



Date and Time: Wednesday, October 25, 2023 2:20:00 PM CST

Job Number: 208876624

## Documents (100)

1. [Zummo v. City of Chi., 345 F. Supp. 3d 995](#)

**Client/Matter:** -None-

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2. [HTC Corp. v. Telefonaktiebolaget LM Ericsson, 2018 U.S. Dist. LEXIS 190415](#)

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3. [In re Restasis \(Cyclosporine Ophthalmic Emulsion\) Antitrust Litig., 355 F. Supp. 3d 145](#)

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4. [Hu Honua Bioenergy, LLC v. Hawaiian Elec. Indus., 2018 U.S. Dist. LEXIS 192162](#)

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5. [Field v. NCAA, 143 Haw. 362](#)

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6. [Cincinnati Reds, L.L.C. v. Testa, 155 Ohio St. 3d 512](#)

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7. [Dennis v. JPMorgan Chase & Co., 345 F. Supp. 3d 122](#)

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8. [Herboso v. Pollo Operations, Inc., 2018 U.S. Dist. LEXIS 201468](#)

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9. [CollegeNet, Inc. v. Common Application, Inc., 355 F. Supp. 3d 926](#)

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10. [BladeRoom Grp. Ltd. v. Emerson Elec. Co, 2018 U.S. Dist. LEXIS 202683](#)

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<b>11. <i>Fields v. McGovern, 430 P.3d 997</i></b>	
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<b>12. <i>Marion Diagnostic Ctr., LLC v. Becton, Dickinson, &amp; Co., 2018 U.S. Dist. LEXIS 203407</i></b>	
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<b>13. <i>Kindred Studio Illustration &amp; Design, LLC v. Elec. Commun. Tech., LLC, 2018 U.S. Dist. LEXIS 223304</i></b>	
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<b>14. <i>Wep Transp. Holdings v. Bison Oil &amp; Gas, 2018 Colo. Dist. LEXIS 4328</i></b>	
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<b>15. <i>Deerpoint Grp., Inc. v. Agrigenix, LLC, 345 F. Supp. 3d 1207</i></b>	
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16. [In re Disposable Contact Lens Antitrust](#), 329 F.R.D. 336

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17. [Hosp. Auth. of Metro. Gov't of Nashville v. Momenta Pharms. Inc.](#), 353 F. Supp. 3d 678

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18. [Hytera Communs. Corp. v. Motorola Sols., Inc.](#), 2018 U.S. Dist. LEXIS 207162

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19. [Kleen Prods. LLC v. Georgia-Pacific LLC](#), 910 F.3d 927

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20. [Corporate Transp. Group, Ltd. v Limosys, LLC](#), 2018 N.Y. Misc. LEXIS 6318

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21. [8600 Landis, LLC v. City of Sea Isle City](#), 2018 U.S. Dist. LEXIS 209440



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22. [Teradata Corp. v. SAP SE, 2018 U.S. Dist. LEXIS 209872](#)

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23. [In re Rule 8.1, Rules of Civil Procedure, 2018 Ariz. LEXIS 442](#)

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24. [Kls Martin, Inc. v. Medical Modeling, Inc., 2018 U.S. Dist. LEXIS 225524](#)

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25. [Wai Feng Trading Co. v. Quick Fitting, Inc., 2018 U.S. Dist. LEXIS 213358](#)

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26. [Innovation Ventures, LLC v. Custom Nutrition Labs, LLC, 912 F.3d 316](#)

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27. [Sonterra Capital Master Fund, Ltd. v. Barclays Bank PLC, 366 F. Supp. 3d 516](#)

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28. [TMT Mgmt. Grp., LLC v. U.S Bank Nat'l Ass'n, 2018 Minn. Dist. LEXIS 88](#)

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29. [Sergeants Benevolent Ass'n Health & Welfare Fund v. Actavis, PLC, 2018 U.S. Dist. LEXIS 220574](#)

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30. [Cinetopia, LLC v. AMC Entm't Holdings, Inc., 2018 U.S. Dist. LEXIS 216600](#)

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31. [Clean Water Opportunities, Inc. v. Willamette Valley Co., 759 Fed. Appx. 244](#)

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32. <a href="#">Greenkraft, Inc. v. Gemayels, 2019 Cal. Super. LEXIS 57491</a>					
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33. <a href="#">LegalForce RAPC Worldwide P.C. v. UpCounsel, Inc., 2019 U.S. Dist. LEXIS 5061</a>					
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34. <a href="#">In re Am. Express Anti-Steering Rules Antitrust Litig., 361 F. Supp. 3d 324</a>					
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35. <a href="#">Shandong Lihong Tech. Ltd. Crop v. Masimo Corp., 2019 Cal. Super. LEXIS 18904</a>					
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36. <a href="#">Sentinel Global Prod. Sols., Inc. v. Hydrofarm, Inc., 2019 Cal. App. Unpub. LEXIS 417</a>					
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37. [O1 Communs., Inc. v. MCI Communs. Servs., 2019 U.S. Dist. LEXIS 9459](#)

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38. [Suarez v. iHeartMedia + Entm't, Inc., 2019 U.S. Dist. LEXIS 10171](#)

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39. [Edoho-Eket v. Wayfair.com, 2019 U.S. App. LEXIS 2332](#)

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40. [Owens v. Cal. Dep't of Corr. & Rehab., 2019 U.S. Dist. LEXIS 11034](#)

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41. [Physician Specialty Pharm. v. Therapeutics, 2019 U.S. Dist. LEXIS 53115](#)

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42. [Ohio State ex rel. AG v. Life Care Ctrs. Am., Inc., 2019 Ohio Misc. LEXIS 229](#)



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43. [City of Rockford v. Mallinckrodt ARD, Inc., 360 F. Supp. 3d 730](#)

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44. [Cox Auto., Inc. v. CDK Global, LLC \(In re Dealer Mgmt. Sys. Antitrust Litig.\), 360 F. Supp. 3d 788](#)

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45. [In re Dealer Mgmt. Sys. Antitrust Litig., MDL 2817, 362 F. Supp. 3d 510](#)

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46. [United States v. Sanchez, 760 Fed. Appx. 533](#)

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47. [Dreamstime.com, LLC v. Google, LLC, 2019 U.S. Dist. LEXIS 13408](#)

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48. [In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 330 F.R.D. 11](#)

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49. [Westinghouse Air Brake Techs. Corp. v. Siemens Mobility, Inc., 330 F.R.D. 143](#)

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50. [In re Mercedes-Benz Emissions Litig., 2019 U.S. Dist. LEXIS 16381](#)

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51. [In re Zetia Ezetimibe Antitrust Litig., 2019 U.S. Dist. LEXIS 59469](#)

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52. [Premier Comp Sols. LLC v. UPMC, 2019 U.S. Dist. LEXIS 19814](#)

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53. [Sims v. Inch, 2019 U.S. Dist. LEXIS 23589](#)

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54. [Becton v. Cytek Biosciences Inc., 2019 U.S. Dist. LEXIS 24569](#)

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55. [Ni-Q, LLC v. Prolacta Bioscience, Inc., 2019 U.S. Dist. LEXIS 24272](#)

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56. [In re Generic Pharms. Pricing Antitrust Litig., 368 F. Supp. 3d 814](#)

**Client/Matter:** -None-

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57. [In re Insulin Pricing Litig., 2019 U.S. Dist. LEXIS 25185](#)

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58. [Washington v. Franciscan Health Sys., 2019 U.S. Dist. LEXIS 26185](#)

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59. [Conn. Fine Wine & Spirits, LLC v. Seagull, 916 F.3d 160](#)

**Client/Matter:** -None-

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60. [Conn. Fine Wine & Spirits, LLC v. Seagull, 932 F.3d 22](#)

**Client/Matter:** -None-

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Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
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61. [Valassis Communs., Inc. v. News Corp., 2019 U.S. Dist. LEXIS 27770](#)

**Client/Matter:** -None-

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Jul 05, 2017 to Dec 31, 2022

62. [Kaul v. Christie, 372 F. Supp. 3d 206](#)

**Client/Matter:** -None-

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

63. [Smith-Brown v. Ulta Beauty, Inc., 2019 U.S. Dist. LEXIS 30460](#)

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

64. [United States v. AT&T, Inc., 916 F.3d 1029](#)

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

65. [Neagle v. Goldman Sachs Grp., Inc., 2019 U.S. Dist. LEXIS 36517](#)

**Client/Matter:** -None-

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Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
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66. [Quality Auto Painting Ctr. of Roselle v. State Farm Indem. Co., 917 F.3d 1249](#)

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

67. [Mulvey v. Am. Airlines Inc., 2019 U.S. Dist. LEXIS 35824](#)

**Client/Matter:** -None-

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Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
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68. [Colo. Real Estate Comm'n v. Vizzi, 2019 COA 33](#)

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

69. [In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058](#)

**Client/Matter:** -None-

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

70. [Kerwin v. Parx Casino, 2019 U.S. Dist. LEXIS 37418](#)

**Client/Matter:** -None-

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Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
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71. [Roxul USA, Inc. v. Armstrong World Indus., 2019 U.S. Dist. LEXIS 37925](#)

**Client/Matter:** -None-

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Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
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72. [Roxul USA, Inc. v. Armstrong World Indus., 2019 U.S. Dist. LEXIS 37926](#)

**Client/Matter:** -None-

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Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
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73. [In re Liquid Aluminum Sulfate Antitrust Litig., 2019 U.S. Dist. LEXIS 39364](#)

**Client/Matter:** -None-

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74. [In re Interest Rate Swaps Antitrust Litig., 2019 U.S. Dist. LEXIS 40742](#)

**Client/Matter:** -None-

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

75. [Crockett v. NEA-Alaska, 367 F. Supp. 3d 996](#)

**Client/Matter:** -None-

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

76. [Soul'd out Prods., LLC v. Anschutz Entm't Grp., Inc., 2019 U.S. Dist. LEXIS 42648](#)

**Client/Matter:** -None-

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

77. [UFCW & Employers Benefit Trust v. Sutter Health, 2019 Cal. Super. LEXIS 342](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

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

78. [United States v. GS Caltex Corp., 2019 U.S. Dist. LEXIS 125998](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

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

79. [United States v. Hanjin Transp. Co., 2019 U.S. Dist. LEXIS 125997](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

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Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
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80. [United States v. SK Energy Co., 2019 U.S. Dist. LEXIS 125999](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

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Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
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81. [Anadarko Petro. Corp. v. Commonwealth, 206 A.3d 51](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

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Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
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82. [Krukas v. AARP, Inc., 376 F. Supp. 3d 1](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

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Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
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83. [Robinson v. Onstar, 2019 U.S. Dist. LEXIS 241113](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

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84. [SZ DJI Tech. Co. v. Autel Robotics USA LLC, 2019 U.S. Dist. LEXIS 44057](#)

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**Client/Matter:** -None-

**Search Terms:** "antitrust law"

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Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
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85. [Patriot Mech. v. Controls, 2019 Me. Bus. & Consumer LEXIS 17](#)

**Client/Matter:** -None-

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Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
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86. [BanxCorp v. Bankrate, Inc., 2019 U.S. Dist. LEXIS 48118](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

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

87. [CH Liquidation Ass'n Liquidation Trust v. Genesis Healthcare Sys., 2019 U.S. Dist. LEXIS 241846](#)

**Client/Matter:** -None-

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Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
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88. [Hetronic Int'l, Inc. v. Hetronic Germany GmbH, 2019 U.S. Dist. LEXIS 118271](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

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89. [Shire US, Inc. v. Allergan, Inc., 375 F. Supp. 3d 538](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"



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Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
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90. [Walgreen Co. v. Johnson & Johnson, 375 F. Supp. 3d 616](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

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Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
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91. [Spa v. Alcor Sci., 2019 U.S. Dist. LEXIS 240271](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

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Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
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92. [Premier Comp Solutions LLC v. UPMC, 377 F. Supp. 3d 506](#)

**Client/Matter:** -None-

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Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
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93. [Best Effort First Time, LLC v. Southside Oil, LLC, 2019 U.S. Dist. LEXIS 53804](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

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Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
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94. [In re Mylan N.V. Sec. Litig., 379 F. Supp. 3d 198](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

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<b>Content Type</b> Cases	<b>Narrowed by</b> Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022
95. <a href="#">Mercedes-Benz USA, LLC v. Nippon Yusen Kabushiki Kaisha, 2019 N.J. Super. Unpub. LEXIS 770</a>	
<b>Client/Matter:</b> -None-	
<b>Search Terms:</b> "antitrust law"	
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<b>Content Type</b> Cases	<b>Narrowed by</b> Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022
96. <a href="#">Gamboa v. Ford Motor Co., 381 F. Supp. 3d 853</a>	
<b>Client/Matter:</b> -None-	
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<b>Content Type</b> Cases	<b>Narrowed by</b> Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022
97. <a href="#">United States v. Aegerion Pharms., Inc., 2019 U.S. Dist. LEXIS 55253</a>	
<b>Client/Matter:</b> -None-	
<b>Search Terms:</b> "antitrust law"	
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<b>Content Type</b> Cases	<b>Narrowed by</b> Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022
98. <a href="#">Leeds v. Bd. of Dental Exam'rs, 382 F. Supp. 3d 1214</a>	
<b>Client/Matter:</b> -None-	
<b>Search Terms:</b> "antitrust law"	
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<b>Narrowed by:</b>	
<b>Content Type</b> Cases	<b>Narrowed by</b> Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022
99. <a href="#">In re Keurig Green Mt. Singleserve Coffee Antitrust Litig., 383 F. Supp. 3d 187</a>	
<b>Client/Matter:</b> -None-	
<b>Search Terms:</b> "antitrust law"	
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<b>Narrowed by:</b>	
<b>Content Type</b> Cases	<b>Narrowed by</b> Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

100. [Sentry Data Sys. v. CVS Health, 379 F. Supp. 3d 1320](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

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





## Zummo v. City of Chi.

United States District Court for the Northern District of Illinois, Eastern Division

November 1, 2018, Decided; November 1, 2018, Filed

No. 17-cv-09006

### **Reporter**

345 F. Supp. 3d 995 \*; 2018 U.S. Dist. LEXIS 187431 \*\*; 2018-2 Trade Cas. (CCH) P80,581; 2018 WL 5718034

THOMAS A. ZUMMO, Plaintiff, v. CITY OF CHICAGO, Defendant.

**Subsequent History:** Affirmed by [Zummo v. City of Chi., 2020 U.S. App. LEXIS 8317 \(7th Cir. Ill., Mar. 17, 2020\)](#)

## **Core Terms**

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impoundment, taxicab, license, abstention, regulation, proceedings, administrative proceeding, due process, medallion, contest, alleges, taxi, two-tiered, notice, Transportation, fines, administrative hearing, deprivation, drivers, driving, expired, water bill, challenges, deception, tortious interference, promissory estoppel, restraint of trade, due process claim, deceptive practices, motion to dismiss

**Counsel:** [\*\*1] Thomas A. Zummo, Plaintiff, Pro se, Chicago, IL.

For Department of Business Affairs And Consumer Protection Public Vehicle Operations Division, Defendant:  
Thomas P. McNulty, LEAD ATTORNEY, City of Chicago Department of Law, Constitutional Law and Commercial Litigation, Chicago, IL; Jordan Alexander Rosen, City of Chicago Law Department, Chicago, IL.

**Judges:** Honorable Edmond E. Chang, United States District Judge.

**Opinion by:** Edmond E. Chang

## **Opinion**

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### **[\*999] MEMORANDUM OPINION AND ORDER**

Thomas A. Zummo was a taxicab driver. He brought this *pro se* lawsuit, alleging that the City of Chicago<sup>1</sup> has denied him constitutional rights, violated antitrust laws, and violated various state laws by failing to regulate what a City ordinance calls "Transportation Network Providers" (such as Uber and Lyft) in the same way as taxicabs.<sup>2</sup> R. 10, Compl.<sup>3</sup> He further [\*1000] alleges that by impounding his car and failing to allow him to contest fines related

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<sup>1</sup> Zummo named the Department of Business Affairs and Consumer Protection Public Vehicle Operations Division as the original defendant. The Court entered an order on December 27, 2017, stating that "[s]ummons shall issue to the City of Chicago, which is the proper Defendant, not one of its departments." R. 9; see also R. 14.

<sup>2</sup> This Court has subject matter jurisdiction over the federal claims in this case under [28 U.S.C. §§ 1331](#) and [1333](#). It has supplemental jurisdiction over the Illinois law claims under [28 U.S.C. § 1337](#).

to his expired taxicab license and an unpaid water bill, the City denied him due process and committed extortion. *Id.* at 10, 12. The City moves to stay the case pending resolution of charges that Zummo is facing in the Department of Administrative Hearings, arguing that Younger abstention principles bar the Court from [\*\*2] considering Zummo's claims. R. 20, Def. Mot. Dismiss. In the alternative, the City moves to dismiss the Complaint for failure to adequately state a claim under [Rule 12\(b\)\(6\)](#). *Id.* For the following reasons, the City's motion to stay is granted in part and denied in part, and the motion to dismiss is granted as to all claims.

## I. Background

For purposes of this motion, the Court accepts as true the allegations in the Complaint. [Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 \(2007\)](#). Zummo has been a taxi driver in Chicago for 32 years. Compl. at 1. For some 20 years, he owned a Chicago taxi medallion, which allowed him to operate his own car as a taxicab under Chicago's municipal regulations. *Id.* at 13. About three years before filing the Complaint in this case, Zummo paid a City department, known as the Business Affairs and Consumer Protection Public Vehicle Operations Division, a \$1,200 medallion fee and a \$1,000 tax to operate his taxi for the following two years. *Id.* at 7. He paid this medallion fee expecting only to compete with 7,000 licensed taxicabs and 300 licensed limos in the City of Chicago. *Id.* Since becoming a driver, Zummo has driven seven days a week to afford maintaining his taxi medallion. *Id.* at 8.

Zummo alleges that, in about early 2014, the Business [\*\*3] Affairs Division conspired to commit fraud by allowing "Transportation Network Providers" (known by their acronym, TNPs) to provide ridesharing services within Chicago without requiring them to comply with the same regulations as taxicabs. Compl. at 6, 8; see also MCC § 9-115 et seq. (legislation regulating TNPs enacted in May 2014). Zummo "mistakenly assumed" that the City would "prohibit[] unlicensed non-public commercial vehicles" to operate in Chicago. Compl. at 9. Because of this "two-tiered system" of regulation of the transportation industry, Zummo alleges that he has been unable to make money as a taxi driver, and as a result, has suffered financial problems. *Id.* at 7, 10. According to Zummo, because it failed to protect his investments in his medallion, the Business Affairs Division forced him into involuntary default on his debts and foreclosure of both his home and his taxicab. *Id.* at 10.

Zummo claims that by avoiding the regulation of TNPs at the expense of the taxicab industry, the City has denied him due process and engaged in restraint of trade and tortious interference. Compl. at 9, 30. Zummo also brings a claim against the City for promissory estoppel based on: (1) his understanding that only a limited [\*\*4] number of taxicabs would be driving in Chicago; (2) his financial investment in his medallion; and (3) the City's issuance of only minimal regulation in allowing TNPs to enter the market. *Id.* at 31. Finally, Zummo alleges that the City engaged in deceptive practices by allowing "unlicensed vehicles" to drive in Chicago and "br[e]aking of regulations." *Id.* at 9, 24, 31.

In late September 2017, Zummo's taxicab was impounded because he was driving [\*1001] with an allegedly expired license and medallion.<sup>4</sup> Compl. at 10. Zummo alleges that the Business Affairs Division impounded his car without giving him an opportunity to contest the impoundment, thus denying him due process. *Id.* at 11. The Department of Administrative Hearings then issued multiple Administrative Notices of Violation of the municipal code to Zummo, including engaging in consumer fraud, unfair methods of competition or deceptive practices in

<sup>3</sup> Citations to the docket are indicated by "R." followed by the docket entry and page number. Zummo has attached numerous materials and addendums to his Complaint. For the sake of clarity, the Court will refer to all materials submitted under docket entry 10 as the Complaint, citing page numbers in the order that materials appear in the docket entry.

<sup>4</sup> At one point in the Complaint, Zummo seems to allege that his medallion and license did not expire before the end of 2017. Compl. at 11-12. ("I knew I could no longer drive my taxicab after December 31st, 2017."). But later in the Complaint, Zummo seems to concede that his license and medallion had expired. *Id.* at 26 ("The fine/citation may have applied technically, but the impoundment of my vehicle was extremely excessive."). Ultimately, whether or not Zummo pleads that the license and medallion were expired at the time his car was impounded does not matter because hearing notices attached to the City's filings demonstrate that Zummo participated in a hearing where he could contest the matter. Def. Second Reply Exh. A.

violation of MCC § 2-25-090(a), and driving a taxicab without a license in violation of MCC § 9-112-020 and MCC § 9-112-260. R. 21, Def. Br. Exh. B.<sup>5</sup>

Around the same time, the City collected on a water bill that Zummo did not pay. Compl. at 10. By denying him a chance to contest the basis of the water bill, Zummo alleges, the City denied him due process and committed extortion. [\*\*5] *Id.* Although Zummo is currently paying the water bill in monthly installments under a payment plan, he alleges that the City is denying him due process by refusing to reinstate his now-expired license and medallion without letting him contest the bill and other administrative fines (discussed below) until they are paid in full. *Id.*

On November 7, 2017, the Department of Administrative Hearings entered a default judgment against Zummo, ordering him to pay \$10,040 in fines. Compl. at 20. In January 2018, the Department vacated the default judgment and granted a motion to continue, setting a hearing date of March 1, 2018. Def. Br. Exh. C. On that date, the Department granted a continuance of the hearing, setting another hearing date in April 2018. Def. Br. Exh. B. The latest filing in this federal case shows that, on June 13, 2018, the administrative hearing was continued to July 25, 2018. R. 31, Def. Second Reply Exh. A.<sup>6</sup> Neither side has provided a further update on the administrative proceedings.

## II. Standard of Review

Under [Federal Rule of Civil Procedure 8\(a\)\(2\)](#), a complaint generally need only include "a short and plain statement of the claim showing that the pleader is entitled to relief." [Fed. R. Civ. P. 8\(a\)\(2\)](#). This short and plain statement [\*\*6] must "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." [Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#) (alteration in original) (internal quotation marks and citation omitted). The Seventh Circuit has explained that this rule "reflects a liberal notice pleading regime, which is intended to 'focus litigation on the [\*1002] merits of a claim' rather than on technicalities that might keep plaintiffs out of court." [Brooks v. Ross, 578 F.3d 574, 580 \(7th Cir. 2009\)](#) (quoting [Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 \(2002\)](#)).

"A motion under [Rule 12\(b\)\(6\)](#) challenges the sufficiency of the complaint to state a claim upon which relief may be granted." [Hallinan v. Fraternal Order of Police of Chi. Lodge No. 7, 570 F.3d 811, 820 \(7th Cir. 2009\)](#). "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" [Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#) (quoting [Twombly, 550 U.S. at 570](#)). These allegations "must be enough to raise a right to relief above the speculative level." [Twombly, 550 U.S. at 555](#). The allegations that are entitled to the assumption of truth are those that are factual, rather than mere legal conclusions. [Iqbal, 556 U.S. at 678-79](#).

## III. Analysis

### A. Younger Abstention

Based on *Younger* abstention, [Younger v. Harris, 401 U.S. 37, 41, 91 S. Ct. 746, 27 L. Ed. 2d 669 \(1971\)](#), the City first moves to stay this case pending resolution of the administrative proceedings against Zummo. Under *Younger*, federal courts must abstain from deciding federal constitutional issues when those issues can be decided in

<sup>5</sup> The Court may take judicial notice of the Department of Administrative Hearings docket and administrative orders as they are matters of public record. See [Milwaukee Police Ass'n v. Flynn, 863 F.3d 636, 640 \(7th Cir. 2017\)](#).

<sup>6</sup> Zummo initially failed to file a response to the City's motion to dismiss by the original deadline, but the City still filed a reply at the reply-brief deadline. Afterwards, the Court extended the time for Zummo to respond and allowed the City to file a second reply. R. 29, Minute Entry 06/04/2018.

ongoing [\*\*7] state *criminal* proceedings. *Id. at 41*. In a case known as *Middlesex County*, the Supreme Court expanded this abstention doctrine to apply to *civil* proceedings when a plaintiff is subject to (1) ongoing state proceedings, (2) which implicate important state interests, and (3) which provide the plaintiff with an opportunity to raise constitutional challenges. *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982); see also *Forty One News, Inc. v. Cty. of Lake*, 491 F.3d 662, 666 (7th Cir. 2007). But the Supreme Court has cautioned that the application of *Younger* based on an underlying civil enforcement proceeding is the "exception, not the rule," holding that *Younger* only applies to civil proceedings when they are sufficiently criminal in nature. *Sprint Communs., Inc. v. Jacobs*, 571 U.S. 69, 81-82, 134 S. Ct. 584, 187 L. Ed. 2d 505 (2013) (cleaned up).<sup>7</sup>

## 1. Two-Tiered System

The City argues that *Younger* abstention is appropriate for Zummo's claims arising out of the "two-tiered" system of regulation because the *Middlesex County* test is satisfied. Def. Br. at 4. *Younger* abstention, however, does not apply to every case in which there is a state court proceeding case that simply touches on the same subject matter. See *Sprint Commc'ns*, 571 U.S. at 72. When the issues in the federal suit are substantially different from the issues in the state proceedings and the relief requested in federal court would not unduly interfere [\*\*8] with the state proceedings, *Younger* abstention is not warranted. See *American Federation of State, County & Municipal Employees v. Tristano*, 898 F.2d 1302, 1305 (7th Cir. 1990) (holding comity and federalism concerns underlying *Younger* doctrine inapplicable where state arbitration proceedings relating to collective bargaining agreement were substantially different from constitutional challenge to a drug abuse program).

[\*1003] Zummo's claim that a "two-tiered system" of regulation—one that applies to taxicab drivers but not TNPs—deprives him of due process is not sufficiently related to his administrative proceedings to trigger *Younger* abstention. The subject of the administrative proceedings—that is, driving a taxicab with an expired taxicab license and medallion—has very little to do with the allegedly disparate application of municipal regulations to taxicab drivers. What's more, the relief that Zummo is seeking, namely, monetary damages, would do little to interfere with the administrative proceedings. *Younger* thus does not require this Court to abstain from addressing the merits of Zummo's claims as to the "two-tiered system" of regulation.

## 2. Impoundment, Fines, and Penalties

Zummo also claims that he was denied due process because he allegedly could not contest the impoundment of his taxicab [\*\*9] and "fines and penalties ... for the lapse of expired licensing." Compl. at 11. On this claim, however, the case for *Younger* abstention is much stronger: the impoundment of Zummo's car and the penalties arising from his expired license are the subject of administrative proceedings, see Def. Br. Exh. B, so adjudicating this claim in federal court while state proceedings are still pending poses federalism and comity concerns, *Tristano*. 898 F.2d at 1305. *Younger* abstention applies to this claim if Zummo is subject to (1) ongoing state proceedings, (2) which implicate important state interests, and (3) provide him with an opportunity to raise these constitutional challenges. *Middlesex Cty.*, 457 U.S. at 432. On the first factor, Zummo is subject to ongoing state proceedings. As of the date the last brief was filed in this case, Zummo's next administrative hearing was scheduled on July 25, 2018. Def. Second Reply Exh. A.

The second factor—the importance of the state interests—also weighs in favor of abstention. The City argues that its interests are important because "they pertain to, *inter alia*, the operation of a taxicab in Chicago without a valid license; misrepresentations of material fact regarding licensure; and unfair methods of competition [\*\*10] by omitting facts about licensure." Def. Br. at 4. Although the City's argument is expressed at a high level of generality,

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<sup>7</sup> This Opinion uses (cleaned up) to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. See Jack Metzler, *Cleaning Up Quotations*, 18 Journal of Appellate Practice and Process 143 (2017).

a detailed march through the pertinent inquiry, as required by the Supreme Court, shows that the government's interests are indeed important. In *Middlesex County*, the Supreme Court looked to how similar the administrative enforcement proceeding was to a criminal proceeding: "the importance of the state interest may be demonstrated by the fact that the noncriminal proceedings bear a close relationship to proceedings criminal in nature." [457 U.S. at 432](#). Later, in *Sprint Communications*, the Supreme Court emphasized that, for *Younger* abstention to apply, proceedings must be "quasi-criminal," lest *Younger* apply too broadly to almost all state proceedings. [571 U.S. at 81](#). In assessing whether an enforcement proceeding is quasi-criminal, courts look to see whether the proceeding shares three specific features of criminal prosecutions: (1) the action was initiated by the State in its sovereign capacity; (2) the action involves sanctions against the federal plaintiff for some wrongful act; and (3) the action commonly involves an investigation, often culminating in formal charges. [Id. at 79-80](#).

The administrative [\*\*11] proceeding against Zummo is sufficiently "quasi-criminal" for *Younger* abstention to apply. First, one way that impoundment and licensing proceedings are initiated by the state are by police officers, who may have taxicabs towed when the officers have probable [\*1004] cause to believe that the owner of the car is driving without a license. See MCC § 9-112-640(b). Unlike proceedings in which an individual is seeking a license, for example, the proceeding at issue here begins with a police officer issuing a citation. Cf. [Bolton v. Bryant, 71 F. Supp. 3d 802, 815 \(N.D. Ill. 2014\)](#) (holding *Younger* abstention did not apply in a proceeding challenging denial of a gun license because, among other things, licensee initiated the proceeding). Second, if the government prevails in the enforcement proceeding, the proceeding would end with sanctions against Zummo for misconduct. The City charges that Zummo made fraudulent misrepresentations, in violation of MCC § 9-112-390, which is equivalent to the crime of fraud crime under state law, see, e.g., [720 ILCS 5/17-1\(A\)\(3\)](#) (a person commits the crime of deceptive practices when, with the intent to defraud, he "knowingly makes a false or deceptive statement addressed to the public for the purpose of promoting the sale of property or services"). The proceeding would end [\*\*12] with a fine of up to \$10,000 if Zummo is found to have violated the municipal code. See MCC § 2-14-076(l), MCC § 2-25-090(a), (f). And, third, although the municipal code does not require a formal investigation into unlicensed taxicabs, the Municipal Code directs police officers to seize and impound unlicensed taxicabs on probable cause. MCC § 9-112-640(b). This is akin to the general approach for criminal offenses: probable cause is needed for an arrest, so by definition the officer must conduct some investigation in order to establish it. Indeed, one of the Municipal Code provisions that Zummo is charged with violating—revocation of license on grounds of fraud—authorizes the Business Affairs Division to revoke the taxicab license "after investigation and hearing." MCC § 9-112-390. Plus, the administrative proceedings have provided formal notice of the violations—in other words, charges—to Zummo. Under *Sprint Communications*, the administrative proceedings against Zummo are quasi-criminal in nature, so the government's interests are important. [571 U.S. at 81](#).

The final question under *Middlesex County* is whether Zummo has an opportunity to raise federal constitutional challenges in the administrative proceedings. It is enough that constitutional claims may be raised [\*\*13] in state-court judicial review of the administrative proceeding. See [Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 629, 106 S. Ct. 2718, 91 L. Ed. 2d 512 \(1986\)](#). Although Zummo cannot raise his federal constitutional claims in the administrative proceedings, see [Hunt v. Daley, 286 Ill. App. 3d 766, 677 N.E.2d 456, 459, 222 Ill. Dec. 253 \(Ill. 1997\)](#); [Yellow Cab Co. v. City of Chicago, 938 F. Supp. 500, 502 \(N.D. Ill. 1996\)](#), Illinois state courts have jurisdiction to address constitutional issues on appeal from the administrative proceeding, see [Hunt, 286 Ill. App. 3d at 771](#). So, because Zummo may raise federal constitutional challenges if and when he seeks state judicial review under the Illinois Administrative Review Law, see [735 ILCS 5/3-101 et seq.](#), this factor too has been met.

Because the administrative proceedings against Zummo are ongoing, are sufficiently quasi-criminal in nature to implicate important state interests, and sufficiently address his federal constitutional claims insofar as he may appeal them to a state court, *Younger* abstention governs. This Court should not intrude on the administrative proceedings as to the impoundment of the car and the allegedly expired license and medallion. Those claims are dismissed without prejudice on *Younger* abstention grounds.

#### B. Motion to Dismiss Under [Rule 12\(b\)\(6\)](#)

## 1. Due Process

Aside from the claims dismissed under *Younger* abstention, the City moves to dismiss [\*1005] the other claims for failure to adequately state a claim under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). Def. Br. at 8. On the [\*\*14] due process claim, Zummo alleges that his due process rights were violated by (1) the City's two-tiered system of regulation of TNPs and taxicabs; and (2) his lack of opportunity to contest the impoundment of his car and certain fines he incurred for driving with an expired taxicab license. Compl. at 30.

### a. Two-Tiered System

To the extent that Zummo asserts that the two-tiered system of regulation violates substantive due process, he has failed to state a claim. A substantive due process claim must allege that the government practice is arbitrary or irrational, bearing no relationship to a legitimate governmental interest. See [Gen. Auto Serv. Station v. City of Chicago](#), 526 F.3d 991, 1000 (7th Cir. 2008). A necessary element of a substantive due process claim, however, is the "intrusion upon a cognizable property interest." [\*Id. at 1002\*](#). The lack of a property interest is thus "fatal" to this type of claim. *Id.*

The City argues that the Seventh Circuit has already resolved this claim in the City's favor. Def. Br. at 6. In *Illinois Transportation Trade Association v. City of Chicago*, an association of companies that owned or operated taxicabs or livery vehicles sued the City for, among other things, taking their property without just compensation, depriving them of property [\*\*15] without due process, and promissory estoppel. [134 F. Supp. 3d 1108, 1110, 1111 \(N.D. Ill. 2015\)](#), aff'd in part and rev'd on other grounds, [839 F.3d 594 \(7th Cir. 2016\)](#). The plaintiffs argued that the ordinance regulating TNPs did not impose the same requirements as did the taxi ordinance on important matters as insurance, qualifications, and fares, and thus the City deprived tax drivers of a protected property interest, namely, "the value of the medallion and the exclusive right to operate a licensed taxi." [\*Id. at 1110, 1111\*](#). The Seventh Circuit rejected this argument, holding that the interest in "[p]roperty" does not include a right to be free from competition," and noting that taxi medallions only authorize drivers to operate taxis, not exclude other drivers from the market. [Illinois Transport.](#), [839 F.3d at 596](#).

This holding applies to Zummo's claim that the two-tiered system of regulation denied him due process. *Illinois Transportation* rejected the property interest that Zummo is attempting to assert. Just as the plaintiffs in *Illinois Transportation* argued that allowing TNPs into the market under less stringent regulations deprived them of a property interest, [839 F.3d at 596](#), Zummo similarly argues that the City deprived him of his investment in the medallion by allowing an unlimited number of TNPs into the market, Compl. [\*\*16] at 9, 30. But Zummo does not have a property interest "in all commercial transportation of persons by automobile in Chicago." [III. Transp., 839 F.3d at 597](#). Because Zummo has not adequately alleged that he has a property interest at stake under the [Due Process Clause](#), the claim based on the two-tier system must be dismissed.

### b. Ability to Contest Impoundment, Fines, and Penalties

Zummo further asserts that he was denied the opportunity to contest the impoundment of his car or the fines arising from his administrative proceedings and failure to pay his water bill. Compl. at 10, 11. Although the Court has already held that these claims are subject to *Younger* abstention, in the alternative, it also holds that Zummo has fallen short of alleging facts sufficient to state a due process claim. To state a procedural due process claim, a plaintiff must allege (1) the deprivation of a protected interest, and (2) insufficient [\*1006] procedural protections in effectuating that deprivation. [Michalowicz v. Vill. of Bedford Park](#), 528 F.3d 530, 534 (7th Cir. 2008).

The City deprived Zummo of a constitutionally protected interest—the use of his car. See [Gable v. City of Chicago](#), 296 F.3d 531, 540 (7th Cir. 2002). The deprivation of that interest, however, does not violate the Constitution unless it occurs without due process of law. See *id.* Zummo contends that his car was taken from [\*\*17] him before he had

345 F. Supp. 3d 995, \*1006 (2018 U.S. Dist. LEXIS 187431, \*\*17

an opportunity to contest "fines and penalties and reasons of truth for the lapse of expired licensing." Compl. at 11. In essence, it appears that Zummo is arguing that he lacked sufficient procedural protections surrounding the deprivation of his car when it was impounded. See [Michalowicz, 528 F.3d at 534](#).

When a car is impounded, due process requires a post-deprivation proceeding to challenge the wrongful deprivation of the person's vehicle. See [Gable, 296 F.3d at 540 \(7th Cir. 2002\)](#); [Sutton v. City of Milwaukee, 672 F.2d 644, 646 \(7th Cir. 1982\)](#). The City correctly points out that, under Chicago's municipal code, Zummo has an opportunity to contest his car's impoundment in an administrative hearing. Def. Br. at 2 (citing MCC § 2-14-132). Zummo does not allege any facts describing how the administrative hearing failed to afford him due process.

The question remains, however, of whether Zummo was informed of this opportunity. Due process requires notice to "be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and [to] afford them an opportunity to present their objections." [Towers v. City of Chicago, 173 F.3d 619 \(7th Cir. 1999\)](#) (cleaned up). Chicago's municipal code requires officers to provide notice of a car owner's right to request an impoundment hearing before or at the time the car is towed. [\*\*18] See MCC § 9-112-640(b).

The City argues that, on the day that his taxi was seized, Zummo received a vehicle impoundment report, which gave him notice of his right to an administrative hearing to contest the impoundment. Def Br. at 12; *id.* Exh. A. At the dismissal-motion stage, however, the Court is limited to the pleadings unless judicial notice is appropriate. See [Milwaukee Police Ass'n, 863 F.3d at 640](#). A vehicle impoundment report prepared by the City of Chicago is not a matter of public record appropriate for judicial notice. See [Michon v. Ugarte, 2017 U.S. Dist. LEXIS 21583, 2017 WL 622236, at \\*3 \(N.D. Ill. Feb. 15, 2017\)](#) (collecting cases and holding a police report is not a public record suitable for consideration on a motion to dismiss). So the Court will not consider the report when determining whether Zummo received notice of the impoundment or that he could contest it in an administrative hearing. Even if the Court could take judicial notice of the report, there is nothing on the impoundment report itself that shows that Zummo ever received the report.

In its second reply brief, the City attaches a Department of Administrative Hearing order that shows that "[r]espondent's motion to continue" was granted with respect to the impoundment proceeding. Def. Second Reply Exh. A. This is the kind of public record the Court can consider [\*\*19] when deciding a [Rule 12\(b\)\(6\)](#) motion. See [Hicks v. Irvin, 2008 U.S. Dist. LEXIS 39440, 2008 WL 2078000, at \\*2 \(N.D. Ill. May 15, 2008\)](#) (collecting cases). Because the administrative record shows that Zummo is currently challenging his impoundment in the administrative proceeding, he *did* have notice of his right to contest the impoundment. Zummo would not have been able to file a motion to continue in administrative court if he were [\*1007] unaware that he could contest the impoundment. In any case, Zummo has not alleged that the City's ordinance gave him inadequate notice or inadequate opportunity to be heard. See, e.g., [Hamid v. City of Chicago, 1999 U.S. Dist. LEXIS 14745, 1999 WL 759423, at \\*3 \(N.D. Ill. Sept. 2, 1999\)](#). Because the impoundment of Zummo's car is the subject of ongoing post-deprivation proceedings, he has been afforded all of the process that he is due.

The same is true of the other administrative hearings: the Court may take judicial notice that Zummo is contesting his fines and penalties for driving with an expired license and medallion. Because the Department of Administrative Hearings is currently considering his claims, Zummo cannot claim that the City's procedures denied him due process with respect to his fines. Def. Br. Exhs. B & C. That leaves the water bill, but Zummo is paying it, Compl. at 10, so it is not clear what additional procedures he thinks should have been [\*\*20] given to him. All that Zummo alleges is that the City was "instructed to collect on a water bill ... without [giving him] due process of [his] civil rights to contest these accusations," *id.*, which is just a bare conclusion. Yes, courts must read *pro se* complaints expansively, but the Court should not need to "fill in all of the blanks in a *pro se* complaint." [Hamlin v. Vaudenberg, 95 F.3d 580, 583 \(7th Cir. 1996\)](#). In sum, Zummo has failed to state a procedural due process claim in all respects.

## 2. Restraint of Trade

Next, Zummo asserts that the City engaged in "restraint of trade" with respect to its "two-tier system" of regulation, Compl. at 9, but here too he fails to state a claim under federal antitrust law.<sup>8</sup> Section 1 of the Sherman Antitrust Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. The City correctly argues that, under either a *per se* or rule of reason analysis of antitrust law, Zummo does not state a claim for restraint of trade.<sup>9</sup>

Some restraints to businesses are unreasonable *per se* because they almost always tend to restrict competition. See Ohio v. Am. Express Co., 138 S. Ct. 2274, 2283, 201 L. Ed. 2d 678 (2018). Restraints [\*\*21] that are unreasonable [\*1008] *per se* usually only include restraints "imposed by agreement between competitors," or horizontal restraints. Id. at 2283-84 (quoting Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)). The City's actions are not *per se* violations of the Sherman Act because the City is not a competitor with Zummo, any other taxicab companies, or any TNPs, and thus cannot impose horizontal restraint to competition.

If a restraint is not *per se* unreasonable, then the next question is whether it violates the rule of reason. Am. Express Co., 138 S. Ct. at 2284. The rule of reason may be violated by an agreement that has an adverse effect on competition in the relevant market. See Agnew v. NCAA, 683 F.3d 328, 335 (7th Cir. 2012); see also Twombly, 550 U.S. at 553 (stating that § 1 of the Sherman Act only prohibits restraints on trade "effected by a contract, combination, or conspiracy") (cleaned up). Although Zummo argues that the City, in "avoiding standing laws and ordinances while unlawfully structuring abr[o]gated new rules at the same time; at the expense and severe harm to the taxicab industry," engaged in unlawful restraint of trade, he alleges no contract, combination, or conspiracy with anyone outside of the City to support his claim. Compl. at 9.

The City correctly points out that it cannot conspire with itself under the intra-corporate conspiracy [\*\*22] doctrine. See Ziglar v. Abbasi, 137 S. Ct. 1843, 1867, 198 L. Ed. 2d 290 (2017) ("[A]n agreement between or among agents of the same legal entity, when the agents act in their official capacities, is not an unlawful conspiracy."); Wright v. Ill. Dep't of Children & Family Servs., 40 F.3d 1492, 1508 (7th Cir. 1994) (holding that intra-corporate conspiracy doctrine applies to governmental entities). Zummo states only that the City engaged in unlawful restraint of trade, naming no other actors involved in this alleged conspiracy. Compl. at 9.

Because Zummo does not claim that the City conspired with any outside entity in creating the two-tiered system of regulation, and the City cannot conspire with itself, he also fails to state an antitrust claim under the rule of reason. Zummo cannot simultaneously argue that the City violated his due process rights by failing to restrict competition and that the City has restrained trade in a manner adverse to him. The rationale behind *Illinois Transportation* applies to Zummo's restraint of trade claim as well: the taxicab industry does not have special legal protection from

<sup>8</sup> Although Zummo does not actually use the word "antitrust" in his complaint, as noted above, the Court must construe *pro se* complaints liberally, Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007), and the facts alleged in his complaint are sufficient to put the City on notice of an antitrust claim.

<sup>9</sup> The City also argues that it is immune from liability under the state action doctrine. Def. Br. at 10 (citing Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1946)). The Court need not definitively decide this issue because it holds that Zummo does not state a claim on the merits. But it is worth noting that there is some reason to question the City's sovereign immunity defense because no state statute gives the City express authority to regulate TNPs beyond home rule authority. See Campbell v. City of Chicago, 823 F.2d 1182, 1184 (7th Cir. 1987) (holding cities subject to sovereign immunity defense only if (1) the challenged conduct was authorized by the state legislature and (2) if the anticompetitive effects were a foreseeable result of the authorization). Although the City relies on *Campbell*, where the Illinois legislature gave municipalities the express authority to "regulate cabmen," *id.*, the state has not given the City any "clearly articulated and affirmative state policy" beyond home-rule authority to regulate TNPs. Cnty. Communs Co. v. City of Boulder, Colo., 455 U.S. 40, 51, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982) (holding home-rule authority to be insufficient to qualify as an authorization by the state to engage in conduct that influences competition); Transportation Network Providers Act, 625 ILCS 57/32 (limiting "concurrent exercise by home rule units of powers").

the entry of competitors into the market. [839 F.3d at 596](#). Having stated no *per se* or rule of reason claim under the Sherman Antitrust Act, he has not stated a sufficient restraint of trade claim to survive the dismissal motion.

### **3. State Law [\*\*23] Claims**

Zummo also accuses the City of numerous violations of state common law, including extortion, tortious interference, promissory estoppel, and deceptive practices.<sup>10</sup> None of these claims survive the motion to dismiss.

#### **a. Extortion**

Zummo claims that by impounding his car and refusing to reinstate his taxi license until he paid his water bill, the City committed extortion. Compl. at 4, 30. Extortion is "a threatening demand made without justification" and involves [\[\\*1009\] "the exercise of coercion or an improper influence."](#) [Jordan v. Knafel, 355 Ill. App. 3d 534, 823 N.E.2d 1113, 1119, 291 Ill. Dec. 527 \(Ill. 2005\)](#) (cleaned up). In both impounding Zummo's car and refusing to reinstate his license before he paid outstanding bills, the City was enforcing the law. The City impounded Zummo's car under a municipal ordinance requiring that any unlicensed vehicle used to transport passengers for hire is subject to seizure and impoundment, after a police officer saw Zummo driving with an expired license and medallion. MCC § 9-112-640, Compl. at 26. The City was similarly justified in not reinstating Zummo's license before he paid his outstanding water bills because, under the municipal code, "no initial taxi license or renewal shall be issued" if a person owes a debt to the City. MCC §§ 4-4-150(b), 9-112-260,. The City's conduct [\[\\*\\*24\]](#) was proper and its demands were justified because it was enforcing laws that Zummo violated. So Zummo does not state a claim for extortion.

#### **b. Tortious Interference**

Next, Zummo alleges that the City engaged in tortious interference when it failed to regulate TNPs in the same manner as taxicabs. Compl. at 4, 9. Illinois courts recognize both the torts of interference with contractual relations and interference with prospective advantage. See [Belden Corp. v. InterNorth, Inc., 90 Ill. App. 3d 547, 413 N.E.2d 98, 101, 45 Ill. Dec. 765 \(Ill. 1980\)](#). Whether Zummo is claiming that the City interfered with a contractual relationship or a prospective economic advantage is unclear, but it does not matter because both versions fail. A claim of tortious interference with a contractual relationship requires the existence of a contract. See [Seip v. Rogers Raw Materials Fund, L.P., 408 Ill. App. 3d 434, 948 N.E.2d 628, 638, 350 Ill. Dec. 348 \(Ill. 2011\)](#). Zummo does not allege any facts that allude to the existence of a contract between him and any third-party.

Nor does Zummo state a plausible claim for tortious interference with a prospective economic advantage. A claim for tortious interference with a prospective economic advantage requires a plaintiff's "(1) reasonable expectation of entering into a valid business relationship; (2) the defendant's knowledge of the plaintiff's expectancy; (3) purposeful interference [\[\\*\\*25\]](#) by the defendant that prevents the plaintiff's legitimate expectancy from ripening into a valid business relationship; and (4) damages to the plaintiff resulting from such interference." [Fellhauer v. City of Geneva, 142 Ill. 2d 495, 568 N.E.2d 870, 878, 154 Ill. Dec. 649 \(Ill. 1991\)](#). Although Zummo maintained an expectation that he would only be competing with other licensed taxicab drivers in his profession, he does not claim that he was expecting to enter into a valid business relationship with anyone before the City implemented the two-tier regulatory scheme. Compl. at 7. Likewise, he does not state any facts suggesting that the City knew of that sort of expectancy, that the City purposefully interfered with such a relationship, or that he incurred any damages from such an interference. Zummo does not state a claim for tortious interference.

<sup>10</sup> Zummo has also listed snippets of conclusory allegations in his Complaint that either do not constitute legal causes of action or fall short of factual allegations necessary to state a claim. Compl. at 30-32 (accusing City of "severe intentionally [sic] malicious malfeasance," "entrapment," "economic duress," and causing "financial hardship").

### c. Promissory Estoppel

Zummo next asserts that his financial investment in his medallion and his understanding that only a certain number of taxi cabs were permitted to drive in the City amount to a claim of promissory estoppel. Compl. at 4, 31. This claim also fails. To state a claim for promissory estoppel, a plaintiff must adequately allege that "(1) defendant made an unambiguous promise to plaintiff, (2) plaintiff relied on such promise, [\*\*26] (3) plaintiff's reliance was [\*1010] expected and foreseeable by defendant[], and (4) plaintiff relied on the promise to [his] detriment." [Newton Tractor Sales, Inc. v. Kubota Tractor Corp., 233 Ill. 2d 46, 906 N.E.2d 520, 523-24, 329 Ill. Dec. 322 \(Ill. 2009\)](#).

In *Illinois Transportation* (the case challenging the two-tiered system), the district court held that plaintiffs—who were pursuing a promissory estoppel claim based on disparate regulations just like Zummo—relied on a taxi ordinance for maintaining and operating a taxi, and suffered a financial detriment because of this reliance. [134 F. Supp. 3d 1108, 1114](#). The court also held, however, that there was no unambiguous promise by the City not to "alter the number or type of for-hire transportation licenses available in Chicago." *Id.* Just like the plaintiffs in *Illinois Transportation*, who did not successfully plead that they relied on an unambiguous promise by the City to refrain from allowing competition in the ridesharing market, Zummo also has not alleged that the City has unambiguously promised him that it would regulate TNPs. Zummo has therefore fallen short of stating a promissory estoppel claim.

### d. Deceptive Practices/Consumer Fraud

Finally, Zummo asserts, at multiple spots in the Complaint, that the City engaged in "deceptive practices" or "fraud." Compl. at 4, 11, 24, 31. Under [\*\*27] [Federal Rule of Civil Procedure 9\(b\)](#)'s heightened pleading standard, a plaintiff must allege fraud claims with "particularity." [Fed. R. Civ. P. 9\(b\); see also Squires-Cannon v. Forest Pres. Dist. of Cook Cty., 897 F.3d 797, 805 \(7th Cir. 2018\)](#). Zummo has failed to meet this particularity requirement for both statutory and common law fraud.

The [Illinois Consumer Fraud and Deceptive Business Practice Act](#) prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices." [815 ILCS 505/2](#). A valid claim must allege: (1) a deceptive act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; (3) that the deception occurred in the course of conduct involving trade or commerce; and (4) actual damage to the plaintiff (5) proximately caused by the deception. [Aliano v. Ferriss, 2013 IL App \(1st\) 120242, 988 N.E.2d 168, 176, 370 Ill. Dec. 392 \(Ill. 2013\)](#).

Zummo does not plead sufficient facts to allege how the City "[broke] regulations" or "fail[ed] to give disclosures," acts that he labels as deceptive practices in his Complaint, nor does he indicate how those acts were deceptive. Compl. at 24, 31. He also alleges no facts plausibly suggesting that the City intended Zummo to rely on the alleged deception. Finally, he does not allege that this deception occurred in trade or commerce, that is, Zummo does not plead that the City intended to sell him anything. Zummo thus does not sufficiently [\*\*28] state that the City violated the Illinois Consumer Fraud and Deceptive Business Practice Act.

Zummo's complaint similarly does not state a claim for common law fraud. The elements of common law fraud in Illinois are "(1) false statement of material fact; (2) defendant's knowledge that the statement was false; (3) defendant's intent that the statement induce the plaintiff to act; (4) plaintiff's reliance on the statement; and (5) plaintiff's damages resulting from reliance on the statement." [Miller v. William Chevrolet/GEO, Inc., 326 Ill. App. 3d 642, 762 N.E.2d 1, 7, 260 Ill. Dec. 735 \(Ill. 2001\)](#). Nowhere in the Complaint does Zummo allege that he relied on a false statement of material fact made by the City. Zummo may have relied on his expectation to be free from competition, [\*1011] but he does not allege that the expectation came from any representation that the City made. No fraud, whether statutory or common law, has been adequately pled.

## IV. Conclusion

For the reasons discussed above, the City's motion to stay on *Younger* abstention grounds is granted as to the due process claims challenging the impounding of Zummo's vehicle and the imposition of the fines. The Court effectuates the stay on those claims by dismissing them without prejudice. In the alternative—that is, if the Court is mistaken [\*\*29] on *Younger* abstention—the Court would dismiss those due process claims for failure to state claim. All other claims are dismissed for failure to state a claim. Ordinarily, the Court would permit Zummo to file an amended complaint, but he does not propose how he could possibly fix the claims, especially in light of the Seventh Circuit's holding in *Illinois Transportation*. Any proposed amendment would be futile. Final judgment will be entered, and the status hearing of November 5, 2018 is vacated.

ENTERED:

/s/ Edmond E. Chang

Honorable Edmond E. Chang

United States District Judge

DATE: November 1, 2018

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## HTC Corp. v. Telefonaktiebolaget LM Ericsson

United States District Court for the Eastern District of Texas, Tyler Division

November 7, 2018, Decided; November 7, 2018, Filed

CIVIL ACTION NO. 6:18-CV-00243-JRG

### **Reporter**

2018 U.S. Dist. LEXIS 190415 \*; 2018-2 Trade Cas. (CCH) P80,584; 2018 WL 5831289

HTC CORPORATION, HTC AMERICA INC, Plaintiffs, v. TELEFONAKTIEBOLAGET LM ERICSSON, ERICSSON INC, Defendants.

**Subsequent History:** Motion denied by [HTC Corp. v. Telefonaktiebolaget LM Ericsson, 2018 U.S. Dist. LEXIS 212292 \(E.D. Tex., Dec. 17, 2018\)](#)

Motion granted by [HTC, Corp. v. Telefonaktiebolaget LM Ericsson, 2019 U.S. Dist. LEXIS 2872 \(E.D. Tex., Jan. 7, 2019\)](#)

Later proceeding at [Htc Corp. v. Telefonaktiebolaget LM Ericsson, 2019 U.S. Dist. LEXIS 62095 \(E.D. Tex., Jan. 16, 2019\)](#)

Stay denied by [HTC Corp. v. Telefonaktiebolaget LM Ericsson Inc., 2019 U.S. Dist. LEXIS 62097 \(E.D. Tex., Jan. 16, 2019\)](#)

Motion granted by [HTC Corp. v. Telefonaktiebolaget LM Ericsson, 2019 U.S. Dist. LEXIS 62100 \(E.D. Tex., Jan. 16, 2019\)](#)

Motion denied by, Stay denied by [HTC Corp. v. Telefonaktiebolaget LM Ericsson, 2019 U.S. Dist. LEXIS 9813 \(E.D. Tex., Jan. 22, 2019\)](#)

Motion granted by, in part, Motion denied by, in part, Claim dismissed by, Judgment entered by [Htc Corp. v. Telefonaktiebolaget Lm, 2019 U.S. Dist. LEXIS 170087 \(E.D. Tex., May 22, 2019\)](#)

Findings of fact/conclusions of law at [HTC Corp. v. Telefonaktiebolaget LM Ericsson, 2019 U.S. Dist. LEXIS 170085 \(E.D. Tex., May 23, 2019\)](#)

Motion denied by, Motion granted by [HTC Corp. v. Telefonaktiebolaget LM Ericsson, 2019 U.S. App. LEXIS 26522 \(5th Cir. Tex., June 18, 2019\)](#)

**Prior History:** [HTC Corp. v. Telefonaktiebolaget LM Ericsson, 2018 U.S. Dist. LEXIS 83486 \(W.D. Wash., May 17, 2018\)](#)

## **Core Terms**

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arbitration, licenses, royalties, Parties, discovery, argues, license agreement, antitrust claim, disputes, refund claim, rules of arbitration, compel arbitration, patent, sever, terms, arbitration agreement, proceedings, questions, refund, waived, right to arbitration, arbitration provision, arbitration clause, motion to dismiss, reconsideration, delegate, requests, alleges, agreed to arbitrate, judicial process

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**Judges:** RODNEY [\*3] GILSTRAP, UNITED STATES DISTRICT JUDGE.

**Opinion by:** RODNEY GILSTRAP

## Opinion

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### MEMORANDUM OPINION AND ORDER

Before the Court is Defendants Telefonaktiebolaget LM Ericsson and Ericsson, Inc.'s Motion to Sever, Stay, and Compel Arbitration of Plaintiff's "Past Refund" Claims Under Prior Licensing Agreements, (Dkt. No. 132), Motion to Sever and Stay HTC's Antitrust Claims and Request for Case Management Conference, (Dkt. No. 140), and Motion to Compel Arbitration or in the Alternative Dismiss HTC's Antitrust Claims Pursuant to [Rule 12\(b\)\(6\)](#). (Dkt. No. 155.) Having considered the motions and briefing, the Court is of the opinion that each motion should be and hereby is **GRANTED** for the reasons as set forth herein.

### I. BACKGROUND

#### A. The Parties

Plaintiffs HTC Corporation ("HTC Corp.") and HTC America, Inc. ("HTC America") (collectively "HTC") design, manufacture, and sell smartphones. (Dkt. No. 135 ¶ 12.) HTC Corp. is a Taiwanese company with headquarters in Taiwan. (*Id.* ¶ 10.) HTC America is a wholly-owned subsidiary of HTC Corp. and has its principal place of business

in Washington state. (*Id.* ¶¶ 10-11.) HTC America sells HTC Corp.'s smartphones in the United States, which implement the second generation (2G), third generation [\*4] (3G), and fourth generation (4G) Mobile Cellular and Wireless Standards. (*Id.* ¶¶ 10-11, 51-52.)

Defendants Telefonaktiebolaget LM Ericsson ("TLM Ericsson") and Ericsson, Inc. (collectively "Ericsson") make and sell "base stations and supporting software and services compliant with the 2G, 3G, and 4G standards in the United States." (Dkt. No. 156 ¶16.) TLM Ericsson is a Swedish corporation with its principal place of business in Sweden, and its wholly-owned subsidiary, Ericsson, Inc., is a Delaware corporation with headquarters in Texas. (*Id.* ¶¶14-15.)

## B. Ericsson's Standard Essential Patents

"[T]he Internet, Wi-Fi, cellular networks, and the mobile devices on which we access these [] [function] in large part due to technological standards and innovation related to or made possible by these standards." OSENGO, KRISTEN, PATENTS AND STANDARDS: PRACTICE, POLICY, AND ENFORCEMENT 1-2 (Michael L. Drapkin et al. eds., *Bloomberg Law Book Division*, 2018). A standard is a uniform design for a product and is intended to represent the "best technological solution" to achieve a particular goal. *Id.* A key goal in telecommunications is interoperability. Interoperability standards allow devices made by [\*5] different manufacturers to connect with one another in a network environment. *Id.* at 1-13.

Telecommunications standards are set by standards setting organizations ("SSOs") and/or standards-development organizations ("SDOs"). *Id.* at 1-3. These include the European Telecommunications Standards Institute ("ETSI"), the 3rd Generation Partnership Project ("3GPP"), and the Institute of Electrical and Electronics Engineers ("IEEE"). *Id.* at 2-41. Each of these organizations is comprised of hundreds of industry participants who, through consensus, develop and adopt standards based on the latest technological innovations. *Id.* at 2-41-2-57. ETSI is one of seven member organizations of 3G¶¶ that create standards related to mobile cellular technologies, including the 2G, 3G, and 4G standards. *Id.* IEEE, through its standard-setting association IEEE-SA, sets standards related to wired and wireless networks, such as wireless local area networks ("WLAN"). *Id.* "Once a standard is adopted, participants [in the respective SSO/SDO] begin to make investments tied to the implementation of the standard, such as creating compliant parts, building compliant cellular towers and even designing devices around particular capabilities." (Dkt. No. 135 ¶ 133.) [\*6]

Patented technology that is "essential" to implement a standard is called a Standard Essential Patent ("SEP"). See *ETSI Rules of Procedure*, Annex 6, Clause 15. A patent is "essential" if it is not technically possible to practice the standard without infringing the patent. *Id.* SSOs/SDOs (e.g., ETSI, 3GPP, and IEEE-SA) have intellectual property rights ("IPR") policies that "define contractual terms for disclosure and licensing of patents that are essential for standard implementation." TAFFET, RICHARD & HARRIS, PHIL, PATENTS AND STANDARDS: PRACTICE, POLICY, AND ENFORCEMENT at 4-2 (Michael L. Drapkin et al. eds., *Bloomberg Law Book Division*, 2018). If a member owns a SEP, it is required to (1) formally declare the patent as essential to the standard and (2) agree to license its patent to companies that practice the standard on specific terms. *Id.* "A commitment to license creates a contract between the SEP owner and the SSO" in which "[s]tandards implementers are third-party beneficiaries under such contracts." *Id.* at 4-10. ETSI and 3G¶¶ require SEP-holders to license patents on terms that are fair, reasonable, and non-discriminatory ("FRAND"). See *ETSI Rules of Procedure*, Annex 6, Clause 6. IEEE similarly requires members to license SEPs using a "reasonable rate," i.e., terms that are reasonable [\*7] and non-discriminatory ("RAND"). See *IEEE-SA Standards Board Bylaws*, Clause 6 (Dec. 2016).

Ericsson is a member of ETSI, 3GPP, and IEEE and has collaborated with industry members to develop cellular network and wireless communications standards. (Dkt. No. 156 ¶ 2.) Ericsson owns several patents that are essential to the 2G, 3G, 4G, and WLAN standards, (*Id.* ¶ 51), and has made a commitment to offer its SEPs on FRAND terms. (*Id.* ¶110.) The chipsets in HTC's smartphones implement the 2G, 3G, 4G, and WLAN standards, and as such, HTC is a third-party beneficiary of the contracts between Ericsson and the SSOs. (Dkt. No. 135 ¶¶ 48-50.) This means Ericsson is required to offer licenses to its SEPs to HTC on terms that comply with the IPR policies of ETSI, 3GPP, and IEEE.

### C. The Parties' Prior License Agreements

Ericsson licensed its SEPs to HTC in three prior agreements in 2003, 2008, and 2014. (Dkt. Nos. 132-2, 132-3, 132-4.) Each agreement contains an arbitration provision as provided below. (*Id.*)

#### 2003 Agreement

##### 10. DISPUTES AND GOVERNING LAW

The validity, performance, construction and interpretation of this Agreement shall be governed by the laws of Sweden without regard to its conflict of law provision. All disputes, differences [\*8] or questions between the Parties shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce in Stockholm, Sweden, by three (3) arbitrators, appointed in accordance with the said Rules. The arbitration proceedings shall be conducted in the English language.

The Parties undertakes and agrees [sic] that all arbitral proceedings conducted under this Article shall be kept confidential, and all information, documentation, materials in whatever form disclosed in the course of such arbitral proceeding shall be used solely for the purpose of those proceedings.

#### 2008 Agreement

##### 9. DISPUTES AND GOVERNING LAW

The validity, performance, construction and interpretation of this Agreement shall be governed by the laws of Sweden without regard to its conflict of law provision. All disputes, differences or questions between the Parties shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce in Stockholm, Sweden, by three (3) arbitrators, appointed in accordance with the said Rules. The arbitration proceedings shall be conducted in the English language. The Parties undertakes and agrees [sic] that all arbitral proceedings conducted [\*9] under this Article shall be kept confidential, and all information, documentation, materials in whatever form disclosed in the course of such arbitral proceeding shall be used solely for the purpose of those proceedings. 2014 Agreement

### **10 GOVERNING LAW AND DISPUTES**

10.1 The validity, performance, construction and interpretation of this Agreement shall be governed by the laws of the State of New York without regard to its conflict of law provisions.

10.2 All disputes, differences or questions arising out of or relating to the interpretation, performance, breach or termination of this Agreement, between the Parties shall be finally settled in New York, New York, under the Rules of Arbitration of the International Chamber of Commerce, by three (3) arbitrators, appointed in accordance with said Rules. The arbitration proceedings shall be conducted in the English language. The award shall be final and binding on the Parties and may be entered and enforced in any court having jurisdiction.

The Parties undertake and agree that all arbitral proceedings conducted under this Article 10 as well as any decision or award that is made or declared during the proceedings shall be kept confidential, and [\*10] all information, documentation, materials in whatever form disclosed in the course of such arbitral proceeding shall be used solely for the purpose of those proceedings.

10.3 Notwithstanding the aforesaid, nothing in this Article 10 shall prevent the Parties from seeking any interim or final injunctive or equitable relief by a court of competent jurisdiction.

10.4 Notwithstanding anything to the contrary, nothing herein shall be construed as restricting or limiting either Party or its Affiliates' or any of their direct or indirect distributor's or customer's ability to immediately assert a release, license, covenant or other defense in any litigation or other proceeding against such Party or its Affiliates, or its or their products subject to the release, licenses, covenants or other rights under this Agreement, or the direct or indirect distributors or customers of such products, regardless of jurisdiction or venue.

Each of the prior licenses also references the Rules of Arbitration of the International Chamber of Commerce, which states in relevant part:

#### Effect of the Arbitration Agreement

1. Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to [\*11] have submitted *ipso facto* to the Rules in effect on the date of commencement of the arbitration, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.
2. By agreeing to arbitration under the Rules, the parties have accepted that the arbitration shall be administered by the Court.
3. If any party against which a claim has been made does not submit an Answer, or if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4).

Arbitration Rules, INTERNATIONAL CHAMBER OF COMMERCE, Art. 6 (Mar. 1, 2017).

#### D. The Instant Lawsuit

On April 6, 2017, HTC sued Ericsson in the Western District of Washington for breach of contract, breach of implied covenant of good faith and fair dealing, and promissory estoppel. [\*12] (Dkt. No. 1.) HTC alleges that Ericsson failed to offer a license to its SEPs on FRAND terms. (*Id.*) HTC subsequently filed a first amended complaint ("FAC") on October 16, 2017, in which it dropped its claim for promissory estoppel and added a claim for back royalties that were allegedly non-FRAND (the "past refund" or "back royalty" claims). (Dkt. No. 41.) Ericsson subsequently moved to dismiss the FAC or transfer the case to this District. (Dkt. No. 46.) In addition to contesting personal jurisdiction and venue, Ericsson argued that HTC's back royalty claims are subject to arbitration. (*Id.* at 15-18.) On May 17, 2018, the Western District of Washington held that it lacked personal jurisdiction over Ericsson and ordered the case be transferred to this District. (Dkt. No. 81.) The court also found that HTC's past refunds claims were not arbitrable:

Defendants argue that the arbitration provisions in the Prior Licensing Agreements with Plaintiff mandate that this issue be arbitrated. The Court cannot agree, especially since Defendants expend the entire first portion of their briefing strenuously advocating that the Licensing Agreements—which arguably have a connection to this forum—are not the operative [\*13] documents; that it is the contracts with the standards-setting agencies with which this litigation is concerned. It is not persuasive to do an about-face on the issue of subject matter jurisdiction and cite to those same Licensing Agreements for their arbitration provisions.

The language of the complaint (which cites to the standards-setting contracts) controls—the arbitration provisions of the Licensing Agreements are inapplicable here and this portion of Defendants' motion will be DENIED.

(*Id.* at 4-5.)

After the case was transferred on June 1, 2018, (Dkt. No. 87), HTC filed a second amended complaint ("SAC") on August 17, 2018 to add antitrust claims under the [Sherman Act](#). (Dkt. No. 135.) HTC alleges that Ericsson colluded with other large SEP holders to manipulate the standards-setting process "to obtain supracompetitive profits and

avoid their FRAND obligation." (*Id.* ¶ 76.) These actions have allegedly "injured HTC, competition, customers, and consumers through decreased competition, increased prices, and reduced innovation, output choice, and quality" as well as "elevat[ed] [] royalties and product prices above competitive levels, the imposition on HTC of one-sided and onerous contract terms, [\*14] [and] lost sales." (*Id.* ¶¶129, 135.) Since then, Ericsson has filed several motions to sever, stay, compel arbitration, and/or dismiss portions of HTC's SAC. (Dkt. Nos. 132, 140, 155.) On September 25, 2018, this Court heard oral argument on Ericsson's Motion to Sever and Stay HTC's Antitrust Claims and Request for Case Management Conference, (Dkt. No. 140), and took the matter under advisement. (Dkt. No. 185.)

## E. HTC's Arbitration Demand

On August 3, 2018, HTC filed a demand for arbitration against Ericsson with the International Chamber of Commerce. (Dkt. No. 132-7.) HTC asserts that the royalties it paid to Ericsson under the parties' 2003 and 2008 license agreements violated Swedish contract and European competition law. (*Id.* at 10.) As a remedy, HTC requests, among other things, repayment for royalties paid "that have been contrary to FRAND terms and conditions." (*Id.* at 13.)

## II. DISCUSSION

Ericsson moves to sever, stay, and compel arbitration of (1) HTC's claim for back royalties and (2) HTC's antitrust claims. Ericsson also moves, in the alternative, to dismiss HTC's antitrust claims for failure to state a claim under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#).

### A. HTC's Claim for Back Royalties

Ericsson argues that HTC's claims for back royalties [\*15] must be submitted to arbitration because they are covered by arbitration clauses in the parties' 2003, 2008, and 2014 license agreements. HTC contends that Ericsson is procedurally barred from seeking arbitration, and that even if it is not, the claims are not arbitrable. The Court will first address HTC's procedural arguments before turning to its substantive arguments.

#### i. The Law of the Case Doctrine

HTC first argues that Ericsson's motion to compel arbitration should be denied under the law of the case doctrine. "[T]he doctrine [of the law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." [Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 815-16, 108 S. Ct. 2166, 100 L. Ed. 2d 811 \(1988\)](#) (internal citation omitted); [Bayou Steel Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania, 487 Fed. Appx. 933, 936 \(5th Cir. 2012\)](#); [Copeland v. Merrill Lynch & Co., 47 F.3d 1415, 1423 \(5th Cir. 1995\)](#). This rule applies to decisions made by (1) the same court; (2) a coordinate court of equal rank in the same case; and (3) an appeals court that remands the case to the district court. [Christianson, 486 U.S. at 816](#); [Bayou Steel, 487 Fed. Appx. at 936](#).

While a court on remand must obey the decisions of the appeals court (known as the "mandate rule"), a court has discretion to revisit its own decisions or those of a coordinate court of equal rank. [Christianson, 486 U.S. at 818](#) ("[T]he law-of-the-case doctrine 'merely expresses the practice of courts [\*16] generally to refuse to reopen what has been decided, not a limit to their power.'"); [Copeland, 47 F.3d at 1424](#) ("[T]he law of the case doctrine is a discretionary rule of practice which does not limit the power of the court to revisit a legal issue."); [Med. Ctr. Pharmacy v. Holder, 634 F.3d 830, 834 \(5th Cir. 2011\)](#) ("[A]n issue of ... law decided on appeal may not be reexamined by the district court on remand or by the appellate court on a subsequent appeal.") (internal citations omitted). Reconsideration of a prior decision is appropriate when "the prior ruling was erroneous, is no longer sound, or would work an injustice." [Loumar, Inc. v. Smith, 698 F.2d 759, 762 \(5th Cir. 1983\)](#); [Christianson, 486 U.S.](#)

[at 818](#) (holding that a court should not revisit a prior decision "absent extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice'"') (internal citation omitted); see, e.g., *United States v. Boruff*, 909 F.2d 111, 116 (5th Cir. 1990) (finding doctrine did not apply where new facts developed). As such, the doctrine "is not [] a barrier to correction of judicial error." [Loumar](#), 698 F.2d at 762.

HTC argues that prior to transfer, Judge Pechman in the Western District of Washington ruled that its past refund claims were non-arbitrable, and therefore, under the law of the case doctrine, this Court should honor that ruling. (Dkt. No. 151 at 2.) HTC argues that reconsideration [\*17] is not appropriate because: (1) HTC's claims have not changed; (2) there has been no intervening change of law; and (3) it would reward Ericsson's attempt to "obtain[] improper reconsideration only after the case was transferred." (*Id.* at 2, 8-9; Dkt. No. 175 at 2-3.)

Ericsson disagrees and argues that reconsideration is proper because new facts have developed that establish that arbitration is required. (Dkt. No. 132 at 13.) HTC previously represented to Judge Pechman that its back royalty claims were not premised on the prior licenses, but instead on Ericsson's alleged breach of its FRAND obligation. (*Id.*) As such, HTC argued that its claims did not implicate the arbitration provisions in the prior license agreements. (*Id.*) Ericsson argues that "this Court [now] has . . . information about HTC's claims that the Washington Court did not have—specifically, HTC's FRAND contentions that reveal that interpretation and performance of the Prior Licenses will be at issue, and HTC's recent filing of an arbitration seeking the same 'back royalties' relief." (*Id.*) Ericsson states that "[c]ourts routinely evaluate how theories of liability evolve in a case, and are willing to reconsider an earlier denial [\*18] of arbitration if evolution of the case warrants." (*Id.*) Ericsson also believes reconsideration is appropriate because the Washington Court: (1) found that it lacked personal jurisdiction, and so was not a "court of competent jurisdiction" for purposes of the law of the case doctrine and (2) did not apply this Circuit's "wholly groundless" standard for arbitration agreements. (*Id.* at 12-14).<sup>1</sup>

Having considered the arguments, the Court finds that it is not bound by Judge Pechman's ruling and further finds that reconsideration in this instance is appropriate. As Ericsson points out, HTC describes the prior licenses and royalties paid under those agreements in its responsive FRAND contentions. (Dkt. No. 132-6 at 5-9.) In fact, HTC states that Ericsson's June 14, 2018 contentions "entirely avoid[ed] discussion of Ericsson's excessive past license rates, which are also at issue in this litigation." (*Id.* at 10.) In addition, HTC filed a demand for arbitration against Ericsson in August 2018, seeking "pursuant to Swedish contract law, . . . repayment by Ericsson of the sums otherwise overpaid by HTC pursuant to the [2003 and 2008 license agreements] in respect of royalties that have been contrary to FRAND terms [\*19] and conditions." (Dkt. No. 132-7 at 13.) The Court finds that these new developments justify revisiting the prior ruling by the Washington court.

## ii. Waiver

HTC also argues that Ericsson has waived its right to arbitration. "[A] party waives its right to arbitrate if it (1) substantially invokes the judicial process and (2) thereby causes detriment or prejudice to the other party." [Janvey v. Alguire](#), 847 F.3d 231, 243 (5th Cir. 2017) (internal citation omitted). This analysis is highly fact-dependent, in which any doubts should result in a finding of no waiver. [Al-Rushaid v. Nat'l Oilwell Varco, Inc.](#), 757 F.3d 416, 421-22 (5th Cir. 2014) ("[I]n light of the federal policy favoring arbitration, '[t]here is a strong presumption against finding a waiver of arbitration.'") (internal citation omitted). As such, the party asserting waiver "bears a heavy burden of proof." [Petroleum Pipe Americas Corp. v. Jindal Saw, Ltd.](#), 575 F.3d 476, 480 (5th Cir. 2009) (internal citation omitted).

"A party substantially invokes the judicial process when it 'engage[s] in some overt act in court that evinces a desire to resolve the arbitration dispute through litigation.'" [Vine v. PLS Fin. Servs., Inc.](#), 689 Fed. Appx. 800, 804 (5th Cir. 2017) (internal citation omitted); see also [Subway Equip. Leasing Corp. v. Forte](#), 169 F.3d 324, 329 (5th Cir. 1999)

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<sup>1</sup> The parties allege that the arbitration provisions in the prior license agreements delegate the question of arbitrability to the arbitrator. In such instances, the Fifth Circuit sends this threshold inquiry to arbitration unless the assertion of arbitrability is "wholly groundless."

(a waiving party "implement[s] or enforc[es] the judicial process" as to the arbitrable claims and "must do more than call upon unrelated litigation to delay an arbitration processing"). This may include a number [\*20] of pre-trial activities, such as moving to dismiss, filing an answer and counterclaims, and participating in discovery. See, e.g., [Janvey, 847 F.3d at 244 n.11](#) (waiver found where party "moved to dismiss, filed an initial answer and amended answer, sent written discovery, and answered discovery" over the span of three years before moving to compel arbitration); [Republic Ins. Co. v. PAICO Receivables, LLC, 383 F.3d 341, 345 \(5th Cir. 2004\)](#) (waiver found where party "answered . . . counterclaims; conducted full-fledged discovery, including four depositions; amended its complaint; . . . filed the required pretrial materials with the district" as well as "two motions to compel discovery, a motion for summary judgment, and a motion *in limine*" all before its motion to compel arbitration); *but see Walker v. J.C. Bradford & Co., 938 F.2d 575, 578 (5th Cir. 1991)* (no waiver where party "did not ask the court to make any judicial decision, for example, by requesting summary judgment" and the "district court actions . . . mainly were routine scheduling order and discovery continuances"); [Tenneco Resins, Inc. v. Davy Intern. AG, 770 F.2d 416, 421 \(5th Cir. 1985\)](#) (no waiver where party indicated desire to arbitrate in answer and engaged in minimal discovery). At the very least, a party that seeks a decision on the merits has substantially invoked the judicial process. [Petroleum Pipe, 575 F.3d at 480](#) (internal citation omitted).

Prejudice refers to the "delay, expense, [\*21] or damage to a party's legal position that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate the same issue." [Petroleum Pipe, 575 F.3d at 480](#) (internal citations omitted). Relevant factors include, but are not limited to, "(1) whether discovery occurred relating to arbitrable claims; (2) the time and expense incurred in defending a motion for summary judgment; and (3) a party's failure to timely assert its right to arbitrate." *Id.* Whether prejudice has occurred is a matter of degree. For example, delay in seeking arbitration, without more, will generally not constitute prejudice. [Nicholas v. KBR, Inc., 565 F.3d 904, 910 \(5th Cir. 2009\)](#) (internal citation omitted). However, when delay is coupled with "pretrial activity inconsistent with an intent to arbitrate, the party later opposing a motion to compel arbitration may more easily show that its position has been compromised, i.e., prejudiced." *Id.* Similarly, engaging in discovery before seeking arbitration will not result in automatic prejudice. It will depend on the extent and nature of the discovery and whether it encompassed the arbitrable claims. [Janvey, 847 F.3d at 244](#) ("Parties cannot enjoy the benefits of federal discovery, and then, after doing so, seek to enforce a decision through private [\*22] resolution."); [Tenneco, 770 F.2d at 421](#) ("However, when only a minimal amount of discovery has been conducted, which may also be useful for the purpose of arbitration, the court should not ordinarily infer waiver based upon prejudice. . . .").

Whether a party has waived arbitration is generally a question for the court and is sent to the arbitrator only if the parties "clear[ly] and unmistakabl[y] evidence" an intent for such result. [Vine, 689 Fed. Appx. At 803](#). This usually requires an "explicit[] mention [of] litigation-conduct waiver" in the agreement. [Id. at 804](#) (refusing to interpret silence regarding waiver issue in favor of sending to the arbitrator).

HTC argues that Ericsson waived its right to arbitrate the past refund claims. HTC asserts that Ericsson substantially invoked the judicial process by: (1) "request[ing] that the Western District of Washington dismiss or transfer this case, rather than . . . simply . . . compel arbitration;" (2) "fil[ing] counterclaims based on the same third-party FRAND obligations, [but] never arguing that its own third-party claims were subject to arbitration;" (3) "agree[ing] to a scheduling order in this District;" (4) engaging in expansive discovery "without mentioning the [\*23] possibility of a forthcoming arbitration motion;" and (5) waiting months to seek arbitration and reconsideration of Judge Pechman's decision. (Dkt. No. 151 at 4-6.) HTC explains that it has produced "over 188,000 pages of discovery" to date and "has incurred hundreds of thousands of dollars in fees" in the process. (*Id.* at 5-6.) Moreover, "Ericsson's discovery requests do not relate exclusively or even primarily to either arbitrability of the claims at issue or to non-arbitrable issues" and would be unavailable to Ericsson in an arbitration proceeding. (Dkt. No. 175 at 2; Dkt. No. 151 at 5-6.) HTC argues that it would be unfair to send the claims to arbitration knowing that Ericsson has had the benefit of discovery to which it would have not obtained otherwise. (*Id.*)

Ericsson asserts that it has not waived any rights. Ericsson argues that it filed a motion to dismiss the arbitrable claims and that its counterclaims were "limited to the parties' current license negotiations" and thus "not subject to mandatory arbitration." (Dkt. No. 165 at 2.) Ericsson also contests that its participation in discovery supports waiver, explaining that its requests have applied to both arbitrable and non-arbitrable [\*24] claims. (*Id.*) Ericsson further

maintains that HTC has suffered no prejudice given that: (1) its "discovery requests largely relate to the parties' current FRAND dispute, which is not subject to mandatory arbitration;" (2) it "has not filed any motions for summary judgment;" and (3) it "timely asserted its right to arbitration." (*Id.* at 2-3.) With respect to any purported delay, Ericsson explains that it waited to file this motion based on HTC's stated plan to file for arbitration under the prior licenses. (*Id.* at 3.) "Only when HTC filed for arbitration approximately one month later did Ericsson realize that HTC was not replacing its past refund claims in district court with claims in arbitration," but was instead seeking relief in both forums. (*Id.*) HTC responds that it "never indicated [to Ericsson] that its arbitration claims based on the Licenses were meant to replace [its] third-party beneficiary claims in this suit." (Dkt. No. 175 at 1.)

The Court finds that Ericsson did not waive its right to arbitrate the past refund claims. Waiver of an arbitration right is strongly disfavored and "should not be lightly inferred," [Janvey, 847 F.3d at 243](#), especially where, as here, the defendant has timely asserted its right to arbitration. [\*25] See [Tenneco, 770 F.2d at 420](#) ("Thus, once the defendant, by answer, has given notice of insisting on arbitration the burden is heavy on the party seeking to prove waiver.") (internal citation omitted). After HTC added claims for past royalties in October 2017, (Dkt. No. 41), Ericsson promptly moved to dismiss those claims as subject to arbitration. (Dkt. No. 46.) That motion remained pending until May 2018 when the Washington Court ruled that the claims were non-arbitrable and transferred the case to this District. (Dkt. No. 81.) After the case was transferred in June 2018, Ericsson explains that HTC planned to file for arbitration under the prior licenses. For example, HTC stated in another motion that "[t]hrough European counsel, HTC intends to assert . . . claims in arbitration in accordance with the past license agreements." (Dkt. No. 105 at 8 n.6.) However, once Ericsson realized that HTC was pursuing claims for past refunds in both arbitration and in court, it immediately filed the instant motion. Ericsson's delay in seeking arbitration, therefore, was entirely reasonable given HTC's conduct. HTC contends that it never told Ericsson that it would drop the past refund claims in court. However, the Court [\*26] was not presented with any communications regarding the same. Even if HTC's general statement that it planned to file for arbitration could be interpreted as having no effect on its intent to litigate its past refund claims here, this Court must resolve all doubts in favor of Ericsson in light of the strong presumption against waiver. Accordingly, the Court is not persuaded that Ericsson "substantially invoked the judicial process" with an intent to litigate, rather than arbitrate, HTC's past refund claims.

Going further, even if the Court agreed that Ericsson's participation in discovery amounted to waiver, HTC has not shown material prejudice. HTC explains that it has incurred tremendous expense on discovery, the majority of which would be unavailable to Ericsson in an arbitration proceeding. The majority of discovery that HTC identifies, however, occurred when Ericsson's initial motion to dismiss was pending before the previous court. (Dkt. No. 151-2 at 2-4.) Prejudice refers to the harm incurred to a party "when the party's opponent forces it to litigate an issue and later seeks to arbitrate the same issue." [Petroleum Pipe, 575 F.3d at 480](#) (emphasis added). Such is not the case here. Once HTC added its past refund [\*27] claims, Ericsson immediately moved for arbitration. It would be unfair to infer prejudice based on discovery conducted during the pendency of Ericsson's motion to dismiss. See [Rab of La., Inc. v. Louisiana-Pacific Corp., No. 5:08-cv-49, 2009 U.S. Dist. LEXIS 140938, 2009 WL 10676990, at \\*1 \(E.D. Tex. Mar. 17, 2009\)](#) ("Because LP has already requested arbitration in this case, this Court finds that it may engage in discovery in this case without waiving its right to arbitrate."). HTC also identifies a single interrogatory that Ericsson propounded after the case was transferred but before it filed the instant motion. (Dkt. No. 151-2 at 4.) Minimal discovery, even that which covers arbitrable claims, is generally not sufficient to find prejudice. [Tenneco, 770 F.2d at 421](#); see, e.g., [Walker, 938 F.2d at 578](#) (finding no waiver where defendant served interrogatories and document requests, did not request a decision on the merits, and the court engaged in routine scheduling prior to defendant requesting arbitration). For the reasons set forth herein, HTC's waiver arguments are unavailing.

### iii. Enforcing the Arbitration Agreement

Having concluded that Ericsson is not procedurally barred from seeking arbitration, the Court now addresses whether HTC's claims for back royalties are, in fact, arbitrable.

Enforcement of [\*28] an arbitration agreement involves a two-step analysis. First, the court must decide whether the parties entered into an arbitration agreement. [Archer and White Sales, Inc. v. Henry Schein, Inc., 878 F.3d 488,](#)

[492 \(5th Cir. 2017\)](#), cert. granted, 138 S. Ct. 2678, 201 L. Ed. 2d 1071 (2018) (internal citations omitted). This is a question of contract formation and concerns whether the parties agreed to arbitrate some set of claims. *Id.* (internal citation omitted); [Rent-A-Center, W., Inc. v. Jackson](#), 561 U.S. 63, 71-72, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010) (holding that court must assess validity and/or enforceability of an arbitration provision only if that specific provision is challenged, and not another provision of the contract or the contract as a whole). If there is an arbitration agreement, the court must then decide whether the claim is covered by the agreement and should therefore be submitted to arbitration. [Archer](#), 878 F.3d at 492 (internal citation omitted). The court applies ordinary state contract law, in which "any doubts concerning the scope of arbitrable issues [are] resolved in favor of arbitration." [Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.](#), 473 U.S. 614, 626, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985).

This analysis changes when the agreement purportedly delegates the question of arbitrability to the arbitrator. In those cases, the presumption in favor of arbitration is reversed and "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence [\*29] that they did so." [First Options of Chicago, Inc. v. Kaplan](#), 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995) (internal citations omitted) (noting that since parties may not appreciate the significance of having an arbitrator decide the scope of his own authority, a presumption in favor of arbitration "might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide").

The Fifth Circuit has adopted a specific framework for applying this rule. If the court determines that the parties "clearly and unmistakably" intended to delegate arbitrability to an arbitrator, the court must send this threshold inquiry to arbitration unless the assertion of arbitrability is "wholly groundless." [Archer](#), 878 F.2d at 495; [Douglas v. Regions Bank](#), 757 F.3d 460, 462-64 (5th Cir. 2014) (adopting test set forth in [Qualcomm Inc. v. Nokia Corp.](#), 466 F.3d 1366 (Fed. Cir. 2006)).<sup>2</sup> An assertion is "wholly groundless" if there is no plausible argument for the arbitrability of the dispute. [Archer](#), 878 F.2d at 495 (internal citations omitted). The Fifth Circuit has cautioned that this exception is a "narrow one" and courts should be careful not to "prejudge arbitrability disputes more properly left to the arbitrator pursuant to a valid delegation clause." *Id.* (internal citation omitted); see generally [AT&T Technologies, Inc. v. Communications Workers of America](#), 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986) ("[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, [\*30] a court is not to rule on the potential merits of the underlying claims."). If "there is a legitimate argument that the arbitration clause covers the present dispute, and, on the other hand, that it does not," then "the resolution of those plausible arguments [should be left to] the arbitrator." [Douglas](#), 757 F.3d at 463 (internal citations omitted).

Turning to the licenses at issue, the Court first notes that each contains an arbitration clause that expressly incorporates by reference the Rules of Arbitration of the International Chamber of Commerce ("ICC Arbitration Rules"). (Dkt. Nos. 132-2, 132-3, 132-4.)

## 2003 Agreement

### 10. DISPUTES AND GOVERNING LAW

. . . . All disputes, differences or questions between the Parties shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce in Stockholm, Sweden, by three (3) arbitrators, appointed in accordance with the said Rules. . .

## 2008 Agreement

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<sup>2</sup>The Supreme Court recently granted a petition for writ of certiorari to decide whether a court must nonetheless submit the question of arbitrability to the arbitrator even if it finds the assertion of arbitrability "wholly groundless." [Archer and White Sales, Inc. v. Henry Schein, Inc.](#), 878 F.3d 488, 492 (5th Cir. 2017), cert. granted, 138 S. Ct. 2678, 201 L. Ed. 2d 1071 (2018) (internal citations omitted).

## 9. DISPUTES AND GOVERNING LAW

. . . All disputes, differences or questions between the Parties shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce in Stockholm, Sweden, by three (3) arbitrators, appointed in accordance with the [\*31] said Rules. . .

## 2014 Agreement

## 10. GOVERNING LAW AND DISPUTES

. . . 10.2 All disputes, differences or questions arising out of or relating to the interpretation, performance, breach or termination of this Agreement, between the Parties shall be finally settled in New York, New York, under the Rules of Arbitration of the International Chamber of Commerce, by three (3) arbitrators, appointed in accordance with said Rules. . .

Article 6 of the ICC Arbitration Rules provides that "any question of jurisdiction or of whether the claims may be determined together in that arbitration *shall be decided directly by the arbitral tribunal*, unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4)." Arbitration Rules, INTERNATIONAL CHAMBER OF COMMERCE, Art. 6 (Mar. 1, 2017) (emphasis added). The Fifth Circuit has held that express adoption of rules that delegate this threshold inquiry to the arbitrator demonstrates clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. See *Cooper v. WestEnd Capital Mgmt., LLC*, 832 F.3d 534, 546 (5th Cir. 2016) (holding that express adoption of JAMS Rules, which delegated arbitrability to arbitrator, "presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability"); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012) (concluding [\*32] that express adoption of AAA arbitration rules showed parties' intent to arbitrate arbitrability). Accordingly, the Court finds that the parties' 2003, 2008, and 2014 license agreements delegate the issue of arbitrability to the arbitrator. The only remaining inquiry then is whether Ericsson's assertion of arbitrability is "wholly groundless."

HTC alleges that it has "incurred substantial monetary damage by being forced to pay non-FRAND royalties to Ericsson over the course of the parties' long relationship" and as a result, it is entitled to back royalties. (Dkt. No. 135 ¶ 119.) Ericsson argues that to prove this, HTC will need to analyze and interpret the prior licenses. To support this contention, Ericsson (1) lists ten potential "arbitrable disputes, issues, or questions related to the interpretation and performance of the Prior Licenses," including "[t]he actual percentage royalty rate that HTC paid in view of the Prior Licenses' royalty caps" and "[w]hether HTC's course of dealing and performance under the Prior Licenses waives and/or supersedes its new position," and (2) explains that HTC's arbitration demand "asserts that the royalties in the 2003 and 2008 licenses violate Ericsson's [\*33] FRAND commitment to ETSI," which is the same relief sought in this case. (Dkt. No. 132 at 8-11.)

HTC responds that while it is seeking the same relief in both arbitration and court, "the causes of action are separate" and the "reference [to] the SSOs [in the arbitration demand] does not speak to or in any way influence the non-arbitrability of [its] separate third-party beneficiary claims." (Dkt. No. 151 at 11.) The claims in arbitration are brought under Swedish contract and European competition law whereas its claims in this case are brought pursuant to Ericsson's FRAND obligations. (*Id.*) HTC contends that since the licenses are governed by Swedish and New York law, "[t]hese changes in venue and the law to be applied could not be possible if each arbitration clause went beyond the agreement of which it is a part to cover other times, claims, and laws, such as HTC's third party beneficiary claims, which are under French law and extend over time periods of all the Licenses." (*Id.* at 12-13.) HTC also argues that each of Ericsson's ten potential arbitrable issues are "strawmen" and can be resolved without reference to the license agreements. (*Id.* at 14-15; Dkt. No. 175 at 4-5.)

The Court disagrees. HTC claims [\*34] that its past royalty payments to Ericsson were non-FRAND and demands a refund of any excess payments. The 2003 and 2008 licenses require arbitration of "[a]ll disputes, differences or questions between the Parties," (Dkt. No. 132-2 at 9; Dkt. No. 132-3 at 9), and the 2014 license requires arbitration of "[a]ll disputes, differences or questions arising out of or relating to the interpretation, performance, breach or

termination of this Agreement." (Dkt. No. 132-4 at 19.) Whether HTC is owed a refund and the amount thereof is certainly a "dispute[], difference[] or question[] between the Parties." Since the terms of the royalties are set out in each of the prior license agreements, resolving this "dispute[], difference[] or question[]" will necessarily require a review of those agreements and thus at a minimum "aris[es] out of or relat[es] to the[ir] interpretation [and/or] performance." HTC's argument that the licenses' choice of law provisions limit arbitrable claims to those brought under Swedish and New York law, respectively, is simply nonsensical. A choice of law provision is generally understood to designate the law of a particular jurisdiction that must be applied to disputes [\*35] arising out of or relating to the contract. It does not represent the types of claims the parties agreed to arbitrate. HTC does not explain why an opposite interpretation is warranted aside from identifying the applicable choice of law provisions. The Court finds that Ericsson has presented a plausible argument that the refund claims are covered by the arbitration clauses, and as such, its assertion of arbitrability is not "wholly groundless." The threshold question of whether the past refund claims are arbitrable must be sent to the arbitrator pursuant to the parties' delegation clause. *Douglas, 757 F.3d at 463* (holding that if "there is a legitimate argument that the arbitration clause covers the present dispute, and, on the other hand, that it does not, then "the resolution of those plausible arguments [should be left to] the arbitrator").

#### iv. Severance and Stay

If a case includes arbitrable and non-arbitrable claims, the court must sever and stay the arbitrable claims pending resolution of the arbitration. *9 U.S.C. § 3; Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985)*; *Wick v. Atlantic Marine, 605 F.2d 166, 168 (5th Cir. 1979)* ("[I]t is well settled in this circuit that if some claims are arbitrable and others are not and they are easily severable, that the court should stay proceedings as to those claims which are arbitrable."). [\*36] HTC argues, however, that its past refund claims cannot be severed from its other breach of FRAND claims because they "are derived from single causes of action and involve the same facts and issues." (Dkt. No. 151 at 8.) Specifically, HTC asserts that this case is about "a single presuit breach of contract, one that continued for years during and at the end of the various Licenses, and that is included in a single claim." (Dkt. No. 175 at 5.)<sup>3</sup> While that may be true, a court must submit to arbitration only those claims to which the parties agreed to arbitrate, "even if the result is piecemeal litigation" or "the possibly inefficient maintenance of separate proceedings in different forums." *Byrd, 470 at 217, 221* (internal citations and quotation marks omitted).<sup>4</sup> "The preeminent concern of Congress in passing the *[Arbitration] Act* was to enforce private agreements. . . and that concern requires that [courts] rigorously enforce agreements to arbitrate." *Id.* at 221. As a result, the Court concludes that it has no discretion in this context and must sever and stay HTC's request for past refunds pending resolution of the arbitration.

### B. HTC's Antitrust Claims

On August 17, 2018, HTC added claims alleging [\*37] that Ericsson violated [Sections 1](#) and [2](#) of the Sherman Act. Ericsson moves to sever, stay, and compel arbitration of HTC's antitrust claims, or in the alternative, to dismiss those claims under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#).

<sup>3</sup> HTC cites *In re Garza, 90 F. App'x 730, 735 (5th Cir. 2004)* for the proposition that "[t]he Fifth Circuit recognized that 'severance of a single cause of action into two parts is never proper and should not be granted.'" (Dkt. No. 151 at 8.) That case applied Texas state law and did not concern severing arbitrable claims from non-arbitrable claims and is therefore distinguishable.

<sup>4</sup> The Supreme Court has expressly rejected the "doctrine of intertwining," which gave courts discretion to deny arbitration if the arbitrable and non-arbitrable claims arose "out of the same transaction" and were "sufficiently intertwined factually and legally." *Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 216, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985)*.

### i. Enforcing the Arbitration Agreement

Ericsson argues that HTC's antitrust claims are subject to arbitration under the prior license agreements. Ericsson explains that HTC alleges that it has purportedly paid higher royalties for Ericsson's SEPs as a result of Ericsson's anticompetitive conduct in coordination with other large SEP-holders, and seeks a refund for past royalties paid. (Dkt. No. 155 at 8-9.) Ericsson argues that any alleged overpayment occurred because HTC entered into the prior licenses, which include arbitration clauses. Ericsson concludes, therefore, that "HTC's antitrust claims arise out of performance of the Prior licenses—i.e., HTC's payments to Ericsson." (*Id.* at 9.) Ericsson also argues that HTC's arbitration demand for past royalties "demonstrates that its antitrust claims are arbitrable" and that "HTC has never explained how its district court and arbitration claims are not duplicative, much less how [it can bring] European competition law claims [in arbitration] but not [its] U.S. competition [**\*38**] law claims." (*Id.* at 10.)

HTC responds that the antitrust claims are "broader than and not implicated by" the license agreements. (Dkt. No. 183 at 3.) HTC substantially sets forth the same flawed arguments that it did for the past refund claims and argues that the choice of law provisions in the arbitration agreements (which are limited to Swedish and New York law, respectively) limit the types of claims subject to arbitration (which it argues does not include U.S. **antitrust law**). (*Id.* at 3-5.)

As with the past refund claims, the Court finds that Ericsson's assertion that HTC's antitrust claims are arbitrable is not "wholly groundless" and thus this threshold inquiry should be sent to the arbitrator. HTC alleges that it "has made quarterly royalty payments of millions of dollars to Ericsson," that those "payments were improperly and unlawfully extracted by Ericsson in breach of its FRAND licensing obligations," and that "Ericsson's conduct [was] made possible by collaborative action" that violates U.S. **antitrust law**. (Dkt. No. 135 at ¶¶ 175-76.) HTC has allegedly suffered "the imposition of . . . one-sided and onerous contract terms" as a result, and seeks relief in the form of back royalties. (*Id.* ¶ 135, [**\*39**] H.) For the same reasons as the past refund claims, it is difficult to envision how HTC could prove it is entitled to back royalties without examining the terms of the prior licenses and the parties' performances thereunder. At a minimum, the Court finds that it is at least plausible that the antitrust allegations implicate the arbitration provisions in the prior license agreements and therefore holds that the issue of arbitrability should be submitted to arbitration.

### ii. Severance and Stay

Since the arbitrability of HTC's antitrust claims must be sent to arbitration, those claims must be severed and stayed pending resolution of arbitration. See *supra* Section II.A.iv.

### iii. Federal Rule of Civil Procedure 12(b)(6)

Having determined that HTC's antitrust claims are arbitrable and should be severed and stayed pending resolution of arbitration, Ericsson's request in the alternative to dismiss the claims under Federal Rule of Civil Procedure 12(b)(6) is considered by the Court to be moot.

## III. CONCLUSION

Based on the foregoing, the Court hereby **GRANTS** Ericsson's Motion to Sever, Stay, and Compel Arbitration of Plaintiff's "Past Refund" Claims Under Prior Licensing Agreements, (Dkt. No. 132), Motion to Sever and Stay HTC's Antitrust Claims and Request for Case Management Conference, [**\*40**] (Dkt. No. 140), and Motion to Compel Arbitration or in the Alternative Dismiss HTC's Antitrust Claims Pursuant to Rule 12(b)(6). (Dkt. No. 155.)

It is therefore **ORDERED** that HTC's request for back royalties pursuant to Count I and HTC's antitrust allegations pursuant to Counts III and IV of the Second Amended Complaint, (Dkt. No. 135) (the "Severed Claims") are hereby

**SEVERED** and shall be submitted to arbitration for a determination of their arbitrability. It is further **ORDERED** that the Severed Claims, as a new and distinct case in this Court's docket, are **STAYED** pending resolution of the arbitration.

**So ORDERED and SIGNED this 7th day of November, 2018.**

/s/ Rodney Gilstrap

RODNEY GILSTRAP

UNITED STATES DISTRICT JUDGE

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## In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.

United States District Court for the Eastern District of New York

November 8, 2018, Decided; November 13, 2018, Filed

18-MD-2819 (NG) (LB)

### **Reporter**

355 F. Supp. 3d 145 \*; 2018 U.S. Dist. LEXIS 194161 \*\*; 2018-2 Trade Cas. (CCH) P80,577; 2018 WL 5928143

IN RE RESTASIS (CYCLOSPORINE OPHTHALMIC EMULSION) ANTITRUST LITIGATION. THIS DOCUMENT APPLIES TO: ALL END-PAYOR PLAINTIFF CASES

**Prior History:** [In re Restasis \(Cyclosporine Ophthalmic Emulsion\) Anti. Litig., 289 F. Supp. 3d 1332, 2018 U.S. Dist. LEXIS 17210, 2018 WL 672031 \(J.P.M.L., Jan. 31, 2018\)](#)

## **Core Terms**

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consumer protection, plaintiffs', purchases, motion to dismiss, consumers, unfair, courts, patents, antitrust, notice, deceptive, misrepresentation, damages, generic, argues, allegations, causation, deceptive trade practices, unfair trade practice, federal court, class action, unfair methods of competition, antitrust claim, defense motion, anticompetitive, unconscionable, fraudulent, prohibits, includes, monopoly

## **LexisNexis® Headnotes**

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

### **[HN1](#) [down arrow] Motions to Dismiss, Failure to State Claim**

When considering a [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion to dismiss , the court must accept as true all well-pleaded factual allegations and must draw all reasonable inferences in plaintiff's favor.

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

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

### **[HN2](#) [down arrow] Motions to Dismiss, Failure to State Claim**

To survive a [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion to dismiss, a complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face. Facial plausibility exists when a plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

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

### [\*\*HN3\*\*](#) [down] Complaints, Requirements for Complaint

[Fed. R. Civ. P. 8\(a\)\(2\)](#) requires a complaint to provide the defendant with fair notice of what the claim is and the grounds upon which it rests. Dismissal of a complaint for failure to provide sufficient notice, however, is usually reserved for those cases in which the complaint is so confused, ambiguous, vague or otherwise unintelligible that its true substance, if any, is well disguised.

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

### [\*\*HN4\*\*](#) [down] Deceptive & Unfair Trade Practices, State Regulation

The Arkansas Deceptive Trade Practices Act, [Ark. Code Ann. § 4-88-101 et seq.](#), contains a catch-all provision, which prohibits any other unconscionable, false, or deceptive act or practice in business, commerce, or trade. [Ark. Code Ann. § 4-88-107\(a\)\(10\)](#).

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

Evidence > Burdens of Proof > Allocation

### [\*\*HN5\*\*](#) [down] Deceptive & Unfair Trade Practices, State Regulation

On August 1, 2017, an amended version of the Arkansas Deceptive Trade Practices Act, [Ark. Code Ann. § 4-88-101 et seq.](#), went into effect. Under this version, a plaintiff must prove individually that he or she suffered an actual financial loss proximately caused by his or her reliance on the use of a practice declared unlawful under this chapter. [Ark. Code Ann. § 4-88-113\(f\)\(2\)](#)

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

Evidence > Burdens of Proof > Allocation

### [\*\*HN6\*\*](#) [down] Deceptive & Unfair Trade Practices, State Regulation

Reliance was not an element of the former version of the Arkansas Deceptive Trade Practices Act, [Ark. Code Ann. § 4-88-101 et seq.](#). The statute previously provided that any person who suffers actual damage or injury as a result of an offense or violation has a cause of action to recover actual damages. [Ark. Code Ann. § 4-88-113\(f\)](#) (effective July 30, 1999). To establish a violation of the prior statute, a plaintiff must show that defendant's conduct proximately caused her injury.

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

Governments > Legislation > Effect & Operation > Retrospective Operation

### [\*\*HN7\*\*](#) [down] Deceptive & Unfair Trade Practices, State Regulation

The amended version of the Arkansas Deceptive Trade Practices Act, [Ark. Code Ann. § 4-88-101 et seq.](#), is not retroactive.

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

## [\*\*HN8\*\*](#) [blue download icon] Deceptive & Unfair Trade Practices, State Regulation

The Florida Deceptive and Unfair Trade Practices Act, [Fla. Stat. § 501.201 et seq.](#), proscribes antitrust violations as well as other unfair methods of competition. Unlike Florida's [antitrust law](#), which follows the Illinois Brick decision and does not allow indirect purchasers to recover damages for antitrust violations, the Unfair Trade Practices Act provides for such recovery.

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

## [\*\*HN9\*\*](#) [blue download icon] Deceptive & Unfair Trade Practices, State Regulation

[Haw. Rev. Stat. § 480-2\(a\)](#) prohibits both unfair methods of competition and unfair or deceptive acts.

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

Civil Procedure > ... > Pleadings > Complaints > Prelitigation Notices

## [\*\*HN10\*\*](#) [blue download icon] Deceptive & Unfair Trade Practices, State Regulation

Under [Haw. Rev. Stat. § 480-13.3\(a\)\(1\)](#), consumers bringing a class action alleging unfair methods of competition under Hawaii's consumer protection law must first file their complaint in camera and under seal, and then serve it on the Attorney General of Hawaii. This requirement sets in motion a process through which the State can decide whether it will prosecute the action on its own. [Haw. Rev. Stat. § 480-13.3\(a\)\(2\)-\(5\)](#).

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

Civil Procedure > ... > Pleadings > Complaints > Prelitigation Notices

## [\*\*HN11\*\*](#) [blue download icon] Deceptive & Unfair Trade Practices, State Regulation

The notice requirement under [Haw. Rev. Stat. § 480-13.3\(a\)\(1\)](#) does not apply to claims for unfair or deceptive acts or practices, and the statute establishes that the requirement does not limit the rights of consumers who bring class actions raising such claims. [Haw. Rev. Stat. § 480-13.3\(a\)-\(b\)](#).

Civil Procedure > Special Proceedings > Class Actions > Prerequisites for Class Action

## [\*\*HN12\*\*](#) [blue download icon] Class Actions, Prerequisites for Class Action

[Fed. R. Civ. P. 23](#) establishes that a class action may be maintained if plaintiffs meet various requirements.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships

Civil Procedure > Special Proceedings > Class Actions > Prerequisites for Class Action

355 F. Supp. 3d 145, \*145L 2018 U.S. Dist. LEXIS 194161, \*\*194161

### **HN13** [blue document icon] Preliminary Considerations, Federal & State Interrelationships

A state law that restricts the types of claims eligible for class treatment beyond the limits established by [Fed. R. Civ. P. 23](#) conflicts with the federal rule.

Civil Procedure > ... > Pleadings > Complaints > Prelitigation Notices

Civil Procedure > Special Proceedings > Class Actions > Prerequisites for Class Action

### **HN14** [blue document icon] Complaints, Prelitigation Notices

[Haw. Rev. Stat. § 480-13.3\(a\)\(1\)](#) conflicts with [Fed. R. Civ. P. 23](#).

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

### **HN15** [blue document icon] Deceptive & Unfair Trade Practices, State Regulation

The Missouri Merchandising Practices Act (MMPA), [Mo. Rev. Stat. § 407.020 et seq.](#), prohibits unfair trade practices, [Mo. Rev. Stat. § 407.020\(1\)](#), which courts have found to include monopolistic conduct, such as filing sham patent litigation. Unlike Missouri's antitrust statute, [Mo. Rev. Stat. § 416.011, et seq.](#), the MMPA permits recovery by indirect purchasers.

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

### **HN16** [blue document icon] Deceptive & Unfair Trade Practices, State Regulation

The Missouri Merchandising Practices Act, [Mo. Rev. Stat. § 407.020 et seq.](#), applies only to claims by any person who purchases or leases merchandise primarily for personal, family, or household purposes and thereby suffers an ascertainable loss of money or property. [Mo. Rev. Stat. § 407.025.1](#).

Civil Procedure > Pleading & Practice > Pleadings

### **HN17** [blue document icon] Pleading & Practice, Pleadings

A plaintiff may plead claims in the alternative.

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

### **HN18** [blue document icon] Deceptive & Unfair Trade Practices, State Regulation

California's Unfair Competition Law (UCL) prohibits any business act or practice that is unlawful, unfair, or fraudulent. [Cal. Bus. & Prof. Code § 17200](#). The law is sweeping in scope. Claims of monopolization via sham litigation and citizen petitions fall within the UCL's scope.

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

**HN19** [blue document icon] Deceptive & Unfair Trade Practices, State Regulation

Colo. Rev. Stat. § 6-1-105(1) is the deceptive trade practices section of the Colorado Consumer Protection Act (CCPA). That provision prohibits numerous, enumerated trade practices and does not contain a catch-all provision. Thus, a plaintiff stating a CCPA claim must allege that the conduct in question falls into at least one of those categories.

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

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

**HN20** [blue document icon] Deceptive & Unfair Trade Practices, State Regulation

Colo. Rev. Stat. § 6-1-105(1)(e) prohibits knowingly making a false representation as to the characteristics, ingredients, uses, or benefits.

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

**HN21** [blue document icon] Deceptive & Unfair Trade Practices, State Regulation

The Supreme Court of Pennsylvania has consistently interpreted the private-plaintiff standing provision's causation requirement in the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. m 201-1, et seq., to demand a showing of justifiable reliance, not simply a causal connection between the misrepresentation and the harm. A mere causal connection can be established by, for instance, proof that a misrepresentation inflated a product's price, thereby injuring every purchaser because he paid more than he would have paid in the absence of the misrepresentation. A justifiable-reliance requirement, by contrast, requires the plaintiff to go further—he must show that he justifiably bought the product in the first place or engaged in some other detrimental activity because of the misrepresentation.

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

**HN22** [blue document icon] Deceptive & Unfair Trade Practices, State Regulation

The Vermont Consumer Fraud Act (VCFA), Vt. Stat. Ann. tit. 9 , § 2461(b) allows any consumer who contracts for goods in reliance upon false or fraudulent representations or who sustains damages or injury as a result of any false or fraudulent representations to sue and recover from the seller the amount of his or her damages. The VCFA defines a consumer as, in part, any person who purchases goods or services not for resale in the ordinary course of his or her trade or business but for his or her use or benefit or the use or benefit of a member of his or her household. Vt. Stat. Ann. tit. 9, § 2451a(a).

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**Judges:** NINA GERSHON, United States District Judge.

**Opinion by:** NINA GERSHON

## Opinion

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### [\*149] OPINION AND ORDER ON DEFENDANT'S MOTION TO DISMISS CERTAIN OF THE END-PAYOR PLAINTIFFS' STATE LAW CLAIMS

GERSHON, United States District Judge:

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#### [\*150] I. INTRODUCTION

This multi-district litigation arises out of defendant Allergan's alleged actions to improperly delay the market entry of generic competitors to its dry-eye medication Restasis® (cyclosporine ophthalmic emulsion). There are two groups of plaintiffs: those that purchased Restasis® directly from Allergan and End-Payor Plaintiffs ("EPPs"), health and welfare funds that purchased (or reimbursed members' purchases of) Restasis® from distributors or retailers. Both

groups contend that the price they paid for Restasis® would have been lower if Allergan had faced competition from generic manufacturers and that they were also deprived of the opportunity to purchase lower-priced, generic versions of the drug.

The EPPs are precluded from asserting federal damages claims under [Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 \(1977\)](#), which interpreted federal **antitrust law** to preclude indirect purchasers from recovering damages in order to avoid "a serious risk of multiple liability for defendants" and "whole new dimensions of complexity to treble-damages suits [which would] seriously undermine their effectiveness." [Id. at 730, 737](#). However, the Supreme Court has recognized that, although federal **antitrust** [\[\\*\\*11\]](#) **law** does not permit indirect purchasers to recover damages, neither does it preempt state antitrust statutes that do so. [California v. ARC Am. Corp., 490 U.S. 93, 105-06, 109 S. Ct. 1661, 104 L. Ed. 2d 86 \(1989\)](#). In their Consolidated Complaint, EPPs seek injunctive relief under the [Clayton Act, 15 U.S.C. § 26](#), and declaratory relief under [28 U.S.C. § 2201](#) for alleged violations of [sections 1, 2](#), and [3 of the Sherman Act, 15 U.S.C. §§ 1-3](#). And plaintiffs bring their claims for monetary damages only under the antitrust and consumer protection laws of various states, Puerto Rico, and the District of Columbia.

Allergan now moves under [Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#) to dismiss certain claims brought under the laws of some of the jurisdictions. For the reasons set forth below, Allergan's motion is granted in part and denied in part.

## II. PLAINTIFFS' ALLEGATIONS

For a full recitation of plaintiffs' factual allegations, I refer to my Opinion and Order dated September 18, 2018 denying defendant's motion to dismiss for failure to allege causation. (Docket No. 146.) Briefly, EPPs allege that Allergan took a number of improper actions to delay the Food and Drug Administration ("FDA") in approving generic competitors for Restasis®, including: (1) filing sham citizen petitions with the FDA; (2) defrauding the U.S. Patent and Trademark Office ("USPTO") into issuing second-wave [\[\\*\\*12\]](#) patents for Restasis®; (3) using those patents to file baseless patent infringement lawsuits, further delaying the FDA's approval process for generic Restasis® equivalents; and (4) when it appeared that its patents were likely to be invalidated, transferring those patents to the Saint Regis Mohawk Tribe, which licensed them back, in an effort to frustrate invalidation of the patents by renting the Tribe's sovereign immunity. As a result, EPPs allege that Allergan has maintained a monopoly for several years beyond what it would have had absent its wrongful conduct and has used that monopoly to charge an inflated price for Restasis®. The EPPs assert that they have been injured because they overpaid for cyclosporine.

EPPs bring five claims, only two of which are at issue on this motion.<sup>1</sup> The [\[\\*151\]](#) Second Claim challenges Allergan's monopolistic conduct and seeks damages under the laws of 22 jurisdictions on an antitrust theory. The Third Claim challenges Allergan's unfair, unconscionable, deceptive, and fraudulent conduct under the consumer protection laws of five states. For each claim, EPPs rely on the same factual allegations.

Allergan moves to dismiss the antitrust claims as to eight of the [\[\\*\\*13\]](#) 22 jurisdictions,<sup>2</sup> and moves to dismiss the consumer protection claims as to each of the five jurisdictions. In their opposition, EPPs voluntarily withdraw their claims brought under the laws of Puerto Rico, but they oppose dismissal of their other claims.

<sup>1</sup> Defendant is not moving to dismiss the following claims: The First Claim, which seeks an injunction under [section 16 of the Clayton Act](#) for violations of [sections 1, 2](#), and [3 of the Sherman Act](#); the Fourth Claim, which seeks disgorgement of the excess profits Allergan earned under California's unjust enrichment law; and the Fifth Claim, which seeks a declaratory judgment that Allergan's conduct violated the Sherman Act.

<sup>2</sup> Allergan does not challenge EPPs' claims for violation of the antitrust laws of Arizona, California, the District of Columbia, Illinois, Iowa, Kansas, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oregon, and Vermont.

### III. LEGAL STANDARD

Defendants move to dismiss the EPPs' Consolidated Complaint pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). [HN1](#)<sup>1</sup> When considering such a motion, the court must accept as true all well-pleaded factual allegations and must draw all reasonable inferences in plaintiff's favor. [Swiatkowski v. Citibank, 446 Fed. Appx. 360, 360-61 \(2d Cir. 2011\)](#). [HN2](#)<sup>1</sup> To survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." [Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#) (quoting [Bell Ad. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#)). Facial plausibility exists when a plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

[HN3](#)<sup>1</sup> [Federal Rule of Civil Procedure 8\(a\)\(2\)](#) requires a complaint to provide the defendant with "fair notice of what the claim is and the grounds upon which it rests." [Twombly, 550 U.S. at 555](#) (quoting [Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 \(1957\)](#) (alterations omitted)). Dismissal of a complaint for failure to provide sufficient notice, however, is "usually reserved for those cases in which the complaint is so confused, ambiguous, vague or otherwise unintelligible [<\*\*14] that its true substance, if any, is well disguised." [Salahuddin v. Cuomo, 861 F.2d 40, 42 \(2d Cir. 1988\)](#).

### IV. ANALYSIS

#### A. Plaintiffs' State Law Antitrust Claims

##### 1. Arkansas, Florida, Hawaii, Minnesota, and Missouri

EPPs' Second Claim, captioned "Violation of State [Antitrust Law](#)," alleges that "Allergan intentionally and wrongfully maintained monopoly power in the relevant market through its overarching anticompetitive scheme in violation of the following state laws" and lists statutory provisions from 22 jurisdictions. Defendant contends that the claims brought under the laws of five of those jurisdictions—Arkansas, Florida, Hawaii, Minnesota, and Missouri—rely on consumer protection statutes that cover a range of theories of liability and therefore leave ambiguous how these statutes apply to an [\*152] antitrust theory of harm. Allergan argues that the claims are confusing and that it lacks "fair notice of what the claim is and the grounds upon which it rests." [Twombly, 550 U.S. at 555](#).

Allergan is correct that the statutes cited by EPPs are broad and provide for a variety of claims under different theories of liability. EPPs make it clear, however, that they have one factual theory of liability—that Allergan engaged in improper efforts to extend its monopoly in order [<\*\*15] to delay market entry of generic substitutes for Restasis®. EPPs are asserting that Allergan's conduct violated several states' antitrust laws, as well as several states' consumer protection laws. Whether or not the conduct does so is addressed below on a state-by-state basis. Allergan's more general argument that plaintiffs have not provided it with sufficient notice of the claims they are asserting, however, is meritless. Allergan has not received notice of any theory other than a monopolization theory precisely because EPPs are not asserting any other theories of liability. Moreover, even if the Consolidated Complaint were unclear on that front, EPPs' Memorandum of Law in Opposition to defendant's motion has confirmed that they are not raising a separate theory of liability on their consumer protection claims, but are merely alleging that the same conduct violated two separate sets of laws. (Mem. in Opp. at 4 ("EPPs intended to assert exactly what they did assert: a claim under the relevant consumer protection statutes based on Allergan's anticompetitive conduct.").) [Rule 8](#)'s notice requirement has been met.

In its Reply Brief, Allergan insists that EPPs must amend their Consolidated Complaint [<\*\*16] to pursue a certain theory or to rely only on specific subsections of a listed statute. It cites authority for the proposition that a party may not amend its pleadings through a brief. Plaintiffs, however, have not amended their complaint. Rather, they have

confirmed that they are not pursuing certain theories that they did not plead. I thus disagree that an Amended Consolidated Complaint is needed, but I do consider the representations made by EPPs to be binding. I will not allow EPPs to revive a theory that they have foregone in their opposition papers and did not articulate in their Consolidated Complaint merely because such a theory is cognizable under a statute listed in the complaint.

## **Arkansas**

**HN4** [↑] The *Arkansas Deceptive Trade Practices Act*, Ark. Code Ann. §§ 4-88-101, et seq. ("ADTPA"), contains a "catch-all" provision, which prohibits "any other unconscionable, false, or deceptive act or practice in business, commerce, or trade." *Id.* § 4-88-107(a)(10). EPPs represent that, for this claim, their "scheme to monopolize" theory of harm is the "unconscionable" practice for which they seek to hold Allergan liable. For the reasons stated above, I reject defendant's argument that plaintiffs' claim under the ADTPA should be dismissed for failure [\*\*17] to provide notice of the specific claim being alleged.

Federal courts are divided on whether the term "unconscionable" in the Arkansas statute includes monopolization claims—a question Arkansas courts have not addressed. Many courts, relying on the Arkansas Supreme Court's liberal construction of the statute, have concluded that the ADTPA does apply to claims of anticompetitive conduct. See, e.g., *Los Gatos Mercantile, Inc v. E.I. DuPont De Nemours & Co.*, 2015 U.S. Dist. LEXIS 106292, 2015 WL 4755335, at \*23 (N.D. Cal. Aug. 11, 2015) (citing *State ex rel. Bryant v. R & A Inv. Co.*, 336 Ark. 289, 985 S.W.2d 299, 302 (Ark. 1999)); *In re Lithium Ion Batteries Antitrust Litig.*, 2014 U.S. Dist. LEXIS 141358, 2014 WL 4955377, at \*22-23 (N.D. Cal. Oct. 2, 2014); [\*153] *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC*, 737 F. Supp. 2d 380, 404, 405 (E.D. Pa. 2010); *In re Aftermarket Filters Antitrust Litig.*, 2009 U.S. Dist. LEXIS 104114, 2009 WL 3754041, at \*9 (N.D. Ill. Nov. 5, 2009); *In re Chocolate Confectionary Antitrust Litig.*, 602 F. Supp. 2d 538, 583 (M.D. Pa. 2009); *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 350 F. Supp. 2d 160, 178 (D. Me. 2004).

Other courts, for varying reasons, have disagreed. See, e.g., *In re Broiler Chicken Antitrust Litig.*, 290 F. Supp. 3d 772, 818-19 (N.D. Ill. 2017); *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at \*35 (N.D. Ill. June 29, 2015); *In re Lidoderm Antitrust Litig.*, 103 F. Supp. 3d 1155, 1166-67 (N.D. Cal. 2015); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 787 F. Supp. 2d 1036, 1042-43 (N.D. Cal. 2011); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 2010 U.S. Dist. LEXIS 131002, 2010 WL 5094289, at \*8 (N.D. Cal. Dec. 8, 2010).

I agree with the courts that have found that claims like those brought by EPPs here fall within the statute's scope. In fact, *Sheet Metal Workers* held that allegations similar to those made by EPPs in their complaint—"that [the defendant] engaged in a scheme designed to maintain its monopoly over the Wellbutrin SR market and prevent generic manufacturers from entering the market"—falls under the ADTPA's catch-all provision. See *737 F. Supp. 2d at 405*.

**HN5** [↑] On August 1, 2017, an amended version of the ADTPA went into effect. Under this version, a plaintiff "must prove individually that he or she suffered an actual financial loss proximately caused by his or her reliance on the use of a practice declared [\*\*18] unlawful under this chapter." *Ark. Code Ann. § 4-88-113(f)(2)*. Allergan argues that plaintiffs' ADTPA claim must be dismissed for failing to allege that they purchased Restasis based on their reliance on Allergan's deception. I agree that, to the extent EPPs' claim is based on purchases that occurred after August 1, 2017, it must be dismissed for failure to plead reliance.

**HN6** [↑] Reliance, however, was not an element of the former version of the ADTPA. The statute previously provided that "[a]ny person who suffers actual damage or injury as a result of an offense or violation. . . has a cause of action to recover actual damages." *Ark. Code Ann. § 4-88-113(f)* (effective July 30, 1999). To establish a violation of the prior statute, a plaintiff must show that defendant's conduct proximately caused her injury. *Ashley Cty., Ark. v. Pfizer, Inc.*, 552 F.3d 659, 666 (8th Cir. 2009); accord *Ramithun v. Bryan Career College-Inc.*, 93 F. Supp. 3d 1011, 1023 (W.D. Ark. 2015). But she need not show reliance. See *Pleasant v. McDaniel*, 2018 Ark. App.

[254, 550 S.W.3d 8, 12 \(Ark. Ct. App. 2018\)](#) (reliance is "conspicuously missing from the elements of the ADTPA"); see also [Erdman Co. v. Phoenix Land & Acquisition, LLC, 2013 U.S. Dist. LEXIS 99918, 2013 WL 3776373, at \\*5 \(W.D. Ark. July 17, 2013\)](#) ("[W]hile reliance is not an element, causation is.").

I find that [HN7](#)[] the amended version of the ADTPA is not retroactive, and thus the portion of EPPs' claim that relies on purchases made prior to August 1, 2017 is viable. See [Mounce v. CHSPSC, LLC, 2017 U.S. Dist. LEXIS 160673, 2017 WL 4392048, at \\*7 \(W.D. Ark. Sept. 29, 2017\)](#) (concluding that the amended version is not retroactive, because the statutory change is substantive, [[\\*\\*19](#)] not procedural). Although the Eighth Circuit recently held that even the former version of the ADTPA "required proof of reliance, even though that term was not expressly included in the statute," that was in the context of satisfying the proximate cause requirement in a deceptive advertising case. [Apex Oil Co. v. Jones Stephens Corp., 881 F.3d 658, 662-63 \(8th Cir. 2018\)](#). It was in that [[\\*154](#)] context that the Eighth Circuit explained that causation is an element of an ADTPA claim and that "[c]ausation, in turn, is not possible without reliance." [Id. at 662](#). The "reliance" requirement, however, need not and should not be read into the statute when a plaintiff brings a monopolization claim. In this case, causation under the ADTPA is established because EPPs plausibly allege that Allergan's monopolization scheme delayed the entry of generic competition and that such competition would have lowered the price of cyclosporine.

Allergan's motion to dismiss EPPs' ADTPA claim is granted to the extent that the claim includes purchases that occurred after August 1, 2017. The motion is otherwise denied.

## Florida

[HN8](#)[] The [Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.201, et seq.](#), proscribes antitrust violations as well as other unfair methods of competition. [In re Nexium \(Esomeprazole\) Antitrust Litig., 297 F.R.D. 168, 175 \(D. Mass. 2013\)](#) ("[C]ourts have held that the violation [[\\*\\*20](#)] of traditional antitrust elements constitutes a violation of the relevant [Florida] consumer protection statute."); [In re Processed Egg Prods. Antitrust Litig., 851 F. Supp. 2d 867, 900 \(E.D. Pa. 2012\)](#); [Mack v. Bristol-Myers Squibb Co., 673 So. 2d 100, 104 \(Fla. Dist. Ct. App. 1996\)](#). And, unlike Florida's [antitrust law](#), which follows *Illinois Brick* and does not allow indirect purchasers to recover damages for antitrust violations, the Unfair Trade Practices Act provides for such recovery. [In re Suboxone \(Buprenorphine Hydrochloride & Naloxone\) Antitrust Litig., 64 F. Supp. 3d 665, 699 n.23 \(E.D. Pa. 2014\)](#); [In re Florida Microsoft Antitrust Litig., 2002 WL 31423620, at \\*2 \(Fla. Cir. Ct. Aug. 26, 2002\)](#).

Defendant's sole argument is that plaintiffs have failed to specify in their complaint that they are pursuing an antitrust theory under the unfair methods of competition provision. Defendant notes that the Florida statute also prohibits three other unfair trade practices. As discussed above, this argument is without merit.

Allergan's motion to dismiss the Florida claim is denied.

## Hawaii

EPPs bring a claim under [HN9](#)[] [Haw. Rev. Stat. § 480-2\(a\)](#), which prohibits both "[u]nfair methods of competition" and "unfair or deceptive acts." Allergan seeks to dismiss this claim, arguing that it cannot determine whether EPPs allege that it engaged in both forms of prohibited conduct. EPPs clarify in their opposition that their claim relates only to "unfair methods of competition," not "unfair and deceptive acts." I find that the anticompetitive scheme described in the complaint is sufficient to state a [[\\*\\*21](#)] claim for unfair methods of competition under the Hawaii statute. See, e.g., [In re Cast Iron Soil Pipe & Fittings Antitrust Litig., 2015 U.S. Dist. LEXIS 121620, 2015 WL 5166014, at \\*23 \(E.D. Tenn. June 24, 2015\)](#); [In re Aggrenox Antitrust Litig., 94 F. Supp. 3d 224, 253 \(D. Conn. 2015\)](#); [In re Dynamic Random Access Memory \(DRAM\) Antitrust Litig., 516 F. Supp. 2d 1072, 1109 \(N.D. Cal. 2007\)](#).

Allergan also seeks dismissal of this claim based on EPPs' failure to notify the Hawaii Attorney General about their Consolidated Complaint prior to serving the complaint on Allergan. [HN10](#)[] Under [Haw. Rev. Stat. § 480-](#)

13.3(a)(1), consumers bringing a class action alleging unfair methods of competition under Hawaii's consumer protection law must first file their complaint *in camera* and under seal, and then serve it on the Attorney General of Hawaii.<sup>3</sup> This [\*155] requirement sets in motion a process through which the State can decide whether it will prosecute the action on its own. [§ 480-13.3 \(a\)\(2\)-\(5\)](#).

I must first determine if failure to comply with Hawaii's notice requirement would mandate dismissal in Hawaii state court. In my view, it would. [HN11](#)[] The notice requirement does not apply to claims for unfair or deceptive acts or practices, and the statute establishes that the requirement does not limit the rights of consumers who bring class actions raising such claims. [§ 480-13.3\(a\)-\(b\)](#). It logically follows that, in Hawaii courts, non-compliance with the requirement does limit the rights of consumers who bring class actions that raise other claims, such as the claim [\*22] brought by EPPs here. *Contra In re Aftermarket Filters, 2009 U.S. Dist. LEXIS 104114, 2009 WL 3754041, at \*6; In re Propranolol, 249 F. Supp. 3d 712, 728 n.24 (S.D.N.Y. 2017)*.

In any event, the issue presented here is whether Hawaii's provision, as I interpret it, bars a federal action. I therefore must decide whether Hawaii's law conflicts with [Federal Rule of Civil Procedure 23](#). If I find that there is no conflict, then Hawaii's law controls and the claim must be dismissed. If I conclude otherwise, then I must decide if Hawaii's law is procedural, in which case federal procedure dictates and the claim survives, unless Hawaii's procedure is "part of a State's framework of substantive rights or remedies." [Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 419, 130 S. Ct. 1431, 176 L. Ed. 2d 311 \(2010\)](#) (Stevens, J., concurring).<sup>4</sup>

[HN12](#)[] [Rule 23](#) establishes that a class action may be maintained if plaintiffs meet various requirements, none of which includes notice to the Hawaii Attorney General. I am aware of two courts that have found that there is not a conflict between [Rule 23](#) and Hawaii's statute. *In re Lipitor Antitrust Litig., 336 F. Supp. 3d 395, 2018 U.S. Dist. LEXIS 143189, 2018 WL 4006752, at \*13 (D.N.J. Aug. 21, 2018)* ("[The Court finds that [Rule 23](#) is not 'sufficiently broad' to cover the state statutory notice provisions."); *In re Asacol Antitrust Litig., 2016 U.S. Dist. LEXIS 94605, 2016 WL 4083333, at \*15 (D. Mass. July 20, 2016)* (same). I find that this conclusion does not comport with *Shady Grove*.

In *Shady Grove*, the Supreme Court considered whether a New York law prohibiting class actions in any suit seeking statutory penalties precluded a federal [\*23] court from exercising diversity jurisdiction over a class action seeking such damages. [559 U.S. at 397-98](#). The Second Circuit, using reasoning similar to that in *In re Lipitor* and *In re Asacol*, had held that the rule did not conflict with [Rule 23](#) because "they address different issues. [Rule 23](#) . . . concerns only the criteria for determining whether a given class [\*156] can and should be certified," whereas the New York rule "addresses an antecedent question: whether the particular type of claim is eligible for class treatment in the first place—a question on which [Rule 23](#) is silent." *Id. at 399*. The Supreme Court disagreed, finding that [Rule 23](#) is not silent on the question of whether a particular claim is eligible for class treatment. The Court found, on the contrary, that [Rule 23](#) empowers a federal court to certify a class as to any type of claim, so long as the Rule's criteria are met. *Id. at 399-400, 406*. Therefore, [HN13](#)[] a state law that restricts the types of claims eligible for class treatment beyond the limits established by [Rule 23](#) conflicts with the federal rule. See *id. at 401*.

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<sup>3</sup> EPPs note that they sent a letter to the Hawaii Attorney General on the same day that the Consolidated Complaint was filed, which was approximately four months after Allergan was served with their first complaint. This action does not comply with the statute.

<sup>4</sup> Justice Scalia's plurality opinion in *Shady Grove*—which adopted a bright-line rule that the Federal Rules of Civil Procedure always apply—garnered only four votes. Justice Stevens's narrower concurrence therefore governs, under the rule announced in *Marks v. United States*: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." [430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 \(1977\)](#) (internal quotation marks omitted). See, e.g., *In re Digital Music Antitrust Litig., 812 F. Supp. 2d 390, 415 (S.D.N.Y. 2011)* (finding that Justice Stevens' concurrence is the controlling opinion by which interpreting courts are bound); *In re Wellbutrin Antitrust Litig., 756 F. Supp. 2d 670, 675 (F.D. Pa. 2010)* (same).

The situation here is identical. Hawaii's law includes a limitation on the types of claims eligible for class treatment and this limitation is absent from [Rule 23](#). Therefore, I find that [HN14](#)<sup>15</sup> Hawaii's law conflicts with [\[\\*\\*24\] Rule 23](#), and I agree with the district courts that have concluded that Hawaii's requirement applies in federal court only if it is substantive, rather than procedural. See [In re Propranolol, 249 F. Supp. 3d at 728](#); [In re Aggrenox, 94 F. Supp. 3d at 253-54](#).

The two courts to address this question have held that Hawaii's statute is procedural, not substantive. [In re Aggrenox, 94 F. Supp. 3d at 254](#) ("I cannot conclude on the basis of the arguments before me that the [section 480-13.3](#) procedural prerequisites are sufficiently a 'part of a State's framework of substantive rights or remedies' to be controlling in federal court"); [In re Propranolol, 249 F. Supp. 3d at 728](#) (finding that "the procedural rules set forth in Hawaii's antitrust statute" do not apply in federal court).

I agree. Under Justice Stevens's concurrence in *Shady Grove*, a state procedural rule should be applied in federal court where it "exist[s] to influence substantive outcomes and may in some instances become so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy." [559 U.S. at 419-20](#) (internal citations omitted). Here, Hawaii's law regulates only when private plaintiffs can litigate the case. It does not alter the substantive elements of plaintiffs' claims. Most importantly, it is surely no more substantive than the statute at issue in *Shady Grove*, which barred [\[\\*\\*25\]](#) class action suits for an entire category of claims. [Id. at 396](#). Under *Shady Grove*, [Rule 23](#) provides the procedural requirements for bringing a class action in federal court, and those are the requirements that govern here.

Allergan's motion to dismiss the Hawaii claim is denied.

### **Minnesota**

In the Consolidated Complaint, EPPs invoke three Minnesota statutes: [Minn. Stat. § 325D.51; § 325D.52](#); and [§ 8.31](#). Allergan moves to dismiss only plaintiffs' claim under [§ 8.31](#), claiming lack of specificity. In their opposition, EPPs clarify that they are relying on [subdivisions 1](#) and [3a of § 8.31](#). [Subdivision 3a](#) establishes private rights of action for violations of the 10 Minnesota statutes, including [§§ 325D.51](#) and [325D.52](#), that are listed in subdivision 1. While plaintiffs' claims were sufficiently clear in the Consolidated Complaint, their further clarification in their opposition resolved any possible ambiguity.

Allergan's motion to dismiss the Minnesota claim under [§ 8.31](#) is denied.

### **[\*157] Missouri**

EPPs allege that Allergan's anticompetitive scheme violated Missouri's consumer protection statute, the [Missouri Merchandising Practices Act \("MMPA"\)](#), [Mo. Rev. Stat. §§ 407.020, et seq.](#) [HN15](#)<sup>15</sup> The MMPA prohibits "unfair" trade practices, [§ 407.020\(1\)](#), which courts have found to include monopolistic conduct, such as filing sham patent litigation as alleged in the [\[\\*\\*26\]](#) Consolidated Complaint. [Sheet Metal Workers, 737 F. Supp. 2d at 416-17; Picone v. Shire PLC, 2017 U.S. Dist. LEXIS 178150, 2017 WL 4873506, at \\*2, \\*18 \(D. Mass. Oct. 20, 2017\)](#). Unlike Missouri's antitrust statute, [Mo. Rev. Stat. §§ 416.011, et seq.](#), the MMPA permits recovery by indirect purchasers. [Picone, 2017 U.S. Dist. LEXIS 178150, 2017 WL 4873506, at \\*17; Gibbons v. J. Nuckolls, Inc., 216 S.W.3d 667, 669 \(Mo. 2007\)](#).

[HN16](#)<sup>15</sup> The statute, however, applies only to claims by "[a]ny person who purchases or leases merchandise primarily for personal, family, or household purposes and thereby suffers an ascertainable loss of money or property." [Mo. Rev. Stat. § 407.025.1](#). Allergan argues that EPPs thus lack standing because they are health and

welfare funds, which purchase Restasis® for use by their members, as opposed to the members themselves.<sup>5</sup> EPPs respond that the statute's text does not specify that the purchase must be for *one's own* personal use, and that plaintiffs are purchasing Restasis® on behalf of their members, who are using it for personal or familial purposes.

Numerous courts have interpreted the MMPA to confer standing exclusively on those who purchase property for their own use. See, e.g., *In re Asacol*, 2016 U.S. Dist. LEXIS 94605, 2016 WL 4083333, at \*12; *Los Gatos Mercantile, Inc.*, 2015 U.S. Dist. LEXIS 106292, 2015 WL 4755335, at \*23; *In re Actimmune Marketing Litig.*, 2010 U.S. Dist. LEXIS 90480, 2010 WL 3463491, at \*12 (N.D. Cal. Sept. 1, 2010); *In re Express Scripts, Inc., Pharmacy Benefits Mgmt. Litig.*, 2006 U.S. Dist. LEXIS 65168, 2006 WL 2632328, at \*10 (E.D. Mo. Sept. 13, 2006). These courts reason that, when an insurance plan makes a purchase, it does so, not for personal purposes, but for the plan's business purposes, i.e., to fulfill its side of a contractual relationship with its members, who pay premiums for its coverage. E.g., *In re Express Scripts*, 2006 U.S. Dist. LEXIS 65168, 2006 WL 2632328, at \*10. EPPs have not pointed to any authority supporting [\*\*27] their position. I thus join the other district courts to have considered this question and hold that the MMPA does not confer standing on plaintiffs.

Defendant's motion to dismiss EPPs' Missouri claim is granted.

## **2. In-State Impact under Tennessee and Wisconsin Law**

Allergan argues that the Consolidated Complaint fails to state a claim with respect to EPPs' antitrust claims under Tennessee and Wisconsin law. Each of these laws applies only if a defendant's out-of-state conduct had a "substantial" effect on the state. *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 523 (Tenn. 2005); *Meyers v. Bayer Ag*, 2007 WI 99, 303 Wis. 2d 295, 735 N.W.2d 448, 451 (Wis. 2007). EPPs allege that Restasis® is a widely purchased drug in every state, with \$1.5 billion in sales in the U.S. in 2016, but, as Allergan points out, the complaint does not specifically reference the scope of harm in Tennessee or Wisconsin.

Allergan's precise argument was rejected in *Wellbutrin XL Antitrust Litig.*, 260 F.R.D. 143, 166 (E.D. Pa. 2009):

[\*158] The Court recognizes that the allegations of the amended complaint contain little information as to the specific impact of the defendants' alleged conduct with respect to any particular state. However, the plaintiffs allege overcharges on a substantial amount of Wellbutrin XL across the United States, including Tennessee, and the Court will not dismiss the plaintiffs' Tennessee claims at this [\*\*28] time for failure to allege the specific extent of any impact on the Tennessee economy. The Court finds that the amended complaint contains facts that "raise a reasonable expectation that discovery will reveal evidence of" a substantial effect on the Tennessee economy sufficient to prove a claim under that state's antitrust law. *Twombly*, 127 S.Ct. at 1965.

I agree with, and adopt, this reasoning.

Defendant's motion to dismiss the claims under Tennessee and Wisconsin law is denied.

## **B. Plaintiffs' State Law Consumer Protection Claims**

Plaintiffs' Third Claim for Relief is premised on the theory that Allergan acted in a manner that was unfair, unconscionable, and deceptive in that it misled the USPTO, the FDA, the courts, and the public about the validity of the second-wave Restasis® patents, causing consumers to overpay. EPPs do not plead, and explicitly state in their opposition that they are not pursuing, any claims based on fraudulent misrepresentations to consumers. (Mem. in Opp. at 17.) EPPs invoke the consumer protection laws of five states—Arkansas, California, Colorado,

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<sup>5</sup> It is undisputed that "person" is defined to include corporate entities, associations, and agents. *Mo. Rev. Stat. § 407.010(5)*. Allergan contends only that the statute does not apply to plaintiffs because they did not purchase Restasis® primarily for their own purposes.

Pennsylvania, and Vermont—to provide the basis for their third claim. Defendant has moved to dismiss these claims.

### **Arkansas**

Just as they did [\*\*29] to support their claim of antitrust liability under the ADTPA, plaintiffs rely on that statute's catch-all provision, [Ark. Code Ann. § 4-88-107\(a\)\(1\)](#), and specifically its proscription of "unconscionable" business practices, to support a consumer protection theory of liability. Although they cite the same language of the statute to support both their Second and Third Claims, plaintiffs assert that their claims are not redundant. At oral argument, plaintiffs expressed the view that a jury could find Allergan's actions unconscionable, but not necessarily anticompetitive. In any event, [HN17](#) [↑] a plaintiff may plead claims in the alternative, and therefore there is no basis to dismiss either one of these claims on the ground of redundancy. [Fed. R. Civ. P. 8\(d\)\(2\)-\(3\)](#) (plaintiffs "may set out 2 or more statements of a claim . . . alternatively or hypothetically, either in a single count or in separate ones . . . regardless of consistency").

Defendant again argues that EPPs' claim must fail because the ADTPA expressly requires reliance, which plaintiffs have not pled. As discussed above, *supra* pp. 7-8, I agree with defendant that plaintiffs cannot pursue damages concerning any purchases that occurred after August 1, 2017, because of EPPs' failure to plead reliance. [\*\*30] Otherwise, I reject defendant's argument. In the context of this case, plaintiffs have adequately pled causation because they have alleged that defendant's actions slowed the entry of generic versions of Restasis® into the marketplace, causing them harm.

Allergan's motion to dismiss this claim is granted to the extent that the claim includes purchases that occurred after August 1, 2017. The motion is otherwise denied.

### **[\*159] California**

[HN18](#) [↑] California's Unfair Competition Law ("UCL") prohibits any business act or practice that is "unlawful, unfair, or fraudulent." [Cal. Bus. & Prof. Code § 17200](#). Plaintiffs assert that Allergan's conduct violated the first two prongs—unlawful and unfair. The law is "sweeping in scope." [Sheet Metal Workers, 737 F. Supp. 2d at 406](#); see also [Saavedra v. Eli Lilly & Co., 2013 U.S. Dist. LEXIS 173055, 2013 WL 6345442, at \\*5 \(C.D. Cal. Feb. 26, 2013\)](#). Claims of monopolization via sham litigation and citizen petitions fall within the UCL's scope. [In re Wellbutrin XL, 260 F.R.D. at 160; Sheet Metal Workers, 737 F. Supp. 2d at 406](#).

Defendant argues that the statute requires reliance when the claim is based on a misrepresentation. But "reliance on misrepresentations, as opposed to *causation* more generally, is [not] required for UCL claims which fall under the unfair or unlawful prongs." [In re Ditropan XL Antitrust Litig., 529 F. Supp. 2d 1098, 1105 \(N.D. Cal. 2007\)](#). In a case involving a claim of a misrepresentation about a product, a plaintiff must show that she relied on that representation in purchasing the [\*\*31] product in order to establish causation. [Moore v. Apple, Inc., 73 F. Supp. 3d 1191, 1200 \(N.D. Cal. Nov. 10, 2014\)](#). Here, however, causation is established if Allergan's actions prevented generic competitors from entering the market. (See Sept. 18, 2018 Op. and Order at 33-36.) Plaintiffs need not plead reliance.

Defendant's motion to dismiss the UCL claim is denied.

### **Colorado**

EPPs bring a claim under [HN19](#) [↑] [Colo. Rev. Stat. § 6-1-105\(1\)](#), the "deceptive trade practices" section of the [Colorado Consumer Protection Act \("CCPA"\)](#). This provision prohibits numerous, enumerated trade practices and does not contain a "catch-all" provision. Thus, "a plaintiff stating a [CCPA] claim must allege that the conduct in question falls into at least one of those categories." [Overturf v. Rocky Mountain Chocolate Factory, Inc., 2009 U.S.](#)

355 F. Supp. 3d 145, \*159 (2018 U.S. Dist. LEXIS 194161, \*\*31

Dist. LEXIS 140924, 2009 WL 10675269, at \*6 (C.D. Cal. Feb. 13, 2009); accord Nauert v. Ace Prop. & Cas. Ins. Co., 2005 U.S. Dist. LEXIS 34497, 2005 WL 2085544, at \*5 (D. Colo. Aug. 27, 2005).

EPPs assert that Allergan engaged in deceptive trade practices under HN20 [§ 6-1-105(1)(e)], which prohibits "knowingly mak[ing] a false representation as to the characteristics, ingredients, uses, [or] benefits. . . of goods," when it misrepresented facts to the USPTO to obtain the second-wave patents and misrepresented the validity of the patents to the FDA. See In re DDAVP Indirect Purchaser Antitrust Litig., 903 F. Supp. 2d 198, 223-24 (S.D.N.Y. 2012) (holding that deceptive citizen petitions to the FDA as well as fraudulent representations to the USPTO are actionable under this subsection of the CCPA, and that the deceptive conduct does [\*\*32] not need to be aimed at consumers). Allergan argues that the Consolidated Complaint is not sufficiently specific to provide notice of that claim, given that it cites only to the entire consumer protection statute, which covers more than 50 types of deceptive conduct. See § 6-1-105(1). For the reasons stated above with regard to plaintiffs' antitrust claims, I do not find this argument convincing. And, I am persuaded by the reasoning in *In re DDAVP* and find that EPPs' allegations state a claim under § 6-1-105(1)(e) of the CCPA.

EPPs also assert that Allergan engaged in unfair trade practices, and that these, too, are prohibited by the CCPA. The word "unfair" appears in only one place in the CCPA, when it states that "[t]he deceptive trade practices listed in this section are in addition to and do not limit the types of unfair trade practices [\*160] actionable at common law or under other statutes of this state." § 6-1-105(3). The statute therefore does not appear to proscribe unfair trade practices, but only deceptive ones.

Despite the statutory language, some courts have found that, to satisfy the first element of a CCPA claim, a plaintiff may show that the defendant engaged "in an *unfair or* deceptive trade practice." In re Liquid Aluminum Sulfate Antitrust Litig., 2017 U.S. Dist. LEXIS 115294, 2017 WL 3131977, at \*26 (D. N.J. July 20, 2017) (emphasis added); In re DDAVP, 903 F. Supp. 2d at 223. These [\*\*33] cases rely on Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc., 62 P.3d 142, 146-47 (Colo. 2003), which does state that an unfair or deceptive trade practice is an element of a CCPA claim.

I agree, however, with the conclusion in Sheet Metal Workers, 737 F. Supp. 2d at 406-08, that there is no standalone claim under the CCPA for an "unfair" trade practice. The *Sheet Metal Workers* court observed that the insertion of "an unfair or" in *Rhino Linings'* articulation of the first element of a CCPA claim is dictum. See id. at 407-08. It further noted that the plaintiffs, like EPPs here, "provide no Colorado or other case where a plaintiff proceeded with a CCPA claim based on an unfair but not deceptive trade practice." 737 F. Supp. 2d at 408; accord In re New Motor Vehicles Canadian Exp., 350 F. Supp. 2d at 180 n.28.

Because EPPs have stated a claim for a deceptive trade practice, defendant's motion to dismiss the CCPA claim is denied. However, insofar as plaintiffs bring a separate claim for unfair trade practices under the statute, it is dismissed.

## Pennsylvania

Plaintiffs bring a claim under the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 Pa. Stat. Ann. §§ 201-1, et seq. In the Consolidated Complaint, EPPs allege that Allergan violated § 201-3 by engaging in "unfair methods of competition and unfair or deceptive acts or practices." Allergan initially notes that the UTPCPL defines "unfair methods of competition" and "unfair [\*\*34] or deceptive acts or practices" to include 20 enumerated types of conduct, as well as a catch-all provision prohibiting "any other fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding." § 201-2(4). While EPPs do not specify in the Consolidated Complaint whether they rely on one of the enumerated types of conduct or the catch-all provision, they clarify in their opposition that their theory is that Allergan was deceptive when it filed sham citizen petitions and patent infringement lawsuits in an attempt to retain its monopoly, as alleged in the Consolidated Complaint.

As Allergan argues, however, this theory is not covered by the UTPCPL. A claim for deceptive conduct under that statute requires a plaintiff to plead reliance, and EPPs here do not allege that they bought Restasis® in reliance on Allergan's misrepresentations. See *Hunt V. U.S. Tobacco Co.*, 538 F.3d 217, 222 n.4 (3d Cir. 2008); *Plumbers' Local Union No. 690 Health Plan v. Apotex Corp.*, 2017 U.S. Dist. LEXIS 156443, 2017 WL 4235773, at \*6-8 (E.D. Pa. Sept. 25, 2017). *Hunt* was a putative class action alleging that the defendant tobacco company "engaged in anticompetitive behavior that artificially inflated the price of the company's moist smokeless tobacco products, causing purchasers to pay . . . more than they would have paid in an efficient market." [538 F.3d at 219](#). The Third Circuit stated that [HN21](#)<sup>↑</sup> the "Supreme [\*\*35] Court of Pennsylvania has consistently interpreted the Consumer Protection Law's private-plaintiff standing provision's causation requirement to demand a showing of justifiable reliance, not simply a causal connection between the [\*161] misrepresentation and the harm." [Id. at 222](#). It then clarified in a footnote that

[a] mere causal connection can be established by, for instance, proof that a misrepresentation inflated a product's price, thereby injuring every purchaser because he paid more than he would have paid in the absence of the misrepresentation. A justifiable-reliance requirement, by contrast, requires the plaintiff to go further—he must show that he justifiably bought the product in the first place (or engaged in some other detrimental activity) because of the misrepresentation.

[Id. at 222 n.4](#) (citing *Weinberg v. Sun Co., Inc.*, 565 Pa. 612, 777 A.2d 442, 445-46 (Pa. 2001)); accord *Toy v. Metro. Life Ins. Co.*, 593 Pa. 20, 928 A.2d 186, 202 (Pa. 2007) ("Weinberg necessarily states that a plaintiff alleging violations of the Consumer Protection Law must prove justifiable reliance.").

Here, plaintiffs have alleged a causal connection, but they have not alleged that they bought the product as a result of Allergan's misrepresentations to the USPTO or the FDA. Their argument that they have alleged enough to establish a claim under the UTPCPL was expressly [\[\\*36\]](#) rejected in *Hunt*. EPPs rely on *Sheet Metal Workers*, which held that the allegation that defendant filed sham patent infringement lawsuits to retain their monopoly was sufficient to state a claim under this Pennsylvania statute. [737 F. Supp. 2d at 421](#). I am not, however, persuaded by that court's reasoning, which fails to address both *Weinberg* and *Toy*.

Because justifiable reliance is an element of any claim under the UTPCPL, EPPs' claim under this provision is dismissed.

## Vermont

EPPs bring a claim under [HN22](#)<sup>↑</sup> the *Vermont Consumer Fraud Act ("VCFA")*, 9 V.S.A. § 2461(b), which allows "[a]ny consumer who contracts for goods . . . in reliance upon false or fraudulent representations . . . or who sustains damages or injury as a result of any false or fraudulent representations . . . [to] sue and recover from the seller . . . the amount of his or her damages[.]". Defendant argues that EPPs are not "consumers" because the VCFA defines a consumer as, in relevant part, "any person who purchases . . . goods or services not for resale in the ordinary course of his or her trade or business but for his or her use or benefit or the use or benefit of a member of his or her household. . . ." [Id. § 2451a\(a\)](#). This definition, Allergan argues, leaves out EPPs, [\[\\*37\]](#) who purchased Restasis® not for their own use or benefit, but in the ordinary course of their business pursuant to the contractual relationship between them and their members.

EPPs counter that the Vermont Supreme Court has held "that business entities are entitled to the same rights under the Act as other consumers." *Rathe Salvage, Inc. v. R. Brown & Sons, Inc.*, 184 Vt. 355, 965 A.2d 460, 467 (Vt. 2008). This misses the point. If a business entity purchased a good or service for its own benefit, it would have standing to sue under the statute. Here, however, the EPPs did not purchase Restasis® for themselves. *In re Aggrenox Antitrust Litig.*, 2016 U.S. Dist. LEXIS 104647, 2016 WL 4204478, at \*9 (D. Conn. Aug. 9, 2016) ("[The VCFA's] definition of 'consumer' allows businesses to sue as consumers with respect to the products they use as consumers. The fact that [plaintiff's] members are consumers, and that [plaintiff] co-purchases or reimburses for consumer products that its members use, does not make [plaintiff] a consumer of those products."). Plaintiffs have cited no case showing that, under these circumstances, they constitute consumers.

[\*162] Because EPPs lack standing to bring a claim under the VCFA, this claim is dismissed.<sup>6</sup>

## V. CONCLUSION

Allergan's motion to dismiss EPPs' antitrust claims, in their Second Claim for Relief in the Consolidated Complaint, brought under Missouri and [\*38] Puerto Rico law is granted, and those claims are dismissed. Allergan's motion to dismiss plaintiffs' antitrust claim brought under Arkansas law is granted to the extent that the claim includes purchases that occurred after August 1, 2017. Allergan's motion to dismiss the remaining state law claims in the Second Claim for Relief is denied.

Allergan's motion to dismiss EPPs' consumer protection law claims, in their Third Claim for Relief in the Consolidated Complaint, brought under Pennsylvania and Vermont law is granted, and those claims are dismissed. Allergan's motion to dismiss plaintiffs' consumer protection claims brought under Arkansas law is granted to the extent that the claim includes purchases that occurred after August 1, 2017. Insofar as plaintiffs allege a claim for an unfair trade practice, as distinct from a claim for a deceptive trade practice, under Colorado Law, such a claim is dismissed. Allergan's motion to dismiss the remaining state law claims in the Third Claim for Relief is denied.

Dated: November 8, 2018

Brooklyn, New York

**SO ORDERED.**

/s/ **Nina Gershon**

**NINA GERSHON**

**United States District Judge**

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<sup>6</sup> Because I find that EPPs lack standing, I do not consider defendant's alternative argument that plaintiffs' VCFA claim must be dismissed because they have not alleged that Allergan's misrepresentations caused them to buy Restasis®.



## **Hu Honua Bioenergy, LLC v. Hawaiian Elec. Indus.**

United States District Court for the District of Hawaii

November 9, 2018, Decided; November 9, 2018, Filed

Civ. No. 16-00634 JMS-KJM

### **Reporter**

2018 U.S. Dist. LEXIS 192162 \*; 2018-2 Trade Cas. (CCH) P80,596; 2018 WL 5891743

HU HONUA BIOENERGY, LLC, a Delaware Limited Liability Company, Plaintiff, vs. HAWAIIAN ELECTRIC INDUSTRIES, INC., a Hawaii Corporation; HAWAIIAN ELECTRIC COMPANY, a Hawaii Corporation; HAWAII ELECTRIC LIGHT COMPANY, INC., a Hawaii Corporation; NEXTERA ENERGY, INC., a Florida Corporation; and HAMAKUA ENERGY PARTNERS, L.P., a Hawaii Limited Partnership, Defendants.

**Prior History:** [Hu Honua Bioenergy v. Hawaiian Elec. Indus., 2017 U.S. Dist. LEXIS 208236 \(D. Haw., Dec. 19, 2017\)](#)

## **Core Terms**

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antitrust, conspiracy, allegations, energy, Electric, monopolize, negotiated, wholesale, Merger, conspiracy to monopolize, qualifying, prices, anti trust law, restraint of trade, specific intent, consumers, rates, reasons, motion to dismiss, power plant, termination, facilities, costs, fails, illegal conspiracy, electric utility, regulations, purchase agreement, antitrust claim, state law claim

**Counsel:** [\*1] For Hu Honua Bioenergy, LLC, a Delaware limited liability company, Plaintiff: Barry W. Lee, Christian E. Baker, LEAD ATTORNEYS, PRO HAC VICE, Manatt, Phelps & Phillips, LLP, San Francisco, CA; Ian L. Sandison, LEAD ATTORNEY, Carlsmith Ball LLP Honolulu, Honolulu, HI; Kelly Anne Higa, Margery S. Bronster, Rex Y. Fujichaku, LEAD ATTORNEYS, Bronster Fujichaku Robbins, Honolulu, HI; Stephen S. Mayne, LEAD ATTORNEY, PRO HAC VICE, Manatt Phelps & Phillips LLP, San Francisco, CA; Wil K. Yamamoto, LEAD ATTORNEY, Honolulu, HI.

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**Judges:** J. Michael Seabright, Chief United States District Judge.

**Opinion by:** J. Michael Seabright

## **Opinion**

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**ORDER GRANTING IN PART AND DENYING WITHOUT PREJUDICE IN PART DEFENDANT NEXTERA ENERGY, INC.'S MOTION TO DISMISS SECOND AMENDED COMPLAINT, ECF NO. 148****I. INTRODUCTION**

Defendant NextEra Energy, Inc. ("NextEra") moves to dismiss the Second Amended Complaint ("SAC") in this antitrust and breach-of-contract action arising out of the cancellation of Plaintiff Hu Honua Bioenergy, LLC's ("Plaintiff" or "Hu Honua") power purchase agreement ("PPA") with co-Defendant Hawaii Electric Light Company, Inc. ("HELCO"). HELCO had agreed to purchase wholesale power from Hu Honua, which was building an independent power plant run on biomass on the Big Island of Hawaii. HELCO cancelled the PPA, allegedly as part of an illegal antitrust conspiracy with NextEra and others, after problems arose with Hu Honua's construction of the power plant (although HELCO and Hu Honua have since renegotiated the PPA).

Hu Honua filed the SAC after the court's January 19, 2018 Amended Order (the "January 19th Order"), which granted in part motions by NextEra and former co-Defendant Hamakua Energy [\*3] Partners, L.P. ("HEP") to dismiss the First Amended Complaint ("FAC").<sup>1</sup> See ECF No. 137; *Hu Honua Bioenergy, LLC v. Hawaiian Elec. Indus.*, 2018 U.S. Dist. LEXIS 8835, 2018 WL 491780 (D. Haw. Jan. 19, 2018). The January 19th Order, among other matters, dismissed federal antitrust claims — two counts alleging violations of sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 & 2 — against NextEra and HEP, with leave to amend to attempt to rectify the identified deficiencies. Accordingly, Hu Honua filed the SAC on January 29, 2018. ECF No. 138. On March 13, 2018, NextEra moved to dismiss those realleged claims with prejudice. ECF No. 148. Hu Honua filed an Opposition on April 13, 2018, and NextEra filed its Reply on April 27, 2018. ECF Nos. 156, 157. The court heard the Motion on July 9, 2018. ECF No. 180. Based on the following, NextEra's Motion is GRANTED as to the federal claims. It is DENIED without prejudice as to the state claims — claims over which the court intends to decline supplemental jurisdiction under 28 U.S.C. § 1337(c)(3).

**II. DISCUSSION**

The January 19th Order comprehensively set forth the factual and legal background of this complicated action involving Hawaii's electric utility market, NextEra's proposed 2014 merger with HEICO, HELCO's 2015 termination (and subsequent [\*4] renegotiation) of the PPA, and HELCO's proposed purchase of a HEP facility. The instant Order does not repeat that background, and the court presumes a detailed familiarity with its prior Order. The court discusses new allegations in the SAC only as necessary to address NextEra's present motion, and otherwise relies on the January 19th Order for the context. The court proceeds directly to NextEra's arguments.

**A. Count One — Conspiracy to Monopolize**

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<sup>1</sup> On July 8, 2018, Hu Honua and HEP entered into a binding settlement, see ECF No. 179, and Hu Honua dismissed claims against HEP with prejudice, see ECF No. 177. Although HEP had filed its own motion to dismiss the SAC, it withdrew that motion and others in conjunction with the settlement, see ECF Nos. 174, 175. This Order thus focuses solely on NextEra's motion.

Similarly, Hu Honua and co-Defendants Hawaiian Electric Industries ("HEI"), Hawaiian Electric Company ("HECO") and HELCO (collectively, "the Hawaiian Electric Defendants") previously reached a settlement in May 2017 in conjunction with a renegotiated PPA, as Hu Honua completes construction of its power plant. See ECF Nos. 88, 122. Consummation of the settlement with the Hawaiian Electric Defendants is still awaiting final completion of the approval process involving the Hawaii Public Utilities Commission ("PUC") and a related state court appeal, *Life of the Land v. Public Utilities Comm'n, et al.*, App. No. SCOT-17-0000630 (Haw. Sup. Ct.).

Count One of the SAC realleges a claim for conspiracy to monopolize under [15 U.S.C. § 2](#), which makes it illegal for someone to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States[.]"<sup>2</sup> "To prove a conspiracy to monopolize in violation of [§ 2](#), [a plaintiff] must show four elements: (1) the existence of a combination or conspiracy to monopolize; (2) an overt act in furtherance of the conspiracy; (3) the specific intent to monopolize; and (4) causal antitrust injury." [Paladin Assocs., Inc. v. Montana Power Co., 328 F.3d 1145, 1158 \(9th Cir. 2003\)](#) (citation omitted).

The January 19th Order dismissed the conspiracy to monopolize claim (the FAC's Count [\*5] One) for two primary reasons: (1) a lack of plausible factual allegations of a "specific intent to monopolize" the market for wholesale firm power generation on the Big Island; and (2) a lack of "causal antitrust injury." [Hu Honua Bioenergy, 2018 U.S. Dist. LEXIS 8835, 2018 WL 491780, at \\*8-9](#). Relatedly, the court also dismissed the FAC's Count Two, alleging conspiracy to restrain trade in violation of [15 U.S.C. § 1](#) because the FAC did not plausibly allege an illegal conspiracy, [2018 U.S. Dist. LEXIS 8835, \[WL\] at \\*14-15](#)—and that reasoning was also sufficient to dismiss Count One for conspiracy to monopolize as well. See, e.g., [Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1576 \(11th Cir. 1991\)](#) ("[A] [section 1](#) claim and a [section 2](#) conspiracy to monopolize claim require the same threshold showing—the existence of an agreement to restrain trade."); IIIB Philip E. Areeda & Herbert Hovenkamp, [Antitrust Law: An Analysis of Antitrust Principles and Their Application](#) ¶ 809 (4th ed. 2015) (hereinafter "Areeda & Hovenkamp") ("Any arrangement that could be considered a 'conspiracy' to monopolize [under [§ 2](#)] must necessarily also be an unreasonable 'contract,' 'combination,' or 'conspiracy' in restraint of trade offending [§ 1](#).").

The SAC's conspiracy to monopolize claim fails for the same fundamental reasons. That is, the SAC has not cured the FAC's deficiencies.

### **1. An Implausible Conspiracy**

Initially, the SAC [\*6] still alleges an implausible illegal antitrust conspiracy. Despite the SAC's amendments, two crucial facts remain that are inconsistent with Hu Honua's antitrust theory: Hu Honua's own failure to complete its power plant under the PPA's terms; and the NextEra/HEI Merger Agreement's prohibition of NextEra's "control" of decisions like HELCO's cancellation of the PPA or proposed purchase of HEP's power plant.

<sup>2</sup>The court only considered Count One of the FAC as to NextEra as a claim for conspiracy to monopolize. See [Hu Honua Bioenergy, 2018 U.S. Dist. LEXIS 8835, 2018 WL 491780, at \\*8](#). To the extent the FAC asserted claims for monopolization and attempted monopolization (as opposed to conspiracy to monopolize), the court dismissed those claims with prejudice for two reasons. First, NextEra (a Florida utility) was never a competitor with Hu Honua in the relevant market (the Big Island). See, e.g., [Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers, 795 F.3d 1124, 1131 \(9th Cir. 2015\)](#); [Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'n's, Inc., 376 F.3d 1065, 1075 \(11th Cir. 2004\)](#). And second, Hu Honua conceded that it was only asserting a conspiracy-based claim. See [Hu Honua Bioenergy, 2018 U.S. Dist. LEXIS 8835, 2018 WL 491780, at \\*8](#) (citing ECF No. 109, Pl.'s Opp'n at 34-35 n.8). The SAC again appears to plead monopolization and attempted monopolization claims, and the claims are again dismissed with prejudice for the same reasons stated in the January 19th Order. Hu Honua need not have repledged those claims if it was seeking to preserve them for appeal. See, e.g., [Lacey v. Maricopa Cty., 693 F.3d 896, 928 \(9th Cir. 2012\)](#) (en banc) ("For claims dismissed with prejudice and without leave to amend, we will not require that they be pled in a subsequent amended complaint to preserve them for appeal.").

In this regard, NextEra points to cases indicating that a *conspiracy to monopolize* claim also fails if the defendant was not a competitor in the relevant market. See, e.g., [Portney v. CIBA Vision Corp., 593 F. Supp. 2d 1120, 1128 \(C.D. Cal. 2008\)](#) ("It is axiomatic in *antitrust law* that a defendant may not be found liable for monopolizing or attempting or *conspiring* to monopolize a market unless that defendant is a competitor in the relevant market and his conduct creates a dangerous probability that he will gain a dominant share of the market.") (quoting [Transphase Sys. v. S. Cal. Edison Co., 839 F. Supp. 711, 717 \(C.D. Cal. 1993\)](#) (emphasis added)). But other authority disagrees, reasoning that in some circumstances a non-competitor can conspire to monopolize a market. See [Spanish Broad. Sys., 376 F.3d at 1078 n.10](#) ("Nothing in our case law suggests that a conspiracy [to monopolize] must be limited solely to market participants so long as the conspiracy also involves a market participant and the non-participant has an incentive to join the conspiracy.") (citation omitted). Because Hu Honua's conspiracy to monopolize claim fails for several other reasons, the court need not decide whether it also fails on this ground.

*a. Hu Honua's Initial Breach of the PPA*

The fact that Hu Honua failed to complete its power plant under the PPA's terms provides an "obvious alternative explanation" (i.e., besides an illegal conspiracy) for HELCO's cancellation of the PPA. See, e.g., [Eclectic Props. E., LLC, 751 F.3d 990, 996 \(9th Cir. 2014\)](#) ("When considering plausibility, courts must also consider an 'obvious alternative explanation,' for defendant's behavior.") (quoting [Ashcroft v. Iqbal, 556 U.S. 662, 682, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#)); [Bell Atl. Corp. v. Twombly, 550 U.S. 544, 567, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#) ("[I]t was not suggestive of conspiracy . . . [where] we have an obvious alternative explanation."). The SAC continues to acknowledge that Hu Honua was unable to complete its biomass power plant as required by the express terms of the PPA. As with the FAC, the SAC explains that labor disputes, financing problems, and litigation with its construction contractors—all completely independent of NextEra, [\*7] and its proposed merger with HEKO — "caused an extended loss of time and delayed the completion of construction of the Hu Honua Facility, setting in motion the chain of events leading to this Complaint." SAC ¶ 75. These events "caused an irretrievable loss of time in the construction of the Hu Honua Facility," such that Hu Honua "would not be able to achieve two milestone[] dates set forth in the PPA." *Id.* ¶ 126. Thus, rather than inferring an illegal antitrust conspiracy from the timing of the proposed merger, the SAC itself explains the obvious alternative explanation for HELCO's termination of the PPA — Hu Honua's own nonperformance—rendering Hu Honua's conspiracy allegations implausible. [Twombly, 550 U.S. at 567](#).

And (as also explained in the January 19th Order) if HELCO unreasonably refused to extend milestone construction dates in accordance with the PPA, this might form the basis for a breach of contract claim against the Hawaiian Electric Defendants, but not for an antitrust conspiracy claim. See, e.g., [Schuylkill Energy Res., Inc. v. Penn. Power & Light Co., 113 F.3d 405, 418 \(3d Cir. 1997\)](#) ("The fundamental dispute . . . concerns the interpretation of the Power Purchase Agreement. This dispute should be resolved pursuant to common-law contract principles" not through antitrust laws); [\*8] [Orion Pictures Distrib. Corp. v. Syufy Enters., 829 F.2d 946, 949 \(9th Cir. 1987\)](#) ("Orion has suffered a breach of contract, not an antitrust injury.").

*b. The Merger Agreement's Consent Provisions*

Second, as with the FAC, the consent provisions of the NextEra/HEI Merger Agreement (whereby HELCO/HEKO needed NextEra's prior consent before "enter[ing] into, terminat[ing] or amend[ing] in any material respect any material Contract," SAC ¶ 84) cannot alone constitute the necessary "combination or conspiracy" to monopolize. [Paladin Assocs., Inc., 328 F.3d at 1158](#). This is because the Merger Agreement also provides that such consent "shall not be unreasonably withheld, conditioned or delayed," ECF No. 73-3 at 5, Merger Agreement at 38, and it specifies:

No Control of [HEI's] Business. [NextEra] acknowledges and agrees that (i) nothing contained in this Agreement is intended to give [NextEra], directly or indirectly, the right to control or direct the operations of [HEI] or an [HEI] Subsidiary prior to the Effective Time and . . . prior to the Effective Time, [HEI] shall exercise, consistent with the terms and conditions of this Agreement, complete control and supervision over its and [HEI's] Subsidiaries' respective operations.

ECF No. 73-3 at 10, Merger Agreement at 43. That is, the Merger Agreement itself precludes [\*9] control, and so — without more — it cannot form the basis of an illegal agreement in violation of antitrust laws.

It remains true, as the court previously explained, that:

Rather than establishing unbridled control by NextEra (and its joinder in an illegal conspiracy), the [Merger Agreement] itself establishes no more than NextEra's routine consent in HELCO's decision. That is, the [SAC] "just as easily suggests rational, legal business behavior" by NextEra, rather than an illegal conspiracy to restrain trade. See [Kendall Jv. Visa U.S.A., Inc., 518 F.3d 1042, 1049 \(9th Cir. 2008\)](#) ("Allegations of facts that

could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws.").

*Hu Honua Bioenergy, 2018 U.S. Dist. LEXIS 8835, 2018 WL 491780, at \*14.* See also *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers, 795 F.3d 1124, 1130 (9th Cir. 2015)*.

## 2. No Specific Intent to Monopolize

Moreover, even accepting that NextEra and the Hawaiian Electric Defendants had some sort of an agreement regarding termination of the PPA, the SAC still fails to allege plausibly that NextEra had the "specific intent to monopolize" such that an agreement could have been part of an illegal antitrust conspiracy. See *Paladin Assocs., Inc., 328 F.3d at 1158* ("To prove a conspiracy to monopolize in violation of § 2, [a plaintiff] must show . . . the [\*10] specific intent to monopolize").

As to the FAC, Hu Honua argued that HECO terminated other independent power purchase agreements on Oahu (in the same time frame that HELCO terminated the Hu Honua PPA and sought to acquire HEP's facility on the Big Island) as part of a larger strategy — shared with NextEra—to plan for liquid natural gas sources of power after the proposed merger. The January 19th Order concluded, however, that such a common motive to increase profits did not indicate that NextEra had a "specific intent to monopolize" the wholesale power market on the Big Island. See *Hu Honua Bioenergy, 2018 U.S. Dist. LEXIS 8835, 2018 WL 491780, at \*9* ("[T]here are no facts pled that would suggest NextEra specifically intended to monopolize that market[] merely by consenting to HELCO's termination of the Hu Honua PPA.") (citing *Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421 (9th Cir. 1995)*, and *Syufy Enters. v. Am. Multicinema, Inc., 793 F.2d 990 (9th Cir. 1986)*). This court reasoned that "[i]t is not enough to show that [a defendant] merely agreed to go along." *Id.* (quoting *Rebel Oil Co., 51 F.3d at 1438 n.8*). "[I]t is not enough to suggest—as Hu Honua does — that NextEra shared a motive to increase prices or profits with a similar strategy." *Id.* (citation omitted). "Motivation to enter a conspiracy is never enough to establish a traditional conspiracy." *Id.* (quoting VI Areeda & Hovenkamp ¶ 1411 (4th ed. 2017)). [\*11]

The SAC adds further allegations detailing HEI's liquid natural gas strategy, purportedly in conjunction with the proposed merger and at the direction of NextEra. See, e.g., SAC ¶¶ 87, 88, 92, 94, 99, 103, 105, 107, 117, 119, 120, 122. But, as NextEra argues, these allegations continue to relate to other markets (Oahu), other products (liquid natural gas), and are largely directed at other Defendants (the Hawaiian Electric Defendants). And although these new allegations, like those in the FAC, might further indicate a motivation for why NextEra would agree to actions of HELCO (cancellation of the PPA, purchase of HEP's facility) during the relevant time period, they still do not indicate a specific intent on NextEra's part to monopolize the wholesale power market on the Big Island. Again, motivation is not enough. *Rebel Oil Co., 51 F.3d at 1438 n.8*; *Hu Honua Bioenergy, LLC, 2018 U.S. Dist. LEXIS 8835, 2018 WL 491780, at \*9*.

There is nothing inherently wrong (at least for the alleged antitrust purposes) with this alleged liquid natural gas strategy. It is a legitimate business purpose. And it is well-settled that,

[i]n proving specific intent, a mere intention to prevail over rivals or improve market position is insufficient. Even an intent to perform acts that can be objectively viewed as tending [\*12] toward the acquisition of monopoly power is insufficient, unless it also appears that the acts were not "predominantly motivated by legitimate business aims."

*Pa. Dental Ass'n v. Med. Serv. Ass'n of Pa., 745 F.2d 248, 260-61 (3d Cir. 1984)* (quoting *Times Picayune Publ'g Co. v. United States, 345 U.S. 594, 627, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*). "[T]he mere intention to exclude competition and to expand one's own business is not sufficient to show a specific intent to monopolize." *Great Escape, Inc. v. Union City Body Co., 791 F.2d 532, 541 (7th Cir. 1986)*.

## 3. No Antitrust Injury

The SAC's conspiracy to monopolize claim also fails for an independent reason—the lack of the required "causal antitrust injury." *Paladin Assocs., Inc., 328 F.3d at 1158*. This element is directed towards injury to "competition not competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*). "[A]ntitrust laws protect the process of competition, and not the pursuits of any particular competitor[.]" *Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 901 (9th Cir. 2008)*.

The January 19th Order concluded that the FAC did not establish harm to competition for two primary reasons: First, as the FAC acknowledged, Hu Honua's proposed biomass power plant is a "qualifying facility" ("QF") under the federal *Public Utility Regulatory Policies Act ("PURPA")* (codified in part at *16 U.S.C. §§ 2601 et seq.*), and such QFs are entitled to receive special rate and regulatory treatment. *Hu Honua Bioenergy, LLC, 2018 U.S. Dist. LEXIS 8835, 2018 WL 491780, at \*9*. And second, the alleged injury — consumers being forced to pay supra-competitive prices for power—was both speculative and controlled by the PUC. *2018 U.S. Dist. LEXIS 8835, [WL] at \*11*. Both reasons [\*13] remain.

#### a. Qualifying Facility Under PURPA

Like the FAC, the SAC alleges that "[t]he Hu Honua facility is a QF because it is a generating facility of 80 MW or less whose primary energy source is biomass, and [Hu Honua] has filed with the Federal Energy Regulatory Commission a notice of self-certification." SAC ¶ 45. As the January 19th Order explained, under PURPA, "Congress has sought to encourage the development of qualifying facilities by insulating them from competition." *Hu Honua Bioenergy, LLC, 2018 U.S. Dist. LEXIS 8835, 2018 WL 491780, at \*10* (quoting *Greensboro Lumber Co. v. Georgia Power Co., 643 F. Supp. 1345, 1373 (N.D. Ga. 1986)*). "PURPA was created as a vehicle to reduce the nation's dependency on foreign oil and to conserve energy, not to foster competition." *Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp., 908 F. Supp. 1194, 1204 (W.D.N.Y. 1995)*. In particular, PURPA and its implementing regulations (both federal and state) guarantee prices and markets. See, e.g., *Greensboro Lumber Co., 643 F. Supp. at 1373* ("[I]n the wholesale market, PURPA establishes a guaranteed price which is equal to, or greater than, the price that would be received in a competitive market. In addition to providing a guaranteed price to qualifying facilities, PURPA also provides a guaranteed market for the power generated by qualifying facilities by making it a requirement that utilities purchase available energy and capacity from qualifying facilities before buying power from anywhere [\*14] else[.]").<sup>3</sup>

As such, case law uniformly holds that PURPA power producers do not harm competition under antitrust laws, even if they might otherwise illegally harm competitors. See, e.g., *Schuylkill Energy, 113 F.3d at 415* (finding no antitrust injury because, under PURPA's regime, "state and federal laws prohibit [plaintiff] from competing in the relevant market"); *Kamine/Besicorp Allegany L.P., 908 F. Supp. at 1207* (finding no antitrust injury at a preliminary injunction stage, reasoning in part that "[t]he PPA, which [PURPA-producer] Kamine is attempting to enforce, was not created as a result of market forces or a competitive process; it is a creature of a statutory scheme [(PURPA)] set up for reasons that have nothing to do with competition *per se*"); *Crossroads Cogeneration Corp. v. Orange & Rockland Utils., Inc., 969 F. Supp. 907, 915 (D.N.J. 1997)* (finding no antitrust injury in action brought by PURPA power producer, reasoning that "Defendant's actions may have caused injury to plaintiff, but they did not cause injury to competition in a defined market [and was] not the sort of injury the antitrust laws were meant to prevent"), *rev'd on other grounds, 159 F.3d 129 (3d Cir. 1998)*.

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<sup>3</sup> "[S]ection 210(a) of PURPA directed the Federal Energy Regulatory Commission ('FERC') to promulgate rules mandating that electric utilities purchase energy from QFs." *Allco Renewable Energy Ltd. v. Mass. Elec. Co., 875 F.3d 64, 67 (1st Cir. 2017)* (citing *16 U.S.C. § 824a-3(a)*). "In accordance with this directive, FERC promulgated regulations requiring utilities to purchase electricity from QFs 'at a rate equal to the utility's full avoided cost.'" *Id.* (citations omitted). "Crucially, given section 210's purpose, the avoided cost rate 'usually exceeds the market price for wholesale power.' Additionally, section 210(f) of PURPA instructs state regulatory authorities to implement these FERC rules." *Id.* (quoting *Portland GE v. FERC, 854 F.3d 692, 695, 428 U.S. App. D.C. 340 (D.C. Cir. 2017)* (other citations omitted)).

The SAC does not cure the failure to allege plausible antitrust injury (injury to competition in the relevant market). To be sure, the SAC adds several paragraphs of allegations regarding QFs under PURPA, [\*15] claiming that Hu Honua actually "competed" in the wholesale market for firm power. See SAC ¶¶ 44 to 53. It alleges that:

Under federal law, there are two primary ways that a QF can sell power to a utility: (a) through a contract obtained under the PURPA "mandatory buy" rule, or (b) through an otherwise-negotiated contract. The "mandatory buy" rule requires utilities to purchase power from QFs at rates that are "just and reasonable" and that "do not discriminate against [QFs]." A rate satisfies these requirements if it is equivalent to the utility's avoided costs.

*Id.* ¶ 46. "Alternatively, a QF is free to enter into a contract to sell power to a utility at a negotiated rate." *Id.* ¶ 47 (citing [18 C.F.R. § 292.301](#)).

Hu Honua elected to enter into a negotiated rate contract with HELCO. Thus, the PPA between HELCO and Hu Honua is not a PURPA contract. Instead, it is a contract whose terms, including its price term, were negotiated between the parties.

*Id.* ¶ 48.

The PPA was never submitted to the [PUC] as a PURPA avoided cost contract. Rather, HELCO submitted the PPA to the [PUC] as a contract with freely-negotiated energy prices. In approving the PPA as a negotiated rate contract, which provided stable prices [\*16] to consumers over the long term, the [PUC] emphasized that Hu Honua's PPA was "de-linked" from fossil fuel prices.

*Id.* ¶ 49.

Because Hu Honua chose to compete against other potential generators, and did not seek a PURPA contract, it is situated differently from other QFs that have mandated contracts. In order to obtain the PPA, Hu Honua had to demonstrate that the benefits of its facility exceeded those of facilities owned by other potential market players and entrants, including HELCO. In entering into a freely-negotiated contract with HELCO, Hu Honua was entering into competition against the utility as a wholesale energy generator, and not simply functioning as a supplier.

*Id.* ¶ 50. Hu Honua thus argues that its PPA was competition in the wholesale power market, and thus HELCO's termination of its PPA (as part of an allegedly illegal conspiracy with NextEra and HEP) constituted antitrust injury. It relies fundamentally on its allegation that because it "elected to enter into a negotiated rate contract with HELCO . . . the PPA between HELCO and Hu Honua is not a PURPA contract," *id.* ¶ 48, and thus it was "entering into competition against [HELCO] as a wholesale energy generator," *id.* [\*17] ¶ 50.

Notably, however, the allegation that Hu Honua suffered antitrust injury, see, e.g., SAC ¶ 234, 244, is a legal conclusion which is not entitled to a presumption of truthfulness. See [Iqbal, 556 U.S. at 678](#) ("[T]he tenet that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions."); [Schuylkill Energy, 113 F.3d at 417](#) ("We are not, however, required to accept as true unsupported conclusions and unwarranted inferences. . . . While [plaintiff] alleges in its Amended Complaint that it is [defendant's] competitor in the retail and wholesale markets, those assertions are belied by both the remaining factual allegations and the law.").

And ultimately, in this context, the SAC's new allegations of "competition" make no difference. This is because, even if Hu Honua's PPA was an "otherwise-negotiated contract," it was done so under the auspices of PURPA. Even if the PPA was not a contract based on PURPA's "mandatory buy" rates, it is undisputed that, as the SAC continues to allege, Hu Honua's proposed biomass power plant was (and still is) a QF under PURPA, with self-certification obtained with the FERC. See SAC ¶ 45. Even if the status might have been formally obtained after negotiations [\*18] had ensued, *id.* ¶ 89, the status (or potential status) brings with it leverage and negotiating options. The PPA was thus negotiated in light of a guaranteed market with PURPA's "mandatory buy" and "avoided cost" provisions as benchmarks, and brings with it all of PURPA's rights and remedies as part of the picture. See, e.g., [Indep. Energy Producers Ass'n, Inc. v. Cal. Pub. Utils. Comm'n, 36 F.3d 848, 850 \(9th Cir. 1994\)](#) ("Section 210 of PURPA specifies the benefits to which QFs are entitled. It creates a market for their energy by requiring that the

[FERC] establish regulations that obligate public utilities to sell electric energy to and purchase electric service from QFs."); *sPower Dev. Co., LLC v. Colo. PUC, 2018 U.S. Dist. LEXIS 28639, 2018 WL 1014142, at \*7 (D. Colo. Feb. 22, 2018)* ("[A] QF has the unconditional right' to choose to sell its output to an electric utility and, in exercising that right, may contract with the utility or force the utility to accept its output through a legally enforceable obligation approved by state authorities.") (citing *In re Hydrodynamics, Inc., 146 FERC ¶ 61193, 61844 (Mar. 20, 2014)*).

Indeed, HELCO actually sought approval of the PPA from the PUC based upon Hawaii's PURPA provisions, among other standards.<sup>4</sup> See ECF Nos. 95-7 at 4 & 147-9 at 4, PPA application at 3 (seeking PUC approval pursuant to *HRS § 269-27.2* and Hawaii Administrative Rules ("HAR") Chapter 6-74). The PPA application indicated that rates, among other criteria, shall "(1) Be just [\*19] and reasonable to the electric consumer of the electric utility and in the public interest; (2) Not discriminate against qualifying cogeneration and small power production facilities; and (3) Be not less than one hundred per cent of avoided cost for energy and capacity purchases to be determined as provided in [HAR §] 6-74-23 from qualifying facilities and not less than the minimum purchase rate."<sup>5</sup> *Id.* at 5, PPA Application at 4.

The PPA application quoted criteria for rates from *HAR § 6-74-22(a)*, which, in turn, is nearly identical to that required by PURPA, as set forth in *16 U.S.C. § 824a-3(b)*:

The rules prescribed under *subsection (a)* shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase—

- (1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and
- (2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

No such rule prescribed under *subsection (a)* shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

Although the application later acknowledged that a utility's avoided [\*20] costs were not determinative in evaluating the PPA's rates, the application specifically advocated for an assessment of "avoided costs" as a "useful benchmark in assessing the reasonableness of an [independent power producer's] pricing." ECF No. 95-8 at 58. That is, the PPA was actually submitted, at least in significant part, under auspices of PURPA.

Moreover, as NextEra argues, merely because a QF's PPA was negotiated does not mean it was done so in a competitive market for purposes of assessing potential antitrust injury. See *Greensboro Lumber, 643 F. Supp. at 1355-56* (finding a lack of antitrust injury/standing regarding a PPA that was the product of extensive negotiations between a QF and utilities and that resulted in pricing "significantly less" than a utility's avoided costs); *Kamine/Besicorp Allegany, 908 F. Supp. at 1207* (finding no antitrust injury in a dispute involving a negotiated PPA with prices allegedly in excess of a utility's avoided costs). Indeed, if those negotiations between Hu Honua and

<sup>4</sup> "[A] Court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment." *Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 999 (9th Cir. 2018)* (quoting *Lee v. City of L.A., 250 F.3d 668, 689 (9th Cir. 2001)*). Moreover, the court can review the PPA application under the incorporation-by-reference doctrine because the SAC refers extensively to the application (see, e.g., SAC ¶¶ 65 to 67). See *Khoja, 899 F.3d at 1002* ("[A] defendant may seek to incorporate a document into the complaint 'if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim.'") (quoting *United States v. Ritchie, 342 F.3d 903, 907 (9th Cir. 2003)*).

<sup>5</sup> HAR Chapter 6-74, entitled "Standards for Small Power Production and Cogeneration," among other things, (1) defines qualifying facilities under FERC's PURPA regulations, 18 C.F.R. Part 292, see *HAR § 6-74-1*; and (2) implements "arrangements between electric utilities and [QFs] under *Section 210 of [PURPA], 16 U.S.C. § 824a-3*," see *HAR §§ 6-74-15* to -28. This Chapter thus executes FERC's mandate to Hawaii (as with all other states) to implement FERC's rules requiring utilities to purchase electricity from QFs "at a rate equal to the utility's full avoided cost," *Alco Renewable Energy Ltd., 875 F.3d at 67* (citations omitted), where "*section 210(f) of PURPA*" instructs state regulatory authorities to implement these FERC rules." *Id.* (citations omitted).

HELCO had failed, Hawaii's PURPA regulations allowed the parties to seek PUC intervention to resolve their differences. See [HAR §§ 6-74-15\(c\) & \(e\)](#).<sup>6</sup>

In sum, although the SAC's amended allegations regarding the origin of the PPA present a closer call than with the FAC on this narrow issue, there is no potential antitrust injury even assuming that the PPA was not a "PURPA contract." Because Hu Honua's facility was a QF under PURPA and was negotiated with that [\*22] status in mind, the resulting PPA was not a product of "competition" in a wholesale marketplace for purposes of assessing antitrust injury to Hu Honua. Again, Hu Honua might have had a viable breach of contract claim against HELCO, but this does not transform that claim into a viable antitrust claim against NextEra.

#### *b. PUC Regulation*

Finally, despite its changes, the SAC continues to allege antitrust injury that is speculative. In this regard, the SAC alleges:

The aforesaid conduct of HELCO has produced antitrust injury to Hu Honua, competition, and consumers, and unless enjoined by this Court, will continue to produce at least the following anticompetitive, exclusionary and injurious effects upon competition in interstate commerce:

(a) competition for the wholesale generation of power on the Island of Hawaii has been substantially and unreasonably restricted, lessened, foreclosed, and eliminated, and consumers will be forced to pay supra-competitive prices for power as a result due to the ultimate pass-through of higher wholesale costs to consumers by HELCO[.]

SAC ¶ 234. As with the FAC, this primary injury—consumers paying supra-competitive prices—remains speculative, depending on factors [\*23] such as oil prices rising from approximately \$60 per barrel to over \$363 per barrel, SAC ¶ 66, or "over \$300 per barrel by 2045," SAC ¶ 204. And it is an injury necessarily and legally controlled by the PUC.

It remains true that "[g]overnment regulation, as opposed to treble damages and criminal liability under the Sherman Act, is generally thought to be the appropriate remedy for difficulties posed by natural monopolies [such as the Hawaii utility market]." [Hu Honua Bioenergy LLC, 2018 U.S. Dist. LEXIS 8835, 2018 WL 491780, at \\*12](#) (quoting [Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 548 \(9th Cir. 1991\)](#)). It remains true that "Hu Honua has alleged anticompetitive behavior in a highly regulated industry." *Id.* And it remains true that "[t]his context is important." *Id.*

Here, the rate base paid by Big Island consumers, including passing on of costs related to power purchase agreements, is a matter for the PUC. See, e.g., [HRS §§ 269-16\(a\), 269-16.22](#). This "comprehensive regulatory framework significantly restricts the nature of the competition which is permitted." [City of Pittsburgh v. W. Penn](#)

<sup>6</sup>HAR § 6-75-15(c) provides:

If the electric utility and qualifying facility fail to reach an agreement on the rate or terms of purchase within seventy-five days after [\*21] the qualifying facility first offers to sell energy or capacity to the electric utility, the electric utility, within fourteen days, shall submit a petition to the commission requesting a hearing on the matter. If the electric utility fails to submit the petition within the prescribed time period, the qualifying facility may petition the commission for a hearing on the matter. Upon the application of the electric utility or the qualifying facility and for good cause, the commission may waive or modify the time periods prescribed in this subsection.

In turn, § 6-75-15(e) provides:

When a petition is filed pursuant to subsection (c), the commission may:

- (1) Dismiss the petition, if it finds that the qualifying facility's offer is incomplete in any material respect;
- (2) Resolve the differences between the parties; or
- (3) Provide such directions, instructions, or rulings as appropriate, and order the parties to resume negotiations.

*Power Co., 147 F.3d 256, 263 (3d Cir. 1998)*. "Under the circumstances of this case, whether and to what extent [a utility] maintains an artificially high rate base is not within the purview of the antitrust laws." *Schuylkill Energy Res., 113 F.3d at 414*. "[Hawaii] regulators—not the market—determine [HELCO's] rate base. [HELCO] has no unilateral ability to change [\*24] its rates; any increase or decrease in rates must be filed with the PUC and conform to PUC regulations and orders." *Id.* The court thus "cannot assume the existence of a PUC [decision] for the purpose[] of assessing damages," and "[t]here is no way to determine whether the rates [consumers] will pay for electric service . . . will be affected by the alleged actions[.]" *W. Penn Power, 147 F.3d at 269*. "As the courts stated in *Kartell v. Blue Shield of Mass., 749 F.2d 922 (1st Cir. 1984)* and *Westchester Radiological Associates P.C. v. Empire Blue Cross & Blue Shield, Inc., 707 F. Supp. 708 (S.D.N.Y. 1989)*, that supervisory power suggests that an expansive application of the antitrust laws is not appropriate[.]" *Kamine/Besicorp Allegany L.P., 908 F. Supp. at 1207*. The alleged injury "is simply too speculative to permit relief under the antitrust laws." *W. Penn Power, 147 F.3d at 269*.

Thus, the court's reasoning in the January 19th Order remains completely applicable:

Like *Schuylkill Energy Resources*, "[t]he fundamental dispute between [Hu Honua] and [HELCO] concerns the interpretation of the Power Purchase Agreement . . . and should be resolved pursuant to common-law contract principles," not through the antitrust laws. *113 F.3d at 418*. Like *Kamine/Besicorp Allegany L.P.*, "whether [HELCO] has breached the PPA or not, [Hu Honua] has not sufficiently demonstrated an antitrust injury[.]" *908 F. Supp. at 1208*. And like *Crossroads Cogeneration* "[HELCO's] actions [\*25] may have caused injury to plaintiff, but they did not cause injury to competition in a defined market. This is not the sort of injury the antitrust laws were meant to prevent." *969 F. Supp. at 915*.

*Hu Honua Bioenergy LLC, 2018 U.S. Dist. LEXIS 8835, 2018 WL 491780, at \*12*.

## B. Count Two — Conspiracy to Restrain Trade

Count Two alleges a violation of *15 U.S.C. § 1*, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States[.]" To state an antitrust claim for restraint of trade, "[a plaintiff] must plead not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true, will prove: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition." *Kendall, 518 F.3d at 1047* (citation omitted)

This claim fails for the same reasons that Count One fails. In particular, as analyzed above, it fails to allege a plausible antitrust conspiracy and fails to allege a plausible theory of antitrust injury. See *Seagood Trading Corp., 924 F.2d at 1576* ("[A] *section 1* claim and a *section 2* conspiracy to monopolize claim require the same threshold showing—the existence of an [\*26] agreement to restrain trade."); *Rebel Oil, 51 F.3d at 1433* ([C]ausal antitrust injury . . . is an element of all antitrust suits brought by private parties seeking damages under *Section 4 of the Clayton Act*.").

## C. State Law Claims

Lastly, NextEra moves to dismiss the state law claims (Count Seven, alleging tortious interference with contract; and Count Eight, alleging unfair competition under HRS chapter 480). The January 19th Order indicated that, because the court had dismissed the federal antitrust claims, it intended to dismiss the state law claims without prejudice under *28 U.S.C. § 1367(c)(3)*. See, e.g., *Acri v. Varian Assocs., Inc., 114 F.3d 999, 1001 (9th Cir. 1997)* ("[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims.") (en banc).

Such action, however, was premature given the procedural posture where federal claims (although stayed) remain against the Hawaiian Electric Defendants. The court cannot exercise its discretion under *28 U.S.C. § 1367(c)(3)*

until it "has dismissed all claims over which it has original jurisdiction." Although the Hawaiian Electric Defendants have entered into a settlement agreement, those claims remain in the action because the settlement was (and [\*27] still is) awaiting a final decision of the PUC approving the renegotiated PPA between Hu Honua and HELCO. In turn, that PUC decision is awaiting proceedings in state court. For administrative reasons, the court denied the motion without prejudice. [Hu Honua Bioenergy, 2018 U.S. Dist. LEXIS 8835, 2018 WL 491780, at \\*16.](#)

The court will take the same action again. That is, the court will not address the merits of Counts Seven and Eight, and will instead deny NextEra's Motion to Dismiss without prejudice as to those claims. The court will address the disposition of the state law claims after the settlement with the Hawaiian Electric Defendants is final.

### **III. CONCLUSION**

For the foregoing reasons, NextEra's Motion to Dismiss is GRANTED as to Counts One and Two; the federal antitrust claims against NextEra are DISMISSED with prejudice. The Motion to Dismiss the state law claims (Counts Seven and Eight) is DENIED without prejudice.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, November 9, 2018.

/s/ J. Michael Seabright

J. Michael Seabright

Chief United States District Judge

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## **Field v. NCAA**

Supreme Court of Hawai'i

November 20, 2018, Decided; November 20, 2018, Filed

SCWC-15-0000663

### **Reporter**

143 Haw. 362 \*; 431 P.3d 735 \*\*; 2018 Haw. LEXIS 246 \*\*\*; 2018 WL 6062411

DANE S. FIELD, TRUSTEE OF THE BANKRUPTCY ESTATE OF ALOHA SPORTS INC., Petitioner/Plaintiff-Appellant, vs. THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, AN UNINCORPORATED ASSOCIATION, Respondent/Defendant-Appellee.

**Subsequent History:** Reconsideration denied by [Field v. NCAA, 2018 Haw. LEXIS 263 \(Haw., Dec. 5, 2018\)](#)

**Prior History:** [\*\*\*1] CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS. (CAAP-15-0000663; CIV NO. 06-1-1832).

[Aloha Sports Inc. v. NCAA, 141 Haw. 143, 406 P.3d 366, 2017 Haw. App. LEXIS 446 \(Haw. Ct. App., Oct. 30, 2017\)](#)

## **Core Terms**

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Sports, Bowl, summary judgment, unfair methods of competition, circuit court, certification, tortious interference, prospective business advantage, final judgment, Subcommittee, recertification, collateral estoppel, anticompetitive, withstand, defendant's conduct, unfair, judicial estoppel, decertification, memorandum, abandon, season, games, fair competition, proceedings, competitor, sponsoring, violations, hotels, waived, harms

## **LexisNexis® Headnotes**

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

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

### **[HN1](#) [] Standards of Review, De Novo Review**

The Hawai'i Supreme Court reviews a trial court's grant or denial of summary judgment de novo.

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

## **HN2** Summary Judgment, Entitlement as Matter of Law

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party.

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

## **HN3** Burdens of Proof, Movant Persuasion & Proof

A movant's burden is generally greater when a party seeks summary judgment before discovery has concluded.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

## **HN4** State Regulation, Claims

Hawai'i's antitrust law, codified in Haw. Rev. Stat. ch. 480, includes a general prohibition at Haw. Rev. Stat. § 480-2(a) (1993 & Supp. 2002) stating that unfair methods of competition in the conduct of any trade or commerce are unlawful. Haw. Rev. Stat. § 480-13 (1993 & Supp. 2002) in turn establishes a private right of action to seek recovery for damages flowing from a party's Haw. Rev. Stat. ch. 480 violation.

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

## **HN5** State Regulation, Claims

To recover under Haw. Rev. Stat. § 480-13(a) (1993 & Supp. 2002) for an unfair method of competition violation, a plaintiff must prove (1) a violation of Haw. Rev. Stat. ch. 480, (2) an injury to the plaintiff's business or property that flows from the defendant's conduct that negatively affects competition or harms fair competition, and (3) damages. The second element has two parts. First, a plaintiff is required to demonstrate an injury in fact to his or her business or property. Second, a plaintiff is required to show the nature of the competition. This latter requirement is met by demonstrating how the defendant's conduct negatively affects competition or harms fair competition.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Absence of Essential Element

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

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

## **HN6** Burdens of Proof, Absence of Essential Element

In evaluating a motion for summary judgment, a burden-shifting framework is applied under which the moving party bears the initial burden of demonstrating that no genuine issue of material fact exists with respect to the essential elements of the claim and that the undisputed facts entitle the party to judgment as a matter of law. Where the non-movant bears the burden of proof at trial, the movant may meet its initial burden by either (1) presenting evidence negating an element of the non-movant's claim, or (1) demonstrating that the non-movant will be unable to carry his

or her burden of proof at trial. Only once the moving party has satisfied its initial burden of production does the burden shift to the non-moving party to show specific facts that present a genuine issue for trial.

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

#### [\*\*HN7\*\*](#) [down] State Regulation, Claims

The first element for recovery under [\*Haw. Rev. Stat. § 480-13\(a\) \(1993 & Supp. 2002\)\*](#) for an unfair method of competition violation is proof of an Haw. Rev. Stat. ch. 480 violation. [\*Haw. Rev. Stat. § 480-2\(a\) \(1993 & Supp. 2002\)\*](#) does not define unfair methods of competition, although a number of other statutes cross-reference the provision and specify that particular practices are per se violations of the prohibition. [\*Haw. Rev. Stat. §§ 480D-4\(a\), 481B-4 \(2008\)\*](#). The statutorily enumerated violations are not an exhaustive catalogue of conduct that violates [\*Haw. Rev. Stat. § 480-2 \(1993 & Supp. 2002\)\*](#), as there is no limit to human inventiveness in this field.

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

#### [\*\*HN8\*\*](#) [down] Trade Practices & Unfair Competition, State Regulation

Under Hawai'i Supreme Court precedents, the evaluation of whether particular, non-statutorily-enumerated conduct is unfair is simply a question of fact that does not require incorporating the elements of an analogous claim. Competitive conduct is unfair when it offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.

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

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

#### [\*\*HN9\*\*](#) [down] State Regulation, Claims

Although the standard to prove an unfair method of competition in violation of [\*Haw. Rev. Stat. § 480-2 \(1993 & Supp. 2002\)\*](#) and the elements to establish a tortious interference with economic advantage may seem similar in that the latter requires that a defendant intended to either pursue an improper objective of harming the plaintiff or use wrongful means, the elements of the two claims are not identical.

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

#### [\*\*HN10\*\*](#) [down] State Regulation, Claims

To fulfill the second element of an unfair method of competition violation, a plaintiff must (a) demonstrate an injury in fact to one's business and (b) demonstrate how a defendant's conduct negatively affects competition or harms fair competition. As to the injury requirement, the injury in fact must flow from the anticompetitive conduct.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

#### [\*\*HN11\*\*](#) [down] Summary Judgment, Evidentiary Considerations

On summary judgment, courts must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion.

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

#### **HN12**[] State Regulation, Claims

To defend against summary judgment dismissing an unfair competition claim, it is sufficient for a plaintiff to offer proof of the general market at issue without resort to expert testimony.

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

#### **HN13**[] State Regulation, Claims

Demonstrating actual negative effects on or harm to fair competition in a relevant market is not required to withstand summary judgment dismissing an unfair competition claim.

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

#### **HN14**[] State Regulation, Claims

Plaintiffs need not be competitors or in competition with defendants to establish or recover from an unfair method of competition in violation of [Haw. Rev. Stat. § 480-2\(a\)](#) (1993 &; Supp. 2002).

Civil Procedure > ... > Defenses, Demurrsers & Objections > Affirmative Defenses > Waiver

#### **HN15**[] Affirmative Defenses, Waiver

A waiver does not occur when there is no right in existence to be waived.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

#### **HN16**[] Estoppel, Judicial Estoppel

The doctrine of judicial estoppel precludes a party from assuming a position that is inconsistent with a position already accepted by a court to gain an unfair advantage in the proceedings. The doctrine is intended to protect the integrity of the judicial system and prevents parties from playing "fast and loose" with the court or blowing "hot and cold" during the course of litigation, thereby promoting orderliness, regularity, and expedition of litigation.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

#### **HN17**[] Estoppel, Collateral Estoppel

Collateral estoppel, or issue preclusion, is a bar to the relitigation of a fact or issue litigated in a prior suit when four requirements are met: (1) the issue decided in the prior adjudication is identical to the one presented in the action in

question, (2) there is a final judgment on the merits, (3) the issue decided in the prior adjudication was essential to the final judgment, and (4) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication.

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

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

### **HN18** [blue icon] State Regulation, Claims

The elements of a [Haw. Rev. Stat. § 480-13\(a\) \(1993 & Supp. 2002\)](#) claim based on an unfair method of competition and a claim for intentional or tortious interference with prospective business advantage are not identical.

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

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

### **HN19** [blue icon] State Regulation, Claims

To establish an unfair method of competition claim, a plaintiff must prove (1) a violation of Haw. Rev. Stat. ch. 480, (2) which causes an injury to the plaintiff's business or property, and (3) proof of the amount of damages. Under the second element, a plaintiff must demonstrate that the defendant's conduct negatively affects competition and that the plaintiff's injury stems from the defendant's anti-competitive or unfair conduct. There is no intent element required to establish an unfair method of competition claim. In contrast, the elements of intentional or tortious interference with prospective business advantage require the plaintiff to prove all of the following: (1) the existence of a valid business relationship or a prospective advantage or expectancy sufficiently definite, specific, and capable of acceptance in the sense that there is a reasonable probability of it maturing into a future economic benefit to the plaintiff, (2) knowledge of the relationship, advantage, or expectancy by the defendant, (3) a purposeful intent to interfere with the relationship, advantage, or expectancy, (4) legal causation between the act of interference and the impairment of the relationship, advantage, or expectancy, and (5) actual damages. Unlike an unfair method of competition claim, tortious interference with prospective business advantage includes a purposeful intent element.

**Counsel:** Amy T. Brantly, Frederick W. Rohlfing, III for petitioner.

Gregory L. Curtner, William C. McCorriston, Jordon J. Kimura for respondent.

**Judges:** RECKTENWALD, C.J., NAKAYAMA, McKENNA, POLLACK, AND WILSON, JJ. OPINION OF THE COURT BY POLLACK, J.

**Opinion by:** POLLACK

## **Opinion**

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### **[\*366] [\*\*739] OPINION OF THE COURT BY POLLACK, J.**

This case arises out of the uncompleted sale of one business to another. The plaintiff alleges that the defendant engaged in an unfair method of competition to terminate the transaction in violation of Hawai'i **antitrust law**. At issue in this case is what a plaintiff must demonstrate to withstand summary judgment on a claim for an unfair

method of competition under *Hawaii Revised Statutes (HRS) Chapter 480*. In particular, we address the plaintiff's requirement of showing that the defendant's conduct would negatively affect competition or harm fair competition. Consistent with our case law, we conclude that to raise an issue of material fact as to the nature of competition requirement of an unfair method of competition claim following the close of discovery, a plaintiff must demonstrate that the defendant's alleged anticompetitive conduct could negatively affect competition [\*\*\*2] but need not prove that the defendant in fact harmed competition. Further, we reaffirm that in order to withstand summary judgment, a plaintiff may generally describe the relevant market without resort to expert testimony and the plaintiff need not be a competitor of or in competition with the defendant.

## I. BACKGROUND AND PROCEDURAL HISTORY

### A. Factual Background

The National Collegiate Athletic Association (NCAA) is a non-profit, unincorporated voluntary association of approximately 1,200 colleges and universities, athletic conferences, and sports organizations. The NCAA regulates and controls Division I-A postseason college football bowl games in which qualifying NCAA Division I-A members may participate. Independent businesses (bowl sponsoring agencies) organize and promote the bowls subject to annual recertification<sup>1</sup> by the NCAA Football Certification Subcommittee (the Subcommittee). The Subcommittee is composed of representatives from NCAA member schools, as well as NCAA staff that serve as non-voting liaisons.

Aloha Sports, Inc.<sup>2</sup> (Aloha Sports) is a former bowl sponsoring agency that produced Division I-A NCAA postseason college football bowl games. Aloha Sports organized, produced, [\*\*\*3] and promoted the NCAA-certified Aloha Bowl in Honolulu from 1982 to 2000. In 1998, Aloha Sports established and received NCAA certification of the Oahu Bowl and began to promote the two bowl games together. For various reasons unrelated to [\*\*740] [\*367] this appeal, Aloha Sports relocated both bowls to the continental United States following the 2000 season. In the 2001 season, Aloha Sports sought and received NCAA recertification of the Aloha Bowl as the San Francisco Bowl and of the Oahu Bowl as the Seattle Bowl. The Seattle Bowl was also recertified by the NCAA and presented by Aloha Sports during the 2002 season.

Several concerns arose with the management of the 2002 Seattle Bowl, including failures to timely submit a letter of credit to the NCAA and to make outstanding payments to participating teams and vendors. Subsequently, Aloha Sports decided to sell its business. In February 2003, Aloha Sports signed a letter of intent to transfer ownership and control of its business to Pro Sports & Entertainment, Inc. (Pro Sports) for the sum of \$2,031,000. The sale was contingent upon NCAA recertification of the Seattle Bowl for the 2003 season. On April 1, 2003, Aloha Sports submitted an application [\*\*\*4] for recertification of the Seattle Bowl for the 2003 season to the NCAA.

In April 2003, the Subcommittee met over four days to make certification decisions for the 2003 season. At an unknown date, an NCAA internal memorandum titled "Seattle Bowl Issues" was created that provided information regarding the pending Seattle Bowl recertification. The memorandum stated that ongoing issues existed with the management of the Seattle Bowl, including a submission of an inaccurate audit report, a failure to pay the required certification fee, and a late letter of credit. The memorandum also noted the intended sale of Aloha Sports to Pro Sports, including that the sale was contingent upon recertification of the 2003 Seattle Bowl, and listed outstanding debts from the 2002 Seattle Bowl as "Feller Debts" in apparent reference to the president of Pro Sports, Paul Feller.

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<sup>1</sup> The requirements for certification listed in the 2002-03 NCAA Bowl Handbook include, inter alia, exceeding a minimum amount of ticket sales, the implementation of a gross receipt sharing policy under which the institutions participating in the bowl each receive a minimum payout of \$750,000, the performance of financial audits, the submission of a letter of credit, and compliance with certification application dates, fees, and procedures.

<sup>2</sup> On December 27, 2017, the ICA issued an order granting Aloha Sports, Inc.'s motion to substitute Dane S. Field, Trustee of the Bankruptcy Estate of Aloha Sports, Inc., for Aloha Sports, Inc. as plaintiff-appellant.

Finally, under a section titled "Penalties" it stated "1) Withhold certification one year. 2) Impose financial penalty — fine up to 50% of gross receipts."

Paul Feller attended the Subcommittee certification meeting as a potential purchaser of Aloha Sports, along with James Haugh, president of Aloha Sports and executive director of [\*\*\*5] the Seattle Bowl. Terry Daw, owner of Aloha Sports, also participated by phone during the portions of the meeting related to the Seattle Bowl. In a discussion regarding the Seattle Bowl's recertification, Pro Sports presented the Subcommittee with information regarding Pro Sports' plan for addressing outstanding issues from the 2002 Seattle Bowl, as well as the company's financial capacity and relevant experience with event management and promotion. During that meeting, Dennis Poppe, an NCAA staff liaison to the Subcommittee, expressed concerns about Daw's prior management of the Seattle Bowl and sought assurance that Daw would not be involved after a transfer of Aloha Sports to Pro Sports.

In a second meeting, Poppe and members of the Subcommittee informed Feller, Haugh, and Daw<sup>3</sup> that the Subcommittee had decided to decertify the Seattle Bowl. Haugh was then asked to leave the room, and Feller was privately informed by Poppe and the Subcommittee members that Pro Sports could independently submit an application to certify the Seattle Bowl for the 2004 season.

The Subcommittee's decision to decertify the Seattle Bowl was formally announced the following day.<sup>4</sup> Following the announcement, [\*\*\*6] Aloha Sports requested that the NCAA instead place the Seattle Bowl on one-year probation as it had done with two other bowl games that had failed to submit timely letters of credit. The NCAA rejected Aloha Sports' request, and the Seattle Bowl was decertified as announced.

At the time, the NCAA's Postseason Handbook contained conflicting provisions concerning the consequences of a sponsoring agency's nonfulfillment of certification requirements. A new provision added in the 2002-03 Handbook stated, "If a sponsoring agency fails to meet the certification requirements, [\*\*741] [\*368] it shall be placed on probation for one year. If the sponsoring agency has not complied with the requirements by the end of the probationary period, the bowl shall lose its certification."<sup>5</sup> (Emphasis added.) The provision was also included nearly verbatim in two locations on the 2003 bowl recertification application form and in a November 18, 2002 memorandum sent to all executive directors of bowl games. The Handbook also retained a provision from previous years, however, which stated as follows:

If the management of a certified game fails to comply with Bylaw 30.9, the requirement for an audited financial report for the [\*\*\*7] immediate past game, or the NCAA's approved policies and procedures, the subcommittee has the option to withhold certification for the postseason bowl game for one year or fine it a percentage of its gross receipts, not to exceed 50 percent, from the contest involved in the noncompliance, with the amount to be determined by it and approved by the Division I Championships/Competition Cabinet.

As a result of the NCAA's decertification of the Seattle Bowl, the sale of Aloha Sports to Pro Sports was not completed and the 2003 Seattle Bowl was not held. On October 20, 2005, Aloha Sports filed a complaint and demand for jury trial against the NCAA in the Circuit Court of the First Circuit (circuit court).

## B. 2005-2013 Court Proceedings

<sup>3</sup> Daw again participated in the meeting by phone.

<sup>4</sup> An NCAA press release regarding the Subcommittee's decisions for the 2003 season bowls provided: "The committee did not recertify the Seattle Bowl, due to financial issues and failure to adhere to administrative requirements."

<sup>5</sup> In the version of the Handbook released the following year, the provision was revised to state, "If a sponsoring agency fails to meet the certification requirements, it may either be put on probation for one year or be decertified for the next bowl season." (Emphasis added)

In its second amended complaint, Aloha Sports alleged four causes of action, including multiple unfair method of competition violations under [HRS § 480-2](#) (1993 & Supp. 2002),<sup>6</sup> tortious interference with prospective economic advantage, and two breach of contract claims.<sup>7</sup> Aloha Sports contended that the NCAA violated [HRS § 480-2](#)'s prohibition on unfair methods of competition by, inter alia, "refusing to permit a transfer of ownership of Plaintiff's NCAA Certified Postseason Football [\*\*\*8] Bowl Games without good cause" (UMOC claim).<sup>8</sup>

The NCAA filed a motion to dismiss the second amended complaint with prejudice, contending, among other things, that Aloha Sports did not plead sufficient facts to support its UMOC claim. On February 26, 2008, the court entered an order granting in part and denying in part the NCAA's motion, dismissing with prejudice the UMOC claim for the reason cited by the NCAA and dismissing several of Aloha Sports' other claims for relief. (Order Dismissing UMOC Claim).

The remaining claims proceeded to jury trial in September 2011.<sup>9</sup> On September 8, **[\*\*742] [\*369]** 2011, at a hearing on a motion in limine prior to trial, Aloha Sports indicated that the intentional interference with prospective economic advantage claim was the sole grounds upon which it wished to proceed, as the company did not believe it was likely to prevail on its remaining claims (including the alleged violations of [HRS § 480-2](#) that had not been previously dismissed).<sup>10</sup>

<sup>6</sup> [HRS § 480-2](#) (2008) provides in relevant part as follows:

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.

...

(e) Any person may bring an action based on unfair methods of competition declared unlawful by this section.

<sup>7</sup> The Honorable Karen S.S. Ahn presided.

<sup>8</sup> The other grounds alleged in the second amended complaint to be unfair methods of competition in violation of [HRS § 480-2](#) were as follows:

(1) requiring Aloha Sports to pay \$75,000 or 75% of gross bowl revenues in equal proportion to participating teams; (2) arbitrarily penalizing sponsoring agencies for not meeting the payout requirements; (3) discriminatorily withdrawing certification of the San Francisco Bowl, refusing to recertify the Aloha Bowl, and decertifying the Seattle Bowl despite substantial compliance with the requirements for maintaining certification and receiving recertification; (4) imposing upon Aloha Sports unreasonable and arbitrary standards of conduct, and (5) terminating and refusing to renew Aloha Sports' San Francisco and Seattle Bowls without good cause and in violation of the NCAA's terms and standards applicable to all bowls. These grounds are largely not relevant to this appeal, and all references to Aloha Sports' UMOC claim refer to only the alleged [HRS § 480-2](#) violation in Subsection 23(f) of the second amended complaint **[\*\*9]** based on the NCAA's purported blocking of Aloha Sports' transfer of ownership to Pro Sports.

<sup>9</sup> The Honorable Karl K. Sakamoto presided over the jury trial, as well as a preceding motion granting Aloha Sports leave to file a third amended complaint excluding any claims related to the Aloha/San Francisco Bowl. The third amended complaint otherwise was identical to the second amended complaint.

<sup>10</sup> The transcript of the September 8, 2011 hearing reflects the following:

[ALOHA SPORTS]: Correct. Just for the record, your Honor, the sole claim on which we're proceeding we can abandon all other claims which may have been pled. The sole claim in which we're proceeding **[\*\*10]** is intentional interference with prospective business advantage. That's it. So all the antitrust claims, the franchise claims, the claim under 480-2 all -- all are abandoned.

...

[ALOHA SPORTS]: Excuse me. We don't think on the record we can satisfy the test that the Hawaii Supreme Court established with the [Davis](#) case, which converted 480-2 which was a redundant antitrust statute, but I don't think we can do that, so that's—

On September 19, 2011, the jury returned a verdict in favor of the NCAA on Aloha Sports' claim for tortious interference with prospective business advantage. On January 12, 2012, the court entered final judgment in favor of the NCAA as to all claims. The final judgment stated that the UMOC claim was [\*\*\*11] dismissed with prejudice pursuant to the February 26, 2008 order. It further stated that claims in the second amended complaint that had been dismissed by the "2/28/08 Dismissal Order"<sup>11</sup> but repeated in the third amended complaint were equally dismissed, and that Aloha Sports' "remaining" HRS § 480-2 claims in the third amended complaint were dismissed with prejudice pursuant to Aloha Sports' September 8, 2011 oral motion.

After unsuccessfully moving the court to vacate the final judgment and grant a new trial, Aloha Sports filed a notice of appeal from the final judgment and other orders in the case, including specifically from the Order Dismissing UMOC Claim.<sup>12</sup>

On October 30, 2013, the ICA issued a memorandum opinion.<sup>13</sup> As to the dismissal of the UMOC claim, the ICA found that a factual basis for the claim could be discerned from the facts alleged in the second amended complaint. Specifically, the ICA pointed to the complaint's allegations that the "NCAA knew about the pending sale to Pro Sports and the significance of certification to the pending transaction," and that "the NCAA disrupted the transaction by encouraging Pro Sports to abandon the deal with Aloha and apply for a bowl game independent [\*\*12] of Aloha." The ICA held that, if true, these alleged facts would be sufficient to establish that the NCAA employed an unfair method of competition. Accordingly, the ICA vacated the Order Dismissing UMOC Claim and the circuit court's January 12, 2012 final judgment and remanded the case to the circuit court for further proceedings.<sup>14</sup>

### C. Circuit Court Proceedings on Remand

On remand, the NCAA filed a motion for judgment on the pleadings, or in the alternative, a motion for summary judgment on the UMOC claim (Motion for Summary Judgment).<sup>15</sup> [\*370] [\*\*743] The NCAA argued that the UMOC claim was barred by collateral estoppel because Aloha Sports relied on the same allegations underlying the UMOC claim to support its claim for tortious interference with prospective business advantage at the jury trial and the jury had decided these factual issues in the NCAA's favor. The NCAA contended that, because the facts were

THE COURT: Right. It makes it very, very difficult to satisfy proof especially without an expert.

...

[NCAA]: So it's clear that the theory of contract based on the handbook is also out?

[ALOHA SPORTS]: Correct. The singular claims prospective advantage.

THE COURT: Right. That's --

[NCAA]: So we're down to one cause of action interference with respective [sic] economic advantage.

THE COURT: That's correct.

[NCAA]: And everything else is dismissed.

THE COURT: That's correct.

<sup>11</sup> It appears that section 3 of the Final Judgment mistakenly refers to the "2/26/08 Dismissal Order" as the "2/28/08 Dismissal Order."

<sup>12</sup> Aloha Sports also appealed from the Order Granting in Part and Denying in Part Defendant The National Collegiate Athletic Association's Motion for Attorneys' Fees and Costs, Filed January 31, 2012 (Attorney's Fee Order).

<sup>13</sup> The ICA's memorandum opinion can be found at [Aloha Sports Inc. v. NCAA, No. CAAP-12-0000512, 2013 Haw. App. LEXIS 616, 2013 WL 5823893 \(Haw. App. Oct. 30, 2013\)](#).

<sup>14</sup> The ICA also vacated the Attorney's Fee Order and affirmed all other circuit court rulings at issue.

<sup>15</sup> The Honorable Karl K. Sakamoto also presided over the circuit court proceedings on remand.

actually litigated, finally decided, and essential to the final judgment, Aloha Sports should be estopped from relitigating them on remand.

The NCAA also maintained that Aloha Sports was judicially estopped from pursuing the UMOC claim because at the motion in limine hearing [\*\*\*13] on September 8, 2011, Aloha Sports abandoned all claims other than the claim for tortious interference with prospective business advantage and conceded it could not meet the burden of establishing a violation of [HRS § 480-2](#). The NCAA asserted that (1) Aloha Sports' present position was factually incompatible with its prior position; (2) the prior inconsistent position had been accepted by the court; and (3) permitting Aloha Sports to continue to pursue the UMOC claim granted Aloha Sports an unfair advantage.

As to the merits of the UMOC claim, the NCAA argued that there was no dispute that the NCAA had legitimate business reasons not to certify the 2003 Seattle Bowl, including the 2002 Seattle Bowl's untimely letter of credit and lack of payment to teams and local vendors. The NCAA maintained that discovery had closed and Aloha Sports could not present any evidence that decertification was intended to induce Pro Sports to forgo the contemplated purchase of Aloha Sports. Thus, the NCAA argued, Aloha Sports could not prove that it was harmed as a result of actions by the NCAA that negatively affected competition. The NCAA also contended that it was entitled to summary judgment because Aloha Sports [\*\*\*14] had not presented any facts demonstrating an anti-competitive impact on the bowl game market as a result of the NCAA's alleged actions.

In its memorandum in opposition, Aloha Sports responded that the UMOC claim was not barred by collateral estoppel because the jury made no specific findings of fact when it decided in the NCAA's favor on the claim for interference with prospective economic advantage. Additionally, Aloha Sports asserted, the elements of an unfair method of competition claim are distinct from those of a claim for interference with prospective economic advantage. Further, Aloha Sports argued, no final judgment existed for purposes of collateral estoppel because it had been vacated by the ICA decision. The UMOC claim was also not barred by judicial estoppel, Aloha Sports contended, because the claim had already been dismissed in February 26, 2008. Therefore, Aloha Sports maintained, the claim could not have been abandoned or conceded at the September 8, 2011 hearing.

Aloha Sports also argued that it presented sufficient evidence demonstrating that the NCAA denied recertification of the 2003 Seattle Bowl in order to induce Pro Sports to abandon its intent to purchase Aloha [\*\*\*15] Sports. Aloha Sports contended that, contrary to the NCAA's assertion, it did not need to prove that its injury resulted from actions by the NCAA that were harmful to competition to withstand summary judgment.

On June 9, 2015, the circuit court issued an order granting summary judgment to the NCAA on the UMOC claim (Order Granting Summary Judgment).<sup>16</sup> The court held that Aloha Sports was barred by waiver and judicial estoppel because Aloha Sports had implicitly surrendered the UMOC claim by its statements at the September 8, 2011 hearing. The circuit court reasoned that the UMOC claim required proof of an additional element under this court's precedents and thus would have been more difficult to prevail upon than the alleged [HRS § 480-2](#) violations that Aloha Sports expressly abandoned. Aloha Sports [\*\*744] [\*371] therefore impliedly conceded that it was unable to prove the UMOC claim when it voluntarily dismissed its other [HRS § 480-2](#) claims, the court concluded.

The circuit court also held that Aloha Sports was collaterally estopped from proceeding on its UMOC claim. The court stated that, because Aloha Sports had not alleged one of the specific violations of [HRS § 480-2\(a\)](#) identified by statute, it fell to the court to identify the elements [\*\*\*16] that must be satisfied to establish an unfair method of competition in this case. The court determined that the alleged unfair method of competition--the NCAA's interference with Aloha Sports' transfer to Pro Sports--was essentially a claim for tortious interference with prospective business advantage, and [HRS § 480-2\(a\)](#) therefore incorporated the elements of a tortious interference claim. Accordingly, the circuit court found that proving facts establishing tortious interference was a prerequisite to

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<sup>16</sup> The full title of the court's order is "Order Granting Defendant The National Collegiate Athletic Association's Motion For Judgment On The Pleadings, Or In The Alternative, For Summary Judgment On The Sole Remaining Claim For Unfair Competition Alleged In Plaintiff's Third Amended Complaint, Filed May 27, 2011, Filed September 25, 2014 [Civ. No. 06-1-1832-10 (June 9, 2015)]."

143 Haw. 362, \*371, 431 P.3d 735, \*\*744, 2018 Haw. LEXIS 246, \*\*\*16

proving that the NCAA derivatively violated [HRS § 480-2](#). Because the jury had entered a verdict in favor of the NCAA on the tortious interference claim and a final judgment had been issued, the court concluded that Aloha Sports could not now proceed on an unfair method of competition claim based on the same alleged conduct.

The court further held that the NCAA had successfully demonstrated that it acted with a legitimate business purpose in denying the recertification of the 2003 Seattle Bowl, that Aloha Sports did not submit any evidence showing that the NCAA acted in an anticompetitive manner, and that Aloha Sports did not demonstrate that its injury resulted from the NCAA's alleged anticompetitive conduct. Final [\*\*\*17] judgment was entered in favor of the NCAA on August 11, 2015,<sup>17</sup> from which Aloha Sports appealed to the ICA.

#### D. Second ICA Appeal

On October 30, 2017, the ICA issued a Summary Disposition Order affirming the circuit court's grant of summary judgment in favor of the NCAA.<sup>18</sup> The ICA held that Aloha Sports failed to present any evidence that the NCAA's alleged conduct affected competition, which was needed to satisfy the nature of competition requirement of a claim for an unfair method of competition in violation of [HRS § 480-2\(a\)](#). Specifically, the ICA held that Aloha Sports failed to (1) specify the relevant market; (2) provide evidence of the anticompetitive effect of the NCAA's conduct on that market; and (3) demonstrate how Aloha Sports, a bowl-sponsoring agency, was in competition with the NCAA. Further, the ICA stated that, in order to prove an anticompetitive effect, it was not sufficient for Aloha Sports to prove harm to its individual business. Rather, Aloha Sports was required to demonstrate an adverse impact to competitive conditions generally within the commercial field in which it was engaged.

Additionally, the ICA held that the NCAA's conduct was not an unfair competitive [\*\*\*18] act because the 2001-02 Handbook allowed for decertification of a non-compliant bowl, and the NCAA demonstrated that Aloha Sports had not complied with certification requirements pertaining to the 2002 Seattle Bowl.<sup>19</sup>

Based on its holdings regarding the UMOC claim, the ICA did not reach the other reasons cited by the circuit court for granting summary judgment--waiver, judicial estoppel, and collateral estoppel. The ICA thus affirmed the circuit court's ruling granting NCAA summary judgment on the UMOC claim.<sup>20</sup>

[\*372] [\*\*745] Aloha Sports timely filed an application for writ of certiorari from the ICA's January 24, 2018 Judgment on Appeal, which this court granted.

## II. STANDARD OF REVIEW

**HN1** [↑] This court reviews a trial court's grant or denial of summary judgment de novo. [Anastasi v. Fid. Nat'l Title Ins. Co., 137 Hawai'i 104, 112, 366 P.3d 160, 168 \(2016\)](#) (citing [Bremer v. Weeks, 104 Hawai'i 43, 51, 85 P.3d 150, 158 \(2004\)](#)).

<sup>17</sup> The final judgment also included an order granting in part and denying in part a motion for reinstatement of the Attorney's Fee Order, filed August 4, 2015 (Order to Reinstate Attorney's Fee Order).

<sup>18</sup> The ICA's SDO can be found at [Aloha Sports Inc. v. The NCAA, 141 Haw. 143, 406 P.3d 366, 2017 WL 4890131 \(Haw. App. 2017\)](#), as corrected (Jan. 11, 2018).

<sup>19</sup> The ICA specifically cited the 2001-02 Handbook in its SDO, which did not contain the conflicting provision added in the 2002-03 Handbook that stated nonfulfillment of certification requirements would be punished by probation. See [supra](#) text accompanying note 5.

<sup>20</sup> The ICA also affirmed the "Judgment" entered on August 11, 2015; the Order to Reinstate Attorney's Fees Order; and the Attorney's Fee Order.

### III. DISCUSSION

On certiorari, Aloha Sports contends that the ICA erred in the evidence it required Aloha Sports to present to withstand summary judgment on its UMOC claim. In light of our resolution of this issue, we also address the circuit court's alternative grounds for granting summary judgment, including that Aloha Sports' claim was waived and that Aloha Sports was judicially and collaterally estopped from proceeding upon [\*\*\*19] this claim.<sup>21</sup> We evaluate each issue in light of the legal standard for summary judgment.<sup>22</sup>

**HN2** [S]ummary judgment is appropriate if . . . there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party.

*Anastasi v. Fid. Nat'l Title Ins. Co., 137 Hawai'i 104, 112, 366 P. 3d 160, 168 (2016)* (quoting *Omerod v. Heirs of Kaheananui, 116 Hawai'i 239, 254-55, 172 P.3d 983, 998-99 (2007)*).

#### A. Evidence Necessary to Withstand Summary Judgment on an *HRS § 480-2* Unfair Method of Competition Claim

**HN4** Hawaii's *antitrust law*, codified in *HRS Chapter 480*, includes a general prohibition at *HRS § 480-2(a)* stating that unfair methods of competition in the conduct of any trade or commerce are unlawful.<sup>23</sup> *HRS § 480-13* (1993 & Supp. 2002)<sup>24</sup> in turn establishes a private right of action to seek recovery for damages flowing from a party's *HRS Chapter 480* violation.

**HN5** To recover under *HRS § 480-13(a)* for an unfair method of competition violation, a plaintiff must prove: (1) a violation of *HRS Chapter 480*; (2) an injury to the plaintiff's business or property that flows from the defendant's conduct that negatively affects competition or harms fair competition; and (3) proof of damages. *Gurrobat v. HTH*

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<sup>21</sup> Aloha Sports also challenges on certiorari the ICA's affirmation of the circuit court's Order to Reinstate Attorney's Fees Order and the Attorney's Fee Order.

<sup>22</sup> In this case, the record indicates that the NCAA's motion was filed after the close of discovery. It is noted that **HN3** the movant's burden is generally greater when a party seeks summary judgment before discovery has concluded. See *Ralston v. Yim, 129 Hawai'i 46, 48, 61, 292 P.3d 1276, 1278, 1291 (2013)* ("[I]n general, a summary judgment movant cannot merely point to the non-moving party's lack of evidence to support its initial burden of production if discovery has not concluded." (citing *French v. Hawaii Pizza Hut, Inc., 105 Hawai'i 462, 472, 99 P.3d 1046, 1056 (2004)*)).

<sup>23</sup> *HRS § 480-2* (2008) in relevant part provides as follows:

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.

...

(e) Any person may bring an action based on unfair methods of competition declared unlawful by this section.

<sup>24</sup> *HRS § 480-13* provides in relevant part as follows:

(a) Except as provided in *subsections (b)* and *(c)*, any person [\*\*\*20] who is injured in the person's business or property by reason of anything forbidden or declared unlawful by this chapter:

(1) May sue for damages sustained by the person and, if the judgment is for the plaintiff, the plaintiff shall be awarded a sum not less than \$1,000 or threefold damages by the plaintiff sustained, whichever sum is the greater . . . .

(Emphasis added.)

Corp., 133 Hawai'i 1, 21, 323 P.3d 792, 812 (2014). The second element has two parts. Id. First, a plaintiff is required to demonstrate "an injury in fact to his or her 'business or [\*\*746] [\*373] property.'" Id. Second, a plaintiff is required to show the "nature of the competition." Id. This latter requirement is met by demonstrating how the defendant's conduct negatively affects competition or harms fair competition. Id. at 22-23, 323 P.3d at 813-14.

We thus consider if Aloha Sports demonstrated a question of material fact as to the elements of its UMOC claim and whether the ICA imposed evidentiary requirements beyond what was required under [\*\*\*21] our law.<sup>25</sup>

### 1. First Element: Violation of HRS Chapter 480

**HN7**[] The first element for recovery under HRS § 480-13(a) is proof of an HRS Chapter 480 violation. HRS § 480-2(a) does not define unfair methods of competition, although a number of other statutes cross-reference the provision and specify that particular practices are per se violations of the prohibition. See, e.g., HRS § 480D-4(a) (2008); HRS § 481B-4 (2008). This court has recognized that the statutorily enumerated violations are not an exhaustive catalogue of conduct that violates HRS § 480-2, as "[t]here is no limit to human inventiveness in this field." Cieri v. Leticia Query Realty, Inc., 80 Hawai'i 54, 61, 905 P.2d 29, 36 (1995) (quoting H. Stand. Comm. Rep. No. 55, in 1965 House Journal, at 538).

The circuit court in this case stated that, because the unfair method of competition alleged here is not specifically defined by statute, it fell to the court to determine the appropriate elements of a HRS § 480-2(a) violation in this context. The court reasoned that the alleged offending conduct was essentially a claim for tortious interference with prospective business advantage, and thus it was necessary to prove the elements of the tort in order to prove a HRS § 480-2(a) violation.

**HN8**[] Under our precedents, however, the evaluation of whether particular, non-statutorily-enumerated conduct is unfair is simply a question of fact that [\*\*\*22] does not require incorporating the elements of an analogous claim. See Robert's Hawaii School Bus, Inc. v. Laupahoehoe Transp. Co., 91 Hawai'i 224, 239, 982 P.2d 853, 868 (1999), superseded by statute on other grounds. "[C]ompetitive conduct 'is unfair when it offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'"<sup>26</sup> Id. at 255 n.34, 982 P.2d at 884 n.34 (quoting State ex rel. Bronster v. U.S. Steel Corp., 82 Hawai'i 32, 51, 919 P.2d 294, 313 (1996)). The circuit court thus erred in finding that it was necessary for Aloha Sports to prove a claim for tortious interference with prospective business advantage in order to demonstrate a HRS § 480-2(a) violation.

<sup>25</sup> **HN6**[] In evaluating a motion for summary judgment, we apply a burden-shifting framework under which the moving party bears the initial burden of demonstrating that no genuine issue of material fact exists with respect to the essential elements of the claim and that the undisputed facts entitle the party to judgment as a matter of law. See Gurrobat v. HTH Corp., 133 Hawai'i 1, 14, 323 P.3d 792, 805 (2014). Where, as here, the non-movant bears the burden of proof at trial, the movant may meet its initial burden by either "(1) presenting evidence negating an element of the non-movant's claim, or (1) demonstrating that the non-movant will be unable to carry his or her burden of proof at trial." Ralston, 129 Hawai'i at 60-61, 292 P.3d at 1290-91 (citing French, 105 Hawai'i at 470-72, 99 P.3d at 1054-56). "Only once the moving party has satisfied its initial burden of production does the burden shift to the non-moving party to show specific facts that present a genuine issue for trial." Gurrobat, 133 Hawai'i at 14, 323 P.3d at 805.

In this case, the circuit court found that the NCAA had met its initial burden and that Aloha Sports then failed to present sufficient evidence to raise a genuine issue of material fact. Because Aloha Sports' arguments before this court focus on the sufficiency of the evidence it presented, the circuit court's finding that the NCAA met its initial burden appears to be uncontested.

<sup>26</sup> **HN9**[] Although the standard to prove a HRS § 480-2 violation and the elements to establish a tortious interference with economic advantage may seem similar in that the latter requires that a plaintiff intended to either pursue "an improper objective of harming the plaintiff or use[] wrongful means," Hawaii Med. Ass'n v. Hawaii Med. Serv. Ass'n, Inc., 113 Hawai'i 77, 116, 148 P.3d 1179, 1218 (2006) (quoting Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1166 (9th Cir. 1997)), the elements of the two claims are not identical. See infra, § III.C.

In its memorandum opinion addressing Aloha Sports' first appeal, the ICA ruled **[\*\*747] [\*374]** that Aloha Sports sufficiently alleged facts to discern a claim for which relief could be granted by alleging that the NCAA knew about Aloha Sports' pending sale to Pro Sports and that the NCAA disrupted the transaction by encouraging Pro Sports to abandon the deal with Aloha Sports and apply for a bowl game independently of Aloha Sports.

On remand, Aloha Sports substantiated its allegations of the NCAA's knowledge of the pending sale by providing evidence that the Subcommittee received information on Pro Sports' qualifications to organize and promote the 2003 Seattle Bowl and to pay the 2002 Seattle **[\*\*\*23]** Bowl debts. Additionally, Aloha Sports submitted to the court the NCAA's internal "Seattle Bowl Issues" memorandum that stated that the sale of Aloha Sports to Pro Sports was contingent upon recertification of the Seattle Bowl. Aloha Sports also submitted evidence that the NCAA expressed concern that Aloha Sports' Terry Daw would remain involved after the sale of Aloha Sports to Pro Sports, and that immediately after announcing the decertification of the Seattle Bowl, the NCAA's Dennis Poppe and the Subcommittee privately informed Feller, CEO of Pro Sports, that it could reapply independently for certification of the Seattle Bowl the following year. Aloha Sports also provided evidence raising a question of fact as to whether the NCAA arbitrarily failed to apply its requirement for a one-year probation period prior to decertification of a bowl that was established for the 2002-03 season.

This evidence, at a minimum, gives rise to a question of material fact as to whether the NCAA unfairly decertified the 2003 Seattle Bowl in order to disrupt the transaction between Aloha Sports and Pro Sports, which a jury could consider immoral, unethical, oppressive, unscrupulous or substantially injurious **[\*\*\*24]** to consumers. Thus, Aloha Sports demonstrated a factual dispute as to a violation of [HRS § 480-2\(a\)](#) by virtue of an unfair method of competition. The circuit court therefore erred in concluding that summary judgment was warranted on this basis.

## **2. Second Element: Injury & Nature of Competition**

### **a. Actual Harm to Competition Not Required to Withstand Summary Judgment**

**HN10** [↑] To fulfill the second element of an unfair method of competition violation, a plaintiff must (a) demonstrate an injury in fact to one's business and (b) demonstrate how a defendant's conduct negatively affects competition or harms fair competition. [Gurrobat, 133 Hawai'i at 21, 323 P.3d at 812](#).

As to the injury requirement, the injury in fact must flow from the anticompetitive conduct. [Id. at 23, 323 P.3d at 814](#). Aloha Sports meets the injury requirement because it presented evidence that as a result of the NCAA's allegedly unfair decertification of the 2003 Seattle Bowl--the NCAA's allegedly anticompetitive conduct--Aloha Sports was unable to complete its sale to Pro Sports.

Turning to the nature of the competition requirement, Aloha Sports contends that the ICA erred by holding that Aloha Sports was required to provide evidence of anticompetitive effects within that market to withstand summary judgment. In **[\*\*\*25]** response, the NCAA maintains that the ICA correctly applied Hawai'i and federal precedent to find that Aloha Sports did not meet its burden as to the nature of competition requirement.

We recently addressed a plaintiff's burden when opposing summary judgment on an unfair method of competition claim in [Gurrobat v. HTH Corporation, 133 Hawai'i 1, 323 P.3d 792 \(2014\)](#). In that case, service employees brought suit against the operators of hotels (hotels) for distributing to non-service employees a portion of the service charges it collected from customers without informing customers of the practice, in contravention of [HRS § 481B-14](#). [Id. at 16-17, 323 P.3d at 807-08](#). We found that a genuine issue of material fact existed as to the nature of competition requirement based upon evidence that the hotels' non-compliance with the service-charge law allowed the hotels to lower their overall prices and thereby obtain an "unfair and illegal business advantage" over compliant competitors. [Id. at 22, 323 L<sup>\\*\\*7481</sup> \[\\*3751\] P.3d at 813](#). Showing that the conduct of the hotels enabled them to create incentives for customers to choose their services over compliant competitors' services was sufficient to demonstrate that their conduct could have negatively affected competition and thus defend against summary judgment. [Id.](#); see [Hawaii Med. Ass'n v. Hawaii Med. Serv. Ass'n, Inc., 113 Hawai'i 77, 113, 148 P.3d 1179, 1215](#)

(2006). It was not necessary for **[\*\*26]** the plaintiffs to prove at a summary judgment proceeding that the hotels' conduct had in fact harmed competition. See Gurrobat, 133 Hawai'i at 22, 323 P.3d at 813. Further, although the plaintiffs in Gurrobat offered the evidence through expert testimony, we noted that expert testimony was not necessary to create a genuine issue of material fact regarding harm to competition sufficient to withstand summary judgment. See id.

In this case, Aloha Sports set forth how the NCAA's alleged anti-competitive conduct would negatively affect competition. Aloha Sports contends that the NCAA's decertification of the 2003 Seattle Bowl incentivized Pro Sports to abandon its agreement with Aloha Sports and to independently seek certification of a future Seattle Bowl through the NCAA. Cf. Gurrobat, 133 Hawai'i at 22, 323 P.3d at 813 ("plaintiffs may prove how a defendant's conduct negatively affects competition by showing that defendant's conduct enables the defendant to create incentives for customers to purchase banquet services from the defendant instead of competitors . . . ."); Hawaii Med. Ass'n, 113 Hawai'i at 113, 148 P.3d at 1215 (holding that plaintiffs may demonstrate harm to competition by showing the defendant engaged in "acts or practices that . . . create incentives for patients to look elsewhere"). Aloha Sports provided evidence **[\*\*27]** that the NCAA no longer wished to deal with Aloha Sports' management and that immediately after its decertification of the 2003 Seattle Bowl, the NCAA privately informed Pro Sports that it could apply independently for certification of the Seattle Bowl in 2004. If true, the NCAA's conduct could be construed as wielding its power to ensure that it only deals with its staff's preferred applicants rather than evaluating certification decisions in compliance with its established rules and procedures.

It is reasonable to infer from this evidence that, as argued by Aloha Sports, the NCAA's allegedly arbitrary certification decision could negatively affect competition by (1) restricting the transfer of ownership of bowl games contingent upon recertification; (2) leading to lower prices for the sale of bowl sponsoring agencies because of uncertainty as to whether a bowl will gain recertification; and (3) acting as a restriction on output that would result in a loss of financial benefits to schools and consumers who would have otherwise participated in a given bowl. HN11  
 ↑ [W]e must view all of the evidence and the inferences drawn therefrom] in the light most favorable to the party opposing the motion." **[\*\*28]** Anastasi, 137 Hawai'i at 112, 366 P.3d at 168 (emphasis added) (quoting Omerod, 116 Hawai'i at 254-55, 172 P.3d at 998-99).

Taken together in the light most favorable to Aloha Sports, Aloha Sports has presented evidence raising a genuine issue of material fact as to whether the NCAA's conduct could negatively affect competition. Thus, the ICA erred in holding that "Aloha [Sports] has failed to provide any evidence that the NCAA's conduct negatively affected competition," and that Aloha Sports did not raise an issue of material fact as to the "nature of competition" to substantiate its UMOC claim.

Based on the foregoing, we conclude that Aloha Sports raised a genuine issue of material fact as to the second element of a HRS § 480-13(a) claim: an injury to the plaintiff's business or property that flows from the defendant's conduct that negatively affects competition or harms fair competition.<sup>27</sup>

#### **b. Proof of Relevant Market, Harm to Market as a Whole, and Competition with Defendant Not Required to Withstand Summary Judgment**

In its analysis regarding the nature of competition requirement, the ICA held that **[\*\*749]** **[\*376]** to withstand summary judgment, Aloha Sports needed to specify the relevant market and demonstrate that the alleged conduct affected that market beyond an adverse effect on Aloha Sports' business. **[\*\*29]** The ICA also concluded that Aloha Sports was required to but failed to demonstrate that it was a competitor of or in competition with the NCAA.

<sup>27</sup> The third element is proof of damages. Gurrobat, 133 Hawai'i at 23, 323 P.3d at 814. Neither the circuit court in granting summary judgment nor the ICA in affirming the circuit court based its decision on the absence of a showing of proof of damages. Accordingly, since this issue is undisputed and was not relied upon by the circuit court, we conclude that Aloha Sports raised a disputed fact as to this element also.

First, [HN12](#)<sup>28</sup> to defend against summary judgment, it is sufficient for a plaintiff to offer proof of the general market at issue without resort to expert testimony. In *Gurrobat*, the plaintiffs contended that the defendants' asserted unfair method of competition would reduce fair competition "in the market for hotels, restaurants, and banquet service providers"--those generally in the field of competition with the defendant. [133 Hawai'i at 22, 323 P.3d at 813](#). We did not require the plaintiffs to define the market with great specificity in order to raise a genuine issue of material fact. Here, Aloha Sports presented sufficient evidence to discern the affected market by describing the NCAA's certification process and the underlying competition among bowl sponsoring agencies vying for NCAA certification of bowl games, the member institutions that participate in the bowls, and the consumers that attend the bowls.

Second, the ICA overstated the nature of competition requirement on summary judgment as necessitating proof that the defendant's conduct in fact negatively affected the market [\[\\*\\*\\*30\]](#) beyond Aloha Sports' own injury. As stated in *Gurrobat*, [HN13](#)<sup>29</sup> demonstrating actual negative effects on or harm to fair competition in the relevant market is not required.<sup>28</sup> [133 Hawai'i at 22, 323 P.3d at 813](#).

Finally, the ICA noted that Aloha Sports failed to demonstrate that it was in competition with the NCAA. It is well settled, however, that [HN14](#)<sup>28</sup> plaintiffs need not be competitors or in competition with defendants to establish or recover from an unfair method of competition in violation of [HRS § 480-2\(a\)](#). *Davis v. Four Seasons Hotel Ltd.*, [122 Hawai'i 423, 435, 228 P.3d 303, 315 \(2010\)](#); *Hawaii Med. Ass'n*, [113 Hawai'i at 110, 148 P.3d at 1212](#); see also [HRS § 480-2\(e\)](#) ("Any person may bring an action based on unfair methods of competition declared unlawful by this section." (emphasis added)).

Thus, the ICA erred in affirming summary judgment on the bases that (1) Aloha Sports "failed to specify the relevant market," (2) Aloha Sports did not demonstrate harm to the market, and (3) Aloha Sports did not demonstrate that it was a competitor of or in competition with the NCAA.

## B. Waiver and Judicial Estoppel

On remand, the circuit court held that Aloha Sports was barred by waiver and judicial estoppel from asserting its UMOC claim based on Aloha Sports' statement at a pre-trial hearing that it was solely preceding on its claim for interference with prospective business advantage and was abandoning [\[\\*\\*\\*31\]](#) all other claims.<sup>29</sup>

[HN15](#)<sup>28</sup> A waiver does not occur when there is no right in existence to be waived. See *Coon v. City & Cty. of Honolulu*, [98 Hawai'i 233, 261, 47 P.3d 348, 376 \(2002\)](#) ("To constitute a waiver, there must have existed a right claimed to have been waived and the waiving party must have had knowledge, actual or constructive, of the existence of such a right at the time of the purported waiver." (citations omitted)). Here, the circuit court had dismissed Aloha Sports' UMOC claim with prejudice three years prior to the 2011 pre-trial hearing when the purported waiver occurred. Indeed, the circuit court's final [\[\\*\\*750\] \[\\*377\]](#) judgment, filed January 12, 2012, distinguished between the claims dismissed in the Order Dismissing UMOC Claim and the "remaining claims," which were dismissed by Aloha Sports' voluntary waiver at the pre-trial hearing. Thus, unlike the claims that were voluntarily dismissed, Aloha Sports did not have a then-existing right to proceed on the UMOC claim when the 2011 pre-trial hearing occurred.

<sup>28</sup> Additionally, the U.S. Supreme Court has held that under federal anti-trust law, harm to a single business may suffice to establish an anti-trust violation. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, [359 U.S. 207, 213, 79 S. Ct. 705, 3 L. Ed. 2d 741 \(1959\)](#) ("As such [a boycott by a combination of manufacturers and dealers] is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy.").

<sup>29</sup> As noted, the ICA did not address the circuit court's holdings on waiver, judicial estoppel, or collateral estoppel. However, the NCAA requested at oral argument that this court address these holdings if we were to conclude that there were disputed facts regarding the elements of a UMOC claim and that summary judgment had thus been improperly granted on this ground. Oral Argument at 00:36:50, *Field v. The NCAA* (No. SCWC-15-663),

In other words, prior to prevailing on its appeal of the Order Dismissing UMOC Claim, Aloha Sports could not have proceeded on the dismissed claim before the circuit court and therefore could not waive that nonexistent right at the hearing. Therefore, [\*\*\*32] the circuit court erred in finding that Aloha Sports had waived its UMOC claim.<sup>30</sup>

**HN16**[<sup>↑</sup>] The doctrine of judicial estoppel precludes a party from assuming a position that is inconsistent with a position already accepted by the court to gain an unfair advantage in the proceedings. See *Gurrobat v. HTH Corp.*, *133 Hawai'i 1, 20, 323 P.3d 792, 811 (2014)*; *Roxas v. Marcos*, *89 Hawai'i 91, 124-25, 969 P.2d 1209, 1242-43 (1998)*. The doctrine is intended to protect the integrity of the judicial system and prevents parties from "playing 'fast and loose' with the court or blowing 'hot and cold' during the course of litigation," thereby promoting "orderliness, regularity, and expedition of litigation." *Gurrobat*, *133 Hawai'i at 20, 323 P.3d at 811* (quoting *Rosa v. CWJ Contractors, Ltd.*, *4 Haw. App. 210, 218-19, 664 P.2d 745, 751 (1983)*). Because we hold that Aloha Sports did not waive its UMOC claim at the pre-trial hearing, Aloha Sports did not assume an inconsistent position by asserting its right to proceed on that claim. Thus, Aloha Sports was not judicially estopped from raising the UMOC claim.

Accordingly, we hold that the circuit court erred in finding that waiver and judicial estoppel applied to preclude Aloha Sport's assertion of its UMOC claim.

### C. Collateral Estoppel

The circuit court also held on remand that based on the jury trial verdict finding that Aloha Sports failed to prove by a preponderance of the evidence that the NCAA tortiously interfered [\*\*\*33] with Aloha Sport's sale of itself to Pro Sports, Aloha Sports was collaterally estopped from pursuing its UMOC claim. **HN17**[<sup>↑</sup>] Collateral estoppel, or issue preclusion, is a bar to the relitigation of a fact or issue litigated in a prior suit when four requirements are met:

- (1) the issue decided in the prior adjudication is identical to the one presented in the action in question; (2) there is a final judgment on the merits; (3) the issue decided in the prior adjudication was essential to the final judgment; and (4) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication.

*Dorrance v. Lee*, *90 Hawai'i 143, 149, 976 P.2d 904, 910 (1999)*.

As an initial matter, Aloha Sports is correct in its contention that, because the ICA vacated the circuit court's January 12, 2012 final judgment, no final judgment in a prior case currently exists and the elements of collateral estoppel are not met. Nevertheless, we must consider whether the jury's determination as to Aloha Sports' claim for tortious interference with prospective business advantage resolved facts in this case that would necessarily preclude recovery on Aloha Sports' UMOC claim.

**HN18**[<sup>↑</sup>] The elements of a *HRS § 480-13(a)* claim based on an unfair method of competition and [\*\*\*34] a claim for intentional or tortious interference with prospective business advantage are not identical. **HN19**[<sup>↑</sup>] To establish an unfair method of competition claim, a plaintiff must prove: "(1) a violation of *HRS Chapter 480*; (2) which causes an injury to the plaintiff's business or property; and (3) proof of the amount of damages." *Gurrobat v. HTH Corp.*, *133 Hawai'i 1, 21, 323 P.3d 792, 812 (2014)*. Under the second element, a plaintiff [\*\*751] [\*378] must demonstrate that the defendant's conduct negatively affects competition and that the plaintiff's injury stems from the defendant's anti-competitive or unfair conduct. *Id. at 22-23, 323 P.3d at 813-14*. There is no intent element required to establish an unfair method of competition claim. See *Hungate v. Law Office of David B. Rosen*, *139 Hawai'i 394, 413, 391 P.3d 1, 20 (2017)* (citing *Short v. Demopolis*, *103 Wash.2d 52, 691 P.2d 163, 172 (Wash. 1984)* (Pearson, J., concurring)).

<sup>30</sup> The circuit court held that Aloha Sports impliedly waived the UMOC claim at the pre-trial hearing because it was more difficult to prove than the other *HRS § 480-2* claims that it expressly waived. Our precedent does not make a distinction between an implied and express waiver in this regard; without a then-existing right to proceed on the UMOC claim, Aloha Sports was not capable of waiving the claim by implication. See *Coon*, *98 Hawai'i at 261, 47 P.3d at 376*.

In contrast, the elements of intentional or tortious interference with prospective business advantage require the plaintiff to prove all of the following:

(1) the existence of a valid business relationship or a prospective advantage or expectancy sufficiently definite, specific, and capable of acceptance in the sense that there is a reasonable probability of it maturing into a future economic benefit to the plaintiff; (2) knowledge of the relationship, advantage, or expectancy by the defendant; (3) a purposeful intent to interfere with the relationship, [\*\*\*35] advantage, or expectancy; (4) legal causation between the act of interference and the impairment of the relationship, advantage, or expectancy; and (5) actual damages.

*Robert's Hawaii Sch. Bus, Inc. v. Laupahoehoe Transp. Co., Inc., 91 Hawai'i 224, 258, 982 P.2d 853, 887 (1999)* (citations and footnote omitted) (emphasis added). Notably, unlike an unfair method of competition claim, tortious interference with prospective business advantage includes a purposeful intent element.

Although Aloha Sports relies on many of the same underlying facts to support the UMOC claim as the tortious interference with prospective business advantage claim, the jury's verdict on the interference with prospective business advantage claim did not provide any specific determinations regarding the individual elements of that claim.<sup>31</sup> Thus, it is unclear which issues and facts the jury determined to render its verdict. For example, the jury could have determined that the NCAA was not liable for tortious interference with prospective business advantage based solely on a failure to meet the purposeful intent element--an element not required in an UMOC claim. Simply stated, the jury's determination that the NCAA was not liable for tortious interference with prospective business advantage did not definitively resolve factual [\*\*\*36] issues that would prevent Aloha Sports from satisfying the elements of its UMOC claim. Accordingly, the circuit court erred in holding that issue preclusion barred Aloha Sports from asserting its UMOC claim.

#### IV. CONCLUSION

Based on the foregoing, Aloha Sports raised genuine issues of material fact as to the first and second elements of an UMOC claim. The third element, damages, has not been contested. Therefore, the ICA erred in affirming the circuit court's order and judgment granting the NCAA summary judgment. Further, the circuit court erred in holding that Aloha Sports was estopped from asserting the UMOC claim based on waiver, judicial estoppel, and collateral estoppel. We therefore vacate the ICA's judgment on appeal, the circuit court's final judgment, and the Order Granting Summary Judgment, and the case is remanded to the circuit court for proceedings consistent with this opinion.<sup>32</sup>

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

<sup>31</sup> The Special Verdict Form stated, "Did Plaintiff ASI prove by a preponderance of the evidence that Defendant NCAA tortiously interfered with ASI's prospective business advantage with Pro Sports & Entertainment?" In the space marked "No" the jury indicated that all "12" jurors found that Aloha Sports had not proven tortious interference beyond a preponderance of the evidence. Because the jury marked "No" on the first question, the jury was not required to and did not respond to the remaining questions, i.e., whether Aloha Sports had proven beyond a preponderance of the evidence that the NCAA's actions were the cause of Aloha Sports harm, or the reasonable dollar amount of that harm.

<sup>32</sup> Based on our disposition, the ICA's holding affirming the Attorney's Fee Order is also vacated because it flows from the ICA and circuit court's holdings that the NCAA was the prevailing party on summary judgment. See *HRS § 607-14* (2016); *Blair v. Ing, 96 Hawai'i 327, 331, 31 P.3d 184, 188 (2001)*.

143 Haw. 362, \*378A431 P.3d 735, \*\*751A2018 Haw. LEXIS 246, \*\*\*36

/s/ Michael D. Wilson

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## Cincinnati Reds, L.L.C. v. Testa

Supreme Court of Ohio

June 13, 2018, Submitted; November 21, 2018, Decided

No. 2017-0854

**Reporter**

155 Ohio St. 3d 512 \*; 2018-Ohio-4669 \*\*; 122 N.E.3d 1178 \*\*\*; 2018 Ohio LEXIS 2710 \*\*\*\*

CINCINNATI REDS, L.L.C., APPELLANT, v. TESTA, TAX COMMR., APPELLEE.

**Subsequent History:** Judgment entered by, Remanded by [\*Cincinnati Reds v. Jeffrey, 2019 Ohio Tax LEXIS 617 \(Ohio B.T.A., Feb. 7, 2019\)\*](#)

**Prior History:** [\*\*\*\*1] APPEAL from the Board of Tax Appeals, No. 2015-1707.

**Disposition:** Decision reversed.

## **Core Terms**

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ticket, fans, guests, lodging, use tax, distributed, games, exemption, Baseball, resell, League, attend, ticket price, transactions, long-term, prices, linen-cleaning, player, hotel, sales, sale-for-resale, transient, consumer, tangible personal property, tax commissioner, lead opinion, purchaser, sales-tax, accessed, promise

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Regulated Industries > Sports > Baseball

**HN1** [down arrow] **Sports, Baseball**

In Fed. Baseball, the United States Supreme Court has held that the business of professional baseball did not constitute interstate commerce and was not subject to antitrust law. The court reaffirmed the holding of Fed. Baseball when it upheld Major League Baseball's reserve clause (which permitted a team to retain the rights to a player even after the player's contract had expired) in Flood. Despite noting that the antitrust exemption for Major League Baseball was an exception and an anomaly, the court has concluded that any change to the exemption would need to be made by the United States Congress. Following Flood, however, player free agency has been established in Major League Baseball through arbitration and collective bargaining, and players' salaries increased significantly as league revenues grew.

Tax Law > State & Local Taxes > Sales Taxes > Exempt Sales

Tax Law > State & Local Taxes > Use Taxes > Imposition of Tax

Tax Law > State & Local Taxes > Sales Taxes > Imposition of Tax

Tax Law > State & Local Taxes > Use Taxes > Limitations on Tax

## **HN2** **Sales Taxes, Exempt Sales**

Pursuant to [R.C. 5741.02\(C\)\(2\)](#), use tax does not apply to tangible personal property or services, the acquisition of which, if made in Ohio, would be a sale not subject to the tax imposed by [R.C. 5739.01](#) to [R.C. 5739.31](#). It follows that if the promotional items are not subject to sales tax pursuant to [R.C. 5739.01](#) through [R.C. 5739.31](#), then the purchaser does not owe use tax for those items. The court need only focus on the relevant sales-tax provisions because use tax will not apply when the acquisition of property would be exempt from sales tax.

Tax Law > State & Local Taxes > Use Taxes > Imposition of Tax

Tax Law > State & Local Taxes > Sales Taxes > Imposition of Tax

Tax Law > State & Local Taxes > Sales Taxes > Sales Tax Definitions

## **HN3** **Use Taxes, Imposition of Tax**

One main feature of the sales and use taxes is the legislative intent to limit imposition of the tax to retail transactions, while excluding or exempting from the tax earlier transactions that are not retail transactions but rather are at the production or wholesale levels. Therefore, the starting point in cases like this often is the statutory definition of retail sale. [R.C. 5739.01\(E\)](#) defines retail sale as all sales, except those in which the purpose of the consumer is to resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person. [R.C. 5739.01\(D\)\(1\)](#); [R.C. 5741.01\(F\)](#). A consumer is any person who has purchased tangible personal property. [R.C. 5739.03\(A\)](#); [R.C. 5741.02\(B\)](#). Each consumer shall be liable for the tax.

Business & Corporate Compliance > ... > Contracts Law > Contract Formation > Consideration

Tax Law > State & Local Taxes > Sales Taxes > Exempt Sales

Tax Law > State & Local Taxes > Sales Taxes > Sales Tax Definitions

Tax Law > State & Local Taxes > Sales Taxes > Imposition of Tax

## **HN4** **Contract Formation, Consideration**

A baseball team, as purchaser of the promotional items, can have the purpose to resell under [R.C. 5739.01\(E\)](#) only if the club intends to make sales of the items. Sale is defined in [R.C. 5739.01\(B\)\(1\)](#) to include all transactions by which title or possession, or both, of tangible personal property, is or is to be transferred, or a license to use or consume tangible personal property is or is to be granted, but this definition applies only if those transactions are for a consideration, [R.C. 5739.01\(B\)](#). [R.C. 5739.02\(C\)](#) establishes the sales-tax presumption that all sales made in this state are subject to the tax until the contrary is established, and [R.C. 5741.02\(G\)](#) carries that presumption over to the use tax. The baseball team accordingly has the burden to prove that they purchased promotional items for the purpose of reselling them to fans. Consideration, in the contract-law sense, is important.

Tax Law > State & Local Taxes > Sales Taxes > Imposition of Tax

Tax Law > State & Local Taxes > Sales Taxes > Sales Tax Definitions

#### [\*\*HN5\*\*](#) **Sales Taxes, Imposition of Tax**

The Ohio Supreme Court has treated the question whether there is a purpose to resell under [R.C. 5739.01\(E\)](#) as an issue of intent to be determined in light of attendant facts and circumstances, with the taxpayer who claims sale-for-resale exclusion bearing the burden to prove its actual intent to resell.

Business & Corporate Compliance > ... > Contracts Law > Contract Formation > Consideration

#### [\*\*HN6\*\*](#) **Contract Formation, Consideration**

Whether there is consideration at all is a proper question for a court. Although courts generally do not inquire into the adequacy of consideration if consideration is found to exist, courts must determine whether any consideration was really bargained for.

Tax Law > State & Local Taxes > Sales Taxes > Exempt Sales

Tax Law > State & Local Taxes > Sales Taxes > Sales Tax Definitions

#### [\*\*HN7\*\*](#) **Sales Taxes, Exempt Sales**

In Hyatt Corp., a hotel operator that paid cleaning companies to launder the linens it supplied to its guests argued that the linen-cleaning service was resold to its guests and therefore did not qualify as a retail sale pursuant to [R.C. 5739.01\(E\)](#). The Ohio Supreme Court has concluded that although the sale-for-resale exemption applied in situations involving transient guests, the exemption did not apply in situations involving long-term guests.

Tax Law > State & Local Taxes > Sales Taxes > Exempt Sales

Tax Law > State & Local Taxes > Sales Taxes > Sales Tax Definitions

#### [\*\*HN8\*\*](#) **Sales Taxes, Exempt Sales**

Because linen-cleaning service is a transaction by which lodging by a hotel is furnished to a guest pursuant to [R.C. 5739.01\(B\)\(2\)](#), it follows that this service is part of a sale in situations involving transient guests. The furnishing of lodging to long-term guests, however, falls outside of the scope of [R.C. 5739.01\(B\)\(2\)](#) by virtue of [R.C. 5739.01\(N\)](#), which defines transient guests as persons occupying a room or rooms for sleeping accommodations for less than thirty consecutive days. This means that because furnishing lodging to long-term guests is not a part of a sale under [R.C. 5739.01\(B\)\(2\)](#)—and is thus not something that can be resold—the sale-for-resale exemption could not apply to linen-cleaning service provided to long-term guests. As the Ohio Supreme Court has explained in Hyatt Corp., under the statutes, renting these rooms is not a sale because lodging is not sold to a transient guest, and consequently, the cleaning service is not resold. Accordingly, this linen cleaning transaction is not excepted.

Tax Law > State & Local Taxes > Sales Taxes > Imposition of Tax

Tax Law > State & Local Taxes > Sales Taxes > Sales Tax Definitions

#### [\*\*HN9\*\*](#) **Sales Taxes, Imposition of Tax**

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 ■■■■F

Transactions involving promotional items are sales in and of themselves pursuant to [R.C. 5739.01\(B\)\(1\)](#), which provides that all transactions by which title or possession, or both, of tangible personal property, is or is to be transferred are sales.

Tax Law > State & Local Taxes > Sales Taxes > Imposition of Tax

Tax Law > State & Local Taxes > Sales Taxes > Sales Tax Definitions

## [HN10](#) [blue icon] Sales Taxes, Imposition of Tax

[R.C. 5739.02\(B\)\(35\)\(a\)](#) states that the sales covered by its terms consist of newspaper inserts, catalogues, coupons, flyers, gift certificates, or other advertising material that prices and describes tangible personal property offered for retail sale. However, the mere fact that an exemption exists for one category of promotional items does not mean that all other promotional items are subject to taxation. The Ohio Supreme Court has explained that the promotional items are not subject to sales tax under [R.C. 5739.01\(E\)](#) because they were bought for the purpose of reselling them. Because the purchase of the promotional items did not constitute a retail sale under [R.C. 5739.01\(E\)](#), the provisions of [R.C. 5739.02](#)—which apply only to retail sales—are irrelevant.

## Headnotes/Summary

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### Headnotes

*Taxation—Use tax—Sale-for-resale exemption, [R.C. 5739.01\(E\)](#)—Promotional items distributed at professional baseball games were transferred with the purpose to "resell" them for consideration and therefore qualified for tax exemption—Decision of Board of Tax Appeals reversed and cause remanded.*

**Counsel:** Buckingham, Doolittle & Burroughs, L.L.C., Steven A. Dimengo, and Richard B. Fry III, for appellant.

Michael DeWine, Attorney General, and Daniel W. Fausey and Kody R. Teaford, Assistant Attorneys General, for appellee.

**Judges:** FISCHER, J. FRENCH, J., concurs. O'CONNOR, C.J., and O'DONNELL and KENNEDY, JJ., concur in judgment only. DEGENARO, J., dissents, with an opinion joined by MAYLE, J. CHRISTINE E. MAYLE, J., of the Sixth District Court of Appeals, sitting for DEWINE, J.

**Opinion by:** FISCHER

## Opinion

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[\*\*\*1179] [\*512] Fischer, J.

[\*\*P1] It would be an understatement to say that baseball has changed in dramatic ways since, as Justice Harry Blackmun wrote, the "Cincinnati Red Stockings came into existence in 1869 upon an outpouring of local pride," [Flood v. Kuhn, 407 U.S. 258, 261, 92 S.Ct. 2099, 32 L.Ed.2d 728 \(1972\)](#). From the 1890s, when National Baseball Hall of Fame legend and Newcomerstown, Ohio's own Cy Young starred for the Cleveland Spiders; through the 1920s, [\*\*\*\*2] when Judge Kenesaw Mountain Landis, a native of Milville, Ohio, and a Hall of Famer, strove as Major League Baseball's first commissioner to maintain the integrity of the game following the notorious Black Sox scandal; through the 1940s, when player-manager and Hall of Famer Lou Boudreau guided the Cleveland Indians to a World Series championship and was the American League's Most Valuable Player ("MVP") in 1948; through the 1950s and 1960s, when Hall of Fame [\*\*\*1180] manager Walter Alston of Venice, Ohio, and Miami University

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won four World Series titles with the Brooklyn and Los Angeles Dodgers; through the Big Red Machine era of the 1970s; through the 1980s, when Dayton, Ohio native, Ohio University alumnus, and Hall of Famer Mike Schmidt won three National League MVP Awards and was named World Series MVP in 1980 for the Philadelphia Phillies; and into the 1990s, when Cincinnati's homegrown Hall of Famer Barry Larkin led the Reds to a World Series Championship, professional baseball has seen the creation of the American League in 1900, the creation of the World Series in 1903, the first radio broadcast of a game in 1921, the first night game at Crosley Field in Cincinnati in 1935, the breaking [\*\*\*3] of the color barrier by Jackie Robinson (in the National League) and Larry Doby (for the Indians in the American League), the first televised World Series in 1947, the establishment of the designated hitter in 1973, and the cancellation of the World Series due to a player strike in 1994. See *Cy Young*, available at <https://www.baseball-reference.com/players/y/youngcy01.shtml> (accessed Oct. 25, 2018); [\*513] *Kenesaw Mountain Landis*, available at [http://mlb.mlb.com/mlb/history/mlb\\_history\\_people.jsp?story=com\\_bio\\_1](http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com_bio_1) (accessed Oct. 25, 2018); *Lou Boudreau*, available at <https://baseballhall.org/hall-of-famers/boudreau-lou> (accessed Oct. 25, 2018); *Walter Alston*, available at <https://www.baseball-reference.com/managers/alstowa01.shtml> (accessed Oct. 25, 2018); *Mike Schmidt*, available at <https://baseballhall.org/hall-of-famers/schmidt-mike> (accessed Oct. 25, 2018); *Barry Larkin*, available at <https://baseballhall.org/hall-of-famers/larkin-barry> (accessed Oct. 25, 2018); *Timeline*, available at <https://www.pbs.org/kenburns/baseball/timeline/> (accessed Oct. 25, 2018); see also [Flood at 260-264](#).

[\*\*P2] At one time, the emphasis in professional baseball was on the game, as succinctly put in the title of the documentary series [\*\*\*4] covering pre-1960s Major League Baseball that was created by a national cable network, HBO: "When It Was a Game." See Richard Sandomir, *Old Color Clips Reborn in HBO Documentary*, New York Times (June 21, 1991) B12, available at <https://www.nytimes.com/1991/06/21/sports/tv-sports-baseball-old-color-clips-reborn-in-hbo-documentary.html> (accessed Oct. 25, 2018). In the early days, professional baseball was a business, but the game itself was the focus of that business, as explained by Justice Oliver Wendell Holmes Jr. in 1922: "The business is giving exhibitions of base ball." [\*Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs\*, 259 U.S. 200, 208, 42 S. Ct. 465, 66 L. Ed. 898, 20 Ohio L. Rep. 211 \(1922\)](#).

[\*\*P3] [HN1](#) In *Fed. Baseball*, the court held that the business of professional baseball did not constitute interstate commerce and was not subject to antitrust law. [\*Id.\* at 207-209](#). The court reaffirmed the holding of *Fed. Baseball* when it upheld Major League Baseball's reserve clause (which permitted a team to retain the rights to a player even after the player's contract had expired) in *Flood*. [\*Flood\* at 284](#). Despite noting that the antitrust exemption for Major League Baseball was "an exception and an anomaly," [\*id.\* at 282](#), the court concluded that any change to the exemption would need to be made by Congress, [\*id.\* at 285](#). Following *Flood*, however, player free agency was established [\*\*\*5] in Major League Baseball through arbitration and collective bargaining, and players' salaries increased significantly as league revenues grew. Noah Goodman, [\*The Evolution and Decline of Free Agency in Major League Baseball: How the 2012-2016 Collective Bargaining Agreement Is Restraining Trade\*, 23 Sports Lawyers J. 19, 20-21, 37-39 \(2016\)](#).

[\*\*P4] [\*\*\*1181] Along with increasing revenues and salaries, other factors have contributed to the transformation of professional baseball into something more than just a game. Faced with rising ticket prices and increasing entertainment options, Major League Baseball has experienced challenges in getting fans to attend games. See Mark Koba, *Keeping Fans in the Stands Is Getting Harder to Do*, [\*514] <https://www.cnbc.com/id/100886843> (accessed Oct. 25, 2018). Baseball organizations have thus become increasingly creative in finding ways to entice fans to attend games, turning stadiums into "mini theme parks" featuring additional attractions such as fireworks, concerts, and expanded dining options. *Id.* One such enticement is the opportunity to receive unique merchandise—such as bobbleheads, shirts, blankets, caps, player cards, tote bags, magnetic schedules, photographs, and bats—that can be obtained only by attending a game. This merchandise, commonly known as "promotional items," is [\*\*\*6] the subject of this appeal.

[\*\*P5] In this case, we are asked to consider how state tax law applies to the purchase of those promotional items by appellant, Cincinnati Reds, L.L.C. ("the Reds"). More specifically, the question before us is whether the sale-for-resale exemption of [\*R.C. 5739.01\(E\)\*](#) precludes the Reds from having to pay use tax on those promotional items. For the reasons explained below, we conclude that the exemption applies in this case. Thus, in the familiar words of Marty Brennaman, longtime Reds radio announcer and recipient of the National Baseball Hall of Fame's Ford C.

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Frick Award, we determine that "this one belongs to the Reds." We accordingly reverse the decision of the Board of Tax Appeals ("BTA").

## I. FACTUAL BACKGROUND

[\*\*P6] Appellee, the tax commissioner, conducted a use-tax audit of the Reds' purchases over the period January 1, 2008, through December 31, 2010. The portion of the audit at issue in this appeal concerns the Reds' purchase of promotional items.

[\*\*P7] At the BTA hearing, the Reds' chief financial officer, Doug Healy, testified that the purpose of distributing promotional items is to drive ticket revenue at games that would otherwise be attended by fewer fans. He testified that [\*\*\*\*7] the increased ticket revenue more than offsets the cost of promotional items distributed—"o]therwise we wouldn't do it." Healy said that the Reds decide prior to the season which games might otherwise have low attendance and therefore could most benefit from the team's distribution of promotional items.

[\*\*P8] Healy testified that the Reds advertise in advance that specific promotional items will be distributed at particular games, using media such as radio, television, billboards, and fliers. Items sold in the Reds' "fan shop" are similar to, but not the same as, the promotional items distributed to ticketholders at games, which are otherwise unavailable to the general public.

[\*\*P9] The cost of promotional items is not separately stated from ticket prices, nor do ticket prices vary in accordance with whether promotional items are offered at a particular game. But ticket prices overall are set to cover the cost of [\*515] promotional items along with other overhead associated with holding them as inventory and distributing them. Thus, the price of tickets to a particular game does not specifically reflect the items distributed at that game; the Reds try to, according to Healy, "smooth [the] ticket prices [\*\*\*\*8] throughout the year."

[\*\*P10] [\*\*\*1182] The tickets themselves do not state or include any guarantee regarding promotional items. However, Healy testified that fans who purchase tickets to games at which promotional items are offered "[a]bsolutely" believe that they are purchasing both the promotional item and the right to view the game at the ballpark. He said that fans expect and feel entitled to receive the promotional items, and he explained that it would be a "public relations nightmare" if the Reds reneged on the commitment to distribute them. The uncontradicted record indicates that the Reds do not purposely underorder promotional items but instead estimate the amount of promotional items needed for a particular game based upon the projected attendance for that game. In the event that the Reds run out of any given promotional item, Healy testified that the Reds "will remedy it." He acknowledged that in these instances, the Reds may not be able to provide exactly the same promotional item, but he said that the Reds would "make it right" in ways such as giving another promotional item or complimentary tickets to fans who had failed to receive the designated items.

[\*\*P11] The tax commissioner in his final [\*\*\*9] determination concluded that "there is no evidence that the promotional items were resold with the admission to the games." The tax commissioner accordingly denied the Reds' request to remove the promotional items from the use-tax assessment.

[\*\*P12] In affirming the decision of the tax commissioner, the BTA similarly found that "the promotional items \* \* \* were given away for free, primarily to increase interest in certain targeted games or generally increase interest among a broader audience." BTA No. 2015-1707, 2017 WL 2324085, \*2 (May 22, 2017). The BTA, despite the uncontradicted record evidence to the contrary, also stated that "the cost of the subject promotional items is not included in the ticket price," in the sense that "the ticket price for each particular seat is the same throughout an entire season regardless of whether a promotional item is being offered." *Id.* The BTA further stated that

at the time they purchased their tickets, the Reds' patrons were not charged a separate, distinct amount for the promotional items given away. Moreover, a patron became eligible to receive a promotional item only after that game's ticket was purchased. Patrons paid the same amount for game tickets on promotional item giveaway

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days, even if they [\*\*\*\*10] did not actually receive a promotional item, i.e., they chose not to take the item upon entrance to the game, or they failed to receive an item because the supply ran out. Finally, [\*516] the Reds' advertising confirmed that patrons were not being charged a separate amount for the items, clearly providing that the promotional items were "free," or a "giveaway."

*Id.* at \*3.

[\*\*P13] In their appeal, the Reds set forth two propositions of law:

1. When there is a transfer of valuable property to induce the purchase of another item, the consideration paid is for both the property and the other item. A separately stated price for the property is unnecessary to establish it was transferred for consideration.
2. The Board of Tax Appeals' decision is unreasonable and unlawful because material findings made by the Board are not supported by any reliable and probative evidence.

## [\*\*\*1183] II. ANALYSIS

[\*\*P14] HN2[ Pursuant to [R.C. 5741.02\(C\)\(2\)](#) as relevant here, use tax does not apply to "tangible personal property or services, the acquisition of which, if made in Ohio, would be a sale not subject to the tax imposed by [sections 5739.01 to 5739.31 of the Revised Code](#)." It follows that if the promotional items are not subject to sales tax pursuant to [R.C. 5739.01 through 5739.31](#), then the Reds do not owe use tax for those items. Thus, the [\*\*\*11] controlling statutory provisions in this case are under [R.C. Chapter 5739](#), the sales-tax chapter of the Revised Code. See [Procter & Gamble Co. v. Lindley, 17 Ohio St.3d 71, 73, 17 Ohio B. 196, 477 N.E.2d 1109 \(1985\)](#) (observing that the court need only focus on the relevant sales-tax provisions because use tax will not apply when the acquisition of property would be exempt from sales tax).

[\*\*P15] HN3[ One main feature of the sales and use taxes is the legislative intent to limit imposition of the tax to retail transactions, while excluding or exempting from the tax earlier transactions that are not retail transactions but rather are at the production or wholesale levels. Therefore, the starting point in cases like this often is the statutory definition of "retail sale." [R.C. 5739.01\(E\)](#) defines "retail sale" as "*all sales, except those in which the purpose of the consumer is to resell* the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person." (Emphasis added.) It is undisputed that the Reds purchased the promotional items from their suppliers and thereby became a "consumer" under the sales-tax [\*517] and use-tax laws. See [R.C. 5739.01\(D\)\(1\); R.C. 5741.01\(F\)](#) (a "consumer" is "any person who has purchased tangible personal property"); see also [R.C. 5739.03\(A\); R.C. 5741.02\(B\)](#) ("Each consumer [\*\*\*\*12] \* \* \* shall be liable for the tax"). Thus, the question in this case is whether the Reds purchased the promotional items for the purpose of reselling them.

[\*\*P16] HN4[ The Reds, as purchaser of the promotional items, can have the purpose to "resell" under [R.C. 5739.01\(E\)](#) only if the club intends to make "sales" of the items. "Sale" is defined in [R.C. 5739.01\(B\)\(1\)](#) to include "[a]ll transactions by which title or possession, or both, of tangible personal property, is or is to be transferred, or a license to use or consume tangible personal property is or is to be granted," but this definition applies only if those "transactions [are] for a consideration," [R.C. 5739.01\(B\)](#). [R.C. 5739.02\(C\)](#) establishes the sales-tax presumption that "all sales made in this state are subject to the tax until the contrary is established," and [R.C. 5741.02\(G\)](#) carries that presumption over to the use tax. The Reds accordingly had the burden to prove that they purchased promotional items for the purpose of reselling them to fans.

[\*\*P17] Consideration, in the contract-law sense, is important here: the question whether the Reds purchased promotional items for resale entails asking whether fans furnished consideration for the Reds' promise to hand out the promotional items at the games.

### A. The Only Evidence [\*\*\*\*13] in the Record Shows the Existence of Consideration

[\*\*P18] The BTA decided this case based on its finding that given all the circumstances, the Reds intended to give away promotional items for free rather than to sell them. The Reds contest this finding, arguing that they resell the promotional items by promising to distribute them. The Reds argue that this promise creates a contractual expectation on the part of the fans, who purchase tickets and attend the [\*\*\*1184] games as consideration for receiving the unique promotional items.

[\*\*P19] [HN5](#) This court has treated the question whether there is a "purpose \* \* \* to resell" under [R.C. 5739.01\(E\)](#) as an issue of intent to be determined in light of attendant facts and circumstances, with the taxpayer who claims sale-for-resale exclusion bearing the burden to prove its actual intent to resell. [Satullo v. Wilkins, 111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954, ¶25-31](#). Based on the record before us, we agree with the Reds' second proposition of law and determine that the BTA's finding that the Reds intended to give away promotional items rather than to sell them is not supported by any reliable and probative evidence found in the record—in fact, the evidence in the record is to the contrary—and is therefore unreasonable and unlawful.

[\*\*P20] [\*518] [HN6](#) "[W]hether there is [\*\*\*14] consideration at all is a proper question for a court." [Williams v. Ormsby, 131 Ohio St.3d 427, 2012-Ohio-690, 966 N.E.2d 255, ¶ 17](#). Although courts generally do not inquire into the adequacy of consideration if consideration is found to exist, courts must determine "whether any "consideration" was really bargained for." *Id.*, quoting [Carlisle v. T & R Excavating, Inc., 123 Ohio App.3d 277, 283-284, 704 N.E.2d 39 \(9th Dist.1997\)](#).

[\*\*P21] Healy's unrefuted testimony indicates that in the specific circumstances here, fans gave consideration in exchange for promotional items. He explained that the Reds advertise in advance to notify fans when specific promotional items will be distributed. Fans then purchase tickets to those specific games with the expectation that they will receive a promotional item. The Reds attempt to purchase enough promotional items so that one will be available for each fan. Healy offered undisputed testimony that in the event that the Reds do not have enough promotional items to provide one to each fan, the Reds would provide something of equivalent value, such as a different promotional item or a ticket to a future game.

[\*\*P22] In determining that no consideration was given by fans in exchange for the promotional items, the tax commissioner and BTA focused on their findings that fans pay the same price to attend a game regardless of whether [\*\*\*15] a promotional item is offered and that the cost of the promotional item is not included in the ticket price. But Healy specifically testified that the costs of promotional items are included in ticket prices when they are set before the start of a season and that promotional items are distributed at less desirable games for which tickets are not expected to be sold out. Thus, rather than offering discounted ticket prices to these less desirable games, it stands to reason that by including the cost of the promotional item in the ticket price, one portion of the ticket price accounts for the right to attend the less desirable game and a separate portion of the ticket price accounts for the right to receive the promotional item. Based on this record, we accordingly conclude that the promotional items constituted things of value in exchange for which fans paid money that was included in the ticket prices.

[\*\*P23] Notably, the promotional items at issue in this case are distinct from unexpected, gratuitous items that fans might receive when attending a game. For instance, a fan might catch and bring home a foul ball hit by a player or a t-shirt tossed into the stands. In these instances, the fan [\*\*\*16] had no expectation of receiving the item and did not purchase a ticket under the assumption that the item would be provided by the team.

[\*\*P24] In the present case, fans did not receive the promotional items unexpectedly or by chance. Instead, the unique promotional items were an explicit part of the [\*\*\*1185] bargain, along with the right to attend the game, that the fans [\*519] obtained in exchange for paying the ticket fee. We therefore conclude that the fans furnished consideration for the Reds' promise to hand out these types of promotional items at the games and that the Reds met their burden to prove that they purchased promotional items for the purpose of reselling them to fans.

[\*\*P25] While our conclusion may be viewed as exposing a "loophole" by which sports organizations can avoid paying use tax on promotional items, we emphasize that our interpretation is compelled by the application of [R.C. Chapter 5739](#) to the specific facts in the record in this case. If the General Assembly prefers that sports

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 organizations pay use tax on promotional items under the circumstances presented here, it can amend the Revised Code to require them to do so.

## B. Application of the Sale-for-Resale Exemption in this Case Is Consistent with *Hyatt* [\*\*\*\*17] Corp. v. *Limbach*

[\*\*P26] In arguing that the promotional items were not resold pursuant to [R.C. 5739.01\(E\)](#) because the Reds did not make a taxable "sale" of the promotional items, the tax commissioner relies on [Hyatt Corp. v. Limbach, 69 Ohio St.3d 537, 1994-Ohio-342, 634 N.E.2d 995 \(1994\)](#). Given the factual differences between this case and [Hyatt Corp.](#), we conclude that *Hyatt Corp.* does not support the tax commissioner's argument and instead accords with our conclusion that the promotional items are subject to the sale-for-resale exemption of [R.C. 5739.01\(E\)](#).

[\*\*P27] [HN7](#) [↑] In *Hyatt Corp.*, a hotel operator that paid cleaning companies to launder the linens it supplied to its guests argued that the linen-cleaning service was resold to its guests and therefore did not qualify as a "retail sale" pursuant to [R.C. 5739.01\(E\)](#). [Id. at 539](#). This court concluded that although the sale-for-resale exemption applied in situations involving transient guests, the exemption did not apply in situations involving long-term guests. [Id. at 540](#).

[\*\*P28] At the time of the court's decision in *Hyatt Corp.*, a transaction by which industrial laundry-cleaning service was provided constituted a "sale" pursuant to former [R.C. 5739.01\(B\)\(3\)\(d\)](#), Am.Sub.H.B. No. 152, 145 Ohio Laws, Part II, 3341, Part III, 4287. The court did not rely on that statute, however, and its decision was instead premised on [R.C. 5739.01\(B\)\(2\)](#) [\*\*\*\*18], which specifies that the definition of "sale" includes "[a]ll transactions by which lodging by a hotel is or is to be furnished to transient guests."

[\*\*P29] The court explained that "[i]n a lodging transaction, the hotel transfers a full sleeping room to its guest. This transfer includes the use of linens to sleep on and to wash with." [Hyatt Corp., 69 Ohio St.3d at 540, 634 N.E.2d 995](#). Because hotel guests bargained solely for lodging, rather than lodging plus a specific linen-cleaning service, the court focused on [R.C. 5739.01\(B\)\(2\)](#), which addresses [\*520] lodging transactions, rather than former [R.C. 5739.01\(B\)\(3\)\(d\)](#), which addressed industrial laundry-cleaning-service transactions.

[\*\*P30] [HN8](#) [↑] Because linen-cleaning service is a transaction by which lodging by a hotel is furnished to a guest pursuant to [R.C. 5739.01\(B\)\(2\)](#), it follows that this service is part of a sale in situations involving transient guests. The furnishing of lodging to long-term guests, however, falls outside of the scope of [R.C. 5739.01\(B\)\(2\)](#) by virtue of [R.C. 5739.01\(N\)](#), which defines "transient guests" as "persons occupying a room or rooms for sleeping accommodations for less than thirty consecutive days." This means that because furnishing lodging to long-term guests is not a part of a "sale" under [R.C. 5739.01\(B\)\(2\)](#) and is thus not [\*\*\*\*1186] something that can be resold—the sale-for-resale exemption [\*\*\*\*19] could not apply to linen-cleaning service provided to long-term guests. As this court explained in *Hyatt Corp.*, "Under the statutes, renting these rooms is not a sale because lodging is not sold to a transient guest, and consequently, the cleaning service is not resold. Accordingly, this linen cleaning transaction is not excepted." [Hyatt Corp. at 540](#).

[\*\*P31] As the tax commissioner points out, like the furnishing of lodging to long-term guests, the sale of game tickets falls outside the definition of "sale" under [R.C. 5739.01\(B\)](#). This does not mean that *Hyatt Corp.* controls in this case, however. In *Hyatt Corp.*, the court treated former [R.C. 5739.01\(B\)\(3\)\(d\)](#) as inapplicable and whether the linen-cleaning service was taxable depended on whether the service was a transaction by which lodging by a hotel was furnished to transient guests pursuant to [R.C. 5739.01\(B\)\(2\)](#). If the service was a feature of lodging provided to a transient guest, it was part of a "sale." If the service was a feature of lodging provided to a long-term guest, however, it was not part of a "sale." Thus, in *Hyatt Corp.*, whether the linen-cleaning service was taxable depended on the nature of the lodging.

[\*\*P32] In this case, however, whether the promotional items are taxable does not depend on whether [\*\*\*\*20] selling tickets constitutes a "sale." This is so because [HN9](#) [↑] transactions involving promotional items are "sales"

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in and of themselves pursuant to [R.C. 5739.01\(B\)\(1\)](#), which provides that "[a]ll transactions by which title or possession, or both, of tangible personal property, is or is to be transferred" are "sales." As we have noted above, the promotional items were an explicit part of the bargain, along with the right to attend the game, that the fans obtained in exchange for paying the ticket fee. This is in distinct contrast to *Hyatt Corp.*, in which this court found that the linen-cleaning service was not a separate and explicit part of the bargain by which lodging was provided. If it had found otherwise, the court would have applied former [R.C. 5739.01\(B\)\(3\)\(d\)](#) and treated the linen-cleaning service as a separate transaction that constituted a "sale" [\*521] pursuant to that statutory provision. We accordingly conclude that *Hyatt Corp.* does not support the tax commissioner's argument.

### C. [R.C. 5739.02\(B\)\(35\)\(a\)](#) Is Not Affected by Our Conclusion

[\*\*P33] The tax commissioner also argues that treating the promotional items in this case as purchases for resale effectively nullifies [R.C. 5739.02\(B\)\(35\)\(a\)](#), which exempts from sales tax those items that are purchased with the intention of [\*\*\*\*21] using them to facilitate retail sales. [HN10](#)  [R.C. 5739.02\(B\)\(35\)\(a\)](#) states that the sales covered by its terms "consist[] of newspaper inserts, catalogues, coupons, flyers, gift certificates, or other advertising material that prices and describes tangible personal property offered for retail sale." The tax commissioner argues that because that list does not include items like the promotional items at issue in this case, the General Assembly must have intended that the promotional items in this case be subject to taxation.

[\*\*P34] However, the mere fact that an exemption exists for one category of promotional items does not mean that all other promotional items are subject to taxation. We have explained that the promotional items here are not subject to sales tax under [R.C. 5739.01\(E\)](#) because they were bought by the Reds for the purpose of reselling them. Because the Reds' purchase of the promotional items did not constitute a "retail sale" under [R.C. 5739.01\(E\)](#), the provisions of [R.C. 5739.02](#)—which apply only to retail sales—are irrelevant in this case. We accordingly [\*\*\*1187] reject the tax commissioner's argument that our conclusion in this case effectively nullifies [R.C. 5739.02\(B\)\(35\)\(a\)](#).

## III. CONCLUSION

[\*\*P35] Echoing a phrase often used by the person who was the youngest-ever Major League [\*\*\*\*22] Baseball player, a longtime Reds player and radio commentator, and a native of Hamilton, Ohio, Joe Nuxhall, having completed our analysis, we are now "rounding third and heading for home."

[\*\*P36] Because the specific evidence in the record establishes that fans who purchase tickets to Reds games at which unique promotional items will be distributed do so with the expectation that they will receive those promotional items, we conclude that consideration is given in exchange for the Reds' agreement to supply fans with those promotional items. The transfer of promotional items to fans thus constitutes a "sale" pursuant to [R.C. 5739.01\(B\)\(1\)](#), and the promotional items are subject to the sale-for-resale exemption of [R.C. 5739.01\(E\)](#). We accordingly conclude that the Reds are not liable for use tax on the promotional items pursuant to [R.C. 5741.02](#).

[\*\*P37] [\*522] We note that this opinion focuses on the sole issue in the case as identified by the Reds: whether the Reds received consideration from fans in exchange for the promotional items so that those items qualified for the sale-for-resale exemption of [R.C. 5739.01\(E\)](#). We do not reach any conclusions on issues not before us in this appeal, and we reverse the BTA's decision.

Decision reversed.

FRENCH, J., concurs.

O'CONNOR [\*\*\*\*23], C.J., and O'DONNELL and KENNEDY, JJ., concur in judgment only.

DEGENARO, J., dissents, with an opinion joined by MAYLE, J.

CHRISTINE E. MAYLE, J., of the Sixth District Court of Appeals, sitting for DEWINE, J.

**Dissent by:** DEGENARO

## Dissent

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**DEGENARO, J., dissenting.**

[\*\*P38] I respectfully dissent from the judgment of a majority of this court to reverse the decision of the Board of Tax Appeals ("BTA"). The lead opinion reasons that because the promotional items purchased and distributed by appellant, Cincinnati Reds, L.L.C. ("the Reds"), were a separate and "explicit part of the bargain" when baseball fans purchased certain game tickets, the Reds acquired those items for the purpose of "reselling" them to the ticket purchasers and, consequently, that the Reds are not obligated to pay use tax on those items. Lead opinion at ¶ 24; see also *id.* at ¶ 32. I disagree. Because the ticket sales themselves are not taxed, the effect of reversing the decision of the BTA is to relieve the Reds' acquisition and transfer of the promotional items—which are tangible personal property—of *any* sales-or use-tax obligation, despite the fact that the sales tax and the use tax generally apply to such transactions. See [R.C. 5739.01\(B\)\(1\)](#) (for purposes of the [\*\*\*\*24] sales tax, "sale" generally includes all transactions transferring title or possession of tangible personal property for consideration); [R.C. 5741.02\(B\)](#) (each consumer who uses tangible personal property in the state generally must pay use tax). In my view, the evidence presented in this case and the applicable law dictate the opposite result.

### Legal Framework

[\*\*P39] A consumer who has purchased tangible, personal property for storage, use, or other consumption in Ohio generally must pay use tax. See [R.C. 5741.02\(A\)\(1\) \(B\)](#). Subject to an exception that is not relevant here, the use tax does not apply to the use of "tangible personal property or services, the acquisition of which, if [\*\*\*1188] made in Ohio, would be a sale not subject to the tax imposed by *sections 5739.01 to 5739.31 of the Revised Code.*" [R.C. 5741.02\(C\)\(2\)](#). In other words, items that are exempt from sales tax are also generally exempt [\*523] from use tax. Accordingly, although this case involves a use-tax assessment, we focus on the provisions of [R.C. Chapter 5739](#), the sales-tax chapter of the Revised Code. See [Procter & Gamble Co. v. Lindley, 17 Ohio St.3d 71, 73, 17 Ohio B. 196, 477 N.E.2d 1109 \(1985\)](#).

[\*\*P40] Relevant here, pursuant to [R.C. 5739.01\(E\)](#), the definition of "retail sale" does not include those sales "in which the purpose of the consumer is to resell the thing transferred or benefit of the service provided." And in order for a transaction to constitute a [\*\*\*\*25] "sale," it must be "for a consideration." [R.C. 5739.01\(B\)](#).

[\*\*P41] The main issue in this case is whether the sale-for-resale exception of [R.C. 5739.01\(E\)](#) relieves the Reds from having to pay use tax on promotional items, such as bobbleheads, that they distribute at games.

### The BTA's Factual Findings Should Be Afforded Deference

[\*\*P42] My principal point of disagreement lies with the lead opinion's determination that the BTA's finding that the Reds intended to give away promotional items rather than to sell them "is not supported by *any* reliable and probative evidence found in the record" (emphasis added) and that the BTA's decision is therefore "unreasonable and unlawful." Lead opinion at ¶ 19. In the same vein, I disagree with the lead opinion's conclusion that the evidence unequivocally establishes that fans gave consideration in exchange for the promotional items.

[\*\*P43] In the BTA proceedings, the Reds bore the burden to demonstrate that they intended to resell the promotional items. [Satullo v. Wilkins, 111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954, ¶27; R.C. 5739.02\(C\)](#) (all sales are presumed taxable "until the contrary is established"); [R.C. 5741.02\(G\)](#) (the same presumption applies

regarding use tax). The BTA concluded that the Reds failed to meet this burden. We must affirm the BTA's factual findings "if they are supported [\*\*\*\*26] by reliable and probative evidence, and we afford deference to the BTA's determination of the credibility of witnesses and its weighing of the evidence subject only to an abuse-of-discretion review on appeal." [Accel, Inc. v. Testa, 152 Ohio St.3d 262, 2017-Ohio-8798, 95 N.E.3d 345, ¶ 16](#), quoting [HealthSouth Corp. v. Testa, 132 Ohio St.3d 55, 2012-Ohio-1871, 969 N.E.2d 232, ¶ 10.](#)

[\*\*P44] Here, the evidence demonstrates that the Reds' pregame advertising often stated that such items were available as a "giveaway," that they would be distributed for "free," and that quantities were limited (e.g., "Free to the first 20,000 fans in attendance"). The game tickets contained no written guarantees that fans who bought tickets would receive the promotional items. The Reds' chief financial officer ("CFO") testified at the BTA hearing that the Reds provided season-ticket holders greater "access to promotional items" by allowing them to enter the stadium 30 minutes earlier than single-game ticket holders. Evidence in [\*524] the record shows that on most promotional-item-giveaway days, *thousands* of fans—sometimes *more than 10,000*—did not receive the promotional item. According to the Reds' CFO, if a fan who did not receive an item complained, the Reds would "make accommodations" to remedy the situation. Typically, the Reds would provide a substitute promotional item [\*\*\*\*27] to an aggrieved fan, but if a person complained enough, the Reds would refund the full ticket price.

[\*\*P45] Moreover, although the Reds' CFO testified at the BTA hearing that "there's a real cost" associated with the [\*\*\*1189] promotional items that is "part of the admission," he also emphasized that advertising the promotional giveaways provided "an incremental ticket lift" that was important because the Reds "*are in the business of selling tickets*" (emphasis added)—in other words, the Reds were *not* in the business of reselling those promotional items but instead distributed them to promote ticket sales. And although—like any other overhead expense—the cost of promotional items was apparently built into ticket prices overall, the record clearly supports the BTA's finding that "the ticket price for each particular seat is the same \* \* \*, regardless of whether a promotional item is being offered," BTA No. 2015-1707, 2017 WL 2324085, \*2 (May 22, 2017). The Reds' CFO stated that the ticket prices for a particular game were not dependent on the Reds' providing promotional items at that game.

[\*\*P46] Thus, the BTA was justified in concluding that the purchase of a game ticket constituted consideration for nothing more than the right to attend the baseball game and [\*\*\*\*28] that the Reds were not reselling the promotional items by advertising and giving them away free of any charge beyond the price of the ticket—as the Reds' CFO testified, the Reds were "driv[ing] additional ticket attendance" by distributing the promotional items. Incentivizing paid attendance at the games does not—at least not *necessarily*, as the lead opinion contends—involve "reselling" the promotional items.

[\*\*P47] I disagree with the lead opinion's conclusion that the ticket purchasers provided consideration for the promotional items. The lead opinion notes that the cost of promotional items was built into *all* ticket prices before the season, with no separate charge for the promotional item offered at a particular game, and it concludes that "by including the cost of the promotional item in the ticket price, one portion of the ticket price accounts for the right to attend the less desirable game and a separate portion of the ticket price accounts for the right to receive the promotional item." Lead opinion at ¶ 22. But that means that every ticket purchaser at every game helped pay for promotional items regardless of whether a promotional item was received—or was even offered—at a particular [\*\*\*\*29] game, and that circumstance breaks the link between the payment of the ticket price and the offer of a promotional item.

[\*\*P48] [\*525] The facts that the Reds' CFO testified that the fans have "a certain level of expectation that they will receive the bobblehead" and that he answered "yes" to the Reds' counsel's assertion that the fans "feel entitled to the promotional items" are not dispositive of this consideration either. Insofar as the CFO was providing his opinion—unrefuted or not—about the subjective beliefs of third parties, the BTA could have reasonably discounted that testimony. Regardless, the CFO also later described the fans' "expectation" as simply being that the Reds would, in fact, distribute the number of promotional items advertised. That is, the CFO explained that "there is an expectation when we put it out to the marketplace that if we say we're going to have \* \* \*, let's say 30,000 bobbleheads, that the Reds are going to have 30,000 bobbleheads" and that "there is an expectation, especially if they arrive early, that they're going to get a promotional item." (Emphasis added.)

155 Ohio St. 3d 512, \*525L 2018-Ohio-4669, \*\*2018-Ohio-4669L 22 N.E.3d 1178, \*\*\*1189L 2018 Ohio LEXIS 2710,  
 EEEFGJ

[\*\*P49] Under these circumstances, the BTA could lawfully conclude that the offer of the promotional items did [\*\*\*\*30] not constitute a contractual obligation supported by the purchase of the tickets. Rather, the situation here was in the nature of what courts have referred to as a "conditional gratuitous promise," [Williams v. Ormsby, 131 Ohio St.3d 427, 2012-Ohio-690, 966 N.E.2d 11901 255, ¶ 17](#), quoting [Carlisle v. T & R Excavating, Inc., 123 Ohio App.3d 277, 283, 704 N.E.2d 39 \(9th Dist.1997\)](#) ("conditional gratuitous promises, which require the promisee to do something before the promised act or omission will take place, are not enforceable as contracts"). Indeed, "[a] written gratuitous promise, even if it evidences an intent by the promisor to be bound, is not a contract." *Id.*, quoting [Carlisle at 283](#). Thus, the written materials announcing the limited availability of promotional items to ticket purchasers who attend a particular game do not as a matter of contract law establish a contract under which both sides furnish consideration.

[\*\*P50] The lead opinion's interpretation of the evidence confuses the *business motive* of the Reds to provide promotional items that have already been promised with a *contractual obligation* to do so. The evidence demonstrates the former but does not establish the latter.

### ***Hyatt Corp. v. Limbach* Is Apposite**

[\*\*P51] My second point of disagreement with the lead opinion lies in its attempt to distinguish our decision in [Hyatt Corp. v. Limbach, 69 Ohio St.3d 537, 1994-Ohio-342, 634 N.E.2d 995 \(1994\)](#). In *Hyatt Corp.*, a hotel operator that contracted [\*\*\*\*31] with third-party companies to launder the linens it supplied to its guests argued that the linen-cleaning service was resold to its guests and therefore did not qualify as a "retail sale" pursuant to [R.C. 5739.01\(E\)](#). *Id. at 539*. The hotel served two types of guests: transient and long-term. Pursuant to [R.C. 5739.01\(B\)\(2\)](#), lodging furnished to "transient guests" constitutes a sales-tax sale, but no provision [\*526] makes the renting of rooms to long-term guests a taxable transaction. Accordingly, this court held that the sale-for-resale exception did not apply in situations involving long-term guests:

The BTA correctly concluded that linen used in rooms rented to long-term guests was not resold. Under the statutes, renting these rooms is not a sale because lodging is not sold to a transient guest, and, consequently, the cleaning service is not resold. Accordingly, this linen cleaning transaction is not excepted.

### [Hyatt Corp. at 540.](#)

[\*\*P52] Although the lead opinion concedes that the Reds' sale of game tickets—like the sale of lodging to the long-term guests in *Hyatt Corp.*—is not a sales-tax "sale," it nonetheless determines that *Hyatt Corp.* is inapposite because the evidence in this case reveals a specific bargain for the promotional items that was supposedly [\*\*\*\*32] absent when hotel guests rented rooms and thereby received the benefit of clean sheets and linens in *Hyatt Corp.*

[\*\*P53] However, I disagree with the lead opinion's conclusion that this court in *Hyatt Corp.* "found that the linen-cleaning service was not a separate and explicit part of the bargain by which lodging was provided," lead opinion at ¶ 32, and that *Hyatt Corp.* therefore is factually distinguishable from this case. In *Hyatt Corp.*, we explained that "[i]n a lodging transaction, the hotel transfers a full sleeping room to its guest. This transfer includes the use of linens to sleep on and to wash with." [Hyatt Corp. at 540](#). As a distinct component of the room rental, "guests received the benefit of [the linen-cleaning] service in being able to use clean linen." *Id.*

[\*\*P54] Contrary to the lead opinion's conclusion, *Hyatt Corp.*'s holding should apply to this case. Because providing long-term lodging for consideration was not a sales-tax sale, the hotel operator did not "resell" the benefit of cleaning service to those guests. By the same logic, the Reds [\*\*\*1191] did not resell the promotional items here, because the sale of game tickets was not a sales-tax sale. Consequently, the Reds should, by the same reasoning as that [\*\*\*\*33] applied in *Hyatt Corp.*, be liable for use tax as the consumer of the promotional items based on the Reds' own purchase of them.

155 Ohio St. 3d 512, \*526L<sup>2018-Ohio-4669</sup>, \*\*2018-Ohio-4669L<sup>22 N.E.3d 1178</sup>, \*\*\*1191L<sup>2018 Ohio LEXIS 2710</sup>,  


[\*\*P55] In sum, the BTA's decision should be affirmed. The Reds offered and distributed the promotional items gratuitously; as a result, the Reds owed tax as the purchaser and the use-tax consumer of the items. Accordingly, I respectfully dissent.

[\*527] MAYLE, J., concurs in the foregoing opinion.

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## Dennis v. JPMorgan Chase & Co.

United States District Court for the Southern District of New York

November 26, 2018, Decided; November 26, 2018, Filed

16-cv-6496 (LAK)

### **Reporter**

345 F. Supp. 3d 122 \*; 2018 U.S. Dist. LEXIS 199802 \*\*; 2018-2 Trade Cas. (CCH) P80,587

RICHARD DENNIS, et al., Plaintiffs -against- JPMORGAN CHASE & CO., et al., Defendants.

**Subsequent History:** Dismissed by, in part [Dennis v. JPMorgan Chase & Co., 342 F. Supp. 3d 404, 2018 U.S. Dist. LEXIS 199673 \(S.D.N.Y., Nov. 26, 2018\)](#)

Reconsideration denied by [Dennis v. JPMorgan Chase & Co., 2018 U.S. Dist. LEXIS 215167 \(S.D.N.Y., Dec. 20, 2018\)](#)

Dismissed by, in part, Motion denied by, in part, Motion denied by, Dismissed by [Dennis v. JPMorgan Chase & Co., 439 F. Supp. 3d 256, 2020 U.S. Dist. LEXIS 25556, 2020 WL 729789 \(S.D.N.Y., Feb. 13, 2020\)](#)

Later proceeding at [Dennis v. JPMorgan Chase & Co., 2020 U.S. Dist. LEXIS 179395 \(S.D.N.Y., Sept. 23, 2020\)](#)

Motion denied by [Dennis v. JPMorgan Chase & Co., 2021 U.S. Dist. LEXIS 89860, 2021 WL 1893988 \(S.D.N.Y., May 11, 2021\)](#)

Class certification granted by [Dennis v. JPMorgan Chase & Co., 2022 U.S. Dist. LEXIS 19628 \(S.D.N.Y., Feb. 1, 2022\)](#)

Later proceeding at [Dennis v. JPMorgan Chase & Co., 2022 U.S. Dist. LEXIS 19676 \(S.D.N.Y., Feb. 1, 2022\)](#)

Later proceeding at [Dennis v. JPMorgan Chase & Co., 2022 U.S. Dist. LEXIS 19742 \(S.D.N.Y., Feb. 1, 2022\)](#)

Later proceeding at [Dennis v. JPMorgan Chase & Co., 2022 U.S. Dist. LEXIS 19534 \(S.D.N.Y., Feb. 1, 2022\)](#)

Motion granted by, Class certification granted by, Settled by [Dennis v. JPMorgan Chase & Co., 2022 U.S. Dist. LEXIS 19627 \(S.D.N.Y., Feb. 1, 2022\)](#)

Costs and fees proceeding at, Motion granted by [Dennis v. JPMorgan Chase & Co., 2023 U.S. Dist. LEXIS 92141 \(S.D.N.Y., May 25, 2023\)](#)

**Prior History:** [Sonterra Capital Master Fund Ltd. v. Credit Suisse Grp. AG, 277 F. Supp. 3d 521, 2017 U.S. Dist. LEXIS 156425, 2017 WL 4250480 \(S.D.N.Y., Sept. 25, 2017\)](#)

## **Core Terms**

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manipulation, Derivatives, transactions, allegations, amended complaint, defendants', plaintiffs', bank bill, prices, traded, swap, personal jurisdiction, conspiracy, contracts, banks, domestic, dollar, extraterritorial, rates, antitrust, damages, enterprise, contacts, artificial, unjust enrichment, antitrust claim, entities, broker, motion to dismiss, conspired

## LexisNexis® Headnotes

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

### [\*\*HN1\*\*](#) [down] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The Racketeer Influenced and Corrupt Organizations Act (RICO Act) makes it illegal for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt, [18 U.S.C.S. § 1962\(c\)](#), and for any person to conspire to so conduct or participate. [§ 1962\(d\)](#).

Constitutional Law > ... > Case or Controversy > Standing > Elements

### [\*\*HN2\*\*](#) [down] **Standing, Elements**

To establish standing under Article III of the Constitution, a plaintiff must allege (1) injury-in-fact, which is a concrete and particularized harm to a legally protected interest; (2) causation in the form of a fairly traceable connection between the asserted injury-in-fact and the alleged actions of the defendant; and (3) redressability, or a non-speculative likelihood that the injury can be remedied by the requested relief.

Constitutional Law > ... > Case or Controversy > Standing > Elements

### [\*\*HN3\*\*](#) [down] **Standing, Elements**

Injury-in-fact is a low threshold that need not be capable of sustaining a valid cause of action. To successfully plead injury-in-fact, a plaintiff must only clearly allege facts demonstrating, that she had a a legally protected interest in a manner that is concrete and particularized and that a defendant invaded that interest. Unless an allegation of injury is so insubstantial, implausible, foreclosed by prior decisions of the United States Supreme Court, or otherwise completely devoid of merit as not to involve a federal controversy, the mere fact that it raises a federal question confers power on a federal court to decide that it has no merit, as well as to decide that it has.

Constitutional Law > ... > Case or Controversy > Standing > Elements

### [\*\*HN4\*\*](#) [down] **Standing, Elements**

The mere fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate standing.

Constitutional Law > ... > Case or Controversy > Standing > Elements

### [\*\*HN5\*\*](#) [down] **Standing, Elements**

The standard for Article III standing is not whether such the alleged injury is plausibly fairly traceable, but, rather, whether the injury is possibly fairly traceable.

Civil Procedure > ... > Class Actions > Class Members > Named Members

#### **HN6** Class Members, Named Members

In a putative class action, a plaintiff has class standing if he plausibly alleges (1) that he personally has suffered some actual injury as a result of the putatively illegal conduct of the defendant, and (2) that such conduct implicates the same set of concerns as the conduct alleged to have caused injury to other members of the putative class by the same defendants. If both of these requirements are met, the named plaintiff's litigation incentives are sufficiently aligned with those of the absent class members that the named plaintiff may properly assert claims on their behalf.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

#### **HN7** Contract Interpretation, Good Faith & Fair Dealing

The promise of good faith and fair dealing is treated as an implied provision in every contract that is breached when a party acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement. In order to find a breach of the implied covenant, a party's action must directly violate an obligation that may be presumed to have been intended by the parties.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

#### **HN8** Equitable Relief, Quantum Meruit

In order to sustain an unjust enrichment claim under New York law, a plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

#### **HN9** Equitable Relief, Quantum Meruit

A plaintiff cannot support a claim of unjust enrichment against a defendant without alleging some kind of connection to that defendant. Liability therefore will depend on each plaintiff's relationship to a given defendant. Where a relationship is governed by a customized, negotiated contract for a derivative traded over the counter, that relationship will change from contract to contract. Where, however, a relationship is governed by a standardized contract for an exchange-traded derivative such as a future, the concerns raised in respect of one such contract will be largely identical to the concerns raised in respect of any other such contracts.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

#### **HN10** Equitable Relief, Quantum Meruit

Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated.

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

#### **HN11** [💡] Motions to Dismiss, Failure to State Claim

To survive a motion to dismiss under [Fed. R. Civ. P. 12\(b\)\(6\)](#), a plaintiff must allege sufficient factual matter to state a claim to relief that is plausible on its face. A claim is facially plausible when the plaintiff pleads factual content that allows a court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The court generally accepts all factual allegations in the complaint as true and draws all reasonable inferences in the plaintiffs' favor when considering a motion to dismiss.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

#### **HN12** [💡] Heightened Pleading Requirements, Fraud Claims

To the extent a claim sounds in fraud, a complaint is subject to the heightened pleading standard of [Fed. R. Civ. P. 9\(b\)](#) and must state with particularity the circumstances constituting fraud. Although the fraud alleged must be stated with particularity the requisite intent of the alleged perpetrator of the fraud need not be alleged with great specificity. Nonetheless, a complaint must allege facts that give rise to a strong inference of fraudulent intent, which may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness.

Antitrust & Trade Law > Sherman Act > Scope

#### **HN13** [💡] Antitrust & Trade Law, Sherman Act

[Section 1](#) of the Sherman Act provides, in part, that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > Scope

#### **HN14** [💡] Remedies, Damages

Section 4 of the Clayton Act, which sets forth a private right of action to bring a Sherman Act claim for damages, provides in part that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. [15 U.S.C.S. § 15\(a\)](#).

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

## [HN15](#) Standing, Requirements

It is a well-established principle that, while the United States is authorized to sue anyone violating the federal antitrust laws, a private plaintiff must demonstrate standing. Like constitutional standing, antitrust standing is a threshold inquiry resolved at the pleading stage. In determining whether a plaintiff has antitrust standing, the court assumes the existence of an antitrust violation and considers two questions: (1) have plaintiffs suffered antitrust injury? (2) Are plaintiffs efficient enforcers of the antitrust laws?

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

## [HN16](#) Standing, Requirements

Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. Rather, an antitrust injury should reflect the anticompetitive effect either of the antitrust violation or of anticompetitive acts made possible by the violation. Accordingly, it is not enough for the actual injury to be causally linked to the asserted violation. Rather, plaintiffs must demonstrate that they themselves have sustained an antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. This inquiry involves three steps. First, the plaintiff must identify the practice complained of and the reasons such a practice is or might be anticompetitive; then the court must identify the actual injury the plaintiff alleges by looking to the ways in which the plaintiff claims it is in a worse position as a consequence of defendant's conduct; and finally, the court must compare the anticompetitive effect of the specific practice at issue to the actual injury the plaintiff alleges.

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

## [HN17](#) Standing, Requirements

Generally, when consumers, because of a conspiracy, must pay prices that no longer reflect ordinary market conditions, they suffer injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

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

## [HN18](#) Standing, Requirements

In the Second Circuit, the efficient enforcer inquiry turns on: (1) whether the antitrust violation was a direct or remote cause of the injury; (2) whether there is an identifiable class of other persons whose self-interest would normally lead them to sue for the violation; (3) whether the injury was speculative; and (4) whether there is a risk that other plaintiffs would be entitled to recover duplicative damages or that damages would be difficult to apportion among possible victims of the antitrust injury.

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

## [HN19](#) Standing, Requirements

The second factor to be considered in the efficient enforcer analysis is the existence of more direct victims of the alleged antitrust conspiracy.

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

## **HN20**[ **Standing, Requirements**

Not every victim of an antitrust violation needs to be compensated under the antitrust laws in order for the antitrust laws to be efficiently enforced.

Antitrust & Trade Law > Regulated Practices > Private Actions > Remedies

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

## **HN21**[ **Private Actions, Remedies**

With respect to the efficient enforcer inquiry, although it is true in private antitrust litigation that even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork, a verdict as to damages may be reached on the basis of probable and inferential data if direct and positive proof is unavailable.

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

## **HN22**[ **Standing, Injury in Fact**

Potential difficulty in ascertaining and apportioning damages is not an independent basis for denying standing where it is adequately alleged that a defendant's conduct has proximately injured an interest of the plaintiff's that the statute protects.

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

## **HN23**[ **Standing, Requirements**

The final factor in the efficient enforcer analysis is the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other.

Antitrust & Trade Law > Sherman Act > Scope

## **HN24**[ **Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Act provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. 15 U.S.C.S. § 1. The crucial question in a § 1 case is therefore whether the challenged conduct stems from independent decision or from an agreement, tacit or express.

Antitrust & Trade Law > Sherman Act > Claims

345 F. Supp. 3d 122, \*122LAW2018 U.S. Dist. LEXIS 199802, \*\*199802

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

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

## [HN25](#) [blue icon] Sherman Act, Claims

To state a plausible claim for conspiracy under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), a complaint must include enough factual matter (taken as true) to suggest that an agreement was made. The claim need not be probable, but the complaint must plead enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. The United States Supreme Court has stated that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a [§ 1](#) claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

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

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

## [HN26](#) [blue icon] Motions to Dismiss, Failure to State Claim

To state a plausible claim for conspiracy under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), allegations of parallel conduct need not be so robust that the only plausible explanation for defendants' conduct is an agreement. The plaintiff need not show that its allegations suggesting an agreement are more likely than not true or that they rule out the possibility of independent action, as would be required at later litigation stages such as a defense motion for summary judgment or a trial. Indeed, a given set of actions may well be subject to diverging interpretations, each of which is plausible. The choice between or among plausible inferences or scenarios is one for the factfinder. The choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion. Fact-specific questions cannot be resolved on the pleadings. A court ruling on such a motion may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible.

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

## [HN27](#) [blue icon] Motions to Dismiss, Failure to State Claim

A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and that a recovery is very remote and unlikely.

Antitrust & Trade Law > Sherman Act > Claims

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

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

## [HN28](#) [blue icon] Sherman Act, Claims

There are two ways that an antitrust plaintiff may plead facts sufficient to support the inference that a conspiracy actually existed. First, a plaintiff may, of course, assert direct evidence that the defendants entered into an

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agreement in violation of the antitrust laws. However, given that in many antitrust cases, this type of smoking gun can be hard to come by, especially at the pleading stage, a complaint, alternatively, may defeat a motion to dismiss by alleging circumstantial facts supporting the inference that a conspiracy existed. With respect to this second method, an antitrust plaintiff can cross the line separating conspiracy from parallelism, and thus state a sufficiently plausible antitrust claim, with allegations of interdependent conduct, accompanied by circumstantial evidence and plus factors. Although these examples are neither exhaustive nor exclusive, such plus factors may include (1) a common motive to conspire; (2) evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators; and (3) evidence of a high level of interfirm communications.

Antitrust & Trade Law > Sherman Act > Claims

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

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

#### **HN29**[] Sherman Act, Claims

The United States District Court for the Southern District of New York respectfully departs from others that have dismissed claims for improper group pleading. In the court's view, dismissing plaintiffs' Sherman Act claims for failing to include specific conspiracy allegations as to each defendant in the amended complaint would be premature at this early stage of litigation.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

#### **HN30**[] International Aspects, Foreign Trade Antitrust Improvements Act

The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) provides, in part, that antitrust actions may not be maintained with respect to: conduct involving trade or commerce with foreign nations unless -- (1) such conduct has a direct, substantial and reasonably foreseeable effect -- (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and (2) such effect gives rise to a claim under the provisions of [sections 1 to 7](#) of this title, other than this section. [15 U.S.C.S. § 6a](#).

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

#### **HN31**[] International Aspects, Foreign Trade Antitrust Improvements Act

In determining whether plaintiffs allege an impermissibly extraterritorial application of the federal antitrust laws, a court considers two questions. First, does the price-fixing activity constitute conduct involving trade or commerce with foreign nations? Second, does the conduct nonetheless fall within a domestic-injury exception to the general rule?

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

#### **HN32**[] Sherman Act, Claims

The domestic-injury exception to the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) makes the Sherman Act nonetheless applicable) where the conduct (1) has a direct, substantial, and reasonably foreseeable effect on domestic commerce, and (2) such effect gives rise to a Sherman Act claim. [15 U.S.C.S. § 6\(a\)](#).

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

### [HN33](#) [+] International Aspects, Foreign Trade Antitrust Improvements Act

The Second Circuit has held that foreign anticompetitive conduct can have the statutorily required direct, substantial, and reasonably foreseeable effect on U.S. domestic or import commerce, [15 U.S.C.S. § 6\(a\)](#), even if the effect does not follow as an immediate consequence of the defendant's conduct, so long as there is a reasonably proximate causal nexus between the conduct and the effect.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

### [HN34](#) [+] International Aspects, Foreign Trade Antitrust Improvements Act

There can be no serious dispute that the manipulation of a benchmark that is globally disseminated and serves as a pricing component of derivatives sold widely in the United States would have a foreseeable effect within the United States. The question whether an alleged effect on U.S. commerce is direct, substantial and reasonably foreseeable, in the context of [15 U.S.C.S. § 6\(a\)](#), clearly is one of fact, and these allegations are sufficient to state a claim upon which relief may be granted.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

### [HN35](#) [+] International Aspects, Foreign Trade Antitrust Improvements Act

For the domestic-injury exception in [15 U.S.C.S. § 6\(a\)](#) to apply, the domestic effect of defendants' alleged conduct must proximately cause the plaintiff's injury.

Securities Law > Commodities Futures Trading > Future Delivery

Securities Law > Commodities Futures Trading > Swap Agreements

### [HN36](#) [+] Commodities Futures Trading, Future Delivery

[Section 6\(c\)](#) of the Commodity Exchange Act (CEA), [7 U.S.C.S. § 9\(3\)](#), makes it unlawful also to use or employ, or attempt to use or employ, in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance in violation of rules promulgated by the Commodity Futures Trading Commission (CFTC) and to make any false or misleading statement of a material fact to the CFTC. [7 U.S.C.S. §§ 9\(1\)-\(2\), 1a\(8\)](#).

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Securities Law > Commodities Futures Trading > Future Delivery

Securities Law > Commodities Futures Trading > Swap Agreements

#### [\*\*HN37\*\*](#) [L] Agriculture & Food, Commodity Exchange Act

Section 22 of the Commodity Exchange Act (CEA), [7 U.S.C.S. § 25\(a\)\(1\)](#), establishes a private right of action for violations of [§ 6\(c\)](#) of the CEA, [7 U.S.C.S. § 9\(3\)](#).

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Securities Law > Commodities Futures Trading

#### [\*\*HN38\*\*](#) [L] Agriculture & Food, Commodity Exchange Act

In order to assert a Commodity Exchange Act (CEA) claim, a private plaintiff must meet the requirements of [§ 22](#) of the CEA, [7 U.S.C.S. § 25\(a\)\(1\)](#). These requirements used to be referred to as statutory standing, but, to avoid incorrectly portraying them as jurisdictional requirements, they are now referred to as simply a question of whether the particular plaintiff has a cause of action under the statute. Section 22 limits a defendant's liability to actual damages, a private plaintiff must plausibly allege actual injury caused by the violation in addition to the elements of whatever violation they allege in order to successfully state a claim.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Securities Law > Commodities Futures Trading

#### [\*\*HN39\*\*](#) [L] Agriculture & Food, Commodity Exchange Act

Commodity and derivative contracts that index their price formulae to prices of other contracts are linked in a rule-based manner, and several cases in this circuit have found such a link to create a sufficient connection for Commodity Exchange Act (CEA) pleading purposes.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Securities Law > Commodities Futures Trading

#### [\*\*HN40\*\*](#) [L] Agriculture & Food, Commodity Exchange Act

The Commodity Exchange Act (CEA) prohibits manipulation of the price of any commodity or commodity future. While the CEA itself does not define the term, a court will find manipulation where (1) defendants possessed an ability to influence market prices; (2) an artificial price existed; (3) defendants caused the artificial prices; and (4) defendants specifically intended to cause the artificial price.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

#### [\*\*HN41\*\*](#) [L] Heightened Pleading Requirements, Fraud Claims

Whether or not the heightened pleading standard of [Fed. R. Civ. P. 9\(b\)](#) applies depends on the conduct alleged. The requirement that a plaintiff plead with particularity is not limited to allegations styled or denominated as fraud or expressed in terms of the constituent elements of a fraud cause of action.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Securities Law > Commodities Futures Trading

#### **HN42** [blue icon] Agriculture & Food, Commodity Exchange Act

The Second Circuit has not decided whether, as a general rule, Commodity Exchange Act (CEA) claims are subject to the heightened pleading standard of [Fed. R. Civ. P. 9\(b\)](#). Courts apply [Rule 9\(b\)](#)'s pleading requirements to the CEA on a case-by-case basis.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Securities Law > ... > Implied Private Rights of Action > Deceptive & Manipulative Devices > Price Manipulation

Securities Law > ... > Securities Exchange Act of 1934 Actions > Express Liabilities > Price Manipulation

#### **HN43** [blue icon] Heightened Pleading Requirements, Fraud Claims

A complaint subject to [Fed. R. Civ. P. 9\(b\)](#) must state with particularity the circumstances constituting fraud or mistake. In the context of manipulation claims, however, the Second Circuit has stated that although the [Rule 9\(b\)](#) pleading standard applies, because a claim of manipulation can involve facts solely within the defendant's knowledge, at the early stages of litigation, the plaintiff need not plead manipulation to the same degree of specificity as a plain misrepresentation claim. Rather, a manipulation complaint must plead with particularity the nature, purpose, and effect of the fraudulent conduct and the roles of the defendants.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Securities Law > Commodities Futures Trading

#### **HN44** [blue icon] Agriculture & Food, Commodity Exchange Act

As to scienter, a plaintiff asserting a claim under the Commodity Exchange Act (CEA) must show, at a minimum, that the defendant or defendants acted (or failed to act) with the purpose or conscious object of causing or affecting a price or price trend in the market that did not reflect the legitimate forces of supply and demand. Although the requisite intent of the alleged perpetrator of the fraud need not be alleged with great specificity, a complaint must nonetheless, allege facts that give rise to a strong inference of fraudulent intent. Scienter may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Securities Law > Commodities Futures Trading

Torts > ... > Multiple Defendants > Concerted Action > Civil Aiding & Abetting

Business & Corporate Law > ... > Duties & Liabilities > Authorized Acts of Agents > Scope of Authority

#### **HN45** [blue icon] Agriculture & Food, Commodity Exchange Act

A claim for principal-agent liability requires that the agent was acting in the capacity of an agent when he or she committed the unlawful acts and that the agent's actions were within the scope of his or her employment. To be found liable for aiding and abetting, on the other hand, a defendant must in some sort associate himself with the venture -- that is, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. In the context of a Commodity Exchange Act (CEA) claim, then, a complaint bringing a claim for aiding and abetting liability must allege that the "aider and abettor" knew that the primary violator intended to engage in price manipulation. A complaint with weak allegations about a defendant's affirmative assistance may still state a claim for aiding and abetting if its allegations about the defendant's knowledge and intent are particularly strong, and vice versa. Accordingly, in evaluating a complaint alleging the aiding and abetting of a violation of the CEA, allegations about the defendant's knowledge, intent, and actions should not be evaluated in isolation, but rather in light of the complaint as a whole.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

#### **HN46** [blue icon] Heightened Pleading Requirements, Fraud Claims

In order to satisfy the particularity requirements of *Fed. R. Civ. P. 9(b)*, a complaint should articulate how each defendant is implicated in the alleged fraudulent conduct.

Governments > Legislation > Effect & Operation

International Law > Authority to Regulate

#### **HN47** [blue icon] Legislation, Effect & Operation

It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. Unless Congress clearly has expressed its affirmative intention to give a statute extraterritorial effect, the court must presume it is primarily concerned with domestic conditions.

Governments > Legislation > Effect & Operation

International Law > Authority to Regulate

#### **HN48** [blue icon] Legislation, Effect & Operation

The United States Supreme Court has articulated a two-step framework to analyze the issue of extraterritoriality: At the first step, a court asks whether the presumption against extraterritoriality has been rebutted -- that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially. The court must ask this question regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction. If the statute is not extraterritorial, then at the second step the court determine whether the case involves a domestic application of the statute, and the court do this by looking to the statute's focus. If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.

Antitrust & Trade Law > Sherman Act > Claims

International Law > Authority to Regulate > Anticompetitive Activities

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Securities Law > Commodities Futures Trading

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

#### **HN49** [blue icon] **Sherman Act, Claims**

The Commodity Exchange Act (CEA) as a whole is silent as to extraterritorial reach. Moreover, and unlike in the case of a federal antitrust claim, as to which the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) provides a clear indication that Congress endorsed an extraterritorial application of the Sherman Act, there is no statute indicating an intention by Congress to apply the CEA extraterritorially. Because the presumption against extraterritoriality has not been rebutted, it is presumed that the CEA is primarily concerned with domestic conditions.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Governments > Legislation > Effect & Operation

Securities Law > Commodities Futures Trading

Securities Law > ... > Scope of Provisions > Covered Transactions > Foreign Transactions

#### **HN50** [blue icon] **Agriculture & Food, Commodity Exchange Act**

In Morrison, the U.S. Supreme Court held that the Securities Exchange Act had no extraterritorial application and concluded that no civil suit under § 10(b) could be sustained unless predicated on a transaction involving (1) a security listed on a domestic exchange, or (2) a domestic purchase or sale of another security. The Second Circuit subsequently concluded, in Absolute Activist, that in order for a transaction to be domestic for purposes of the Securities Exchange Act and Morrison's second prong, either the parties must incur irrevocable liability or title to the securities must pass within the United States. The Second Circuit has extended both Morrison and Absolute Activist to the Commodity Exchange Act (CEA), concluding that Morrison's domestic transaction test in effect decides the territorial reach of [7 U.S.C.S. § 25\(a\)\(1\)](#) and that a plaintiff bringing a CEA claim must demonstrate that the transfer of title or the point of irrevocable liability for the applicable transaction occurred in the United States. On the other hand, the Second Circuit has never concluded that Morrison's domestic exchange prong applies to the CEA either to broaden or to narrow its extraterritorial reach.

Governments > Legislation > Effect & Operation

Securities Law > ... > Scope of Provisions > Covered Transactions > Foreign Transactions

#### **HN51** [blue icon] **Legislation, Effect & Operation**

In Parkcentral Global, the Second Circuit concluded that while the United States Supreme Court's decision in Morrison unmistakably made a domestic securities transaction necessary to a properly domestic invocation of §

10(b) of the Securities Exchange Act, such a transaction is not alone sufficient to state a properly domestic claim under the statute. The imposition of liability under § 10(b) on foreign defendants with no alleged involvement in plaintiffs' transactions, on the basis of the defendants' largely foreign conduct, for losses incurred by the plaintiffs in securities-based swap agreements based on the price movements of foreign securities would constitute an impermissibly extraterritorial extension of the statute. The court reasoned that to hold otherwise would require courts to apply the statute to wholly foreign activity clearly subject to regulation by foreign authorities solely because a plaintiff in the United States made a domestic transaction, even if the foreign defendants were completely unaware of it.

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

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

## **HN52** [blue icon] **Racketeer Influenced & Corrupt Organizations, Claims**

18 U.S.C.S. § 1962(c) makes it unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. It is unlawful also for any person to conspire to violate § 1962(c).

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

## **HN53** [blue icon] **Private Actions, Racketeer Influenced & Corrupt Organizations**

"Racketeering activity" includes violations of the wire fraud statute, 18 U.S.C.S. § 1961(1)(B) (incorporating by reference 18 U.S.C.S. § 1343), which makes it unlawful for anyone having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, to transmit or cause to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice. § 1343. An "enterprise" is defined as any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. 18 U.S.C.S. § 1961(4). A pattern of racketeering activity requires at least two acts of racketeering activity to have been committed within ten years of one another. § 1961(5).

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

## **HN54** [blue icon] **Racketeer Influenced & Corrupt Organizations, Claims**

A civil remedy under the Racketeer Influenced and Corrupt Organizations Act (RICO Act) is available to private plaintiffs who are injured in their business or property by reason of a violation of 18 U.S.C.S. § 1962, 18 U.S.C.S. § 1964(c). This language has been construed to require that in order to merit standing, a civil RICO plaintiff must establish that the RICO violation at issue was a proximate cause of the injury to the plaintiff's business or property for which redress is sought. Because a plaintiff must show injury by the conduct constituting the violation of RICO, the injury must be caused by a pattern of racketeering activity violating § 1962 or by individual RICO predicate acts.

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

## [\*\*HN55\*\*](#) [blue icon] Racketeer Influenced & Corrupt Organizations, Claims

To state a claim for a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO Act), a complaint must allege that the defendant violated [18 U.S.C.S. § 1962](#) -- that is, it must allege: (1) that the defendant (2) through the commission of two or more acts (3) constituting a pattern (4) of racketeering activity (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an enterprise (7) the activities of which affect interstate or foreign commerce.

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

## [\*\*HN56\*\*](#) [blue icon] Racketeer Influenced & Corrupt Organizations, Claims

An association-in-fact enterprise is simply a continuing unit that functions with a common purpose. Such an enterprise must have a structure exhibiting three features: a purpose, relationships among the individuals associated with the enterprise, and longevity sufficient to permit the associates to pursue the purpose of the enterprise. For an association of individuals to constitute an enterprise, the individuals must share a common purpose to engage in a particular fraudulent course of conduct and work together to achieve such purposes.

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

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

## [\*\*HN57\*\*](#) [blue icon] Racketeer Influenced & Corrupt Organizations, Claims

The wire fraud statute prohibits any use of interstate wires in furtherance of any fraudulent scheme. [18 U.S.C.S. § 1343](#). There are three elements of a wire fraud violation: (1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of wires to further the scheme. Where the predicate acts alleged in a complaint are wire fraud, Racketeer Influenced and Corrupt Organizations Act (RICO Act) claims are subject to the heightened pleading standard under [Fed. R. Civ. P. 9\(b\)](#). Accordingly, a RICO plaintiff must plead the alleged wire fraud with particularity, and establish that the communications were in furtherance of a fraudulent scheme.

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

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

## [\*\*HN58\*\*](#) [blue icon] Racketeer Influenced & Corrupt Organizations, Claims

The Second Circuit has stated that generally in the Racketeer Influenced and Corrupt Organizations Act (RICO Act) context, where mail or wire fraud are the alleged predicate acts, a complaint must adequately specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements. However, as courts in the Second Circuit have applied a different standard in cases where a plaintiff claims that mails or wires were simply used in furtherance of a master plan to defraud, but does not allege that the communications themselves contained false or misleading information. In such cases, including complex civil RICO actions involving multiple defendants, [Fed. R. Civ. P. 9\(b\)](#) does not require that the temporal or geographic particulars of each mailing or wire transmission made in furtherance of the fraudulent scheme be stated with particularity. Instead, [Rule 9\(b\)](#) requires only that the plaintiff delineate with adequate particularity in the body of the complaint, the specific circumstances constituting the overall fraudulent scheme.

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

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

### **HN59** [blue icon] **Racketeer Influenced & Corrupt Organizations, Claims**

Although a Racketeer Influenced and Corrupt Organizations Act (RICO Act) complaint need not list every single allegedly fraudulent use of interstate wires involved in the overall scheme, it nonetheless is necessary to inform each defendant of the nature of his alleged participation in the fraud.

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

Torts > ... > Concerted Action > Civil Conspiracy > Elements

### **HN60** [blue icon] **Racketeer Influenced & Corrupt Organizations, Claims**

The core of a Racketeer Influenced and Corrupt Organizations Act (RICO Act) conspiracy is an agreement to commit predicate acts, and a RICO civil conspiracy complaint must specifically allege such an agreement. Allegations of a conspiracy must set forth specific facts tending to show that each of the defendants entered into an agreement to conduct the affairs of a particular, identified enterprise through a pattern of racketeering activity—not simply that each defendant committed two or more acts that would qualify as predicate acts, without regard to whether those acts were committed in furtherance of the activity of the enterprise.

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

Governments > Legislation > Effect & Operation

International Law > Authority to Regulate

### **HN61** [blue icon] **Private Actions, Racketeer Influenced & Corrupt Organizations**

In RJR Nabisco, the United States Supreme Court concluded that Congress intended the [18 U.S.C.S. § 1962\(c\)](#) prohibition to apply extraterritorially in tandem with the underlying predicates, without regard to the locus of the enterprise. Accordingly, a Racketeer Influenced and Corrupt Organizations Act (RICO Act) claim may be based on foreign racketeering activity only if the predicate act(s) underlying the claim apply extraterritorially. The Second Circuit has considered whether Congress has manifested an intent that the federal wire fraud statute, [18 U.S.C.S. § 1343](#), apply extraterritorially and concluded that it had not.

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

International Law > Authority to Regulate

Governments > Legislation > Effect & Operation

### **HN62** [blue icon] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The Second Circuit has not decided precisely how to draw the line between domestic and extraterritorial applications of the wire fraud statute, [18 U.S.C.S. § 1343](#). In RJR Nabisco, for example, the Second Circuit stated that if domestic conduct satisfies every essential element to prove a violation of a United States statute that does not apply extraterritorially, that statute is violated even if some further conduct contributing to the violation occurred outside the United States. And in Norex Petroleum, in which a Racketeer Influenced and Corrupt Organizations Act (RICO Act) complaint alleging that a group of foreign defendants had engaged in a racketeering conspiracy in order to acquire control over a Russian company in which the plaintiff had been a majority shareholder was dismissed as impermissibly extraterritorial, the Circuit stated only that simply alleging that some domestic conduct occurred cannot support a claim of domestic application. It is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States.

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

Governments > Legislation > Effect & Operation

International Law > Authority to Regulate

#### [\*\*HN63\*\*](#) [+] **Racketeer Influenced & Corrupt Organizations, Claims**

In CGC Holding, the U.S. District Court for the District of Colorado rejected the contention that a RICO Act claim was impermissibly extraterritorial simply because some of the participants in the enterprise resided outside the United States. Rather, the court held that the focus of the statute is the racketeering activity, i.e., to render unlawful a pattern of domestic racketeering activity perpetrated by an enterprise. It then concluded that although most of the enterprise participants had resided in Canada, the plaintiffs stated a domestic claim because the racketeering activity had been directed at and largely occurred within the United States. The conduct of the enterprise within the U.S. was a key to its success. This approach appeals because it affords a remedy to a U.S. plaintiff who claims injury caused by domestic acts of racketeering activity without regard to the nationality or foreign character of the defendants or the enterprise, is consistent with the U.S. Supreme Court's and the Second Circuit's repeated recognition that the heart of any RICO complaint is the allegation of a pattern of racketeering, and is consistent with Congressional intent, which included protecting American victims at least against injury caused by the conduct of the affairs of enterprises through patterns of racketeering activity that occur in this country.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

#### [\*\*HN64\*\*](#) [+] **Contract Interpretation, Good Faith & Fair Dealing**

Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance. Encompassed within the implied obligation of each promisor to exercise good faith are any promises which a reasonable person in the position of the promisee would be justified in understanding were included. This embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

#### [\*\*HN65\*\*](#) [+] **Equitable Relief, Quantum Meruit**

A plaintiff alleging unjust enrichment under New York law must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered. The essence of such a claim is that one party has received money or a benefit at the

expense of another. Accordingly, courts require proof that the defendant received a specific and direct benefit from the property sought to be recovered, rather than an indirect benefit, which in turn requires that a plaintiff allege some kind of relationship or connection to that defendant.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

#### **HN66** [blue icon] **Equitable Relief, Quantum Meruit**

While a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment, there must exist a relationship or connection between the parties that is not too attenuated.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

#### **HN67** [blue icon] **Types of Contracts, Quasi Contracts**

Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded. A plaintiff may proceed on the quasi-contract theory of unjust enrichment only where the contract does not cover the dispute in issue. In order for a contract to cover the dispute in issue and thus bar a plaintiff's quasi-contract claims, however, the contract must specifically address the actions that gave rise to the dispute. That is to say, the contract must clearly cover the dispute between the parties.

Antitrust & Trade Law > Clayton Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

#### **HN68** [blue icon] **Clayton Act, Defenses**

The statute of limitation to bring a private antitrust action is four years. [15 U.S.C.S. § 15b](#).

Antitrust & Trade Law > Clayton Act > Claims

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Clayton Act > Defenses

#### **HN69** [blue icon] **Clayton Act, Claims**

A court will not dismiss plaintiffs' claims on statute of limitations grounds at the pleading stage unless the complaint clearly shows the claim is out of time. An antitrust plaintiff may prove fraudulent concealment sufficient to toll the running of the statute of limitations if he establishes (1) that the defendant concealed from him the existence of his cause of action, (2) that he remained in ignorance of that cause of action until some point within four years of the commencement of his action, and (3) that his continuing ignorance was not attributable to lack of diligence on his part. A plaintiff may allege fraudulent concealment by showing either that the defendant took affirmative steps to prevent the plaintiff's discovery of his claim or injury or that the wrong itself was of such a nature as to be self-concealing.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Governments > Legislation > Statute of Limitations > Time Limitations

Securities Law > Commodities Futures Trading

### **HN70** [blue icon] Agriculture & Food, Commodity Exchange Act

A claim for a violation of the Commodity Exchange Act (CEA) must be brought within two years. [7 U.S.C.S. § 25\(c\)](#). A cause of action arises under the CEA when a party is placed on inquiry notice of the violation, which occurs when the circumstances would suggest to an investor of ordinary intelligence the probability that she has been defrauded.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

Governments > Legislation > Statute of Limitations > Time Limitations

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

### **HN71** [blue icon] Contract Interpretation, Good Faith & Fair Dealing

Under New York law, the statutes of limitations for claims of breach of the implied covenant of good faith and fair dealing and unjust enrichment are six years, and generally begin to run from the time when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Challenges

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

### **HN72** [blue icon] In Personam Actions, Challenges

In order to survive a motion to dismiss for lack of personal jurisdiction, a plaintiff must make a *prima facie* showing that jurisdiction exists. Such a showing entails making legally sufficient allegations of jurisdiction, including an averment of facts that, if credited, would suffice to establish jurisdiction over the defendant. In determining whether the requisite showing has been made, the court construes the pleadings and any supporting materials in the light most favorable to the plaintiffs.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

### **HN73** [blue icon] In Personam Actions, Due Process

Three requirements must be met in order for a court to exercise personal jurisdiction lawfully. First, the plaintiff's service of process upon the defendant must have been procedurally proper. Second, there must be a statutory basis for personal jurisdiction that renders such service of process effective. Third, the exercise of personal jurisdiction must comport with constitutional due process principles.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Federal Questions

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > In Personam Actions

#### **HN74** [blue icon] Subject Matter Jurisdiction, Federal Questions

A plaintiff must establish a court's jurisdiction with respect to each claim asserted. For an out-of-state defendant in a federal question case, federal courts apply the forum state's personal jurisdiction rules if the applicable federal statute does not provide for national service of process.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Securities Law > Commodities Futures Trading

Civil Procedure > ... > Pleadings > Service of Process > Methods of Service

#### **HN75** [blue icon] Agriculture & Food, Commodity Exchange Act

The Commodity Exchange Act (CEA) provides for nationwide service of process without restriction. Process in such action may be served in any judicial district of which the defendant is an inhabitant or wherever the defendant may be found. [7 U.S.C.S. § 25\(c\)](#).

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

Civil Procedure > ... > Pleadings > Service of Process > Methods of Service

#### **HN76** [blue icon] Racketeer Influenced & Corrupt Organizations, Claims

The Racketeer Influenced and Corrupt Organizations Act (RICO Act) provides for national service of process where the ends of justice so require, as follows: in any action under [18 U.S.C.S. § 1964](#) in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof. [18 U.S.C.S. § 1965\(b\)](#).

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Pleadings > Service of Process > Methods of Service

Antitrust & Trade Law > Clayton Act > Jurisdiction

#### **HN77** [blue icon] Clayton Act, Claims

[Section 12](#) of the Clayton Act provides for national service of process as follows: any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found. [15 U.S.C.S. § 22](#). Because the service of process provision applies only to "such cases" described in the preceding clause, the Second Circuit has concluded that nationwide service of process is permissible only in cases in which its venue provision is satisfied.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Pleadings > Service of Process > Methods of Service

Antitrust & Trade Law > Clayton Act > Jurisdiction

#### [\*\*HN78\*\*](#) [ ] **Clayton Act, Claims**

The first part of [§ 12](#) of the Clayton Act, [15 U.S.C.S. § 22](#), which permits any suit, action, or proceeding under the antitrust laws against a corporation to be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business, is an expanded venue provision. But the operative language for purposes of personal jurisdiction is found in the second half of the statute -- that is, the service provision, which states that all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found. The Second Circuit has construed "in such cases" in accordance with its plain language. As such, jurisdiction lies only in cases in which the venue provision of [§ 12](#), not the general venue statute, is satisfied.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Doing Business

Antitrust & Trade Law > Clayton Act > Jurisdiction

#### [\*\*HN79\*\*](#) [ ] **Clayton Act, Claims**

Under the Clayton Act, the nationwide service of process provision applies only where the action has been brought in a district wherein the defendant may be found or transacts business. [15 U.S.C.S. § 22](#). The United States Supreme Court has construed the phrase "transacts business," as used in the venue provision of Clayton Act, to refer to the practical, everyday business or commercial concept of doing business or carrying on business of any substantial character. However, for a defendant to transact business of any substantial character, there must be some amount of business continuity and certainly more than a few isolated and peripheral contacts with the particular judicial district. The nature and amount of a defendant's contacts in a judicial district are to be considered in light of the nature of the defendant's business.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

#### [\*\*HN80\*\*](#) [ ] **In Personam Actions, Due Process**

The [Due Process Clause of the Fourteenth Amendment](#) contains a state's authority to bind a nonresident defendant to a judgment of its courts. Accordingly, the touchstone due process principle has been that, before a court may exercise jurisdiction over a person or an organization, such as a bank, that person or entity must have sufficient minimum contacts' with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. The quality and nature of the defendant's contacts with the forum state are evaluated under a totality of the circumstances test. However, in a federal question case, the manner in which district courts assess whether the exercise of personal jurisdiction comports with constitutional due process varies depending on the asserted statutory basis.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

#### [HN81](#) [blue icon] In Personam Actions, Minimum Contacts

The U.S. Supreme Court has established two types of personal jurisdiction: general jurisdiction and specific jurisdiction.

Civil Procedure > ... > Pleadings > Service of Process > Methods of Service

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

#### [HN82](#) [blue icon] Service of Process, Methods of Service

Although the Second Circuit has not yet decided whether to adopt the nationwide contacts approach, several other circuits have endorsed the position that, when a civil case arises under federal law and a federal statute authorizes nationwide service of process, the relevant contacts for determining personal jurisdiction are contacts with the United States as a whole. The rationale underlying this national contacts approach is that when the national sovereign is applying national law, the relevant contacts are the contacts between the defendant and the sovereign's nation. The United States District Court for the Southern District of New York holds that the appropriate forum for purposes of determining whether the exercise of personal jurisdiction would comport with due process is the United States, rather than New York State.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

#### [HN83](#) [blue icon] In Personam Actions, Due Process

A court with general personal jurisdiction over a foreign defendant may hear any and all claims against that defendant. But it by now is well established that a court may assert general jurisdiction over foreign corporations to hear any and all claims against them only when their affiliations with the state are so continuous and systematic as to render them essentially at home in the foreign state. Aside from an exceptional case, a corporation is at home (and thus subject to general jurisdiction, consistent with due process) only in a state that is the company's formal place of incorporation or its principal place of business.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

#### [HN84](#) [blue icon] In Personam Actions, Minimum Contacts

Specific jurisdiction is a significantly more limited doctrine. It depends on an affiliation between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum state and is therefore subject to the state's regulation. In order for a state court to exercise specific jurisdiction, the suit must arise out of or relate to the defendant's contacts with the forum. That is to say, the defendant's suit-related conduct must create a substantial connection with the forum state. The inquiry requires a two-step analysis: First, the court must decide if the defendant has purposefully directed his activities at the forum and the litigation arises out of or relates to those activities. Second, once the court has established these minimum contacts, it determines whether the assertion of personal jurisdiction would comport with fair play and substantial justice.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Foreseeability

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

#### **HN85** [blue icon] In Personam Actions, Foreseeability

Generally, the minimum contacts necessary to support specific jurisdiction exist where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there. If however, the conduct that forms the basis for the controversy occurs entirely out-of-forum, courts may employ the effects test, which permits a court to assert specific personal jurisdiction over a defendant if the defendant expressly aimed its conduct at the forum. An additional theory of jurisdiction may be available in cases alleging a conspiracy if plaintiffs allege that (1) a conspiracy existed; (2) the defendant participated in the conspiracy; and (3) a co-conspirator's overt acts in furtherance of the conspiracy had sufficient contacts with a state to subject that co-conspirator to jurisdiction in that state.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Foreseeability

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

#### **HN86** [blue icon] In Personam Actions, Foreseeability

To satisfy the effects test, a defendant's conduct must have been expressly aimed at the forum. To that end, the relationship between the defendant and the forum must have arisen out of contacts that the defendant himself, as opposed to the plaintiff or third parties, created with the forum. Moreover, the analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there. It thus is insufficient to rely on a defendant's random, fortuitous, or attenuated contacts or on the unilateral activity of a plaintiff with the forum to establish specific jurisdiction. Indeed even the fact that harm in the forum is foreseeable is insufficient to establish specific personal jurisdiction over a defendant. On this basis, the Second Circuit has interpreted United States Supreme Court jurisprudence to suggest that a defendant's mere knowledge that a plaintiff resides in a specific jurisdiction would be insufficient to subject a defendant to specific jurisdiction in that jurisdiction if the defendant does nothing in connection with the tort in that jurisdiction.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

#### **HN87** [blue icon] In Personam Actions, Minimum Contacts

A mere injury to a forum resident is not a sufficient connection to the forum and that regardless of where a plaintiff lives or works, an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State.

Banking Law > ... > Business & Corporate Compliance > Banking & Finance > Foreign Banks in the United States

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Doing Business

## **HN88** [blue icon] International Banking, Foreign Banks in the United States

The plain language of [N.Y. Banking Law § 200](#) suggests that, if anything, a banking corporation that registers under this statute would be subject to jurisdiction only in respect of a cause of action arising out of a transaction with its New York agency or agencies or branch or branches, rather than any and all claims, as would be the case in a grant of general jurisdiction.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Parties

## **HN89** [blue icon] Supplemental Jurisdiction, Pendent Parties

The doctrine of pendent personal jurisdiction provides that where a federal statute authorizes nationwide service of process, and the federal and state-law claims derive from a common nucleus of operative fact, the district court may assert personal jurisdiction over the parties to the related state-law claims even if personal jurisdiction is not otherwise available.

Civil Procedure > Discovery & Disclosure > Discovery

## **HN90** [blue icon] Discovery & Disclosure, Discovery

It is within a court's discretion to allow jurisdictional discovery.

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**Judges:** Lewis A. Kaplan, United States District Judge.

**Opinion by:** Lewis A. Kaplan

## **Opinion**

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[\*141]

LEWIS A. KAPLAN, *District Judge*.

This purported class action is the latest in a growing number of lawsuits accusing financial institutions of manipulating interest rates used as benchmarks for the pricing of various financial derivatives among other purposes. In this case, defendants — a collection of entities from fifteen major banks and two major brokerage firms [\*5] — are accused of conspiring to manipulate the Bank Bill Swap Reference Rate ("BBSW"), a rate set at the relevant times in Australia but allegedly used widely in the United States and elsewhere in the world. All defendants<sup>1</sup> move to dismiss for lack of subject-matter jurisdiction and failure to state a claim.<sup>2</sup> Certain defendants (the "Foreign Defendants") move also to dismiss as to them for lack of personal jurisdiction,<sup>3</sup> and as to a subgroup

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<sup>1</sup> Per the request of defendants JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. the motion to dismiss is stayed as to them.

<sup>2</sup> DI 132.

<sup>3</sup> DI 109.

of these defendants (the "Venue Defendants") with respect to certain of the claims, on the additional ground of improper venue.<sup>4</sup> Defendants' [\*142] motions each are granted in part and denied in part.

### *Background*

BBSW is a benchmark interest rate, somewhat similar in concept to the London Interbank Offered Rate ("LIBOR") in that it is used to price certain types of financial derivatives. Plaintiffs here, all of whom "engaged in U.S.-based transactions for BBSW-based derivatives" during the purported class period,<sup>5</sup> bring claims under the *Clayton Act*, the *Commodity Exchange Act ("CEA")*, and the *Racketeer Influenced and Corrupt Organizations Act ("RICO Act")*. They sue as well on state law claims for unjust enrichment and breach of the implied covenant of good faith [\*\*6] and fair dealing.

The following facts are alleged in the amended complaint, the truth of which the Court is bound to assume when considering a motion to dismiss the amended complaint.<sup>6</sup>

### *I. Derivatives and the Money Market*

In order to understand the claims in this case, it is helpful first to provide some background information on financial derivatives and BBSW.

A derivative is "a contract whose value is based on the performance of an underlying financial asset, index, or other investment."<sup>7</sup> The contractual terms of derivatives vary widely, but they generally fall into four basic structures: forward contracts, futures contracts, options, and swaps. A forward contract is a contract for the purchase or sale of some underlying asset for an agreed-upon price at some point in the future.<sup>8</sup> A futures contract is similar to a forward, except that it is traded on a regulated exchange and has standardized terms.<sup>9</sup> An option is a contract that

The Foreign Defendants are: BNP Paribas, S.A.; UBS AG; Australia and New Zealand Banking Group Ltd.; Commonwealth Bank of Australia; National Australia Bank Limited; Westpac Banking Corporation; Deutsche Bank AG; Credit Suisse Group AG; Credit Suisse AG; HSBC Holdings plc; HSBC Bank Australia Limited; ICAP plc; ICAP Australia Pty Ltd.; Lloyds Banking Group plc; Lloyds Bank plc; Macquarie Group Ltd.; Macquarie Bank Ltd.; Royal Bank of Canada; Morgan Stanley Australia Limited; The Royal Bank of Scotland Group plc; The Royal Bank of Scotland plc; RBS N.V.; RBS Group (Australia) Pty Limited; Tullett Prebon plc; and Tullett Prebon (Australia) Pty Ltd.

<sup>4</sup> The Venue Defendants are: Credit Suisse Group AG; HSBC Holdings plc; HSBC Bank Australia Limited; ICAP plc; ICAP Australia Pty Ltd.; Lloyds Banking Group plc; Macquarie Group Ltd.; Morgan Stanley Australia Limited; The Royal Bank of Scotland Group plc; The Royal Bank of Scotland plc; RBS N.V.; RBS Group (Australia) Pty Limited; Tullett Prebon plc; and Tullett Prebon (Australia) Pty Ltd.

<sup>5</sup> DI 63 ("AC") at ¶¶ 35-39.

<sup>6</sup> See *Ret. Bd. of the Policemen's Annuity & Benefit Fund of the City of Chic. v. Bank of N.Y. Mellon*, 775 F.3d 154, 159 (2d Cir. 2014) (applying standard in respect of motion to dismiss under *Fed. R. Civ. P. 12(b)(1)* and *12(b)(6)* (citing *Rothstein v. UBS AG*, 708 F.3d 82, 90 (2d Cir. 2013))).

<sup>7</sup> John Downes & Jordan Elliot Goodman, BARRON'S DICTIONARY OF FINANCE AND INVESTMENT TERMS 187 (9th ed. 2014) [hereinafter Barron's]; see also *CSX Corp. v. Children's Inv. Fund Mgmt. (UK)*, 562 F. Supp. 2d 511, 519 (S.D.N.Y. 2008), aff'd in part & rev'd in part, 654 F.3d 276 (2d Cir. 2011) ("The term 'derivative,' as the term is used in today's financial world, refers to a financial instrument that derives its value from the price of an underlying instrument or index.").

<sup>8</sup> Barron's at 289; see also Barbara J. Etzel, WEBSTER'S NEW WORLD FINANCE AND INVESTMENT DICTIONARY 139 (2003).

<sup>9</sup> *Id.* at 144.

gives the holder the right (but not the obligation) to buy or sell an underlying asset at some point in the future.<sup>10</sup> Finally, a swap in broad strokes is an instrument pursuant to which two counterparties agree to exchange periodic cash flows over a specific length [\*\*7] of time.<sup>11</sup>

Swaps come in various forms, one of which is an interest rate swap. An interest rate swap generally obligates each party to pay an amount equal to the amount of [\*143] interest that would be payable on an agreed upon notional principal amount if that amount actually had been borrowed.<sup>12</sup> In the most common type of interest rate swap, one party agrees to pay to the other an amount equal to the amount of interest on the notional principal amount if the hypothetical bond of the notional principal amount bore a fixed interest rate while the other party agrees to pay an amount equal to the amount of interest if the hypothetical loan bore interest at a floating rate based on a benchmark such as LIBOR.<sup>13</sup> For example:

"Counterparty A and Counterparty B enter into a five-year swap with the following terms: Counterparty A agrees to pay Counterparty B an amount equal to 6 percent per annum on a notional principal of \$20 million, and Counterparty B agrees to pay Counterparty A an amount equal to one-year LIBOR plus 1 percent per annum on the same [\*\*8] notional principal amount. For simplicity, let us assume the counterparties exchange payments annually on December 31, beginning in 2017 and concluding in 2021. At the end of 2017, Counterparty A will pay Counterparty B \$1,200,000 (*i.e.*, \$20,000,000 x 6 percent). Let us assume further that on December 31, 2016, one-year LIBOR was 5.33 percent. At the end of 2017, then, Counterparty B will pay Counterparty A \$1,266,000 (*i.e.*, \$20,000,000 x (5.33 percent + 1 percent))."<sup>14</sup>

Another type of swap is a foreign exchange ("FX") swap, in which "two counterparties agree to exchange streams of interest payments in different currencies for an agreed-upon period of time and to exchange principal amounts in different currencies at an agreed-upon exchange rate at maturity."<sup>15</sup> According to the amended complaint, "[t]here are two components to a foreign exchange swap: (1) a spot transaction in which the parties buy or sell a certain amount of one currency (*e.g.*, Australian dollars) at the current market prices for immediate delivery (*i.e.*, typically within two days); and (2) a foreign exchange forward, which reverses the spot transaction by buying or selling an equivalent [\*\*9] amount of a second currency (*e.g.*, U.S. dollars) on some future maturity date (*e.g.*, 14 days later)."<sup>16</sup>

## *II. The BBSW Rate "Set"*

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Derivatives may be traded on regulated exchanges or over-the-counter. Exchange-traded futures are uniform as to most terms and vary only in particular ways. Over-the-counter derivatives, including forwards, are neither listed nor traded on an exchange and may be customized to suit the particular counterparties involved. *Barron's* at 529.

<sup>10</sup> *Id. at 517.*

<sup>11</sup> [CSX Corp., 562 F. Supp. 2d at 519.](#)

<sup>12</sup> See [trueEX, LLC v. MarkitSERV Ltd., 266 F. Supp. 3d 705, 709 \(S.D.N.Y. 2017\)](#) (defining typical interest rate swap "a transaction between two counterparties in which one stream of future interest payments [on a notional debt obligation] is exchanged for another such stream on the same notional amount" (internal quotation marks and citations omitted)).

<sup>13</sup> *Id.*; see also *Barron's* at 749-50.

<sup>14</sup> [trueEX, LLC, 266 F. Supp. 3d at 709.](#)

<sup>15</sup> AC at ¶ 193; see also *Barron's* at 749.

<sup>16</sup> AC at ¶ 193.

### *A. Prime Bank Bills*

Because BBSW rates are "intended to reflect the observed rate of interest paid on Prime Bank Bills actually traded in the Australian money market," it is necessary next to provide some background on Prime Bank Bills.<sup>17</sup>

#### *1. Bank Bills and Certificates of Deposit*

Banks regularly borrow money on the money market by issuing "bank bills" and [\*144] certificates of deposit ("CDs").<sup>18</sup>

A bank bill is a bill of exchange that requires the issuing bank to pay a specified amount of money — the "face value" of the bill — on a certain maturity date. The number of days between the date on which a bank bill is issued and the date on which it matures is referred to as the "tenor" of the bank bill.<sup>19</sup> Bank bills may be "accepted" or "endorsed" by any bank. When a bank accepts a bank bill, the bill becomes a bank accepted bill (a "BAB") and the accepting bank becomes obligated to pay its face value upon maturity. When a bank endorses a bank bill, it becomes obligated to pay the face value of that bill at maturity if the acceptor is unable to do so.<sup>20</sup>

A CD is a [\*\*10] document evidencing a deposit with the issuing bank for a certain amount of time. Upon maturity, the purchaser receives its deposit plus interest. CDs may be negotiable or nonnegotiable. A negotiable CD (an "NCD") can be sold by the depositor on the secondary market whereas a nonnegotiable CD generally must be held until maturity.<sup>21</sup>

Issuing a bank bill or a CD is economically equivalent to borrowing money. Bank bills are sold at discounts to their face value. The issue price that the bank receives when it issues a bank bill is equivalent to the principal of the loan. Upon maturity, when the bank pays the face value to the purchaser of the bank bill, it effectively repays the loan plus interest, with the interest being equal to the difference between the face value and issue price.<sup>22</sup> Similarly, a bank that issues a CD "borrows" the amount deposited and upon maturity repays the deposited amount plus interest.<sup>23</sup>

#### *2. AFMA and Prime Banks*

<sup>17</sup> *Id.* at ¶ 179.

The money market is the market for short-term debt instruments — that is, a debt obligation due within one year. *Barron's* at 459, 693.

<sup>18</sup> AC at ¶¶ 162, 166.

<sup>19</sup> *Id.* at ¶ 162. For example, if a bank bill matures in 90 days, it has a three-month tenor. *Id.*

<sup>20</sup> *Id.* at ¶ 165.

<sup>21</sup> *Id.* at ¶¶ 166-167.

<sup>22</sup> *Id.* at ¶¶ 163-164.

In so stating, the Court implies nothing concerning the tax treatment of such transactions under U.S. or foreign law.

<sup>23</sup> *Id.* at ¶ 166.

"The Australian Financial Markets Association ('AFMA') is a trade association and the principal Australian financial markets industry group."<sup>24</sup> AFMA, through a subcommittee of the larger organization, facilitates the annual election of Prime Banks.<sup>25</sup> Prime [\*\*11] Banks are "a designated subset of banks operating in Australia whose [b]ank [b]ills and NCDs are recognized as having the highest quality with regard to liquidity, credit and consistency of relative yield."<sup>26</sup> "Prime Bank Bills," the financial instruments that relate to BBSW, are bank bills and NCDs issued by Prime Banks.<sup>27</sup>

#### *B. The Rate "Set"*

As stated above, BBSW is "intended to reflect the observed rate of interest paid on Prime Bank Bills actually traded in the Australian money market."<sup>28</sup>

Until September 27, 2013, BBSW was calculated on a daily basis using submissions from each of fourteen panel banks that, together, comprised the "BBSW Panel." [\*145]<sup>29</sup> The Court understands from the amended complaint that any banks designated as Prime Banks automatically became members of the BBSW Panel<sup>30</sup> and that the remaining members of the Panel were "selected periodically through a private election held at the discretion of the [then] current BBSW Panel."<sup>31</sup>

Each bank on the BBSW Panel submitted to AFMA the observed "mid-rate" — that is, treating the discount on the issue price of a Prime Bank Bill as if it were an interest rate, the midpoint between the rates at which [\*\*12] banks offered to buy and sell Prime Bank Bills — for Prime Bank Bills at each of six tenors traded between 9:55 am and 10:05 am (Sydney Time) (the "Fixing Window").<sup>32</sup>

<sup>24</sup> *Id.* at ¶ 168.

<sup>25</sup> *Id.* at ¶¶ 169-171.

<sup>26</sup> *Id.* at ¶ 171.

<sup>27</sup> *Id.* at ¶ 176.

<sup>28</sup> *Id.* at ¶ 179.

<sup>29</sup> *Id.* at ¶ 179.

As of September 27, 2013, the process of calculating BBSW changed to move away from panel bank submissions and toward an automated process whereby rates were extracted directly from brokers and electronic markets. Evolution of the BBSW Methodology, COUNCIL OF FIN. REGULATORS, <https://www.cfr.gov.au/publications/consultations/evolution-of-the-bbsw-methodology/> (last visited Nov. 20, 2018). Effective January 1, 2017, the AFMA stopped acting as the administrator for BBSW. The Australian Securities Exchange now administers BBSW. Market Data, AFMA, <https://afma.com.au/data> (last visited Nov. 20, 2018).

<sup>30</sup> AC at ¶ 176.

<sup>31</sup> *Id.* at ¶ 179.

According to the amended complaint, "[t]his discretionary election process resulted in an extremely low turnover in panel membership. While there were several BBSW panel elections during the Class Period, but [sic] the composition of the panel did not change." *Id.*

<sup>32</sup> *Id.* at ¶ 182.

The banks derived these mid-rates with the help of trading brokers who facilitated Prime Bank Bill transactions between banks.<sup>33</sup> During the relevant period, ICAP and Tullett Prebon were the only interdealer brokers operating markets for Prime Bank Bills. In order to broker trades, each operated its own electronic system for reporting the prices of Prime Bank Bills and would post bids for and offers of Prime Bank Bills on that system so that they would be visible to participating financial institutions.<sup>34</sup> The BBSW Panel banks were supposed to base the "mid-rates" that they submitted to AFMA on the rates displayed on each of the brokers' electronic trading screens.<sup>35</sup>

Upon receipt of the submissions from the banks on the BBSW Panel, AFMA would calculate BBSW for each tenor by ranking the submissions for Prime Bank Bills of each tenor, eliminating the highest and lowest submissions, and averaging the remaining rates. These averages — that is, the BBSW rates for each tenor — then would be published to financial data providers [\*\*13] including Thomson Reuters and Bloomberg for global distribution.<sup>36</sup>

### *III. BBSW-Based Derivatives*

The Court turns next to a discussion of the six types of financial instruments referred to in the amended complaint that incorporate BBSW as a component of the price of the instrument ("BBSW-Based Derivatives").<sup>37</sup>

- *BBSW-Based Swaps*: As discussed above, a swap is a derivative in which two parties exchange obligations to make a series of payments based on some underlying principal amount for some set period of time. In a BBSW-based swap, at least one of [\*146] the parties' payment obligations references BBSW.<sup>38</sup>
- *BBSW-Based Forward Rate Agreements*: A forward rate agreement ("FRA") is an interest rate forward contract, also known as a single-period swap. In an FRA, the two parties agree to exchange amounts equal to the amount of interest that would be payable on the same notional principal amount, but at different would-be interest rates, on some agreed upon date in the future. In a BBSW-based FRA, at least one party is obligated to pay an amount equal to the would-be interest payment at a floating rate that is tied to BBSW.<sup>39</sup>
- *Chicago Mercantile Exchange Australian Dollar Futures*: A Chicago Mercantile Exchange [\*\*14] ("CME") Australian dollar future is "an exchange-traded BBSW-based derivative that represents an agreement to buy . . . or sell . . . 100,000 Australian dollars in terms of U.S. dollars on some future date."<sup>40</sup> "Prices of CME Australian dollar futures contracts are determined by a formula that incorporates BBSW as one of its terms" — that is, the contractual formula adjusts the price of the Australian dollars for immediate delivery "to account for . . . the amount of interest earned on Australian dollar deposits over the duration of the agreement."<sup>41</sup>

<sup>33</sup> *Id.* at ¶ 177.

<sup>34</sup> *Id.* at ¶¶ 177-178.

<sup>35</sup> *Id.* at ¶ 183.

<sup>36</sup> *Id.* at ¶ 184.

<sup>37</sup> *Id.* at ¶ 185.

<sup>38</sup> *Id.* at ¶ 186.

<sup>39</sup> *Id.* at ¶ 190.

<sup>40</sup> *Id.* at ¶ 191.

<sup>41</sup> *Id.*

Plaintiffs allege also that "there is a statistically significant relationship between a change in BBSW and a change in the prices of CME Australian dollar futures contracts" because BBSW is incorporated into the formula used to price CME Australian dollar futures contracts.

- *Australian Dollar FX Forwards & Swaps:* An Australian dollar FX forward is another type of "agreement to buy or sell Australian dollars on some future date" and can be thought of as "the over-the-counter equivalent of a CME Australian dollar futures contract."<sup>42</sup> These forwards are priced using the same formula that determines the value of CME Australian dollar futures contracts and thus incorporate BBSW as a component of their price. An Australian dollar FX swap is an FX swap using Australian dollars as one of the underlying currencies.<sup>43</sup> As discussed above, an FX forward is one of the two components of an FX swap. An Australian dollar FX swap [\*\*15] that involves an Australian dollar FX forward that in turn incorporates BBSW as a component of price thus will also be dependent at least to some extent on BBSW.
- *90-Day BAB Futures:* A 90-day BAB futures contract is a standardized, exchange-traded contract in which one party agrees to buy from the other party a 90-day Prime Bank Bill with a face value of \$1 million at a specified yield on a certain future date.<sup>44</sup>

#### *IV. The Parties*

##### *A. Plaintiffs*

There are five named plaintiffs in this case, each of whom or which "engaged in U.S.-based transactions for BBSW-Based Derivatives" during the class period. The amended complaint alleges the following:

- [\*147] 1. Richard Dennis ("Dennis") is a natural person who resides in Florida. He entered into a large number of CME Australian dollar futures contracts, including on November 22, 2010, a day on which defendant National Australia Bank ("NAB") allegedly "was involved in manipulating BBSW artificially higher."<sup>45</sup>
- 2. Sonterra Capital Master Fund, Ltd. ("Sonterra") was an investment fund with its principal place of business in New York.<sup>46</sup> Sonterra entered into Australian dollar FX swaps and forwards worth more than \$490 million from within [\*\*16] the United States directly with defendant Morgan Stanley, including as follows:
  - An FX swap on November 5, 2010, a day on which defendant Westpac allegedly engaged in manipulating one-month BBSW artificially lower,<sup>47</sup>
  - An FX forward on June 3, 2011, a day on which defendant Australia and New Zealand Banking Group ("ANZ") allegedly manipulated BBSW artificially higher,<sup>48</sup> and
  - An FX swap on May 14, 2010, two days after defendant Morgan Stanley's involvement in the BBSW rate set was discussed among defendants NAB and Commonwealth Bank of Australia ("CBA").<sup>49</sup>

<sup>42</sup> *Id.* at ¶ 194.

<sup>43</sup> *Id.* at ¶ 193.

<sup>44</sup> *Id.* at ¶¶ 195, 198.

<sup>45</sup> *Id.* at ¶¶ 35, 283-285.

<sup>46</sup> *Id.* at ¶ 36.

<sup>47</sup> *Id.* at ¶¶ 286-288.

<sup>48</sup> *Id.* at ¶¶ 289-291.

<sup>49</sup> *Id.* at ¶¶ 292-294.

3. FrontPoint Asian Event Driven Fund, L.P., ("FrontPoint Event Driven") was an investment fund with its principal place of business in Greenwich, Connecticut.<sup>50</sup> FrontPoint Financial Services Fund, L.P. and FrontPoint Financial Horizons Fund, L.P. both were limited partnerships, from the Cayman Islands and Delaware, respectively, with their principal places of business in Greenwich, Connecticut and investment teams in New York.<sup>51</sup> The amended complaint alleges that each of the three FrontPoint plaintiffs (collectively, the "FrontPoint Plaintiffs") engaged in BBSW-based swap transactions from within the United States directly with defendant **[\*\*17]** Macquarie at artificial prices proximately caused by defendants' manipulative conduct.<sup>52</sup> Specifically, FrontPoint Event Driven entered into:

- A swap governed by an ISDA Master Agreement in which Macquarie agreed to make payments to FrontPoint Event Driven equal to one-month BBSW on certain valuation dates, including on July 1 2010, the same day that defendant Westpac allegedly manipulated the 1-month BBSW lower, and
- A one-month BBSW swap with Macquarie on January 27, 2011, a day when CBA and NAB allegedly manipulated BBSW.<sup>53</sup>

The putative class of plaintiffs is defined as "[a]ll persons or entities that engaged in U.S.-based transactions in financial instruments **[\*148]** that were priced, benchmarked, and/or settled based on BBSW at any time from at least January 1, 2003, through the date on which the effects of Defendants' unlawful conduct ceased."<sup>54</sup>

#### *B. Defendants*

Defendants are horizontal competitors that deal in financial products that are priced, benchmarked, and/or settled by reference to a BBSW rate, including (1) twenty-five banking entities from fifteen different banks, including JPMorgan, BNP Paribas, RBS, UBS, ANZ, CBA, NAB, Westpac, Deutsche Bank, HSBC, Lloyds, Macquarie, Royal **[\*\*18]** Bank of Canada, Morgan Stanley, and Credit Suisse, (2) two entities from ICAP, a UK-based brokerage firm, and (3) two entities from Tullett Prebon, another UK-based brokerage firm.

#### *V. The Amended Complaint*

Plaintiffs' allegations follow largely from the findings of a series of investigations by the Australian Securities and Investments Commission ("ASIC").

In mid-2016, ASIC initiated proceedings against defendants ANZ,<sup>55</sup> Westpac,<sup>56</sup> and NAB<sup>57</sup> in the Federal Court of Australia, accusing each of the three banks of attempting improperly to influence BBSW. In early 2018, ASIC commenced similar proceedings against defendant CBA.<sup>58</sup>

<sup>50</sup> *Id.* at ¶ 38.

<sup>51</sup> *Id.* at ¶¶ 37, 39. The amended complaint alleged that FrontPoint Financial Services Fund, L.P. was a Delaware limited partnership as well, but subsequent court filings indicate that this entity in fact was established in the Cayman Islands. DI 187-1 at 4.

<sup>52</sup> AC at ¶¶ 37-39.

<sup>53</sup> *Id.* at ¶¶ 295-299.

There are no specific examples of transactions provided with respect to either FrontPoint Financial Services Fund, L.P. or FrontPoint Financial Horizons Fund, L.P. The amended complaint alleges also that defendants Macquarie, Deutsche Bank, Royal Bank of Scotland ("RBS"), UBS, and Credit Suisse traded Australian dollar-denominated swaps with the FrontPoint Plaintiffs while BBSW was being manipulated, but does not allege how these Australian dollar-denominated swap were connected to BBSW. *Id.* at ¶ 23.

<sup>54</sup> *Id.* at ¶ 304.

In its original statements of claim against ANZ, Westpac, and NAB, ASIC released a large collection of emails, phone [\*149] calls, and electronic chats among traders from the banks and brokerage firms that ultimately were named as defendants [\*\*19] in this case. Plaintiffs commenced this action on August 16, 2016 alleging that defendants used various means systematically to manipulate BBSW and seeking damages for alleged violations of the Sherman Act, the CEA, and the RICO Act and claims of unjust enrichment and breach of the implied covenant of good faith and fair dealing. Plaintiffs quote directly from ASIC's disclosures throughout the amended complaint.

#### A. Antitrust Claims

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<sup>55</sup> A.S.I.C. v. Australia and New Zealand Banking Group Limited, ACN 005 357 522, Concise Statement at 1 (F.C.A. Mar. 4, 2016) (accusing ANZ of engaging "in market manipulation, unconscionable conduct and other unlawful behaviour which likely influenced the setting of the BBSW in such a way as to advantage ANZ over others with an opposite exposure to the BBSW" on 44 occasions between March 9, 2010 and May 25, 2012).

<sup>56</sup> A.S.I.C. v. Westpac Banking Corporation, ACN 007 457 141, Concise Statement at 1 (F.C.A. Apr. 5, 2016) (accusing Westpac of trading Prime Bank Bills "with the intention and likely effect of influencing the setting of the [BBSW] to its advantage and to the disadvantage of parties to certain products who had an opposite exposure to the BBSW" on 16 occasions between April 6, 2010 and June 6, 2012).

<sup>57</sup> A.S.I.C. v. National Australia Bank Limited, ACN 004 044 937, Concise Statement at 1 (F.C.A. June 7, 2016) (accusing NAB of trading "Prime Bank Bills in the Bank Bill Market with the intention and likely effect of influencing the setting of the [BBSW] to its advantage, or to the advantage of one of its business units, and to the disadvantage of parties to certain products who had an opposite exposure to the BBSW" on 50 occasions between June 8, 2010 and December 24, 2012).

<sup>58</sup> A.S.I.C. v. Commonwealth Bank of Australia, ACN 123 123 124, Concise Statement at 1 (F.C.A. Jan. 30, 2018) (accusing CBA of "trading Prime Bank Bills in the Bank Bill market with the purpose of affecting the yield of Prime Bank Bills and the setting of the [BBSW] to its advantage or to the advantage of one of its business units . . . and to the disadvantage of parties to certain products who had an opposite exposure to the BBSW" between January 31, 2012 and around October 2012 and of knowing or believing "that other Prime Banks, including ANZ, NAB and Westpac, also engaged in this trading practice").

Ultimately, ANZ and NAB each settled with ASIC for a total of \$50 million (Au) in penalties and costs and acknowledged improperly attempting to manipulate BBSW on numerous occasions. Press Release, ASIC, 17-393MR ASIC Accepts Enforceable Undertakings from ANZ and NAB to Address Conduct Relating to BBSW (Nov. 20, 2017), <https://asic.gov.au/about-asic/media-centre/find-a-media-release/2017-releases/17-393mr-a-sic-accepts-enforceable-undertakings-from-anz-and-nab-to-address-conduct-relating-to-bbsw/>. CBA and ASIC also reached an agreement in principle to settle the legal proceeding, pursuant to which CBA agreed to pay \$25 million (Au) and acknowledge its unconscionable conduct related to BBSW on numerous occasions. Press Release, CBA Group, CBA and ASIC Agree In-Principle Settlement Over BBSW (May 9, 2018), <https://www.asx.com.au/asxpdf/20180509/pdf/43twn0khh969y5.pdf>. Each of NAB, ANZ, and CBA agreed also to take certain measures to change its BBSW rate setting practices and to be subject to monitoring by an independent expert. As to Westpac, the Federal Court of Australia concluded, following trial, that Westpac had traded Prime Bank Bills on four occasions with the dominant purpose of influencing BBSW in order to favor its BBSW exposure. Press Release, ASIC, 18-151MR Federal Court Finds Westpac Traded to Affect the BBSW and Engaged in Unconscionable Conduct (May 24, 2018), <https://asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-151mr-f-federal-court-finds-westpac-traded-to-affect-the-bbsw-and-engaged-in-unconscionable-conduct/>. The Court subsequently imposed a penalty of \$3.3 million (Au) on Westpac, which apparently was the maximum applicable penalty. Patrick Durkin, *Westpac Fined \$3.3 million in ASIC BBSW Case: "Clearly Inadequate"*, THE AUSTRALIAN FINANCIAL REVIEW (Nov. 9, 2018, 3:43 P.M., updated at 4:56 P.M.), <https://www.afr.com/business/banking-and-finance/westpac-fined-33-million-in-asic-bbsw-case-20181109-h17pv7>.

In prior years (2012 and 2014), ASIC had accepted enforceable undertaking related to BBSW from defendants UBS, BNP Paribas and RBS. Unlike ASIC's more recent settlements with ANZ, NAB, and CBA, however, none of UBS, BNP Paribas or RBS admitted to any wrongdoing as part of their settlement. See Enforceable Undertaking between The Royal Bank of Scotland plc and ASIC at § 5.9 (July 21, 2014), available at <https://download.asic.gov.au/media/1301287/028492040.pdf>; Enforceable Undertaking between BNP Paribas and ASIC at § 5.5 (Jan. 28, 2014), available at <https://download.asic.gov.au/media/1301239/028399392.pdf>; Enforceable Undertaking between UBS AG and ASIC at § 5.5 (Dec. 23, 2013), available at <https://download.asic.gov.au/media/1301413/028553828.pdf>.

Plaintiffs allege that defendants, in violation of the federal antitrust laws, "entered into a series of agreements designed to create profit or limit liabilities amongst themselves by coordinating the manipulation of BBSW and the prices of BBSW-Based Derivatives, by conspiring to, *inter alia*: (1) engage in manipulative money market transactions during the BBSW Fixing Window; (2) make false BBSW rate submissions that did not reflect actual transaction prices; (3) uneconomically buy or sell money market instruments at a loss to cause artificial derivatives prices; and (4) share proprietary BBSW-[B]ased [D]erivatives information."<sup>59</sup> As a result, plaintiffs allege that they were "overcharged and underpaid in their BBSW-[B]ased [D]erivatives transactions" and "deprived **[\*\*20]** of the ability to accurately price" and "determine **[\*150]** the settlement value of BBSW-[B]ased [D]erivatives by reference to an accurate BBSW."<sup>60</sup>

The allegations concerning the manipulative money market transactions mentioned above merit some explanation. The amended complaint alleges that bank defendants, with the assistance of the broker defendants, rigged BBSW rates by engaging in uneconomic transactions during the Fixing Window to manipulate the supply of Prime Bank Bills in the market. In other words, defendants engaged in Prime Bank Bill transactions during the Fixing Window without regard to whether the transaction would be profitable for the bank but, rather, with the intention of driving BBSW in a direction that would generate profits from their positions in BBSW-Based Derivatives as a whole.<sup>61</sup>

To that end, the bank defendants would calculate their net exposure to the various BBSW rates on a daily basis and then increase the supply of and demand for Prime Bank Bills in the market by selling or buying them in large numbers, respectively, during the Fixing Window.<sup>62</sup> In addition, they issued new Prime Bank Bills during the Fixing Window to further increase supply.<sup>63</sup> As the supply **[\*\*21]** of or demand for Prime Bank Bills increased, their issue prices consequently would decrease or increase, again respectively. As the price of a Prime Bank Bill decreased, its effective interest rate would increase, and vice versa.<sup>64</sup> These strategies thus allowed the banks to push their own BBSW rate submissions, based on the observed mid-rates of Prime Bank Bills during the Fixing Window, higher or lower.

According to the amended complaint, the bank defendants did not engage in this effort unilaterally. Rather, they conferred with one another ahead of these manipulative transactions, "aligning their interests and recruiting co-conspirators to trade in the same direction."<sup>65</sup> In addition, the bank defendants allegedly gave one another advance notice as to whether they planned to buy or sell during the Fixing Window, allowing them "to predict fluctuations in BBSW that were not caused by genuine economic factors and gave Defendants and their co-conspirators an advantage over counterparties who did not have access to this information."<sup>66</sup> To maximize their impact on the market, defendants allegedly transacted with one another ahead of the Fixing Window to concentrate the supply of Prime **[\*\*22]** Bank Bills that would be used to manipulate BBSW.<sup>67</sup> Certain banks even reorganized their trading

<sup>59</sup> AC at ¶ 318.

With respect to the allegations concerning the submission of false Prime Bank Bill mid-rates, *id.* at ¶ 272, in some instances, the individuals responsible for making the mid-rate submissions would accept and even solicit requests for BBSW manipulation from derivatives traders. In others, the banks gave the responsibility for making BBSW submissions to BBSW-Based Derivative traders, thus creating a conflict of interest. *Id.* at ¶¶ 273-275.

<sup>60</sup> *Id.* at ¶ 319.

<sup>61</sup> *Id.* at ¶ 202.

<sup>62</sup> *Id.* at ¶¶ 206-211, 215-217.

<sup>63</sup> *Id.* at ¶¶ 212-213.

<sup>64</sup> *Id.* at ¶ 205.

<sup>65</sup> *Id.* at ¶ 204; see also *id.* at ¶ 221.

<sup>66</sup> *Id.* at ¶ 222; see also *id.* at ¶¶ 223-236.

desks to make specific groups that had a greater exposure to BBSW-Based Derivatives — and thus "a larger incentive to conspire in manipulating the rate" — responsible for the bank's BBSW activities.<sup>68</sup>

The amended complaint alleges that the broker defendants actively participated in the alleged conspiracy to manipulate BBSW by facilitating these manipulative trades for the bank defendants. Banks pre-authorized the broker defendants to trade the banks' caches of Prime Bank Bills until the interest rate landed at the banks' desired [\*151] level.<sup>69</sup> The brokers were instructed to line up trades at artificial prices, rather than find the actual best bid for a Prime Bank Bill transaction, in order to push BBSW in one direction or another.<sup>70</sup> The brokers acted also as conduits of information for the bank defendants. According to the amended complaint, "[t]heir frequent contact with Bank Defendants gave the Broker Defendants a wealth of information that enhanced the cartel's efficacy, including other banks' (a) BBSW rate exposure; (b) Prime Bank Bill stock levels; and (c) plans [\*\*23] for manipulative trading during the Fixing Window."<sup>71</sup> The banks consequently relied on the brokers, who shared knowledge about other banks' positions and preferred BBSW rates with them.<sup>72</sup> The brokers then coordinated with the BBSW traders at the banks, facilitated the banks' desired high-volume trades, and earned "outsized commission payments."<sup>73</sup>

The amended complaint alleges also that defendants used their positions in AFMA "to control the BBSW rule-making process, conceal complaints from other market participants, and perpetuate the BBSW methodology that they used to secretly manipulate BBSW."<sup>74</sup> The bank defendants positioned their BBSW-Based Derivatives traders, and in certain cases, their Prime Bank Bill traders who were generally responsible for manipulating BBSW, on relevant AFMA governance committees to compromise AFMA's oversight of BBSW.<sup>75</sup> They proposed also rules to keep the committees' activities secret, including by making meeting minutes confidential.<sup>76</sup> Finally, they used their control over the committees' decisions to reject proposals to mechanize the BBSW rate set.<sup>77</sup> Plaintiffs allege also that defendants violated the CEA (1) as primary violators, (2) in their capacities [\*\*24] as principals in respect of the manipulation committed by their "agents, representatives, and/or other persons acting for them in the scope of their employment,"<sup>78</sup> and (3) as aiders and abettors,<sup>79</sup> by using their influence to manipulate BBSW as well as the prices of BBSW-Based Derivatives.<sup>80</sup> Defendants violated the CEA by engaging in the manipulative transactions described above and by submitting false BBSW rates in order to "obtain[] hundreds of millions (if not billion) of dollars in illegitimate profits on BBSW-[B]ased [D]erivatives, held by themselves or other co-conspirators, the prices

<sup>67</sup> *Id.* at ¶¶ 238-240.

<sup>68</sup> *Id.* at ¶¶ 269-270.

<sup>69</sup> *Id.* at ¶ 251.

<sup>70</sup> *Id.* at ¶¶ 255-258.

<sup>71</sup> *Id.* at ¶ 248.

<sup>72</sup> *Id.* at ¶¶ 253-254.

<sup>73</sup> *Id.* at ¶ 248.

<sup>74</sup> *Id.* at ¶ 259.

<sup>75</sup> *Id.* at ¶¶ 260-263, 267.

<sup>76</sup> *Id.* at ¶ 264.

<sup>77</sup> *Id.* at ¶ 265.

<sup>78</sup> *Id.* at ¶ 331.

<sup>79</sup> *Id.* at ¶ 334.

<sup>80</sup> *Id.* at ¶ 325.

of which . . . were priced, benchmarked, and/or settled based on BBSW."<sup>81</sup> As a result of defendants' manipulation, the BBSW-Based Derivatives in which plaintiffs and the purported class members transacted allegedly were priced at artificial levels.<sup>82</sup>

#### *B. CEA Claims*

##### **[\*152] C. RICO Act Claims**

Plaintiffs assert also substantive and conspiracy RICO violations. [HN1](#) The RICO Act makes it illegal for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct [\*\*25] of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt"<sup>83</sup> and for "any person to conspire" to so conduct or participate.<sup>84</sup> The "racketeering activity" alleged in the amended complaint is wire fraud, as defined under [18 U.S.C. § 1343](#).

The amended complaint alleges that "[d]efendants' collective association, including through their participation together (i) as members of the AFMA and its subcommittees; (ii) as BBSW Panel Banks; and (iii) acting as a trading bloc and engaging in secret collusive trades in the Prime Bank Bill market to manipulate BBSW, constitutes the RICO enterprise."<sup>85</sup> The members of this enterprise allegedly participated in and conspired to participate in domestic wire fraud by: "(a) transmitting or causing to be transmitted artificial BBSW rates in the U.S. or while crossing U.S. borders through electronic servers located in the United States; (b) transmitting or causing to be transmitted false and artificial BBSW submissions that were relied on by Thomson Reuters and the AFMA in collecting, calculating, publishing, and/or disseminating the daily BBSW rates that were transmitted, published, and disseminated in the United States or while [\*\*26] crossing U.S. borders through electronic servers located in the United States; and (c) transmitting or causing to be transmitted confirmations for fraudulent transactions intended to impact BBSW in the U.S. or while crossing U.S. borders through electronic servers located in the United States."<sup>86</sup> Through this scheme, defendants defrauded participants in the BBSW-Based Derivatives market, depriving plaintiffs and purported class members of "their money relative to their BBSW-[B]ased [D]erivatives contracts."<sup>87</sup>

#### *D. State Law Claims*

Finally, plaintiffs assert two state law claims. First, they assert breach of the implied covenant of good faith and fair dealing against defendants Macquarie Bank, Morgan Stanley, Credit Suisse, Deutsche Bank AG, and UBS. They allege that the FrontPoint Plaintiffs "entered into binding and enforceable contracts with Defendants Macquarie Bank, Credit Suisse, Deutsche Bank AG, and UBS in connection with transactions for BBSW-[B]ased [D]erivatives" and that "Sonterra entered into binding and enforceable contracts with Defendant Morgan Stanley in connection

<sup>81</sup> *Id.* at ¶¶ 326-327.

<sup>82</sup> *Id.*

<sup>83</sup> [18 U.S.C. § 1962\(c\)](#).

<sup>84</sup> *Id.* [§ 1962\(d\)](#).

<sup>85</sup> AC at ¶ 345.

<sup>86</sup> *Id.* at ¶¶ 345-346; see also *id.* at ¶ 348 (listing alleged predicate acts); *id.* at ¶¶ 354-356 (asserting separate cause of action for conspiracy to violate RICO Act).

<sup>87</sup> *Id.* at ¶¶ 351, 357.

with transactions for BBSW-[B]ased [D]erivatives.<sup>88</sup> These defendants allegedly breached the [\*\*27] implied covenant and frustrated the purpose of these contracts by "(a) intentionally manipulating BBSW for the express purpose of generating illicit profits from its BBSW-[B]ased [D]erivatives; and (b) conspiring with other Defendants to manipulate BBSW and the [\*153] prices of BBSW-[B]ased [D]erivatives."<sup>89</sup>

Finally, plaintiffs assert a claim of unjust enrichment against all defendants.<sup>90</sup> They allege that defendants entered into BBSW-Based Derivatives transactions but that, "[r]ather than compete honestly and aggressively with each other, Defendants colluded to manipulate BBSW and the prices of BBSW-[B]ased [D]erivatives to ensure they had an unfair advantage in the marketplace."<sup>91</sup> Defendants' "unlawful and inequitable acts caused Plaintiffs and Class members to suffer injury, lose money, and otherwise be deprived of the benefit of accurate BBSW rates, as well as the ability to accurately price, benchmark and or settle BBSW-[B]ased [D]erivatives transactions."<sup>92</sup> Plaintiffs consequently received less and defendants received more in value in than they would have received absent defendants' wrongful conduct.<sup>93</sup>

## *VI. Defendants' Motions*

All defendants now move to dismiss the amended complaint [\*\*28] pursuant to [Rules 12\(b\)\(1\)](#) and [12\(b\)\(6\) of the Federal Rules of Civil Procedure](#). The Foreign Defendants move also to dismiss the amended complaint pursuant to [Rule 12\(b\)\(2\)](#), and the Venue Defendants move to dismiss plaintiffs' antitrust claims pursuant to [Rule 12\(b\)\(3\)](#).<sup>94</sup>

Defendants' motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim rests on alternative grounds. Defendants challenge plaintiffs' standing under Article III of the Constitution as well as under the Clayton Act, the CEA, and the RICO Act to bring each respective cause of action. In addition, they assert that the amended complaint fails to state a claim upon which relief can be granted under either federal or state law. Finally, defendants argue that each federal cause of action should be dismissed as impermissibly extraterritorial and that all but the RICO claims should be dismissed as untimely.

The Foreign Defendants move also to dismiss each of plaintiffs' claims for lack of personal jurisdiction, and the Venue Defendants move to dismiss plaintiffs' antitrust claims for improper venue. The amended complaint alleges that the Foreign Defendants are subject to personal jurisdiction on a number of bases, including that (1) all Foreign Defendants are subject to general personal jurisdiction in New York, [\*\*29] (2) all Foreign Defendants are subject to specific personal jurisdiction,<sup>95</sup> and (3) certain defendants have consented to personal jurisdiction by registering their New York branches under [New York Banking Law § 200](#) and by entering into [\*154] contracts governed by

<sup>88</sup> *Id.* at ¶ 363.

<sup>89</sup> *Id.* at ¶¶ 365-366.

<sup>90</sup> To the extent required, plaintiffs assert their claims of unjust enrichment and breach of the implied covenant of good faith and fair dealing in the alternative in accordance with [Federal Rule of Civil Procedure 8\(d\)](#). *Id.* at ¶¶ 362, 368.

<sup>91</sup> *Id.* at ¶ 369.

<sup>92</sup> *Id.* at ¶ 370.

<sup>93</sup> *Id.*

<sup>94</sup> Defendants have filed a separate motion to dismiss the claims brought by Sonterra and the FrontPoint Plaintiffs because, defendants allege, these plaintiffs no longer exist and therefore lack standing and legal capacity to sue. DI 207 (notice of motion by letter), DI 213 (brief). The Court will resolve that motion in a separate opinion and does not now reach the issues there raised.

<sup>95</sup> As discussed later in this opinion, the Venue Defendants' motion to dismiss, although characterized as one for improper venue, in substance challenges plaintiffs' antitrust claims for lack of personal jurisdiction, which in turn depends on the Clayton Act's venue provision.

ISDA Master Agreements with the FrontPoint Plaintiffs. In the alternative, plaintiffs argue that they should be permitted to engage in jurisdictional discovery. The Foreign Defendants challenge jurisdiction on each of these grounds.

## *Discussion*

### *I. Standing*

#### *A. Constitutional Standing*

**HN2** [↑] "To establish standing under Article III of the Constitution, a plaintiff must allege '(1) *injury-in-fact*, which is a concrete and particularized harm to a legally protected interest; (2) *causation* in the form of a fairly traceable connection between the asserted injury-in-fact and the alleged actions of the defendant; and (3) *redressability*, or a non-speculative likelihood that the injury can be remedied by the requested relief."<sup>96</sup> Defendants here challenge both injury-in-fact and causation.<sup>97</sup>

##### *1. Injury-In-Fact*

**HN3** [↑] Injury-in-fact is a "low threshold" that "need not be capable of sustaining a valid cause of action."<sup>98</sup> As the Second Circuit recently stated:

"To successfully plead injury-in-fact, a plaintiff must only 'clearly' [\*\*30] . . . allege facts demonstrating,' *Warth v. Seldin*, 422 U.S. 490, 518, 95 S. Ct. 2197, 45 L.Ed.2d 343 (1975) (quoted in *Spokeo*, 136 S. Ct. at 1547), that she had a 'a legally protected interest in a manner that is concrete and particularized' and that a defendant 'inva[ded]' that interest. *Bhatia v. Piedrahita*, 756 F.3d 211, 218 (2d Cir. 2014) (quoting *Lujan*, 504 U.S. at 560, 112 S. Ct. at 2130). . . . Unless an allegation of injury is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy,' *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L.Ed.2d 210 (1998) (quoting *Oneida Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666, 94 S. Ct. 772, 39 L.Ed.2d 73 (1974)), the mere fact that it 'raises a federal question . . . confers power [on a federal court] to decide that it has no merit, as well as to decide that it has.' *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 249, 71 S. Ct. 692, 95 L.Ed. 912 (1951)." <sup>99</sup>

Plaintiffs Dennis, Sonterra, and FrontPoint Event Driven here allege that defendants manipulated BBSW on days when these plaintiffs transacted in BBSW-Based Derivatives, thereby impacting the price of and/or periodic

<sup>96</sup> *Harry v. Total Gas & Power N. Am., Inc.*, 889 F.3d 104, 110 (2d Cir. 2018) (quoting *W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100, 106-07 (2d Cir. 2008) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992))) (emphasis in original).

<sup>97</sup> As discussed above, the Court will write separately on and does not now reach the questions of Sonterra's and the FrontPoint Plaintiffs' standing raised in defendants' subsequent motion to dismiss.

<sup>98</sup> *Ross v. Bank of Am. N.A. (USA)*, 524 F.3d 217, 222 (2d Cir. 2008) (internal quotation marks and citations omitted); see also *Harry*, 889 F.3d at 110-11 ("While the pleading of a cause of action must possess enough heft to show that the pleader is entitled to relief, to plead standing, the pleader need only show that allowing her to raise her claim in federal court would not move so beyond the court's ken as to usurp the power of the political branches." (emphasis in original) (internal quotation marks and citations omitted)).

<sup>99</sup> *Harry*, 889 F.3d at 110-11.

payments due on [\*155] such derivatives and causing these plaintiffs to be either overcharged or underpaid. This alleged injury readily meets the "low threshold" for injury-in-fact. The harm of "pa[ying] too much" or "receiv[ing] too little" is a "classic economic injury-in-fact."<sup>100</sup> In *Gelboim v. Bank of America Corporation*,<sup>101</sup> for example, the Second Circuit considered an Article III [\*31] challenge to plaintiffs who there alleged that they had been "harmed by receiving lower returns on LIBOR-denominated instruments as a result of defendants' manipulation of LIBOR."<sup>102</sup> The Circuit concluded that plaintiffs had "easily satisfied" the injury-in-fact requirement.<sup>103</sup>

Nor is the Court persuaded by defendants' argument that plaintiffs might just as easily have been benefitted by the alleged manipulation. This argument is premature at best. [HN4](#)<sup>104</sup> The mere "fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate standing."<sup>104</sup>

Accordingly, Dennis, Sonterra and FrontPoint Event Driven each sufficiently has alleged injury-in-fact. In contrast, the amended complaint does not allege that either FrontPoint Financial Horizons Fund, L.P. or FrontPoint Financial Services Fund, L.P. engaged in any BBSW-Based Derivatives transactions on days when BBSW allegedly was manipulated. These two named plaintiffs therefore lack constitutional standing and their claims must be dismissed.

## 2. Fairly Traceable

Defendants next argue that the injuries of plaintiffs Dennis and Sonterra cannot fairly be traced to the alleged conspiracy [\*32] because they have not alleged sufficiently that BBSW was a component of the prices of their CME Australian futures contracts and Australian dollar FX swaps and forwards.<sup>105</sup>

But the amended complaint alleges that the "[p]rices of CME Australian dollar futures contracts are determined by a formula that incorporates BBSW as one of its terms."<sup>106</sup> Specifically, the alleged formula "uses BBSW to adjust the 'spot price' of Australian dollars for immediate delivery to account for the 'cost of carry,' i.e., the amount of interest earned on Australian dollar deposits over the duration of the agreement."<sup>107</sup> And plaintiffs' Australian dollar FX forwards are alleged to have been essentially "over-the-counter equivalent[s] of . . . CME Australian dollar futures contract[s]" that "are priced using the same formula that determines the value of CME Australian dollar futures contracts."<sup>108</sup> Finally, these Australian dollar FX forwards are one of the two components [\*156] of an Australian dollar FX swap.<sup>109</sup> These allegations, the truth of which this Court is bound to assume at this motion to dismiss

<sup>100</sup> [Alaska Elec. Pension Fund v. Bank of Am. Corp., 175 F. Supp. 3d 44, 53 \(S.D.N.Y. 2016\)](#) (internal quotation marks omitted).

<sup>101</sup> [823 F.3d 759 \(2d Cir. 2016\)](#).

<sup>102</sup> [Id. at 770](#).

<sup>103</sup> [Id.](#)

<sup>104</sup> [Ross, 524 F.3d at 222](#) (internal quotation marks and citation omitted); see also [Alaska Elec. Pension Fund, 175 F. Supp. 3d at 53](#) ("At this stage, the appropriate question is whether the alleged manipulation of ISDAfix plausibly caused each Plaintiff to suffer some loss under the terms of some derivative at some point during the years the conspiracy allegedly took place." (emphasis in original)).

<sup>105</sup> DI 134 at 10-12.

<sup>106</sup> AC at ¶ 191.

<sup>107</sup> [Id.](#); see also [id. at ¶ 192](#) (alleging statistically significant relationship between changes in BBSW and changes in the prices of CME Australian dollar futures contracts).

<sup>108</sup> [Id. at ¶ 194](#).

<sup>109</sup> [Id. at ¶ 193](#).

stage, are sufficient to make out a causal connection between defendants' alleged manipulation of BBSW and Dennis' and Sonterra's [\*\*33] diminished returns on their BBSW-Based Derivatives.<sup>110</sup>

Defendants' various arguments that a causal nexus between the alleged manipulation and each of plaintiffs' specific transactions is implausible fail as well.<sup>111</sup> [HN5](#) As an initial matter, the standard for Article III standing is not whether such the alleged injury is *plausibly* fairly traceable, but, rather, whether the injury is *possibly* fairly traceable.<sup>112</sup> Moreover, the Court declines at this early stage of litigation to make assumptions about how enduring or short-lived the effect of the alleged misconduct might have been on a given BBSW-Based Derivative.

Finally, the dates identified in the amended complaint in any event "do not purport to be the universe of defendants' communications and misconduct"<sup>113</sup> or of plaintiffs' transactions in BBSW-Based Derivatives. In *John v. Whole Foods Market Group, Inc.*,<sup>114</sup> the Second Circuit concluded that the plaintiff, a regular purchaser of certain items from Whole Foods Market, had Article III standing to sue Whole Foods in light of a report that Whole Foods had "systematically" and [\*\*34] "routinely" overcharged for those products during the general period in which the plaintiff had made his purchases.<sup>115</sup> Although *Whole Foods* does not directly control, it nonetheless weighs in favor of plaintiffs, who have asserted here that defendants engaged in systematic manipulation of BBSW and that the trades alleged in the amended complaint are only some examples of numerous transactions entered into by plaintiffs.

#### *B. Standing to Represent Purported Class*

Defendants argue also that plaintiffs "lack standing to assert claims regarding FRAs and BAB Futures because [p]laintiffs do not claim to have transacted in [\*157] those products."<sup>116</sup>

[HN6](#) "[I]n a putative class action, a plaintiff has class standing if he plausibly alleges (1) that he personally has suffered some actual . . . injury as a result of the putatively illegal conduct of the defendant, and (2) that such conduct implicates the same set of concerns as the conduct alleged to have caused injury to other members of the putative class by the same defendants."<sup>117</sup> If both of these requirements are met, "the named plaintiff's litigation

<sup>110</sup> See, e.g., *Sullivan v. Barclays PLC*, No. 13-cv-2811 (PKC), 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \*9 (S.D.N.Y. Feb. 21, 2017) ("If defendants are correct and the Complaint inaccurately describes the Euribor's role in these transactions, the issue could likely be resolved through a summary judgment motion at the proper juncture."); see also *Gelboim*, 823 F.3d at 776 (rejecting similar argument in context of antitrust injury because that type of disputed factual issue "must be reserved for the proof stage").

<sup>111</sup> DI 134 at 11-13 (citing, among other authorities, *In re LIBOR-Based Fin. Instruments Antitrust Litig. ("LIBOR II")*, 962 F. Supp. 2d 606, 622 (S.D.N.Y. 2013)).

<sup>112</sup> See *Harry*, 889 F.3d at 110-11 (comparing pleading standards for stating cause of action and constitutional standing).

<sup>113</sup> *Sullivan*, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \*11; see also *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 74 F. Supp. 3d 581, 595 (S.D.N.Y. 2015) (rejecting argument that a complaint need "allege facts that, if proven, would establish . . . actual harm in real trades in specific currencies on particular days" (emphasis omitted)).

<sup>114</sup> 858 F.3d 732 (2d Cir. 2017).

<sup>115</sup> *Id. at 737-38*; see also *id.* ("Taking these allegations as true and drawing all reasonable inferences in his favor, it is plausible that John overpaid for at least one product. John's complaint thus satisfies the 'low threshold' required to plead injury in fact." (citation omitted)).

<sup>116</sup> DI 134 at 9-10.

incentives are sufficiently aligned with those of the absent class members that the named plaintiff [\*\*35] may properly assert claims on their behalf.<sup>118</sup> As discussed above, plaintiffs Dennis, Sonterra, and Front Point Event Driven satisfy the first prong of this test. The Court now considers whether they satisfy the second.

In *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*,<sup>119</sup> the Second Circuit considered a purported class action brought by holders of mortgage-backed certificates issued in a collection of offerings. The action, filed against the issuing and underwriting financial institutions, alleged that the registration statements issued in the offerings for the certificates had contained "similar if not identical" false or misleading information in violation of the *Securities Act of 1933*.<sup>120</sup> The question there was whether the named plaintiffs had standing to litigate claims with respect to certificates from offerings in which the named plaintiffs had not purchased certificates and with respect to certificates from different tranches of the offerings in which the named plaintiffs had purchased certificates.<sup>121</sup>

The Circuit first considered the hypothetical scenario of a claim brought by a purchaser of debt asserting that the relevant offering documents contained a misrepresentation about [\*\*36] the issuing company's impending insolvency and that the same misrepresentation appeared in the offering documents for each of a series of debt offerings by the company. The court noted that such a claim "would raise a 'set of concerns' nearly identical to that of a purchaser from another offering: the misrepresentation would infect the debt issued from every offering in like manner, given that all of it is backed by the same company whose solvency has been called into question."<sup>122</sup> In comparison, the certificates at issue had been backed by distinct sets of loans issued by distinct set of originators. The Circuit concluded that "differences in the identity of the originators backing the Certificates matter[ed] for the purposes of assessing whether [the alleged] claims raise[d] the same set of concerns" because the alleged misstatements concerned origination guidelines.<sup>123</sup> This meant that the proof of any given injury alleged "would center on whether the particular originators of the loans backing the particular Offering from which a Certificate-holder purchased a security had in fact abandoned its underwriting guidelines, [\*158] rendering defendants' Offering Documents false or misleading."<sup>124</sup> Accordingly, [\*\*37] the Circuit concluded that "to the extent certain Offerings were backed by loans originated by originators common to those backing the [offerings from which the named plaintiffs had purchased certificates], NECA's claims raise[d] a sufficiently similar set of concerns to permit it to purport to represent Certificate-holders from those Offerings."<sup>125</sup> The Circuit concluded also that the differences among the various tranches in a given offering were of no moment to class standing because the difference in priority with respect to receiving cash flows "[did] not alter the fact that all of the Certificate-holders' cash flows

<sup>117</sup> *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 162 (2d Cir. 2012) (internal quotation marks and citations omitted).

<sup>118</sup> *Ret. Bd. of the Policemen's Annuity & Benefit Fund of the City of Chic.*, 775 F.3d at 161.

<sup>119</sup> 693 F.3d 145 (2d Cir. 2012).

<sup>120</sup> *Id. at 149, 162*.

<sup>121</sup> The varying tranches in the offering dictated the payment priority to the various holders of the certificates.

<sup>122</sup> *Id. at 163*.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id. at 164*; see also *Ret. Bd. of the Policemen's Annuity & Benefit Fund of the City of Chic.*, 775 F.3d at 161 (explaining that in *NECA-IBEW*, "the named plaintiff had the right incentives, largely because the proof contemplated for all of the claims would be sufficiently similar").

within any such Offering or Group derive[d] from loans originated by some of the same originators," but rather impacted only the relative damages that class members would receive.<sup>126</sup>

In a subsequent case involving residential mortgage-based securities ("RMBS"),<sup>127</sup> the Second Circuit did not permit a named plaintiff to assert "breach-of-duty" claims against the trustee of a RMBS trust in which the named plaintiff did not invest. There, the defendant had served as the trustee for 530 different RMBS trusts, and the named plaintiff had invested **[\*\*38]** in a subset of those trusts.<sup>128</sup> The originator of the mortgage loans underlying the securities in the trust had made several representations and warranties in respect of the credit quality and underwriting of the loans. According to plaintiffs, however, it had failed to adhere to prudent underwriting standards and thus breached several of the representations and warranties. These breaches allegedly had resulted in significant losses to the holders because the underlying loans had defaulted at higher than expected rates.<sup>129</sup> Plaintiffs consequently sued defendant, as trustee, for breach of its fiduciary duties of care and loyalty, breach of contract, breach of the covenant of good faith, and breach of the *Trust Indenture Act*.

The Circuit held that the named plaintiff did not have standing to assert claims on behalf of the purported class members who invested in RMBS trusts in which the named plaintiff had not invested because the defendant's alleged misconduct — which included failure to notify certificate holders of the originator's breaches of the governing agreements, failure to force the originator to repurchase defaulted mortgage loans, and failure to ensure that the mortgage loans **[\*\*39]** held by the trusts were correctly documented — had to be "proved loan-by-loan and trust-by-trust."<sup>130</sup>

**[\*159]** Plaintiffs here allege that defendants conspired to and did manipulate BBSW on a systematic basis, which manipulation resulted in artificial pricing of BBSW-Based Derivatives across the globe, including in the United States. The proof required for plaintiffs to prevail on their federal claims — that is, their claims under the Clayton Act, the CEA and the RICO Act — will be largely identical because, as described above, the allegations underlying these claims are that defendants engaged in manipulative Prime Bank Bill transactions and submitted false BBSW rates. That plaintiffs and the purported class members transacted in different derivatives is relevant only to the question of damages because plaintiffs have sufficiently alleged that BBSW was a component of the prices of the derivatives in which they transacted as well as of the FRAs described in the amended complaint.<sup>131</sup> Although 90-day BAB futures contracts stand on somewhat different footing because they are priced by reference to 90-day Prime Bank Bills, rather than BBSW, the proof needed to prevail on claims with **[\*\*40]** respect to those derivatives — i.e., that defendants manipulated BBSW by manipulating the prices of Prime Bank Bills — largely will overlap as well.

<sup>126</sup> *Id.*; see also *id. at 164-65* ("Their ultimate damages will of course vary depending on their level of subordination, but 'it is well-established that the fact that damages may have to be ascertained on an individual basis is not sufficient to defeat class certification' under *Rule 23(a)*, let alone class standing." (quoting *Seijas v. Republic of Argentina*, 606 F.3d 53, 58 (2d Cir. 2010))).

<sup>127</sup> *Ret. Bd. of the Policemen's Annuity & Benefit Fund of the City of Chic. v. Bank of N.Y. Mellon*, 775 F.3d at 154 (2d Cir. 2014).

<sup>128</sup> *Id. at 156*.

<sup>129</sup> *Id.*

<sup>130</sup> *Id. at 162*; see also *id.* (distinguishing NECA-IBEW, in which the defendant had been accused of making the same misstatements as to origination across multiple offerings).

<sup>131</sup> See, e.g., *Sullivan*, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \*8 (concluding plaintiffs alleging identical federal claims in respect of alleged Euribor manipulation had class standing to assert claims on behalf of plaintiffs that transacted in FRAs because "any harm suffered by a party to an FRA as a result of the Euribor's manipulation would have been caused by the identical misconduct of the identical parties" and "[l]iability would turn on the same proof as to the allegedly false Euribor submissions").

The remaining state law claims, however, stand apart from the federal claims. Unlike the federal claims, in respect of which a plaintiff's specific relationship with defendants is relevant only or substantially to damages, a plaintiff's connection to the defendants is central to the question of liability in the case of claims of breach of the implied covenant of good faith and fair dealing and unjust enrichment.

**HN7** The promise of good faith and fair dealing is treated as an implied provision in every contract that "is breached when a party acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement."<sup>132</sup> "In order to find a breach of the implied covenant, a party's action must 'directly violate an obligation that may be presumed to have been intended by the parties.'"<sup>133</sup>

The terms of contracts for BBSW-Based Derivatives that are traded over the counter — that is, BBSW-based swaps, BBSW-based FRAs, and Australian dollar <sup>\*\*41</sup> FX forwards and swaps — are negotiated and customized to the particular investor. As the terms across these contracts vary, so too do the "obligation[s] that may be presumed to have been intended by the <sup>\*160</sup> parties."<sup>134</sup> Accordingly, liability for the breach of the implied covenant of good faith and fair dealing with respect to such contracts may be determined only on a contract-by-contract basis. Plaintiffs therefore do not have standing to represent absent purported class members who entered into BBSW-based FRAs because plaintiffs do not allege that they themselves entered into such derivatives.

The analysis is somewhat different with respect to the exchange-traded BBSW-Based Derivatives — that is, CME Australian dollar futures and 90-day BAB futures — but the result is the same. The contract terms for a given type of exchange-traded future are almost entirely standardized. They vary only with respect to the maturity date and price of the derivative, and the prices in turn are determined by a set formula based in part either on a 90-day Prime Bank Bill or a BBSW rate.<sup>135</sup> Accordingly, the manipulative conduct alleged in the amended complaint likely would "infect" these derivatives contracts <sup>\*\*42</sup> "in like manner"<sup>136</sup> and, although the question is not now before the Court, a strong case could be made that a plaintiff's burden to sustain a claim for breach of the implied covenant of good faith and fair dealing as to such a contract would be largely identical to anyone else who entered into a contract for the same type of future. The only meaningful differences would be with respect to the damages suffered, if any, by a given contract holder.

Here, however, defendants challenge plaintiffs' class standing to represent purported class members who traded 90-day BAB futures. None of the named plaintiffs alleges that it traded 90-day BAB futures. Accordingly, plaintiffs' claims for breach of the implied covenant will not raise a "sufficiently similar set of concerns"<sup>137</sup> to those of the would-be class members. Plaintiffs therefore lack class standing as to purported class members who entered into contracts for 90-day BAB futures.

<sup>132</sup> *Skillgames, LLC v. Brody*, 1 A.D.3d 247, 252, 767 N.Y.S.2d 418, 423 (1st Dept. 2003) (internal quotation marks omitted) (citing *Rowe v. Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 68, 385 N.E.2d 566, 412 N.Y.S.2d 827 (1978); *Jaffe v. Paramount Commc'n Inc.*, 222 A.D.2d 17, 22-23, 644 N.Y.S.2d 43, 47 (1st Dept. 1996)); see also *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389, 663 N.E.2d 289, 639 N.Y.S.2d 977 (1995) ("Encompassed within the implied obligation of each promisor to exercise good faith are any promises which a reasonable person in the position of the promisee would be justified in understanding were included." (internal quotation marks and citations omitted)).

<sup>133</sup> *Gaia House Mezz LLC v. State Street Bank & Trust Co.*, 720 F.3d 84, 93 (2d Cir. 2013) (quoting *Thyroff v. Nationwide Mut. Ins. Co.*, 460 F.3d 400, 407-08 (2d Cir. 2006)).

<sup>134</sup> *Id.*

<sup>135</sup> AC at ¶¶ 191, 195-199.

<sup>136</sup> *NECA-IBEW*, 693 F.3d at 163.

<sup>137</sup> *Id. at 164*.

The analysis is similar with respect to plaintiffs' claims of unjust enrichment. [HN8](#)<sup>138</sup> In order to sustain an unjust enrichment claim under New York law, "[a] plaintiff must show 'that (1) the other party was enriched, (2) at that party's expense, and (3) that "it is against [\*\*43] equity and good conscience to permit [the other party] to retain what is sought to be recovered.'"<sup>139</sup> [HN9](#)<sup>140</sup> A plaintiff cannot support a claim of unjust enrichment against a defendant without alleging some kind of connection to that defendant.<sup>141</sup> Liability therefore will depend on each plaintiff's relationship to a given defendant. Where a relationship is governed by a customized, negotiated contract for a derivative traded over the counter, that relationship will change from contract to contract. Where, however, a relationship is governed by a standardized contract for an exchange-traded derivative such as a future, the [\[\\*161\]](#) concerns raised in respect of one such contract will be largely identical to the concerns raised in respect of any other such contracts. Nonetheless, none of the named plaintiffs traded in the type of contract at issue here, which is a 90-day BAB future.

The Court concludes that plaintiffs do not have class standing to assert their state law claims for breach of the implied covenant of good faith and fair dealing or unjust enrichment on behalf of absent plaintiffs who traded in BBSW-based FRAs or 90-day BAB futures. The contracts related to BBSW-based FRAs will differ across [\[\\*44\]](#) the holders of such contracts. And although the proof required for holders of 90-day BAB futures to prevail on claims for either breach of the implied covenant of good faith and fair dealing or unjust enrichment likely would be largely identical across such holders, none of the plaintiffs here falls into that group. Accordingly, plaintiffs have standing to assert their federal claims, but not their state law claims, on behalf of the purported class members who traded in BBSW-based FRAs and 90-day BAB futures.

## II. Pleading Standard on [Rule 12\(b\)\(6\)](#) Motion

[HN11](#)<sup>142</sup> To survive a motion to dismiss under [Rule 12\(b\)\(6\)](#), a plaintiff must allege "sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'"<sup>143</sup> A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."<sup>144</sup> The Court generally "accept[s] all factual allegations in the complaint as true and draw[s] all reasonable inferences in the plaintiffs' favor" when considering a motion to dismiss.<sup>145</sup>

[HN12](#)<sup>146</sup> To the extent a claim sounds in fraud, however, the complaint is subject to the heightened pleading standard of [Rule 9\(b\)](#) and "must state [\[\\*45\]](#) with particularity the circumstances constituting fraud."<sup>147</sup> Although "the fraud alleged must be stated with particularity . . . the requisite intent of the alleged [perpetrator] of the fraud need not be alleged with great specificity."<sup>148</sup> Nonetheless, a complaint "must allege facts that give rise to a strong

<sup>138</sup> [Mandarin Trading Ltd. v. Wildenstein](#), 16 N.Y.3d 173, 182, 944 N.E.2d 1104, 919 N.Y.S.2d 465 (2011) (quoting [Citibank, N.A. v. Walker](#), 12 A.D.3d 480, 481, 787 N.Y.S.2d 48 (2d Dept. 2004); [Baron v. Pfizer, Inc.](#), 42 A.D.3d 627, 629-30, 840 N.Y.S.2d 445 (3d Dept. 2007)) (internal quotation marks omitted).

<sup>139</sup> [HN10](#)<sup>149</sup> *Id.* ("Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated." (citing [Sperry v. Crompton Corp.](#), 8 N.Y.3d 204, 215, 863 N.E.2d 1012, 831 N.Y.S.2d 760 (2007)).

<sup>140</sup> [Ashcroft v. Iqbal](#), 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

<sup>141</sup> *Id.*

<sup>142</sup> [Rombach v. Chang](#), 355 F.3d 164, 169 (2d Cir. 2004) (quoting [Ganino v. Citizens Utils. Co.](#), 228 F.3d 154, 161 (2d Cir. 2000)) (internal quotation marks omitted).

<sup>143</sup> [Fed. R. Civ. P. 9\(b\)](#).

inference of fraudulent intent,"<sup>145</sup> which "may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness."<sup>146</sup>

### *III. Antitrust Claims*

Plaintiffs' first cause of action is a claim against all defendants under [Section 4](#) of the Clayton Act asserting a violation of [HN13](#) [Section 1](#) of the Sherman Act, which provides, in relevant part:

**[\*162]** "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."<sup>147</sup>

[HN14](#) [Section 4](#) of the Clayton Act, which sets forth a private right of action to bring a Sherman Act claim for damages, provides, in relevant part:

"[A]ny person who shall be injured in his business or property by reason of anything forbidden in the **[\*\*46]** antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."<sup>148</sup>

#### *A. Antitrust Standing*

Defendants first challenge plaintiffs' ability to bring their federal antitrust claims under the concept of "antitrust standing" — that is whether plaintiffs have pled "enough facts to make it plausible that they did indeed suffer the sort of injury that would entitle them to relief"<sup>149</sup> under [Section 4](#) of the Clayton Act.

[HN15](#) [Section 4](#) "It is a well-established principle that, while the United States is authorized to sue anyone violating the federal antitrust laws, a private plaintiff must demonstrate 'standing.'"<sup>150</sup> "Like constitutional standing, antitrust standing is a threshold inquiry resolved at the pleading stage."<sup>151</sup> In determining whether a plaintiff has antitrust standing, the Court "assume[s] the existence' of an antitrust violation"<sup>152</sup> and considers two questions:

- (1) "[H]ave [plaintiffs] suffered antitrust injury?"
- (2) "[A]re [plaintiffs] efficient enforcers of the antitrust **[\*\*47]** laws?"<sup>153</sup>

<sup>144</sup> *Amusement Indus., Inc. v. Stern*, 693 F. Supp. 2d 327, 338 (S.D.N.Y. 2010) (quoting *Chill v. Gen. Elec. Co.*, 101 F.3d 263, 267 (2d Cir. 1996)) (internal quotation marks omitted).

<sup>145</sup> *Id.* (internal quotation marks and citations omitted).

<sup>146</sup> *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290-91 (2d Cir. 2006) (internal quotation marks and citations omitted).

<sup>147</sup> [15 U.S.C. § 1](#).

<sup>148</sup> *Id.* [§ 15\(a\)](#).

<sup>149</sup> *Harry*, 889 F.3d at 110 (citing *Ashcroft*, 556 U.S. at 678).

<sup>150</sup> *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 436 (2d Cir. 2005).

<sup>151</sup> *Gelboim*, 823 F.3d at 770 (citing *Gatt Commc'n v. PMC Assocs., L.L.C.*, 711 F.3d 68, 75 (2d Cir. 2013)).

<sup>152</sup> *Harry*, 889 F.3d at 115 (quoting *Gelboim*, 823 F.3d at 770).

## 1. Antitrust Injury

**HN16** [↑] "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation."<sup>154</sup> Rather, "[a]n antitrust injury 'should reflect the anticompetitive effect either of the [antitrust] violation or of anticompetitive acts made possible by the violation.'"<sup>155</sup> Accordingly, "[i]t is not enough for the actual injury to be 'causally linked' to the asserted violation."<sup>156</sup> Rather, "plaintiffs must demonstrate that they themselves have sustained an '*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent [**\*163**] and that flows from that which makes defendants' acts unlawful."<sup>157</sup>

This inquiry involves three steps:

"[F]irst the plaintiff must 'identify the practice complained of and the reasons such a practice is or might be anticompetitive'; then the court must 'identify the actual injury the plaintiff alleges' by 'look[ing] to the ways in which the plaintiff claims it is in a worse position as a consequence of defendant's conduct'; and finally, the court must 'compare the anticompetitive effect of the specific practice at issue to the actual injury the plaintiff alleges.'" **[\*\*48]**<sup>158</sup>

As to the first question, plaintiffs here assert that defendants, in coordination with one another, manipulated BBSW and the prices of BBSW-Based Derivatives by conspiring to engage in manipulative and uneconomic money market transactions during the Fixing Window, by sharing proprietary BBSW-Based Derivative information with one another, and by making false BBSW rate submissions.<sup>159</sup> That is sufficient.

As to the second, plaintiffs allege that they were "overcharged and underpaid in their BBSW-[B]ased [D]erivatives transactions" and were "deprived of the ability to accurately price BBSW-[B]ased [D]erivatives entered into during the Class Period and to accurately determine the settlement value of BBSW-[B]ased [D]erivatives by reference to an accurate BBSW."<sup>160</sup> They consequently received "less in value" on their BBSW-Based Derivatives transactions than they otherwise would have.<sup>161</sup> That too is sufficient.

The third query is resolved quickly in favor of plaintiffs. **HN17** [↑] "Generally, when consumers, because of a conspiracy, must pay prices that no longer reflect ordinary market conditions, they suffer 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes **[\*\*49]** defendants' acts unlawful."<sup>162</sup>

<sup>153</sup> [Gelboim, 823 F.3d at 772](#); accord [Daniel, 428 F.3d at 436-38](#).

<sup>154</sup> [Gelboim, 823 F.3d at 772](#) (quoting [Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 534, 103 S. Ct. 897, 74 L. Ed. 2d 723 \(1983\)](#) (quoting [Hawaii v. Standard Oil Co., 405 U.S. 251, 263 n. 14, 92 S. Ct. 885, 31 L. Ed. 2d 184 \(1972\)](#))) (internal quotation marks omitted).

<sup>155</sup> *Id.* (quoting [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 \(1977\)](#)).

<sup>156</sup> [Gatt Commc'nns, Inc., 711 F.3d at 76](#) (internal quotation marks and citations omitted).

<sup>157</sup> [Daniel, 428 F.3d at 438](#) (quoting [Brunswick Corp., 429 U.S. at 489](#)) (emphasis in original).

<sup>158</sup> [Harry, 889 F.3d at 115](#) (quoting [Gatt Commc'nns, Inc., 711 F.3d at 76](#)).

<sup>159</sup> AC at ¶ 318.

<sup>160</sup> *Id.* at ¶ 319.

<sup>161</sup> *Id.*

<sup>162</sup> [Gelboim, 823 F.3d at 772](#) (quoting [Brunswick Corp., 429 U.S. at 489](#)).

The Second Circuit's decision in *Gelboim* is instructive. The Circuit there concluded that plaintiffs — consumers in the market for various LIBOR-based derivatives — sufficiently alleged antitrust injury when they claimed that they had received lower rates of return on their derivatives as a result of defendants' collusion to depress LIBOR.<sup>163</sup> Because defendants' alleged conduct constituted a horizontal price fixing scheme — that is, a *per se* violation of the federal antitrust laws — the plaintiffs did not need to make a "showing of actual adverse effect in the marketplace."<sup>164</sup> In alleging that they, as consumers in the marketplace for financial instruments the prices of which had been influenced by defendants' alleged conspiracy, had received less for their money than they would have absent defendants' conduct, they had sufficiently alleged antitrust injury.<sup>165</sup>

Unlike the complaint in *Gelboim*, the allegations in the amended complaint here do not assert that BBSW was consistently [\*164] moved in the same direction by defendants. But this is of no import with respect to the issue of antitrust standing. Plaintiffs allege that defendants each made a regular practice of determining [\*\*50] the optimal BBSW rate that would maximize their profits on BBSW-Based Derivatives and that they then worked together to move BBSW to that spot. This alleged coordinated effort is no less an example of horizontal price fixing than the alleged LIBOR scheme in *Gelboim*. Plaintiffs Dennis, Sonterra, and FrontPoint Event Driven each has alleged that it was overcharged and underpaid on its BBSW-Based Derivatives transactions as a result of a *per se* violation of the Sherman Act. They have plausibly alleged antitrust injury.

## 2. Efficient Enforcers

The Court now turns to consider whether plaintiffs Dennis, Sonterra, and FrontPoint Event Driven would be efficient enforcers of the antitrust laws.

### HN18 [+] In the Second Circuit:

"The efficient enforcer inquiry turns on: (1) whether the violation was a direct or remote cause of the injury; (2) whether there is an identifiable class of other persons whose self-interest would normally lead them to sue for the violation; (3) whether the injury was speculative; and (4) whether there is a risk that other plaintiffs would be entitled to recover duplicative damages or that damages would be difficult to apportion among possible victims of the antitrust injury."<sup>166</sup>

#### (a) Causation [\*\*51]

The first factor to consider is the "'directness or indirectness of the asserted injury,' which requires evaluation of the 'chain of causation' linking [plaintiffs'] asserted injury and the Banks' alleged price-fixing."<sup>167</sup>

Plaintiffs' claims, with rare exceptions, are different from the typical price fixing case in which defendants are sellers that collectively agree on an input to the price and plaintiffs are buyers from one or members of the conspiracy. The amended complaint, for the most part, does not allege that plaintiffs transacted directly with defendants. This implicates the concept of umbrella standing — which typically is relevant "when a cartel controls only part of a

<sup>163</sup> [Id. at 771-75.](#)

<sup>164</sup> [Id. at 776.](#)

<sup>165</sup> [Id.](#)

<sup>166</sup> [Id. at 772](#) (citing *Port Dock & Stone Corp. v. Oldcastle, Northeast, Inc.*, 507 F.3d 117, 121-22 (2d Cir. 2007)).

<sup>167</sup> [Id. at 778](#) (quoting *Associated Gen. Contractors*, 459 U.S. at 540).

market" and a plaintiff-consumer that dealt only with a non-cartel member "alleges that he sustained injury by virtue of the cartel's raising of prices in the market as a whole."<sup>168</sup>

The Second Circuit considered umbrella standing in *Gelboim*, stating, in relevant part:

"At first glance, here there appears to be no difference in the injury alleged by those who dealt in LIBOR-denominated instruments, whether their transactions were conducted directly or indirectly with the Banks. At the same time, however, if the Banks [\*\*52] control only a small percentage of the ultimate identified market, this case may raise the . . . concern of damages disproportionate to wrongdoing . . . Requiring the Banks to pay treble damages to every plaintiff who ended up on the wrong side of an independent LIBOR-denominated derivative swap would, if appellants' allegations were proved at trial, not only bankrupt 16 of the world's most important financial institutions, but also vastly [\*165] extend the potential scope of antitrust liability in myriad markets where derivative instruments have proliferated."<sup>169</sup>

The Court is not persuaded that concerns related to umbrella standing need bear on this case. The amended complaint does not allege that a group of conspirators, without controlling the entire market for a commodity, fixed prices for that commodity. In those circumstances, the question of causation is whether the conspirators that did not transact directly with a plaintiff nonetheless affected the price of the commodity in which the plaintiff transacted. In contrast, the conspiracy alleged here involves essentially all of the entities that contribute to setting BBSW and asserts that these banks and brokers affected the price of all [\*\*53] derivatives priced or benchmarked by reference to BBSW.<sup>170</sup>

Plaintiffs allege that they engaged in transactions for such derivatives and that their returns were lower because of defendants' anticompetitive conduct. The Court has rejected already defendants' arguments that plaintiffs have failed to allege a plausible link between BBSW and the derivatives in which plaintiffs transacted. Nor do plaintiffs need to allege plausibly that their losses were not offset by gains on other BBSW-linked trades.<sup>171</sup> These allegations amount to a plausible and sufficiently direct causal link between plaintiffs' injuries and defendants' alleged misconduct. The question of with whom plaintiffs transacted directly is irrelevant.

#### (b) More Direct Victims

**HN19**[] The second factor to be considered in the efficient enforcer analysis is "the 'existence of more direct victims of the alleged conspiracy.'"<sup>172</sup>

<sup>168</sup> *Id.*

<sup>169</sup> *Id. at 779* (citations omitted).

<sup>170</sup> See *In re London Silver Fixing, Ltd., Antitrust Litig.*, 213 F. Supp. 3d 530, 555 (S.D.N.Y. 2016) (reaching this conclusion in context of plaintiffs who alleged that "the 'Fix Price determines the price of the entire silver market' such that . . . there is little room for any interfering price impact due to the actions of non-culpable entities or exogenous market forces"); see *id.* ("In other words, Defendants are not merely alleged to have conspired to alter prices within a particular segment or region of the market but rather are alleged to have manipulated the benchmark price, upon which all market participants (buyers and sellers alike) relied in trading silver investments across a variety of markets.").

<sup>171</sup> Cf. *Alaska Elec. Pension Fund*, 175 F. Supp. 3d at 53 (rejecting this argument in context of constitutional standing).

<sup>172</sup> *Gelboim*, 823 F.3d at 778 **HN20**[] (quoting *Associated Gen. Contractors*, 459 U.S. at 545); see *id. at 779* ("[N]ot every victim of an antitrust violation needs to be compensated under the antitrust laws in order for the antitrust laws to be efficiently enforced.").

Concerns with respect to indirect purchasers prevailed in *Illinois Brick Co. v. Illinois*.<sup>173</sup> The Supreme Court there held that the State of Illinois could not recover damages in an antitrust action against manufacturers of concrete block that had sold the block to masonry contractors, which in turn sold the block [\*\*54] to general contractors from whom the State purchased masonry structures containing the concrete block. Allowing indirect purchasers to recover in such cases "would create a serious risk of multiple liability for defendants," and would require courts to undertake the "uncertain[] and difficult[]" process of reconstructing price and output decisions.<sup>174</sup> Ruling otherwise would have risked "transform[ing] treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that [\*166] could have absorbed part of the overcharge — from direct purchasers to middlemen to ultimate consumers."<sup>175</sup>

The indirect purchaser doctrine does not present the same concerns in this case. This is not a case of a fixed price commodity or even a fixed price component of a commodity being passed through a distribution chain to plaintiffs. Plaintiffs have not indirectly borne the effects of the alleged conspiracy. Nor is *Illinois Brick* properly read to permit antitrust standing only among plaintiffs in direct privity with defendants.<sup>176</sup> Defendants allegedly fixed BBSW, which then was incorporated into various derivatives. Accordingly, anyone who engaged in BBSW-Based Derivatives transactions [\*\*55] on days when BBSW was manipulated would have been injured regardless of whether they purchased such derivatives directly from defendants.<sup>177</sup> In like circumstances, the Second Circuit has suggested that "directness may have diminished weight."<sup>178</sup>

Indeed, who would be a victim more direct than these plaintiffs to bring antitrust claims alleging a conspiracy to fix BBSW? Defendants allegedly manipulated BBSW in order to impact the prices of, and thereby increase their returns on, BBSW-Based Derivatives. Consumers in the BBSW-Based Derivatives market are the most natural and direct victims of the alleged conspiracy. This factor, accordingly, weighs in plaintiffs' favor.

### (c) Speculative Damages

The third factor is "the extent to which appellants' damages claim is 'highly speculative.'"<sup>179</sup> Defendants argue that damages here would be highly speculative because "[t]o attempt to ascertain damages in this case, the Court would have to construct a 'but for' BBSW rate for each day of the years-long Class Period and then hypothesize how market participants . . . would have altered their behavior and thereby changed the prices of the instruments at issue, [\*166] based on this 'but for' rate."<sup>180</sup>

<sup>173</sup> [431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 \(1977\)](#).

<sup>174</sup> [Id. at 730-32](#).

<sup>175</sup> [Id. at 737](#); see also [Simon v. KeySpan Corp., 694 F.3d 196, 202 \(2d Cir. 2012\)](#) ("[I]t is nearly impossible for a court to determine which portion of an overcharge is actually borne by the direct purchaser and which portion is borne by a subsequent indirect purchaser.").

<sup>176</sup> [In re London Silver Fixing, Ltd., Antitrust Litig., 213 F. Supp. 3d at 554](#).

<sup>177</sup> See [Gelboim, 823 F.3d at 779](#) ("[O]ne peculiar feature of this case is that remote victims (who acquired LIBOR-based instruments from any of thousands of non-defendant banks) would be injured to the same extent and in the same way as direct customers of a [sic] the Banks."); see also 1 [\*\*ANTITRUST LAW\*\*](#) DEVELOPMENTS § 9B(4)(b), at 749 (8th ed. 2017) ("Most courts have restricted the application of *Illinois Brick* to situations in which a plaintiffs' recovery requires proof of overcharges or undercharges passed through a chain of distribution." (footnotes omitted)).

<sup>178</sup> [Gelboim, 823 F.3d at 779](#).

<sup>179</sup> [Id. at 778](#) (quoting [Associated Gen. Contractors, 459 U.S. at 542](#)).

<sup>180</sup> DI 134 at 24.

But this misstates the principles governing damages in private antitrust litigation. [HN21](#)<sup>181</sup> Although it is true that "even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork,"<sup>182</sup> a verdict as to damages may be reached on the basis of "probable and inferential" data if "direct and positive proof" is unavailable.<sup>183</sup> In [[\\*167](#)] *Bigelow v. RKO Radio Pictures*,<sup>184</sup> the Supreme Court rejected a challenge to an antitrust damages verdict even though plaintiffs' losses in receipts during the period of defendants' unlawful restraint on trade could not be determined with total certainty.<sup>185</sup> The Court there upheld the jury's damages verdict, which had been based on a comparison of the plaintiff's receipts before and after the defendants' unlawful actions, concluding that "[a]ny other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim" and would act as "an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain."<sup>186</sup>

The Second Circuit, considering this third factor [[\\*\\*57](#)] in *Gelboim*, echoed the Supreme Court, stating, "some degree of uncertainty stems from the nature of antitrust law."<sup>187</sup> It nonetheless remarked also that "highly speculative damages is a sign that a given plaintiff is an inefficient engine of enforcement" and that "it [was] difficult to see how appellants would arrive at such an estimate, even with the aid of expert testimony."<sup>188</sup> Specifically, it noted that the case before it presented numerous "unusual challenges," namely:

"The disputed transactions were done at rates that were negotiated, notwithstanding that the negotiated component was the increment above LIBOR. And the market for money is worldwide, with competitors offering various increments above LIBOR, or rates pegged to other benchmarks, or rates set without reference to any benchmark at all."<sup>189</sup>

The question for courts to consider, it held, was "whether the damages would *necessarily* be highly speculative."<sup>190</sup>

This Court concludes that standing here is not defeated by the risk of speculative damages. Plaintiffs have alleged sufficiently that the derivatives transactions in which they engaged depended on BBSW and that defendants' conduct altered the prices of BBSW-Based Derivatives. [[\\*\\*58](#)] Although the damages calculations in this case may indeed be complex, it is possible, as plaintiffs repeatedly allege, to calculate one's exposure to changes in BBSW based on one's BBSW-Based Derivative positions. As another judge in this district reasoned in a prior benchmark rate case, "because exogenous factors affect price movements in most antitrust cases, and because the existence of such factors does not alone defeat standing, questions regarding the extent of Plaintiffs' injuries can best be resolved at a later stage."<sup>191</sup> In any case, it would be entirely premature to foreclose this claim at this most

<sup>181</sup> [Bigelow v. RKO Radio Pictures](#), 327 U.S. 251, 264, 66 S. Ct. 574, 90 L. Ed. 652 (1946).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> [Id. at 262-65](#).

<sup>185</sup> [Id. at 264-65](#); accord [Gelboim](#), 823 F.3d at 779.

<sup>186</sup> [Gelboim](#), 823 F.3d at 779; see also [id. at 780](#) ("Impediments to reaching a reliable damages estimate often flow from the nature and complexity of the alleged antitrust violation.").

<sup>187</sup> [Id. at 779](#).

<sup>188</sup> [Id. at 780](#).

<sup>189</sup> *Id.* (emphasis added) (internal quotation marks and citations omitted).

<sup>190</sup> [In re Commodity Exch., Inc.](#), 213 F. Supp. 3d 631, 658 (S.D.N.Y. 2016); [HN22](#)<sup>191</sup> cf. [Lexmark Intern., Inc. v. Static Control Components, Inc.](#), 572 U.S. 118, 135, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014) ("[P]otential difficulty in ascertaining and

preliminary stage. In the event that it [\*168] were to become clear that the appropriate level of certainty as to damages is unattainable here, the point again would be available to defendants at later stages of the case.

#### (d) Duplicate Recovery and Complex Damages Apportionment

**HN23**[<sup>↑</sup>] The final factor in the efficient enforcer analysis is "the importance of avoiding 'either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other.'"<sup>191</sup> In *Gelboim*, the Second Circuit focused on, but drew no conclusions from, the various government regulatory [\*\*59] investigations and lawsuits that were then in progress in respect of the alleged widespread manipulation of LIBOR.<sup>192</sup>

Defendants raise no challenge to plaintiffs' antitrust standing on this basis and the Court finds no reason to do so *sua sponte*. As a practical matter, the scale of the investigations into various of the defendants by ASIC, as of the date of this opinion, is nowhere close to that of the ongoing proceedings and investigations related to the alleged manipulation of LIBOR.

In the circumstances, the Court concludes that the efficient enforcer factors, taken together, weigh in plaintiffs' favor. Accordingly, plaintiffs Dennis, Sonterra, and FrontPoint Event Driven have standing to pursue their federal antitrust claims against defendants.

### B. Plausible Antitrust Claims

To avoid dismissal, plaintiffs must allege an antitrust violation stemming from defendants' transgression of **HN24**[<sup>↑</sup>] Section 1 of the Sherman Act, which provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."<sup>193</sup> "The crucial question in a Section 1 case is therefore whether the challenged conduct [\*\*60] 'stem[s] from independent decision or from an agreement, tacit or express.'"<sup>194</sup>

#### 1. Pleading Standard

**HN25**[<sup>↑</sup>] To state a plausible claim for conspiracy under Section 1 of the Sherman Act, a complaint must include "enough factual matter (taken as true) to suggest that an agreement was made."<sup>195</sup> The claim need not be probable, but the amended complaint must plead "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."<sup>196</sup> The Supreme Court has stated:

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apportioning damages is not . . . an independent basis for denying standing where it is adequately alleged that a defendant's conduct has proximately injured an interest of the plaintiff's that the statute protects." (emphasis omitted).

<sup>191</sup> *Gelboim*, 823 F.3d at 778 (quoting *Associated Gen. Contractors*, 459 U.S. at 543-44).

<sup>192</sup> *Id. at 780* (stating that it was "wholly unclear on this record how issues of duplicate recovery and damage apportionment c[ould] be assessed").

<sup>193</sup> *15 U.S.C. § 1*; see also *Gelboim*, 823 F.3d at 770.

<sup>194</sup> *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 321 (2d Cir. 2010) (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540, 74 S. Ct. 257, 98 L. Ed. 273 (1954)).

<sup>195</sup> *Twombly*, 550 U.S. at 556.

<sup>196</sup> *Id.*; *Gelboim*, 823 F.3d at 781 ("Circumstances must reveal a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." (quoting *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 183 (2d Cir. 2012) (internal quotation marks omitted))).

"[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified [\*169] point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action."<sup>197</sup>

**HN26**[↑] That said, allegations of parallel conduct need not be so robust that the only plausible explanation for defendants' conduct is an agreement. "[T]he plaintiff need not show that its allegations suggesting [\*\*61] an agreement are more likely than not true or that they rule out the possibility of independent action, as would be required at later litigation stages such as a defense motion for summary judgment or a trial."<sup>198</sup> Indeed, "a given set of actions may well be subject to diverging interpretations, each of which is plausible."<sup>199</sup> Faced with multiple plausible interpretations, the Second Circuit has stated:

"The choice between or among plausible inferences or scenarios is one for the factfinder. The choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a *Rule 12(b)(6)* motion. Fact-specific questions cannot be resolved on the pleadings. A court ruling on such a motion may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible."<sup>200</sup>

**HN28**[↑] There are two ways that an antitrust plaintiff may plead facts sufficient to support the inference that a conspiracy actually existed. "First, a plaintiff may, of course, assert direct evidence that the defendants entered into an agreement in violation of the antitrust laws."<sup>201</sup> However, given that "in many antitrust [\*\*62] cases, this type of 'smoking gun' can be hard to come by, especially at the pleading stage," a complaint, alternatively, may defeat a motion to dismiss by alleging "circumstantial facts supporting the *inference* that a conspiracy existed."<sup>202</sup> With respect to this second method, an antitrust plaintiff can cross the "line separating conspiracy from parallelism," and thus state a sufficiently plausible antitrust claim, "with allegations of interdependent conduct, accompanied by circumstantial evidence and plus factors."<sup>203</sup> Although these examples are "neither exhaustive nor exclusive," such plus factors may include "(1) a common motive to conspire; (2) evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators; and (3) evidence of a high level of interfirm communications."<sup>204</sup>

## [\*170] 2. Application

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<sup>197</sup> [Twombly, 550 U.S. at 556-57.](#)

<sup>198</sup> [Anderson News, L.L.C., 680 F.3d at 184](#) HN27[↑] (citations omitted); see also [Twombly, 550 U.S. at 556](#) ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and that a recovery is very remote and unlikely." (internal quotation marks and citations omitted)).

<sup>199</sup> [Anderson News, L.L.C., 680 F.3d at 184.](#)

<sup>200</sup> [Id. at 184-85](#) (internal quotation marks and citations omitted); see also [Starr, 592 F.3d at 325](#) (rejecting argument that plaintiffs needed to allege facts that tended to exclude independent self-interested conduct as an explanation for defendants' parallel behavior).

<sup>201</sup> [Mayor & City Council of Baltimore v. Citigroup, Inc., 709 F.3d 129, 136 \(2d Cir. 2013\).](#)

<sup>202</sup> *Id.* (emphasis in original).

<sup>203</sup> [Gelboim, 823 F.3d at 781](#) (quoting [Mayor & City Council of Baltimore, 709 F.3d at 136](#)) (internal quotation marks omitted).

<sup>204</sup> *Id.* (quoting [Mayor & City Council of Baltimore, 709 F.3d at 136](#) & n.6) (internal quotation marks omitted).

Plaintiffs here allege that defendants — "horizontal competitors" in the market for financial products — undertook collective action to manipulate BBSW in order to influence the prices of, and therefore the returns on, derivatives the fair market value of which was allegedly linked to BBSW. Plaintiffs, in other words, allege a horizontal [\*\*63] price-fixing conspiracy — a *per se* violation of the federal antitrust laws.<sup>205</sup>

The Court concludes that the amended complaint alleges "interdependent conduct, accompanied by circumstantial evidence and plus factors"<sup>206</sup> sufficient to state a claim under the Clayton Act.

In particular, the amended complaint alleges that defendants each engaged in noneconomic transactions of Prime Bank Bills to push the prices of the bills up or down, thereby pushing BBSW submissions in the opposite direction. It is alleged also that defendants made false BBSW rate submissions to AFMA and used their positions on the various AFMA committees to maintain the *status quo* and, hence, their ability to manipulate BBSW. And all of this conduct allegedly was undertaken with a common motive among defendants — that is "increased profits" on defendants' BBSW-Based Derivatives positions.<sup>207</sup>

Defendants argue that this case is distinguishable from *Gelboim* in that the defendants there allegedly conspired to move LIBOR in the same direction (down). But it is not necessary for defendants' interests to be aligned at all times to share a common motive. The allegations create a plausible claim that defendants conspired to [\*\*64] rig the process of setting the BBSW rate such that, over time, each would benefit by realizing profits on their respective derivative positions.<sup>208</sup> This is not unlike the thinking among coconspirators who collectively engage in non-competitive bidding. In such cases, the coconspirators will agree that one among them should get a certain job and that a subsequent job then will go to a different competitor — all with the understanding that, over time, each coconspirator will benefit from their collective rigging of the bidding process.<sup>209</sup>

[\*171] In addition, the amended complaint contains extensive allegations of inter-firm communications and cooperative efforts among defendants — including the sharing of information with one another about their respective exposures to BBSW, the strategic trading of Prime Bank Bills ahead of the Fixing Window to enable one another to flood the market and artificially raise BBSW, and, in the case of the broker defendants, the facilitation of various noneconomic transactions.<sup>210</sup> Finally, the claims brought by ASIC against various defendants and those

<sup>205</sup> See *id. at 771*; see also *Anderson News, L.L.C.*, 680 F.3d at 182 (defining "horizontal agreements" as "agreements between competitors at the same level of the market structure" (quoting *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)) (internal quotation marks and alteration omitted)).

That BBSW is not itself a price is of no moment. The amended complaint alleges that the benchmark rate is incorporated as a component of the price of certain financial instruments and "the fixing of a component of price violates the antitrust laws." *Gelboim*, 823 F.3d at 771.

<sup>206</sup> *Id. at 781* (quoting *Mayor & City Council of Baltimore*, 709 F.3d at 136) (internal quotation marks omitted).

<sup>207</sup> *Id. at 781-82*.

<sup>208</sup> See, e.g., *Alaska Elec. Pension Fund*, 175 F. Supp. 3d at 55 (concluding plaintiffs sufficiently alleged antitrust conspiracy in part because they alleged defendants had "common motive to conspire — namely that Defendants were major players in the market for interest rate derivatives who were jointly motivated by a desire to maximize profits by manipulating the ISDAfix benchmark rates"); see also *Sullivan*, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \*13.

<sup>209</sup> See, e.g., *FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A.*, No. 16 Civ. 5263 (AKH), 2018 U.S. Dist. LEXIS 171999, 2018 WL 4830087, at \*4 (S.D.N.Y. Oct. 4, 2018) ("While the derivative positions of Panel Members may differ on a given day, a subset of the Panel may benefit from a given manipulation, and the remainder may wait for their winning day to come, being privy to the knowledge of where the rates are heading. In such a conspiracy, where Panel Members communicate with one another, they can plan their trades around the anticipated rates, buying when low, selling when high, and circumventing the market risk confronting those not privy to foreshadowed rates.").

defendants' admissions of misconduct also support an inference that an agreement among defendants [\*\*65] existed.<sup>211</sup>

These allegations create a plausible claim that defendants conspired to rig the process of setting BBSW such that, over time, each would benefit by realizing profits on their respective derivative positions. The machinery of the conspiracy was such that, at least on certain days, there was agreement among at least some defendants artificially to drive BBSW higher or lower.<sup>212</sup> Drawing all reasonable inferences in plaintiffs' favor, the Court concludes that the amended complaint plausibly alleges that a conspiracy to violate the federal antitrust laws existed among defendants.

### C. Extraterritoriality

Defendants next assert that plaintiffs' antitrust claims are impermissibly extraterritorial under [HN30](#)[] the [Foreign Trade Antitrust Improvements Act of 1982 \("FTAIA"\)](#), which provides, in relevant part, that antitrust actions may not be maintained with respect to:

"[C]onduct involving trade or commerce . . . with foreign nations unless—(1) such conduct has a direct, substantial and reasonably foreseeable effect—(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; [\*\*66] or (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and (2) such effect gives rise to a claim under [\*172] the provisions of [sections 1 to 7](#) of this title, other than this section."<sup>213</sup>

[HN31](#)[] In determining whether plaintiffs allege an impermissibly extraterritorial application of the federal antitrust laws, the Court considers two questions: First, "does the price-fixing activity constitute conduct involving trade or commerce . . . with foreign nations?"<sup>214</sup> Second, does "the conduct nonetheless fall[] within a domestic-injury exception to the general rule?"<sup>215</sup>

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<sup>210</sup> The Court is not persuaded by defendants' argument that the amended complaint improperly contains pleadings only as to the group of defendants as a whole, rather than as to each individual defendant. [HN29](#)[] The Court respectfully departs from others that have dismissed claims for improper group pleading. *E.g., Sonterra Capital Master Fund Ltd. v. Credit Suisse Grp. AG*, 277 F. Supp. 3d 521, 553 (S.D.N.Y. 2017) ("[E]ach defendant is entitled to know how he is alleged to have conspired, with whom and for what purpose. Mere generalizations as to any particular defendant — or even defendants as a group — are insufficient." (quoting *In re Zinc Antitrust Litig.*, 155 F. Supp. 3d 337, 384 (S.D.N.Y. 2016))). In the Court's view, dismissing plaintiffs' claims for failing to include specific conspiracy allegations as to each defendant in the amended complaint would be premature at this early stage of litigation. See generally *Gelboim*, 823 F.3d. Cf. *Starr*, 592 F.3d at 325 (holding that in case where antitrust claim of agreement rests on the parallel conduct, plaintiffs are "not required to mention a specific time, place or person involved in each conspiracy allegation").

<sup>211</sup> See [Alaska Elec. Pension Fund](#), 175 F. Supp. 3d at 55 ("The mere existence of such investigations is a circumstance that, 'when combined with parallel behavior, might permit a jury to infer the existence of an agreement.'" (quoting *Mayor & City Council of Baltimore*, 709 F.3d at 136 n. 6)); see also [FrontPoint Asian Event Driven Fund, L.P.](#), 2018 U.S. Dist. LEXIS 171999, 2018 WL 4830087, at \*3.

<sup>212</sup> See [United States v. Socony-Vacuum Oil Co.](#), 310 U.S. 150, 223, 60 S. Ct. 811, 84 L. Ed. 1129 (1940) ("[T]he machinery employed by a combination for price-fixing is immaterial. Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.").

<sup>213</sup> [15 U.S.C. § 6a](#).

<sup>214</sup> [F. Hoffmann-La Roche Ltd. v. Empagran S.A.](#), 542 U.S. 155, 158, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004) (internal quotation marks and citations omitted).

Defendants challenge the antitrust claims in the amended complaint on the basis that the conduct alleged does not fall into the "domestic-injury exception." [HN32](#)[<sup>↑</sup>] This exception "applies (and makes the Sherman Act nonetheless applicable) where the conduct (1) has a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce, and (2) 'such effect gives rise to a [Sherman Act] claim.'"<sup>216</sup>

### *1. Direct, Substantial and Reasonably Foreseeable Effect*

Defendants argue that "all of the purported manipulative conduct occurred in Australia" and that the amended complaint suggests merely [\[\\*67\]](#) a ripple effect on domestic commerce.<sup>217</sup> [HN33](#)[<sup>↑</sup>] But the Second Circuit has held that "foreign anticompetitive conduct can have the statutorily required 'direct, substantial, and reasonably foreseeable effect' on U.S. domestic or import commerce even if the effect does not follow as an immediate consequence of the defendant's conduct, so long as there is a reasonably proximate causal nexus between the conduct and the effect."<sup>218</sup>

Plaintiffs plead that defendants manipulated BBSW on a regular basis in order to impact the prices of and increase profits on BBSW-Based Derivatives. They plead also that substantial quantities of BBSW-Based Derivatives were sold in the United States.<sup>219</sup> [HN34](#)[<sup>↑</sup>] As another judge in this district previously stated, "There can be no serious dispute that the manipulation of a benchmark that is globally disseminated and serves as a pricing component of derivatives sold widely in the United States, as plaintiffs have plausibly alleged, would have a foreseeable effect within the United States."<sup>220</sup> The question whether an alleged effect on U.S. commerce is direct, substantial and reasonably foreseeable clearly is one of fact,<sup>221</sup> and these allegations are sufficient to state a claim upon which relief [\[\\*68\]](#) may be granted.

### *2. Effect Gives Rise to a Claim*

This second prong of the analysis pertains to the causal connection between the alleged conduct and injury. [HN35](#)[<sup>↑</sup>] For the domestic-injury exception to apply, "the domestic effect" of defendants' alleged conduct "must proximately cause the plaintiff's injury."<sup>222</sup>

[\[\\*173\]](#) The alleged effect of defendants' conduct is the manipulation of prices of BBSW-Based Derivatives. Plaintiffs' alleged injury is that they were overcharged and underpaid on the BBSW-Based Derivatives transactions in which they engaged as a result of defendants' conduct. The amended complaint sufficiently alleges that this injury was reasonably foreseeable from the alleged effect of defendants' conduct and therefore gave rise to their antitrust claim.

<sup>215</sup> [Id. at 159](#).

<sup>216</sup> [Id.](#) (quoting [15 U.S.C. § 6\(a\)](#)).

<sup>217</sup> DI 134 at 24-25.

<sup>218</sup> [Lotes Co., Ltd. v. Hon Hai Precision Indus. Co.](#), 753 F.3d 395, 398 (2d Cir. 2014).

<sup>219</sup> AC at ¶¶ 300-303.

<sup>220</sup> [Sonterra Capital Master Fund Ltd.](#), 277 F. Supp. 3d at 569; see also [Sullivan](#), 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \*22.

<sup>221</sup> See U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *Antitrust Guidelines for International Enforcement and Cooperation* § 3.2, at 21 (Jan. 13, 2017).

<sup>222</sup> [Lotes Co.](#), 753 F.3d at 414.

#### IV. CEA Claims

Plaintiffs assert three CEA claims against each defendant.

Their first is that all defendants are liable as principals under [Section 6\(c\) of the CEA](#), which, in relevant part, makes it unlawful to:

"[M]anipulate or attempt to manipulate the price of any swap, or of any commodity in interstate commerce, or for future delivery on or subject to the [\[\\*\\*69\]](#) rules of any registered entity."<sup>223</sup>

[HN37](#) [↑] [Section 22](#) establishes a private right of action for violations of [Section 6\(c\)](#). It provides, in relevant part: "Any person . . . who violates this chapter or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this chapter shall be liable for actual damages resulting from one or more of the transactions referred to in subparagraphs (A) through (D) of this paragraph and caused by such violation to any other person . . . — (D) "who purchased or sold [any contract of sale of any commodity for future delivery (or option on such contract or any commodity)] or swap if the violation constitutes . . . a manipulation of the price of any such contract or swap or the price of the commodity underlying such contract or swap."<sup>224</sup>

Plaintiffs allege also principal-agent liability<sup>225</sup> and aiding and abetting liability<sup>226</sup> against all defendants.

##### A. CEA Standing

###### 1. FrontPoint Plaintiffs and Sonterra

Defendants argue that Sonterra and the FrontPoint Plaintiffs lack standing under the CEA on the basis that the pre-Dodd Frank CEA governs this case, not the current version of the statute. [\[\\*\\*70\]](#)

<sup>223</sup> [7 U.S.C. § 9\(3\)](#).

[HN36](#) [↑] [Section 6\(c\) of the CEA](#) makes it unlawful also to "use or employ, or attempt to use or employ, in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance" in violation of rules promulgated by the Commodity Futures Trading Commission ("CFTC") and to "make any false or misleading statement of a material fact to the [CFTC]." *Id.* [§ 9\(1\)-\(2\)](#); see also *id.* [§ 1a\(8\)](#) (defining "Commission"). Neither provision is implicated by the factual allegations in the amended complaint.

In the same cause of action, the amended complaint asserts that all defendants are liable as principals under [Section 9 of the CEA](#), codified at [7 U.S.C. § 13](#), which defines criminal penalties arising from similar conduct.

<sup>224</sup> *Id.* [§ 25\(a\)\(1\)](#).

<sup>225</sup> See *id.* [§ 2\(a\)\(1\)\(B\)](#) ("The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person.").

<sup>226</sup> See *id.* [§ 25\(a\)\(1\)](#) ("Any person . . . who violates this chapter or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this chapter shall be liable . . ." (emphasis added)).

[\*174] The CEA was amended by the *Dodd-Frank Wall Street Reform and Consumer Protection Act*, which became effective on July 21, 2011.<sup>227</sup> Among other things, the amendment added swaps to the purview of [Sections 6\(c\)](#) and [22](#), quoted above.<sup>228</sup> Prior to that amendment, the CEA excluded a "sale of any cash commodity for deferred shipment or delivery" from the term "future delivery"<sup>229</sup> as well as agreements, contracts, and transactions in "excluded commodities" if the agreement, contract or transaction was (1) entered into by "eligible contract participants" and (2) not executed or traded on a trading facility.<sup>230</sup> Similarly, the CEA then excluded agreements, contracts, and transactions in most commodities if the agreement, contract or transaction was (1) entered into by "eligible contract participants," (2) subject to individual negotiation by the parties, and (3) not executed or traded on a trading facility.<sup>231</sup> A financial institution acting for its own account was included in the definition of "eligible contract participant."<sup>232</sup> Defendants therefore argue that the CEA excluded the swaps and forwards allegedly entered into by the FrontPoint Plaintiffs and Sonterra prior to the effective date of Dodd Frank.

Even if the pre-Dodd Frank version of the CEA excluded such swaps and forwards, the amendments to the CEA enacted by Dodd Frank became effective before the changes AFMA made to the BBSW rate set process, which occurred just over two years later in September 2013. Accordingly, it is unclear whether all of the transactions allegedly entered into by the FrontPoint Plaintiffs and Sonterra would fall under the pre-Dodd Frank version of the CEA. Nonetheless, plaintiffs have waived their CEA claims in respect of BBSW-Based Derivatives other than CME Australian dollar futures contracts — the derivatives in which Dennis transacted.<sup>233</sup> Accordingly, Sonterra's and the FrontPoint Plaintiffs' claims under the CEA will be dismissed.

## 2. Dennis

[HN38](#) [↑] In order to assert a CEA claim, a private plaintiff must meet the requirements of [Section 22](#).<sup>234</sup> "These requirements used to be referred to as 'statutory standing,' but, to avoid incorrectly portraying them as jurisdictional requirements, they are now referred to as 'simply a question of whether the particular plaintiff has a cause of action under the statute.'"<sup>235</sup> Because [Section 22](#) "limits a defendant's liability to 'actual damages,'" a private plaintiff must plausibly allege "actual injury [\*72] caused by the violation in addition to the elements of whatever violation they allege in order to successfully state a claim."<sup>236</sup>

<sup>227</sup> **Dodd-Frank Wall Street Reform and Consumer Protection Act**, Pub. L. No. 111-203, § 754, 124 Stat. 1376, 1754 (2010) (enacted on July 21, 2010).

<sup>228</sup> *Id.* §§ 741(b), 1730-31.

<sup>229</sup> [7 U.S.C. § 1a\(19\) \(2006\)](#).

<sup>230</sup> *Id.* [§ 2\(d\)](#).

<sup>231</sup> *Id.* [§ 2\(g\)](#).

<sup>232</sup> *Id.* [\*71] [§ 1a\(12\)\(A\)\(i\)](#).

<sup>233</sup> DI 156 at 28-31 (stating that FrontPoint Plaintiffs and Sonterra do not allege CEA claims for BBSW-Based Derivatives traded before Dodd Frank became effective and addressing merits only as to CME futures contracts).

<sup>234</sup> [Harry](#), 889 F.3d at 111.

<sup>235</sup> *Id.* (quoting [Am. Psychiatric Ass'n v. Anthem Health Plans, Inc.](#), 821 F.3d 352, 359 (2d Cir. 2016)).

<sup>236</sup> *Id.* (internal quotation marks and citations omitted).

[\*175] In order to plead actual injury, Dennis was obliged to allege plausibly that (1) he "transacted in at least one commodity contract at a price that was lower or higher than it otherwise would have been absent the defendant's manipulations," and (2) "the manipulated prices were to [his] detriment."<sup>237</sup>

Defendants argue that Dennis fails to meet the requirements of [Section 22](#) because he has not pled that defendants' alleged manipulations affected either the price of his CME futures contracts or the price of a commodity underlying his CME futures contracts.<sup>238</sup> But as this Court has discussed in the context of constitutional and antitrust standing, this argument lacks merit at this stage. The amended complaint alleges that Dennis purchased and sold CME Australian dollar futures contracts that were priced, benchmarked and/or settled based on BBSW.<sup>239</sup> He has pled sufficiently that BBSW was a component of the price of the CME Australian dollar futures contracts in which he transacted. [HN39](#)<sup>↑</sup> "Commodity and derivative contracts that index their price formulae to prices of other contracts [\*73] are linked in a rule-based manner, and several cases in this circuit have found such a link to create a sufficient connection for CEA pleading purposes."<sup>240</sup>

Dennis alleges further that he purchased and sold these derivatives at artificial prices caused by defendants' manipulative conduct. For example, Dennis alleges that he had a net short position of one CME Australian dollar futures contract on November 22, 2010. On that day, defendant NAB allegedly was involved in manipulating BBSW artificially higher, causing Dennis to suffer a \$170 net loss on his CME Australian dollar futures position.<sup>241</sup> These allegations are sufficient to state a plausible actual injury. He need not specify, at this early stage in the litigation, exactly which tenor of BBSW was manipulated nor explain precisely how the pricing relationship worked.<sup>242</sup> Dennis therefore meets the requirements of [Section 22](#).

#### B. Plausible CEA Claims on Behalf of Dennis

That leaves for consideration the plausibility of Dennis' CEA claims alone.

Defendants argue that Dennis has failed to state a CEA claim for price manipulation. [HN40](#)<sup>↑</sup> "The CEA prohibits manipulation of the price of any commodity or commodity future."<sup>243</sup> "While the CEA itself [\*74] does not define the term, a court will find manipulation where '(1) Defendants possessed an ability to influence market prices; (2) an artificial price existed; (3) Defendants caused the artificial prices; and (4) Defendants specifically intended to [\*176] cause the artificial price."<sup>244</sup> Defendants argue that Dennis' CEA claims must be dismissed because he fails to plead that defendants caused artificial prices and acted with the requisite intent.

#### 1. Pleading Standard

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<sup>237</sup> [Id. at 112](#).

<sup>238</sup> DI 134 at 30-31.

<sup>239</sup> AC at ¶ 283; see also *id.* at ¶ 191 (alleging formulaic connection between CME Australian dollar futures and BBSW).

<sup>240</sup> [Harry, 889 F.3d at 113](#) (citing, among others, [Gelboim, 823 F.3d at 765-66](#)).

<sup>241</sup> AC at ¶¶ 283-285.

<sup>242</sup> Cf. [Harry, 889 at 113 n.4](#) ("In articulating this [\[Section 22\]](#) standard, we do not impose a loss causation requirement, which would mandate demonstrating losses in specific trades. We have never imported loss causation from the securities context and we do not begin to do so with this case." (citation omitted)).

<sup>243</sup> [In re Amaranth Natural Gas Commodities Litig., 730 F.3d 170, 173 \(2d Cir. 2013\)](#) (citing [7 U.S.C. §§ 9\(1\), 13\(a\)\(2\)](#)).

<sup>244</sup> *Id.* (quoting [Hershey v. Energy Transfer Partners, L.P., 610 F.3d 239, 247 \(5th Cir. 2010\)](#)).

As an initial matter, the Court concludes, and Dennis does not dispute, that his CEA claims sound in fraud.<sup>245</sup> **HN41**[] Whether or not the heightened pleading standard of [Rule 9\(b\) of the Federal Rules of Civil Procedure](#) applies depends on the conduct alleged. The requirement that a plaintiff plead with particularity "is not limited to allegations styled or denominated as fraud or expressed in terms of the constituent elements of a fraud cause of action."<sup>246</sup> In this case, defendants are accused of trading Prime Bank Bills at uneconomic prices and knowingly submitting false mid-rates in order to artificially raise or lower BBSW rates and, consequently, collect illegitimate profits. These allegations suggest fraudulent conduct on defendants' part.<sup>247</sup> Accordingly, Dennis' CEA claims are subject [\*\*75] to the heightened pleading requirements of [Rule 9\(b\)](#).

**HN43**[] As noted earlier, a complaint subject to [Rule 9\(b\)](#) must "state with particularity the circumstances constituting fraud or mistake."<sup>248</sup> In the context of manipulation claims, however, the Second Circuit has stated that although the [Rule 9\(b\)](#) pleading standard applies, because "[a] claim of manipulation . . . can involve facts solely within the defendant's knowledge," "at the early stages of litigation, the plaintiff need not plead manipulation to the same degree of specificity as a plain misrepresentation claim."<sup>249</sup> Rather, "a manipulation complaint must plead with particularity the nature, purpose, and effect of the fraudulent conduct and the roles of the defendants."<sup>250</sup>

**HN44**[] As to *scienter*, a plaintiff must show, at a minimum, that the defendant or defendants "acted (or failed to act) with the purpose or conscious object of causing or affecting a price or price trend in the market that did not reflect the legitimate forces of supply and demand."<sup>251</sup> Although "the requisite intent of the alleged perpetrator of the fraud need not be alleged [\*177] with great specificity,"<sup>252</sup> a complaint must nonetheless, "allege facts that give rise to a strong inference of fraudulent [\*\*76] intent."<sup>253</sup> *Scienter* "may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness."<sup>254</sup>

## 2. Liability

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<sup>245</sup> **HN42**[] The Second Circuit has not decided whether, as a general rule, CEA claims are subject to the heightened pleading standard of [Federal Rule of Civil Procedure 9\(b\)](#). *Id.* at 180-81; see also [Sullivan, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \\*30](#) ("Courts apply [Rule 9\(b\)](#)'s pleading requirements to the CEA on a case-by-case basis.").

<sup>246</sup> [Rombach, 355 F.3d at 171](#).

<sup>247</sup> See *id. at 172* (concluding a claim sounded in fraud where it alleged that statements were "inaccurate and misleading" and "contained untrue statements of material facts" and that "materially false and misleading written statements were issued" (emphasis omitted) (internal quotation marks omitted)).

<sup>248</sup> [Fed. R. Civ. P. 9\(b\)](#).

<sup>249</sup> [ATSI Commc'n's, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 101-02 \(2d Cir. 2007\)](#).

<sup>250</sup> *Id. at 102*; see also [Sonterra Capital Master Fund Ltd., 277 F. Supp. 3d at 573](#) ("[Rule 9\(b\)](#)'s heightened pleading standard 'is generally relaxed in the context of manipulation-based claims, where the complaint must simply specify what manipulative acts were performed, which defendants performed them, when the manipulative acts were performed, and what effect the scheme had on the market for the securities at issue.'" (quoting [In re London Silver Fixing, Ltd., Antitrust Litig., 213 F. Supp. 3d at 566](#))).

<sup>251</sup> [In re Commodity Exch., Inc., 213 F. Supp. 3d at 670](#) (internal quotation marks and citations omitted).

<sup>252</sup> [Amusement Indus., Inc., 693 F. Supp. 2d at 338](#) (quoting [Chill, 101 F.3d at 267](#)) (internal quotation marks omitted).

<sup>253</sup> *Id.* (internal quotation marks and citation omitted).

<sup>254</sup> [Lerner, 459 F.3d at 290-91](#).

As noted above, plaintiffs first assert that all defendants are liable as principals — that is, that defendants themselves intentionally manipulated or caused to be manipulated the price of Dennis' CME Australian dollar futures by manipulating the BBSW rate set.<sup>255</sup>

Plaintiffs assert also principal-agent and aiding and abetting liability against each of the defendants.

"[HN45](#) [A] claim for principal-agent liability requires that the agent was acting in the capacity of an agent when he or she committed the unlawful acts and that the agent's actions were within the scope of his or her employment."<sup>256</sup>

To be found liable for aiding and abetting, on the other hand, a defendant must "in some sort associate himself with the venture" — that is, "that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed."<sup>257</sup> In the context of a CEA claim, then, a complaint bringing a claim for aiding [[\\*\\*77](#)] and abetting liability must allege that the "aider and abettor" knew that the primary violator intended to engage in price manipulation. "[A] complaint with weak allegations about a defendant's affirmative assistance may still state a claim for aiding and abetting if its allegations about the defendant's knowledge and intent are particularly strong, and vice versa."<sup>258</sup> "Accordingly, in evaluating a complaint alleging the aiding and abetting of a violation of the CEA, allegations about the defendant's knowledge, intent, and actions should not be evaluated in isolation, but rather in light of the complaint as a whole."<sup>259</sup>

#### (1) Bank Defendants

Dennis here makes extensive allegations as to the "nature, purpose, and effect" of the alleged fraudulent conduct — each defendant submitted false BBSW rates and engaged in uneconomic transactions to artificially increase or decrease BBSW, thereby increasing their respective profits on BBSW-Based Derivatives. Moreover, the amended complaint alleges motive and opportunity as to each defendant. The banks' common motive allegedly was to maximize their profits on their global [[\\*178](#)] BBSW-Based Derivatives positions, and each bank, by virtue of participating [[\\*\\*78](#)] in Prime Bank Bill transactions had the opportunity to manipulate BBSW, regardless of whether the bank was on the BBSW Panel.

Many of the allegations in the amended complaint, however, attribute conduct and motivation to defendants as a group rather than to each of the twenty-nine named defendants.<sup>260</sup> [HN46](#) In order to satisfy the particularity requirements of [Rule 9\(b\)](#), a complaint should articulate how each defendant is implicated in the alleged fraudulent conduct.

<sup>255</sup> See [In re Amaranth Natural Gas Commodities Litig.](#), 730 F.3d at 173.

<sup>256</sup> [Sonterra Capital Master Fund Ltd.](#), 277 F. Supp. 3d at 574 (quoting [In re London Silver Fixing, Ltd., Antitrust Litig.](#), 213 F. Supp. 3d at 571).

<sup>257</sup> [In re Amaranth Natural Gas Commodities Litig.](#), 730 F.3d at 182 (quoting [United States v. Peoni](#), 100 F.2d 401, 402 (2d Cir. 1938)) (internal quotation marks omitted); see also *id.* ("[A] complaint . . . states a claim for aiding and abetting under [7 U.S.C. § 25](#) when it plausibly alleges conduct that would constitute aiding and abetting under [18 U.S.C. § 2](#).").

<sup>258</sup> [Id. at 183](#).

<sup>259</sup> *Id.*

<sup>260</sup> See, e.g., [Sullivan](#), 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \*30-31 (concluding that "summary references of a collective intent among all 'defendants,' while making allegations as to only three" was insufficient to state CEA claims against other defendants); [City of Perry, Iowa v. Procter & Gamble Co.](#), 188 F. Supp. 3d 276, 290 (S.D.N.Y. 2016) (claim that "lumps all Defendants together" is "plainly insufficient to satisfy [Rule 9\(b\)](#)'s heightened pleading requirements").

The amended complaint in this case makes detailed allegations that defendants ANZ,<sup>261</sup> Westpac,<sup>262</sup> and NAB<sup>263</sup> bought and sold large numbers of Prime Bank Bills during the Fixing Window in order to move BBSW in a profitable direction. HSBC,<sup>264</sup> CBA,<sup>265</sup> and Credit Suisse<sup>266</sup> are alleged to have engaged in setting BBSW to some extent as well.<sup>267</sup> Meanwhile, the traders at UBS, RBS, BNP Paribas who were in charge of submitting BBSW mid-rates to AFMA solicited rate submission requests from their colleagues who traded in BBSW-Based Derivatives.<sup>268</sup> As against the defendant entities from these ten banks, the amended complaint satisfies the particularity requirement of Rule 9(b) by alleging the role played by each bank.<sup>269</sup>

In contrast, the amended complaint [\*\*79] makes either no or minimal mention [\*179] of the remaining defendants — that is, the entities from the Royal Bank of Canada, Deutsche Bank, Lloyds, Macquarie, and Morgan Stanley. As to the entities from these five banks, Dennis' CEA claims will be dismissed.

## (2) Broker Defendants

The allegations against the broker defendants are more limited. Both ICAP<sup>270</sup> and Tullett Prebon<sup>271</sup> are alleged to have facilitated large transactions in Prime Bank Bills for the bank defendants during the Fixing Window and provided information about the Prime Bank Bill market in exchange for large commission fees. These allegations are insufficient to support a CEA claim against the broker defendants.

<sup>261</sup> AC at ¶¶ 208-213 (on December 1 and December 10, 2010), 229-230 (in March 2010 and February and June 2011), 238 (discussing plans to acquire "ammo" on March 9, 2011), 249-250 (March 10 and August 10, 2011).

<sup>262</sup> *Id.* at ¶¶ 216-220 (on July 1, 2011, April 7, 2010 and June 30, 2009), 238 (June 8, 2010), 255-257 (on April 30, 2010).

<sup>263</sup> *Id.* at ¶¶ 221-223 (in February, April, and December 2010), 226 (in July 2011), 235 (on March 24, 2010), 238-239 (on January 23, 2012 and March 9, 2011), 251-252 (on February 22, 2011).

<sup>264</sup> *Id.* at ¶¶ 221-223 (on December 20, 2010).

<sup>265</sup> *Id.* at ¶¶ 242-244 (on April 22, 2010).

<sup>266</sup> *Id.* at ¶ 226 (promising not to repeat information shared on July 19, 2011).

<sup>267</sup> Westpac and CBA allegedly structured their trading desks to maximize their profits from manipulating the BBSW rate set. *Id.* at ¶¶ 269-270.

<sup>268</sup> *Id.* at ¶¶ 272-275.

<sup>269</sup> The CEA claims as to principal-agent liability and aiding and abetting liability as to these defendants are sustained as well. There is no indication here that the employees mentioned in the amended complaint acted outside of the scope of their employment. Indeed, the profit-seeking motive alleged in the amended complaint would naturally benefit the institutions for which the employees worked.

The amended complaint sufficiently alleges aiding and abetting liability as well. Defendant banks allegedly knew that efforts to manipulate BBSW were widespread and shared information with one another to coordinate transactions and align interests. In addition, the banks facilitated other banks' manipulative trading by providing them with "ammunition" in order to be able sell off more Prime Bank Bills during a given Fixing Period. These acts of affirmative assistance and indications of knowledge and intent suffice to state a claim of aiding and abetting liability against the entities from the nine bank defendants mentioned above.

<sup>270</sup> *Id.* at ¶¶ 241, 251-252.

<sup>271</sup> *Id.* at ¶ 253.

In *In re Amaranth Natural Gas Commodities Litigation*,<sup>272</sup> the Second Circuit considered Amaranth Advisors ("Amaranth"), a hedge fund that had been accused of accumulating large positions in natural gas futures and swaps and engaging in manipulative trading therewith. J.P. Futures had been accused of aiding and abetting Amaranth's manipulation of natural gas futures through its services as Amaranth's futures commission merchant and clearing broker. Specifically, the complaint alleged that J.P. Futures had processed and settled **[\*\*80]** Amaranth's trades on the New York Mercantile Exchange ("NYMEX") and had earned over \$32 million in commissions in twenty months from Amaranth's trading. By virtue of its position, J.P. Futures knew of Amaranth's positions and trading activity, including the positions that Amaranth took in respect of its allegedly manipulative trading strategies. J.P. Futures knew when Amaranth violated NYMEX positions limits or exceeded NYMEX accountability levels and knew that Amaranth was being investigated by both NYMEX and the CFTC. It nonetheless had continued to service all of Amaranth's trades, including those that put Amaranth's positions above applicable NYMEX position limits and accountability levels and those for which J.P. Futures had to bypass its own internal position limits.<sup>273</sup>

The Circuit there dismissed the CEA claim against J.P. Futures, concluding that the allegations that J.P. Futures had aided and abetted Amaranth in manipulating natural gas derivative prices were insufficient.<sup>274</sup> The court reasoned that (1) Amaranth's large positions on their own did not necessarily imply manipulation,<sup>275</sup> and (2) although the type of trading activity in which Amaranth had engaged was strongly suggestive **[\*\*81]** of an intent to manipulate, J.P. Futures had not been alleged to have done anything more than provide "routine clearing firm services."<sup>276</sup> The Circuit concluded that, without alleging greater knowledge of the principal wrongdoing or more active involvement in that wrongdoing, the **[\*180]** plaintiffs had failed to state a claim for aiding and abetting Amaranth against J.P. Futures.<sup>277</sup>

The amended complaint in this case, as it applies to the broker defendants, suffers from similar deficiencies. Although the brokers are alleged to have helped facilitate the bank defendants' manipulative trades in Prime Bank Bills, the amended complaint does not plead facts suggesting that the brokers specifically intended to manipulate BBSW rates. Indeed, the allegations do not assert anything other than the routine provision of brokerage services against either ICAP or Tullett Prebon. The amended complaint therefore fails to state a claim for liability as either a principal or an aider and abettor under the CEA against the broker defendants.

### C. Extraterritoriality

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<sup>272</sup> [730 F.3d 170 \(2d Cir. 2013\)](#).

<sup>273</sup> [Id. at 178-79.](#)

<sup>274</sup> [Id. at 183](#) ("[A]llegations of such knowledge and intent, considered in connection with the routine services that J.P. Futures allegedly provided to Amaranth, fail to state a claim for aiding and abetting manipulation under the CEA.").

<sup>275</sup> [Id. at 184-85.](#)

<sup>276</sup> [Id. at 185.](#)

Moreover, even though J.P. Futures had extended Amaranth's credit limit and bypassed their internal position limits to accommodate Amaranth's trades, these "non-routine" activities had been alleged to have been performed only in connection with Amaranth's accumulation of large open positions, not with Amaranth's manipulative trades. [Id. at 185-86.](#)

<sup>277</sup> [Id. at 186.](#)

**HN47** [+] "It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial [\*\*82] jurisdiction of the United States."<sup>278</sup> Unless Congress clearly has expressed its affirmative intention to "give a statute extraterritorial effect, we must presume it is primarily concerned with domestic conditions."<sup>279</sup>

**HN48** [+] The Supreme Court has articulated "a two-step framework" to analyze the issue of extraterritoriality:

"At the first step, we ask whether the presumption against extraterritoriality has been rebutted — that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially. We must ask this question regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction. If the statute is not extraterritorial, then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's 'focus.' If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct [\*\*83] that occurred in U.S. territory."<sup>280</sup>

## 1. Presumption Against Extraterritoriality

**HN49** [+] "The CEA as a whole . . . is silent as to extraterritorial reach."<sup>281</sup> Moreover, and unlike in the case of plaintiffs' federal antitrust claim, as to which the FTAIA provided a clear indication that Congress "endorsed an extraterritorial application of the Sherman Act,"<sup>282</sup> there is no statute indicating an intention by Congress to apply the CEA extraterritorially. Because the presumption against extraterritoriality has not been rebutted, we "presume [the CEA] is primarily concerned with domestic [\*181] conditions."<sup>283</sup> It therefore is necessary to consider the "focus of congressional concern."<sup>284</sup>

## 2. Domestic Application

**HN50** [+] In *Morrison v. National Australia Bank Ltd.*,<sup>285</sup> the Supreme Court held that the *Securities Exchange Act* had no extraterritorial application and concluded that no civil suit under *Section 10(b)* could be sustained unless predicated on a transaction involving (1) a security listed on a domestic exchange, or (2) a domestic purchase or sale of another security.<sup>286</sup> The Second Circuit subsequently concluded, in *Absolute Activist Value Master Fund*

<sup>278</sup> See *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010) (internal quotation marks and citations omitted).

<sup>279</sup> *Id.* (internal quotation marks and citations omitted).

<sup>280</sup> *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2101, 195 L. Ed. 2d 476 (2016).

<sup>281</sup> *Loginovskaya v. Batratchenko*, 764 F.3d 266, 271 (2d Cir. 2014).

<sup>282</sup> *Sullivan*, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \*22; accord *Sonterra Capital Master Fund Ltd.*, 277 F. Supp. 3d at 569.

<sup>283</sup> *Loginovskaya*, 764 F.3d at 272 (quoting *Morrison*, 561 U.S. at 255) (internal quotation marks omitted).

<sup>284</sup> *Id.* (quoting *Morrison*, 561 U.S. at 266) (internal quotation marks omitted).

<sup>285</sup> 561 U.S. 247, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010).

<sup>286</sup> *Id.* at 267.

*Ltd. v. Ficeto*,<sup>287</sup> that in order for a transaction to be "domestic" for purposes of the [\*\*84] Securities Exchange Act and *Morrison's* second prong, either the parties must incur irrevocable liability or title to the securities must pass within the United States.<sup>288</sup>

The Second Circuit has extended both *Morrison* and *Absolute Activist* to the CEA, concluding that "*Morrison's* domestic transaction test in effect decides the territorial reach of [CEA § 22](#)"<sup>289</sup> and that a plaintiff bringing a CEA claim must "demonstrate that the transfer of title or the point of irrevocable liability for [the applicable transaction] occurred in the United States."<sup>290</sup> On the other hand, the Second Circuit has "never concluded . . . that *Morrison's* 'domestic exchange' prong applies to the CEA either to broaden or to narrow its extraterritorial reach."<sup>291</sup>

In this case, the BBSW-Based Derivatives in which Dennis transacted were traded on a domestic exchange — the CME. The relevant inquiry is whether Dennis thus has alleged sufficiently that his transactions in CME Australian dollar futures contracts occurred in the United States. The answer unmistakably is yes. But this is not the end of the inquiry.

In *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE*,<sup>292</sup> the Second Circuit considered a claim under [Section 10\(b\)](#) of the Securities [\*\*85] Exchange Act involving swaps that allegedly were entered into in the United States but were linked to the prices of Volkswagen stock on European exchanges. The alleged fraud had been conducted by Porsche, which was accused of making statements and taking actions to deny and conceal its intention to take over Volkswagen. The plaintiffs there alleged that they had relied on these statements in entering into swaps that were economically equivalent to taking short positions in Volkswagen stock and that they were injured when the stock price of Volkswagen rose dramatically following Porsche's public announcement of its true intentions.<sup>293</sup> [HN51](#)[] The Circuit there concluded that "while [*Morrison*] unmistakably made a domestic securities transaction . . . necessary to a properly domestic invocation [\*182] of [§ 10\(b\)](#), such a transaction is *not alone sufficient* to state a properly domestic claim under the statute."<sup>294</sup> It then dismissed the complaint as "so predominantly foreign as to be impermissibly extraterritorial"<sup>295</sup> because "the imposition of liability under [§ 10\(b\)](#) on these foreign defendants with no alleged involvement in plaintiffs' transactions, on the basis of the defendants' largely foreign conduct, for losses incurred [\*\*86] by the plaintiffs in securities-based swap agreements based on the price movements of foreign securities would constitute an impermissibly extraterritorial extension of the statute."<sup>296</sup> The court reasoned that to hold otherwise "would require courts to apply the statute to wholly foreign

<sup>287</sup> [677 F.3d 60 \(2d Cir. 2012\)](#).

<sup>288</sup> [Id. at 67](#).

<sup>289</sup> [Loginovskaya](#), [764 F.3d at 272](#).

<sup>290</sup> [Id. at 274](#).

<sup>291</sup> [Myun-Uk Choi v. Tower Research Capital LLC](#), [890 F.3d 60, 67 \(2d Cir. 2018\)](#).

<sup>292</sup> [763 F.3d 198 \(2d Cir. 2014\)](#).

<sup>293</sup> [Id. at 201](#).

<sup>294</sup> [Id. at 215](#) (emphasis added).

<sup>295</sup> [Id. at 216](#).

<sup>296</sup> [Id. at 201](#).

activity clearly subject to regulation by foreign authorities solely because a plaintiff in the United States made a domestic transaction, even if the foreign defendants were completely unaware of it.<sup>297</sup>

Setting aside the open question of whether *Parkcentral* applies to claims brought under the CEA, the reasoning in that case weighs in favor of sustaining Dennis' CEA claims. Although the conduct alleged here largely occurred in Australia and was intended to affect a foreign benchmark interest rate, the amended complaint alleges that defendants engaged in the alleged manipulation in order to increase their returns on derivatives linked to BBSW. The conduct necessarily was intended to reach BBSW-Based Derivatives worldwide, including in the United States. In the Court's view, this distinguishes *Parkcentral* from this case. The defendants in *Parkcentral* allegedly engaged in fraud "with respect to stock [\*\*87] in a German company traded only on exchanges in Europe" and even if the company's false statements had "been intended to deceive investors worldwide," the alleged fraud was effectuated in order to permit the take over of one foreign company by another.<sup>298</sup> The amended complaint here, on the other hand, alleges that the United States is a large market for BBSW-Based Derivatives.<sup>299</sup> In consequence, defendants' alleged actions plausibly depended on their impact on BBSW-Based Derivatives around the world, and in particular, in the United States. Dennis therefore has alleged a sufficiently domestic application of the CEA.<sup>300</sup>

#### [\*183] V. RICO Act Claims

Plaintiffs assert two RICO counts against all defendants: a substantive RICO violation predicated on a pattern of wire fraud and a conspiracy to violate the RICO Act. [HN52](#) [↑] [18 U.S.C. § 1962\(c\)](#) makes it unlawful:

"[F]or any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

It is unlawful also "for any person to conspire [\*\*88] to violate [[18 U.S.C. § 1962\(c\)](#)]."<sup>301</sup>

[HN53](#) [↑] "Racketeering activity" includes violations of the wire fraud statute,<sup>302</sup> which makes it unlawful for anyone: "[H]aving devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, [to] transmit[] or cause[] to be

<sup>297</sup> [Id. at 215](#); see also [id. at 215-16](#) ("If the domestic execution of the plaintiffs' agreements could alone suffice to invoke [§ 10\(b\)](#) liability with respect to the defendants' alleged conduct in this case, then it would subject to U.S. securities laws conduct that occurred in a foreign country, concerning securities in a foreign company, traded entirely on foreign exchanges, in the absence of any congressional provision addressing the incompatibility of U.S. and foreign law nearly certain to arise.").

<sup>298</sup> [Id. at 216](#).

<sup>299</sup> AC at ¶ 20.

<sup>300</sup> Nor is the Court persuaded by [In re North Sea Brent Crude Oil Futures Litig.](#), 256 F. Supp. 3d 298 (S.D.N.Y. 2017), in which the district court considered defendants who were producers, refiners and traders of Brent crude oil that allegedly entered into transactions to intentionally manipulate Brent Crude Oil prices and the prices of Brent Crude Oil futures and derivatives contracts. The court there applied *Parkcentral* and concluded that the application would be extraterritorial even though the derivatives in question were traded on a domestic exchange. [Id. at 309](#). This case is distinguishable from *Brent Crude* because most of the derivatives in that case were not priced by reference to the allegedly manipulated rate. [Id. at 310](#). Here, in contrast, Dennis alleges not only that the derivatives in which he transacted were linked to BBSW, but that defendants acted with the intent to take advantage worldwide of the link between BBSW and BBSW-Based Derivatives such as his.

<sup>301</sup> [18 U.S.C. § 1962\(d\)](#).

<sup>302</sup> See *id.* [§ 1961\(1\)\(B\)](#) (incorporating by reference [18 U.S.C. § 1343](#)).

transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice.<sup>303</sup>

An "enterprise" is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."<sup>304</sup> A pattern of racketeering activity requires at least two acts of racketeering activity to have been committed within ten years of one another.<sup>305</sup>

#### A. RICO Standing

**HN54** [↑] A civil remedy under RICO is available to private plaintiffs who are "injured in [their] business or property by reason of a violation of [18 U.S.C. § 1962]."<sup>306</sup> This language 'has been construed to require that in order to merit standing, a civil RICO plaintiff must establish that the RICO violation at issue [\*\*89] was a proximate cause of the injury to the plaintiff's business or property for which redress is sought."<sup>307</sup> Because a plaintiff must show injury by the conduct constituting the violation of RICO, the injury must be caused by a pattern of racketeering activity violating [section 1962](#) or by individual RICO predicate acts.<sup>308</sup>

Defendants argue only that "[t]he analysis for RICO standing mirrors that for antitrust standing . . . and [that] Plaintiffs' alleged injuries here are too indirect and speculative to support RICO standing for the same reasons that their alleged injuries fail to support antitrust [\*184] standing."<sup>309</sup> But plaintiffs allege that they were deprived of at least some of the value of their BBSW-Based Derivatives and that this injury was caused by defendants' persistent manipulation of BBSW rates, which manipulation constituted a pattern of wire fraud. As discussed above, plaintiffs have alleged sufficiently that BBSW was a component of the price of the derivatives in which they transacted. To suggest that the manipulation of a component of the price of a derivative impacts the overall price and therefore the returns on such derivative requires no great leap of logic. It therefore [\*\*90] was entirely foreseeable that systematic efforts to manipulate BBSW would in turn injure parties on the wrong end of the affected BBSW-Based Derivatives.

While plaintiffs Dennis, Sonterra, and FrontPoint Event Driven point to specific transactions in which they paid too much or received too little as a result of defendants' alleged misconduct, neither FrontPoint Financial Services Fund, L.P. nor FrontPoint Financial Horizons Fund, L.P. do so. Accordingly, plaintiffs Dennis, Sonterra, and FrontPoint Event Driven — whose alleged injuries were a foreseeable consequence of defendants' alleged RICO violations — have standing to bring their RICO claims. The RICO claims of the other plaintiffs will be dismissed.

#### B. Plausible RICO Violations

<sup>303</sup> *Id.* [§ 1343](#).

<sup>304</sup> *Id.* [§ 1961\(4\)](#).

<sup>305</sup> *Id.* [§ 1961\(5\)](#).

<sup>306</sup> *Id.* [§ 1964\(c\)](#); see also [Town of West Hartford v. Operation Rescue](#), 915 F.2d 92, 100 (2d Cir. 1990).

<sup>307</sup> [First Capital Asset Mgmt. v. Brickellbush](#), 218 F. Supp. 2d 369, 379 (S.D.N.Y. 2002) (citing [Terminate Control Corp. v. Horowitz](#), 28 F.3d 1335, 1344 (2d Cir. 1994)).

<sup>308</sup> *Id.* (quoting [Hecht v. Commerce Clearing House, Inc.](#), 897 F.2d 21, 23 (2d Cir. 1990) (quoting [Sedima, S.P.R.L. v. Imrex Co.](#), 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985))) (internal quotation marks omitted).

<sup>309</sup> DI 134 at 38.

**HN55** [+] To state a claim for a violation of RICO, a complaint must allege that the defendant violated [Section 1962](#) — that is, it must allege: "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce."<sup>310</sup> Defendants assert that the amended [\*\*91] complaint fails to allege either an enterprise or a pattern of predicate acts of racketeering.

### 1. Enterprise

**HN56** [+] "[A]n association-in-fact enterprise is simply a continuing unit that functions with a common purpose."<sup>311</sup> Such an enterprise "must have a 'structure' exhibiting three features: a purpose, relationships among the individuals associated with the enterprise, and longevity sufficient to permit the associates to pursue the purpose of the enterprise."<sup>312</sup> "[F]or an association of individuals to constitute an enterprise, the individuals must share a common purpose to engage in a particular fraudulent course of conduct and work together to achieve such purposes."<sup>313</sup>

Defendants assert that the amended complaint fails to show that each of the defendants shared a common purpose to engage in fraud. Defendants argue also that amended complaint fails to show that the defendants worked together to achieve the fraudulent purpose and that each defendant knowingly participated in the such fraud with the requisite intent to [\*185] harm.<sup>314</sup> The Court is not so persuaded.

Each of the three structural requirements for an association-in-fact are met. The amended complaint alleges that "defendants' collective [\*\*92] association . . . acting as a trading bloc and engaging in secret collusive trades in the Prime Bank Bill market to manipulate BBSW" constituted a RICO enterprise.<sup>315</sup> The common purpose of the alleged enterprise was to manipulate BBSW as needed to increase profits on BBSW-Based Derivatives. This is sufficient to satisfy the first of the three structural requirements. The amended complaint alleges also that defendants associated with one another by sharing information and providing one another with Prime Bank Bills ahead of the Fixing Window to permit large trades. This satisfies the second structural requirement. Finally, with respect to longevity, the amended complaint alleges that these activities were ongoing for the duration of the Class Period.

The amended complaint, which alleges that defendants shared private information with one another, including their plans to drive BBSW rates in one direction or the other, and assisted one another in transacting large numbers of Prime Bank Bills, states a plausible claim that defendants actively participated in the alleged scheme to manipulate BBSW with the intention of profiting on their BBSW positions at the expense of unwitting counterparties. [\*\*93] The amended complaint thus sufficiently alleges that defendants formed a RICO enterprise.

### 2. Pattern of Wire Fraud

Defendants challenge plaintiffs' RICO claims on the additional basis that plaintiffs fail to allege a pattern of racketeering.

<sup>310</sup> [Town of West Hartford, 915 F.2d at 100](#) (quoting [18 U.S.C. § 1962\(a\)-\(c\) \(1976\)](#)).

<sup>311</sup> [Boyle v. United States, 556 U.S. 938, 948, 129 S. Ct. 2237, 173 L. Ed. 2d 1265 \(2009\)](#).

<sup>312</sup> [Elsevier Inc. v. W.H.P.R., Inc., 692 F. Supp. 2d 297, 305-06 \(S.D.N.Y. 2010\)](#).

<sup>313</sup> [Cruz v. FXDirectDealer, LLC, 720 F.3d 115, 120 \(2d Cir. 2013\)](#) (quoting [First Capital Asset Mgmt., Inc., 385 F.3d at 174](#)); see also [Elsevier Inc., 692 F. Supp. 2d at 306-07](#) (discussing the "relationship requirement" for an association-in-fact).

<sup>314</sup> DI 134 at 41 (citation omitted).

<sup>315</sup> AC at ¶ 345.

**HN57** [+] The wire fraud statute prohibits any use of interstate wires in furtherance of any fraudulent scheme. There are three elements of a wire fraud violation: "(1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of . . . wires to further the scheme."<sup>316</sup> Because the predicate acts alleged in the amended complaint are wire fraud, plaintiffs' RICO claims are subject to the heightened pleading standard under [Rule 9\(b\)](#).<sup>317</sup> Accordingly, a RICO plaintiff "must plead the alleged [wire] fraud with particularity, and establish that the [communications] were in furtherance of a fraudulent scheme."<sup>318</sup>

Defendants argue that plaintiffs' RICO claims must be dismissed because they are grounded entirely on generalized allegations that each defendant engaged in acts of wire fraud in furtherance of the conspiracy.

**HN58** [+] The Second Circuit has stated that generally in the RICO context, where mail or wire fraud are the alleged predicate acts, a "complaint [\[\\*94\]](#) must adequately specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those [\[\\*186\]](#) responsible for the statements."<sup>319</sup> However, as another judge in this district has stated previously:

"Courts in the Second Circuit have applied a different standard in cases where '[a] plaintiff claims that . . . mails or wires were simply used in furtherance of a master plan to defraud,' but does not allege that 'the communications [themselves] . . . contained false or misleading information.' In such cases, including 'complex civil RICO actions involving multiple defendants, [Rule 9\(b\)](#) does not require that the temporal or geographic particulars of each mailing or wire transmission made in furtherance of the fraudulent scheme be stated with particularity.' Instead, '[Rule 9\(b\)](#) requires only that the plaintiff delineate with adequate particularity in the body of the complaint, the specific circumstances constituting the overall fraudulent scheme."<sup>320</sup>

Here, the amended complaint alleges that each defendant conspired to "engag[e] in secret collusive trades in the Prime [\[\\*95\]](#) Bank Bill market to manipulate BBSW" and distort returns on BBSW-Based Derivatives.<sup>321</sup> In furtherance of this scheme, each defendant engaged in acts of wire fraud, including: (1) the transmission of artificial BBSW rates to Thomson Reuters in the United States, (2) the electronic transmission of confirmations for collusive transactions intended to manipulate BBSW, (3) causing the transmission and dissemination in the United States of the artificial BBSW rates by Thomson Reuters as agent for the AFMA, (4) causing the transmission and dissemination in the United States of distorted BBSW individual bank quotes by Thomson Reuters, (5) the transmission and dissemination of false bid and ask price quotes for BBSW-Based Derivatives within the United States, (6) electronic communications and instant messages containing manipulative requests that emanated from within the United States or were routed through electronic servers located within the United States, (7) sending out trade confirmations based on manipulated and false BBSW rates to counterparties within the United States, and (8)

<sup>316</sup> [United States v. Shellef](#), 507 F.3d 82, 107 (2d Cir. 2007) (internal quotation marks and citations omitted).

<sup>317</sup> See, e.g., [Lundy v. Catholic Health System of Long Island Inc.](#), 711 F.3d 106, 119 (2d Cir. 2013); [First Capital Asset Mgmt. v. Satinwood, Inc.](#), 385 F.3d 159, 178 (2d Cir. 2004); [Moore v. PaineWebber, Inc.](#), 189 F.3d 165, 172-73 (2d Cir. 1999).

<sup>318</sup> [Lundy](#), 711 F.3d at 119 (citing [McLaughlin v. Anderson](#), 962 F.2d 187, 190-91 (2d Cir. 1992)).

<sup>319</sup> *Id.* (quoting [Cosmas v. Hassett](#), 886 F.2d 8, 11 (2d Cir. 1989)) (internal quotation marks omitted).

<sup>320</sup> [Angermeir v. Cohen](#), 14 F. Supp. 3d 134, 145-46 (S.D.N.Y. 2014) (quoting [In re Sumitomo Copper Litig.](#), 995 F. Supp. 451, 456 (S.D.N.Y. 1998)); see also *id. at 146* (collecting cases); [Spira v. Nick](#), 876 F. Supp. 553, 559 (S.D.N.Y. 1995) (concluding that circumstances constituting fraud were stated with sufficient particularity and holding that [Rule 9\(b\)](#) did not require that "mailings and wire communications relied upon as jurisdictional elements of the predicate acts, but which are not themselves said to have been fraudulent," be alleged with particularity).

<sup>321</sup> AC at ¶¶ 345, 347.

sending communications to encourage, negotiate or complete the sale or purchase of price-fixed BBSW-based financial [\*\*96] instruments to counterparties within the United States.<sup>322</sup>

These allegations, however, are largely generalized to all defendants and to that extent are insufficient to meet the pleading standard. [HN59](#) [↑] Although the amended complaint need not list every single allegedly fraudulent use of interstate wires involved in the overall scheme, it nonetheless is necessary to "inform each defendant of the nature of his alleged participation in the fraud."<sup>323</sup>

[\*187] As discussed above, the amended complaint sets forth detailed allegations that traders at ANZ, Westpac, NAB, HSBC, CBA, and Credit Suisse bought and sold large numbers of Prime Bank Bills during the Fixing Window in order to move BBSW in a profitable direction and that traders at UBS, RBS, and BNP Paribas who were in charge of submitting BBSW mid-rates to AFMA solicited rate submission requests from their colleagues who traded in BBSW-Based Derivatives. Although the instances of alleged manipulative transactions and submissions of false BBSW rates are not alleged in great detail, these allegations serve at least to inform the defendant entities from these banks of the "nature of [their] alleged participation in the fraud." As to these defendants, the [\*\*97] amended complaint has alleged racketeering activity sufficient to survive a motion to dismiss. As to the remaining bank defendants — that is, the defendant entities from the Royal Bank of Canada, Deutsche Bank, Lloyds, Macquarie, and Morgan Stanley — plaintiffs' RICO claims are dismissed. Similarly, although ICAP and Tullett Prebon are alleged to have facilitated large transactions in Prime Bank Bills for the bank defendants during the Fixing Window and provided information about the Prime Bank Bill market in exchange for large commission fees, there are no well-pled factual allegations in the amended complaint that either entity acted with specific intent to engage in the alleged fraudulent scheme.

Accordingly, the substantive RICO cause of action is sustained against the defendant entities from ANZ, Westpac, NAB, HSBC, CBA, Credit Suisse, UBS, RBS, and BNP Paribas. Plaintiffs' substantive RICO claims will be dismissed as to the remaining defendants.

### C. RICO Conspiracy

Defendants next argue that plaintiffs have failed to state a claim of a RICO conspiracy because the amended complaint does not allege a conscious agreement among defendants to violate RICO.<sup>324</sup>

[HN60](#) [↑] "The core of a RICO conspiracy [\*\*98] is an agreement to commit predicate acts, and a RICO civil conspiracy complaint must specifically allege such an agreement."<sup>325</sup> Allegations of a conspiracy:

"[M]ust set forth specific facts tending to show that each of the defendants entered into an agreement to conduct the affairs of a particular, identified enterprise through a pattern of racketeering activity — not simply that each defendant committed two or more acts that would qualify as predicate acts, without regard to whether those acts were committed in furtherance of the activity of the enterprise."<sup>326</sup>

<sup>322</sup> *Id.* at ¶ 348.

<sup>323</sup> [Sonterra Capital Master Fund Ltd., 277 F. Supp. 3d at 578](#) (quoting [DiVittorio v. Equidyne Extractive Indus., Inc., 822 F.2d 1242, 1247 \(2d Cir. 1987\)](#)) (internal quotation marks omitted).

<sup>324</sup> DI 134 at 42.

<sup>325</sup> [Elsevier Inc., 692 F. Supp. 2d at 313](#) (citing [Hecht, 897 F.2d at 25](#)).

<sup>326</sup> *Id.* (emphasis omitted).

Defendants rely largely on *Elsevier Inc. v. W.H.P.R., Inc.*<sup>327</sup> in which the district court considered a RICO conspiracy claim against a group of individual defendants who allegedly had purchased academic journals from the plaintiff at the discounted price for individuals, rather than the higher price for institutions, and then resold those journals to institutions at a profit. The court there concluded that the conspiracy claim could not survive a motion to dismiss because the complain "contain[ed] nothing more than a conclusory allegation of an agreement among defendants and a further allegation that each of the individual defendants [\*\*99] committed certain discrete [\*188] acts of fraud."<sup>328</sup> Here in contrast, plaintiffs allege cooperation among defendants — including through the exchange of information and the provision of "ammunition" to help one another execute manipulative Prime Bank Bill transactions. These allegations amounted to a plausible claim that the defendants had formed an antitrust conspiracy and are sufficient also to state a claim that they were part of a RICO conspiracy. Accordingly, plaintiffs' RICO conspiracy claims also are sustained against the defendant entities from ANZ, Westpac, NAB, HSBC, CBA, Credit Suisse, UBS, RBS, and BNP Paribas and dismissed as to the remaining defendants.

#### D. Extraterritoriality

Finally, defendants assert that plaintiffs' RICO claims should be dismissed as impermissibly extraterritorial. The Court proceeds through the two-step inquiry set forth in *Morrison*.

##### 1. Presumption Against Extraterritoriality

**HN61** In *RJR Nabisco, Inc. v. European Community*,<sup>329</sup> the Supreme Court concluded that "Congress intended the [§ 1962(c)] prohibition . . . to apply extraterritorially in tandem with the underlying predicates, without regard to the locus of the enterprise."<sup>330</sup> Accordingly, a RICO claim may be based on foreign [\*\*100] racketeering activity only if the predicate act(s) underlying the claim apply extraterritorially.<sup>331</sup> The predicate acts alleged in this case all are instances of wire fraud.<sup>332</sup> In *RJR Nabisco*, the Second Circuit considered whether Congress had manifested an intent that the federal wire fraud statute<sup>333</sup> apply extraterritorially and concluded that it had not.<sup>334</sup> The presumption against extraterritoriality therefore is not rebutted and the Court next considers whether plaintiffs nonetheless have alleged a domestic application of the RICO Act.

##### 2. Domestic Application

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<sup>327</sup> *Id.*

<sup>328</sup> *Id. at 313.*

<sup>329</sup> [136 S. Ct. 2090, 195 L. Ed. 2d 476 \(2016\)](#).

<sup>330</sup> *Id. at 2105.*

<sup>331</sup> The Supreme Court there held also that "[i]rrespective of any extraterritorial application of § 1962 . . . § 1964(c) does not overcome the presumption against extraterritoriality." Therefore, "[a] private RICO plaintiff . . . must allege and prove a domestic injury to its business or property." *Id. at 2106* (emphasis omitted). This point is not in contention in this case and, in any event, is sufficiently alleged. See *Bascunan v. Elsaca*, [874 F.3d 806 \(2d Cir. 2017\)](#) (alleged scheme in which defendant misappropriated funds held in New York bank account owned by plaintiff alleged a domestic injury to property).

<sup>332</sup> AC at ¶¶ 336-350.

<sup>333</sup> [18 U.S.C. § 1343.](#)

<sup>334</sup> *European Community v. RJR Nabisco, Inc.*, [764 F.3d 129, 141 \(2d Cir. 2014\)](#), *rev'd and remanded on other grounds*, [136 S. Ct. 2090, 195 L. Ed. 2d 476](#); accord *Sonterra Capital Master Fund Ltd.*, [277 F. Supp. 3d at 580](#).

Whether plaintiffs have alleged a domestic RICO claim presents a close question. [HN62](#)<sup>335</sup> The Second Circuit has not "decide[d] precisely how to draw the line between domestic and extraterritorial applications of the wire fraud statute."<sup>335</sup> In *RJR Nabisco*, for example, the Second Circuit stated that "[i]f domestic conduct satisfies every essential element to prove a violation of a United States statute that does not apply extraterritorially, that statute is violated even if some further conduct contributing to the violation occurred outside [\*\*189] the United States."<sup>336</sup> And in *Norex Petroleum Ltd. v. Access Industries, Inc.*,<sup>337</sup> in which a RICO complaint alleging that a group of foreign defendants had engaged in a racketeering conspiracy in order to acquire control over a Russian company in which the plaintiff had been a majority shareholder was dismissed as impermissibly extraterritorial, the Circuit stated only that:

"[S]imply alleging that some domestic conduct occurred cannot support a claim of domestic application. 'It is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States.' [[Morrison, 561 U.S. at 266](#) (emphasis in the original).] The slim contacts with the United States alleged by Norex are insufficient to support extraterritorial application of the RICO statute."<sup>338</sup>

Defendants here assert that the amended complaint fails to plead a domestic RICO claim because it "lacks any specific allegations concerning activities in (or directed at) the U.S."<sup>339</sup> Plaintiffs respond that the amended complaint alleges a domestic application of the wire fraud statute because all of the elements of wire fraud — that is, the formation of a scheme to defraud victims of money or other property and the use of interstate or foreign wire communications in furtherance of such scheme — [\[\\*\\*102\]](#) occurred within the United States or while crossing U.S. borders. The amended complaint alleges specifically that defendants' domestic conduct involved: (1) "transmitting or causing to be transmitted artificial BBSW rates in the United States or while crossing U.S. borders through electronic servers located in the United States;" (2) "transmitting or causing to be transmitting false and artificial BBSW submissions that were relied on by Thomson Reuters and the AFMA in collecting, calculating, publishing, and/or disseminating the daily BBSW rates that were transmitted, published, and disseminated in the United States or while crossing U.S. borders through electronic servers located in the United States;" and (3) "transmitting or causing to be transmitted confirmations for fraudulent transactions intended to impact BBSW in the U.S. or while crossing U.S. borders through servers located in the United States."<sup>340</sup>

As discussed above, however, plaintiffs' RICO claims in significant part are not pled with sufficient particularity. Indeed, plaintiffs' allegations of domestic conduct are entirely generalized. To the extent that plaintiffs assert well-pled factual allegations in support of their [\[\\*\\*103\]](#) RICO claims, the allegations consist solely of activity that took place in Australia.

This Court considered the extraterritoriality question in *Chevron Corporation v. Donzinger*.<sup>341</sup> It there considered the various approaches that had been taken by federal courts and ultimately found persuasive the analysis articulated in *CGC Holding Company v. Hutchens*.<sup>342</sup>

<sup>335</sup> [European Community, 764 F.3d at 142](#).

<sup>336</sup> *Id.*

<sup>337</sup> [631 F.3d 29 \(2d Cir. 2010\)](#).

<sup>338</sup> *Id. at 33*.

<sup>339</sup> DI 134 at 39.

<sup>340</sup> AC at ¶ 346.

<sup>341</sup> [871 F. Supp. 2d 229 \(S.D.N.Y. 2012\)](#).

<sup>342</sup> [824 F. Supp. 2d 1193 \(D. Colo. 2011\)](#).

**HN63** [+] In *CGC Holding*, the district court had rejected the contention that a RICO claim was impermissibly extraterritorial simply because "some of the participants in the enterprise reside[d] outside the United States."<sup>343</sup> Rather, the court held, "[t]he [\*190] focus of the statute is the racketeering activity, i.e., to render unlawful a pattern of *domestic* racketeering activity perpetrated by an enterprise."<sup>344</sup> It then concluded that although most of the enterprise participants had resided in Canada, the plaintiffs had stated a domestic claim because the racketeering activity had been "directed at and largely occurred within the United States." The defendants had "allegedly used telephone, mail, and email communications directed to potential borrowers in the United States" and traveled to the United States for purposes of the scheme. The court therefore concluded [\*\*104] that the allegations in *CGC Holding* were "a far cry from those of *Norex* . . . where the actors, victims and conduct were foreign, and the connection to the United States was essentially incidental" because in *CGC Holding*, "the conduct of the enterprise within the United States was a key to its success."<sup>345</sup>

As this Court concluded in *Chevron*, the approach taken in *CGC Holding* appeals because it "afford[s] a remedy to a U.S. plaintiff who claims injury caused by domestic acts of racketeering activity without regard to the nationality or foreign character of the defendants or the enterprise," is "consistent with the Supreme Court's and [the Second] Circuit's repeated recognition that 'the heart of any RICO complaint is the allegation of a *pattern* of racketeering,'" and seems to be "consistent with Congressional intent, which included protecting American victims at least against injury caused by the conduct of the affairs of enterprises through patterns of racketeering activity that occur in this country."<sup>346</sup> Applying this analysis to the alleged racketeering activity in *Chevron*, this Court readily concluded that the complaint had stated a domestic RICO claim because "[t]he scheme (1) allegedly [\*\*105] was conceived and orchestrated in and from the United States (2) in order wrongfully to obtain money from a company organized under the laws of and headquartered in the United States, and to cover up unlawful and improper activities, and (3) acts in its furtherance were committed here by Americans and in Ecuador by both Americans and Ecuadoreans."<sup>347</sup>

This focus on the alleged racketeering activity, rather than the location of the enterprise, has been endorsed in the Second Circuit which, in *Petroleos Mexicanos v. SK Engineering and Construction Company*,<sup>348</sup> affirmed the dismissal of a civil RICO complaint involving bribes to approve overrun and expense payments in the course of an oil refinery rehabilitation project abroad. The complaint had alleged three contacts with the United States, namely, that the financing was obtained in the United States, the invoices were sent to the bank for payment, and the bank issued payment. There were no allegations that the scheme was directed from or to the United States and the primary activities involved in the alleged scheme — that is, falsifying the invoices, making the bribes, and approving the false invoices — had taken place outside of the United States. [\*\*106] On this basis, the Circuit concluded that the allegations of domestic conduct were "simply insufficient" to sustain RICO jurisdiction.<sup>349</sup>

In this case, the conduct underlying the alleged scheme, including the facilitation of [\*191] manipulative transactions and submission of false BBSW rates, took place entirely outside of the United States. It perhaps is not

<sup>343</sup> *Id. at 1209* (emphasis in original).

<sup>344</sup> *Id.*

<sup>345</sup> *Id. at 1210.*

<sup>346</sup> *Chevron Corp.*, 871 F. Supp. 2d at 244-45 (emphasis in original).

<sup>347</sup> *Id. at 245.*

<sup>348</sup> 572 F. App'x 60 (2d Cir. 2014).

<sup>349</sup> *Id. at 61.*

unexpected that several courts in this district have dismissed RICO claims in other benchmark rate manipulation cases alleging nearly identical domestic conduct.<sup>350</sup>

Respectfully, this Court parts with those cases. Unlike in *Petroleos*, in which there were no allegations that the scheme was directed to or from the United States, the ultimate goal of the scheme alleged here — that is, affecting the prices of and returns on BBSW-Based Derivatives — necessarily implicated the worldwide market for such derivatives. Plaintiffs allege that the United States is among the largest markets for BBSW-Based Derivatives. It thus is reasonable to infer that the scheme largely was "directed to" the United States. Accordingly, although the conduct involved in the alleged conspiracy to manipulate BBSW generally is alleged [\*\*107] to have taken place outside of the United States, the Court is not now in a position to dismiss plaintiffs' RICO claims as extraterritorial. Defendants' alleged scheme at least plausibly was directed at the United States, and the amended complaint therefore states a plausible domestic RICO claim.

#### *VI. Breach of Implied Covenant of Good Faith and Fair Dealing*

Plaintiffs' first state claim is against defendants Macquarie Bank, Morgan Stanley, Credit Suisse, Deutsche Bank AG, and UBS for breach of the implied covenant of good faith and fair dealing. The amended complaint alleges that the FrontPoint Plaintiffs entered into binding contracts with Macquarie Bank, Credit Suisse, Deutsche Bank AG, and UBS and that Sonterra entered into binding contracts with Morgan Stanley, in each case, in connection with transactions for BBSW-Based Derivatives.<sup>351</sup>

**HN64** "[I]mplicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance. . . . Encompassed within the implied obligation of each promisor to exercise good faith are any promises which a reasonable person in the position of the promisee would be justified in understanding were included. This embraces a pledge that [\*\*108] neither party shall do anything which will have the effect of destroying or [\*192] injuring the right of the other party to receive the fruits of the contract."<sup>352</sup>

<sup>350</sup> See, e.g., *Sonterra Capital Master Fund, Ltd.*, 277 F. Supp. 3d at 582 ("That the alleged goal of the conspiracy was to increase *worldwide* profits, including profits generated in the United States, cannot render 'domestic' a scheme that was otherwise centered abroad. Nor can the fact that the CHF LIBOR fixes were distributed *worldwide*, including into the United States, or that defendants carried out their manipulation from abroad through servers that happened to route their communications in the United States."); *FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A.*, No. 16 Civ. 5263 (AKH), 2017 U.S. Dist. LEXIS 132759, 2017 WL 3600425, at \*14-15 (S.D.N.Y. Aug. 18, 2017) (concluding that the dissemination of the daily SIBOR rate throughout the United States via Thomson Reuters was merely incidental use of domestic wires because "[e]ven if defendants' allegedly wrongful conduct had an impact on the United States, any act of wire fraud committed in furtherance of the conspiracy was not sufficiently domestic as to overcome the presumption against extraterritoriality"); *Sullivan*, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \*33 (concluding that "generalized allegations about the defendants' use of interstate wires to coordinate the Euribor scheme" did not suffice to state a domestic RICO claim); *Laydon v. Mizuho Bank, Ltd.*, No. 12 Civ. 3419 (GBD), 2015 U.S. Dist. LEXIS 44126, 2015 WL 1515487, at \*8-9 (S.D.N.Y. Mar. 31, 2015) (rejecting similar contacts as "far too attenuated" and distinguishing *RJR Nabisco* "where the scheme was allegedly both managed from and directed at the U.S." (emphasis omitted)).

<sup>351</sup> AC at ¶ 363.

<sup>352</sup> *Dalton*, 87 N.Y.2d at 396 (internal quotation marks and citations omitted); see also *Skillgames, LLC*, 1 A.D.3d at 252, 767 N.Y.S.2d at 423 ("Implicit in every contract is a promise of good faith and fair dealing, which is breached when a party acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." (quoting *Rowe*, 46 N.Y.2d at 68) (internal quotation marks omitted))).

While the amended complaint does not allege which law governs plaintiffs' state law claims, there is no dispute that New York law is applicable to both. DI 134 at 44-45, DI 156 at 36.

Although the amended complaint alleges that the FrontPoint Plaintiffs contracted with Deutsche Bank, UBS, and Credit Suisse in "Australian dollar-denominated swaps,"<sup>353</sup> it is not clear from the pleading whether these swaps were linked to BBSW. In addition there are no well-pleaded factual allegations in respect of either FrontPoint Financial Services Fund, L.P.'s or FrontPoint Financial Horizons Fund, L.P.'s supposed contracts with Macquarie Bank. In contrast, the amended complaint sufficiently alleges transactions in BBSW-Based Derivatives between FrontPoint Event Driven and Macquarie Bank Ltd. and between Sonterra and Morgan Stanley, although the amended complaint does not specify whether Sonterra transacted with Morgan Stanley or Morgan Stanley Australia Limited.<sup>354</sup>

FrontPoint Event Driven and Sonterra seek damages from defendants Macquarie Bank Ltd. and Morgan Stanley for their respective breaches of the implied covenant of good faith and fair dealing by (1) "intentionally manipulating BBSW for the express purpose **[\*\*109]** of generating illicit profits from its BBSW-[B]ased [D]erivatives, and (2) conspiring with other Defendants to manipulate BBSW and the prices of BBSW-[B]ased [D]erivatives."<sup>355</sup> It is plausible that in allegedly manipulating BBSW rates, defendants Macquarie Bank Ltd. and Morgan Stanley interfered with FrontPoint Event Driven and Sonterra's respective reasonable expectations that they would enjoy the maximum returns permitted by market forces on their BBSW-Based Derivatives transactions. Their claims for breach of the implied covenant of good faith and fair dealing as to Macquarie Bank Ltd. and the Morgan Stanley defendants are, accordingly, sustained. The remaining claims for breach of this implied covenant will be dismissed.

## *VII. Unjust Enrichment*

Plaintiffs' final claim asserts unjust enrichment against all defendants.

**HN65**<sup>†</sup> As discussed above, a plaintiff alleging unjust enrichment under New York law "must show 'that (1) the other party was enriched, (2) at that party's expense, and (3) that "it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'."<sup>356</sup> "The 'essence' of such a claim **[\*193]** 'is that one party has received money or a benefit at **[\*\*110]** the expense of another.'"<sup>357</sup> Accordingly, "courts require proof that the defendant received a 'specific and direct benefit' from the property sought to be recovered, rather than an 'indirect benefit,'"<sup>358</sup> which in turn requires that a plaintiff allege some kind of relationship or connection to that defendant.<sup>359</sup>

<sup>353</sup> AC at ¶ 23; see also *id.* at ¶ 109 (alleging that "Deutsche Bank AG entered into Australian dollar-denominated derivatives transactions with [the FrontPoint Plaintiffs] during the Class Period" and "agreed that these transactions were governed by New York law"); ¶ 150 (repeating allegation as to Credit Suisse).

<sup>354</sup> *Id.* at ¶¶ 286-299.

<sup>355</sup> *Id.* at ¶¶ 365-366.

<sup>356</sup> *Mandarin Trading Ltd.*, 16 N.Y.3d at 182 (quoting *Citibank, N.A.*, 12 A.D.3d at 481; *Baron*, 42 A.D.3d at 629-630) (internal quotation marks omitted); accord *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 516, 973 N.E.2d 743, 950 N.Y.S.2d 333 (2012).

<sup>357</sup> *In re London Silver Fixing, Ltd., Antitrust Litig.*, 213 F. Supp. 3d at 574 (quoting *Kaye v. Grossman*, 202 F.3d 611, 616 (2d Cir. 2000) (quoting *City of Syracuse v. R.A.C. Holding, Inc.*, 258 A.D.2d 905, 685 N.Y.S.2d 381 (4th Dept. 1999))).

<sup>358</sup> *Id.* (quoting *Kaye*, 202 F.3d at 616).

<sup>359</sup> **HN66**<sup>†</sup> See also *Mandarin Trading Ltd.*, 16 N.Y.3d at 182; see also *FrontPoint Asian Event Driven Fund, L.P.*, 2017 U.S. Dist. LEXIS 132759, 2017 WL 3600425, at \*16 ("While a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment, there must exist a relationship or connection between the parties that is not too attenuated." (quoting *Georgia Malone & Co.*, 19 N.Y.3d at 516 (quoting *Sperry*, 8 N.Y.3d at 215-16)) (internal quotation marks omitted)).

On this basis, plaintiffs' claims of unjust enrichment are dismissed as to all defendants except Macquarie Bank Ltd. and Morgan Stanley, with which FrontPoint Event Driven and Sonterra respectively allege having engaged in BBSW-Based Derivatives transactions directly. As discussed above with respect to plaintiffs' claims for breach of the implied covenant of good faith and fair dealing, the amended complaint fails to sufficiently allege a relationship or connection between any other defendant and plaintiff.

Plaintiffs allege that Morgan Stanley and Macquarie Bank Ltd. colluded with the other defendants to manipulate BBSW and the prices of BBSW-Based Derivatives to ensure that they would have an unfair advantage in the marketplace. Defendants "financially benefitted from their unlawful acts . . . by, *inter alia*, (i) coordinating the manipulation of BBSW . . . [\*\*111] . ; and (ii) acting as a trading bloc and engaging in secret, collusive trades in the swap market to manipulate BBSW."<sup>360</sup> As a result, plaintiffs "received, upon execution or settlement of their trades [in BBSW-Based Derivatives], less in value than they would have received absent Defendants' wrongful conduct."<sup>361</sup>

Defendants argue that plaintiffs' unjust enrichment claims against Morgan Stanley and Macquarie Bank Ltd. must be dismissed because the subject matter in dispute is governed by an existing contract.<sup>362</sup> **HN67** It is true that "[w]here the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded."<sup>363</sup> A plaintiff may proceed on the "quasi-contract theory of unjust enrichment" [**\*194**] only "where the contract does not cover the dispute in issue."<sup>364</sup> In order for a contract to "cover the dispute in issue" and thus bar a plaintiff's quasi-contract claims, however, the contract "must specifically address" the actions that gave rise to the dispute.<sup>365</sup> That is to say, the contract must "clearly cover[] the dispute between the parties."<sup>366</sup>

Other courts in this district have interpreted this rule narrowly and, facing claims of unjust enrichment on similar factual allegations, denied motions to dismiss. In *LIBOR II*,<sup>367</sup> for example, the court considered whether the plaintiffs' claims for unjust enrichment on the basis of the defendants' alleged manipulation of LIBOR were precluded by the existence of swap contracts between those plaintiffs and defendants. The court concluded that "although the swap contracts clearly required defendants to pay plaintiffs the prescribed floating rate of return using

<sup>360</sup> AC at ¶¶ 369-370.

<sup>361</sup> *Id.* at ¶ 370.

<sup>362</sup> DI 134 at 45 (citing *Korea Life Ins. Co., Ltd. v. Morgan Guaranty Trust Co. of New York*, 269 F. Supp. 2d 424, 447 (S.D.N.Y. 2003)).

<sup>363</sup> *Ashwood Capital, Inc. v. OTG Mgmt., Inc.*, 99 A.D.3d 1, 10, 948 N.Y.S.2d 292, 299 (1st Dept. 2012) (quoting *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142, 907 N.E.2d 268, 879 N.Y.S.2d 355 (2009)) (internal quotation marks omitted); see also *Pappas v. Tzolis*, 20 N.Y.3d 228, 234, 982 N.E.2d 576, 958 N.Y.S.2d 656 (2012) ("[A] party may not recover in . . . unjust enrichment where the parties have entered into a contract that governs the subject matter." (internal quotation marks and citations omitted)).

<sup>364</sup> *Ashwood Capital, Inc.*, 99 A.D.3d at 10, 948 N.Y.S.2d at 299; see also *Sullivan*, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \*36 (citing *LIBOR II*, 962 F. Supp. 2d at 630).

<sup>365</sup> *Union Bank, N.A. v. CBS Corp.*, No. 08 Civ. 8362 (PGG), 2009 U.S. Dist. LEXIS 48816, 2009 WL 1675087, at \*7 (S.D.N.Y. June 10, 2009).

<sup>366</sup> *Id.* (emphasis omitted) (quoting *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 389, 516 N.E.2d 190, 521 N.Y.S.2d 653 (1987)); see also [\*\*112] 2009 U.S. Dist. LEXIS 48816, [WL] at \*8 (holding that it was not appropriate for the court to rule "at the inception of this case and as a matter of law" that the parties' agreements governed the dispute at issue where there were allegations that "that resolution of the dispute require[d] going outside of the four corners of their agreements").

<sup>367</sup> 962 F. Supp. 2d 606 (S.D.N.Y. 2013).

. . . LIBOR . . . , the contracts did not 'clearly cover[]' the subject matter now at issue, namely whether defendants were permitted to manipulate LIBOR itself and thereby depress the amount they were required to pay plaintiffs."<sup>368</sup>

The Court now adopts this reasoning and concludes that dismissal of plaintiffs' unjust enrichment claims would be premature at this early stage in the litigation. It certainly is plausible that the alleged contracts between FrontPoint Event Driven and Macquarie Bank Ltd. and between Sonterra and Morgan Stanley did not "clearly cover" the manipulation of the benchmark rate underlying the **[\*\*113]** derivatives that were the subject of the contracts. Defendants' motion with respect to plaintiffs' claims of unjust enrichment therefore is denied against the Morgan Stanley defendants and Macquarie Bank Ltd. and granted as to the remaining defendants.

#### *VIII. Fraudulent Concealment*

Defendants' final argument in respect of their motion to dismiss for failure to state a claim is that each of plaintiffs' claims (except for their RICO claims) is untimely.

##### *A. Antitrust Claims*

**HN68** [↑] The statute of limitation to bring a private antitrust action is four years.<sup>369</sup> Plaintiffs filed their complaint on August 16, 2016, which means that conduct predating August 16, 2012 would fall outside of the limitations period, setting aside any questions of continuing violation and equitable tolling. The amended complaint alleges that the limitations period tolled "because of fraudulent concealment involving both active acts of concealment by Defendants and inherently self-concealing conduct." **[\*195]**<sup>370</sup> Defendants argue that plaintiffs allege no injuries after July 1, 2011 and fail to plead fraudulent concealment with the requisite particularity.<sup>371</sup>

**HN69** [↑] The Court will not dismiss plaintiffs' claims on statute of limitations grounds at the **[\*\*114]** pleading stage unless the "complaint clearly shows the claim is out of time."<sup>372</sup>

"[A]n antitrust plaintiff may prove fraudulent concealment sufficient to toll the running of the statute of limitations if he establishes (1) that the defendant concealed from him the existence of his cause of action, (2) that he remained in ignorance of that cause of action until some point within four years of the commencement of his action, and (3) that his continuing ignorance was not attributable to lack of diligence on his part."<sup>373</sup>

A plaintiff may allege fraudulent concealment "by showing either that the defendant took affirmative steps to prevent the plaintiff's discovery of his claim or injury or that the wrong itself was of such a nature as to be self-concealing."<sup>374</sup>

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<sup>368</sup> *Id. at 630*; see also *Sullivan*, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \*36 (citing *LIBOR II* and concluding that "[a]t the pleading stage, plaintiffs sufficiently allege that defendants' conduct in manipulating the Euribor went beyond the terms of any underlying agreements").

<sup>369</sup> *15 U.S.C. § 15b*.

<sup>370</sup> AC at ¶ 311.

<sup>371</sup> DI 134 at 25.

<sup>372</sup> *Harris v. City of New York*, 186 F.3d 243, 250 (2d Cir. 1999).

<sup>373</sup> *State of New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1083 (2d Cir. 1988).

<sup>374</sup> *Id.*

In *State of New York v. Hendrickson Brothers, Inc.*,<sup>375</sup> the Second Circuit concluded that a bid-rigging conspiracy allegedly involving multiple defendants and lasting for over a year was an "inherently self-concealing fraud" such that "proof of the conspiracy itself sufficed to prove concealment by the coconspirators."<sup>376</sup> The Circuit there reasoned that because a bid-rigging conspiracy was the "kind of enterprise that requires a number of participants" [\*\*115] and, in order to incentivize each participate, needed to secure "agreement as to a number of contracts," such a conspiracy necessarily had to last for a prolonged period of time. "In order to endure, it [had to] remain concealed from the victim of the collusive bids."<sup>377</sup>

Plaintiffs make similar allegations here. They highlight defendants' alleged use of private communications through instant messaging to ensure that their efforts to manipulate BBSW rates would remain concealed. As a result, plaintiffs argue, they had "no knowledge of Defendants' unlawful and self-concealing manipulative acts and could not have discovered same by exercise of due diligence prior to the time of public disclosures reporting the manipulation of BBSW."<sup>378</sup>

Defendants next argue that plaintiffs were on notice of their claims by the time that ASIC announced its enforceable undertakings related to BBSW from UBS, BNP Paribas, and RBS, which were accepted between December 19, 2012 and July 21, 2014.<sup>379</sup> But defendants did not admit any wrongdoing in those earlier settlements.<sup>380</sup> Plaintiffs argue that they could [\*196] not have been put on notice from these settlements that any other banks were involved in manipulating BBSW or [\*\*116] that there was a widespread conspiracy to manipulate BBSW.<sup>381</sup> They argue that they were not on notice until the subsequent statements of claim were issued against ANZ, NAB, and Westpac in 2016.<sup>382</sup> Indeed, it was at that point that ASIC released the communications between defendants upon which plaintiffs relied in their complaint. Plaintiffs thus have alleged a plausible basis to find that their complaint was timely. They are entitled to an opportunity to prove fraudulent concealment at trial or, at least, adduce a fuller record on a motion for summary judgment.

#### B. CEA Claims

**HN70** [¶] A claim for a violation of the CEA must be brought within two years.<sup>383</sup> "A cause of action arises under the CEA when a party is placed on inquiry notice of the violation,"<sup>384</sup> which occurs "when the circumstances would suggest to an investor of ordinary intelligence the probability that she has been defrauded."<sup>385</sup> Plaintiffs again argue

<sup>375</sup> *Id.*

<sup>376</sup> *Id. at 1083-84.*

<sup>377</sup> *Id.*

<sup>378</sup> AC at ¶ 315.

<sup>379</sup> DI 134 at 26.

<sup>380</sup> See Enforceable Undertaking between UBS AG and ASIC at § 5.5 (Dec. 23, 2013), available at <https://download.asic.gov.au/media/1301413/028553828.pdf>; Enforceable Undertaking between BNP Paribas and ASIC at § 5.5 (Jan. 28, 2014), available at <https://download.asic.gov.au/media/1301239/028399392.pdf>; Enforceable Undertaking between The Royal Bank of Scotland plc and ASIC at § 5.9 (July 21, 2014), available at <https://download.asic.gov.au/media/1301287/028492040.pdf>.

<sup>381</sup> DI 156 at 45.

<sup>382</sup> *Id. at 46.*

<sup>383</sup> *7 U.S.C. § 25(c).*

<sup>384</sup> *Sonterra Capital Master Fund Ltd., 277 F. Supp. 3d at 575* (quoting *In re Natural Gas Commodity Litig.*, 337 F. Supp. 2d 498, 512 (S.D.N.Y. 2004)) (internal quotation marks omitted).

that they were not put on inquiry notice until ASIC filed its notice of claims against ANZ, NAB, and Westpac in 2016.<sup>386</sup> For the reasons discussed above, these allegations are sufficient to survive a motion to dismiss.

### C. State Law Claims

**HN71**[] Finally, the statutes of limitations for claims of breach [\*\*117] of the implied covenant of good faith and fair dealing and unjust enrichment are six years,<sup>387</sup> and generally "begin[] to run from the time when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury."<sup>388</sup> Defendants again argue that plaintiffs failed to plead fraudulent concealment. For the reasons discussed above, this argument is unavailing. It would be premature at this stage to dismiss plaintiffs' state law claims as untimely.

## IX. Personal Jurisdiction

The Court now turns to the Foreign Defendants' motion to dismiss for lack of personal jurisdiction and improper venue.

**HN72**[] "In order to survive a motion to dismiss for lack of personal jurisdiction, a plaintiff must make a *prima facie* showing that jurisdiction exists."<sup>389</sup> "Such a showing entails making legally sufficient allegations of jurisdiction, including an averment of facts that, if credited[,] would suffice to establish jurisdiction over the [\*197] defendant."<sup>390</sup> In determining whether the requisite showing has been made, the Court "construe[s] the pleadings and any supporting materials in the light most favorable to the plaintiffs." [\*\*118]<sup>391</sup>

### A. Personal Jurisdiction Arising From Defendants' Contacts

**HN73**[] Three requirements must be met in order for a court to exercise personal jurisdiction lawfully: "First, the plaintiff's service of process upon the defendant must have been procedurally proper. Second, there must be a statutory basis for personal jurisdiction that renders such service of process effective. . . . Third, the exercise of personal jurisdiction must comport with constitutional due process principles."<sup>392</sup>

There being no dispute as to the first of these three pleading requirements, the Court turns to the remaining requirements.

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<sup>385</sup> *Id.* (quoting [In re Polaroid Corp. Secs. Litig.](#), 465 F. Supp. 2d 232, 242 (S.D.N.Y. 2006) (quoting [LC Capital Partners v. Frontier Ins. Grp., Inc.](#), 318 F.3d 148, 154 (2d Cir. 2003))).

<sup>386</sup> DI 156 at 46.

<sup>387</sup> [Alaska Elec. Pension Fund](#), 175 F. Supp. 3d at 66.

<sup>388</sup> [ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v. DB Structured Prods., Inc.](#), 25 N.Y.3d 581, 594, 15 N.Y.S.3d 716, 36 N.E.3d 623 (2015) (internal quotation marks and citations omitted).

<sup>389</sup> [Licci ex rel. Licci v. Lebanese Canadian Bank, SAL](#), 732 F.3d 161, 167 (2d Cir. 2013) (quoting [Thomas v. Ashcroft](#), 470 F.3d 491, 495 (2d Cir. 2006)) (internal quotation marks omitted).

<sup>390</sup> [Charles Schwab Corp. v. Bank of Am. Corp.](#), 883 F.3d 68, 81 (2d Cir. 2018) (quoting [Penguin Grp. \(USA\) Inc. v. Am. Buddha](#), 609 F.3d 30, 34-35 (2d Cir. 2010)) (internal quotation marks omitted).

<sup>391</sup> [Licci ex rel. Licci](#), 732 F.3d at 167 (citing [Chloé v. Queen Bee of Beverly Hills, LLC](#), 616 F.3d 158, 163 (2d Cir. 2010)).

<sup>392</sup> [Waldman v. Palestine Liberation Org.](#), 835 F.3d 317, 327 (2d Cir. 2016) (internal quotation marks and citation omitted).

## 1. Statutory Basis

**HN74** [↑] "A plaintiff 'must establish the court's jurisdiction with respect to each claim asserted.'"<sup>393</sup> "For an out-of-state defendant in a federal question case, 'federal courts apply the forum state's personal jurisdiction rules if the applicable federal statute does not provide for national service of process.'"<sup>394</sup> Plaintiffs here assert federal claims under three federal statutes: the Clayton Act, the CEA, and the RICO Act, each of which provides for national service of process in certain circumstances.<sup>395</sup>

The only challenge to the statutory basis for personal jurisdiction is brought by the Venue Defendants in respect of plaintiffs' federal antitrust claims under the Clayton Act.<sup>396</sup> **HN77** [↑] Section 12 of the [\*198] Clayton Act provides for national service of process as follows:

"Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."<sup>397</sup>

"Because the service of process [\*\*120] provision applies only to 'such cases' described in the preceding clause, the Second Circuit has concluded that nationwide service of process is permissible 'only in cases in which its venue provision is satisfied'"<sup>398</sup> The Venue Defendants, characterizing this argument as a motion for improper venue, argue that "Plaintiffs cannot demonstrate proper venue under the Clayton Act" and therefore "cannot establish personal jurisdiction [as to their federal antitrust claim] over Venue Defendants."<sup>399</sup> Plaintiffs respond to defendants'

<sup>393</sup> [Charles Schwab Corp., 883 F.3d at 83](#) (quoting [Sunward Elecs., Inc. v. McDonald, 362 F.3d 17, 24 \(2d Cir. 2004\)](#)).

<sup>394</sup> [McGraw-Hill Global Educ. Holdings, LLC v. Mathrani, 295 F. Supp. 3d 404, 410 \(S.D.N.Y. 2017\)](#) (quoting [Sunward Elecs., Inc., 362 F.3d at 22](#)); accord [Brown v. Lockheed Martin Corp., 814 F.3d 619, 624 \(2d Cir. 2016\)](#); [Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 128 \(2d Cir. 2013\)](#).

<sup>395</sup> The relevant provision of the Clayton Act is discussed below. **HN75** [↑] The CEA provides for nationwide service of process without restriction:

"Process in such action may be served in any judicial district of which the defendant [\*\*119] is an inhabitant or wherever the defendant may be found." [7 U.S.C. § 25\(c\)](#); see also [Sullivan, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \\*42](#).

**HN76** [↑] The RICO Act provides for national service of process where "the 'ends of justice' so require," [PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 70-71 \(2d Cir. 1998\)](#); [Elsevier Inc., 692 F. Supp. 2d at 314-15](#), as follows:

"In any action under [section 1964](#) of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof." [18 U.S.C. § 1965\(b\)](#).

<sup>396</sup> Although the Foreign Defendants challenge also the statutory basis for plaintiffs' assertion of conspiracy jurisdiction, the Court need not reach this question because, as discussed below, plaintiffs have failed to make a *prima facie* showing of jurisdiction under a conspiracy jurisdiction theory.

<sup>397</sup> [15 U.S.C. § 22](#).

<sup>398</sup> [Sullivan, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \\*36](#) (quoting [Daniel, 428 F.3d at 423](#)).

<sup>399</sup> DI 110 at 30.

challenge only by arguing that the Clayton's Act's venue provision "supplements, and does not restrict" the general venue statute codified in [28 U.S.C. § 1391](#).<sup>400</sup>

**HN78** [↑] Plaintiffs' argument falls short. The first part of [Section 12](#) of the Clayton Act, which permits "[a]ny suit, action, or proceeding under the antitrust laws against a corporation [to] be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business," is indeed an expanded venue provision.<sup>401</sup> But the operative language for purposes of personal jurisdiction is found in the second half of the statute — that is, the service provision, which states that "all process **[\*\*121]** *in such cases* may be served in the district of which it is an inhabitant, or wherever it may be found."<sup>402</sup> The Second Circuit has construed "in such cases" in accordance with its plain language. As such, jurisdiction lies only in cases in which the venue provision of [Section 12](#), not the general venue statute, is satisfied.<sup>403</sup>

Although plaintiffs fail to brief the issue, the Court considers whether the amended complaint has sufficiently alleged that the Venue Defendants satisfy the venue provision of [Section 12](#) — that is, whether the amended complaint has sufficiently alleged that they "transact business" in the Southern District of New York.<sup>404</sup>

**HN79** [↑] Under the Clayton Act, the nationwide service of process provision applies only where the action has been brought in a district "wherein [the defendant] may be found or transacts business."<sup>405</sup> "The Supreme Court has construed the phrase 'transacts business,' as used in the venue provision of Clayton Act [Section 12](#), to refer to 'the practical, everyday business or commercial concept of doing business or carrying on business of any **[\*199]** substantial character.'"<sup>406</sup> However, "[f]or a defendant to transact business of any substantial character, there must be 'some amount of business continuity **[\*\*122]** and certainly more than a few isolated and peripheral contacts with the particular judicial district."<sup>407</sup> The nature and amount of a defendant's contacts in a judicial district are to be "considered in light of the nature of [the defendant's] business."<sup>408</sup>

There are no allegations in the amended complaint that HSBC Holdings plc, HSBC Bank Australia Limited, ICAP plc, ICAP Australia Pty Ltd., Lloyds Banking Group plc, Morgan Stanley Australia Limited, The Royal Bank of Scotland Group plc, RBS N.V., RBS Group (Australia) Pty Limited, Tullett Prebon plc, and Tullett Prebon (Australia) Pty Ltd. — that is, eleven out of the fourteen Venue Defendants — transacted any business in New York. Allegations that certain of these defendants are parent companies of subsidiaries that transact business in New York do not suffice to show that the parent companies transact business in New York.<sup>409</sup> As to these defendants,

<sup>400</sup> DI 153 at 29.

<sup>401</sup> [Daniel, 428 F.3d at 425](#) (describing this language as an "expansion of the bounds of venue" (emphasis omitted) (internal quotation marks and citation omitted)).

<sup>402</sup> *Id.* (distinguishing between these two provisions in [Section 12](#) of the Clayton Act).

<sup>403</sup> See [id. at 423](#).

<sup>404</sup> See [id. at 430](#) (concluding alleged "contacts . . . with the State of New York as a whole, not specifically the Western District of New York" were irrelevant to venue under [Section 12](#)).

<sup>405</sup> [15 U.S.C. § 22](#).

<sup>406</sup> [Daniel, 428 F.3d at 428](#) (quoting [United States v. Scophony Corp. of Am., 333 U.S. 795, 807, 68 S. Ct. 855, 92 L. Ed. 1091 \(1948\)](#)).

<sup>407</sup> [Gates v. Wilkinson, No. 01 Civ. 3145 \(GBD\), 2003 U.S. Dist. LEXIS 9417, 2003 WL 21297296, at \\*1 \(S.D.N.Y. June 4, 2003\)](#) (quoting [Daniel v. Am. Bd. of Emergency Medicine, 988 F. Supp. 127, 257 \(S.D.N.Y. 1997\)](#)).

<sup>408</sup> [Daniel, 428 F.3d at 430](#).

the venue provision of [Section 12](#) of the Clayton Act is not satisfied and the federal antitrust claims will be dismissed for lack of personal jurisdiction.

As to the remaining Venue Defendants, the limited allegations in the amended complaint are unavailing. First, the amended complaint alleges [\[\\*\\*123\]](#) that Credit Suisse Group AG "is a Swiss banking and financial services company incorporated in Switzerland" and that one of its six primary offices is located at 11 Madison Avenue, New York, NY, 10010.<sup>410</sup> This allegation, however, is challenged directly by the declaration of Daniel Kläy, Director of Credit Suisse Group AG, which states that Credit Suisse Group AG "has no offices in the United States and no employees in the United States" and that its "only connection to the United States is that it has subsidiaries that are located in or do business in the United States."<sup>411</sup> Indeed, a review of SEC filings indicates that Credit Suisse Group AG is "not an operating company" and merely "holds investments in subsidiaries."<sup>412</sup> This does not amount to "transacting business" in the Southern District of New York.

The amended complaint next alleges that the Royal Bank of Scotland plc "maintains a Foreign Representative Office, registered [\[\\*200\]](#) with the NYSDF, . . . at 340 Madison Avenue, New York, New York," and that its U.S. headquarters is located in Connecticut.<sup>413</sup> However, plaintiffs allege no specific activities conducted by any such Foreign Representative Office and the declaration of William Gougherty alleges [\[\\*\\*124\]](#) that this entity's presence in the United States "consists of a single branch office located in Stamford, Connecticut and a license for a representative office in Jersey City, New Jersey."<sup>414</sup> Left with these minimal allegations, the Court concludes that plaintiffs have not sustained their burden to show that Royal Bank of Scotland plc "transacts business" in the Southern District of New York.

Finally, the amended complaint alleges that Macquarie Group Ltd. is a global banking and diversified financial services corporation headquartered in Sydney, Australia. The only allegation connecting Macquarie Group Ltd. to the Southern District of New York is that it "recruits students in the [Southern District of New York] for its New York offices."<sup>415</sup> This allegation does not sufficiently allege venue for purposes of [Section 12](#). There are no allegations in the amended complaint as to the regularity of such recruitment. Nor does the amended complaint allege that Macquarie Group Ltd. has an office located in New York. Moreover, Macquarie Group is a banking corporation, and there is no indication in the amended complaint that the alleged recruitment efforts comprise a substantial component of the company's business. [\[\\*\\*125\]](#) Without more, the Court cannot conclude that these recruiting

<sup>409</sup> See, e.g., [Scophony Corp. of Am., 333 U.S. at 810-16](#) (considering activities of parent corporation separately from those of subsidiary); cf. [Charles Schwab Corp., 883 F.3d at 84](#) (concluding no personal jurisdiction where complaint failed to distinguish between parent and subsidiary entities).

<sup>410</sup> AC at ¶ 144.

<sup>411</sup> DI 115 at 2.

<sup>412</sup> See Credit Suisse Group AG, Annual Report (Form 20-F) at 135 (March 24, 2016); Credit Suisse Group AG, Annual Report (Form 20-F) at 125 (March 20, 2015); Credit Suisse Group AG, Annual Report (Form 20-F) at 114 (April 3, 2014); Credit Suisse Group AG, Annual Report (Form 20-F) at 108-09 (March 23, 2012); see also [Indymac Mortg. Holdings, Inc. v. Reyad, 167 F. Supp. 2d 222, 237 \(D. Conn. 2001\)](#) (concluding that although generally, the "court must take all allegations in the complaint as true," if an allegation as to venue is "contradicted by the defendants' affidavits, . . . a court may examine facts outside the complaint to determine whether venue is proper" (internal quotation marks and citations omitted)).

<sup>413</sup> AC at ¶¶ 57-58.

<sup>414</sup> DI 127 at 3.

<sup>415</sup> AC at ¶ 128.

efforts evidence the "practical, everyday business or commercial concept of doing business or carrying on business of any substantial character."<sup>416</sup>

For the foregoing reasons, the Court concludes that it cannot exercise personal jurisdiction with respect to plaintiffs' antitrust claims over the Venue Defendants. These claims therefore will be dismissed.

## 2. Due Process

Having dismissed plaintiffs' antitrust claims against the Venue Defendants, the Court next considers whether its exercise of personal jurisdiction with respect to (1) plaintiffs' CEA, RICO Act, and state law claims against the Venue Defendants, and (2) all of plaintiffs' claims against the Foreign Defendants other than the Venue Defendants would "comport[] with due process protections established under the United States Constitution."<sup>417</sup>

**HN80** [+] "The *Due Process Clause of the Fourteenth Amendment* contains a State's authority to bind a nonresident defendant to a judgment of its courts."<sup>418</sup> Accordingly, "the touchstone due process principle has been that, before a court may exercise jurisdiction over a person or an organization, such as a bank, that person or entity must have sufficient 'minimum contacts' with the [\*\*126] forum 'such that the maintenance of the suit does not offend "traditional [\*201] notions of fair play and substantial justice.'"<sup>419</sup> "[T]he quality and nature of the defendant's contacts with the forum state" are evaluated "under a totality of the circumstances test."<sup>420</sup> However, "[i]n a federal question case, the manner in which district courts assess whether the exercise of personal jurisdiction comports with constitutional due process varies depending on the asserted statutory basis."<sup>421</sup>

**HN81** [+] The Supreme Court has established two types of personal jurisdiction: general jurisdiction and specific jurisdiction. The Court considers each in turn below, but first turns to a threshold dispute between the parties — that is, in which forum must the Foreign Defendants have the requisite minimum contacts.

### (a) Relevant Forum

The amended complaint generally alleges that the Foreign Defendants have sufficient minimum contacts with the United States as a whole, rather than with New York State.<sup>422</sup> Plaintiffs argue that the appropriate forum for

<sup>416</sup> *Daniel*, 428 F.3d at 430 (internal quotation marks and citations omitted); see also *id.* (concluding venue was not proper where defendant's business was "certifying doctors who [met] its training and testing standards in the field of emergency medicine" and sole allegation was that defendant had mailed a copy of its application form to plaintiff in the district).

<sup>417</sup> *Licci ex rel. Licci*, 732 F.3d at 168.

<sup>418</sup> *Walden v. Fiore*, 571 U.S. 277, 283, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)).

<sup>419</sup> *Gucci Am., Inc. v. Bank of China*, 768 F.3d 122, 134 (2d Cir. 2014) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940))); accord *Walden*, 571 U.S. at 283.

<sup>420</sup> *Licci ex rel. Licci*, 732 F.3d at 170 (quoting *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 242 (2d Cir. 2007)) (internal quotation marks omitted).

<sup>421</sup> *In re Platinum & Palladium Antitrust Litig.*, No. 1:14-cv-9391-GHW, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at \*39 (S.D.N.Y. Mar. 28, 2017).

<sup>422</sup> AC at ¶¶ 17-33.

purposes of the due process analysis is the United States by virtue of the national service of process provisions in the Clayton [\*\*127] Act, the CEA, and the RICO Act.<sup>423</sup>

This argument is grounded in what is known as the nationwide contacts approach. [HN82](#)[<sup>1</sup>] Although the Second Circuit "has not yet decided" whether to adopt this approach, several other circuits "have endorsed the position that, when a civil case arises under federal law and a federal statute authorizes nationwide service of process, the relevant contacts for determining personal jurisdiction are contacts with the United States as a whole."<sup>424</sup> "The rationale underlying this national contacts approach is that when the national sovereign is applying national law, the relevant contacts are the contacts between the defendant and the sovereign's nation."<sup>425</sup>

[\*202] Several courts in this district addressing federal claims with national service of process — including claims alleging benchmark rate manipulation — have adopted this nationwide contacts approach.<sup>426</sup> This Court now joins them. The appropriate forum for purposes of determining whether the exercise of personal jurisdiction would comport with due process is the United States, rather than New York State.

#### (b) General Jurisdiction [\*\*128]

[HN83](#)[<sup>1</sup>] A court with general personal jurisdiction over a foreign defendant may "hear any and all claims against that defendant."<sup>427</sup> But it by now is well established that "a court may assert general jurisdiction over foreign . . . corporations to hear any and all claims against them [only] when their affiliations with the State are so continuous and systematic as to render them essentially at home in the foreign State."<sup>428</sup> "Aside from 'an exceptional case,' . . . a corporation is at home (and thus subject to general jurisdiction, consistent with due process) only in a state that is the company's formal place of incorporation or its principal place of business."<sup>429</sup> In the guiding "exceptional case,"

<sup>423</sup> DI 153 at 3-4.

<sup>424</sup> [Gucci Am., Inc., 768 F.3d at 142 n.21](#) (collecting cases); see also [In re Magnetic Audiotape Antitrust Litig., 334 F.3d 204, 207 \(2d Cir. 2003\)](#) (same); [S.E.C. v. Straub, 921 F. Supp. 2d 244, 253 \(S.D.N.Y. 2013\)](#) (stating "[w]hen the jurisdictional issue flows from a federal statutory grant that authorizes suit under federal-question jurisdiction and nationwide service of process . . . the [Fifth Amendment](#) applies" and "the minimum-contacts test in such circumstances looks to contacts with the entire United States rather than with the forum state" (internal quotation marks omitted)); cf. [Waldman, 835 F.3d at 330](#) ("[T]he due process analysis [for purposes of the court's *in personam* jurisdiction] is basically the same under both the [Fifth](#) and [Fourteenth Amendments](#). The principal difference is that under the [Fifth Amendment](#) the court can consider the defendant's contacts throughout the United States, while under the [Fourteenth Amendment](#) only the contacts with the forum state may be considered.") (quoting [Chew v. Dietrich, 143 F.3d 24, 28 n.4 \(2d Cir. 1998\)](#))).

<sup>425</sup> [Sonterra Capital Master Fund Ltd., 277 F. Supp. 3d at 589-90](#) (quoting [In re LIBOR-Based Fin. Instruments Antitrust Litig. \("LIBOR IV"\), No. 11-MDL-2262-NRB, 2015 U.S. Dist. LEXIS 107225, 2015 WL 4634541, at \\*18 \(S.D.N.Y. Aug. 4, 2015\)](#), amended, [In re LIBOR-Based Fin. Instruments Antitrust Litig., 2015 U.S. Dist. LEXIS 147561, 2015 WL 13122396 \(S.D.N.Y. Oct. 19, 2015\)](#)) (internal quotation marks omitted).

<sup>426</sup> E.g., *id.*; [In re Platinum & Palladium Antitrust Litig., 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at \\*40; Sullivan, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \\*41-42; S.E.C., 921 F. Supp. 2d at 253.](#)

<sup>427</sup> [Waldman, 835 F.3d at 331](#).

<sup>428</sup> [Daimler AG v. Bauman, 571 U.S. 117, 127, 134 S. Ct. 746, 187 L. Ed. 2d 624 \(2014\)](#) (quoting [Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919, 131 S. Ct. 2846, 180 L. Ed. 2d 796 \(2011\)](#)) (internal quotation marks omitted); accord [Waldman, 835 F.3d at 331](#).

<sup>429</sup> [Gucci Am., Inc., 768 F.3d at 135](#) (quoting [Daimler AG, 571 U.S. at 137 & 139 n.19](#)).

the foreign corporation that was subject to general jurisdiction had moved its entire business to the United States from the Philippines during the Japanese occupation of World War II.<sup>430</sup>

Plaintiffs' argument that the Foreign Defendants are subject to general jurisdiction in the United States can be dispensed with quickly. None of the Foreign Defendants is domiciled or has its principal place of business in the United States. At most, plaintiffs have alleged that certain Foreign Defendants have an [\*\*129] active branch office in the United States, which does not approach the "exceptional case" that would permit the Court to view the defendant as "at home" here.<sup>431</sup> The Foreign Defendants thus are not subject to general jurisdiction in this forum.

### (c) Specific Jurisdiction

**HN84** [↑] Specific jurisdiction is a significantly more limited doctrine. It "depends on an affiliation between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation."<sup>432</sup> "In order for a state court to exercise specific jurisdiction, 'the suit' must 'aris[e] out of or relat[e] to the defendant's contacts with the *forum*."<sup>433</sup> That is to say, "the defendant's suit-related [\*203] conduct must create a substantial connection with the forum State."<sup>434</sup>

The inquiry requires a two-step analysis:

"First, the court must decide if the defendant has "purposefully directed" his activities at . . . the forum and the litigation . . . "arise[s] out of or relate[s] to" those activities.' *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L.Ed.2d 528 (1985) (citation omitted). Second, once the court has established these minimum contacts, it 'determine[s] whether the assertion of personal jurisdiction would comport with [\*\*130] fair play and substantial justice.' *Id. at 476*, 105 S. Ct. at 2174 (quoting [*Int'l Shoe Co.*, 326 U.S. at 320]). See also *Asahi Metal Indus. Co. v. Superior Ct. of Cal., Solano Cnty.*, 480 U.S. 102, 113-14, 107 S. Ct. 1026, 94 L.Ed.2d 92 (1987) (identifying fairness factors that courts should consider)."<sup>435</sup>

**HN85** [↑] Generally, the "minimum contacts necessary to support [specific] jurisdiction exist where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there."<sup>436</sup> If however, "the conduct that forms the basis for the controversy occurs entirely out-of-forum," courts may employ the effects test, which permits a court to assert specific personal jurisdiction over a defendant "if the defendant expressly aimed its conduct at the forum."<sup>437</sup> An additional theory of jurisdiction may be available in cases alleging a conspiracy if plaintiffs "allege that (1) a conspiracy existed; (2) the defendant participated in the

<sup>430</sup> See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447-48, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio Law Abs. 146 (1952).

<sup>431</sup> *Gucci Am., Inc.*, 768 F.3d at 135.

<sup>432</sup> *Waldman*, 835 F.3d at 331 (quoting *Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. at 919) (internal quotation marks omitted).

<sup>433</sup> *Bristol-Myers Squibb Co. v. Superior Ct. of Cal., S.F. Cnty.*, 137 S. Ct. 1773, 1780, 198 L. Ed. 2d 395 (2017) (quoting *Daimler AG*, 571 U.S. at 127).

<sup>434</sup> *Walden*, 571 U.S. at 284.

<sup>435</sup> *Gucci Am., Inc.*, 768 F.3d at 136; accord *Waldman*, 835 F.3d at 331; *Licci ex rel. Licci*, 732 F.3d at 170.

<sup>436</sup> *Licci ex rel. Licci*, 732 F.3d at 170 (internal quotation marks and citations omitted).

<sup>437</sup> *Id. at 173* (citing *Calder v. Jones*, 465 U.S. 783, 789, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984)).

conspiracy; and (3) a co-conspirator's overt acts in furtherance of the conspiracy had sufficient contacts with a state to subject that co-conspirator to jurisdiction in that state.<sup>438</sup> Plaintiffs argue that the Foreign Defendants have sufficient minimum contacts with the United States under each of these three theories.

The jurisdictional basis for plaintiffs' claims under the "purposeful availment" [\*\*131] theory is that the Foreign Defendants engaged in suit-related conduct in the United States. They allege that certain defendants "market[ed] and s[old] BBSW-[B]ased [D]erivatives in the United States."<sup>439</sup> These transactions are sufficiently related to plaintiffs' claims, they argue, because "they are the machinery through which Defendants committed a domestic *per se* antitrust violation by reaching into the forum to contract for price-fixed BBSW-[B]ased [D]erivatives with U.S. investors."<sup>440</sup>

In *Charles Schwab Corporation v. Bank of America Corporation*,<sup>441</sup> the Second Circuit considered Securities Exchange Act and state law claims brought by Charles Schwab against a group of financial institutions that allegedly had conspired in London to artificially suppress LIBOR. Certain of the defendant banks had directly [\*204] and indirectly through broker-dealer subsidiaries or affiliates sold LIBOR-based debt instruments to Charles Schwab. Others were not alleged to have sold financial instruments to Charles Schwab. These defendants' "principal connection to th[e] case . . . [was] that they allegedly conspired with the other Defendants to manipulate LIBOR to Schwab's detriment."<sup>442</sup> Charles Schwab argued that its [\*\*132] transactions with the direct-seller defendants in the forum state "[gave] rise to personal jurisdiction over both the direct and indirect seller Defendants, and jurisdiction, therefore, also [lay] as to the non-seller co-conspirator Defendants."<sup>443</sup>

With respect to the direct-seller defendants, the Circuit concluded that while the alleged in-forum transactions with plaintiff formed a sound basis for Charles Schwab's "claims for fraud relating to omissions by Defendants in the course of selling floating-rate instruments, interference with prospective economic advantage, breach of the implied covenant, and unjust enrichment," they did not "constitute 'suit-related conduct that create[ed] a substantial connection with [the forum state]' with respect to plaintiff's 'claims premised solely on Defendants' false LIBOR submissions in London."<sup>444</sup> It reasoned that "[c]ourts typically require that the plaintiff show some sort of causal relationship between a defendant's U.S. contacts and the episode in suit,' and the plaintiff's claim must in some way 'arise from the defendants' purposeful contacts with the forum."<sup>445</sup> In *Charles Schwab*, the Circuit held that the in-forum transactions "did not cause Defendants' [\*\*133] false LIBOR submissions to the BBA in London, nor did the transactions in some other way give rise to claims seeking to hold Defendants liable for those submissions."<sup>446</sup> Its conclusion, it added, was "only bolster[ed]" by the fact that Charles Schwab had "assert[ed] its false submission claims against all Defendants, including those that did not sell any products to Schwab."<sup>447</sup>

<sup>438</sup> [Charles Schwab Corp., 883 F.3d at 87](#) (citation omitted).

<sup>439</sup> DI 153 at 4; AC at ¶¶ 17, 33.

<sup>440</sup> DI 153 at 8.

<sup>441</sup> [883 F.3d 68 \(2d Cir. 2018\)](#).

<sup>442</sup> [Id. at 79](#).

<sup>443</sup> [Id. at 82](#).

<sup>444</sup> [Id. at 83-84](#) (quoting [Walden, 571 U.S. at 284](#)) (emphasis omitted).

<sup>445</sup> [Id. at 84](#) (quoting [Waldman, 835 F.3d at 341, 343](#)).

<sup>446</sup> [Id.](#)

<sup>447</sup> [Id.](#)

The Circuit then considered whether personal jurisdiction over the non-seller defendants would lie based on their membership in a conspiracy with the direct seller defendants. It noted that Charles Schwab had plausibly alleged a conspiracy,<sup>448</sup> but concluded that these allegations by themselves "[did] not mean that the forum contacts of the seller Defendants [were] necessarily imputed to the co-conspirators."<sup>449</sup> The pleading had to allege that "a co-conspirator's overt acts in furtherance of the conspiracy had sufficient contacts with a state to subject that co-conspirator to jurisdiction in that state."<sup>450</sup> The court concluded that the direct-seller defendants' transactions with Charles Schwab "had nothing to do" with the alleged conspiracy to manipulate LIBOR. There therefore was "no reason to impute the [forum state] **[\*\*134]** contacts to the co-conspirators."<sup>451</sup> Nor was the Second Circuit persuaded by plaintiff's argument **[\*205]** that "Defendants conspired not only to manipulate LIBOR, but also 'to earn profits' from that manipulation."<sup>452</sup> It concluded that "financial self-interest is not the same as furthering a conspiracy through California-directed sales, and nowhere in Schwab's complaint are there allegations that Defendants undertook such sales as part of the alleged conspiracy."<sup>453</sup>

The Foreign Defendants argue that the Court should grant their motion to dismiss on the basis of *Charles Schwab* because "the alleged manipulation of BBSW — an Australian benchmark interest rate — was not caused by any transactions that any Defendant entered into in the United States."<sup>454</sup> Moreover, defendants argue, "such transactions would not be 'acts in furtherance of' the alleged conspiracy even if defendants had 'also [conspired] "to earn profits" from that manipulation."<sup>455</sup>

Plaintiffs argue that the "reputation-based" conspiracy alleged in *Charles Schwab* should be distinguished from the "profit-motivated" conspiracy alleged here.<sup>456</sup> They point to *Sonterra Capital Master Fund Ltd. v. Credit Suisse Group AG*,<sup>457</sup> in which **[\*\*135]** the court considered an alleged conspiracy to manipulate CHF LIBOR. The court there held that certain defendants were subject to specific personal jurisdiction because the "effects on CHF LIBOR-based derivatives in the United States" were "the purpose of defendants' manipulation."<sup>458</sup> Reasoning that "[w]here the goal of the manipulation is to profit wrongfully from transacting in a product, the places where those transactions occur (not just the places where the price manipulation took place) are jurisdictionally relevant," the court concluded that "transacting in CHF LIBOR-based derivatives in the United States after manipulating CHF

<sup>448</sup> *Id. at 86* (citing *Gelboim*, 823 F.3d at 781 & n.19).

<sup>449</sup> *Id.*; see also *id.* ("[T]he mere existence of a conspiracy is not enough.").

<sup>450</sup> *Id. at 87* (citation omitted).

<sup>451</sup> *Id.*

<sup>452</sup> *Id.* (citation omitted).

<sup>453</sup> *Id.*

<sup>454</sup> Def. Letter of March 6, 2018, at 4 (emphasis omitted).

<sup>455</sup> *Id.* (quoting *Charles Schwab Corp.*, 883 F.3d at 87).

<sup>456</sup> Pl. Letter of March 12, 2018, at 3; see *id.* (arguing that defendants here "could only achieve their conspiratorial goal of extracting higher (illegitimate) profits on their BBSW-[B]ased [D]erivatives transactions by ripping off innocent BBSW-[B]ased [D]erivatives investors like Plaintiffs and others similarly situated in the United States").

<sup>457</sup> *277 F. Supp. 3d 521 (S.D.N.Y. 2017)*.

<sup>458</sup> *Id. 591*.

LIBOR for the purpose of wrongfully increasing the profits of those transactions constitute[d] 'purposeful availment' of the forum."<sup>459</sup>

But in *Charles Schwab*, which postdates *Sonterra*, the alleged conspiracy was undertaken both because "[b]y understating their true borrowing costs, Defendants were able to project an image of financial stability to investors who were sensitive to risks associated with major banks following the financial crisis that began in 2007" and because "[s]uppressing LIBOR . . . had the immediate effect of lowering Defendants' interest [\*\*136] payment obligations on financial instruments tied to LIBOR."<sup>460</sup> Accordingly, the conspiracy to manipulate LIBOR alleged in *Charles Schwab* was indeed motivated in part by financial incentives. On this basis, the Court concludes that *Charles Schwab* controls here and precludes a finding of personal jurisdiction — whether through the Foreign Defendants' direct transactions in BBSW-Based Derivatives with plaintiffs or [\*206] through a conspiracy theory of jurisdiction — over plaintiffs' federal claims on the basis of the Foreign Defendants' transactions in BBSW-Based Derivatives in the United States.<sup>461</sup>

Plaintiffs assert in the alternative that Foreign Defendants are subject to personal jurisdiction because their conspiracy, the conduct of which took place entirely outside of the United States, nonetheless was purposefully directed at the United States.<sup>462</sup>

**HN86** To satisfy the effects test, a defendant's conduct must have been "expressly aimed" at the forum.<sup>463</sup> To that end, the relationship between the defendant and the forum must have arisen "out of contacts that the 'defendant *himself*,' as opposed to the plaintiff or third parties, created with the forum.<sup>464</sup> Moreover, the "analysis [\*\*137] looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there."<sup>465</sup> It thus is "insufficient to rely on a defendant's random, fortuitous, or attenuated contacts or on the unilateral activity of a plaintiff with the forum to establish specific jurisdiction."<sup>466</sup> Indeed even "the fact that harm in the forum is foreseeable . . . is insufficient . . . [to] establish[] specific personal jurisdiction over a defendant."<sup>467</sup> On this basis, the Second Circuit has interpreted Supreme Court jurisprudence to "suggest that a

<sup>459</sup> *Id. at 591-92.*

<sup>460</sup> *Charles Schwab Corp., 883 F.3d at 78*; see also No. 1:11-md-02262-NRB DI 672 at 21 (amended complaint in *Charles Schwab*).

<sup>461</sup> The Court notes also that certain of plaintiffs' allegations concerning the Foreign Defendants' transactions in the United States attribute such transactions to corporate families and fail to distinguish between parent and subsidiary entities. In these cases, personal jurisdiction is precluded on the additional basis that the allegations are "insufficiently 'individualized' to make out a *prima facie* case of personal jurisdiction." *Charles Schwab Corp., 883 F.3d at 84*.

<sup>462</sup> DI 153 at 16-21.

<sup>463</sup> *Licci ex rel. Licci, 732 F.3d at 173.*

<sup>464</sup> *Walden, 571 U.S. at 284* (citing *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)*); *id.* (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)*).

<sup>465</sup> *Id. at 285*; see also *id.* ("[T]he plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him."); *id. at 287* (explaining that in *Calder v. Jones*, the Court focused "the various contacts the defendants had created with California (and not just with the plaintiff) by writing the allegedly libelous story"); *Waldman, 835 F.3d at 337-38* (concluding court lacked personal jurisdiction because terrorist attacks in Jerusalem in which U.S. nationals were killed were "random[ly] and fortuitous[ly]" connected to U.S. victims and "the Constitution requires much more purposefully directed contact with the forum").

<sup>466</sup> *Waldman, 835 F.3d at 337* (quoting *Walden, 571 U.S. at 286* (quoting *Burger King Corp., 471 U.S. at 475*) (internal quotation marks omitted)).

defendant's mere knowledge that a plaintiff resides in a specific jurisdiction would be insufficient to subject a defendant to specific jurisdiction in that jurisdiction if the defendant does nothing in connection with the tort in that jurisdiction."<sup>468</sup>

In *Charles Schwab*, the Second Circuit concluded that the effect of defendants' conduct on California markets merely was foreseeable.<sup>469</sup> Plaintiffs here argue that "[t]he Bank Defendants planned their conduct based on each bank's 'net BBSW exposure' . . . aggregating the value of positions across the entire bank, including [\*207] transactions in the United States with U.S. investors."<sup>470</sup> In plaintiffs' view, such misconduct "was 'expressly aimed' at the United States because the net BBSW exposure calculation always included U.S. transactions," resulting in the "perpetual[] victimiz[ation]" of U.S. customers.<sup>471</sup> Indeed, these allegations set the Foreign Defendants' alleged conspiracy to manipulate BBSW apart from the LIBOR manipulation conspiracy in *Charles Schwab*, in which the defendants persistently suppressed LIBOR by submitting artificially low rates with no alleged regard to their in-forum LIBOR-based transactions.

Nonetheless, plaintiffs' arguments are unavailing. The Foreign Defendants may indeed have incorporated their U.S.-based BBSW-Based Derivatives transactions into the calculation of their respective exposures to the rates. But their conduct is connected more readily to the counterparties on their BBSW-Based Derivatives transactions, not the forum in which such transactions took place or where such counterparties were located.

This case can be analogized to *Walden v. Fiore*,<sup>472</sup> in which a group of airline passengers sued a police officer for violating their *Fourth Amendment* rights by seizing money from them in Georgia during the passengers' return [\*139] trip to Nevada and then delaying the return of such monies. The Supreme Court concluded that the police officer was not subject to specific personal jurisdiction in Nevada. It reasoned that the officer had not formed any jurisdictionally relevant contacts with Nevada — the alleged intentional tort had not taken place in Nevada and the officer's only connection to the forum was that he allegedly had directed his conduct at plaintiffs whom he knew had Nevada connections.<sup>473</sup> The plaintiffs' argument there that they had suffered "injury" caused by the defendant's allegedly tortious conduct in the forum — in that the passengers suffered from the delay of the return of their cash while they were in Nevada — similarly was unavailing. [HN87](#)<sup>474</sup> The Court concluded that "mere injury to a forum resident is not a sufficient connection to the forum" and that "[r]egardless of where a plaintiff lives or works, an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State."<sup>474</sup>

Here, the Foreign Defendants are alleged to have engaged in calculating their exposure to BBSW-Based Derivatives while they were outside of the United States. That plaintiffs and [\*140] the purported class members were in the United States and suffered from diminished returns on their BBSW-Based Derivatives transactions does not serve to connect the Foreign Defendants to the United States for jurisdictional purposes. There are no allegations that the Foreign Defendants expressly aimed their conduct at the forum — just that they expressly aimed their conduct at counterparties to BBSW-Based Derivative transactions around the world, some of whom happened to be in the United States. Plaintiffs' allegations that the United States was a substantial market for

<sup>467</sup> [Id. at 339](#) (internal quotation marks and citations omitted).

<sup>468</sup> [Id. at 338](#) (discussing *Walden*).

<sup>469</sup> [Charles Schwab Corp., 883 F.3d at 87-88](#).

<sup>470</sup> DI 153 at 17.

<sup>471</sup> [Id. at 18](#).

<sup>472</sup> [571 U.S. 277, 134 S. Ct. 1115, 188 L. Ed. 2d 12 \(2014\)](#).

<sup>473</sup> [Id. at 289](#).

<sup>474</sup> [Id. at 290](#).

BBSW-Based Derivatives speak only to the foreseeability of the effect of the Foreign Defendants' conduct in the United States. Such contacts therefore are too [\*208] "random, fortuitous, [and] attenuated"<sup>475</sup> to be a basis for the Court's exercise of personal jurisdiction over Foreign Defendants.

Because the Court has concluded that the Foreign Defendants lack sufficient minimum contacts, it need not consider "whether the assertion of personal jurisdiction would comport with fair play and substantial justice."<sup>476</sup>

#### *B. Personal Jurisdiction Arising from Defendants' Consent*

##### *1. ISDA Master Agreements*

Plaintiffs next argue that the FrontPoint [\*\*141] Plaintiffs' claims against Credit Suisse and Macquarie Bank Ltd. arise from transactions related to ISDA Master Agreements that contain consents to personal jurisdiction in New York.<sup>477</sup> They point specifically to two ISDA Master Agreements, which they alleged were in force during the Class Period and governed by New York law and pursuant to which these defendants transacted in BBSW-based swaps with the FrontPoint Plaintiffs.<sup>478</sup>

As an initial matter, it is unclear whether plaintiffs intend to allege that Credit Suisse Group AG or Credit Suisse AG entered into an ISDA Master Agreement with the FrontPoint Plaintiffs. The amended complaint states that these two defendants are referred to collectively as "Credit Suisse,"<sup>479</sup> and neither plaintiffs' brief nor the alleged ISDA Master Agreement itself specifies the Credit Suisse entity, or entities, that is party to the contact.<sup>480</sup> Plaintiffs' allegations as to Credit Suisse therefore are insufficiently individualized to make a *prima facie* showing that either Credit Suisse entity consented to personal jurisdiction in New York.<sup>481</sup>

With respect to Macquarie Bank Ltd., however, plaintiffs highlight an ISDA Master Agreement between Macquarie Bank Ltd. and [\*\*142] FrontPoint Event Driven dated September 8, 2009.<sup>482</sup> Section 13 of the Agreement provides that when an ISDA Master Agreement is governed by New York law, "[w]ith respect to any suit, action, or proceedings related to this Agreement . . . each party irrevocably . . . submits to . . . the non-exclusive jurisdiction of the courts of the State of New York and the United States District Court located in the Borough of Manhattan in New York City."<sup>483</sup> The schedule attached to this ISDA Master Agreement provides that the Agreement is governed by New York state law.<sup>484</sup> Finally, plaintiffs have produced an Equity Swap Transaction Confirmation, which "forms

<sup>475</sup> [Waldman, 835 F.3d at 337](#) (quoting [Walden, 571 U.S. at 286](#) (quoting [Burger King Corp., 471 U.S. at 475](#)) (internal quotation marks omitted).

<sup>476</sup> [Licci ex rel. Licci, 732 F.3d at 170](#) (quoting [Burger King Corp., 471 U.S. at 476](#)).

<sup>477</sup> DI 153 at 21-22.

<sup>478</sup> See DI 154-3, DI 154-7.

<sup>479</sup> AC at ¶ 146.

<sup>480</sup> DI 154-7 at 1.

<sup>481</sup> See [Charles Schwab Corp., 883 F.3d at 84](#).

<sup>482</sup> DI 154-3.

As discussed above, plaintiffs FrontPoint Financial Services Fund, L.P. and FrontPoint Financial Horizons Fund, L.P. lack standing to assert their claims. Accordingly, the Court considers only the alleged ISDA Master Agreement to which FrontPoint Event Driven is party.

<sup>483</sup> DI 154-3 at 12.

part of and is subject to, the ISDA Master Agreement dated as of 08 September 2009 . . . between Macquarie Bank Limited and [\*209] [FrontPoint Even Driven],<sup>485</sup> and which contemplates an equity swap with a "Floating Rate Option" of "AUD-BBR-BBSW."<sup>486</sup> This is sufficient to make a *prima facie* showing that defendant Macquarie Bank Ltd. consented to the exercise of personal jurisdiction in respect of each of the claims asserted by FrontPoint Event Driven in this case.

## 2. New York Banking Laws

Plaintiffs next argue that defendants BNP Paribas S.A., Credit Suisse AG, [\*143] Deutsche Bank AG, Lloyds Bank plc, and Macquarie Bank Ltd. have consented to general personal jurisdiction in New York by virtue of having registered to do business in New York under [New York Banking Law § 200](#) and appointed the Superintendent of the NYSDFS as their agent for service of process.<sup>487</sup>

[New York Banking Law § 200](#) provides, in relevant part:

"No foreign banking corporation . . . shall transact [banking business] in this state . . . unless such corporation shall have: . . .

"(3) Filed in the office of the superintendent . . . a duly executed instrument in writing, by its terms of indefinite duration and irrevocable, appointing the superintendent and his or her successors its true and lawful attorney, *upon whom all process in any action or proceeding against it on a cause of action arising out of a transaction with its New York agency or agencies or branch or branches, may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state.*"<sup>488</sup>

Plaintiffs rely on four cases, each of which is either not precedential, unpersuasive, or both.

In [Varga v. Credit Suisse](#),<sup>489</sup> the then-exiled president of Hungary sued Credit Suisse demanding that the latter release to him funds that had been deposited with the bank as a safety net for his government if it ever were exiled from the country. The New York Supreme Court rejected as "untenable" the argument that [Section 200\(3\)](#) "should be construed as a limitation on the causes of action for which foreign banks may be sued in this state."<sup>490</sup> This section, it held, "merely limits the actions in which the Superintendent may be served."<sup>491</sup> Even if Varga were

<sup>484</sup> D 154-4 at ECF 13.

<sup>485</sup> DI 154-13 at ECF 2.

<sup>486</sup> *Id.* at ECF 4.

<sup>487</sup> DI 153 at 22-25.

<sup>488</sup> [N.Y. Banking Law § 200\(3\)](#) (emphasis added).

Plaintiffs point also to [New York Banking Law § 200-b](#), which provides, in relevant part:

"[A]n action or special proceeding against a foreign banking corporation may be maintained by . . . a non-resident in the following cases only: . . . — where the defendant is a foreign banking corporation doing business in this [\*144] state." *Id.* [§ 200-b\(2\)\(e\)](#).

Reliance on this statute is unpersuasive as the New York Court of Appeals, in [Indosuez Int'l Fin. v. Nat'l Reserve Bank](#), 98 N.Y.2d 238, 248, 774 N.E.2d 696, 746 N.Y.S.2d 631 (2002), has indicated that [Section 200-b](#) provides for subject-matter jurisdiction, rather than personal jurisdiction, over claims against foreign parties.

<sup>489</sup> [155 N.Y.S.2d 655 \(Sup. Ct. N.Y. Co. 1956\)](#).

<sup>490</sup> *Id.* at 658.

controlling, it does not indicate affirmatively that [Section 200\(3\)](#) provides for general personal jurisdiction. Nor has it been cited for such a proposition.

[\*210] Plaintiffs point also to two cases in which courts concluded that a defendant from outside of the forum state had consented to personal jurisdiction for purposes of responding to information subpoenas [\*\*145] served in order to enforce money judgments.<sup>492</sup> The context in those cases, however, was distinct from that before this Court.<sup>493</sup> Indeed, in a subsequent case, Judge Hellerstein, who authored one of the judgment creditor cases, concluded in the context of a benchmark rate manipulation case related to Singaporean bank rates that "the questions and concerns raised in *Vera* [we]re not present [t]here"<sup>494</sup> because *Vera* "concerned whether a foreign bank with branches registered in New York must identify assets of judgment debtors over which it has custody, regardless of where the particular branches holding those assets might be located."<sup>495</sup>

Finally, plaintiffs point to [Brown v. Lockheed Martin Corporation](#),<sup>496</sup> which held that a Connecticut banking registration statute could not subject registrants to general personal jurisdiction.<sup>497</sup> The Second Circuit there stated in *dicta* that "the registration statute in the state of New York has been definitively construed" to "plainly advise the registrant that enrolling in the state as a foreign corporation and transacting business will vest the local courts with general jurisdiction over the corporation."<sup>498</sup> In support of this statement, [\*\*146] however, *Brown* cited a law review article which referred only to [New York Business Corporation Law § 1301](#), not [New York Banking Law § 200](#).<sup>499</sup>

Plaintiffs therefore have offered no legal basis upon which the Court should find that the applicable defendants consented to general personal jurisdiction by virtue of their registration under [New York Banking Law § 200](#). [HN88](#) [↑] The plain language of the statute suggests that, if anything, a banking corporation that registers under this statute would be subject to jurisdiction only in respect of a "cause of action arising out of a transaction with its New York agency or agencies or branch or branches,"<sup>500</sup> rather than any and all claims, as would be the case in a grant of general jurisdiction.<sup>501</sup> And just as plaintiffs' allegations [\*211] did not amount to a plausible showing that the

<sup>491</sup> *Id.*

<sup>492</sup> See [Vera v. Republic of Cuba](#), 91 F. Supp. 3d 561, 570-71 (S.D.N.Y. 2015), rev'd on other grounds, 867 F.3d 310 (2d Cir. 2017); accord [In re B&M Kingstone, LLC v. Mega Int'l Commercial Bank Co., Ltd.](#), 131 A.D.3d 259, 265-67, 15 N.Y.S.3d 318, 322-24 (1st Dept. 2015).

<sup>493</sup> [Vera](#), 91 F. Supp. 3d at 564-65, 571-72 (limiting scope of opinion to "information subpoenas issued to a New York branch in the course of discovery relating to post-judgment execution proceedings").

<sup>494</sup> [FrontPoint Asian Event Driven Fund, L.P.](#), 2017 U.S. Dist. LEXIS 132759, 2017 WL 3600425, at \*4.

<sup>495</sup> *Id.*

<sup>496</sup> [814 F.3d 619](#) (2d Cir. 2016).

<sup>497</sup> [Id. at 641](#) ("[I]n the absence of a clear legislative statement and a definitive interpretation by the Connecticut Supreme Court and in light of constitutional concerns, we construe Connecticut's registration statute and appointment of agent provisions not to require registrant corporations that have appointed agents for service of process to submit to the general jurisdiction of Connecticut courts.").

<sup>498</sup> [Id. at 640](#).

<sup>499</sup> *Id.* (citing Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, [36 CARDOZO L. REV.](#) 1343, 1344-45 & nn. 2 & 4 (2015)).

<sup>500</sup> [N.Y. Banking Law § 200\(3\)](#).

Foreign Defendants engaged in suit-related conduct in the United States sufficient to satisfy the minimum contacts threshold, so have plaintiffs failed to plead that their claims arise out of transactions with defendants' New York agencies or branches.

On this basis, the Court concludes that none of BNP Paribas S.A., Credit Suisse AG, Deutsche Bank AG, Lloyds Bank plc, or Macquarie Bank Ltd. has [\[\\*\\*147\]](#) consented to general personal jurisdiction in New York by virtue of their registration under [New York Banking Law § 200](#).

#### C Pendent Jurisdiction

To this point, the Court's discussion of personal jurisdiction has focused on plaintiffs' federal law claims. [HN89](#)  "The doctrine of pendent personal jurisdiction provides that 'where a federal statute authorizes nationwide service of process, and the federal and state-law claims derive from a common nucleus of operative fact, the district court may assert personal jurisdiction over the parties to the related state-law claims even if personal jurisdiction is not otherwise available.'"<sup>502</sup>

With the exception of the claims asserted by FrontPoint Event Driven against Macquarie Bank Ltd., the Court has concluded that the plaintiffs have not made a *prima facie* showing that the Foreign Defendants are subject to personal jurisdiction in this Court. Accordingly, with the exception of Macquarie Bank Ltd., the Court is without a basis to exercise pendent jurisdiction over the Foreign Defendants in respect of plaintiffs' state law claims. As to Macquarie Bank Ltd., however, the Court agrees with plaintiffs<sup>503</sup> that the state law claims derive from "a common nucleus of operative fact" sufficient [\[\\*\\*148\]](#) for the Court to assert personal jurisdiction in respect of FrontPoint Event Driven's state law claims.

#### D. Jurisdictional Discovery

Plaintiffs' final argument is that the "Court should decline to dismiss any Defendant before simple, targeted jurisdictional discovery has occurred," reasoning that defendants have "demonstrate[d] that much of the discoverable information remains exclusively in their hands by providing declarations and documents that only tell half the story, omitting any reference to their trades in the United States, use of U.S.-based personnel, facilities, and accounts, and consent to jurisdiction in ISDA Master Agreements."<sup>504</sup> The Foreign Defendants respond that "[j]urisdictional discovery is inappropriate where, as here, [\[\\*212\]](#) Plaintiffs have failed to allege a *prima facie* case of jurisdiction."<sup>505</sup>

<sup>501</sup> See [Sonterra Capital Master Fund Ltd., 277 F. Supp. 3d at 586-87](#) ("Section 200(3) provides for service of process on a cause of action arising out of a transaction with the foreign bank's New York agency or agencies or branch or branches. The most natural reading of the provision does not provide general jurisdiction." (internal quotation marks and citations omitted)); [FrontPoint Asian Event Driven Fund, L.P., 2017 U.S. Dist. LEXIS 132759, 2017 WL 3600425, at \\*4](#) ("By its express terms, this statute limits a foreign bank's consent to suits 'arising out of a transaction with its New York agency or agencies or branch or branches,' and is thus relevant only to specific jurisdiction, not general jurisdiction. Courts have been virtually unanimous in concluding that this statute does not provide for general jurisdiction."); [Sullivan, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \\*39](#) ("The statute does not establish a consent to jurisdiction by the branch's foreign parent, and courts in this District have uniformly rejected plaintiffs' argument."); [7 West 57th Street Realty Co., LLC v. CitiGroup, Inc., No. 13 Civ. 981 \(PGG\), 2015 U.S. Dist. LEXIS 44031, 2015 WL 1514539, at \\*11 \(S.D.N.Y. Mar. 31, 2015\)](#) ("The plain language of this provision limits any consent to personal jurisdiction by registered banks to specific personal jurisdiction.").

<sup>502</sup> [Charles Schwab Corp., 883 F.3d at 88](#) (quoting [JUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1056 \(2d Cir. 1993\)](#)).

<sup>503</sup> DI 153 at 4 n.5.

<sup>504</sup> *Id.* at 30.

<sup>505</sup> DI 164 at 15 (citations omitted).

**HN90** [+] It is within the Court's discretion to allow jurisdictional discovery.<sup>506</sup> Given that plaintiffs need only make a *prima facie* case for jurisdiction in order to *survive* a motion to dismiss pursuant to [Rule 12\(b\)\(2\)](#), it follows that the standard for allowing jurisdictional discovery is at least somewhat lower than that. However, although plaintiffs broadly request jurisdictional discovery, they propose [\*\*149] no actual plan for such discovery on the limited question of whether the Foreign Defendants are subject to personal jurisdiction in this Court. In the circumstances, it would be inappropriate to permit limitless discovery at this stage of the proceedings.

### Conclusion

Defendants' motions to dismiss each are granted in part and denied in part, as follows:

A. The motion to dismiss for lack of subject-matter jurisdiction and failure to state a claim [DI 132] is granted (except as to defendants JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A.) to the following extent:

- (1) All claims brought by plaintiffs FrontPoint Financial Services Fund, L.P. and FrontPoint Financial Horizons Fund, L.P. are dismissed;
- (2) Plaintiffs do not have class standing to assert claims for breach of the implied covenant of good faith and fair dealing or unjust enrichment on behalf of purported class members to the extent such class members traded in BBSW-based forward rate agreements and 90-day BAB futures;
- (3) The CEA claims brought by FrontPoint Asian Event Driven Fund, L.P. and Sonterra Capital Master Fund, Ltd. are dismissed;
- (4) The remaining CEA and RICO Act claims are dismissed as to defendants Deutsche Bank AG, [\*\*150] Royal Bank of Canada, RBC Capital Markets LLC, Lloyds Banking Group plc, Lloyds Bank plc, Macquarie Group Ltd., Macquarie Bank Ltd., Morgan Stanley, Morgan Stanley Australia Limited, ICAP plc, ICAP Australia Pty Ltd., Tullett Prebon plc, and Tullett Prebon (Australia) Pty Ltd.;
- (5) The claims of breach of the implied covenant of good faith and fair dealing and unjust enrichment are dismissed as to all defendants except Macquarie Bank Ltd., Morgan Stanley, and Morgan Stanley Australia Limited, and

The motion [DI 132] is denied in all other respects.

B. The motion to dismiss for lack of personal jurisdiction and improper venue [DI 109] is granted in all respects except that it is denied as to the claims brought by FrontPoint Asian Event Driven Fund, L.P. against defendant Macquarie Bank Ltd.

C. Plaintiffs' request for jurisdictional discovery is denied without prejudice to their renewing such request [\*213] within thirty (30) days after the date of entry hereof.

Any motion for leave to amend must be made no later than thirty (30) days after the date of entry hereof.

SO ORDERED.

Dated: November 26, 2018

/s/ Lewis A. Kaplan

Lewis A. Kaplan

United States District Judge

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<sup>506</sup> [Sonterra Capital Master Fund Ltd., 277 F. Supp. 3d at 599](#) (citing [Jazini v. Nissan Motor Co., Ltd., 148 F.3d 181, 186 \(2d Cir. 1998\)](#)).



## *Herboso v. Pollo Operations, Inc.*

United States District Court for the Southern District of Florida

November 27, 2018, Decided; November 27, 2018, Entered on Docket

CASE NO.: 18-21960-CIV-MARTINEZ/AOR

### **Reporter**

2018 U.S. Dist. LEXIS 201468 \*; 2018 WL 6978697

SUSANA HERBOSO, Plaintiff, v. POLLO OPERATIONS, INC. and DINOLAYS VERA, Defendants.

**Subsequent History:** Adopted by, Motion granted by, Stay granted by, Dismissed without prejudice by, Motion denied by, As moot [Herboso v. Pollo Operations, Inc., 2018 U.S. Dist. LEXIS 222941 \(S.D. Fla., Dec. 17, 2018\)](#)

## **Core Terms**

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Arbitration, arbitration agreement, parties, new hire, recommendation, assent, employee handbook, undersigned, employees, mandatory, terms, courts, state statute, disputes

**Counsel:** [\*1] For Susana Herboso, Plaintiff: Diane Patricia Perez, Diane Perez, P.A., Coral Gables, FL.

For Pollo Operations, Inc., Defendant: Christopher Patrick Hammon, Gregory Robert Hawran, LEAD ATTORNEYS, Ogletree Deakins Nash Smoak & Stewart PC, Miami, FL.

**Judges:** ALICIA M. OTAZO-REYES, UNITED STATES MAGISTRATE JUDGE.

**Opinion by:** ALICIA M. OTAZO-REYES

## **Opinion**

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### **REPORT AND RECOMMENDATION**

THIS CAUSE came before the Court upon Defendant Pollo Operations, Inc. d/b/a Pollo Tropical's ("Pollo Tropical") Motion to Compel Arbitration and Dismiss or, in the Alternative, Stay Proceedings Pending Arbitration (hereafter, "Motion to Compel Arbitration") [D.E. 11]. This matter was referred to the undersigned pursuant to [28 U.S.C. § 636](#) by the Honorable Jose E. Martinez, United States District Judge [D.E. 12]. The undersigned held a hearing on this matter on August 7, 2018 [D.E. 19]. For the reasons stated below, the undersigned respectfully recommends that the Motion to Compel Arbitration be GRANTED and this case be DISMISSED WITHOUT PREJUDICE.

### **FACTUAL AND PROCEDURAL BACKGROUND**

This action arises out of an employment dispute between Plaintiff Susana Herboso ("Plaintiff" or "Herboso") and her former employer, Pollo Tropical. See Compl. [D.E. 1]. Pollo Tropical [\*2] employed Plaintiff from August 28, 2000 until it terminated her employment on May 5, 2017. Id. at 2, 4.

On June 16, 2006, Pollo Tropical issued a Company Memorandum to its employees with the subject line: "Mandatory Arbitration Program — Existing Employee Roll-Out" (hereafter, "Memorandum") [D.E. 11-1 at 13]. See

Declaration of Sally Throckmorton ("Throckmorton Decl.") [D.E. 11-1 at 3]. The Memorandum described the implementation of a Mandatory Arbitration Program ("MAP") [D.E. 11-1 at 7-8] to be agreed upon in the Agreement for Resolution of Disputes Pursuant to Binding Arbitration ("Arbitration Agreement") [D.E. 11-1 at 10-11] (MAP and Arbitration Agreement, together "Arbitration Policy"), a copy of which was attached to the Memorandum. See Throckmorton Decl. [D.E. 11-1 at 3]. The Memorandum stated that employees' employment-related disputes that could not be resolved internally would be resolved through arbitration rather than in a lawsuit; and it directed employees to review the Arbitration Agreement carefully because they would "agree to be bound by its terms and conditions after August 1, 2006." See Memorandum [D.E. 11-1 at 13]. The Memorandum further stated, "**By reporting to work on or [\*3] after August 1, 2006, you agree to the terms of MAP as a condition of your continued employment with [Carrols Corporation/Taco Cabana/Pollo Tropical].**" Id. (bold in original).

The Arbitration Agreement states:

Polio Tropical...has therefore implemented a mandatory arbitration program that is a condition of your employment. . . . Under this arbitration program, which is mandatory, [Polio Tropical] and you agree that any and all disputes, claims or controversies for monetary or equitable relief arising out of or relating to your employment, even disputes, claims, or controversies relating to events occurring outside the scope of your employment ("Claims"), shall be arbitrated before JAMS

....

Claims subject to arbitration shall include, without limitation, disputes, claims, or controversies relating or referring in any manner, directly or indirectly, to: Title VII of the Civil Rights Act of 1964 and similar state statutes; the Federal Age Discrimination Employment Act and similar state statutes; the whistleblower provisions of state or federal law or state or federal regulations; personal or emotional injury to you or your family; the Federal Fair Labor Standards Act or similar state [\*4] statutes; the Family and Medical Leave Act or similar state statutes; the Americans with Disabilities Act or similar state statutes; injuries you believe are attributable to [Polio Tropical] under theories of product liability, strict liability, intentional wrongdoing, gross negligence, negligence, or *respondeat superior*; actions or omissions of third parties you attribute to [Polio Tropical]; the Employee Retirement Income Security Act tort claims brought pursuant to actual or alleged exceptions to the exclusive remedy provisions of state workers compensation laws; federal and state antitrust law; benefits, bonuses, and wages; contracts; pensions; federal, state, local, or municipal regulations, ordinances, or orders; any common law, or statutory law relating to discrimination by sex, race, national origin, sexual orientation, family or marital status, disability, weight, dress, or religion; and alleged wrongful retaliation of any type, including retaliation related to workers compensation laws or employee injury benefit plan actionable at law or equity, but not any claims under workers compensation laws or employee injury benefit plan. My agreement to arbitrate Claims extends to [\*5] Claims against [Polio Tropical's] officers, directors, managers, employees, owners, attorneys and agents, as well as to any dispute you have with any entity owned, controlled or operated by [Polio Tropical].

See Arbitration Agreement [D.E. 11-1 at 10].

The Memorandum and the Arbitration Agreement were distributed to Polio Tropical employees on June 16, 2006 as an attachment stapled to their paychecks and/or paystubs. See Throckmorton Decl. [D.E. 11-1 at 3]. However, Plaintiff contends that neither the Memorandum nor the Arbitration Agreement were attached to her paycheck or paystub, and that Polio Tropical never provided her with the Memorandum or the Arbitration Agreement in any other manner. See Affidavit of Susana Herboso ("Herboso Affidavit") [D.E. 15-1 at 2].

On August 1, 2006, Polio Tropical implemented the MAP, which was contained in the Polio Tropical Employee Handbook (hereafter, "Employee Handbook"). See Throckmorton Decl. [D.E. 11-1 at 3]; MAP [D.E. 11-1 at 7-8]. The MAP states, in pertinent part, "All Polio Tropical employees are subject to the Company's Mandatory Arbitration Program." See MAP [D.E. 11-1 at 8]. The Employee Handbook also contained an Acknowledgment form, which [\*6] stated that "the information contained in this Handbook is subject to change at anytime and at the sole discretion of [Polio Tropical]." See Acknowledgement [D.E. 15-2].

Plaintiff continued working for Polio Tropical after August 1, 2006. See Throckmorton Decl. [D.E. 11-1 at 4]; Herboso Affidavit [D.E. 15-1 at 2]. She was promoted to General Manager on July 2, 2007. See Throckmorton Decl. [D.E. 11-1 at 2]; Herboso Affidavit [D.E. 15-1 at 2]. Plaintiff admits that, as General Manager, she was provided with an Employee Handbook that contained the MAP as part of the new hire paperwork that Polio Tropical directed her to have new hires sign. See Herboso Affidavit [D.E. 15-1 at 3]. Plaintiff provided at least three new hires with the MAP and the Arbitration Agreement during her tenure as General Manager. See Throckmorton Decl. [D.E. 11-1 at 4]; see also New Hire Paperwork Checklists [D.E. 11-1 at 15, 17, 19]. Plaintiff claims to have believed that "arbitration applied only to those individuals employed by [Polio Tropical] after the date it created and disseminated its arbitration program." See Herboso Affidavit [D.E. 15-1 at 3].

On May 16, 2018, Plaintiff brought this action against Polio [\*7] Tropical and Defendant Dinolays Vera ("Vera") (together, "Defendants") asserting claims for age discrimination in violation of the Florida Civil Rights Act, Fla. Stat. § 760.01, et seq.; retaliatory discharge in violation of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3); and retaliatory discharge in violation of Florida's Private Whistleblower Act, Fla. Stat. § 448.102. See Compl. [D.E. 1]. Specifically, Plaintiff alleges that Polio Tropical demoted her from General Manager to Assistant Manager because of her age, and that Defendants fired her for complaining about Polio Tropical's purported failure to pay overtime. Id.

On June 29, 2018, Pollo Tropical filed the instant Motion to Compel Arbitration [D.E. 11]. Pollo Tropical argues that the Arbitration Policy is binding and enforceable against Plaintiff, and that all of her claims fall within the scope of the Arbitration Policy, requiring that the instant case be dismissed and the claims be arbitrated. Id. at 8-12. On July 13, 2018, Plaintiff filed her Response, arguing that there was no enforceable agreement to arbitrate [D.E. 15]. On July 20, 2018, Polio Tropical filed its Reply [D.E. 16].

## APPLICABLE LAW

"The validity of an arbitration agreement is generally governed by the 9Federal Arbitration Act, U.S.C. §§ 1 et seq. (the "FAA"), [\*8] which was enacted in 1925 to reverse the longstanding judicial hostility toward arbitration." Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1367 (11th Cir. 2005) (citing Mitsubishi Motors Corp. v. Soler Chrysler—Plymouth, Inc., 473 U.S. 614, 626-27, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985); Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1312 (11th Cir. 2002)). "The FAA embodies a liberal federal policy favoring arbitration agreements." Id. (citations omitted). Pursuant to the FAA, a written arbitration provision in a "contract evidencing a transaction involving commerce" is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. To determine whether parties should be compelled to arbitrate a dispute, courts consider: (1) whether an enforceable written agreement to arbitrate exists; (2) whether the issues are arbitrable; and (3) whether the party seeking arbitration has waived the right to arbitrate. Sims v. Clarendon Nat. Ins. Co., 336 F. Supp. 2d 1311, 1326 (S.D. Fla. 2004).

"[I]n determining whether a binding agreement arose between the parties, courts apply the contract law of the particular state that governs the formation of contracts." Caley, 428 F.3d at 1368. Under Florida law, mutual assent is a prerequisite for the formation of any contract and is evaluated by analyzing the parties' agreement process in terms of offer and acceptance. Kolodziej v. Mason, 774 F.3d 736, 741 (11th Cir. 2014) (citations omitted). In determining assent, courts do not look into the subjective [\*9] minds of the parties, but rather, "the law imputes an intention that corresponds with the reasonable meaning of a party's words and acts." Id. at 745. The best evidence of intent is the plain language of the contract. Tranchant v. Ritz Carlton Hotel Co., LLC, No. 2:10-CV-233-FTM-29DNF, 2011 U.S. Dist. LEXIS 35099, 2011 WL 1230734, at \*3 (M.D. Fla. Mar. 31, 2011) (citations omitted).

It is not necessary for the party opposing arbitration to have signed the arbitration agreement in order for it to be enforced; and assent can be established through a course of conduct. Mays v. Keiser Sch., Inc., No. 10-61921-CIV, 2011 U.S. Dist. LEXIS 42213, 2011 WL 1539675, at \*2 (S.D. Fla. Mar. 31, 2011) (citations omitted), report and recommendation adopted, 2011 U.S. Dist. LEXIS 43365, 2011 WL 1496774 (S.D. Fla. Apr. 19, 2011). See also Sundial Partners, Inc. v. Atl. St. Capital Mgmt. LLC, No. 8:15-CV-861-T-23JSS, 2016 U.S. Dist. LEXIS 31617, 2016

WL 943981, at \*5 (M.D. Fla. Jan. 8, 2016) ("Because the object of a signature is to show mutuality or assent, a contract may be binding on a party notwithstanding the absence of a signature if the parties assented to the contract in another manner."), report and recommendation adopted, 2016 U.S. Dist. LEXIS 31616, 2016 WL 931135 (M.D. Fla. Mar. 11, 2016). Moreover, the FAA does not require that an arbitration agreement be signed by the parties. Id.; 9 U.S.C. § 2. Courts in Florida have found that continued employment after receiving notice of the terms of an arbitration agreement constitutes assent. See Mays, 2011 U.S. Dist. LEXIS 42213, 2011 WL 1539675, at \*2 (finding that the plaintiff's "course [<sup>10</sup>] of conduct of continuing her employment with Defendant, with knowledge of the terms of the Agreement, including the arbitration clause, constitutes an assent to those terms"); Sierra v. Isdell, No. 6:09-cv-124-Orl-19KRS, 2009 U.S. Dist. LEXIS 66148, 2009 WL 2179127, at \*4 (M.D. Fla. July 21, 2009) (finding that plaintiff's continued employment after obtaining knowledge of the terms of an arbitration agreement established assent); BDO Seidman, LLP v. Bee, 970 So.2d 869, 875 (Fla. 4th DCA 2007) (finding that a party acquiesced to the terms of the agreement to arbitrate by continuing employment after the agreement came into existence).

"[A] party seeking to avoid arbitration must unequivocally deny that an agreement to arbitrate was reached and must offer 'some evidence' to substantiate the denial." Mays, 2011 U.S. Dist. LEXIS 42213, 2011 WL 1539675, at \*1 (citations omitted). The Eleventh Circuit has held:

If, under a "summary judgment-like standard," the district court concludes that there "is no genuine dispute as to any material fact concerning the formation of such an agreement," it "may conclude as a matter of law that [the] parties did or did not enter into an arbitration agreement."

Burch v. P.J. Cheese, Inc., 861 F.3d 1338, 1346 (11th Cir. 2017) (quoting Bazemore v. Jefferson Capital Sys., LLC, 827 F.3d 1325, 1333 (11th Cir. 2016)). On summary judgment, "courts are required to view the facts and draw reasonable inferences in the light most favorable to the party opposing the summary judgment motion." Scott v. Harris, 550 U.S. 372, 378, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (citations [<sup>11</sup>] omitted). Upon being satisfied that the issue is referable to arbitration, the Court may, on application of one of the parties, stay the trial of the action until the conclusion of the arbitration proceedings. 9 U.S.C. § 3. Courts in this District have also "dismissed the case where all claims were subject to arbitration." Perera v. H & R Block E. Enters, Inc., 914 F. Supp. 2d 1284, 1290 (S.D. Fla. 2012) (citations omitted); see also Amat v. Rey Pizza Corp., 204 F. Supp. 3d 1359, 1368 (S.D. Fla. 2016) (adopting recommendation to dismiss the case because "all of the issues raised in the district court were arbitrable").

## DISCUSSION

Plaintiff argues that there is no enforceable agreement to arbitrate because she never received the Memorandum or the Arbitration Policy when Pollo Tropical distributed them to its employees. See Response [D.E. 15 at 5-6]. However, Plaintiff admits that she did receive the Employee Manual that contained the MAP as part of the new hire paperwork that Pollo Tropical directed her to have new hires sign in her role as General Manager. See Herboso Affidavit [D.E. 15-1 at 3]. Further, Plaintiff does not dispute that she provided at least three new hires with the MAP and the Arbitration Agreement during her tenure as General Manager. See Throckmorton Decl. [D.E. 11-1 at 4]; see also New Hire Paperwork Checklists [D.E. 11-1 [<sup>12</sup>] at 15, 17, 19]. It is also undisputed that Plaintiff continued working for Pollo Tropical until she was terminated on May 5, 2017. See Compl. [D.E. 1 at 4]; Throckmorton Decl. [D.E. 11-1 at 2].

Viewing the facts and drawing reasonable inferences in the light most favorable to Plaintiff, see Scott, 550 U.S. at 378, the undersigned concludes that Plaintiff had notice of the terms of the Arbitration Policy during her employment, including that it was mandatory for all Pollo Tropical employees and that it was a condition of employment; and she continued to work for Pollo Tropical after obtaining such knowledge. Thus, the undersigned finds that Plaintiff's conduct constituted assent to the Arbitration Policy. See Mays, 2011 U.S. Dist. LEXIS 42213, 2011 WL 1539675, at \*2; Sierra, 2009 U.S. Dist. LEXIS 66148, 2009 WL 2179127, at \*4; BDO Seidman, 970 So.2d at 875. Moreover, that Plaintiff never signed the Arbitration Agreement is of no moment. See Mays, 2011 U.S. Dist.

LEXIS 42213, 2011 WL 1539675, at \*2; Sundial Partners, Inc., 2016 U.S. Dist. LEXIS 31617, 2016 WL 943981, at \*5; 9 U.S.C. § 2.

Although Plaintiff claims that she believed that "arbitration applied only to those individuals employed by [Polio Tropical] after the date it created and disseminated its arbitration program," see Herboso Affidavit [D.E. 15-1 at 3], her subjective intent does not raise a genuine issue of material fact. See Kolodziej, 774 F.3d at 745. The plain language of the Arbitration Policy indicates that it was mandatory for all employees and [\*13] that it was a condition of employment. See MAP [D.E. 11-1 at 8]; Arbitration Agreement [D.E. 11-1 at 10]. Hence there is no evidence to indicate that the Arbitration Policy was intended to apply only to new hires. See Tranchant, 2011 U.S. Dist. LEXIS 35099, 2011 WL 1230734, at \*3. Accordingly, the "reasonable meaning" of Plaintiff's continued employment is that she intended to be bound to the Arbitration Policy. Kolodziej, 774 F.3d at 745. Furthermore, Plaintiff's statement in her affidavit that she believed the Arbitration Policy applied only to those employed after Polio Tropical disseminated it implies that she knew exactly when it was distributed. Such a belief is inconsistent with Plaintiff's claim that she was never provided with the Memorandum or Arbitration Agreement in any manner.

Additionally, Plaintiff argues that the MAP is illusory and unenforceable due to the inclusion of the following language in the Acknowledgment for the Employee Handbook: "the information contained in this Handbook is subject to change at anytime and at the sole discretion of Pollo Tropical." See Response [D.E. 15 at 7-8]; Acknowledgement [D.E. 15-2]. Under Florida law, a contract is illusory when "one of the promises appears on its face to be so insubstantial as to impose no obligation [\*14] at all on the promisor." Princeton Homes, Inc. v. Virono, 612 F.3d 1324, 1331 (11th Cir. 2010) (citations omitted). Potential future alterations to the Employee Handbook do not render the MAP illusory. See Vince v. Specialized Servs., Inc., No. 8:11-CV-1683-T-24-TBM, 2011 U.S. Dist. LEXIS 113779, 2011 WL 4599824, at \*3 (M.D. Fla. Oct. 3, 2011) (rejecting the notion that an arbitration agreement contained in an employee handbook was illusory because the employer could alter the terms of the employee handbook).

Given these considerations, the undersigned concludes that there was an enforceable agreement for Plaintiff to arbitrate all of her claims against Defendants. Because all of Plaintiff's claims are subject to arbitration, the undersigned recommends that the case be dismissed without prejudice. Perera, 914 F. Supp. 2d at 1290; Amat, 204 F. Supp. 3d at 1368.

## **RECOMMENDATION**

Based on the foregoing considerations, the undersigned RESPECTFULLY RECOMMENDS that Polio Tropical's Motion to Compel Arbitration [D.E. 11] be GRANTED and the case be DISMISSED WITHOUT PREJUDICE.

Pursuant to Local Magistrate Judge Rule 4(b), the parties have **fourteen days** from the date of this Report and Recommendation to file written objections, if any, with the Honorable Jose E. Martinez. Failure to timely file objections shall bar the parties from attacking or appealing the factual findings contained herein. See Resolution Tr. Corp. v. Hallmark Builders, Inc., 996 F.2d 1144, 1149 (11th Cir. 1993). Further, "failure [\*15] to object in accordance with the provisions of [28 U.S.C.] § 636(b)(1) waives the right to challenge or appeal the district court's order based on unobjected-to factual and legal conclusions." See 11th Cir. R. 3-1 (I.O.P. - 3).

RESPECTFULLY SUBMITTED in Chambers at Miami, Florida this 27th day of November, 2018.

/s/ Alicia M. Otazo-Reyes

ALICIA M. OTAZO-REYES

UNITED STATES MAGISTRATE JUDGE



## CollegeNet, Inc. v. Common Application, Inc.

United States District Court for the District of Oregon

November 28, 2018, Decided; November 28, 2018, Filed

No. 3:14-cv-00771-HZ

### **Reporter**

355 F. Supp. 3d 926 \*; 2018 U.S. Dist. LEXIS 202059 \*\*; 2018-2 Trade Cas. (CCH) P80,604; 2018 WL 6251366

COLLEGENET, INC., a Delaware Corporation, Plaintiff, v. THE COMMON APPLICATION, INC., a Virginia Corporation, Defendant.

**Prior History:** [CollegeNET, Inc. v. The Common Application, Inc., 711 Fed. Appx. 405, 2017 U.S. App. LEXIS 20840 \(9th Cir. Or., Oct. 23, 2017\)](#)

## **Core Terms**

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alleges, Online, Processing, witnesses, processing service, market power, competitors, membership, relevant market, market share, judicial notice, convenience, providers, markets, monopolization, parties, argues, output, products, courts, motion to dismiss, Sherman Act, barriers, tied product, anticompetitive, prices, bundled, rival, choice of forum, equal treatment

**Counsel:** [\*\*1] For Plaintiff: Sarah J. Crooks, PERKINS COIE LLP, Portland, OR; Susan E. Foster, Shylah R. Alfonso, David S. Steele, PERKINS COIE LLP, Seattle, WA; Jon B. Jacobs, PERKINS COIE LLP, Washington, DC.

For Defendant: Thomas Triplett, Richard K. Hansen, SCHWABE, WILLIAMSON & WYATT, P.C., Portland, OR; J. Mark Gidley, WHITE & CASE LLP, Washington, DC; Heather M. Burke, WHITE & CASE LLP, Palo Alto, CA.

**Judges:** MARCO A. HERNÁNDEZ, United States District Judge.

**Opinion by:** MARCO A. HERNÁNDEZ

## **Opinion**

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[\*939] OPINION & ORDER

HERNÁNDEZ, District Judge:

[\*940] Plaintiff CollegeNet, Inc., brings this antitrust action for violations of [Sections 1](#) and [2](#) of the Sherman Act against Defendant The Common Application, Inc. Plaintiff brings seven claims for relief: (1) Horizontal Restraint of Trade in the Admissions Markets; (2) Horizontal Restraint of Trade in the Online College Application Processing Market; (3) Exclusive Dealing; (4) Tying; (5) Monopolization; (6) Attempted Monopolization; and (7) Conspiracy to Monopolize. Defendant moves to dismiss all of Plaintiff's claims and transfer this action to the Eastern District of Virginia. The Court denies Defendant's Motions to Dismiss and Transfer.

## **BACKGROUND**

## I. The Parties

Plaintiff CollegeNET is a Portland-based corporation [\*\*2] that offers various web-based administrative services to higher education and non-profit organizations, including customized online application forms, processing services, and contact management services. First Am. Compl. ("FAC") ¶ 6, ECF 75. Defendant The Common Application is a Virginia-based non-profit corporation comprised of 549 non-profit member colleges and universities. *Id.* at ¶ 7. It offers a standard college application data service, application forms, and processing services. *Id.*

Defendant was formed in 1975 as a limited group of selective colleges seeking to simplify the college admissions process. *Id.* at ¶¶ 13, 38. The application was initially a paper form that was universally accepted by all member colleges, eliminating the need for applicants to write their basic information more than once. *Id.* at ¶ 13. According to Plaintiff, Defendant has since "transformed itself into a dominant online college application processing provider." *Id.* at ¶ 14. As it grew, Defendant's members began to "understand that Common Application was providing tangible monetary benefits to them at the expense of applicants. What started out as a service to simplify the college application process [\*\*3] for students had become a pipeline of applicants" *Id.* at ¶ 48. According to Plaintiff, membership grew "not to serve students but in part to secure a boost in applications, application fees, and rankings." *Id.*

Plaintiff alleges that Defendant is not a single entity, but rather a "consortium of competitors" that have participated with Defendant as co-conspirators in connection with the alleged antitrust violations. *Id.* at ¶¶ 8, 84. A majority of Defendant's steering committee or board of directors is made up of admissions officers from member colleges. *Id.* at ¶ 85. The board discusses and approves membership agreements, Common Application changes, and restraints. *Id.* at ¶ 86. Each year, member colleges sign an agreement with Defendant to abide by its rules and regulations. *Id.* at ¶ 88.

## II. Evolution of Defendant's Unlawful Conduct

Plaintiff alleges various anticompetitive behavior resulting from membership restrictions and restraints, including but not limited to: (a) Tying and Bundling/Forced Purchase Requirements; (b) Exclusivity Restrictions; (c) the "Equal Treatment" Requirement; and (d) Uniformity Requirements. *Id.* at ¶ 15. Plaintiff suggests that none of these requirements—which [\*\*4] Defendant operated without for 25 years—is necessary to achieve any legitimate or procompetitive goal of the Common Application. *Id.* at ¶ 16. According to Plaintiff, these restraints "have the primary effect of suppressing competition to provide online [\*941] college application processing services to applicants and colleges, reducing net output, and excluding rival providers." *Id.* They "are not ancillary to or reasonably necessary to carry out Common Application's official mission." *Id.* at ¶ 159.

In 2003, Defendant "redefined its 'equal treatment' requirement." *Id.* at ¶ 46. Specifically, it began requiring members to "encourage the use of the Common Application" by "(1) charging an application fee to Common Applicants that was 'no greater than the fee charged for [their] other accepted applications; (2) providing 'an equally prominent link to the Common App Online wherever [they] post[ed] a link to another online application; and (3) not 'explicitly offer[ing] any special benefits to students regardless of the application they choose.'" *Id.* It also began charging non-exclusive members a higher fee per application than was charged to exclusive members. *Id.* at ¶ 47.

In 2005-06, Defendant entered [\*\*5] into agreements with Naviance and ApplyYourself ("AY"). Naviance is the "largest provider of planning and advising systems for secondary schools" with an "electronic document transmission system . . . integrated into more than 5,500 schools." *Id.* at ¶ 55. Defendant became "tightly integrated" with Naviance's system, and college counselors familiar with Naviance "encourage[d] students to apply to college through the Common App." *Id.* Defendant also awarded an "exclusive Online College Application Processing Services contract" to AY from 2007 to 2013. *Id.* at ¶ 56.

During this time, Defendant also made several changes to its services and pricing structure. Plaintiff alleges that Defendant's "typical pattern was to begin by offering additional 'optional' services and then, after a few years, (1)

bundle the services with its core offering, (2) make their use mandatory, and/or (3) impose penalties on members who did not agree to use Common Application's services exclusively." *Id.* at ¶ 58. In the mid-2000's, for example, Defendant introduced supplemental forms and payment processing services. *Id.* at ¶ 59. Initially, members could pay for membership, applications, application payment processing, [\*\*6] supplemental applications, and maintenance of supplemental applications separately. *Id.* But, in the late 2000's, Defendant "bundled all of its distinct services (except for payment processing) into a single offering for one all-in fee." *Id.* at ¶ 61. In other words, Common Application still charged a membership fee and a fee per application, but the supplemental application and other services were "free." *Id.* In addition, members who were fully exclusive and did not use other application providers were charged \$4.00 per application processed as opposed to the standard \$5.50 fee per application. *Id.* at ¶¶ 61-62. Defendant also began "restricting member institutions' ability to customize and personalize their Institutional Supplements." *Id.* at ¶ 64.

In 2011, Defendant announced its intent to end its contract with AY and—in 2014 with its fourth-generation system "CA4"—to bring the online processing staff, software, and infrastructure in-house. *Id.* at ¶ 66. According to Plaintiff, Defendant was equipping itself to "handle the full volume of the entire American college application process." *Id.* at ¶ 67.

Plaintiff alleges that CA4 was a "woefully deficient, technologically backwards, glitchriddled [\*\*7] product that would never survive in a competitive marketplace." *Id.* at ¶ 68. By further homogenizing the college application process, CA4 made it "harder for applicants and Colleges to identify good 'matches.'" *Id.* at ¶ 79. CA4 eliminated file uploads and used text boxes that were limited to 650 words. *Id.* Applicants were further limited in the number of versions of essays they could upload and [\*942] to answering four specific essay prompts. *Id.* at ¶¶ 80-81.

In addition, Defendant made further changes to its pricing and membership structure. Under its new three-tiered membership structure, all members had to (1) use Defendant's Common Application for all form and payment processing—including Institutional Supplements—for Common Applicants; (2) accept all Common Applicant evaluation forms (including final transcripts) online, for schools that chose to send them online; and (3) accept the Common Application fee waiver. *Id.* at ¶¶ 74-75. In addition, "Exclusive I" members had to use the Common Application as their only admission application for full-time, undergraduate, degree-seeking applicants, and "Exclusive II" members had to (1) establish uniform fees for all applicants; (2) use the Common [\*\*8] Application as their only transfer application; and (3) use Slideroom.com for their Arts Supplement (if they offered one). *Id.* at ¶¶ 76, 77. According to Plaintiff, the "penalties" for choosing to be a Non-Exclusive versus Exclusive II member are "extreme." *Id.* at ¶ 78.

Since 2000, Defendant's membership has grown substantially, reaching 549 members in the 2014-2015 academic year. *Id.* at ¶ 44. With that growth, its total revenue increased from \$339,046 in 2003 to \$14.5 million in 2013. *Id.* It processed 3.45 million applications in the 2013-2014 application cycle. *Id.* at ¶ 82. In addition, in 2014 Defendant eliminated its "holistic admission membership requirement," allowing "virtually any College . . . to join Common Application." *Id.* at ¶ 83.

### **III. Anticompetitive Effects and Injury**

Plaintiff alleges that Defendant's agreements and the challenged restraints have had various anticompetitive effects. They have harmed competition in the Admissions and Online College Application Processing Markets. *Id.* at ¶ 149. They have resulted in lower "Net Output," defined as the net value derived from Online College Application Processing services including (1) quality, functionality, features, ease [\*\*9] of use and level of innovativeness of Application Processing services; (2) the ability of applicants and Colleges to find good matches; (3) the ability to predict yield or matriculation; and (4) the amount of time and money spent by Colleges and applicants using these services. *Id.* at ¶¶ 21, 151, 153-56. According to Plaintiff, the equal treatment requirement in particular has reduced competition among members to offer better alternatives to the Common Application. It amounts to a group boycott and an agreement to suppress demand for application services. *Id.* at ¶¶ 151-52. Plaintiff alleges that Defendant has impermissibly tied its Standard College Application Data service to its Online Application Processing service through its "one-price-for-all-services model." *Id.* at ¶ 153. The exclusivity provisions have also foreclosed rival

providers by making it "prohibitively expensive for members to use and offer to applicants those rivals' services." *Id.* at ¶ 154. The uniformity requirements have similarly reduced Net Output by decreasing the value that applicants derive from the application process and limiting their ability to find a good match. *Id.* at ¶ 155.

Plaintiff has also been injured [\*\*10] by the restraints. Plaintiff alleges that it has lost over 200 college customers to Common Application in the last 10-15 years. *Id.* at ¶ 37. Prior to the alleged restraints, Plaintiff asserts that it hosted Common Application Institutional Supplements and supported Common Application member colleges in other ways. *Id.* Plaintiff attributes its losses to these restraints. *Id.*

According to Plaintiff, members receive certain benefits from the restraints. *Id.* at ¶ 157. The restraints allow them to spend less on online application processing services [\*943] without a reduction in applicants. *Id.* at ¶ 157(a). They boost their application numbers, fees, and rankings. *Id.* at ¶ 157(c). Plaintiff alleges that early members in particular have a "significant financial interest and have invested substantial time and effort" in the commercial joint venture such that they are motivated to prevent competition. *Id.* at ¶ 157(b).

#### **IV. The Relevant Markets**

Plaintiff alleges that there are four relevant markets in which to analyze the effects of Defendant's allegedly unlawful restraints: "(1) the market for applicants to Colleges (the "Student Application Market"); (2) the market for admission to Colleges (the "College [\*\*11] Admissions Market") ((1) and (2) collectively, the 'Admissions Markets'); (3) the Online College Application Processing Market and each of its submarkets; and (4) the College market for Standard College Application Data Services." *Id.* at ¶ 90. In the alternative, Plaintiff contends that the Admissions Markets may be limited to Elite Colleges, defined as top-50 universities and top-50 liberal arts colleges by U.S. News & World Report. *Id.* at ¶¶ 18, 91.

Plaintiff contends that the Online Application Processing Market is a distinct product market. *Id.* at ¶ 92. It is limited in geographic scope to the United States, and suppliers include: Defendant, Plaintiff, Applications Online LLC ("AOL"), XAP Corporation, Hobsons U.S., and AY. *Id.* at ¶¶ 33, 93. Plaintiff alleges that the market does not include applications to graduate programs (which cost more and are not a reasonable substitute for the college product) or student information systems ("SIS") (which are more limited products and require significant investment from the college). *Id.* at ¶¶ 96-106. Plaintiff alleges that barriers to entry are high because of the high fixed costs involved in entering the industry and the difficulty obtaining [\*\*12] and retaining customers due to Defendant's entrenchment and exclusivity agreements. *Id.* at ¶¶ 107-10. Plaintiff also alleges that Defendant's exclusivity agreements, equal treatment requirements, bundling/forced purchase requirements, and tying behavior disincentivize offering other applications and have made switching costs high. *Id.* at ¶¶ 110-13. Plaintiff contends that Defendant's share of this market is 60%: "In 2014-15, an estimated 9.4 million undergraduate applications will be submitted, with 5-6 million processed online by third-party providers, and approximately 3.6 million of which will be processed by Common Application." *Id.* at ¶ 115.

The Standard College Application Service Market is a distinct product market. Unlike the Online Application Processing Market, "which includes full application form development and processing," the Standard College Application Data Service "provides a generic, text-based data entry form for applicants to input their background information required by more than one College." *Id.* at ¶ 118. Plaintiff alleges that there are no reasonable substitutes for access to this product, which generates an "applicant pipeline." *Id.* at ¶ 121. Competitors in [\*\*13] this market include AOL (provider of the Universal College Application) and Defendant. *Id.* at ¶¶ 24, 122. Plaintiff alleges that Defendant's share of this market is 90%. *Id.* at ¶ 122.

The Student Application Market and College Admissions Markets are also distinct product markets. *Id.* at ¶ 124. They are supplied by Online Application Processing providers. *Id.* at ¶ 125. The Student Application Market is limited to applications for admission to full-time, four-year degree programs at Colleges ("regionally accredited, non-profit, undergraduate colleges and universities"). *Id.* at ¶ 124. Similarly, the College Admissions Market is comprised of full-time, four-year College degree programs. *Id.* Plaintiff contends [\*944] that graduate programs; part-time or two-year programs; programs at non-regionally accredited, for-profit schools; or non-US institutions are

not substitutes for Colleges and thus excludable from these markets. *Id.* at ¶ 127. Plaintiff contends that Defendant will process 40-45% of College applications in 2014-15 year and therefore controls at least 40-50% of the Student Application Market. *Id.* at ¶ 129. Plaintiff alleges that this number is an understatement of Defendant's market power, [\*\*14] or "their ability to reduce Net Output without losing applicants" as a result of the network effects of its applicant pipeline. *Id.* at ¶ 130. There are also high barriers to entry in this market. *Id.* at ¶ 131.

The College Admissions Market is the market for admission to full-time, four-year College degree programs. *Id.* at ¶ 138. For the reasons discussed in the preceding paragraph, this market excludes other degree programs, and Defendant has similar market share and market power. *Id.* at ¶¶ 139-40. Plaintiff contends that the ability of Defendant to offer a product with "inferior functionality" at a high cost with limitations on Colleges' advertising opportunities and the ability of applicants to find a good College (without losing users) is direct evidence of Defendant's "unconstrained exercise of their market power." *Id.* at ¶ 137.

## V. Procedural History

Plaintiff filed this case in the District of Oregon on May 8, 2014. Compl., ECF 1. On May 15, 2015, the Court granted Defendant's first Motion to Dismiss Plaintiff's claims for failure to plead antitrust injury. Opinion & Order, ECF 96. On appeal, the Ninth Circuit reversed the decision of the district court and remanded this case for [\*\*15] further proceedings. Mandate, ECF 112. On July 12, 2018, Defendant filed its Motion to Dismiss, and on August 3, 2018, Defendant filed its Motion to Transfer. Def. Mot. Dismiss, ECF 137; Def. Mot. Transfer, ECF 146.

## STANDARDS

### I. Motion to Dismiss

A motion to dismiss under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) tests the sufficiency of the claims. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). "All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Am. Family Ass'n, Inc. v. City & Cnty. of S.F.*, 277 F.3d 1114, 1120 (9th Cir. 2002). To survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face[.]" meaning "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (internal quotation marks omitted). In other words, a complaint must contain "well-pleaded facts" that "permit the court to infer more than the mere possibility of misconduct[.]" *Id.* at 679.

However, the court need not accept conclusory allegations as truthful. See *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) ("[W]e are not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint, and we do not necessarily assume the truth of legal conclusions [\*\*16] merely because they are cast in the form of factual allegations.") (internal quotation marks, citation, and alterations omitted). A motion to dismiss under [Rule 12\(b\)\(6\)](#) will be granted if a plaintiff alleges the "grounds" of his "entitlement to relief" with nothing "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action[.]" [\*945] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)[.]" *Id.* (citations and footnote omitted).

### II. Motion to Transfer Venue

[28 U.S.C. § 1404](#) governs motions to transfer venue: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been

brought." The purpose of the [§ 1404\(a\)](#) is to "prevent the waste of time, energy and money and to protect litigants, witnesses, and the public against unnecessary inconvenience and expense." [Van Dusen v. Barrack, 376 U.S. 612, 616, 84 S. Ct. 805, 11 L. Ed. 2d 945 \(1964\)](#) (internal citation and quotation marks omitted). The decision whether to transfer venue lies in the discretion of the district court. [28 U.S.C. § 1404; Jones v. GNC Franchising, Inc., 211 F.3d 495, 498 \(9th Cir. 2000\)](#) (Under [section 1404\(a\)](#), "the district court has discretion to adjudicate [\*\*17] motions for transfer according to an individualized, case-by-case consideration of convenience and fairness.") (internal quotation omitted).

The burden is on the moving party to demonstrate that the balance of conveniences favoring the transfer is high. The defendant must make "a clear showing of facts which . . .

establish such oppression and vexation of a defendant as to be out of proportion to plaintiff's convenience, which may be shown to be slight or nonexistent." [Dole Food Co. v. Watts, 303 F.3d 1104, 1118 \(9th Cir. 2002\)](#).

## DISCUSSION

### I. Judicial Notice

Both parties filed requests for judicial notice.<sup>1</sup> Typically, "when the legal sufficiency of a complaint's allegations is tested by a motion under [Rule 12\(b\)\(6\)](#), review is limited to the complaint." [Lee v. City of Los Angeles, 250 F.3d 668, 688 \(9th Cir. 2001\)](#). "Indeed, factual challenges to a plaintiff's complaint have no bearing on the legal sufficiency of the allegations under [Rule 12\(b\)\(6\)](#)." *Id.* However, without turning a motion to dismiss into a motion for summary judgment, the Court may consider "material which is properly submitted as part of the complaint," documents not physically attached to the complaint if their authenticity is not contested and they are relied on in the complaint, and documents that are subject to judicial notice. [Id. at 688-89](#).

Courts may take judicial notice [\*\*18] of information "not subject to reasonable dispute because it (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." [Fed. R. Evid. 201\(b\)](#). Courts may take judicial notice of SEC filings, press releases, or contents of a website, when they are "matters of public record." See [Lee, 250 F.3d at 688-89](#); see also [Nw. Pipe Co. v. RLI Ins. Co., No. 3:09-CV-01126-BR, 2014 U.S. Dist. LEXIS 50531, 2014 WL 1406595, at \\*5 \(D. Or. Apr. 10, 2014\)](#). When a court takes judicial notice of a public record, "it may do so not for the truth of the facts [\*946] recited therein, but for the existence of the [record], which is not subject to reasonable dispute over its authenticity." [Klein v. Freedom Strategic Partners, LLC, 595 F. Supp. 2d 1152, 1157 \(D. Nev. 2009\)](#) (quoting [Lee, 250 F.3d at 690](#)).

Turning first to Defendant's request, the Court declines to take judicial notice of the attached documents. Specifically, many of Defendant's exhibits are used to challenge inferences from facts alleged in the complaint. For example, numerous exhibits involve the "Coalition Application" and are cited to demonstrate that, because Plaintiff and other member colleges entered the market, barriers to entry are low, see Def. Mot. Dismiss 30 (citing RJD Exs. 2, 3, 5) (arguing that actual entry "proves that there are low barriers [\*\*19] to entry" defeating Plaintiff's [Section 2](#) claim), and there is no group boycott, see *id.* at 12 (citing RJD Exs. 23-34) (asking the Court to infer from the fact that some colleges provide multiple application options that there is no group boycott). Others are used to challenge Plaintiff's allegations of market power. See *id.* at 29 (citing RJD Exs. 17-18). In its own words, Defendant is "asking the court to take judicial notice of uncontested facts" and "[f]rom there, . . . assess the plausibility of Plaintiff's allegations in light of those uncontested facts." Def. Reply Req. Judicial Notice 3, ECF 150. Thus, Defendant

<sup>1</sup> Plaintiff also filed an "Objection to Defendant's 'Non-Request' for Judicial Notice" in response to Defendant's Reply to the Motion to Transfer. ECF 158. Plaintiff objects to two websites that were cited in Defendant's Reply but were neither attached to a declaration nor included in a request for judicial notice. See Def. Reply Transfer 16-17, ECF 156. The Court, however, has not relied on either source in its decision and, therefore, declines to address this objection further.

improperly asks the Court to take notice of the facts contained within these documents and infer from them that Plaintiff cannot state its claims under the Sherman Act. See [\*Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 1001 \(9th Cir. 2018\)\*](#) (finding that a report was generally susceptible to judicial notice but declining to take notice because "there [was] a reasonable dispute as to what the report establishes"). In addition, some of the exhibits are irrelevant to the motion to dismiss, such as the exhibits demonstrating that only one public institution in Oregon offers The Common Application. Def. Mot. Dismiss 5. Accordingly, Defendant's Request for Judicial Notice **[\*\*20]** is denied.<sup>2</sup>

Turning to Plaintiff's request, the Court finds that the documents in question are irrelevant to the disposition of the Motion to Transfer. In connection with its response to Defendant's Motion to Transfer, Plaintiff asks the Court to take judicial notice of the per diem costs in Washington, D.C., and the endowments of certain member schools. Pl. Req. Judicial Notice, ECF 155. But neither of these exhibits is relevant in determining whether the Court should transfer this case to the Eastern District of Virginia. See [\*Neylon v. Cty. of Inyo, No. 1:16-CV-0712 AWI JLT, 2016 U.S. Dist. LEXIS 161326, 2016 WL 6834097, at \\*4 \(E.D. Cal. Nov. 21, 2016\)\*](#) (citing [\*Adriana Intern. Corp. v. Thoeren, 913 F.2d 1406, 1410 n.2 \(9th Cir. 1990\)\*](#)) ("[I]f an exhibit is irrelevant or unnecessary to deciding the matters at issue, a request for judicial notice may be denied."). Accordingly, Plaintiff's Request for Judicial Notice is also denied.

## **[\*947] II. Defendant's Motion to Dismiss**

Plaintiff's claims arise under [Sections 1](#) and [2](#) of the Sherman Act. [Section 1](#) prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." [15 U.S.C. § 1](#). "Agreements of competitors, whether express or implicit, whether by formal agreement or otherwise, in restraint **[\*\*21]** of trade are outlawed." [\*California ex. rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1132 \(9th Cir. 2011\)\*](#). However, the Supreme Court has repeatedly recognized that by the language of the Sherman Act, "Congress intended to outlaw only *unreasonable* restraints." [\*State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 \(1997\)\*](#). [Section 2](#) of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty of a felony. . . ." [15 U.S.C. § 2](#).

Defendant moves to dismiss all of Plaintiff's antitrust claims. For the reasons that follow, the Court finds that Plaintiff has plausibly alleged all seven of its claims for relief. Accordingly, Defendant's Motion to Dismiss is denied.

### A. Horizontal Restraints on Trade (Claims 1 & 2)

Plaintiff's first and second claims for relief arise under [Section 1](#) of the Sherman Act. "[A] cause of action under [15 U.S.C. § 1](#) consists of the following three elements: (1) an agreement, conspiracy, or combination between two or more entities; (2) an unreasonable restraint of trade under either a *per se* or rule of reason analysis; and (3) the restraint affected interstate commerce." [\*Am. Ad Mgmt., Inc. v. GTE Corp., 92 F.3d 781, 788 \(9th Cir. 1996\)\*](#).

Defendant argues that Plaintiff has not adequately plead a claim under [Section 1](#) of the Sherman Act for horizontal restraint of trade. Specifically, **[\*\*22]** Defendant contends that Plaintiff has not adequately alleged (1) an agreement; or (2) any unlawful restraint on trade that harmed competition. Def. Mot. Dismiss 8-19.

<sup>2</sup> Defendant also asks the Court to take judicial notice of the 2014 U.S. News & World Report rankings. The Court instead finds that the complaint incorporates this doctrine by reference. See [\*United States v. Ritchie, 342 F.3d 903, 908 \(9th Cir. 2003\)\*](#) ("Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim."). Plaintiff does not dispute this documents authenticity. It merely objects that it was neither extensively relied on in the complaint nor formed the "entire basis" of Plaintiff's claims. However, the Rankings form the basis for Plaintiff's alleged Elite College Submarket. FAC ¶ 18 ("Elite College' means a top-ranked College (e.g., by U.S. News & World Report as a top-50 national university or a top-50 liberal arts college."). Accordingly, this document is properly incorporated by reference.

### i. Agreement

In the absence of direct evidence of a horizontal agreement, the plaintiff must demonstrate "parallel conduct plus." *In Re Musical Instruments and Equipment Antitrust Litigation*, 798 F.3d 1186, 1193 (2015). In other words, in addition to demonstrating parallel conduct—"such as competitors adopting similar policies around the same time in response to similar market conditions"—the plaintiff must plead "some further factual enhancement" or a "further circumstance pointing toward a meeting of the minds" *Id.* (citing *Twombly*, 550 U.S. at 557, 560). In addition, the Supreme Court has indicated that, under certain circumstances, a joint venture constitutes an agreement under Section 1: "[W]e have repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity." *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 191, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010); see also *NCAA v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 99 n.18, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984); Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶¶ 1477, 1478 (4th ed. 2011) ("[T]he courts have had little difficulty in treating organizations created to serve their member-competitors or to regulate their market behavior [\*\*23] as continuing 'agreements' among the members.").

Plaintiff makes the following relevant allegations in support of its contention [\*948] that there was an agreement to restrain trade: Defendant is an association of 549 universities, which are all legally distinct entities. FAC ¶¶ 7, 84. They compete with one another for applicants. *Id.* at ¶ 84. Defendant's board is primarily comprised of admissions officers from member colleges. *Id.* at ¶ 85. They regularly meet in this capacity to discuss and vote on business decisions and modify the restraints that Defendant imposes on members. *Id.* at ¶ 86. Annually, each member college signs an agreement with Defendant in which it agrees to abide by the restraints at issue here. *Id.* at ¶ 88. Plaintiff argues that "[w]hen horizontal competitors," like the member colleges, "form an association," like Defendant, "to adopt rules on how they will compete against each other, those rules constitute 'agreements' under Section 1." Pl. Opp'n Dismiss 9, ECF 143.

The Court agrees with Plaintiff. As noted above, the Supreme Court has acknowledged that such associations or joint ventures can, under certain circumstances, violate Section 1. Defendant responds that the restraints alleged here [\*\*24] do not constitute concerted action because membership does not preclude colleges from buying or selling their own products or prohibiting them from using other services. Def. Reply Mot. Dismiss ("Def Reply") 12. Thus, membership "does not 'deprive the marketplace of independent centers of decisionmaking' and . . . does not fall into the 'concerted activity' covered by Section 1." *Id.* at 13 (citing *Am. Needle*, 560 U.S. at 194). But that is precisely what Plaintiff alleges. As described in more detail below, Plaintiff alleges that the challenged restraints in the membership agreement amount to a group boycott or refusal to deal in both the Admissions and Online College Application Processing markets. In other words, member Colleges who would otherwise be competitors and independent decision makers in the marketplace for online application processing services have, by virtue of their membership, limited their participation in the market. Thus, at this stage of these proceedings, Plaintiff has sufficiently alleged an agreement for purposes of Section 1 of the Sherman Act.

### ii. Unlawful Horizontal Restraints

Plaintiff and Defendant both characterize Plaintiff's first and second claims for horizontal restraints on trade as group boycott or buyer's [\*\*25] cartel/refusal to deal claims. "[M]ost antitrust claims are analyzed under a 'rule of reason,' according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors[.]" *State Oil*, 522 U.S. at 10. The rule of reason is the presumptive or default standard, and it requires the antitrust plaintiff to "demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive." *Texaco Inc. v. Dagher*, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006). "A conclusion that a restraint of trade is unreasonable may be 'based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.'" *NCAA*, 468 U.S. at 103 (quoting *Nat'l Soc'y of Prof. Eng. v. U.S.*, 435 U.S. 679, 690, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)). Ultimately, "[u]nder the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition." *Id. at 104*. Plaintiff can make this showing directly by demonstrating the anti-competitive effects of competition—

such as "reduced output, increased prices, or decreased quality in the relevant market"—or [\*\*26] indirectly [\*949] through "proof of market power plus some evidence that the challenged restraint harms competition." [Ohio v. Am. Express. Co., 138 S.Ct. 2274, 2284, 201 L. Ed. 2d 678 \(2018\)](#).

While the rule of reason is the default standard to analyze allegedly anticompetitive conduct, "[s]ome types of restraints . . . have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*." [State Oil, 522 U.S. at 10](#). Such restraints "are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." [Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co., 472 U.S. 284, 289, 105 S. Ct. 2613, 86 L. Ed. 2d 202 \(1985\)](#) (quoting [N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 \(1958\)](#)). *Per se* treatment is proper only "[o]nce experience with a particular kind of restraint enables the [c]ourt to predict with confidence that the rule of reason will condemn it[.]" [Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 344, 102 S. Ct. 2466, 73 L. Ed. 2d 48 \(1982\)](#). "[A] 'departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing.'" [Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 887, 127 S. Ct. 2705, 168 L. Ed. 2d 623 \(2007\)](#) (second alteration in original) (quoting [Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568 \(1977\)](#)). To justify *per se* condemnation, a challenged practice must have "manifestly anticompetitive" effects and lack "any redeeming virtue." [Id. at 886](#) (internal quotation marks omitted). The Supreme Court has "expressed reluctance to adopt *per* [\*\*27] *se* rules where the economic impact of certain practices is not immediately obvious." [Dagher, 547 U.S. at 5](#) (quotation marks and ellipses omitted) (quoting [State Oil, 522 U.S. at 10](#)).

Plaintiff alleges that the challenged restraints—namely, the equal treatment requirement, exclusivity provisions, and tying—have all injured competition. FAC ¶¶ 149-56. For example, the equal treatment requirement has disincentivized investment in alternative applications that might provide better and less expensive services. *Id.* at ¶ 150. Tying of access to the applicant pipeline has foreclosed rival providers from capturing Colleges' business. *Id.* at ¶ 153. The exclusivity provisions make it cost prohibitive for members to use or offer rival services. *Id.* at ¶ 154.

Plaintiff's First and Second Claims for relief allege horizontal restraints of trade in the Admissions Market and the Online College Application Processing Markets, respectively. In Plaintiff's First Claim, Plaintiff alleges that the horizontal agreements among Defendant and its members amount to a conspiracy to insulate competitors in the application process, fix and reduce Net Output, stabilize or increase the prices paid, or reduce the benefits received by applicants. FAC ¶ 164. By [\*\*28] boycotting other providers, Defendant and its members restrain competition in the Admissions markets. *Id.* at ¶¶ 164-65. These are allegedly unlawful under the rule of reason because Defendant has significant market power and the restraints have reduced competition, reduced Net Output, and impaired access to other options. *Id.* at ¶ 167.

Similarly, in its Second Claim, Plaintiff alleges that the horizontal agreements among Defendant and its members amount to a conspiracy to refuse to deal or exclude rival providers in the Online College Application Processing Market in order to suppress demand for services and prices paid below competitive levels. *Id.* at ¶ 173. [\*950] Plaintiff alleges that the restraints are unreasonable under the rule of reason because Defendant and its members have significant market power and their adoption of the challenged restraints and boycott of rival providers have reduced competition in the Online College Application Processing Market. *Id.* at ¶ 174.

Defendant first challenges Plaintiff's "Group Boycott" Claim<sup>3</sup> on the grounds that the alleged restraints are not anticompetitive.<sup>4</sup> Def. Mot. Dismiss 11. Specifically, it argues that Plaintiff's claim fails because the [\*\*29] equal

<sup>3</sup>The Court notes that Defendant cites the *per se* rules in its analysis and that neither party addresses the legal sufficiency of Plaintiff's claim under the rule of reason. Though horizontal restraints can—under some circumstances—be unlawful *per se*, the Court finds that analyzing Plaintiff's First and Second Claims under the rule of reason is likely most appropriate in this case, which involves an otherwise lawful joint venture involving certain horizontal restraints. See [Am. Needle, 560 U.S. at 203](#) ("When 'restraints on competition are essential if the product is to be available at all,' *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason."); [NCAA, 468 U.S. at 100-01](#) (declining to apply

treatment requirement does not affect the price or terms at which CollegeNet or other rivals can sell their services to Colleges. *Id.* at 11-14. The Court disagrees. Plaintiff plainly alleges that the challenged restraints are anticompetitive. By limiting members' abilities to offer more affordable alternatives, making non-exclusive memberships more expensive, and requiring members to purchase processing services to obtain access to the student data pipeline, Colleges are disincentivized to explore superior or more affordable alternative online college application processing services. In other words—as a result of the unlawful tying, equal treatment provisions, and exclusivity discounts—the members have "effectively agreed not to purchase higher-quality, more innovative, or lower-priced . . . services from rival providers." FAC ¶¶ 150, 152-54. In addition, Plaintiff alleges that the agreements—which constrain choice among the member colleges—have caused Net Output to decrease and quality in the relevant markets to suffer. *Id.*

Defendant also makes more targeted challenges to Plaintiff's "Refusal to Deal" Claim. Specifically, it argues that (1) Plaintiff's **\*\*30** claims are illogical because a buyer's cartel in this context would only hurt all market participants, including Defendant and its member schools; and (2) that Plaintiff cannot allege suppression of demand because the number of applications ("output") increased as a result of increased demand. Def. Mot. Dismiss 14-19. With respect to Defendant's first argument, the Court finds that Plaintiff's allegations are not implausible. Plaintiff specifically alleges that Defendant and its member colleges have an interest in reducing demand and prices for application services. It is in their economic interest to eliminate all suppliers except Common App (which is controlled by members) and to prevent other competitor colleges from using a different supplier and changing the competitive landscape of the Admissions Market. FAC ¶ 157. These restraints benefit the members by allowing them to spend **\*951** below-competitive levels on services without losing applicants and boosting their applications, application fees, and rankings. *Id.* In addition, members—particularly those who joined the venture early—have invested time and effort in Defendant and have a financial interest in the success of The Common Application. **\*\*31** On the second argument, the Court finds that Plaintiff has adequately alleged that Net Output has decreased as a result of Defendant's market power. *Id.* at ¶¶ 149-56, 166, 173. Members and Colleges have derived less value from the process, including a reduction in their ability to find good matches, poorer quality and innovativeness of the application process, and increased monetary costs. *Id.* at ¶¶ 149-57. Accordingly, the Court declines to dismiss Plaintiff's first and second claims for relief.

#### B. Exclusive Dealing (Claim 3)

Plaintiff's third claim for relief is for exclusive dealing under [Sections 1](#) and [2](#) of the Sherman Act. "Exclusive dealing involves an agreement between a vendor and a buyer that prevents the buyer from purchasing a given good from any other vendor." [\*Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP\*, 592 F.3d 991, 996 \(9th Cir. 2010](#)). "There are 'well-recognized economic benefits to exclusive dealing arrangements, including the enhancement of interbrand competition.'" *Id.* (quoting [\*Omega Envtl., Inc. v. Gilbarco, Inc.\*, 127 F.3d 1157, 1162 \(9th Cir. 1997\)](#)). Thus, "'an exclusive-dealing arrangement does not constitute a *per se* violation of [section 1](#).'" *Id.* (quoting [\*Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.\*, 676 F.2d 1291, 1303-04 \(9th Cir. 1982\)](#)). Under the antitrust rule of reason, an exclusive dealing arrangement violates [Section 1](#) only if its probable effect is to "foreclose competition in a substantial share of the line of commerce **\*\*32** affected." [\*Omega\*, 127 F.3d at 1162](#) (quoting [\*Tampa Elec. Co. v. Nashville Coal Co.\*, 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 \(1961\)](#)). Generally, this requires "a showing of significant market power by the defendant, substantial foreclosure, contracts of sufficient duration to prevent meaningful competition by rivals, and an analysis of likely or actual anticompetitive effects considered in light of any procompetitive effects." [\*ZF Meritor, LLC v. Eaton Corp.\*, 696 F.3d 254, 271 \(3d Cir. 2012\)](#) (internal citations omitted).

the *per se* rule because the "case involve[d] an industry in which horizontal restraints on competition [were] essential if the product [was] to be available at all"); see also Areeda & Hovenkamp ¶ 1478 (noting that when single-entity claims are rejected, courts generally reject *per se* illegality as well).

<sup>4</sup> To the extent that Defendant's argument hinges on the difference between limiting what the school can charge students applications and what the provider can charge the College for its services, the effect of this difference is a factual issue that cannot be resolved at this stage in the proceedings.

Defendant argues that complaint does not allege either (1) an agreement to deal exclusively; or (2) substantial foreclosure of the market. Def. Mot. 20-21.

#### i. Exclusivity Agreement

"[A] prerequisite to any exclusive dealing claim is an agreement to deal exclusively." *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1181 (9th Cir. 2016) (quoting *ZF Meritor*, 696 F.3d at 270). Generally, courts focus on whether there are "requirements terms, volume or market share targets, or long-term contracts that "prevent meaningful competition by taking potential purchasers off the market." *Id.*; Cf. *Omega Envtl.*, 127 F.3d at 1163-64 ("[T]he short duration and easy terminability of these agreements negate substantially their potential to foreclose competition."). The Ninth Circuit has not recognized "de facto" exclusive dealing arrangements, *Aerotec*, 836 F.3d at 1182 ("Although we have not explicitly recognized a 'de facto' exclusive dealing theory like that recognized in the Third Circuit and Eleventh Circuit, [\*\*33] we need not reach the issue here . . . .), but other circuit courts have, see *ZF Meritor*, 696 F.3d at 282 ("[A]n express exclusivity requirement is not necessary because *de facto* exclusive dealing may be unlawful."); see also *Tampa Elec.*, 365 U.S. at 326 (noting that "even though a contract does not contain specific agreements not to use the (goods) of a competitor, if the practical [\*952] effect is to prevent such use, it comes within the condition of the section as to exclusivity"). In determining whether such an agreement exists, the court "look[s] past the terms of the contract to ascertain the relationship between the parties and the effect of the agreement in the real world." *ZF Meritor*, 696 F.3d at 270, 282-83 (finding that agreements that conditioned discounts on market-share targets were *de facto* agreements to deal exclusively where the defendant was a dominant supplier in the relevant market).

Here, Plaintiff adequately alleges exclusive dealing. First, provisions in the agreements for Exclusive members specifically condition exclusivity on a discount for Defendant's services. FAC ¶ 76-78. In addition, the membership agreements contain equal treatment provisions, which, among other things, prevent member schools from offering other applications at a lower price. *Id.* [\*\*34] at ¶ 46. Further, Plaintiff plausibly alleges that Defendant has tied access to its data services—and the student pipeline—on using its online application processing services, in a sense requiring member schools to use Defendant's product instead of competitor products. *Id.* at ¶ 61. Combined with the alleged high switching costs associated with terminating membership with Defendant (a dominant supplier), the membership agreements here plausibly constitute *de facto* exclusive dealing arrangements that in practical effect prevent purchasers from using the services and goods of competitors. See *Pro Search Plus, LLC v. VFM Leonardo Inc.*, No. SACV 12-2102-JLS (ANx), 2013 U.S. Dist. LEXIS 169856, 2013 WL 6229141, at \*6 (C.D. Cal. Dec. 2, 2013) (finding, on a motion to dismiss, that Plaintiff had plausibly alleged a *de facto* exclusive dealing claim where costs of switching were "prohibitive," the defendant's monopoly power made dealing with it an "economic necessity," at least one customer dealt exclusively with the defendant, and the defendant had market power).

#### ii. Substantial Foreclosure

To determine whether an agreement forecloses competition, the Ninth Circuit "focus[es] on whether there are requirements terms (i.e., terms requiring a buyer to purchase all the product or service it needs from one seller), volume or market share targets, or long-term contracts that prevent meaningful competition by taking potential purchasers off the market." See *Aerotec*, 836 F.3d at 1181 (internal citations omitted). To determine substantiality, the court:

[W]eigh[s] the probable effect of the contract on the relevant area of effective competition taking into account the relative strength of the parties, the proportionate [\*\*35] volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein.

*Tampa Elec. Co.*, 365 U.S. at 329. For claims arising under § 1, "[s]ubstantial share" has been quantified as foreclosure of 40% to 50% of the relevant market." *Feitelson v. Google Inc.*, 80 F.Supp.3d 1019, 1030 (N.D. Cal. 2015) (citing *U.S. v. Microsoft Corp.*, 253 F.3d 34, 70, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)). For exclusive dealing, "foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent." *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 68 (1st Cir. 2004). Under § 2, less might be

required. See [\*Microsoft, 253 F.3d at 70\*](#) ("At the same time, however, we agree with plaintiffs that a monopolist's use of exclusive contracts, in certain circumstances, may give rise to a [§ 2](#) violation even though the contracts foreclose [\[\\*953\]](#) less than the roughly 40% or 50% share usually required in order to establish a [§ 1](#) violation.").

Plaintiff alleges that many aspects of the membership agreement—including the alleged tying, exclusivity discount, and equal treatment provisions—taken together amount to an exclusive dealing arrangement. Pl. Opp'n Dismiss 18-21. In other words, all the membership agreements—not just the Exclusive agreements—are relevant to this inquiry. *Id.* at 20-21 n.14. Plaintiff also alleges that Defendant has [\[\\*\\*36\]](#) at least a 60% market share in the Online Processing Market and a 90% share in the Data Services Market. FAC ¶¶ 115, 122. Though the agreements are only one year in duration, Plaintiff alleges that there are high switching costs associated with ending or failing to renew the contract. *Id.* at ¶¶ 109-114, 116, 130, 154.

Again, taken together, Plaintiff has adequately alleged substantial foreclosure of the market. [\*Tampa Elec. Co., 365 U.S. at 334\*](#) (emphasizing, among other things, whether there is a seller in a dominant position, exclusive contracts, or tying arrangements). Defendant is a dominant supplier that is alleged to control 60% of the market through these agreements, which exceeds the foreclosure rate that has been deemed significant in the past. Because switching costs are high, parties are unlikely to terminate their memberships. Cf. [\*Omega Envtl., 127 F.3d at 1163-64\*](#) ("[T]he short duration and easy terminability of these agreements negate substantially their potential to foreclose competition."). In addition, terminating their agreements with Defendant or pursuing other competitive options would be difficult for members, particularly in light of the equal treatment and tying provisions. Without access to Defendant's data services and student [\[\\*\\*37\]](#) applicant pipeline, member colleges would lose applicants and, in turn, fall in their rankings. Taken together, Plaintiff plausibly alleges that potential purchasers are removed from the market, making it difficult for other competitors to enter or remain.

#### C. Tying (Claim 4)

Plaintiff's Fourth Claim is for unlawful tying in violation of [Sections 1](#) and [2](#) of the Sherman Act. "Tying is defined as an arrangement where a supplier agrees to sell a buyer a product (the tying product), but 'only on the condition that the buyer also purchase a different (or tied) product . . . .'" [\*Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1199 \(9th Cir. 2012\)\*](#) (citing [\*N. Pac. Ry. Co., 356 U.S. at 5-6\*](#)). "The potential injury to competition threatened by this practice is that the tying arrangement will either 'harm existing competitors or create barriers to entry of new competitors in the market for the tied product,' or will 'force buyers into giving up the purchase of substitutes for the tied product.'" *Id.* (internal citations and quotations omitted).

"The Supreme Court has developed a unique *per se* rule for illegal tying arrangements." [\*Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 913 \(9th Cir. 2008\)\*](#). Plaintiff "must prove: (1) that the defendant tied together the sale of two distinct products or services; (2) that the defendant possesses enough economic power in the tying product [\[\\*\\*38\]](#) market to coerce its customers into purchasing the tied product; and (3) that the tying arrangement affects a not insubstantial volume of commerce in the tied product market." *Id.* (quoting [\*Paladin Assocs., Inc. v. Mont. Power Co., 328 F.3d 1145, 1159 \(9th Cir. 2003\)\*](#)) (internal quotation marks omitted); see also [\*Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 461-62, 112 S. Ct. 2072, 119 L. Ed. 2d 265 \(1992\)\*](#). "A *per se* tying violation 'is proscribed without examining the actual market conditions, [\[\\*954\]](#) when the seller has such power in the tying product or service market that 'the existence of forcing is probable,' . . . and there is 'a substantial potential for impact on competition.'" [\*Cty. of Tuolumne v. Sonora Cnty. Hosp., 236 F.3d 1148, 1157 \(9th Cir. 2011\)\*](#) (quoting [\*Beard v. Parkview Hosp., 912 F.2d 138, 140 \(6th Cir. 1990\)\*](#)).

Alternatively, "[a] tying arrangement which is not unlawful *per se* may be invalidated under the rule of reason if the party challenging the tie demonstrates that it is an unreasonable restraint on competition in the relevant market." *Id.* (internal citations and quotations omitted). As described earlier, the crux of this analysis is "whether the challenged agreement is one that promotes competition or one that suppress competition." [\*Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 691\*](#). "[T]he plaintiff must allege an actual adverse effect on competition caused by the tying arrangement." [\*Brantley, 675 F.3d at 1200\*](#) (internal citations omitted).

Defendant raises two challenges to Plaintiff's tying claim. First, Defendant asserts that Data Services [\*\*39] and Processing Services are one product market, not two. Def. Mot. Dismiss 24-25. Second, Defendant argues that Plaintiff has not plausibly alleged coercion because there are no alleged facts to show an express or implied tying condition in the Common App's agreements with member colleges. *Id.* at 25-27.

#### i. Distinct Products

To state a claim for unlawful tying, Plaintiff must show that there are two distinct products or services offered for sale by the defendant. *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2, 21, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984). "The existence of distinct products depends upon 'the character of the demand for the two items.'" *Rick-Mik Enters. v. Equilon Enters., LLC*, 532 F.3d 963, 975 (9th Cir. 2008) (quoting *Jefferson Parish*, 466 U.S. at 19). "There must be a sufficient demand for the purchase of the tied product separate from the tying product to identify a distinct product market. To determine this, the 'purchaser demand' test of *Jefferson Parish* examines direct and indirect evidence of consumer demand for the tied product separate from the tying product." *Id.* (brackets, quotations, and citations omitted). Direct evidence includes "whether, when given a choice, consumers purchase the tied good from the tying good maker, or from other firms." *Id.* By contrast, "indirect evidence includes the behavior of firms without market power in the tying good market, presumably [\*\*40] on the notion that (competitive) supply follows demand. If competitive firms always bundle the tying and tied goods, then they are a single product." *Id.*

Here, Plaintiff has adequately alleged that two separate product markets exist. The tying product is the Standard College Application Data service. This is a "a type of network service where the service provider hosts a single, web-based background information form that applicants wishing to apply to any of the network Colleges—which all require this same information—fill out only once." FAC ¶ 22. The tied product is the Online Application Processing Services, or "online application evaluation forms and processing services offered to Colleges and Applicants." *Id.* at ¶ 20. Plaintiff alleges that not all colleges that purchase processing services buy data services. *Id.* at ¶ 188. The products do not operate better when bundled than when integrated with a rival processing services provider. *Id.* at ¶ 189. They are "physically and economically" separable as evidenced by Defendant's former pricing structure whereby members could purchase one or both. *Id.* at ¶ 190. [\*955] Defendant, Plaintiff, AOL, XAP Corporation, Hobsons, and AY all provide Online [\*\*41] Application Processing Services, and only Defendant and AOL provide standard application data services. *Id.* at ¶¶ 24, 33; see *Eastman Kodak*, 504 U.S. at 462 (emphasizing "[e]vidence in the record indicat[ing] that service and parts have been sold separately in the past and still are sold separately to self-service equipment owners" and that "the development of the entire high-technology service industry is evidence of the efficiency of a separate market for service."). Data Services—not Processing Services—provide the "pipeline" for student applicants. *Id.* at ¶¶ 23, 121. Taken together, these facts create a reasonable inference is that there is demand for such services separate and apart from application processing services. Thus, at least at this stage in the proceedings, Plaintiff has adequately alleged that there are distinct markets for the allegedly tied products.

#### ii. Coercion

Defendant argues that "CollegeNET has not plausibly alleged coercion because it did not allege any facts to show an express or implied tying condition in the Common App's agreements with member colleges." Def. Mot. 25. Courts typically encounter positive ties, or the "sale of the desired ('tying') product is conditioned on purchase of [\*\*42] another ('tied') product. *Aerotec*, 836 F.3d at 1178. "[W]here the buyer is free to take either product by itself there is no tying problem." *N. Pac. Ry. Co.*, 356 U.S. at 6 n.4. In addition, "[a] plaintiff must present evidence that the defendant went beyond persuasion and coerced or forced its customer to buy the tied product in order to obtain the tying product." *Paladin*, 328 F.3d at 1159. "[F]orcing (or coercion) is likely if the seller has power in the tying product market." *Robert's Waikiki U-Drive, Inc. v. Budget Rent-a-Car Sys., Inc.*, 732 F.2d 1403, 1407 (9th Cir. 1984). "For example, if the seller has a patent on the tying product, or has a high market share, or if the tying product is so unique that competitors are unable to offer it, the court will assume adequate market power exists." *Id.*

In *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Professional Publications, Inc.*, the Tenth Circuit held that the plaintiff—a commercial provider of bar examination preparation services—had created an issue of fact on summary judgment with respect to its tying claim. 63 F.3d 1540, 1543 (10th Cir. 1995). There, the defendants—competitors that also provided bar preparation materials—began bundling their full-service bar examination workshop with their smaller MBE workshop. *Id.* at 1544-45. The supplemental MBE course was initially

priced below cost and then marketed as free even though the defendants [\*\*43] increased the cost of the full workshop by \$50 the year after they began bundling the products. *Id.* Consumers could still purchase the supplemental course but would not receive a discount on any other services. *Id. at 1546*. The Court first found that, in the year the supplemental course was truly free, no separate or tied purchase was involved. *Id. at 1548*. However, when tuition was raised the subsequent year for the bundled course and reflected the cost of the tied product, customers were purchasing the tied product. *Id.* Thus, the circuit court found that the plaintiff had "presented enough evidence to create a triable issue as to whether the tuition for the bundled . . . course covered some portion of the [supplemental course costs], and therefore whether the conditioning element was satisfied." *Id.*

Here, Plaintiff has plausibly alleged a tying condition in the agreements with member colleges. Initially, Defendant is alleged to have offered its Data Services [\*956] to colleges in the form of a paper application. FAC ¶ 13. More recently, however, both products are bundled together such that a school cannot purchase Data Services—and the pipeline of student applications that comes with it—without also purchasing [\*\*44] Processing Services. *Id.* at ¶¶ 61, 192. In other words, this is not a case where the consumer can buy both products separately and the seller is merely offering them together at a lower price. Cf. *Jefferson Parish, 466 U.S. at 12 n.17* ("[W]here the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price."); *Cascade Health Sols., 515 F.3d at 915* ("[T]he fact that a customer would end up paying higher prices to purchase the tied products separately does not necessarily create a fact issue on coercion."). Under the facts alleged, the consumer is unable to purchase the tying product without the purchased of the tied product. In addition, though additional services are marketed as free, the pricing of Defendant's services changed once they were bundled together. FAC ¶¶ 59, 190. Thus, Plaintiff plausibly alleges that Defendant coerced Colleges into purchasing application processing services from Defendant instead of from other providers.

#### C. Monopolization (Claims 5, 6 & 7)

Plaintiff's Fifth, Sixth, and Seventh Claims for relief are for monopolization, attempted monopolization, and conspiracy to monopolize in violation of [Section 2](#) of the Sherman Act. "In order to state a claim [\*\*45] for monopolization under [Section 2](#) of the Sherman Act, a plaintiff must prove: (1) Possession of monopoly power in the relevant market; (2) willful acquisition or maintenance of that power; and (3) causal antitrust injury." [\*SmileCare Dental Grp. v. Delta Dental Plan of California, Inc., 88 F.3d 780, 783 \(9th Cir. 1996\)\*](#) (citation omitted). To establish an attempt to monopolize claim, the plaintiff must show: "(1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct to accomplish the monopolization; (3) dangerous probability of success; and (4) causal antitrust injury." *Id.* To prove a conspiracy to monopolize in violation of [Section 2](#), a plaintiff must show four elements: "(1) the existence of a combination or conspiracy to monopolize; (2) an overt act in furtherance of the conspiracy; (3) the specific intent to monopolize; and (4) causal antitrust injury." [\*Paladin, 328 F.3d at 1158\*](#).

Defendant argues that Plaintiff's monopolization claims should be dismissed for three reasons. First, Defendant contends that Plaintiff cannot adequately allege monopoly power. Second, Defendant alleges that Plaintiff's entry into the Online College Application Market defeats its [Section 2](#) claims. Third, Defendant argues that Plaintiff has not alleged sufficient facts to support its conspiracy claims.

##### i. Market [\*\*46] Power

To state a claim under the Sherman Act, "a plaintiff must allege that the defendant has market power within a 'relevant market.'" [\*Newcal Indus., Inc. v. IKON Office Solutions, 513 F.3d 1038, 1044 \(9th Cir. 2008\)\*](#). Market power under [Section 2](#) can be demonstrated in two ways: (1) through "direct evidence of the injurious exercise of market power," such as restricted output and supracompetitive prices; or (2) circumstantial evidence. [\*Rebel Oil Co., Inc. v. Atl. Richfield Co., 51 F.3d 1421, 1434 \(9th Cir. 1995\)\*](#). Proof by circumstantial evidence is more common and requires plaintiff to: "(1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and . . . that existing competitors lack the capacity to increase their output in the short run." *Id.* "The [\*957] question of whether, and if so in what market, [the defendant] has monopoly power is complex, nuanced, and fact dependent." [\*CollegeNET v. The Common Application, Inc., 711 F. Appx 405, 407 \(9th Cir. 2017\)\*](#). "There is no requirement that these elements of the antitrust

claim be pled with specificity." [Newcal, 513 F.3d at 1045](#). In this case, Defendant challenges all three elements of Plaintiff's market power allegations.

#### a. Market Definition

Defendant first argues that "Plaintiff wrongfully excludes other competitor application options, including a college's own internal application, which shifts the market share [\*\*47] analysis." Def. Mot. 29. Separately, Defendant also argues that Plaintiff's product markets inappropriately focus on a small subset of colleges by excluding two-year colleges and graduate school admissions. *Id.* at 33-34.

"[A] 'market' is the group of sellers or producers who have the 'actual or potential ability to deprive each other of significant levels of business.'" [Rebel Oil, 51 F.3d at 1434](#) (citing [Thurman Indus. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1374 \(9th Cir. 1989\)](#)). "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." [Brown Shoe Co. v. U.S., 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 \(1962\)](#); see also [Thurman Indus., 875 F.2d at 1374](#) ("[A] product market is typically defined to include the pool of goods or services that qualify as economic substitutes because they enjoy reasonable interchangeability of use and cross-elasticity of demand."). Courts should look to both demand and supply elasticity in determining whether two products are part of the same market. [Rebel Oil, 51 F.3d at 1436](#). "As a matter of law, courts have generally recognized that when a customer can replace the services of an external product with an internally-created system, this 'captive output' (i.e. the self-production of all or part of the relevant product) should be included in the same market." [U.S. v. Sungard Data Sys., Inc., 172 F. Supp. 2d 172, 186 \(D.D.C. 2001\)](#) (brackets [\*\*48] and citations omitted).

"[T]he validity of the 'relevant market' is typically a factual element rather than a legal element, [and] alleged markets may survive scrutiny under [Rule 12\(b\)\(6\)](#) subject to factual testing by summary judgment or trial." [Newcal Indus., 513 F.3d at 1045](#); see also [Rebel Oil, 51 F.3d at 1435](#) ("[T]he definition of the relevant market is a factual inquiry for the jury, and the court may not weigh evidence or judge witness credibility."). Consequently, an antitrust claim will survive a motion to dismiss "unless it is apparent from the face of the complaint that the alleged market suffers a fatal legal defect." [Newcal Indus., 513 F.3d at 1045](#); see also [Queen City Pizza v. Domino's Pizza, Inc., 124 F.3d 430, 437 \(3d Cir. 1997\)](#) ("Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products . . . the relevant market is legally insufficient and a motion to dismiss may be granted.").

In [RealPage, Inc. v. Yardi Systems, Inc.](#), the parties were competitors in the real property management business. [852 F. Supp. 2d 1215, 1218 \(C.D. Cal. 2012\)](#). RealPage and Yardi were the only two competitors in the market for supplying vertically integrated cloud computing services for real property owners [\*\*49] and managers. [Id. at 1224](#). RealPage brought antitrust claims against Yardi and excluded from the relevant market any "self-hosting" [\*958] of management software." [Id. at 1218](#). The district court acknowledged that RealPage's market definition was "quite narrow"; however, the definition was not "facially unsustainable" because RealPage considered and rejected multiple conceivably interchangeable substitutes in "great factual detail." [Id. at 1225](#). The district court denied the motion to dismiss the antitrust claims, explaining that the exclusion of "self-hosting of management software" did not render the relevant market inappropriate and that the resolution depended on issues of fact inappropriate for resolution at a motion to dismiss. *Id.*

Here, as in [RealPage](#), Plaintiff's complaint does not suffer from a "fatal legal defect" as it adequately considers and rejects alternatives. First, with regard to the exclusion of in-house or SIS-based application services from the Online Application Processing Market, Plaintiff alleges that they are not a reasonable substitute for third-party processing. Third-party solutions have distinct features, such as better data security and payment processing, and SIS-based application services require [\*\*50] substantial time investment by the College. FAC ¶¶ 100-05. Because these systems are so "barebones," Plaintiff alleges that Colleges would not turn to them in response to a small but significant, nontransitory increase in price. *Id.* at ¶ 106.

Similarly, Plaintiff excludes two-year, part-time, and graduate schools from the Admissions markets because of their distinct characteristics. *Id.* at ¶¶ 127, 139. The customer base is distinct because students seeking four-year or full-time undergraduate degree programs would not consider these—or could not consider them in the case of graduate programs—as alternatives. *Id.* Graduate program applications all require more specialized applications and processing, and graduate school application processing services are sold at a higher price. *Id.* at ¶¶ 97-98. Thus, according to Plaintiff, a small but significant, nontransitory increase in the price of College programs would not result in students applying to these other programs, nor would an increase in price result in Colleges using graduate products. *Id.* at ¶¶ 98, 127, 139. Plaintiff therefore plausibly alleges that these products are not interchangeable. The extent to which these markets are too [\*\*51] narrow turns on issues of fact more appropriate for resolution at summary judgment.

#### b. Market Share

Defendant also contends that Plaintiff has miscalculated its market share. Def. Mot. Dismiss 30. "Courts generally require a 65% market share to establish a prima facie case of market power." *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997) (*citing American Tobacco Co. v. United States*, 328 U.S. 781, 797, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)). "[A] market share of less than 50 percent is presumptively insufficient to establish market power." *Rebel Oil*, 51 F.3d at 1438. Though "the minimum showing of market share required in an attempt case is a lower quantum than the minimum showing required in an actual monopolization case, . . . . a market share of 30 percent is presumptively insufficient to establish the power to control price." *Id.* (finding that a market share of 44% was sufficient to support a finding of market power in an attempt case). "Where such an inference is not implausible on its face, an allegation of a specific market share is sufficient, as a matter of pleading, to withstand a motion for dismissal." *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 925 (9th Cir. 1980).

The parties primarily dispute the appropriate way to calculate market share. Defendant alleges that Plaintiff's market share—which it calculates by dividing Defendant's [\*959] total number of members by the total number of Colleges—is [\*\*52] only 24% and is, therefore, insufficient to constitute a monopoly. Def. Mot. Dismiss 30. Plaintiff, by contrast, calculates market share of the Online College Application Processing Market by looking to the number of undergraduate applications processed by Defendant. FAC ¶ 115. According to Plaintiff's calculation, this puts Defendant's total market share 60%. *Id.* The Court cannot say that Plaintiff's calculation is incorrect as a matter of law. Therefore, at this stage in the proceedings—where the Court is required to take Plaintiff's allegations as true—Plaintiff plausibly alleges monopoly power in the Online Application Processing Market.

#### c. Barriers to Entry

Defendant also contends that Plaintiff cannot demonstrate barriers to entry. Def. Mot. 33. "Entry barriers pertain not to those already in the market, but to those who would enter but are prevented from doing so." *United States v. Syufy Enterprises*, 903 F.2d 659, 671 n.21 (9th Cir. 1990). "A mere showing of substantial or even dominant market share alone cannot establish market power sufficient to carry out a predatory scheme. The plaintiff must show that new rivals are barred from entering the market and show that existing competitors lack the capacity to expand their output to challenge the predator's [\*\*53] high price." *Rebel Oil*, 51 F.3d 1421. "Barriers to entry may be defined as either additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants, or factors in the market that deter entry while permitting incumbent firms to incur monopoly returns." *Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1427-28 (9th Cir. 1993). "The main sources of entry barriers are: (1) legal license; (2) control over an essential or superior resource; (3) entrenched buyer preferences for established brands or company reputations; . . . (4) capital market evaluations imposing higher capital costs on new entrants; and (5) "economies of scale . . . in some situations." *Id.* at 1428 n.4 (*citing* 2 Areeda & Turner, *Antitrust Law* ¶ 409b at 299-300 (1978)).

Here, Defendant's argument focuses on the recent entry of the Coalition Application into the market. Def. Mot. 30-31. Defendant argues that the entry of the Coalition defeats Plaintiff's *Section 2* claims because it shows that barriers to market entry are low. *Id.* But the mere fact that a competitor entered the market does not defeat Plaintiff's allegations that barriers to entry are high at this stage in the litigation. Whether the entry of the Coalition is

sufficient to defeat this claim is a factual question.<sup>5</sup> The Court does not know, [\*\*54] for example, the output or capacity of the Coalition or whether it poses any challenge Defendant's market power. See [Rebel Oil, 51 F.3d at 1440 \(9th Cir. 1995\)](#). ("If the output or capacity of the new entrant is insufficient to take significant business away from the predator, they are unlikely to represent a challenge to the predator's market power."); [Eastman Kodak, 125 F.3d at 1208](#) ("Although some new entry was possible, the record reflects substantial evidence of entry barriers sufficient to prevent Kodak's monopoly share from self-correcting."). The Court therefore declines to dismiss Plaintiff's monopoly claims on this basis.

## ii. Conspiracy

As stated above, to succeed on a claim for conspiracy to monopolize, the [\*960] plaintiff must demonstrate: "(1) the existence of a combination or conspiracy to monopolize; (2) an overt act in furtherance of the conspiracy; (3) the specific intent to monopolize; and (4) causal antitrust injury. [Paladin, 328 F.3d at 1158](#). Like claims arising under [Section 1](#), conspiracy claims under [Section 2](#) require the plaintiff to show "the existence of an agreement, . . . conspiracy[,] or concerted action." [W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 99 \(3d Cir. 2010\)](#); see also [Morgan, Strand, Wheeler & Biggs v. Radiology Ltd., 924 F.2d 1484, 1491 \(3d Cir. 1991\)](#) (when there was insufficient evidence of an agreement under [Section 1](#), the Ninth Circuit also affirmed the district court's grant of summary judgment on the conspiracy to [\*\*55] monopolize claim). As described above in Section II(A)(i), the Court has found that there are sufficient allegations of an agreement to withstand Defendant's motion to dismiss.

## III. Defendant's Motion to Transfer Venue

Courts employ a two-step analysis when determining whether transfer is proper. First, a court must ask "whether the transferee district was one in which the action might have been brought by the plaintiff." [Hoffman v. Blaski, 363 U.S. 335, 343-44, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 \(1960\)](#). Second, if the moving party has made this threshold showing, courts may consider "individualized, case-by-case consideration[s] of convenience and fairness." [Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29, 108 S. Ct. 2239, 101 L. Ed. 2d 22 \(1988\)](#). In addition to considering the convenience of the parties and the witnesses, the court may consider, in "the interests of justice," a number of factors including the plaintiff's choice of forum, the location where the relevant agreements were negotiated and executed, the state that is most familiar with the governing law, the respective parties' contacts with the forum, the contacts relating to the plaintiff's cause of action in the chosen forum, the differences in the costs of litigation in the two forums, the availability of compulsory process to compel attendance of unwilling non-party witnesses, the ease [\*\*56] of access to sources of proof, and the relevant public policy of the forum state, if any. [Jones v. GNC Franchising, Inc., 211 F.3d 495, 498-99 \(2000\)](#).

Defendant moves to transfer this action to the Eastern District of Virginia. Though this alternate venue is proper, the Court finds that Defendant has not demonstrated that the convenience of the parties and witnesses or any other factors outweigh the great weight accorded to Plaintiff's choice of forum. Accordingly, Defendant's Motion to Transfer is denied.

### A. Venue is proper in the Eastern District of Virginia

Plaintiff does not dispute that the Eastern District of Virginia is a permissible forum. Pl. Opp'n Transfer 9 n.2, ECF 152. Defendant's principal place of business is Virginia. [28 U.S.C. § 1391\(b\)\(1\), \(c\)\(3\); see also 15 U.S.C. § 22](#) (an antitrust suit against a corporation may be brought in any district where the defendant transacts business). Accordingly, the decision whether to grant Defendant's motion to transfer is based on this Court's considerations of convenience and fairness.

### B. Convenience and Fairness

#### i. Plaintiff's Choice of Forum

<sup>5</sup> The litany of cases cited by Defendant on this point are inapposite: they were all decided either on a motion to summary judgment or after trial. See Def. Mot. Dismiss 30-31 (citing cases).

Defendant asserts that Plaintiff's choice of forum should be given little weight because "the challenged conduct . . . lacks any substantial connection to Oregon." Def. Mot. Transfer 9, ECF 146. [\*\*57] It argues that "the fact that ten colleges and universities in Oregon . . . accept The Common Application does not in and of itself make Oregon an appropriate venue" in light of [\*961] the fact that Defendant provides products and services to colleges and applicants throughout the United States. *Id.* at 9-10. It further notes that none of the contractual negotiations or bad acts took place in Oregon. *Id.* at 10-11

A plaintiff's choice of forum is generally accorded great weight. [\*Lou v. Belzberg, 834 F.2d 730, 739 \(9th Cir. 1987\)\*](#). A defendant must make a strong showing of inconvenience to upset a plaintiff's choice of forum. [\*Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843 \(9th Cir. 1986\)\*](#) (explaining that a court should give the plaintiff's choice of forum great deference unless the defendant can show that other factors of convenience clearly outweigh the plaintiff's choice). However, a plaintiff's choice of forum may receive less weight "if the operative facts did not occur within the forum of original selection and that forum has no particular interest in the parties or the subject matter[.]" [\*Partney Constr., Inc. v. Ducks Unlimited, Inc., Civil No. 08-574-SU, 2008 U.S. Dist. LEXIS 125164, 2008 WL 4838849, at \\*2 \(D. Or. Nov. 3, 2008\)\*](#); see also [\*Pac. Car & Foundry Co. v. Pence, 403 F.2d 949, 954 \(9th Cir. 1968\)\*](#) ("In judging the weight to be given such a choice, as is the case with other types of actions, consideration must be given to the extent both of the defendant's [\*\*58] business contacts with the chosen forum and of the plaintiff's contacts, including those relating to his cause of action. If the operative facts have not occurred within the forum of original selection and that forum has no particular interest in the parties or the subject matter, the plaintiff's choice is entitled only to minimal consideration.").

Here, the Court finds that Plaintiff's choice of forum should receive substantial weight. First, this is not a case where Plaintiff has no substantial connection with Oregon. Cf. [\*Ventress v. Japan Airlines, 486 F.3d 1111, 1118-19 \(9th Cir. 2007\)\*](#) (upholding the District Court's transfer from California to Hawaii because, in part, the plaintiffs both resided in Hawaii). Rather, Oregon is Plaintiff's home forum. See [\*Adidas Am., Inc. v. Cougar Sport, Inc., 169 F.Supp.3d 1079, 1096 \(D. Or. 2016\)\*](#) ("The plaintiff's choice of forum is especially given deference where the plaintiff is a resident of the forum in which the action is brought."). Second, Plaintiff's residence is not the only connection to Oregon. Cf. [\*Partney Constr., 2008 U.S. Dist. LEXIS 125164, 2008 WL 4838849, at \\*2\*](#) (noting that the plaintiff's residence was the only connection to Oregon and all the conduct giving rise to the claims occurred in Nevada and would likely be governed by Nevada law). Defendant's alleged anticompetitive conduct—governed by federal law—occurred throughout the United [\*\*59] States, including in Oregon where at least twelve member schools are located. Thus, Defendant has some business contacts relevant to this case in the forum state, and the Court has some interest outside of Plaintiff in this subject matter. This factor, therefore, weighs heavily against transfer.

## ii. Convenience of the Parties and Witnesses

Defendant argues that the Eastern District of Virginia is more convenient for both party and non-party witnesses and will reduce the financial burden on Defendant. Def. Mot. Transfer 12. First, Defendant argues that Plaintiff's monopolization claim will center on Defendant's office in Virginia, which is only seven miles from the federal courthouse. *Id.* at 12-14 (citing Adam Decl. Ex. F, ECF 147). In addition, Defendant asserts that Virginia is a more convenient location for non-party witnesses, including member and non-members educational institutions, vendors, and partners, who will likely reside outside the 100-mile radius of Portland. *Id.* at 15. Here, Defendant also emphasizes the ease [\*962] of access to third parties in Virginia. *Id.* at 16.

"Convenience of witnesses is often the most important factor in determining whether or not to transfer a given case." [\*Partney Constr., Inc., 2008 U.S. Dist. LEXIS 125164, 2008 WL 4838849, at \\*3\*](#) (citation omitted). The [\*\*60] "convenience of the witnesses" factor takes into account the convenience to both party and non-party witnesses; however, courts give more consideration to non-party witnesses, as opposed to witnesses who are employees of a party to the litigation. *Id.* The court considers not only the number of witnesses located in the respective districts, but also the nature and quality of their testimony, as it relates to the issues in the case. *Id.*

Defendant has not made a sufficiently strong showing of inconvenience to upset Plaintiff's choice of forum. To the extent that proceeding in Oregon presents a hardship to Defendant and its party witnesses—including its executives and other employees—proceeding in Virginia would present the same hardships to Plaintiff and its party

witnesses, including executives and other employees. Compare Rickard Decl. ¶ 7 (noting that 80 of 87 employees work in the Virginia office, including key executive witnesses) and ¶¶ 10-12 (noting that trial is currently scheduled for Defendant's busiest months), ECF 148, with Trachtenbarg Decl. ¶¶ 3-5 (noting 147 of 165 its employees are located in Portland as are executives who are likely to be witnesses) and ¶ 6 (also noting [\*\*61] that trial is scheduled during its busiest months), ECF 154. Thus, transfer of venue would merely shift inconvenience of trial from one party to another. See [Decker Coal Co., 805 F.2d at 844](#) (when witnesses were located in both districts, "[t]he transfer would merely shift rather than eliminate the inconvenience"). This is insufficient to justify transfer of this case to the Eastern District of Virginia.

As to nonparties, the Court notes that—with the information provided by both Plaintiff and Defendant—it is difficult to tell not only the number of witnesses located within the respective districts but also the nature and quality of their testimony. For example, Defendant notes that there are "three times as many" institutions of higher education within 100 miles of the Virginia courthouse and more elite or public institutions. But neither party has indicated that witnesses from these schools will be called or whether they are relevant to this case. Indeed, Plaintiff has indicated that it may call third-party schools—both members and non-members—located throughout the country and outside the subpoena power of both courts. See Pl. Opp'n (citing Compl. ¶¶ 29, 54-56) (identifying colleges in Kansas, New York, South Carolina, [\*\*62] California, and Louisiana).

In addition, no individuals or organizations have been identified or noted for deposition. See Alfonso Decl. ¶ 4 (no nonparty depositions have yet been identified), ECF 153. Though subpoenas for documentary evidence have been served on some third-party competitors within the subpoena power of the Eastern District of Virginia, see Adam Decl. ¶¶ 2-5, Exs. A-D, there is no evidence of the substance or materiality of their testimony or any indication that either party plans to call these third parties as witnesses, [Adidas Am., 169 F. Supp. 3d at 1096](#) ("As neither party identifies its witnesses with specificity, the Court finds it difficult [to] meaningfully evaluate the effect that a change of venue would have on any witnesses."). Thus, Defendant has not made a strong showing that the convenience of either the party or nonparty witnesses justify transferring this case.

### iii. Other Factors in the Interest of Justice

As to the remaining factors, the Court finds that they are, on balance, neutral and [\*\*63] therefore have little impact on this determination.

The place of negotiation and execution of the relevant agreements is neutral. Defendant argues that the place of negotiation was Virginia, where Defendant [\*\*63] is located, and that this factor weighs in favor of transfer. The Court disagrees. The contracts in this case were negotiated by phone and email in Virginia and throughout the United States, wherever the relevant member school was located. Rickard Decl. ¶¶ 5-6. In other words, "there is no one prominent location for negotiation or execution that would sway this Court's determination under this factor." [Shee Atika Languages, LLC v. Kershner, No. 107CV00009JWSDMS, 2008 U.S. Dist. LEXIS 130940, 2008 WL 11429798, at \\*5 \(D. Alaska Feb. 27, 2008\)](#) (where the parties negotiated by phone and email and the parties were located in Virginia, Maine, and Alaska and not "one place" it had no bearing on the courts analysis under § 1404).

Overall, the interest of judicial efficiency is a neutral factor. The relative court congestion and time of trial in each forum weighs in favor of transfer. As Defendant notes, the Court's recent scheduling order, which set trial just under two years from now in August of 2020, is consistent with the "26.5 month median timeline from the filing of a civil case to trial in the District of Oregon." *Id.* at 18 (citing Adam Decl. Ex. E). By comparison, the Eastern District of Virginia is a "rocket docket," such that the median timeline from filing to trial is 10.8 [\*\*64] months. *Id.* As Plaintiff points out, however, the Court has already familiarized itself with the issues of the case, handled multiple motions, and set a global case schedule. In addition, this case has been pending in this district and the Ninth Circuit for over four years now. This factor weighs in favor of Plaintiff. See [Commodity Futures Trading Commc'n v. Savage, 611 F.2d 270, 279 \(9th Cir. 1979\)](#) (affirming the district court's refusal to transfer and noting that "[t]he district court was familiar with the case and transfer may have led to delay."); [DIRECTV, Inc. v. EQ Stuff, Inc., 207 F. Supp. 2d 1077, 1083 \(C.D. Cal. 2002\)](#) (finding that the "familiarity of the Court with the relevant issues of a case" weighed against transfer where the district court had invested time and resources in the case, including issuing a TRO and a Preliminary Injunction).

As to the familiarity of each forum with the applicable law, the law governing Plaintiff's antitrust claims is federal and, therefore, the Court can presume all federal courts have equal familiarity with the applicable law. The Court finds that this factor is neutral.

The Court concludes that the evidence is located in multiple locations, though perhaps more evidence will be located in Virginia where Defendant is located. However, the evidence is largely documentary evidence that can [**\*\*65**] be easily transmitted from afar. *Adidas Am., 169 F.Supp.3d at 1097* ("With regard to documents and records, transporting documents does not generally create a burden due to technological advances in document storage and retrieval."). Accordingly, this factor is neutral.

## **CONCLUSION**

The Court DENIES Defendant's Motion to Dismiss [137], Request for Judicial Notice [138], and Motion to Change or Transfer Venue [146]. The Court also DENIES Plaintiff's Request for Judicial Notice [155].

IT IS SO ORDERED.

Dated this 28 day of November, 2018.

/s/ Marco A. Hernández

MARCO A. HERNÁNDEZ

United States District Judge

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## BladeRoom Grp. Ltd. v. Emerson Elec. Co

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

November 29, 2018, Decided; November 29, 2018, Filed

Case No. 5:15-cv-01370-EJD

### **Reporter**

2018 U.S. Dist. LEXIS 202683 \*; 2018 WL 6242090

BLADEROOM GROUP LIMITED, et al., Plaintiffs, v. EMERSON ELECTRIC CO, et al., Defendants.

**Subsequent History:** Vacated by, Remanded by [\*Bladeroom Grp., Ltd. v. Emerson Elec. Co., 11 F.4th 1010, 2021 U.S. App. LEXIS 26085 \(9th Cir. Cal., Aug. 30, 2021\)\*](#)

Vacated by [\*BladeRoom Grp. Ltd v. Emerson Elec. Co., 2021 U.S. App. LEXIS 37740 \(9th Cir. Cal., Dec. 21, 2021\)\*](#)

**Prior History:** [\*BladerRoom Grp. Ltd. v. Facebook, Inc., 2015 U.S. Dist. LEXIS 164602, 2015 WL 8028294 \(N.D. Cal., Dec. 7, 2015\)\*](#)

## **Core Terms**

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trade secret, unfair, designs, prong, misappropriation, competitor, technology, violation of antitrust laws, unfair competition, preponderance of evidence, incipient, patent

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**Judges:** EDWARD J. DAVILA, United States District Judge.

**Opinion by:** EDWARD J. DAVILA

## **Opinion**

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### **ORDER DENYING MOTION FOR JUDGMENT ON UNFAIR COMPETITION CLAIM; FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Re: Dkt. No. 896

A jury returned a verdict in favor of Plaintiffs BladeRoom Group Ltd. and Bripco (UK) Ltd. (collectively, "BladeRoom") on claims against Defendants Emerson Electric Co., Emerson Network Power Solutions, Inc. and Liebert Corporation (collectively, "Emerson") for misappropriation of trade secrets and breach of contract. BladeRoom now moves the court for judgment in its favor on the remaining claim under California's Unfair Competition Law ("UCL"), Business and Profession [<sup>\*4</sup>] Code [§ 17200 et seq.](#) Dkt. No. 896.

Federal jurisdiction arises pursuant to [28 U.S.C. § 1332](#). Having carefully considered the trial evidence in conjunction with the parties' pleadings, the court has determined that BladeRoom did not prove a UCL violation by a preponderance of the evidence. Accordingly, BladeRoom's motion for judgment will be denied consistent with the findings of fact and conclusions of law established below.

#### **I. FINDINGS OF FACT**

1. There is no dispute that Plaintiffs BladeRoom Group, Ltd. and Bripco (UK) Ltd. are companies organized under the laws of England with registered offices located in Cheltenham, England. Second Am. Compl. ("SAC"), Dkt. No. 107, at ¶¶ 4-5; Answers, Dkt. Nos. 231-233, at ¶¶ 4-5.
2. There is no dispute that Defendant Emerson Electric Co. is a company organized under the laws of Missouri with a principal place of business at St. Louis, Missouri. SAC, at ¶ 7; Answers, at ¶ 7.
3. There is no dispute that Defendant Emerson Network Power Solutions, Inc. is a company organized under the laws of Delaware with a principal place of business at Columbus, Ohio. SAC, at ¶ 8; Answers, at ¶ 8.
4. There is no dispute that Defendant Liebert Corporation is a company organized under the laws of Delaware [<sup>\*5</sup>] with a principal place of business at Columbus, Ohio. SAC, at ¶ 9; Answers, at ¶ 9.
5. Emerson Network Power Solutions, Inc. and Liebert Corporation are 100% owned by Vertiv Group Corporation. Dkt. No. 186.
6. BladeRoom and Emerson are competitors in the field of modular data center design and construction. Trial Tr., at 622:12-19; 1764:22-1765:6; 2439:4-2440:22; 3355:24-3356:16; Trial Ex. 823; Trial Ex. 1084.

7. BladeRoom and Emerson were the only two companies that competed to design and construct Facebook's data center project known as "Lulea 2." Trial Tr., at 1677:2-1678:7; 1858:7-10.
8. In July, 2012, BladeRoom submitted a proposal to Facebook to design and build a data hall for Lulea 2. Trial Tr., at 617:10-15; 1888:19-1889:2; Trial Ex. 753.
9. Facebook ultimately selected Emerson over BladeRoom to design and construct Lulea 2. Trial Tr., at 1858:11-14; Trial Ex. 1735.
10. Emerson proposed designs and methods of construction for Lulea 2 to Facebook during a meeting on October 30, 2012. Trial Tr., at 2086:14-2087:4; Trial Ex. 904.
11. The October 30th design was the basis for, and was actually incorporated into, the construction of Lulea 2. Trial Tr., at 2086:9-2152:2.
12. A jury found [\*6] that BladeRoom proved by a preponderance of the evidence that the designs and methods described in Court Exhibit 2 and designated therein as Trade Secret 1 and Combination Trade Secret 8 qualified as trade secrets. Dkt. No. 867. The court likewise finds based on the evidence admitted at trial.
13. Components of Emerson's October 30th design for Lulea 2 were substantially derived from the designs and methods described in Court Exhibit 2 and designated therein as Trade Secret 1 and Combination Trade Secret 8. Trial Tr., at 2090:8-2116:10.
14. A jury found that BladeRoom proved by a preponderance of the evidence that Emerson improperly disclosed or used the designs and methods described in Court Exhibit 2 and designated therein as Trade Secret 1 and Combination Trade Secret 8. Dkt. No. 867. The court likewise finds based on the evidence admitted at trial.
15. A jury found that Emerson's misappropriation of the designs and methods described in Court Exhibit 2 and designated therein as Trade Secret 1 and Combination Trade Secret 8 was a substantial factor in causing BladeRoom harm and causing Emerson to be unjustly enriched. Dkt. No. 867. The court likewise finds based on the evidence admitted [\*7] at trial.
16. Liebert filed provisional U.S. Patent Application No. 61/886,402 on October 3, 2013. Mar Decl., Dkt. No. 894, at Ex. 5.
17. Liebert's U.S. Patent No. 9,572,288 issued on February 14, 2017, and claims priority to the '402 provisional application. Trial Ex. 1260.
18. The '288 patent covers some of the same components described in Emerson's October 30th design for Lulea 2. Trial Tr., at 2127:3-6.
19. Many of the figures in the '288 patent are the same as figures used in Emerson's October 30th design for Lulea 2. Compare Trial Ex. 904 with Trial Ex. 1260.
20. There is no evidence that Emerson has ever sought to enforce the '288 patent.
21. There is no evidence regarding whether, and to what extent, the '288 patent gives Emerson a share of a particular market.
22. In its 2014 Annual Report, Emerson featured photos of the Lulea 2 project and claimed that, in collaboration with Facebook, it had created "the new 'rapid deployment data center'" approach for Lulea 2, which it described as a "new-to-the-world data center approach." Mar Decl., at Ex. 6.
23. Emerson referenced the design and construction of Lulea 2 in marketing materials and on its website. Trial Tr., at 1721:17-1732:2; Dkt. 831, pp. 39-40 at 99:23-121:03, 125:7-160:22; Trial Exs. 823, 1084; [\*8] Mar Decl., at Ex. 1.

24. Emerson hosted Microsoft for a tour of Lulea 2 as part of its efforts to win Microsoft as a modular data center customer. Trial Ex. 980.
25. Emerson hosted a large technology company and a large telecommunications company on tours of Lulea 2 in an attempt to gain their data center business. Trial Tr., at 2146:23-2147:7.
26. Emerson proposed to use versions of the designs and methods used to construct Lulea 2 to other prospective customers. Trial Tr., at 2146:7-22.
27. In March, 2014, BladeRoom received an email from a "super important" client suggesting that Facebook's "new way of building a data center" was similar to BladeRoom's designs and method. Trial Tr., at 614:19-615:2; Trial Ex. 32.
28. Due to the similarities between Facebook's "new way of building a data center" and BladeRoom's designs and method, there was a "question mark" over whether BladeRoom had created its own technology. Trial Tr., at 622:7-11.
29. Google and Microsoft were interested in BladeRoom's data center product, but each company stopped communicating with BladeRoom after the "question mark over the technology has taken place." Trial Tr., at 622:12-19.
30. BladeRoom originally alleged claims [\*9] under the UCL's unlawful and unfair "prongs." Dkt. No. 106-4, at ¶¶ 149-157.
31. The court previously determined that BladeRoom's UCL claim under the unlawful prong was preempted by the California Uniform Trade Secrets Act. Dkt. No. 494.
32. BladeRoom moves for judgment against Emerson on the UCL claim under the unfair prong. Dkt. No. 896.
33. BladeRoom argued at the hearing on July 18, 2018, that "BladeRoom's UCL claim (and the competitive harm alleged) is premised on 'non-preempted' unfair conduct." Pls.' Presentation for Post-Trial Motions Hearing, at p. 3.<sup>1</sup>
34. BladeRoom argued at the July 18th hearing that "Emerson is harming Consumers at the market for the technology by wrongfully 'passing off' this invention as its own." Id.
35. At the July 18th hearing, BladeRoom identified two ways that Emerson "passes" off the invention as its own: (1) "To potential customers through marketing and sales presentations," and (2) "To the patent office and to the public through its unlawfully-obtained patent." Id.
36. BladeRoom argued at the July 18th hearing that these instances of "non-preempted" unfair conduct are "the gravamen" of the UCL claim. Id.

## II. CONCLUSIONS OF LAW

37. An "unauthorized use [\*10]" need not extend to every aspect or feature of the trade secret; use of any substantial portion of the secret is sufficient to subject the actor to liability" for misappropriation. *Restatement (Third) of Unfair Competition § 40 cmt. c* (1995).
38. "[T]he actor need not use the trade secret in its original form" to be liable for misappropriation of trade secrets. Id.

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<sup>1</sup> The court has attached Page 3 of BladeRoom's presentation as Ex. 1.

39. "[A]n actor is liable for using the trade secret with independently created improvements or modifications if the result is substantially derived from the trade secret." *Id.*; accord *Mangren Res. & Dev. Corp. v. Nat'l Chem. Co., Inc.*, 87 F.3d 937, 944 (7th Cir. 1996).

40. A patent provides its owner with "the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States." [35 U.S.C. § 154\(a\)\(1\)](#)

41. The UCL broadly prohibits business practices that are unlawful, unfair, or fraudulent. [Cal. Bus. & Prof. Code § 17200](#); *Kwikset v. Super. Ct.*, 51 Cal. 4th 310, 320, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011).

42. The UCL's "purpose 'is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services,'" and its language is framed broadly in service of that purpose. *Kwikset*, 51 Cal. 4th at 320 (quoting *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 949, 119 Cal. Rptr. 2d 296, 45 P.3d 243 (2002)).

43. To have standing under the UCL, a plaintiff must have "lost money or property as a result of the unfair competition." [Cal. Bus. & Prof. Code § 17204](#).

44. "There are innumerable ways in which economic injury from unfair competition may be shown." *Kwikset*, 51 Cal. 4th at 323.

45. Injunctive [\*11] relief and restitution are possible remedies for UCL violations. See *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1146, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003).

46. "Although the unfair competition law's scope is sweeping, it is not unlimited." *Cel-Tech Commc'nns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 182, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999). "Courts may not simply impose their own notions of the day as to what is fair or unfair." *Id.*

47. "There is authority that the test to determine whether a business practice is unfair differs depending on whether the plaintiff in a UCL case is a competitor of the defendant or a consumer." *Drum v. San Fernando Valley Bar Ass'n*, 182 Cal. App. 4th 247, 106 Cal. Rptr. 3d 46, (2010).

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

49. Under the UCL's unfair prong, and as equally applicable in antitrust, "[i]njury to a *competitor* is not equivalent to injury to *competition* . . ." *Id. at 186* (emphasis added).

50. "[I]njuries which result from increased competition . . . are not encompassed by the antitrust laws." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1057 (9th Cir. 199).

51. Neither [\*12] *Spring Design, Inc. v. Barnesandnoble.com, LLC*, No. C 09-05185 JW, 2010 U.S. Dist. LEXIS 136569, 2010 WL 5422556 (N.D. Cal. Dec. 27, 2010), nor *Allergan, Inc. v. Athena Cosmetics, Inc.*, 640 F.3d 1377 (Fed. Cir. 2011), hold that misleading consumers about the inventor or owner of technology is a violation of the antitrust laws.

52. A UCL claim must be proven by a preponderance of the evidence. See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387, 103 S. Ct. 683, 74 L. Ed. 2d 548 (1983); see also *People v. First Federal Credit Corp.*, 104 Cal. App. 4th 721, 732, 128 Cal. Rptr. 2d 542 (2002).

53. A claim is preempted by the *California Uniform Trade Secrets Act* ("CUTSA") if it is based on the "same nucleus of facts" as the misappropriation of trade secrets claim for relief. *K.C. Multimedia, Inc. v. Bank of America Tech. &*

Operations, Inc., 171 Cal. App. 4th 939, 954, 90 Cal. Rptr. 3d 247 (2009) (quoting Digital Envoy, Inc. v. Google, Inc., 370 F. Supp. 2d 1025, 1035 (N.D. Cal. 2005)).

54. CUTSA preemption "is not triggered where the facts in an independent claim are similar to, but distinct from, those underlying the misappropriation claim." Gabriel Techs. Corp. v. Qualcomm Inc., No. 08cv1992-MMA(POR), 2009 U.S. Dist. LEXIS 98379, 2009 WL 3326631, at \*11 (S.D. Cal. Sept. 3, 2009).

55. BladeRoom has standing under the UCL because it claims to have lost business opportunities as a result of Emerson's "passing off," which placed a "question mark" over the ownership of BladeRoom's technology.

56. BladeRoom's UCL claim under the unfair prong is not preempted because the "gravamen" of the claim is based on conduct distinct from that underlying its claim for trade secret misappropriation.

57. BladeRoom did not prove that Emerson violated the UCL's unfair prong, because the fact that components of Emerson's October 30th design for Lulea 2 were substantially derived [\*13] from the designs and methods underlying BladeRoom's trade secrets constitutes an injury to BladeRoom's business interests as a competitor, not an injury to competition or an incipient violation of antitrust law.

58. BladeRoom did not prove that Emerson violated the UCL's unfair prong, because the fact that Emerson misappropriated BladeRoom's trade secrets through disclosure or use constitutes an injury to BladeRoom's business interests as a competitor, not an injury to competition or an incipient violation of antitrust law.

59. BladeRoom did not prove that Emerson violated the UCL's unfair prong, because the fact that Emerson "passed off" as its own the designs and methods it used to construct Lulea 2 constitutes an injury to BladeRoom's business interests as a competitor, not an injury to competition or an incipient violation of antitrust law.

60. BladeRoom did not prove that Emerson violated the UCL's unfair prong, because there is no evidence that Liebert's ownership of the '288 patent constitutes an injury to competition or an incipient violation of antitrust law in the absence of corresponding evidence that Liebert exercised its right to exclude others from the technology disclosed in the '288 patent [\*14].

61. BladeRoom has not satisfied its burden to prove a violation of the UCL's unfair prong by a preponderance of the evidence.

### **III. ORDER**

BladeRoom's Motion for Judgment on Unfair Competition Claim (Dkt. No. 896) is DENIED.

**IT IS SO ORDERED.**

Dated: November 29, 2018

/s/ Edward J. Davila

EDWARD J. DAVILA

United States District Judge



## Fields v. McGovern

Court of Appeals of Kansas

November 30, 2018, Opinion Filed

No. 119,219

**Reporter**

2018 Kan. App. Unpub. LEXIS 924 \*; 430 P.3d 997; 2018 WL 6253329

SAMUEL W. FIELDS, Appellant, v. KEN MCGOVERN and DEBORAH PORTER, Appellees.

**Notice:** NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

**Prior History:** [\*1] Appeal from Douglas District Court; JAMES R. MCCABRIA, judge.

**Disposition:** Affirmed.

## **Core Terms**

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district court, sheriff, surety, arrest warrant, arrest, appearance, bail

**Counsel:** Samuel W. Fields, pro se appellant.

Daniel S. Bell, of Andersen & Associates, of Overland Park, for appellees.

**Judges:** Before GARDNER, P.J., ATCHESON and POWELL, JJ.

## **Opinion**

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### MEMORANDUM OPINION

PER CURIAM: Samuel W. Fields, a bail bondsman, appeals pro se the dismissal of his lawsuit against Douglas County Sheriff Ken McGovern and Deputy Deborah Parker for failing to state a legal claim for relief. Fields' suit claimed the defendants had wrongfully used incorrect identifying information for a defendant in preparing a bail bond facesheet. For reasons we more fully explain below, we see no error in the district court's dismissal of Fields' lawsuit and affirm.

### FACTUAL AND PROCEDURAL BACKGROUND

Because Fields represents himself in this litigation, the underlying facts of the case are difficult to glean from the record on appeal. It is undisputed, however, that Fields is a bondsman with Applejacks Bail Bonds and is approved by the Douglas County District Court to act as a bond surety within the State of Kansas. It is also undisputed that Fields entered a surety agreement with Larry Raymond Brown II on December 3, 2015, for posting a bond for [\*2] a court appearance in Atchison County. Many of the remaining facts pertinent to Fields' suit are murky.

On November 19, 2015, the Atchison County District Court issued a bench warrant for the arrest of Larry Raymond Brown III on charges of distribution of cocaine, failing to affix tax stamps, and use of a telecommunications device in the sale of a controlled substance. The warrant described Brown as a black male, 5'5" tall, and 155 pounds with a birth year of 1985. At some point, the Atchison County arrest warrant was entered into the National Crime Information Center (NCIC) database, listing Larry Raymond Brown II with various aliases, including Larry Raymond Brown III.

On December 3, 2015, an individual named Larry Raymond Brown II was issued a citation by the City of Lawrence for battery and possession of marijuana. The Lawrence municipal citation listed Brown's year of birth as 1985, registered address, and driver's license number and described Brown as a black male, 5'5" tall, weighing 160 pounds. He was subsequently arrested on the outstanding Atchison County arrest warrant. The booking information listed only Larry Raymond Brown but also identified Brown by his address and date [\*3] of birth. Fields signed an Atchison County appearance bond as surety for Larry Raymond Brown II and listed the same address for Brown as listed in the citation and the booking information. Fields stood as surety in the amount of \$15,000 for Brown's court appearance in Atchison County on December 11, 2015.

The record is not clear about whether Brown appeared for the December 11 hearing in Atchison County. He did appear for his arraignment in Douglas County on December 22, 2015. But, Brown failed to appear for subsequent hearings in both Douglas and Atchison Counties. The Douglas County District Court issued a bench warrant against Brown for failing to appear on January 19, 2016. The Atchison County District Court forfeited Brown's bond for his failure to appear on January 20, 2016, and issued a warrant for Brown's arrest. The order provided an opportunity for Fields to avoid payment of the \$15,000 bond if he provided the district court with a reason to set aside the order before March 18, 2016.

On March 10, 2016, Fields filed a pro se brief, arguing that he should be relieved of his obligations as surety because discrepancies in the names assigned to Brown in the various court documents [\*4] prevented Fields from securing Brown's capture in Kansas or another state. Fields acknowledged that Brown signed the bond agreement as Larry Raymond Brown II. Fields failed to attend the scheduled hearing on March 28, 2016. The Atchison County District Court rejected Fields' argument and ordered Fields to pay \$15,000 to the court.

On January 18, 2017, Fields filed a petition in the Douglas County District Court, initiating this current lawsuit. He claimed McGovern and Porter were negligent in preparing a bail bond facesheet with incorrect identifying information for Brown. Fields also claimed that protections from liability for McGovern and Porter violated federal **antitrust law**. Additionally, Fields claimed that McGovern and Porter had damaged his professional reputation by preventing him from capturing Brown out of state and claimed the bond contract should be declared void as unenforceable. Fields sought damages in the amount of \$15,000, legal expenses in the amount of \$3,000, and exemplary or punitive damages in the amount of \$75,000.

McGovern and Porter filed an answer, arguing Fields' petition should be dismissed on the following grounds: (1) Fields failed to state a valid claim; [\*5] (2) the district court lacked subject matter jurisdiction and proper venue; (3) Fields could not pursue a claim for punitive or exemplary damages; (4) Fields' own negligence excused any negligence on the part of the defendants; and (5) Fields lacked privity of contract with them, thus they lacked any duty to Fields. Fields filed a pro se pleading in response, generally rehashing the arguments of his petition.

Subsequently, Fields filed a motion for summary judgment, and the defendants moved to dismiss for failure to state a claim. On January 2, 2018, the district court entered a journal entry dismissing the petition for failing to state a cause of action upon which relief might be granted.

Fields timely appeals.

#### DID THE DISTRICT COURT ERR IN DISMISSING THE PETITION FOR FAILURE TO STATE A CLAIM?

When we review the dismissal of a petition for failing to state a claim, we consider the well-pleaded facts in a light most favorable to the plaintiff, which requires us to assume the truth of those facts as well as any reasonable inference that may be drawn from them. If the facts as pled state any claim upon which relief might be granted, then dismissal was improper. See *Cohen v. Battaglia*, 296 Kan. 542, 545-46, 293 P.3d 752 (2013). We do not resolve any [\*6] factual disputes when deciding a motion to dismiss for failure to state a claim, and dismissal is appropriate only when the allegations in the petition clearly demonstrate that the plaintiff lacks a legal claim for relief. *Steckline Communications, Inc. v. Journal Broadcast Group of KS, Inc.*, 305 Kan. 761, Syl. ¶2, 388 P.3d 84 (2017).

While Fields' factual allegations have remained relatively consistent, his legal theories for relief provide us with a moving target. Essentially, Fields contends that McGovern and Porter committed a fraud or misrepresentation on Fields by characterizing Brown as "Larry Raymond Brown II" when the arrest warrant from Atchison County designated "Larry Raymond Brown III." Before the district court Fields' legal theories rested upon *K.S.A. 2017 Supp. 60-209*; *K.S.A. 2017 Supp. 22-2802*; the *Racketeer Influenced and Corrupt Organizations (RICO) Act*, 18 U.S.C. § 1961 et seq. (2012); and the *Sherman Anti-Trust Act*, 15 U.S.C. § 1 et seq. (2012). On appeal, Fields' theory shifts to *Kansas Supreme Court Rule 114* (2018 Kan. S. Ct. R. 186). Because Fields has not argued these other legal theories on appeal, we consider them abandoned. See *State v. Reu-El*, 306 Kan. 460, 471, 394 P.3d 884 (2017) (issues raised in district court but not advanced on appeal are considered abandoned).

This failure notwithstanding, given the wide parameters of appellate review following dismissal of a petition for failure to state a claim, all of Fields' various theories, [\*7] plus any applicable theories not articulated by him, will be considered to determine whether any claim based on the alleged facts would support a judgment in favor of Fields. Unfortunately for Fields, none of the authorities cited by him impose a duty on a county sheriff in favor of a surety to ensure that a criminal appearance bond correctly names the individual subject to the appearance bond.

*K.S.A. 2017 Supp. 60-209* provides rules for pleading particular matters including fraud and libel or slander. See *K.S.A. 2017 Supp. 60-209(b), (j)*. The statute does not create a duty or a cause of action. *K.S.A. 2017 Supp. 22-2802* directs the payment of bonds by individuals or sureties into the court. It does not address the authority or responsibility of the sheriff with respect to the bond and does not impose liability on the sheriff towards a surety. Similarly, *Supreme Court Rule 114(a)* permits authorized surety companies to post bonds set by the sheriff or the court clerk. The record establishes that the Atchison County District Court set the bond amount. *Supreme Court Rule 114* is therefore inapplicable. But, even if *Supreme Court Rule 114(a)* applied to the bond guaranteed by Fields in this case, the rule does not impose any duty or responsibility on the sheriff.

By definition, RICO also does not apply to the sheriff's conduct. "Racketeering [\*8] activity" is defined as "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical" or as "any act which is indictable" under a list of specific crimes. See 18 U.S.C. § 1961(1). Because the sheriff's or deputy's conduct cannot be classified as a crime, particularly a crime listed by RICO, this Act does not apply here.

For similar reasons, the Sherman Anti-Trust Act, 15 U.S.C. § 1, also does not impose liability upon the sheriff or deputy. This Act prohibits contracts, conspiracies, or agreements to restrain trade or commerce among states or with foreign nations. Nothing about the sheriff's alleged intentional or negligent misstatement in naming Brown restrains trade or commerce with other states. Furthermore, to the extent the bonding authorization in Douglas County constitutes a restraint on trade, it is the Douglas County District Court, not the sheriff, which imposes that restraint. Any incidental restraint on trade imposed by state government in regulating industry in the interest of public health and welfare is immune from the Sherman Anti-Trust Act under the *Parker* doctrine. See generally *North Carolina State Bd. of Dental Examiners v. FTC*, 574 U.S. , 135 S. Ct. 1101, 1110, 191 L. Ed. 2d 35 (2015); [\*9] *Parker v. Brown*, 317 U.S. 341, 350-51, 63 S. Ct. 307, 87 L. Ed. 315 (1943).

Fields has cited no caselaw in which a court has imposed liability upon a sheriff for negligently or intentionally providing the wrong name for a bail bond agreement, and independent research has discovered none. In order to establish a claim for fraud or misrepresentation (intentional or negligent), Fields would be required to demonstrate, among other things, that the information provided by the sheriff was false. See *Stechschulte v. Jennings*, 297 Kan.

2, 19, 298 P.3d 1083 (2013) (elements of fraud); Rinehart v. Morton Buildings, Inc., 297 Kan. 926, 937, 305 P.3d 622 (2013) (elements of negligent misrepresentation). According to the record, the individual arrested by Douglas County law enforcement officers on the Atchison County arrest warrant went by several variations of the same name: Larry Raymond Brown, Larry Raymond Brown II, and Larry Raymond Brown III. The record does not indicate which one of these names is Brown's legal name. The booking form listed the arrested person as "Larry Raymond Brown." The Lawrence police citation issued to Brown at the time of his offense was presumably based on Brown's driver's license information and listed "Larry Raymond Brown II" as the name of the offender. Fields admitted that on December 3, 2015, the NCIC listed an active warrant out of Atchison County for Larry Raymond [\*10] Brown II. The facts, even when viewed in a light most favorable to Fields, do not establish that the sheriff provided him with false information regarding Brown's name. It establishes only that the name provided in the bond does not match the name provided in the arrest warrant. Fields provides no authority requiring the sheriff to conduct an independent inquiry into an offender's name before booking him or her into jail or issuing a bond.

If the NCIC entry did not match the name of the person against whom the arrest warrant was issued, the error rests with the party entering the information into the NCIC system, which was presumably Atchison County, not Douglas County. Fields' factual assertions in his petition contend as much: "Samuel Fields, alleges misuse of NCIC, and misuse of Kansas Hot Files, by the Atchison County Sheriff's Office, which caused Lawrence Police Department and the Douglas County Sheriff's Office, to error and arrest and book Larry Raymond Brown 2nd, rather than Larry Raymond Brown 3rd." (Emphasis added.) Our Supreme Court has held that "one who negligently creates a dangerous condition cannot escape liability for the natural and probable consequences thereof, [\*11] although the innocent act of a third person may have contributed to the final result." Steele v. Rapp, 183 Kan. 371, 377, 327 P.2d 1053 (1958) (quoting Rowell v. City of Wichita, 162 Kan. 294, 303, 176 P.2d 590 [1947]). Therefore, even if Larry Raymond Brown II was not the offender's true identity, Fields cannot demonstrate that McGovern intended to mislead Fields or that McGovern was negligent in relying on the entry in the NCIC system to issue the bond in the name of Larry Raymond Brown II.

The district court properly dismissed the petition for failing to state a claim upon which relief might be granted.

Affirmed.

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## Marion Diagnostic Ctr., LLC v. Becton, Dickinson, & Co.

United States District Court for the Southern District of Illinois

November 30, 2018, Decided; November 30, 2018, Filed

Case No. 18-CV-01059-NJR-RJD

### **Reporter**

2018 U.S. Dist. LEXIS 203407 \*; 2018-2 Trade Cas. (CCH) P80,594; 2018 WL 6266751

MARION DIAGNOSTIC CENTER, LLC; MARION HEALTHCARE, LLC; and ANDRON MEDICAL ASSOCIATES, individually and on behalf of all others similarly situated, Plaintiffs, vs. BECTON, DICKINSON, AND COMPANY; PREMIER, INC.; VIZIENT, INC.; CARDINAL HEALTH, INC.; OWENS & MINOR DISTRIBUTION, INC.; MCKESSON MEDICAL-SURGICAL INC.; HENRY SCHEIN, INC.; and UNNAMED BECTON DISTRIBUTOR CO-CONSPIRATORS, Defendants.

**Subsequent History:** Vacated by, Remanded by [\*Marion Healthcare, LLC v. Becton Dickinson & Co., 952 F.3d 832, 2020 U.S. App. LEXIS 6938, 2020 WL 1059951 \(7th Cir. Ill., Mar. 5, 2020\)\*](#)

Dismissed by [\*Marion Diagnostic Ctr., LLC v. Becton, Dickinson & Co., 2021 U.S. Dist. LEXIS 47365 \(S.D. Ill., Mar. 12, 2021\)\*](#)

## **Core Terms**

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conspiracy, distributors, manufacturer, purchaser, overcharges, antitrust, dealer, motion to dismiss, provider, medical supply, price-fixing, Sherman Act, healthcare, prices, chain

**Counsel:** [\*1] For Marion HealthCare, LLC, Marion Diagnostic Center LLC, Andron Medical Associates, Plaintiffs: Steven F. Molo, LEAD ATTORNEY, MoloLamken LLP- Chicago, Chicago, IL; Allison Mileo Gorsuch, PRO HAC VICE, MoloLamken LLP, New York, NY; Justin M. Ellis, MoloLamken LLP, New York, NY; R. Stephen Berry, PRO HAC VICE, Berry Law PLLC, Washington, DC.

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For Owens & Minor Distribution, Inc., Defendant: Shari Lahlou, LEAD ATTORNEY, PRO HAC VICE, Crowell & Moring LLP, Washington, DC; Jordan L. Ludwig, Luke Van Houwelingen, PRO HAC VICE, Crowell & Moring LLP, Los Angeles, CA.

**Judges:** NANCY J. ROSENSTENGEL, United States District Judge.

**Opinion by:** NANCY J. ROSENSTENGEL

## **Opinion**

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### MEMORANDUM AND ORDER

#### **ROSENSTENGEL, [\*3] District Judge:**

Pending before the Court are three motions to dismiss (Docs. 83, 84, & 85) filed by Defendants Becton, Dickinson, and Company ("Becton"); Premier, Inc. ("Premier"); Vizient, Inc. ("Vizient"); Cardinal Health, Inc. ("Cardinal"); Owens & Minor Distribution, Inc. ("Owens"); McKesson Medical-Surgical, Inc., ("McKesson"); and Henry Schein, Inc. ("Schein") (collectively "Defendants"). The Court heard arguments from counsel on October 17, 2018, and took the motions under advisement (see Docs. 112, 116). For the reasons set forth below, the Court now grants the motions to dismiss and dismisses the Amended Complaint (Doc. 52) with prejudice.

#### **FACTUAL & PROCEDURAL BACKGROUND**

Plaintiffs Marion Diagnostic Center, LLC; Marion Healthcare, LLC; and Andron Medical Associates (collectively "Plaintiffs") are healthcare providers who assert that Defendants are part of a conspiracy to charge inflated prices for medical supplies, in violation of [Section 1 of the Sherman Act, 15 U.S.C. § 1](#) (see Doc. 52).<sup>1</sup>

Generally, when a healthcare provider wants to purchase medical supplies, it becomes a member of a group purchasing organization ("GPO") (Doc. 52, p. 2). GPOs aggregate the purchasing power of healthcare providers [\*4] and, ideally, negotiate significant discounts with medical supply manufacturers on behalf of its members.<sup>2</sup> Once the GPO and the manufacturer agree on the terms of a sale, the GPO notifies the healthcare provider of the proposed contract (Doc. 52, p. 2). The contract, referred to as a "net dealer contract," is not binding on the provider (*Id.* at p. 11). But if the provider decides to move forward with the net dealer contract, it enters into a "distributor agreement" with a medical supply distributor (*Id.* at p. 12). In that agreement, the distributor agrees to purchase the medical supplies from the manufacturer and resell them to the provider according to the terms of the net dealer contract, plus an additional cost (*Id.*). The distributor also enters into a "dealer notification agreement" with the manufacturer to sell the supplies under the terms of the net dealer contract (*Id.*).

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<sup>1</sup> The Court has subject matter jurisdiction over this action under [28 U.S.C. §§ 1331](#) and [1337](#). Those statutes grant district courts original jurisdiction over actions "arising under the Constitution, laws, or treaties of the United States," [28 U.S.C. § 1331](#), and over "any civil action . . . arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." [28 U.S.C. § 1337](#).

<sup>2</sup> GPOs and the Commoditization of Medical Devices, DRG, <https://decisionresourcesgroup.com/drg-blog/medtech-perspectives/gpos-and-the-commoditization-of-medical-devices/> (last visited Nov. 29, 2018).

According to the Amended Complaint, Plaintiffs have purchased hypodermic products<sup>3</sup> from Becton, a medical supply manufacturer, through the process described above (*Id.* at pp. 3-4). Premier and Vizient are GPOs involved in those transactions, and Cardinal, Owens, Schein, and McKesson are Becton distributors [\*5] (*Id.* at p. 4). Plaintiffs allege Defendants are engaged in a conspiracy to prevent competition and restrain trade by negotiating and enforcing net dealer contracts that employ penalty pricing rebate provisions and sole or dual source provisions (*Id.* at pp. 11-13).<sup>4</sup> Plaintiffs also assert Becton has engaged in other anticompetitive acts in aid of the conspiracy, including deception, disparagement, patent infringement, and false advertising against one of its competitors (*Id.* at pp. 13-15).

Defendants now move the Court to dismiss Plaintiffs' Amended Complaint under [Federal Rule of Civil Procedure \("Rule"\) 12\(b\)\(6\)](#), arguing Plaintiffs do not have antitrust standing to bring their claims (Doc. 83).

### **Rule 12(B)(6) MOTION TO DISMISS**

The purpose of a [Rule 12\(b\)\(6\)](#) motion is to decide the adequacy of the complaint, not to determine the merits of the case or decide whether a plaintiff will ultimately prevail. [Gibson v. City of Chicago, 910 F.2d 1510, 1520 \(7th Cir. 1990\)](#). To survive a [Rule 12\(b\)\(6\)](#) motion to dismiss, a plaintiff only needs to allege enough facts to state a claim for relief that is plausible on its face. [Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#). A plaintiff need not plead detailed factual allegations, but must provide "more than labels and conclusions, and a formulaic recitation of the elements." *Id.* For purposes of a motion to dismiss under [Rule 12\(b\)\(6\)](#), the Court must accept all well-pleaded facts as true [\*6] and draw all possible inferences in favor of the plaintiff. [McReynolds v. Merrill Lynch & Co., Inc., 694 F.3d 873, 879 \(7th Cir. 2012\)](#).

### **DISCUSSION**

[Section 1](#) of the Sherman Act prohibits any "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. . ." [15 U.S.C. § 1](#). [Section 4](#) the Clayton Act grants private citizens standing to enforce the Sherman Act. See [15 U.S.C. § 15\(a\)](#) ("[A]ny person . . . injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."). Although the Clayton Act broadly defines the class of persons who can bring claims under the Sherman Act, the Supreme Court has set forth numerous doctrines that limit the circumstances under which someone may recover from an antitrust violator. [Loeb Industries, Inc. v. Sumitomo Corp., 306 F.3d 469, 480 \(7th Cir. 2002\)](#). The "direct purchaser rule," a doctrine announced in [Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 \(1977\)](#), forms the crux of Defendants' motion to dismiss.

In [Illinois Brick](#), building owners brought antitrust claims against manufacturers of concrete blocks, based on allegations of price-fixing. *Id. at 726-27*. The defendants sold the blocks primarily to masonry contractors, who then submitted bids to general contractors for construction projects. *Id. at 726*. The [\*7] general contractors, in turn, submitted bids to customers such as the plaintiffs. *Id.* The Supreme Court found the plaintiffs lacked standing to

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<sup>3</sup> Specifically, the sales at issue here involve safety catheters, safety syringes, and conventional syringes (Doc. 52, pp. 2-3).

<sup>4</sup> Penalty pricing rebate provisions require a provider to purchase a certain volume of products based on its Becton purchases from the year before (Doc. 52, pp. 11-12). For instance, a net dealer contract may state that a provider must make purchases equal to at least 80% of its purchases from the previous year (*Id.*). In return, the provider pays a lower cost per unit (*Id.*). The provider realizes the cost-savings through an end-of-year rebate payment (*Id.* at p. 12). If the provider does not meet the required amount of purchases, it must pay Becton's highest price for the products (*Id.*). Becton's net dealer contracts also usually contain sole or dual source provisions (*Id.* at p. 11). Sole source provisions require providers to purchase products only from Becton while dual source provisions permit providers to purchase from only one other approved non-Becton manufacturer (*Id.*). If the provider violates the source provision, it must pay higher prices (*Id.*).

bring their antitrust claims because they were not direct purchasers of the blocks. *Id. at 746-47*. "The only way in which the antitrust violation alleged could have injured [the plaintiffs] is if all or part of the overcharge was passed on by the masonry and general contractors to [the plaintiffs], rather than being absorbed at the first two levels of distribution." *Id. at 727*. The Court explained that allowing indirect purchasers to assert "pass-on arguments" would lead to "uncertainties and difficulties" in tracing the economic adjustments made throughout the chain of distribution and leave antitrust defendants susceptible to double recovery. *Id. at 731-32*. "Permitting the use of pass-on theories under *[§] 4* would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge from direct purchasers to middlemen to ultimate consumers." *Id. at 737*. Additionally, "potential plaintiffs at each level in the distribution chain are in a position to assert conflicting claims to a common fund the amount [\*8] of the alleged overcharge by contending that the entire overcharge was absorbed at that particular level in the chain." *Id.*

The Seventh Circuit recognizes an exception to the direct purchaser rule in cases involving conspiracies, *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980); *Paper Systems Inc. v. Nippon Paper Industries Co., Ltd.*, 281 F.3d 629 (7th Cir. 2002), but here, the parties disagree as to what types of conspiracies qualify for the exception.

In *Fontana*, the plaintiff, Fontana, was a corporation that sold aviation aircrafts and performed custom installations of avionics equipment. *Fontana*, 617 F.2d at 479. Cessna, the defendant, manufactured aviation aircrafts and manufactured and sold its own line of avionics. *Id.* Fontana was a Cessna dealer, but it purchased its Cessna products from Aviation Activities, Inc., and not directly from Cessna. *Id.* Another relevant party, Cessna Finance Corporation, provided financing for distributors, dealers, and purchasers of Cessna products. *Id.* Fontana filed suit against Cessna, alleging it conspired with Aviation Activities, Inc. and Cessna Finance Corporation to unreasonably restrain trade via price-fixing and to monopolize the selling and installation of avionics equipment in Cessna aircrafts, in violation of the Sherman Act. *Id.* The trial court granted summary judgment in favor of Cessna, [\*9] finding, in part, that *Illinois Brick* precluded Fontana from bringing antitrust claims as an indirect purchaser. *Id. at 481*. On appeal, the Seventh Circuit rejected this conclusion, stating, "[w]e are not satisfied that the Illinois Brick rule directly applies in circumstances where the manufacturer and the intermediary are both alleged to be co-conspirators in a common illegal enterprise resulting in intended injury to the buyer." *Id.* The Seventh Circuit also distinguished the facts of *Fontana* from *Illinois Brick*, pointing out that Fontana was not just an indirect purchaser of Cessna products; it was also a competitor alleging competitive injury that destroyed its avionics business. *Id.* The Seventh Circuit concluded that summary judgment was inappropriate and reversed and remanded the case to the trial court. *Id. at 482*.

The Seventh Circuit addressed *Illinois Brick* again in *Paper Systems Inc.* There, paper distributors brought antitrust claims against several paper manufacturers, who allegedly participated in a price-fixing conspiracy. *Paper Systems*, 281 F.3d at 631. Two of the manufacturers sold directly to distributors, like the plaintiffs. *Id.* The Seventh Circuit held that, even though the plaintiffs resold the paper to their own [\*10] customers, the plaintiffs were entitled to collect damages from the manufacturers because "[t]he first buyer from a conspirator is the right party to sue." *Id.* Two other manufacturers sold exclusively to trading houses, who then resold to the plaintiffs. *Id.* The plaintiffs alleged that the trading houses were part of the conspiracy. *Id.* The Seventh Circuit found the plaintiffs could also recover damages in that instance because the plaintiffs were "the first purchasers from outside the conspiracy." *Id.* The Court went on to explain that *Illinois Brick* did not bar the plaintiffs from recovering against the conspiracy because all members of the conspiracy were jointly and severally liable for damages. *Id. at 633*. Thus, multiple recovery was a non-issue, and "[t]he difficulty of tracing overcharges through the chain of distribution therefore [was] unimportant." *Id.*

*Fontana* and *Paper Systems* both employed the conspiracy exception in the context of vertical price-fixing. Vertical price restraints are agreements involving actors at different levels of a distribution chain to set either minimum or maximum prices. WILLIAM B. RUBENSTEIN, 6 NEWBERG ON CLASS ACTIONS § 20:27 (5th ed. 2018). Applying the conspiracy [\*11] exception in these instances avoids the potential conundrums recognized in *Illinois Brick*, namely, duplicative recovery and difficulties tracing overcharges. 2 P. AREEDA, R. BLAIR, & H. HOVENKAMP, *ANTITRUST LAW* 369 (2d ed. 2004). That is because, in practicality, there is only one true sale when the direct purchaser conspires

with the manufacturer to fix the price of the sale. Thus, "the consumer is the only party who has paid any overcharge." *Id.*

Here, Plaintiffs do not allege a price-fixing conspiracy. Rather, they argue Defendants use exclusive-dealing provisions, penalty provisions, and other anticompetitive behavior to inflate prices. The parties disagree as to whether the conspiracy exception applies only to vertical price-fixing conspiracies or whether it encompasses other types of conspiracies as well.

Regardless of the semantics, Plaintiffs allege a conspiracy that implicates the same concerns expressed in *Illinois Brick*. The direct purchasers, the distributors, are passing on alleged overcharges already established in net dealer contracts they have no hand in negotiating. According to the Amended Complaint, the distributor defendants are not involved in determining the inflated [\*12] prices. The distributors merely enforce the terms of net dealer contracts and then subject Plaintiffs to additional costs the distributors independently assess.<sup>5</sup> It would be infeasible to calculate with any certainty which portion of overcharges the distributors absorb or ascertain which portion of the distributors' upcharges are due to market force, rather than overcharges. In other words, unlike *Paper Systems* and *Fontana*, there is not, as a practical matter, a single transaction between Becton, the distributors, and Plaintiffs.

Plaintiffs cite the portion of *Paper Systems* where the Seventh Circuit opined that principles of joint and several liability rendered the difficulty of tracing overcharges "unimportant." *Paper Systems*, 281 F.3d 629 at 633. But *Paper Systems* involved a price fixing conspiracy between the manufacturer and intermediary. Here, Plaintiffs allege that the distributors act independently to increase already-inflated prices—a classic "pass-on" theory prohibited by *Illinois Brick*. Apportioning overcharges in this case would lead to the complexities *Illinois Brick* sought to avoid. As such, Plaintiffs' claims fall within the direct purchaser rule, and no exception applies.

## **CONCLUSION**

Plaintiffs do not allege [\*13] facts plausibly suggesting they have antitrust standing to proceed under the Sherman Act. Accordingly, the Court **GRANTS** Defendants' motions to dismiss (Docs. 83, 84, & 85). The Amended Complaint (Doc. 52) is **DISMISSED with prejudice**. The case is **CLOSED**, and judgment will be entered accordingly.

**IT IS SO ORDERED.**

**DATED: November 30, 2018**

/s/ Nancy J. Rosenstengel

**NANCY J. ROSENSTENGEL**

**United States District Judge**

**JUDGMENT IN A CIVIL ACTION**

**DECISION BY THE COURT.**

This matter having come before the Court, and the Court having rendered a decision,

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<sup>5</sup> Notably, the contracts at issue here do not qualify for the "cost-plus" exception to the direct purchaser rule because the distributor agreements do not contemplate a strict purchasing requirement or pre-date the overcharge. *Illinois Brick*, 431 U.S. at 735-36.

**IT IS ORDERED AND ADJUDGED** that pursuant to the Order dated November 30, 2018 (Doc. 117), which granted Defendants' motions to dismiss (Docs. 83, 84, & 85), Plaintiffs' Amended Complaint (Doc. 52) is **DISMISSED with prejudice**. This entire action is **DISMISSED**, and the case is closed.

**DATED: November 30, 2018**

**APPROVED:** /s/ Nancy J. Rosenstengel

**NANCY J. ROSENSTENGEL**

**United States District Judge**

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## **Kindred Studio Illustration & Design, LLC v. Elec. Commun. Tech., LLC**

United States District Court for the Central District of California

December 3, 2018, Decided; December 3, 2018, Filed

CV 18-7661-GW(GJSx)

### **Reporter**

2018 U.S. Dist. LEXIS 223304 \*; 2018 WL 6985317

Kindred Studio Illustration and Design, LLC v. Electronic Communication Technology, LLC

**Subsequent History:** Motion granted by, Costs and fees proceeding at [Kindred Studio Illustration & Design v. Elec. Commun. Tech., 2019 U.S. Dist. LEXIS 127983 \(C.D. Cal., May 23, 2019\)](#)

**Prior History:** [Eclipse IP, LLC v. Paybyphone Techs., 2014 U.S. Dist. LEXIS 200554 \(C.D. Cal., Apr. 24, 2014\)](#)

## **Core Terms**

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covenant, declaratory judgment, allegations, patent, case or controversy, moot, infringement, license, invalidity, consumers, unfair, subject matter jurisdiction, business practice, conclusory, failure to state a claim, motion to dismiss, wrongful behavior, cause of action, cessation, designs, parties, courts, rights, recur

**Counsel:** [\*1] Attorneys for Plaintiffs: Rachael D. Lamkin.

Attorneys for Defendants: Jean G. Vidal Font.

**Judges:** GEORGE H. WU, UNITED STATES DISTRICT JUDGE.

**Opinion by:** GEORGE H. WU

## **Opinion**

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### **CIVIL MINUTES - GENERAL**

#### **PROCEEDINGS: DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S DECLARATORY JUDGMENT COMPLAINT [22]; SCHEDULING CONFERENCE**

Court hears oral argument. The Tentative circulated and attached hereto, is adopted as the Court's Final Ruling. The Court would GRANT Defendant's Motion to Dismiss Plaintiff's Declaratory Judgment Complaint. The Court would dismiss Counts 1-5 without prejudice. Plaintiff will have until December 24, 2018 to file a First Amended Complaint. Counsel will attempt to stipulate as to the basis for the dismissal to be with prejudice.

The scheduling conference is continued to January 10, 2019 at 8:30 a.m., with a joint report to be filed by noon on January 3, 2019.

### **I. Background**

### A. Procedural Background

On August 10, 2018, Electronic Communication Technology, LLC ("Defendant" or "ECT") sent an enforcement letter to Kindred Studio Illustration and Design, LLC, d/b/a True Grit ("Plaintiff" or "True Grit"). In the letter, Defendant accused Plaintiff of infringing its U.S. Patent No. 9,373,261 ("the '261 Patent"). Compl., Ex. B, Docket No. 1-3. In response, Plaintiff [\*2] filed a Declaratory Judgment Complaint on August 31, 2018 and sued Defendant for: (1) declaratory judgment of invalidity of the '261 Patent, (2) declaratory judgment of non-infringement of the '261 Patent, (3) declaratory judgment of inequitable conduct, (4) unlawful competition under the "unlawful" prong of [California Business & Professions Code § 17200](#) ("UCL"), and (5) unfair competition under the "unfair" prong of the UCL. Complaint ("Compl.") ¶¶ 71-93, Docket No. 1. On October 22, 2018, Defendant provided Plaintiff with an executed Covenant Not To Sue ("CNS") for all the patents owned by Defendant, including the '261 Patent. Mot., Ex. 1, Docket No. 21-2.

Now, Defendant moves to dismiss Plaintiff's Complaint for lack of subject matter jurisdiction and for failure to state a claim. See Defendant's Motion to Dismiss Plaintiff's Declaratory Judgment Complaint ("Mot."), Docket No. 21. Plaintiff filed an opposition to the Motion. See Plaintiff's Opposition to Defendant's Motion to Dismiss ("Opp."), Docket No. 25. Defendant filed a reply in support of the Motion. See Reply Brief to Plaintiff's Opposition to Defendant's Motion to Dismiss ("Reply"), Docket No. 26.

### B. Factual Background

In the Complaint, Plaintiff alleges the following:

Plaintiff, a California corporation [\*3] with its principal place of business in Los Angeles, California, "markets downloadable tools and assets for use by commercial graphic designers and illustrators including digital paintbrushes, stock images, software shortcuts and tutorials." Compl. ¶¶ 2, 9 (emphasis in original). Plaintiff's "products allow customers (other designers) to add effects and aesthetics to their designs and physical end-products that would be otherwise unachievable, commercially unviable, or require years of experience and know-how to develop in isolation." *Id.* ¶ 10.

Defendant, a Florida corporation, owns the '261 Patent titled "Secure Notification Messaging with User Option to Communicate with Delivery or Pickup Representative," that issued on June 21, 2016. See *id.* ¶ 3; '261 Patent. The '261 Patent "generally relates to data communications, information, and messaging systems and, more particularly, to systems and methods that notify a party of travel status associated with one or more mobile things." *Id.* at 1.

On August 10, 2018, Defendant sent an enforcement letter accusing Plaintiff of infringing the '261 Patent and asked for a negotiable "paid-up one-time license" of \$15,000. Compl., Ex. B. The enforcement letter gave Plaintiff the option of entering into [\*4] a licensing agreement or submitting evidence of non-infringement of the '261 Patent. *Id.*

We expect that, upon review, you will acknowledge that TrueGritTextureSupply practices the inventions disclosed in the ECT Patent and will enter into licensing discussions. In the event TrueGritTextureSupply.com concludes that it does not desire a license for the ECT Patent, we expect to receive from you within fourteen (14) days responsive claim charts showing why TrueGritTextureSupply.com does not infringe the ECT Patent, along with copies of the system documentation, manuals and any other materials that describe the components and functionality of the TrueGritTextureSupply.com system, including those materials you reviewed in the course of your investigation.

ECT's proposed license fee, of course, is subject to early discussions and good faith communications toward a patent license. If litigation is required to enforce ECT's rights, the upfront license offer is obviously removed. Compl., Ex. B.

In response to the enforcement letter, Plaintiff filed a Complaint on August 31, 2018. See generally Compl. It claimed that Defendant knows that its '261 patent is invalid because the claims of three other patents in the same [\*5] family sharing the same specification have been invalidated under Section 101. Compl. ¶ 56.

Additionally, Plaintiff is aware of at least sixteen other parties that have recently received cease and desist letters from Defendant. See Declaration of Rachel Lamkin ("Lamkin Decl."), Docket No. 25-1; see *id.* Ex. 1, Docket No. 25-2.

## II. Legal Standard

### A. Rule 12(b)(1)

A party may contest subject matter jurisdiction pursuant to a motion to dismiss under [Federal Rule of Civil Procedure 12\(b\)\(1\)](#). See [Fed. R. Civ. P. 12\(b\)\(1\)](#). Under [Rule 12\(b\)\(1\)](#), the moving party may either attack the pleadings on their face or present extrinsic evidence for the district court's consideration. [Kohler v. CJP, Ltd., 818 F. Supp. 2d 1169, 1172 \(C.D. Cal. 2011\)](#) (citing [White v. Lee, 227 F.3d 1214, 1242 \(9th Cir. 2000\)](#)) (noting that [Rule 12\(b\)\(1\)](#) jurisdictional attacks "can be either facial or factual"). A district court must determine whether an attack is facial or factual, as this determination governs the scope of the court's review. See [Kohler, 818 F. Supp. 2d at 1172](#). When deciding a [Rule 12\(b\)\(1\)](#) motion that attacks the complaint on its face, a court "must accept the allegations of the complaint as true." *Id.* (citing [Valdez v. United States, 837 F. Supp. 1065, 1067 \(E.D. Cal. 1993\)](#), aff'd, [56 F.3d 1177 \(9th Cir. 1995\)](#)). But in deciding a [Rule 12\(b\)\(1\)](#) motion that raises a factual attack, courts "may weigh the evidence presented, and determine the facts in order to evaluate whether they have power to hear the case." *Id.* (citing [Roberts v. Corrothers, 812 F.2d 1173, 1177 \(9th Cir. 1987\)](#)); see also [White, 227 F.3d at 1242](#) (when a motion relies on extrinsic evidence, [\*6] a court "need not presume the truthfulness of the plaintiffs' allegations").

If a party seeks to dismiss a declaratory judgment claim on the ground that no true case or controversy exists, the action is properly brought under [Rule 12\(b\)\(1\)](#). [Rhoades v. Avon Products, Inc., 504 F.3d 1151, 1157 \(9th Cir. 2007\)](#). "A case becomes moot — and therefore no longer a 'Case' or 'Controversy' for purposes of Article III - 'when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" [ArcelorMittal v. AK Steel Corp., 856 F.3d 1365, 1370 \(Fed. Cir. 2017\)](#) (citations omitted). Under the Declaratory Judgment Act, "a covenant not to sue can deprive the Court of subject matter jurisdiction." [Fulton v. Genea Energy Partners, CV-12-1506-DOC-\(MLGx\), 2014 WL 12597588 at \\*2 \(C.D. Cal. 2014\)](#). When determining whether a covenant not to sue moots a case or controversy, the voluntary cessation doctrine applies. [Already, LLC v. Nike, Inc., 568 U.S. 95, 92, 133 S. Ct. 721, 184 L. Ed. 2d 553 \(2013\)](#). The relevant inquiry under the doctrine is: "[c]ould the allegedly wrongful behavior reasonably be expected to recur?" *Id.* "Whether a covenant not to sue will in fact divest [the] Court of jurisdiction 'depends on what is covered by the covenant.'" [Fulton, 2014 WL 12597588 at \\*2 \(citing Revolution Eyewear Inc. v. Aspex Eyewear, Inc., 556 F.3d 1294, 1297 \(Fed. Cir. 2009\)\)](#). In proving that a covenant not to sue has mooted a case or controversy, the "defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely [\*7] clear the allegedly wrongful behavior could not reasonably be expected to recur." [Already, 568 U.S. at 91](#) (citing [Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. \(TOC\), Inc., 528 U.S. 167, 190, 120 S. Ct. 693, 145 L. Ed. 2d 610 \(2000\)](#)).

### B. Rule 12(b)(6)

Under [Rule 12\(b\)\(6\)](#), a complaint is deficient and warrants dismissal when it fails to state a claim upon which relief can be granted. [Fed. R. Civ. P. 12\(b\)\(6\)](#). A complaint may fail to state a claim for one of two reasons: (1) lack of a cognizable legal theory or (2) failure to allege sufficient facts under a cognizable legal theory. [Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#). In determining whether a complaint survives this test, courts "may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." [Swartz v. KPMG LLP, 476 F.3d 756, 763 \(9th Cir. 2007\)](#). In so doing, courts must accept the complaint's factual allegations as true, and construe them in the light most favorable to the plaintiff. [Gompper v. VISX, Inc., 298 F.3d 893, 896 \(9th Cir. 2002\)](#). But a court should not accept "threadbare recitals of a cause of action's elements, supported by mere conclusory statements," [Ashcroft v. Iqbal, 556 U.S. 662, 663, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#), or "allegations that are merely conclusory,

unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Where a plaintiff facing a [12\(b\)\(6\)](#) motion has pled "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," the motion should be denied. [\[\\*8\] Iqbal, 556 U.S. at 678](#); *Sylvia Landfield Trust v. City of Los Angeles*, 729 F.3d 1189, 1191 (9th Cir. 2013). But "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not 'show[n]' - 'that the pleader is entitled to relief.'" [Iqbal, 556 U.S. at 679](#) (quotations omitted).

### **III. Analysis**

#### **A. The Court Dismisses Counts 1 Through 3 for Declaratory Judgment**

In the Complaint, Plaintiff's first three causes of action seek declaratory judgment. See generally Compl. More specifically, it alleges: (1) declaratory judgment of invalidity of the '261 Patent, (2) declaratory judgment of non-infringement of the '261 Patent, and (3) declaratory judgment of inequitable conduct. See Compl. ¶¶ 71-76. Defendant moves to dismiss each of those claims, primarily arguing that a case or controversy no longer exists as to those claims due to the executed CNS.<sup>1</sup> See Mot. at 11. Plaintiff counters that the CNS "is not sufficiently broad to trigger the mootness and voluntary cessation doctrines" and fails to divest the Court's jurisdiction. Opp. at 3-4.

Touched on in the legal standard section above, the Declaratory Judgment Act ("DJA") provides that, in "a case of actual controversy within its jurisdiction," a federal court "may declare the rights [\[\\*9\]](#) and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." [28 U.S.C. § 2201\(a\)](#). Generally, the DJA exists "to afford an added remedy to one who is uncertain of his rights and who desires an early adjudication thereof without having to wait until his adversary should decide to bring suit, and to act at his peril in the interim." [McGraw-Edison Co. v. Preformed Line Products Co.](#), 362 F.2d 339, 342 (9th Cir. 1966); [Shell Oil Co. v. Frusetta](#), 290 F.2d 689, 692 (9th Cir. 1961). Although the DJA expands available remedies, it does not undermine the Constitution's minimum jurisdictional requirements. [Skelly Oil Co. v. Phillips Petroleum Co.](#), 339 U.S. 667, 671, 70 S. Ct. 876, 94 L. Ed. 1194 (1950) ("[The DJA] enlarged the range of remedies available in the federal courts but did not extend their jurisdiction"). For DJA claims, satisfying these minimum requirements means showing that, under all the circumstances, there exists an "actual controversy" between parties with adverse legal interests of sufficient immediacy, and that declaratory relief will fully resolve the controversy presented. See [MedImmune, Inc. v. Genentech, Inc.](#), 549 U.S. 118, 127, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007); [Calderon v. Ashmus](#), 523 U.S. 740, 747, 118 S. Ct. 1694, 140 L. Ed. 2d 970 (1998); [United States Nat'l Bank v. Independent Ins. Agents of Am.](#), 508 U.S. 439, 446, 113 S. Ct. 2173, 124 L. Ed. 2d 402 (1993); [Aetna Life Ins. Co. v. Haworth](#), 300 U.S. 227, 240-41, 57 S. Ct. 461, 81 L. Ed. 617 (1937).

Under the DJA, "a covenant not to sue can deprive the Court of subject matter jurisdiction." *Fulton*, 2014 WL 12597588 at \*2. When determining whether a covenant not to sue moots a case or controversy, the voluntary cessation doctrine applies. [Already, 568 U.S. at 92](#). The relevant inquiry under the doctrine is: "[c]ould the allegedly [\[\\*10\]](#) wrongful behavior reasonably be expected to recur?" *Id.* "Whether a covenant not to sue will in fact divest [the] Court of jurisdiction 'depends on what is covered by the covenant.'" *Fulton*, 2014 WL 12597588 at \*2 (citations omitted). In proving that a covenant not to sue has mooted the case or controversy, "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." [Already, 568 U.S. at 91](#) (citations omitted).

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<sup>1</sup>The CNS states that Defendant "will never institute any action or lawsuit at law or in equity against Covenantee" for all of Defendant's patents, including the '261 Patent. Mot., Ex. 1. To support its arguments, Defendant relies primarily on *Already, LLC v. Nike*. Defendant asserts that, like the counterclaims in *Already*, Plaintiff's Counts 1-3 should be rendered moot as "the allegedly wrongful behavior could [not] reasonably be expected to recur." Mot. at 14 (citing [Already, 568 U.S. at 92](#)). Defendant further argues that "[a] cursory review of [Defendant's] Covenant Not To Sue reveals that its scope is similar to the one in *Already, LLC*, which . . . the Supreme Court deemed sufficient to render that case moot." *Id.* at 16.

As per the above authority, the inquiry begins with the text of the CNS. The CNS provides as follows:

Covenantors will never institute any action or lawsuit at law or in equity against Covenantee, nor institute, prosecute, make allegations of, or in any way aid in the institution or prosecution of any claims, demands, actions, or causes of action for damages, reasonable royalties, lost profits, costs, expenses or compensation, whether past, present or future for or on account of any damages, losses, injuries either to person or property, or both, whether developed or undeveloped, resulting or to result, unknown or known, past, present or future, arising out of or relating in any way to [\*11] any claims of patent infringement of any of the patents listed in **Schedule A** attached hereto, including all corresponding provisional, continuation, continuation-in-part, divisional, reissue, and reexamination applications pertaining to said patents.

Mot., Ex. 1.

Comparing the CNS to covenants found sufficient to moot a case or controversy is instructive. Relevant to this inquiry is *Already*, which both Plaintiff and Defendant cite at length and the Court cited above.<sup>2</sup> In *Already*, Nike alleged that Already's athletic footwear infringed Nike's trademark. [Already, 568 U.S. at 88](#). Already denied that it infringed Nike's trademark and filed a counterclaim that the trademark was invalid. *Id.* Four months after Already filed its counterclaim, Nike issued a covenant not to sue and brought a motion to dismiss its claims and Already's counterclaim without prejudice. [Id. at 88-89](#). The district court dismissed Already's counterclaim holding that there was no longer "a substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." [Id. at 89-90](#) (citations omitted). The Second Circuit affirmed. [Id. at 90](#). After reviewing whether Nike's covenant to sue could moot the case, the Supreme Court affirmed the [\*12] Second Circuit, holding that "[t]he uncontested findings made by the District Court, and confirmed by the Second Circuit, make it 'absolutely clear' this case is moot." [Id. at 102](#).

Although Plaintiff contends that the covenant not to sue in *Already* was "uncontested," the Court still analyzed the terms of the covenant under the voluntary cessation doctrine. [Already, 568 U.S. at 93](#). The *Already* covenant read, in relevant part:

[Nike] unconditionally and irrevocably covenants to refrain from making *any* claim(s) or demand(s) . . . against Already or *any* of its . . . related business entities . . . [including] distributors . . . and employees of such entities and *all* customers . . . on account of any *possible* cause of action based on or involving trademark infringement, unfair competition, or dilution, under state or federal law . . . relating to the NIKE Mark based on the appearance of *any* of Already's current and/or previous footwear product designs, and *any* colorable imitations thereof, regardless of whether that footwear is produced . . . or otherwise used in commerce before or after the Effective Date of this Covenant.

[Already, 568 U.S. at 93](#) (emphasis in original).

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<sup>2</sup> While Plaintiff agrees that *Already* governs, it argues that "[Defendant] has not met its formidable burden as its proffered CNS is not sufficiently broad to trigger the mootness and voluntary cessation doctrines cited in *Already*." Opp. at 3. Plaintiff's arguments focus on distinguishing the CNS from the covenant not to sue in *Already*. *Id.* at 3-4. Plaintiff asserts that Defendant's reliance on *Already* is inappropriate as "the CNS in [*Already*] was uncontested." *Id.* at 3. Next, Plaintiff argues that, unlike the CNS, the covenant not to sue in *Already* was "unconditional and irrevocable," and "extended to customers and distributors." *Id.* at 4. Plaintiff further argues that, under the language of the CNS, "[Defendant] is now able to sue [Plaintiff's] customers; employees; online distributors; and platforms (e.g., Shopify). Further, [Defendant] can revoke the CNS at any point." *Id.* (parenthetical numbering omitted).

Defendant disagrees with Plaintiff's characterization of the CNS. Responding to Plaintiff's concerns, Defendant states that "[t]he CNS covers [Plaintiff] as Covenantee and; therefore, by extension, also covers [Plaintiff's] employees," and "the CNS covers any possible cause of action arising out of [Defendant's] patents." Reply at 8. Defendant further asserts that, while the CNS does not mention Plaintiff's customers, distributors, or platforms, "the claimed steps of the '216[sic] Patent—which recite a method for an automated notification system—are not performed by entities such as [Plaintiff's] customers or distributors; and therefore, they cannot be sued for infringement of the '261 Patent." *Id.* The Court will address these points after preliminarily discussing *Already* and other relevant case law.

The Court found Nike's covenant [\*13] not to sue sufficient under the voluntary cessation test, noting that "[t]he covenant is unconditional and irrevocable. Beyond simply prohibiting Nike from filing suit, it prohibits Nike from making any claim or any demand. It reaches beyond *Already* to protect *Already*'s distributors and customers. And it covers not just current or previous designs, but any colorable imitations." [\*Already\*, 568 U.S. at 93.](#)

Nearly a year after *Already*, in *Phoenix Modular Elevator*, a district court similarly found that a covenant not to sue mooted the case. See [\*Phoenix Modular Elevator, Inc. v. T.L. Shield & Assoc., CV-14-00339-RGK-\(PLAx\), 2014 U.S. Dist. LEXIS 194667, 2014 WL 12569344 \(C.D. Cal. 2014\)\*](#). There, the court found the terms of the covenant not to sue "sufficiently broad to constitute a relinquishment of the rights originally asserted under the '520 Patent." [\*Phoenix\*, 2014 U.S. Dist. LEXIS 194667, 2014 WL 12569344 at \\*2.](#) The covenant not to sue in *Phoenix* "expressly and unconditionally agree[d] to not sue Defendants for infringement as to the '520 patent" based on:

(1) any actions by Defendants on, or before, the date of dismissal of the current lawsuit; (2) Defendants' use, importation, manufacture, development, design, marketing, licensing, distributing, offering for sale, or selling any elevators that Defendants *currently, or in the past*, use, import, manufacture, market, [\*14] sell, or install; and (3) Defendants' use, importation, manufacture, development, design, marketing, licensing, distributing, offering for sale, or selling any *future* elevators that are *substantially the same* structure as those used, imported, manufactured, marketed, sold, or installed by Defendants in the past.

[\*Phoenix\*, 2014 U.S. Dist. LEXIS 194667, 2014 WL 12569344 at \\*2](#) (emphasis in original).

While the covenants not to sue in *Already* and in *Phoenix* differ from one another in some respects, the effect of both covenants is clear — the covenanting party will not sue, now or in the future, for legal disputes relating to the patented product and "colorable imitations thereof." [\*Already\*, 568 U.S. at 93.](#) The CNS appears to have substantially the same components as the covenants not to sue in *Already* and *Phoenix*. Overall, a reading of the CNS indicates that "the allegedly wrongful behavior could [not] reasonably be expected to recur." [\*Already\*, 568 U.S. at 92.](#) The CNS herein uses broad, unequivocal, and absolutely clear language, providing that "Covenantors will never institute any action or lawsuit at law or in equity against Covenantee, nor institute, prosecute, make allegations of, or in any way aid in the institution or prosecution of any claims, demands, actions, or causes of actions . . . [\*15] whether past, present, or future . . . whether developed or undeveloped . . . unknown or known, past, present or future, arising out of or relating in any way to any claims of patent infringement of the patents listed in Schedule A." See Mot., Ex. 1. The distinctions Plaintiff points out between the CNS and the covenant not to sue in *Already* are inapposite.<sup>3</sup>

<sup>3</sup> Plaintiff asserts that the CNS is distinct from the covenant not to sue in *Already* and is not sufficient because it (1) omits the phrase "unconditional and irrevocable," (2) does not extend to employees, customers, online distributors, and platforms, and (3) does not include "any possible cause of action." Opp. at 4. The Court will address these arguments in turn.

First, while omitting the phrase "unconditional and irrevocable," the CNS states that "Covenantors **will never** institute any action or lawsuit." Mot., Exh. 1. Plaintiff fails to explain why the term "never" is not sufficient as compared to the phrase "unconditional and irrevocable." Additionally, Defendant has stated its willingness to include the phrase "unconditional and irrevocable" to the CNS if "[Plaintiff's] unwillingness to accept [Defendant's] CNS hinges on the inclusion of the phrase . . . ." Reply at 7, n1. The Court sees no need to include this phrase in view of the terminology already present in the CNS.

Second, although the covenant not to sue in *Already* specifically carved out Nike's customers, employees and distributors, the covenant not to sue in *Phoenix* did not but was still found to be "sufficiently broad to constitute a relinquishment of the rights." [\*Phoenix\*, 014 U.S. Dist. LEXIS 194667, 2014 WL 12569344 at \\*2.](#) There is no set requirement that a covenant not to sue list out all parties associated with the covenantee to be sufficiently broad. Further, as discussed by Defendant, Plaintiff's employees appear covered under Plaintiff as the "covenantee" and it is unclear how Plaintiff's customers, distributors, or platforms would even infringe the '261 Patent. Reply at 8.

Third, the CNS specifically states that "Covenantors will never institute *any actions or lawsuit at law or in equity* against Covenantee nor institute, prosecute, make allegations of, or in any way aid in the institution or prosecution of any claims, demands, actions, or causes of actions . . . relating in any way to any claims of patent infringement of any of the patents listed . . .

Defendant additionally notes that "the fact that [Plaintiff] has not signed [Defendant's] Covenant Not To Sue [is] not sufficient to create an actual case or controversy." Mot. at 17 (citing [Merit Healthcare Int'l, Inc. v. Merit Med. Sys., Inc., No. CV-14-4280-FMO-\(SHX\), 2016 U.S. Dist. LEXIS 10286, 2016 WL 6963052 at \\*5 \(C.D. Cal. 2016\)](#), aff'd [721 F. App'x 628 \(9th Cir. 2018\)](#)) ("Because plaintiff has not identified any affirmative act by defendant to demonstrate that a case or controversy exists, defendant's failure to sign a covenant not to sue is insufficient to create an actual controversy under the circumstances of this case."). Plaintiff does not respond to this argument. See generally Opp. The Court thus finds a lack of signature, absent any affirmative act, to fall short of creating a case or controversy as required for jurisdiction under [Rule 12\(b\)\(1\)](#).

After a review of the [\*16] parties' arguments and the language of the CNS, the Court finds the CNS sufficient to moot the case or controversy as to Plaintiff's Counts 1-3 (pertaining to the invalidity, non-infringement and inequitable conduct of the '261 Patent). Defendant requests that the Court dismiss Counts 1-3 with prejudice and Plaintiff fails to respond to this request. The Court's own review indicates that dismissal with prejudice is likely inappropriate. In general, "a lack of subject matter jurisdiction usually justifies only a dismissal, not a dismissal with prejudice." [Textile Productions, Inc. v. Mead Corp., 134 F.3d 1481, 1486 \(Fed. Cir. 1998\)](#); see also [Siler v. Dillingham Ship Repair, 288 Fed. App'x 400, 401 \(9th Cir. 2008\)](#) ("vacat[ing] the district court's judgment to the extent it dismissed the complaint with prejudice . . . because a dismissal for lack of subject matter jurisdiction is not an adjudication on the merits."). The nature of a covenant not sue supports the notion that dismissal with prejudice is an atypical result. For example, "[a] plaintiff's promise not to sue eliminates the controversy between the parties but does not extinguish the plaintiff's underlying rights, unlike a release of liability that would affect the merits." [Out RAGE, LLC v. New Archery Products Corp., 12-cv-122-bbc, 2012 U.S. Dist. LEXIS 191425, 2013 WL 12234188 at \\*10 \(W.D. Wis. 2013\)](#) (citation omitted). Thus, the Court is inclined to [\*17] dismiss these claims without prejudice, but the Court would ask the parties to address this point at the December 3, 2018 hearing.

Thus, with no case or controversy remaining, the Court dismisses Counts 1-3 under [Rule 12\(b\)\(1\)](#) without prejudice.

## B. The Court Dismisses Counts 4 and 5 (UCL Claims)

### a. Count 4 Is Dismissed for Failure to State a Claim

In the Complaint, Count 4 invokes [Section 5](#) of the Federal Trade Commission Act, [15 U.S.C. § 45](#) ("FTC [Section 5](#)") as the "predicate law" for a UCL claim. Compl. ¶ 78. While admitting that FTC [Section 5](#) does not create a private right of action, Plaintiff asserts that it "can serve as [a] predicate for a [UCL] action." Opp. at 4 (citations omitted). Defendant argues that Plaintiff has no remedy under FTC [Section 5](#) as a private party and "cannot enforce provisions of the FTC Act under the UCL." Reply at 10. Defendant further argues that it "has [not] engaged in any unlawful business practice by merely asserting a patent that the law specifically states is presumed valid." *Id.* at 11.

The UCL proscribes three avenues to challenge business practices: if they are: "[1] unlawful, [2] unfair or [3] fraudulent . . ." [Khoury v. Maly's of California, Inc., 14 Cal. App. 4th 612, 619, 17 Cal. Rptr. 2d 708 \(1993\)](#). First, unlawful business practices are those "forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, [\*18] regulatory, or court-made." [Saunders v. Superior Court, 27 Cal. App. 4th 832, 838-39, 33 Cal. Rptr. 2d 438 \(1994\)](#). Second, unfair business practices "means conduct that threatens an incipient violation of an [antitrust law](#), or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." [Cel-Tech Commc'n, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 \(1999\)](#). Third, fraudulent business practices are those "likely to deceive the public." [McKell v. Washington Mut., Inc., 142 Cal. App. 4th 1457, 1471, 49 Cal. Rptr. 3d 227 \(2006\)](#).

There is no private right of action under FTC [Section 5](#). See [O'Donnell v. Bank of Am., N.A., 504 Fed. Appx. 566, 568 \(9th Cir. 2013\)](#); see also [Carlson v. Coca-Cola Co., 483 F.2d 279, 280-81 \(9th Cir. 1973\)](#). Though courts have

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. ." Mot., Exh. 1. This language encompasses "any possible cause of action" as it relates to infringement of Defendant's patents and is found to be sufficiently broad.

held "that the California UCL does not create [a private right of action] for FTC Act claims," recently "the Ninth Circuit held in an unpublished decision that violations of the FTC Act can be actionable through a UCL cause of action." *Sperling v. Stein Mart, Inc.*, 291 F. Supp. 3d 1076, 1087 (C.D. Cal. 2018) (citing *Rubenstein v. Neiman Marcus Grp. LLC*, 687 F. App'x 564, 567 (9th Cir. 2017)). Separately, the Ninth Circuit has long held that "[v]irtually any state, federal or local law can serve as the predicate for an action under [the UCL]." *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1168 (9th Cir. 2012) (citations omitted). Based on the foregoing, the Court would find that Plaintiff may allege a UCL claim hinged on FTC Act [Section 5](#), despite the fact the latter does not on its own provide a private right of action.

To prove unlawful competition under FTC [Section 5](#), Plaintiff must show that "the act or practice causes or is likely to cause [\*19] substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." [15 U.S.C. § 45\(n\)](#). From the Court's review of the Complaint, Plaintiff only provides conclusory allegations in support of this claim. For example, Plaintiff alleges that "[t]he conduct of [Defendant] and the [Defendant's] Entities amounts to an act or practice that causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." Compl. ¶ 81. Plaintiff further alleges that "[Defendant] and the [Defendant's] Entities methods have a direct, substantial, and reasonably foreseeable effect on consumers." *Id.* ¶ 82. Lacking sufficient factual allegations on this front, Plaintiff has failed to "allege sufficient facts under a cognizable legal theory." *Bell Atl. Corp. v. Twombly*, 550 U.S at 555 (2007). A court should not accept such "threadbare recitals of a cause of action's elements, supported by mere conclusory statements," *Ashcroft v. Iqbal*, 556 U.S. at 663, or "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences," *Sprewell v. Golden State Warriors*, 266 F.3d at 988.

The Court thus dismisses Count [\*20] 4 under [12\(b\)\(6\)](#) for failure to state a claim, but Plaintiff will have an opportunity to amend the Complaint as to this cause of action.

#### b. Count 5 Is Dismissed for Failure to State a Claim

In Count 5, Plaintiff alleges another UCL claim but seemingly under the "unfair" prong rather than the "unlawful" prong.<sup>4</sup> Compl. ¶¶ 85-93. Defendant moves to dismiss that claim, arguing that Plaintiff does not allege sufficient standing under the UCL. Mot. at 21. Defendant further argues that the Court does not have diversity jurisdiction over this claim because Plaintiff has failed to meet the amount in controversy requirement. *Id.* In response, Plaintiff takes issue with both these arguments. See Opp. at 6-10.

Even though the Court can hear Plaintiff's UCL claim pursuant to diversity jurisdiction,<sup>5</sup> Plaintiff again struggles to allege facts sufficient to satisfy [Rule 12\(b\)\(6\)](#). Before reaching the merits of Plaintiff's UCL claim, Plaintiff does not

<sup>4</sup> The Court assumes that Plaintiff brings this claim under the "unfair prong" based on the allegations in the Complaint. See, e.g., Compl. ¶ 93 ("True Grit seeks all compensatory and statutory damages allowed under [Section 17200's Unfair Business Practices prong](#).") (emphasis added).

<sup>5</sup> Plaintiff asserts that "[t]his Court has jurisdiction over [Plaintiff's] claims pursuant to [28 U.S.C. §§ 1338](#) and [1337](#), and [35 U.S.C. § 271](#). Should [Defendant] attempt to avoid adjudicating the merits of [Plaintiff's] declaratory judgment claims by filing a covenant not to sue, this Court maintains jurisdiction over [Plaintiff's] state law claims based on diversity jurisdiction." Compl. ¶ 6. Plaintiff further states that "[t]his Court [ ] has diversity jurisdiction over this matter pursuant to [28 U.S.C. § 1332](#) because the Parties reside in different states and there is more than \$75,000 dollar at-issue." *Id.* ¶ 5. Defendant does not dispute that the parties reside in different states, but argues that "the Complaint does not contain any allegations which plausibly show that [Plaintiff] meets the amount in controversy." Mot. at 21. Plaintiff failed to provide information about the amount in controversy in its Complaint, but listed its estimated loss in revenue in its opposition. Opp. at 8. Plaintiff lists the following estimated costs:

- Product release delays \$5,000-\$10,000
- Cancelled product releases: \$20,000-\$30,000

sufficiently allege standing under the UCL. To establish statutory standing under the UCL, "a private plaintiff [must] have suffered 'injury in fact and lost money or property as a result of the unfair competition.'" *Rubio v. Capital One Bank, 613 F.3d 1195, 1203 (9th Cir. 2010)* (quoting *Cal. Bus. & Prof. Code § 17204*) (punctuation [\*21] altered). A UCL plaintiff must show that he or she "lost money or property" sufficient to constitute an 'injury in fact' under Article III of the Constitution, and also [show] a 'causal connection' between [the defendant's] alleged UCL violation and [his or] her injury in fact." *Id. at 1203-04* (citations omitted); *Hall v. Time Inc., 158 Cal. App. 4th 847, 855, 70 Cal. Rptr. 3d 466 (2008)* ("The phrase 'as a result of' in its plain and ordinary sense means 'caused by' and requires a showing of a causal connection or reliance on the alleged misrepresentation.").

Here, Plaintiff's allegations of harm under the UCL predominantly stem from Defendant's assertions regarding Counts 1 through 3. Compl. ¶¶ 86, 88-90 ("[Defendant] is engaged in the business practice of alleging patent infringement it knows to be baseless and strong-arms small businesses into paying nuisance value settlements;" "[Defendant] profited by knowingly asserting an invalid patent by receiving settlement sums from hundreds of small businesses who cannot afford to litigate patent invalidity . . .").<sup>6</sup> Plaintiff does not show how Defendant's UCL violations, separate and apart from Counts 1-3 for patent-related [\*22] declaratory judgment, caused it "to suffer an injury and lose money or property." *Kemp v. Wells Fargo Bank, N.A., 17-cv-01259-MEJ, 2017 U.S. Dist. LEXIS 177032, 2017 WL 4805567 at \*15 (N.D. Cal. 2017)* (dismissing Plaintiff's UCL claim for failing to show "how Defendant's *UCL violations* - as opposed to the other conduct she identifies in the FAC—caused her to suffer an injury or lose money or property.") (emphasis in original). The other allegations cited in the Opposition to support Plaintiff's argument that it was harmed are similarly insufficient. See Opp. at 8 (citing Compl. ¶¶ 14-17). Though Plaintiff pleads that Defendant sent an "enforcement email" to Plaintiff's Shopify account email (see Compl. ¶¶ 14-16), the allegations that Shopify "can suspend a business" for infringement accusations and that Defendant's "phishing campaign has harmed True Grit's business relationship with Shopify" are both speculative and conclusory (see Compl. ¶ 17).

As such, Plaintiff has failed to sufficiently plead the requisite injury in fact to support its UCL claim. With insufficient factual allegations, the Court would dismiss Count 5 under 12(b)(6) for failure to state a claim. Dismissal without prejudice is appropriate.

#### **IV. Conclusion**

For the foregoing reasons, the Court would [\*23] **GRANT** Defendant's Motion to Dismiss Plaintiff's Declaratory Judgment Complaint. The Court would dismiss Counts 1-5 without prejudice.

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- Cancellation of physical merchandise \$5,000-\$8,000

Opp. at 8.

Plaintiff goes on to state that "[t]he stake in the litigation costs as plead likely exceed twenty (20) times the requisite \$75,000." Opp. at 9. Although Plaintiff's total estimated loss in revenue only amounts to a maximum of \$48,000, attorney's fees and other costs associated with the litigation as pleaded in the Complaint are sufficient to meet the amount in controversy requirement. This is not a case where "upon the face of the complaint, it is obvious that the suit cannot involve the necessary amount." *St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 292-93, 58 S. Ct. 586, 82 L. Ed. 845 (1938)*.

<sup>6</sup> Plaintiff's additional allegations of harm under its UCL claim are merely conclusory allegations about Defendant's "unethical, oppressive, unscrupulous" practice. Compl. ¶ 87.



## **Wep Transp. Holdings v. Bison Oil & Gas**

District Court of Colorado, Adams County

December 3, 2018, Decided; December 3, 2018, Filed

Case No. 2017CV30269

### **Reporter**

2018 Colo. Dist. LEXIS 4328 \*

WEP TRANSPORT HOLDINGS, LLC; WESTERN TRANSPORT, LLC; ECARG RESOURCES, LLC; COLORADO MAVERICK COMPANY, LLC and TREE TOP LP, Plaintiff v. BISON OIL & GAS, LLC; CARNELIAN ENERGY CAPITAL UPG, LLC; AXIS EXPLORATION, LLC f/k/a BISON EXPLORATION, LLC and EXTRACTION OIL & GAS, INC., Defendants

### **Core Terms**

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Plaintiffs', leases, Antitrust, allegations, bid, motion to dismiss, oil and gas lease, Defendants', rule of reason, compete, rigging, Oil, antitrust claim, ancillary, per se violation, anticompetitive, acquire, fraud claim, anti trust law, procompetitive, competitors, courts, prices, non-compete, conclusory, effects, alleged agreement, price fixing, per se rule, acquisition

**Judges:** [\*1] Jaclyn Casey Brown, District Court Judge.

**Opinion by:** Jaclyn Casey Brown

### **Opinion**

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#### **ORDER ON PARTIAL MOTIONS TO DISMISS THIRD AMENDED COMPLAINT**

This matter comes before the Court on two Motions to Dismiss: (1) Bison Oil & Gas, LLC's ("Bison") Motion for Partial Dismissal of Plaintiffs' Third Amended Complaint; and (2) Defendants Extraction Oil & Gas, Inc. ("Extraction") and Axis Exploration, LLC's ("Axis") (together "Extraction Defendants") Motion to Dismiss Third Amended Complaint, In Part, Pursuant to [C.R.C.P. 12\(b\)\(5\)](#). Both Motions were filed July 12, 2018. The Motions are resolved together by this Order. Plaintiffs WEP Transport Holdings, LLC, Western Transport, LLC, Ecarg Resources, LLC, Colorado Maverick Company, LLC, and Tree Top LP (collectively, "Plaintiffs") filed a Response on August 2, 2018. Defendants filed Replies on August 9, 2018. The Court, having read the briefs and supporting exhibits, considered the applicable law, and otherwise being advised in the premises, finds and orders as follows.

### **Relevant Background**

Plaintiffs commenced this action by filing a Complaint on February 17, 2017, asserting claims for fraudulent inducement of contract, fraud, breach of contract, and declaratory judgment against Defendants [\*2] Bison Oil & Gas, LLC ("Bison"), Axis Exploration, LLC f/k/a Bison Exploration, LLC ("Axis"), and Extraction Oil & Gas, Inc. ("Extraction") (collectively, "Defendants"). Plaintiffs' claims arise out of the transfer of oil and gas leases and surface use agreements covering land in Adams County, Colorado (the "Lands"). Before any Defendant answered or otherwise responded to the Complaint, on March 3, 2017, Plaintiffs filed their First Amended Complaint and Jury

Demand. The First Amended Complaint substantially mirrors Plaintiffs' original filing, but cites to addition events that occurred after Plaintiffs filed their initial complaint. The Defendants filed motions to dismiss the First Amended Complaint. In its Order on Motions to Dismiss, entered October 31, 2017, the Court found that Plaintiffs had asserted plausible fraud claims, but ordered Plaintiffs to file a Second Amended Complaint that more specifically and particularly averred the damages they seek on each of the claims alleged. On November 9, 2017, Plaintiffs filed their Second Amended Complaint and Jury Demand. The Defendants answered the Second Amended Complaint and asserted counterclaims against Plaintiffs.

On March 27, 2018, [\*3] Plaintiffs moved the Court to file a Third Amended Complaint, seeking to add a demand for punitive damages, assert two new claims against all Defendants, and add Carnelian as a defendant. Bison opposed the amendment. Axis and Extraction did not oppose the amendment, preferring to address its objections to the new claims by way of a motion to dismiss under C.R.S.P. 12(b) rather than under the relaxed amendment standard set forth in [C.R.C.P. 15\(a\)](#). On June 28, 2018, the Court granted Plaintiffs leave to file the Third Amended Complaint and added Carnelian as a Defendant. The Third Amended Complaint currently serves as the operative complaint. Bison and the Extraction Defendants now move the Court to partially dismiss the Third Amended Complaint.

In its Order on Motions to Dismiss entered October 31, 2017, the Court set forth in some detail the facts giving rise to Plaintiffs' original claims. The Court incorporates that factual background as may be pertinent here. Regarding the new claims asserted in the Third Amended Complaint, Plaintiffs generally allege that by November 1, 2016, Defendants Bison and Extraction had reached an agreement not to compete against each other for oil and gas leases in the [\*4] DJ Basin south of Denver International Airport ("DIA South Area"). (Third Amended Complaint ("TAC") ¶ 97.) According to this alleged agreement, Bison would acquire leases at reduced prices and then resell them to Extraction at a substantial mark-up. (*Id.* ¶¶ 97-98.) Plaintiffs contend that the agreement was intended to, and did, depress the price of oil and gas leases in the DIA South Area below competitive levels. (*Id.* ¶ 98.) Plaintiffs also allege that the Defendants conspired to suppress competition for the acquisition of oil and gas leases in the DIA South Area with the intent to depress the market for such leases. (*Id.* ¶¶ 109-113.)

### **Applicable Legal Principles**

A motion to dismiss under [C.R.C.P. 12\(b\)\(5\)](#) for failure to state a claim tests the formal sufficiency of a plaintiff's complaint. [Dwyer v. State, 2015 CO 58 ¶ 43](#). The Court must decide whether the allegations of the complaint are sufficient to raise a right to relief "above the speculative level" and provide "plausible grounds" to support the cause of action asserted. [Warne v. Hall, 373 P.3d 588, 591 \(Colo. 2016\)](#) (adopting the heightened standard of pleading set forth in [Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 \(2007\)](#) and [Ashcroft v. Iqbal, 556 U.S. 662, 678 \(2009\)](#)). The Court is tasked with weeding out groundless complaints early, and one which does not plead enough facts to suggest the claim is "plausible [\*5] on its face" must be dismissed. [Warne, 373 P.3d at 594](#). A claim is facially plausible when the allegations give rise to a reasonable inference that the defendant is liable. [Mayfield v. Bethards, 826 F.3d 1252, 1255 \(10th Cir. 2016\)](#).

In reviewing a motion to dismiss, the Court must accept all well-pleaded facts contained in the complaint as true, view them in the light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff's favor. [Blooming Terrace No. 1, LLC v. KH Blake St., LLC, 2017 COA 72 ¶ 9](#). See also [Twombly, 550 U.S. at 556](#); [Warne, 373 P.3d at 591](#). Although [C.R.C.P. 8](#) does not require "detailed factual allegations," [Twombly, 550 U.S. at 555](#), "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." [Iqbal, 556 U.S. at 678](#). Thus, the court is not bound by conclusory allegations, unwarranted inferences, or legal conclusions. [Warne, 373 P.3d at 591, 596](#); see also [Denver Post Corp. v. Ritter, 255 P.3d 1083, 1088 \(Colo. 2011\)](#).

Furthermore, when reviewing a motion to dismiss, the Court may only consider matters stated within the complaint itself and may not consider information outside the confines of that pleading. [Pub. Serv. Co of Colo. V. Van Wyk, 27 P.3d 377, 386 \(Colo. 2001\)](#). However, "a document that is referred to in the complaint, even though not formally

incorporated by reference or attached to the complaint, is not considered a matter outside the pleading." [Yadon v. Lowry, 126 P.3d 332, 336 \(Colo. App. 2005\)](#).

## **Analysis**

As an initial matter, Plaintiffs argue in their Response that several of Defendants' arguments should be treated as untimely motions for reconsideration [\*6] or as arguments that are barred by the law of the case. The Court is reluctant to revisit the merits of its prior decisions, and will endeavor to identify those arguments Defendants re-raise in their motions that were already disposed of by the Court in previous orders.

### **I. Fraud Claims**

To succeed on a claim for fraudulent inducement, a plaintiff must prove: (1) the defendant made a fraudulent misrepresentation of fact or knowingly failed to disclose a fact that defendant had a duty to disclose; (2) the fact was material; (3) the plaintiff relied on the misrepresentation or failure to disclose; (4) the plaintiff's reliance was justified; and (5) the reliance resulted in damage to the plaintiff. See [M.D.C./Wood, Inc. v. Mortimer, 866 P.2d 1380, 1382 \(Colo. 1994\)](#). To succeed on a claim for common law fraud, a plaintiff must prove: (1) that the defendant made a false representation of a material fact; (2) that the defendant knew it was false; (3) that the plaintiff did not know of the falsity; (4) that the representation was made with the intent that it be acted upon; and (5) that the representation resulted in damages. See [Wood v. Houghton Mifflin Harcourt Pub. Co., 569 F. Supp. 2d 1135, 1140 \(D. Colo. 2008\)](#) (quoting [Brody v. Bock, 897 P.2d 769, 775-76 \(Colo. 1995\)](#)). Under [C.R.C.P. 9\(b\)](#), "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with [\*7] particularity." The particularity required by the rule applies to all the material elements of an action in fraud. [Coon v. District Court, 420 P.2d 827, 828 \(Colo. 1966\)](#). However, a claimant need not plead detailed allegations of evidentiary facts. [Northwest Development, Inc. v. Dunn, 483 P.2d 1361, 1363 \(Colo. App. 1971\)](#). Instead, the complaint "must at least state the main facts or incidents which constitute the fraud so that the defendant is provided with sufficient information to frame a responsive pleading and defend against the claim." [State Farm Mut. Auto. Ins. Co. v. Parrish, 899 P.2d 285, 289 \(Colo. App. 1994\)](#) (citations omitted).

According to Bison, Plaintiffs' fraud claims fail because Plaintiffs do not assert allegations that are definite and specific, which would justify Plaintiffs' assumption that Bison would be the entity operating and developing Plaintiffs' land. Instead, Bison argues that the alleged representations about Bison's experience, good standing, partnership qualities, and future plans for development were puffery and vague allusions to potential benefits, not specific commitments about how Bison would operate its oil and gas leases. Bison contends that the evidence contradicts Plaintiffs' expectation that Bison would operate the assets, as the plain language of the agreements expressly contemplates Bison's right to assign them. In response, Plaintiffs argue [\*8] that Bison is precluded from attempting to challenge the sufficiency of Plaintiffs' fraud claims because the Court has already rejected Bison's arguments. Even if the Court were to revisit the merits of Bison's arguments, Plaintiffs argue the Court should reach the same result.

Bison's Motion to Dismiss is its third attempt to challenge the validity of Plaintiffs' fraud claims. On two prior occasions, the Court rejected Bison's argument that Plaintiffs failed to state a claim for fraudulent inducement or common law fraud. (See Order on Motions to Dismiss; Order Granting Leave to File Third Amended Complaint). Here, Bison's arguments are similar to those raised in its first motion to dismiss and in its opposition to Plaintiffs' motion to amend. Taking Plaintiffs' allegations as true and viewing them in the light most favorable to Plaintiffs, it is plausible that Bison's representations would induce Plaintiffs to assign the subject leases to Bison. The Court reiterates that "Defendants' argument goes to the reasonableness of Plaintiffs' reliance on the representations or omissions Bison allegedly made." (Order on Motions to Dismiss at 13.) As previously stated, whether a person justifiably [\*9] relied on alleged misrepresentation is a question of fact. [Loveland Essential Group, LLC v. Grommon Farms, Inc., 251 P.3d 1109, 1116-17 \(Colo. App. 2010\)](#).

The Extraction Defendants argue that Plaintiffs' fraud claims must be dismissed as against them because Plaintiffs have failed to adequately plead their claims under [C.R.C.P. 8](#) and failed to meet the heightened pleading standard

required for fraud claims under [C.R.C.P. 9](#). Plaintiffs respond that they are not asserting fraud claims against the Extraction Defendants. It is unclear from the Third Amended Complaint which of Plaintiffs' claims are asserted against which Defendants. Thus, to clarify, the Court finds that Plaintiffs' first and second claims do not apply to the Extraction Defendants.

## II. Antitrust Claim

Colorado's Antitrust Act bars "[e]very contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce." [C.R.S. § 6-4-104](#). It also prohibits "any person to contract, combine, or conspire with any person to rig any bid, or any aspect of the bidding process, in any way related to the provision of any commodity or service." [C.R.S. § 6-4-106](#). Any person injured in its business by reason of a violation of the Antitrust Act may file an action to prevent or restrain the violation, [C.R.S. § 6-4-113\(1\)](#), or may sue to recover any actual damages sustained, [\*10] [C.R.S. § 6-4-114\(1\)](#). Courts have interpreted the Antitrust Act to prohibit only the unreasonable restraint of trade. [People ex rel. Woodard v. Colo. Springs Bd. Of Realtors](#), 692 P.2d 1055, 1062 (Colo. 1984); [Nat'l Soc'y of Prof'l Eng'rs v. United States](#), 435 U.S.679, 688 (1978). When Colorado courts are construing these statutes, they are to use federal law interpreting the corresponding antitrust acts as a guide. [C.R.S. § 6-4-119](#).

To prevail on an antitrust claim, a plaintiff must prove three elements. First, a plaintiff must prove that there was an agreement between two entities. [Law v. Nat'l Collegiate Athletic Ass'n](#), 134 F.3d 1010, 1016 (10th Cir. 1998); [Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.](#), 996 F.2d 537, 542 (2d Cir. 1993). Second, a plaintiff must prove that the agreement unreasonably restrained trade in the market. [Law](#), 134 F.3d at 1016. A plaintiff can establish the second element by proving the restraint on trade was unreasonable per se or unreasonable under the rule of reason. [Capital Imaging Assocs.](#), 996 F.2d at 542. Unless the alleged restraint falls within certain categories of offenses proscribed as per se anticompetitive, there is a presumption that the rule of reason standard will apply. [Expert Masonry, Inc. v. Boone County, Ky.](#), 440 F.3d 336, 343 (6th Cir. 2006). Third, a plaintiff must prove that the violation of the act resulted in an antitrust injury. [Full Draw Prod. v. Easton Sports, Inc.](#), 182 F.3d 745, 750 (10th Cir. 1999).

Defendants raise four arguments in their motions to dismiss Plaintiffs' antitrust claims:

- (1) Bison contends that Plaintiffs failed to allege the existence of an unlawful agreement;
- (2) Defendants argue that Plaintiffs have not plead a per se violation of Colorado's antitrust laws;
- (3) [\*11] the Extraction Defendants argue that Plaintiffs fail to plead an antitrust injury.

### A. Plaintiffs Adequately Allege the Existence of an Agreement

Bison argues that Plaintiffs' claims for violation of the Antitrust Act must be dismissed because Plaintiffs rely exclusively on conclusory assertions that Defendants violated [antitrust law](#) without including any independent allegations of actual agreement among the Defendants.<sup>1</sup> In support of its argument, Bison primarily relies on the U.S. Supreme Court case, [Bell Atlantic Corp. v. Twombly](#), 550 U.S. 544 (2007), which addresses pleading standards in the antitrust context. In *Twombly*, the Supreme Court affirmed the trial court's dismissal of plaintiffs' antitrust claims because the complaint failed to provide a factual context suggesting there was an illegal agreement between the defendants. [Id. at 548-49](#). Because federal [antitrust law](#) only prohibits unreasonable restraints on trade that are "effected by a contract, combination, or conspiracy," the Court determined that the crucial question "is whether the challenged anticompetitive conduct stems from independent decision[s] or from an agreement." [Id. at 553](#) (internal citation and quotation omitted). The Court held that adequately pleading an antitrust claim "requires [\*12] a complaint with enough factual matter (taken as true) to suggest that an *agreement* was made." [Id. at 556](#) (emphasis added). In other words, the complaint must state "enough fact to raise a reasonable expectation

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<sup>1</sup> The Extraction Defendants concede that Plaintiffs have identified an agreement between two economically distinct entities. (Extraction Motion at 11.)

that discovery will reveal evidence of [an] illegal agreement." *Id.* The complaint in *Twombly* was defective because the plaintiffs failed to plead facts of an agreement between the defendant telephone companies; instead, plaintiffs relied upon inferences that could be drawn from the defendants' parallel conduct. *Id. at 564-65*. The Court found that the inferences failed to establish a violation of the antitrust laws and could have been the result of routine market conduct. *Id. at 566*.

Bison asserts that, like *Twombly*, the Plaintiffs here have failed to allege any specific facts suggesting that there was an agreement between the Defendants. Bison contends that the Third Amended Complaint fails to identify any written or verbal agreement among the Defendants and fails to specify which individuals assented to the alleged agreement, when the agreement was made, and how it was negotiated. In response, Plaintiffs argue that this Court has already determined that there are sufficient allegations of an agreement in its [\*13] Order Granting Leave to File Third Amended Complaint. However, Plaintiffs assert that if the Court were to consider the merits of Bison's argument, the Court should affirm its prior conclusion. Plaintiffs contend that the Third Amended Complaint details the overarching agreement between the Defendants to not compete in acquiring oil and gas leases in the area of Plaintiffs' land. (See TAC ¶¶ 21, 25, 30, 56, 91-107).<sup>2</sup>

Plaintiffs have sufficiently alleged the existence of an agreement in the Third Amended Complaint. Plaintiffs allege that prior to the fall of 2016, Bison and Extraction were both acquiring oil and gas leases in the Denver-Julesburg Basin ("DJ Basin") south of Denver International Airport ("DIA South Area"). (TAC ¶ 21.) However, Plaintiffs allege that by November 1, 2016, Bison and Extraction had entered into an agreement not to compete for oil and gas leases in the DIA South Area. (*Id.* at ¶¶ 21, 97.) This allegation generally is supported by a November 1, 2016 Indication of Interest letter. (Response Ex. 2.) Plaintiffs allege that by the terms of this agreement Bison would continue to acquire leases in the area, including Plaintiffs' leases, and that Extraction would [\*14] not compete with Bison. (See *id.* at ¶ 21.) According to Plaintiffs, during the fall of 2016, when Plaintiffs were in discussions with Bison, Extraction complied with the terms of the Defendants' agreement and did not acquire any oil and gas leases in the area. (See *id.* at ¶ 25.) Plaintiffs contend that, pursuant to this agreement, Bison acquired Plaintiffs' leases at below market value and then sold them to Extraction at a price fifteen times greater than price Plaintiffs were paid. (See *id.* at ¶¶ 99-100.) As discussed more fully below, Plaintiffs further allege that on November 22, 2016, Bison and the Extraction Defendants entered into a written "Purchase and Sale Agreement" ("PSA") by which Bison sold all of its oil and gas leases in the DIA South Area to Extraction. (*Id.* at ¶ 30.) As part of the PSA, the Defendants entered into an "Additional Leasing Agreement" pursuant to which Extraction agreed not directly or indirectly purchase or acquire leases in the acquisition area for a period of twelve months. (See Bison Motion Ex. B § 2(g)).

Unlike in *Twombly*, these allegations are more than mere inferences that can be drawn from parallel conduct of the parties. This Court is not aware [\*15] of any binding precedent that would require Plaintiffs to be more specific. As the Court noted in its Order Granting Leave to File Third Amended Complaint, Plaintiffs may "exaggerate the significance" of some of the evidence they have uncovered. But again, it is not for the Court to resolve disputes of fact at this stage of the litigation. Rather, taking the allegations as true, Plaintiffs have sufficiently alleged facts to suggest that an agreement not to compete was made between the Defendants.

## **B. Plaintiffs Fail to Allege a Per Se Violation of the Antitrust Act**

The Defendants argue that Plaintiffs fail to allege a per se unreasonable restraint on competition. Conduct is considered illegal per se under the Antitrust Act only in a limited class of cases where the defendant's actions are so plainly harmful to competition and so obviously lacking in any redeeming procompetitive values that they are conclusively presumed illegal without further examination. *Capital Imaging Assoc., 996 F.2d at 543*. Courts have found agreements to be illegal per se when "the practice facially appears to be one that would always or almost

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<sup>2</sup> Bison contends that Plaintiffs' inability to sufficiently allege an agreement is particularly problematic because Plaintiffs have already engaged in extensive discovery. In response, Plaintiffs allege additional facts obtained during discovery that bolster the claims asserted in the Third Amended Complaint. Of course, it would be improper for the Court to consider any facts not contained in the Third Amended Complaint in resolving the motions to dismiss. See *Fluid Tech., Inc. v. CVJ Axles, Inc.*, 964 P.2d 614, 616 (Colo. App. 1998).

always tend to restrict competition and decrease output." *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 19-20 (1979). For example, the per se rule has been applied [\*16] to situations of: (1) horizontal price fixing and output limitation, see *Nat'l Collegiate Athletic Ass'n v. Bd. Of Regents of Univ. of Oklahoma*, 468 U.S. 85, 100 (1984); (2) allocation or division of a market amongst competitors, see *U.S. v. Suntar Roofing, Inc.*, 897 F.2d 469, 473 (10th Cir. 1990); (3) certain group boycotts, see *Diaz v. Farley*, 215 F.3d 1175, 1182-1183 (10th Cir. 2000); and (4) bid rigging, See *U.S. v. Reicher*, 983 F.2d 168, 170 (10th Cir. 1992). Generally, "only horizontal restraints - restraints imposed by agreement between competitors - qualify as unreasonable per se." *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2283-84 (2018) (internal quotations omitted) (quoting *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988)). Application of the per se rule "eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work." *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (citing *Business Electronics Corp.*, 485 U.S. at 723). A plaintiff is entitled to treble damages when he alleges a per se violation of the Antitrust Act. *C.R.S. § 6-4-114(1)*.

Here, Plaintiffs assert that the alleged agreement between Bison and Extraction not to compete for leases in the DIA South Area was a per se violation of antitrust laws because the Defendants agreed to fix prices and rig bids. (TAC ¶ 91.) Federally, bid rigging has been defined as "[a]ny agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party." *Reicher*, 983 F.2d at 170 (quoting *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 325 (4th Cir. 1982)). Plaintiffs assert that bid rigging includes agreeing to refrain from bidding, and that bid rigging is per se illegal. (Response at 14 (citing [\*17] 1 ABA Antitrust Section, *Antitrust Law Developments* ("ALD") 93 (8th ed. 2017); *U.S. v. MMR Corp.*, 907 F.2d 489, 496 (5th Cir. 1990); *U.S. v. Mobile Materials, Inc.*, 881 F.2d 866, 869 (10th Cir. 1989); *Compact v. Metro Gov't of Nashville & Davidson Cty., TN*, 594 F. Supp. 1567, 1578 (M.D. Tenn 1984)).) Plaintiffs assert that bid rigging is a type of price fixing, which is also per se illegal. (*Id. at 14-15* (citing *U.S. v. Bensinger Co.*, 430 F.2d 584, 589 (8th Cir. 1970), superseded by rule on other grounds (explaining that bid rigging is a type of price fixing "of the simplest kind")).) Plaintiffs argue that no matter how their claim is labeled, Defendants' agreement falls squarely within the per se rule. Plaintiffs cite several cases where courts have evaluated the per se rule in the context of competitors in the market for oil and gas leases. See, e.g. *Branta, LLC v. Newfield Production Co.*, 310 F.Supp.3d 1166 (D. Colo. April 12, 2018) (appeal filed); *Northstar Energy LLC v. Encana Corp.*, No. 1:13-cv-200, 2014 WL 5343423, at \*6 (W.D. Mich. Mar. 10, 2014).

The Defendants contend that Plaintiffs' allegations regarding an agreement to fix prices or rig bids are conclusory and fail to establish a per se violation of the Antitrust Act. The Extraction Defendants specifically challenge Plaintiffs' statement that Defendants engaged in price fixing, noting that the Third Amended Complaint is devoid of any facts of the method by which the Defendants fixed prices or what price was allegedly fixed. Similarly, they contend that Plaintiffs have not offered any particular facts regarding the bidding process [\*18] to evidence their bid rigging claim. The Court agrees with Defendants that Plaintiffs have not alleged any facts regarding alleged price-fixing. Plaintiffs have not identified what price was fixed or how Defendants allegedly fixed the price. Further, the only facts Plaintiffs allege to support a claim of bid rigging is that Bison and Extraction agreed not to compete with one another. Plaintiffs do not allege that Bison and Extraction compared bids before submission, knowingly submitted noncompetitive bids, or agreed to jointly refrain from bidding. See ALD at 93. As alleged, it is not clear that the non-compete agreement Plaintiffs allege existed constitutes bid rigging.

Furthermore, the Defendants assert that the non-compete agreement that forms the basis of Plaintiffs' claims was a reasonable and necessary agreement that was ancillary to a separate and distinct business transaction - the purchase of Bison's assets by Extraction. The Defendants persuasively argue that the non-compete agreement cannot, as a matter of law, support a per se violation of the Antitrust Act. First, courts often evaluate covenants not to compete under the rule of reason. See, e.g., *County Materials Corp. v. Allan Block Corp.*, 502 F.3d 730, 735 (7th Cir. 2007) (holding that a non-compete [\*19] agreement between two companies was required to be evaluated under the rule of reason); *Perceptron, Inc. v. Sensor Adaptive Machines, Inc.*, 221 F.3d 913, 919 (6th Cir. 2000) ("The legality of noncompetition covenants ancillary to a legitimate transaction must be analyzed under the rule of reason."); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 265 (7th Cir. 1981) (same). Second, even restraints ordinarily considered per se violations are analyzed under the rule of reason when they are ancillary to a legitimate

business transaction. See [SCFC ILC, Inc. v. Visa USA, Inc.](#), 36 F.3d 958, 964 (10th Cir. 1994) (directing courts to "look at the challenged agreement to judge whether it represents the essential reason for the competitors' cooperation or reflects a matter merely ancillary to the venture's operation" in an "effort to appreciate the economic reality of the particular business behavior to assure that the procompetitive goals, in fact, are neither undervalued nor mask a reduction in competition"); [L.A. Mem'l Coliseum Comm'n v. Nat'l Football League](#), 726 F.2d 1381, 1395 (9th Cir. 1984) (explaining that the effect of a finding of ancillarity is to 'remove the per se label from restraints otherwise falling within that category') (quoting R. Bork, *Ancillary Restraints & the Sherman Act*, 15 Antitrust L.J. 211, 212 (1959)). "To be ancillary, and hence exempt from the per se rule, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction." [Rothery Storage & Van Co. v. Atlas Van Lines, Inc.](#), 792 F.2d 210, 224 (D.C. Cir. 1986). An ancillary agreement "is [\*20] subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose." *Id.* When an agreement that restrains trade is found to be ancillary to a legitimate transaction, the rule of reason is applied, which requires the court to "consider the harms and benefits to competition caused by the restraint and whether the putative benefits can be achieved by less restrictive means." [Los Angeles Memorial Coliseum Comm'n v. National Football League](#), 726 F.2d 1381, 1395 (9th Cir. 1984).

Plaintiffs concede that an agreement not to compete that ordinarily would be unlawful per se is subject to rule of reason analysis if it is ancillary to a legitimate joint venture or transaction. (Response at 17.) Plaintiffs argue, however, that the rule of reason does not apply because the alleged agreement was not part of a procompetitive joint venture. Plaintiffs assert that the Court must accept as true its allegation in the Third Amended Complaint that the agreement was "not part of any procompetitive or efficiency-enhancing collaboration so there is no procompetitive justification for the agreement." (TAC ¶ 104(c).) But this allegation is conclusory, and the Court does not have to accept conclusory allegations as true. [Warne](#), 373 P.3d at 591

Here, the alleged anticompetitive [\*21] conduct can only be properly understood in light of the overarching transaction between Bison and Extraction for the purchase of Bison's oil and gas assets. Plaintiffs allege that by November 1, 2016, Defendants had agreed not to compete with one another for leases in the DIA South Area. (TAC ¶ 97.) As of that date, Bison and Extraction had entered into a Non-Disclosure Agreement, pursuant to which Extraction agreed not to compete with Bison for a six-month period of time within a certain geographic area pending disclosure of confidential information and discussions regarding an asset acquisition. (Extraction Motion Ex. A ¶ 10. See also Bison Motion Ex. A at 3 (defining "Confidentiality Agreement").) Also, on November 1, 2016, Bison and Extraction had entered into the Indication of Interest evidencing a potential transaction whereby Extraction would acquire Bison's oil and gas interests in certain Colorado counties. (Response Ex. 2.) As Plaintiffs assert, "[p]ursuant to the oral agreement, on November 1, 2016, Bison and Extraction entered into a 'Non-Binding Indication of Interest' (referred to as the 'Letter of Intent') . . ." (Response at 5.) The Indication of Interest<sup>3</sup> contemplates [\*22] the parties entering into a Transaction Services Agreement ("TSA"). (*Id. at 2.*) Although the Indication of Interest itself does not refer to the non-compete agreement, later transaction documents do. On November 22, 2016, Bison executed the PSA with Bison Exploration, a subsidiary of Extraction, pursuant to which Bison assigned its interest in oil and gas leases in Adams County to Bison Exploration. (TAC ¶ 30.) The PSA obligated Bison to enter into a TSA with Extraction, also referred to as the "Additional Leasing Agreement." (See Bison Motion Ex. A, Art. 1; § 2.04(b)(6) (obligating Bison to deliver the TSA at the PSA's initial closing).) In part, the TSA provides that, for a period of twelve months, Bison would continue to acquire leases in areas the PSA designated and Extraction would either purchase those leases or have the option to purchase the leases. (See Bison Motion Ex. B § 2(b)). During that same period, the parties agreed Exploration would not "purchase, acquire or earn . . . any oil and gas leases within the Acquisition Area." (*Id. at §2(g)).* According to Plaintiffs: "On November 22, 2016, Bison and Extraction confirmed the bid-rigging agreement reflected in the Letter of Intent [\*23] when they signed the Purchase and Sale Agreement, by which Bison sold all of its oil and gas leases in the DIA South Area to Extraction." (Response at 6, citing TSA ¶ 30.)

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<sup>3</sup> Although the Indication of Interest is not specifically mentioned in the Complaint, all parties rely on it in making their arguments to the Court. Even if the Court disregarded the Indication of Interest, its analysis and the outcome of the Motions to Dismiss would remain the same.

Thus, the allegations of the Third Amended Complaint make clear that, by November 1, 2016, the date Plaintiffs allege Defendants entered into their illegal anticompetitive agreement, that Defendants were engaged in, or at a minimum taking steps to consummate, a much larger transaction. The Third Amended Complaint further makes clear that Defendants finalized the asset transfer later in November. The larger transaction not only supports Plaintiffs' argument that it has sufficiently alleged an agreement between the defendants to sustain its antitrust claim (see above), but also necessarily places that agreement in the context of a larger overarching business transaction. Although Plaintiffs challenge the legitimacy of the non-compete agreement and whether it truly was ancillary to the asset transfer, Plaintiffs do not allege that the asset transfer itself was illegitimate. The allegations of the Third Amended Complaint can lead to only one conclusion. To the extent Defendants engaged in an unreasonable restraint of [\*24] trade, they did so in the context of a larger, legitimate transaction. Under such circumstances, the Court must examine Defendants' conduct under the rule of reason. To the extent Plaintiffs' antitrust claim is based on a per se violation of the Antitrust Act, it is dismissed.

### C. Plaintiffs Adequately Allege an Antitrust Injury

Finally, the Extraction Defendants argue that Plaintiffs fail to allege an antitrust injury.<sup>4</sup> To establish an anti-trust injury, a private plaintiff must demonstrate more than an "injury causally linked to an illegal presence in the market," and instead show that the injury was one antitrust laws are intended to prevent and flows from a defendant's unlawful behavior. *Full Draw Prod., 754 F.3d at 750* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)*). With per se violations, unreasonable anticompetitive results are presumed and no economic evidence is required to establish anticompetitive impact on the affected market. *Woodard, 692 P.2d at 1062*. The rule of reason analysis, however, requires the factfinder to weigh all the evidence of a case to decide if a practice imposes an unreasonable restraint on competition. *U.S. v. Suntar Roofing, Inc., 897 F.2d 469, 472 (10th Cir. 1990)*. Under the rule of reason, courts apply a burden shifting analysis by which:

[T]he plaintiff bears the initial burden of showing that an agreement [\*25] had a substantially adverse effect on competition. If the plaintiff meets this burden, the burden shifts to the defendant to come forward with evidence of the procompetitive virtues of the alleged wrongful conduct. If the defendant is able to demonstrate procompetitive effects, the plaintiff then must prove that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner. Ultimately, if these steps are met, the harms and benefits must be weighed against each other in order to judge whether the challenged behavior is, on balance, reasonable.

*Gregory v. Fort Bridger Rendezvous Ass'n, 448 F.3d 1197, 1205 (10th Cir. 2006)*(quoting *Law, 134 F.3d at 1019*). For a plaintiff to carry its initial burden, it must show more than that the challenged action adversely affected its business; and instead, must show an adverse effect on competition in general. *Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp., 846 F.3d 1297, 1310 (10th Cir. 2017)*. Ultimately, a plaintiff must show that challenged restraint actually injured competition, not merely a competitor. *Suture Express, Inc. v. Owens & Minor Distribution, Inc, 851 F.3d 1029, 1044 (10th Cir. 2017)* (citing *SCFC ILC, Inc., 36 F.3d at 965*). Plaintiffs can make the showing of anticompetitive effect through direct or indirect evidence. *Ohio v. American Express Co., 138 S.Ct. 2274, 2284 (2018)*. Direct evidence of anticompetitive effects is actual proof of detrimental effects on competition, such as "reduced [\*26] output, increased prices, or decreased quality in the relevant market." *Id.* (citation omitted). While indirect evidence "would be proof of market power plus some evidence that the challenged restraint harms competition." *Id.*<sup>5</sup>

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<sup>4</sup>The Extraction Defendants first argue that Plaintiffs fail to allege an antitrust claim under the rule of reason because they fail to allege harm to competition. The Extraction Defendants separately argue that Plaintiffs fail to allege any antitrust claim because they fail to allege an antitrust injury. The Court finds these arguments largely duplicative, so addresses them together. The Court notes that Bison did not argue that Plaintiffs failed to allege antitrust injury.

<sup>5</sup> Plaintiffs can sometimes establish the anticompetitive effect under the "quick look" doctrine, where courts "simply assume the existence of anticompetitive effect where the conduct at issue amounts to a naked and effective restraint on price or output that carries obvious anticompetitive consequences." *Gunnison Energy Corp., 846 F.3d at 1311*(internal quotations omitted). In that case, the burden shifts to the defendant to demonstrate a countervailing procompetitive effect. *Id.*

The Extraction Defendants argue that Plaintiffs' do not sufficiently allege an antitrust claim (generally or under the rule of reason) because Plaintiffs fail to plead any harm to competition. According to the Extraction Defendants, Plaintiffs rely on conclusory allegations that (1) competition was harmed, and (2) Bison sold Plaintiffs' leases for a profit. The Extraction Defendants argue that Plaintiffs pled just two injuries with particularity, namely that (1) Bison improperly assigned Plaintiffs' leases to the Extraction Defendants; and (2) Bison did not pay Plaintiffs fair market value for their leases due to misrepresentations by Bison. The Extraction Defendants assert that these injuries cannot serve the basis of an antitrust claim because they are not of the kind contemplated by the antitrust laws; instead of alleging impact on the larger oil and gas market, Plaintiffs' allegations focus on their individual injuries. The Extraction Defendants further contend [\*27] that the well pleaded facts contradict Plaintiffs' claims because Plaintiffs disregarded potential offers from other companies interested in Plaintiffs' oil and gas rights. (TAC ¶ 24.)

In response, Plaintiffs argue that Third Amended Complaint sufficiently alleges the anticompetitive effects of the agreement between the Defendants by alleging that (1) Defendants' illegal agreement depressed market prices and negatively impacted competition in the DIA South Area; (2) Bison purchased Plaintiffs' leases below market prices; and (3) the leases were resold at a substantially higher price. Plaintiffs assert that they need not plead specifics regarding the prevailing price for leases in a competitive market absent Defendants' unlawful agreement. Plaintiffs argue that although they must prove the fact of damage with reasonable certainty, the amount of damage need not be proved with precision. (Response at 25 (citing, *inter alia*, [Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 123-24 \(1969\)](#).)

The Court finds that Plaintiffs have sufficiently pled an antitrust injury because Plaintiffs allege that Defendants' unlawful agreement harmed competition in the DIA South area. (TAC ¶ 98). Plaintiffs contend that the relevant market is the DIA South Area and that [\*28] Defendants were two of the major competitors for leases in that market. (*Id.* at ¶ 96.) Plaintiffs allege that Defendants were able to avoid bidding against each other for leases covering 3,000 net mineral acres and paid a price below fair market value. (*Id.* at ¶¶ 99, 101.) According to Plaintiffs, the Defendants' agreement not to compete for leases was intended to and did depress the acquisition price for oil and gas leases in the DIA South Area. (*Id.* at ¶¶ 98-101.)

These allegations are sufficient to demonstrate that Defendants' alleged agreement had a substantially adverse effect on competition in violation of the rule of reason. Whether the DIA South area is a relevant market, whether the Defendants' conduct impacted that market, and whether Plaintiffs suffered an injury caused by Defendants' conduct all will depend on evidence that is not before the Court and cannot be considered when resolving a motion to dismiss. Indeed, Plaintiffs' allegation that they rejected competitive offers in favor of finalizing the transaction with Bison seems to contradict their assertion that Defendants' conduct negatively impacted competition in the market. On a motion to dismiss, however, the Court [\*29] does not weigh competing evidence. Therefore, the Court concludes that Plaintiffs have sufficiently alleged an antitrust injury.

### III. Plaintiffs' Civil Conspiracy Claim

Finally, the Defendants move to dismiss Plaintiffs' civil conspiracy claim because it depends entirely on the antitrust claim. Because the Court has found that Plaintiffs sufficiently pled a violation of the Antitrust Act, the conspiracy claim also survives.

### Conclusion

For the foregoing reasons, and as set forth herein, the Court GRANTS IN PART AND DENIES IN PART Bison Oil & Gas, LLC's Motion for Partial Dismissal of Plaintiffs' Third Amended Complaint and Extraction Oil & Gas, Inc. and Axis Exploration, LLC's Motion to Dismiss Third Amended Complaint, In Part, Pursuant to [C.R.C.P. 12\(b\)\(5\)](#).

SO ORDERED this 3rd day of December, 2018.

/s/ Jaclyn Casey Brown

Jaclyn Casey Brown

District Court Judge

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## Deerpoint Grp., Inc. v. Agrigenix, LLC

United States District Court for the Eastern District of California

December 4, 2018, Decided; December 4, 2018, Filed

CASE NO. 1:18-CV-0536 AWI BAM

**Reporter**

345 F. Supp. 3d 1207 \*; 2018 U.S. Dist. LEXIS 205322 \*\*; 2018 WL 6330897

DEERPOINT GROUP, INC., Plaintiff v. AGRIGENIX, LLC and SEAN MAHONEY, Defendants

**Subsequent History:** Dismissed without prejudice by, in part, Motion denied by, in part [Deerpoint Grp., Inc. v. Agrigenix, LLC, 393 F. Supp. 3d 968, 2019 U.S. Dist. LEXIS 101908, 2019 WL 2513756 \(E.D. Cal., June 17, 2019\)](#)

Later proceeding at [Deerpoint Grp., Inc. v. Agrigenix, LLC, 2019 U.S. Dist. LEXIS 140351 \(E.D. Cal., Aug. 16, 2019\)](#)

Reconsideration denied by [Deerpoint Grp., Inc. v. Agrigenix, LLC, 400 F. Supp. 3d 988, 2019 U.S. Dist. LEXIS 151563, 2019 WL 4201443 \(E.D. Cal., Sept. 5, 2019\)](#)

Request granted, Request denied by [Deerpoint Grp., Inc. v. Agrigenix, LLC, 2020 U.S. Dist. LEXIS 13351 \(E.D. Cal., Jan. 27, 2020\)](#)

Motion granted by [Deerpoint Grp., Inc. v. Agrigenix LLC, 2020 U.S. Dist. LEXIS 31295, 2020 WL 883116 \(E.D. Cal., Feb. 24, 2020\)](#)

Patent interpreted by [Deerpoint Grp., Inc. v. Agrigenix, LLC, 2021 U.S. Dist. LEXIS 248748, 2022 WL 36963 \(E.D. Cal., Dec. 30, 2021\)](#)

Motion granted by [Deerpoint Grp., Inc. v. Agrigenix, LLC, 2022 U.S. Dist. LEXIS 105577, 2022 WL 2118963 \(E.D. Cal., June 13, 2022\)](#)

Request granted [Deerpoint Grp., Inc. v. Agrigenix, LLC, 2022 U.S. Dist. LEXIS 159512, 2022 WL 4002122 \(E.D. Cal., Aug. 30, 2022\)](#)

Request granted [Deerpoint Grp., Inc. v. Agrigenix, LLC, 2022 U.S. Dist. LEXIS 159513, 2022 WL 3908278 \(E.D. Cal., Aug. 30, 2022\)](#)

Sanctions allowed by, Objection overruled by, Objection overruled by, As moot, Request granted, in part, Request denied by [Deerpoint Grp., Inc. v. Agrigenix, LLC, 2022 U.S. Dist. LEXIS 197646, 2022 WL 16551632 \(E.D. Cal., Oct. 31, 2022\)](#)

Costs and fees proceeding at, Request granted, in part, Request denied by, in part [Deerpoint Grp., Inc. v. Agrigenix, LLC, 2022 U.S. Dist. LEXIS 225609, 2022 WL 17670002 \(E.D. Cal., Dec. 14, 2022\)](#)

Dismissed by, in part [Deerpoint Grp., Inc. v. Agrigenix, LLC, 2023 U.S. Dist. LEXIS 58682 \(E.D. Cal., Apr. 3, 2023\)](#)

Dismissed by, in part [Deerpoint Grp., Inc. v. Agrigenix, LLC, 2023 U.S. Dist. LEXIS 131036 \(E.D. Cal., July 27, 2023\)](#)

## Core Terms

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trade secret, Settlement, misappropriation, cause of action, confidential, Lawsuit, parties, allegations, proprietary, breach of contract, Defendants', trade secret information, third party, fair dealing, breached, preempted, leave to amend, unfair, contractual, third-party, disclosing, settlement agreement, good faith, circumstances, disparagement, fertilizers, obligations, disclosure, provisions, employees

## LexisNexis® Headnotes

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

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

### **HN1** [down arrow] Motions to Dismiss, Failure to State Claim

Under [Fed. R. Civ. P. 12\(b\)\(6\)](#), a claim may be dismissed because of the plaintiff's failure to state a claim upon which relief can be granted. [Fed. R. Civ. P. 12\(b\)\(6\)](#). A dismissal under [Rule 12\(b\)\(6\)](#) may be based on the lack of a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. In reviewing a complaint under [Rule 12\(b\)\(6\)](#), all well-pleaded allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. However, complaints that offer no more than labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. The court is not required to accept as true allegations that contradict exhibits attached to the complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.

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

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

### **HN2** [down arrow] Motions to Dismiss, Failure to State Claim

To avoid a [Fed. R. Civ. P. 12\(b\)\(6\)](#) dismissal, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Plausibility means more than a sheer possibility, but less than a probability, and facts that are merely consistent with liability fall short of plausibility.

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

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

### **HN3** [down arrow] Motions to Dismiss, Failure to State Claim

The following principles apply to [Fed. R. Civ. P. 12\(b\)\(6\)](#) motions: (1) to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively; (2) the factual allegations that are taken as true must plausibly suggest entitlement to relief, such that it

is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation. In assessing a motion to dismiss, courts may consider documents attached to the complaint, documents incorporated by reference in the complaint, or matters subject to judicial notice. If a motion to dismiss is granted, the district court should grant leave to amend even if no request to amend the pleading was made. However, leave to amend need not be granted if amendment would be futile or the plaintiff has failed to cure deficiencies despite repeated opportunities.

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

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

#### **HN4** Elements of Misappropriation, Acquisition

Under the California Uniform Trade Secrets Act (CUTSA), in a plaintiff's action against the same defendant, the continued improper use or disclosure of a trade secret after the defendant's initial misappropriation is viewed under the CUTSA as part of a single claim of continuing misappropriation accruing at the time of the initial misappropriation. A distinction between a misappropriation and a claim emerges. A misappropriation within the meaning of the CUTSA occurs not only at the time of the initial acquisition of the trade secret by wrongful means, but also with each misuse or wrongful disclosure of the secret. But a claim for misappropriation of a trade secret arises for a given plaintiff against a given defendant only once, at the time of the initial misappropriation, subject to the discovery rule provided in [Cal. Civ. Code § 3426.6](#). Each new misuse or wrongful disclosure is viewed as augmenting a single claim of continuing misappropriation rather than as giving rise to a separate claim.

Governments > Courts > Judicial Precedent

#### **HN5** Courts, Judicial Precedent

An unpublished district court case, is persuasive authority, it is not binding precedent.

Trade Secrets Law > Breach of Contract

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

#### **HN6** Trade Secrets Law, Breach of Contract

There is only one claim that arises for misappropriation under the California Uniform Trade Secrets Act (CUTSA), all future claims, i.e., subsequent uses or disclosures, merely augment that one claim. For purposes of CUTSA, a separate future misappropriation claim against a single defendant and involving the same previously misappropriated trade secret is a legal impossibility. CUTSA does not preempt or displace breach of contract claims that are based on misappropriation of trade secrets. [Cal. Civ. Code § 3426.7\(b\)\(1\)](#).

Trade Secrets Law > Breach of Contract

Trade Secrets Law > Civil Actions > Remedies > Damages

Trade Secrets Law > Civil Actions > Remedies > Injunctions

#### **HN7** Trade Secrets Law, Breach of Contract

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It is possible for plaintiffs to obtain monetary damages and injunctive relief for the subsequent use or disclosure of a trade secret as part of a breach of contract/settlement claim. [Cal. Civ. Code § 3422\(3\)](#).

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

Trade Secrets Law > Misappropriation Actions

#### **HN8** [] **Trade Secrets, Uniform Trade Secrets Act**

The California Uniform Trade Secrets Act does not create any affirmative obligations to return trade secrets.

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

Civil Procedure > Settlements > Releases From Liability > Interpretation of Releases

#### **HN9** [] **Trade Secrets, Uniform Trade Secrets Act**

Merely reaffirming a prior existing contractual obligation in a release does not have the effect of creating a new California Uniform Trade Secrets Act cause of action where none would otherwise exist.

Business & Corporate Compliance > ... > Contracts Law > Breach > Breach of Contract Actions

Contracts Law > Remedies

Business & Corporate Compliance > ... > Contracts Law > Breach > Material Breach

#### **HN10** [] **Breach, Breach of Contract Actions**

When one party to a contract breaches a material term of the contract, the other party has the option to terminate the contract for cause.

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

Trade Secrets Law > Federal Versus State Law > Federal Trade Secrets Act

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

#### **HN11** [] **Trade Secrets, Uniform Trade Secrets Act**

The Defend Trade Secrets Act (DTSA) is largely modelled after the Uniform Trade Secrets Act (UTSA). California adopted the UTSA without significant change through enactment of the California Uniform Trade Secrets Act (CUTSA). States that have adopted the UTSA, like California, consistently apply a single claim theory to misappropriations of trade secrets. Further, the CUTSA provisions relied upon and examined by Cadence Design v. Avant are materially the same as the corresponding sections of the DTSA. Both the DTSA and CUTSA provide a

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three-year limitations period for misappropriation and explain that a continuing misappropriation constitutes a single claim of misappropriation. [18 U.S.C.S. § 1836\(d\)](#); Cal. Code Civ. [§ 3426.6](#).

Contracts Law > Third Parties > Beneficiaries > Claims & Enforcement

Contracts Law > ... > Beneficiaries > Types of Third Party Beneficiaries > Intended Beneficiaries

Contracts Law > Contract Interpretation > Intent

Contracts Law > ... > Ambiguities & Contra Proferentem > Contract Ambiguities > Latent Ambiguities

#### [\*\*HN12\*\*](#) [] **Beneficiaries, Claims & Enforcement**

A third-party beneficiary is someone who may enforce a contract because the contract is made expressly for his benefit. A putative third party's rights under a contract are predicated upon the contracting parties' intent to benefit it. That is, the test for determining whether a contract was made for the benefit of a third party is whether an intent to benefit a third person appears from the terms of the contract. Ascertaining this intent is a question of ordinary contract interpretation. A contract is to be interpreted to give effect to the mutual intention of the parties at the time the contract was made. [Cal. Civ. Code § 1636](#). The intent of the parties is to be ascertained from the writing alone, if possible. [Cal. Civ. Code § 1639](#). A contract's words are to be understood in their ordinary and popular sense, unless used by the parties in a technical sense, or unless a special meaning is given them by usage. [Cal. Civ. Code § 1644](#). Extrinsic evidence is admissible, however, to interpret an agreement when a material term is ambiguous. A contractual term will be ambiguous where, in the context of the whole and negotiations of the parties making the contract, the issue becomes one of law. [Cal. Civ. Code § 1647](#).

Contracts Law > Third Parties > Beneficiaries > Claims & Enforcement

Contracts Law > Contract Interpretation > Intent

Contracts Law > ... > Beneficiaries > Types of Third Party Beneficiaries > Intended Beneficiaries

#### [\*\*HN13\*\*](#) [] **Beneficiaries, Claims & Enforcement**

A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates. [Cal. Civ. Code § 1647](#). The character of a contract is not to be determined by isolating any single clause or group of clauses, rather a contract is to be construed as a whole, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other. A third-party beneficiary need not be named in the contract where the agreement reflects the intent of the contracting parties to benefit the unnamed party. However, a third party who is only incidentally benefitted by performance of a contract is not entitled to enforce it. The circumstance that a literal contract interpretation would result in a benefit to the third party is not enough to entitle the third party to demand enforcement of the contract. Generally, whether a third party is an intended beneficiary under a contract is a question of fact, but if the issue can be answered by interpreting the contract as a whole and doing so in light of the uncontradicted evidence of the circumstances and negotiations of the parties making the contract, the issue becomes one of law.

Civil Procedure > Settlements > Releases From Liability > Interpretation of Releases

Contracts Law > Third Parties > Beneficiaries > Claims & Enforcement

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Contracts Law > ... > Ambiguities & Contra Proferentem > Contract Ambiguities > Latent Ambiguities

#### **HN14** [blue icon] Releases From Liability, Interpretation of Releases

The law permits a plaintiff who opposes enforcement of a general release by a third party to offer extrinsic evidence as to the circumstances surrounding negotiation and signing of the release to attempt to show that releasing any other person, meaning everyone, does not comport with the parties' intent.

Civil Procedure > Settlements > Releases From Liability > Interpretation of Releases

Contracts Law > Third Parties > Beneficiaries > Claims & Enforcement

#### **HN15** [blue icon] Releases From Liability, Interpretation of Releases

Third-party beneficiary cases are usually decided after the submission of evidence regarding the parties' intent, including evidence about the negotiations and circumstances of the contract. The law permits a plaintiff who opposes enforcement of a general release by a third party to offer extrinsic evidence as to the circumstances surrounding negotiation and signing of the release to attempt to show that releasing any other person, meaning everyone, does not comport with the parties' intent. This principle has generally been followed either through a bench trial or summary judgment.

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

Civil Procedure > Judgments > Summary Judgment > Motions for Summary Judgment

#### **HN16** [blue icon] Motions to Dismiss, Failure to State Claim

In the procedural context of a [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion, [Rule 12\(d\)](#) explains that if matters outside the pleadings are considered, the motion is converted to a [Fed. R. Civ. P. 56](#) motion for summary judgment.

Evidence > Types of Evidence > Judicial Admissions > Effects

Evidence > Types of Evidence > Judicial Admissions > Pleadings

#### **HN17** [blue icon] Judicial Admissions, Effects

Judicial admissions are formal admissions in the pleadings which have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. Factual assertions in a complaint, unless amended, are conclusively binding judicial admissions. Courts appear to be reluctant to construe allegations expressly made on information and belief as binding judicial admissions.

Business & Corporate Compliance > ... > Contracts Law > Breach > Breach of Contract Actions

Torts > Remedies > Damages

#### **HN18** [blue icon] Breach, Breach of Contract Actions

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There is a distinction between tort and contract law - contract law enforces the intentions of the individual contracting parties, but tort law vindicates a society's social policy. Tort damages should not be judicially extended in order to fashion remedies for the breach of a contract.

[Business & Corporate Compliance](#) > ... > [Contracts Law](#) > [Breach](#) > [Breach of Contract Actions](#)

[Torts](#) > [Business Torts](#) > [Bad Faith Breach of Contract](#) > [Elements](#)

[Torts](#) > [Business Torts](#) > [Bad Faith Breach of Contract](#) > [Remedies](#)

### **HN19** [] **Breach, Breach of Contract Actions**

A litigant may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations. However, it is possible for the same conduct to constitute both a breach of contract and an invasion of an interest protected by the law of torts. That is, courts will generally enforce the breach of a contractual promise through contract law, except when the actions that constitute the breach violate a social policy that merits the imposition of tort remedies. Conduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law. An omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty.

[Civil Procedure](#) > [Pleading & Practice](#) > [Responses](#) > [Defenses, Demurrsers & Objections](#)

[Civil Procedure](#) > [Preliminary Considerations](#) > [Federal & State Interrelationships](#)

### **HN20** [] **Responses, Defenses, Demurrsers & Objections**

An attempt to impose a state law defense on a federal cause of action is improper and unavailing.

[Business & Corporate Compliance](#) > ... > [Breach](#) > [Breach of Contract Actions](#) > [Elements of Contract Claims](#)

[Contracts Law](#) > [Contract Interpretation](#) > [Good Faith & Fair Dealing](#)

### **HN21** [] **Breach of Contract Actions, Elements of Contract Claims**

Although breach of the implied covenant of good faith and fair dealing often is pleaded as a separate count, a breach of the implied covenant is necessarily a breach of contract.

[Torts](#) > ... > [Prospective Advantage](#) > [Intentional Interference](#) > [Elements](#)

### **HN22** [] **Intentional Interference, Elements**

One of the elements of an intentional interference with prospective economic advantage claim is that the defendant engaged in an independently wrongful act, that is, an act that is wrongful by some legal measure other than the fact of interference. An act is independently wrongful if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.

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Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims  
Torts > ... > Prospective Advantage > Intentional Interference > Elements  
Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

### **HN23** [] Breach of Contract Actions, Elements of Contract Claims

With respect to breaches of contract, including breaches of the covenant of good faith and fair dealing, this conduct does not form the basis of a valid interference with prospective economic advantage claim. Under California law, a breach of contract cannot constitute the wrongful conduct required for the tort of interference with prospective economic advantage.

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

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

### **HN24** [] Trade Secrets, Uniform Trade Secrets Act

The duties imposed by California Uniform Trade Secrets Act (CUTSA) do not depend upon any contractual relationship. Because the duties of CUTSA are statutory and independent of contracts, an intentional interference with prospective economic advantage claim does not improperly attempt to obtain tort remedies for breaches of contract.

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

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Trade Secrets Law > Misappropriation Actions > Unfair Competition

### **HN25** [] State Regulation, Claims

The duties imposed by the California Unfair Competition Law (UCL) do not depend upon any contractual relationship. Because the duties of the UCL are statutory and independent of contracts, such a claim does not improperly attempt to obtain tort remedies for breaches of contract.

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

Trade Secrets Law > Misappropriation Actions

### **HN26** [] Trade Secrets, Uniform Trade Secrets Act

The California Uniform Trade Secrets Act (CUTSA) enjoys a comprehensive structure and breadth. CUTSA has a specific provision that addresses preemption. [Cal. Civ. Code § 3426.7](#). CUTSA does not preempt or supersede any statute relating to misappropriation of trade secrets or any statute that otherwise regulates trade secrets. [Cal. Civ. Code § 3426.7\(a\)](#). Importantly, CUTSA does not affect (1) contractual remedies, whether or not based upon misappropriation of a trade secret, (2) other civil remedies that are not based upon a misappropriation of a trade

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secret, or (3) criminal remedies. [Cal. Civ. Code § 3426.7\(b\)](#). Therefore, [§ 3426.7](#) expressly allows contractual and criminal remedies, whether or not based on trade secret misappropriation, but implicitly preempts alternative civil remedies based on trade secret misappropriation. CUTSA provides the exclusive civil remedy for conduct falling within its terms, so as to supersede other civil remedies based upon misappropriation of a trade secret. The determination of whether a claim is based on trade secret misappropriation is largely factual. CUTSA preempts/supersedes civil, non-contract claims based on the same nucleus of facts as trade secret misappropriation.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

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

#### [HN27](#) [+] Breach of Contract Actions, Elements of Contract Claims

Contract claims are expressly outside of the California Uniform Trade Secrets Act's (CUTSA) preemptive scope. [Cal. Civ. Code § 3426.7\(b\)\(1\)](#). Because a claim for breach of the covenant of good faith and fair dealing is a contract claim, it is expressly not preempted/superseded by CUTSA. [Cal. Civ. Code § 3426.7\(b\)\(1\)](#).

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

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

#### [HN28](#) [+] Breach of Contract Actions, Elements of Contract Claims

The elements of a claim for intentional interference with prospective economic advantage (IIPEA) are: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional wrongful acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm proximately caused by the defendant's actions. Courts have recognized that, if an interference with prospective economic advantage claim is based on the same nucleus of facts as a California Uniform Trade Secrets Act (CUTSA) trade secret misappropriation claim, then the IIPEA tort is preempted by CUTSA.

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

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

#### [HN29](#) [+] State Regulation, Claims

The Unfair Competition Law (UCL) broadly proscribes the use of any unlawful, unfair or fraudulent business act or practice. [Cal. Bus. & Prof. Code. § 17200](#). The UCL operates as a three-pronged statute: Each of these three adjectives, unlawful, unfair, or fraudulent, captures a separate and distinct theory of liability.

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

### [HN30](#) [blue document icon] State Regulation, Claims

An Unfair Competition Law claim will rise or fall depending on the state of the antecedent substantive causes of action.

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

Trade Secrets Law > Civil Actions

Trade Secrets Law > Misappropriation Actions

### [HN31](#) [blue document icon] Trade Secrets, Uniform Trade Secrets Act

With respect to violations of the trade secret laws, the California Uniform Trade Secrets Act (CUTSA) will not preempt non-trade secret related civil claims if the civil claims do not share a common nucleus of operative facts with the CUTSA misappropriation claim. [Cal. Civ. Code § 3426.7\(b\)\(2\)](#).

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

Trade Secrets Law > Misappropriation Actions > Unfair Competition

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

### [HN32](#) [blue document icon] State Regulation, Claims

An Unfair Competition Law claim that is based on the same nucleus of operative facts as a California Uniform Trade Secrets Act claim is preempted.

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

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

### [HN33](#) [blue document icon] State Regulation, Claims

A breach of contract claim will not support an Unfair Competition Law (UCL) claim unless the conduct that constitutes a breach of contract is also unfair, unlawful, or fraudulent, as those terms are understood under the UCL.

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

### [HN34](#) [blue document icon] State Regulation, Claims

The terms unlawful, unfair, and fraudulent are terms of art under the Unfair Competition Law (UCL). A business practice is fraudulent under the UCL if members of the public are likely to be deceived. The UCL's unlawful prong borrows violations of other laws and makes those unlawful practices actionable under the UCL, and that virtually any law or regulation-federal or state, statutory or common law-can serve as a predicate. California law with respect

to unfair conduct is currently in flux. Conduct is unfair either when it threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition, or when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.

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

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

### [HN35](#) [+] State Regulation, Claims

An allegation of a statutory violation is an allegation of unlawful conduct, rather than unfair or deceptive conduct. However, a violation of California Uniform Trade Secrets Act (CUTSA) cannot form the basis of an Unfair Competition Law claim because of CUTSA's preemptive scope.

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

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

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

### [HN36](#) [+] State Regulation, Claims

Unfair Competition Law (UCL) claims that are based on fraudulent conduct must meet Fed. R. Civ. P. 9(b)'s heightened pleading standard, meaning that the who, what, when, where, and how of the fraudulent conduct, as well as what conduct/statement is misleading and why it is false, must be expressly alleged. Although other paragraphs in a complaint may indicate fraudulent conduct, the shotgun incorporation by reference of literally every prior allegation that precedes a UCL claim is improper and does not meet Fed. R. Civ. P. 8 standards, let alone Rule 9 standards.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

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

### [HN37](#) [+] Breach of Contract Actions, Elements of Contract Claims

The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. The scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract. Although breach of the implied covenant often is pleaded as a separate count, a breach of the implied covenant is necessarily a breach of contract. However, if the plaintiff's allegations of breach of the covenant of good faith do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated. That is, where breach of an actual contract term is alleged, a separate implied covenant claim, based on the same breach, is superfluous.

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

## **HN38** [+] Complaints, Requirements for Complaint

Shotgun pleading is improper and does not provide sufficient notice.

**Counsel:** [\*\*1] For Deerpoint Group, Inc., an Illinois corporation, Plaintiff: Shane Garrett Smith, LEAD ATTORNEY, McCormick Barstow LLP, Fresno, CA; Vanessa M. Cohn, LEAD ATTORNEY, McCormick Barstow Sheppard Wayte & Carruth LLP, Fresno, CA; David R. McNamara, McCormick Barstow Sheppard Wayte & Carruth, LLP, Fresno, CA.

For Agrigenix, LLC, a Delaware limited liability company, Sean Mahoney, Defendants: Charles Doerksen, LEAD ATTORNEY, Doerksen Taylor Stokes LLP, Fresno, CA.

**Judges:** Anthony W. Ishii, SENIOR UNITED STATES DISTRICT JUDGE.

**Opinion by:** Anthony W. Ishii

## **Opinion**

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### **[\*1216] ORDER ON DEFENDANTS' MOTION TO DISMISS**

(Doc. No. 10)

This is a business dispute involving intellectual property and trade secrets between Plaintiff Deerpoint Group, Inc. ("Deerpoint") and Defendants Agrigenix, LLC ("Agrigenix") and Sean Mahoney ("Mahoney").<sup>1</sup> Deerpoint brings federal [\*1217] claims for violations of [15 U.S.C. § 1125](#) (False Advertising) and [18 U.S.C. § 1836 \(Defend Trade Secrets Act \("DTSA"\)\)](#), state law statutory claims for violations of [Cal. Civ. Code § 3426.1 \(California Uniform Trade Secrets Act \("CUTSA"\)\)](#), [Cal. Bus. & Prof. Code § 17200](#) (Unfair Competition ("UCL")), two claims for breach of contract (two different contracts) and two related claims for breach of the covenant of good faith and fair dealing, and intentional interference with [\*\*2] prospective economic advantage ("IIPEA"). Currently before the Court is Defendants' [Rule 12\(b\)\(6\)](#) motion to dismiss. For the reasons that follow, Defendants' motion will be granted in part and denied in part.

### **RULE 12(b)(6) FRAMEWORK**

**HN1** [+] Under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#), a claim may be dismissed because of the plaintiff's "failure to state a claim upon which relief can be granted." [Fed. R. Civ. P. 12\(b\)\(6\)](#). A dismissal under [Rule 12\(b\)\(6\)](#) may be based on the lack of a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. See [Mollett v. Netflix, Inc., 795 F.3d 1062, 1065 \(9th Cir. 2015\)](#). In reviewing a complaint under [Rule 12\(b\)\(6\)](#), all well-pleaded allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. [Kwan v. SanMedica, Int'l, 854 F.3d 1088, 1096 \(9th Cir. 2017\)](#). However, complaints that offer no more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." [Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#); [Johnson v. Federal Home Loan Mortg. Corp., 793 F.3d 1005, 1008 \(9th Cir. 2015\)](#). The Court is "not required to accept as true allegations that

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<sup>1</sup> Defendant Eva Kwong was dismissed from this lawsuit without prejudice through a [Rule 41\(a\)\(1\)\(A\)\(i\)](#) dismissal on November 1, 2018. [See Doc. No. 22](#).

contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." [Seven Arts Filmed Entm't, Ltd. v. Content Media Corp. PLC](#), 733 F.3d 1251, 1254 (9th Cir. 2013). [HN2](#) To avoid a [Rule 12\(b\)\(6\)](#) dismissal, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible [\\*\\*3](#) on its face." [Iqbal](#), 556 U.S. at 678; [Mollett](#), 795 F.3d at 1065. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." [Iqbal](#), 556 U.S. at 678; [Somers v. Apple, Inc.](#), 729 F.3d 953, 959 (9th Cir. 2013). "Plausibility" means "more than a sheer possibility," but less than a probability, and facts that are "merely consistent" with liability fall short of "plausibility." [Iqbal](#), 556 U.S. at 678; [Somers](#), 729 F.3d at 960. The Ninth Circuit has distilled [HN3](#) the following principles for [Rule 12\(b\)\(6\)](#) motions: (1) to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively; (2) the factual allegations that are taken as true must plausibly suggest entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation. [Levitt v. Yelp! Inc.](#), 765 F.3d 1123, 1135 (9th Cir. 2014). In assessing a motion to dismiss, courts may consider documents attached to the complaint, documents incorporated by reference in the complaint, or matters subject to judicial notice. [In re NVIDIA Corp. Sec. Litig.](#), 768 F.3d 1046, 1051 (9th Cir. 2014). If a motion to dismiss is granted, [\[\\*1218\]](#) "[the] district [\\*\\*4](#) court should grant leave to amend even if no request to amend the pleading was made . . ." [Ebner v. Fresh, Inc.](#), 838 F.3d 958, 962 (9th Cir. 2016). However, leave to amend need not be granted if amendment would be futile or the plaintiff has failed to cure deficiencies despite repeated opportunities. [Garmon v. County of L.A.](#), 828 F.3d 837, 842 (9th Cir. 2016).

## BACKGROUND FACTS

From the Complaint, Deerpoint is in the business of chemical water treatment solutions for agriculture irrigation. Over the past decade, Deerpoint has enjoyed explosive demand for its precision-fed patented fertilizers at custom irrigation sites. Deerpoint custom builds each chemical feed system for each site. Deerpoint sells its products and services within California and Arizona. Deerpoint utilizes integrated systems of fertilizers, which are custom-blended through proprietary methods, and applied to crops through data-controlled mechanical delivery systems. Proprietary blends of fertilizers and foliar products<sup>2</sup> are the backbone of Deerpoint's product line. Deerpoint's fertilizers are tailored to a variety of crops and conditions. Further, at the heart of Deerpoint's fertigation<sup>3</sup> program is patented precision feeding equipment, which has been nicknamed the "White Box" by Deerpoint's customers. Deerpoint has invested millions [\\*\\*5](#) of dollars customizing its fertilizers, foliar products, and equipment to a wide range of crops and environments, and archives its products and services for the growers that use its services. The confidential, proprietary, and trade secret nature of Deerpoint's fertilizer and foliar blends is essential to Deerpoint's business, and is the source of much business goodwill.

Deerpoint puts a premium on its employees to maintain strict confidentiality over its proprietary formulations, practices, methods, insights, intellectual property, and other information. Since Deerpoint's founding in 1993, it has required its employees and executives to execute a detailed confidentiality agreement, the Employees Invention and Secrecy Agreement (the "EIS"). Deerpoint steadfastly enforces the EIS. Since at least 2000, every employee signs the EIS. Deerpoint's employee handbook also contains policies relating to confidentiality, and in 2016, Deerpoint implemented a new-hire training program that highlighted its policies, including the confidentiality policies. Deerpoint also regulates the access and exchange of information within the company, restricts access to certain information, and ensures that its [\\*\\*6](#) confidential information is confined to company-owned computers.

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<sup>2</sup> "Foliar feeding" is the application of nutrients to crops by spraying liquid fertilizer directly on to the leaves.

<sup>3</sup> "Fertigation" refers to a fertilization process whereby fertilizers are added to the water being used to irrigate crops, and reflects a combination of irrigation and fertilization.

Until October 4, 2017, Mahoney was the Chief Executive Officer of Deerpoint. Mahoney signed the EIS and an updated EIS in 2016. Despite the EIS, Mahoney acted to gain access to, and download from, a central computer Deerpoint's confidential, proprietary, and trade secret information. Further, prior to his departure, Mahoney was seen removing files and documents relating to formulation manufacturers, vendors, and suppliers. Mahoney and Deerpoint mutually agreed to terminate his employment on October 4, 2017.

On October 3, 2017, Mahoney filed a lawsuit in the Fresno County Superior Court against Deerpoint ("the Lawsuit"). On October 7, 2017, Mahoney filed an administrative [\*1219] complaint with the California Department of Fair Housing and Employment against Deerpoint. These matters were stayed pending settlement negotiations.

Sometime in October 2017, Mahoney launched a direct competitor to Deerpoint, Agrigenix. Mahoney is the president and chief executive officer of Agrigenix. Agrigenix promotes itself as an alternative to Deerpoint by feeding crops the precise nutrients need, in exactly the right amounts, at the right time for [\*\*7] optimum growth. Agrigenix states that it provides a full line of nutrients and fertilizer blends formulated with proprietary chemistries. However, the blends are pirated from Deerpoint. Agrigenix also has foliar blends that mimic Deerpoint. Mahoney and Agrigenix possessed Deerpoint's confidential, proprietary, and trade secret information, and Mahoney founded Agrigenix on trade secrets misappropriated from Deerpoint. Agrigenix has told Deerpoint's customers that it is "the same as Deerpoint with a twist." Four large clients of Deerpoint have switched to Agrigenix. Further, circumstances suggest that Agrigenix/Mahoney may have taken steps to steal and copy Deerpoint's White Box technology.

On January 8, 2018, Mahoney and Deerpoint signed a Settlement Agreement ("the Settlement"). The Settlement resolved the Lawsuit and all other claims that the Mahoney and Deerpoint had against each other. The Settlement included a provision that Paragraph 3 of the EIS remained in full force, a provision in which Mahoney acknowledged the confidential and proprietary nature of Deerpoint's trade secret information, a provision in which Mahoney agreed not to divulge or use Deerpoint's trade secrets and [\*\*8] to take steps to protect such information from disclosure, and to return Deerpoint's property that was in Mahoney's possession. Around March 2018, Agrigenix installed at least four devices that approximate Deerpoint's White Boxes.

## **DEFENDANTS' MOTION TO DISMISS**

### **1. SETTLEMENT BAR — 1st, 2nd, 5th, 7th, 8th, and 9th Causes of Action**

#### Defendants' Argument

Defendants argue that the Settlement bars all claims based on conduct that occurred up to and including January 8, 2018. The language of the Settlement is broad and settles all claims between Deerpoint and Defendants, regardless of whether the claims were known or unknown, that existed before and at the time the settlement was executed. Although Agrigenix was not a signatory to the settlement, its conduct is encompassed by the Settlement as a third-party beneficiary because it was a person acting under, by, through, or in concert with Mahoney.

In reply, Defendants argue that Deerpoint has judicially admitted through the allegations in the complaint that Agrigenix acted together and in concert with Mahoney. That judicial admission shows that Deerpoint's claims against Agrigenix were covered by the Settlement. Defendants also argue that a claim [\*\*9] under CUTSA arises against a given defendant only once, at the time of the initial misappropriation, and that all other wrongful uses of the particular trade secret augments the single claim. Since the Settlement resolved Deerpoint's trade secret cause of action, and there is only one misappropriation claim possible against any one person, Deerpoint's trade secret misappropriation claims that are based on post-Settlement conduct are barred.

#### Plaintiff's Opposition

Deerpoint argues that the Settlement does not bar claims that accrued after the Settlement was signed, and that the Complaint [\*1220] contains many such claims. For example, the Settlement reaffirmed the confidential relationship between Mahoney and Deerpoint with respect to its trade secrets and obligated Mahoney to return Deerpoint's property/confidential information. These provisions preserved the ability of Deerpoint to bring a post-Settlement CUTSA claim.

With respect to claims that accrued pre-Settlement, the Settlement does not bar such claims as to Agrigenix. First, Defendants' argument is based on the inferential facts that Deerpoint knew that Agrigenix was up and running by January 8, 2018, and that the Settlement's release [\*\*10] included any pre-existing-yet-unknown claims it had against Agrigenix. This logic leads to the absurd result that Deerpoint released each and every former employee who went to work at Agrigenix simply because Deerpoint knew of the new employment on January 8, 2018. Second, Agrigenix has not shown that the signatories intended for it to be a third-party beneficiary. Agrigenix does not provide an ordinary interpretation of the isolated term "acting in concert," nor does it account for other portions of the settlement agreement. For example, the Settlement defines its scope by reference to the lawsuit brought by Mahoney and the potential cross claims that could have been brought by Deerpoint, but Agrigenix was not a party to that lawsuit. The Settlement's release defines the subject matter released in the same way. At best, there is ambiguity in the Settlement, and that ambiguity is a question of fact that cannot be resolved in this motion.

#### Relevant Contractual Provisions

Under the "Recitals" portion of the Settlement, the Settlement explains that Mahoney filed an administrative complaint with the California Department of Fair Employment and Housing, on October 6, 2017. See Settlement ¶ [\*\*11]. A lawsuit was filed by Mahoney in the Fresno County Superior Court on October 3, 2017, known as "the Lawsuit," which included the October 6 DFEH complaint. Id. at ¶ C. Deerpoint indicated an intent to file a cross-complaint against Mahoney, or remove the Lawsuit and then file various counterclaims against Mahoney, which would include claims for "breach of fiduciary duty, misappropriation of trade secrets, unfair competition, and violation of secrecy agreements." Id. at ¶ D. However, the parties "settled, fully and finally, all claims the Parties might have against each other up to and including the date of execution of this [Settlement] including, but not limited to, those claims which have been or could have been made in the Lawsuit." Id. at E.

The "Complete General Release" reads:

Except as stated herein, in consideration for the promises set forth in this Agreement, each Party does hereby for themselves and for their heirs, representatives, attorneys, executors, administrators, successors, and assigns, release, acquit, remise, and forever discharge the other Party, including each of their respective affiliates, subsidiaries, parent companies, related companies, partners, officers, [\*\*12] directors, managers, servants, agents, employees, former employees, representatives, insurance carriers, and attorneys, past or present, and all persons acting under, by, through, or in concert with any of them (collectively, the "Releasees"), from any and all actions, causes of action, obligations, costs, expenses, damages, losses, claims, liabilities, suits, debts, demands, and benefits (including attorneys' fees and costs), of whatever character, in law or in equity, known or unknown, suspected or unsuspected, matured or unmatured, of any kind or nature whatsoever, based [\*1221] on any act, omission, event, occurrence, or nonoccurrence from the beginning of time to the date of execution hereof, including but not limited to any claims or causes of action arising out of or in any way relating to Plaintiff's employment, his alleged contract claims, or which have been or could have been made in the Lawsuit (collectively "the claims") as well as any threatened claims in any cross-complaint or counterclaims. Exception: Nothing in this Agreement shall release any of the Parties from any of their rights or obligations under the terms of this Agreement.

Id. at ¶ 7.

The "General Release of Unknown [\*\*13] Claims" section reads:

For the purpose of implementing a full and complete release, the Parties expressly acknowledge that this release is intended to include in its effect, without limitation, claims that the Parties did not know or suspect to exist at the time of execution hereof, regardless of whether the knowledge of such claims, or the facts upon which they might be based, would materially have affected the settlement of this matter, and the consideration given under this Agreement is also for the release of those claims and contemplates the extinguishment of any such unknown claims. In furtherance of this settlement, the Parties waive any rights they may have under [California Civil Code § 1542](#) (and other similar statutes and regulations). . . .<sup>4</sup>

Id. at ¶ 10.

Section 14 of the Agreement contains subparagraphs and is entitled "Agreement Not to Infringe or Misappropriate [Deerpoint's] Intellectual Property." Paragraph 14.3, entitled "Acknowledgment of [Deerpoint's] Confidential, Proprietary, and Trade Secret Information," and Paragraph 14.4, entitled "Non-Disclosure," read:

Plaintiff acknowledges that he had occasion to access, acquire, and generate knowledge and information related to DPG's business and technology, [\*\*14] which DPG maintains as confidential or proprietary in order to maintain its competitive value. Plaintiff further acknowledges that DPG considers this information proprietary within the meaning of Paragraph 3 of Plaintiff's EIS Agreement with DPG attached as Exhibit "3" hereto, and which remains in full force and effect notwithstanding Paragraph 7 of this Agreement. Plaintiff further acknowledges that the confidential and proprietary information belonging to DPG comprises Trade Secret information ("Trade Secrets") belonging to DPG in that such information includes, without limitation, technical or nontechnical data, formulas, patterns, processes, machines, compounds and compositions, automated equipment, automated information reporting to customers, compilations, programs, laboratory or technical notebooks, financial data, financial plans, business plans, product or service plans, and lists of actual or potential customers or suppliers which (a) derive economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (b) are the subject of efforts [\*\*15] that are reasonable [\*1222] under the circumstances to maintain its secrecy. By way of examples only, and not limitation, Plaintiff agrees that confidential, proprietary, and Trade Secret information belonging to DPG that is subject to this Agreement includes: (1) DPG macro and micro fertilizer formulations, whether applied via fertigation, foliar, or by ground; (2) DPG water treatment formulations; (3) All chemical delivery equipment, systems and methods for DPG fertilizer and water treatment products; (4) Commodity fertilizers delivered via DPG proprietary equipment, systems, or methods and (5) Or modifications thereof which would be considered obvious iterations of DPG IP.

Id. at ¶ 14.3.

Plaintiff shall not divulge, communicate, use to the detriment of DPG or for the benefit of any other person or entity, or misuse in any way, any confidential, proprietary, or Trade Secret information belonging to DPG (collectively "DPG Information") identified in Paragraph 14.3 above. Any DPG Information now known or hereafter acquired by Plaintiff shall be deemed a valuable, special, and unique asset of DPG that is received by Plaintiff in confidence and as a fiduciary of DPG, and such Plaintiff shall remain [\*\*16] a fiduciary to DPG with respect to all of such DPG Information. In addition, Plaintiff (1) will receive and hold all DPG Information in trust and in strictest confidence, (2) will take reasonable steps to protect the DPG Information from disclosure and will, in no event, take any action causing, or fail to take any action reasonably necessary to prevent, any DPG Information from losing its character as DPG Information, and (3) except as required by law, will not, directly or indirectly, use, misappropriate, disseminate or otherwise disclose any DPG Information to any third party without the prior written consent of DPG, which may be withheld in DPG's absolute and sole discretion.

Id. at ¶ 14.4.

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<sup>4</sup> [Cal. Civ. Code § 1542](#) reads: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

Paragraph 14.5, entitled "Return of Tangible and Intangible Property Belonging to [Deerpoint]," required Mahoney to return any Deerpoint property, prohibited Mahoney from duplicating Deerpoint property, required Mahoney to destroy any electronic formats containing Deerpoint property, and acknowledged that Paragraph 4 of the EIS remained in force, notwithstanding the Settlement's release provision.

Finally, the "EIS Agreement" referenced is the May 9, 2016 EIS, which Deerpoint required all its employees [\*\*17] to sign. See id. at ¶ 14.2. Paragraph 4 of the EIS acknowledged that certain items provided to Mahoney or to which he had access were Deerpoint's property, and that Mahoney would not provide such property to third parties. See Complaint at Ex. 1 at ¶ 4. Paragraph 3 of the EIS addresses Deerpoint's confidential, proprietary, and trade secret information. See Complaint ¶ 65 & Ex. 1 at ¶ 3. Paragraph 3 of the EIS reads in relevant part:

I agree that . . . I shall not either during or after my employment with [Deerpoint] (a) disclose to any third party, (b) use, or (c) publish any information which is secret and confidential to [Deerpoint]. Such information, it is understood, may include, but is not limited to, knowledge and data relating to processes, machines, compounds and compositions, formulas, business plans, and marketing and sales information originated, owned, controlled or possessed by [Deerpoint] and which give [Deerpoint] an opportunity to obtain an advantage over its competitors. I further understand that as a guide I am to consider information originated, [\*1223] owned, controlled, or possessed by [Deerpoint] which is not disclosed in printed publications stated to be available for [\*\*18] distribution outside [Deerpoint] as being secret and Confidential to [Deerpoint]. In instances wherein doubt exists in my mind as to whether information is secret and Confidential to [Deerpoint], I will request an opinion, in writing, from [Deerpoint].

Complaint Ex. 1 at ¶ 3.

### Discussion

#### 1. Mahoney

##### a. Pre-Settlement Claims

There is actually no dispute that the Settlement is broad and releases all claims that Deerpoint and Mahoney had against each other, whether known or unknown, that existed on or before January 8, 2018. Therefore, for the sake of clarity, to the extent that the Complaint may be read to include any claims by Deerpoint against Mahoney that existed on or before January 8, 2018, those claims will be dismissed without leave to amend.

##### b. Post-Settlement Claims

###### (1) CUTSA

**HN4** [↑] The California Supreme Court in *Cadence Design Systems, Inc. v. Avant! Corp.*, 29 Cal.4th 215, 217, 127 Cal. Rptr. 2d 169, 57 P.3d 647 (2002) addressed the following question: "Under the [CUTSA], when does a claim for trade secret infringement arise: only once, when the initial misappropriation occurs, or with each subsequent misuse of the trade secret?" Immediately after identifying the question, the California Supreme Court revealed its answer: "We conclude that in a plaintiff's action against the same defendant, the [\*\*19] continued improper use or disclosure of a trade secret after defendant's initial misappropriation is viewed under the [CUTSA] as part of a single claim of 'continuing misappropriation' accruing at the time of the initial misappropriation." Id. The California Supreme Court explained:

From our examination of the above statutes, a distinction between a 'misappropriation' and a 'claim' emerges. A misappropriation within the meaning of the [CUTSA] occurs not only at the time of the initial acquisition of the

trade secret by wrongful means, but also with each misuse or wrongful disclosure of the secret. But a claim for misappropriation of a trade secret arises for a given plaintiff against a given defendant only once, at the time of the initial misappropriation, subject to the discovery rule provided in [§ 3426.6](#). Each new misuse or wrongful disclosure is viewed as augmenting a single claim of continuing misappropriation *rather than as giving rise to a separate claim*.

[\*Id.\*](#) at 223 (emphasis added); see also [\*id.\*](#) at 227; [Cypress Semiconductor Corp. v. Superior Ct., 163 Cal. App. 4th 575, 583-84, 77 Cal. Rptr. 3d 685 \(2008\)](#).

Here, the Settlement's release is broad and essentially covers all claims or causes of action that Mahoney and Deerpoint had against each other, be they known or unknown, as of January 8, 2018. The Settlement's [\*\*20] release would include CUTSA misappropriation claims that Deerpoint had against Mahoney. Further, at the time of Settlement, Deerpoint was clearly aware that Mahoney had "misappropriated" trade secrets for purposes of CUTSA. The Settlement's "Recitals" state that Deerpoint was threatening cross-claims and counterclaims in the Lawsuit for *inter alia* misappropriation of trade secrets. See Settlement ¶ C. Under the reasoning of *Cadence Design*, when Deerpoint and Mahoney executed the Settlement, they resolved the one and only CUTSA claim that Deerpoint [\*1224] could bring against Mahoney.<sup>5</sup> See [Cadence Design, 29 Cal.4th at 217, 223, 227; Cypress Semiconductor, 163 Cal. App. 4th at 583-84](#). Although Mahoney may have continued to misappropriate the trade secrets by disclosing them to Agrigenix or using them to make competing products, those subsequent acts of misappropriation are not separate claims, they merely augment the single claim that Deerpoint could have brought against Mahoney. See *id.* Because Deerpoint can only have one trade secret misappropriation claim against Mahoney, and that claim was settled on January 8, 2018, the Settlement appears to bar Deerpoint's attempt to bring a CUTSA claim for post-Settlement acts of misappropriation of the same trade secrets. See *id.*

Deerpoint relies [\*\*21] largely on [Junction Solutions, LLC v. MBS Dev., Inc., 2007 U.S. Dist. LEXIS 86958 \(N.D. Ill. Nov. 21, 2007\)](#) to argue that its post-Settlement CUTSA claims are not barred.<sup>6</sup> In *Junction Solutions*, Junction filed suit against MBS (and others) for *inter alia* violation of the Illinois Trade Secrets Act, based on the alleged improper acquisition and use of Junction's trade secret software. See [id. at \\*4-\\*5](#). That lawsuit settled. See *id.* The settlement agreement released all claims, known or unknown or accrued or unaccrued, that the parties had against each other. See [id. at \\*18-\\*19](#). The settlement excluded actions to enforce the settlement agreement itself, and any other matter that arose after the settlement's effective date. See [id. at \\*19](#). Over a year after the settlement was executed, Junction brought a second lawsuit against MBS for *inter alia* MBS's use of the same trade secret software that was the subject of the first lawsuit. See [id. at \\*6-\\*7, \\*21](#). In declining to grant MBS's [Rule 12\(c\)](#) motion based on the settlement, the district court explained:

Junction's current lawsuit is clearly "related to" matters which occurred prior to the Settlement Agreement. That is, Junction is suing defendants for inappropriately using and/or disclosing its trade secrets--the very same trade secrets that were at issue in Junction's first suit. . . . Were this [\*\*22] to be the only relevant provision of the Settlement Agreement, the court's inquiry would be over as the Settlement Agreement would bar Junction's current suit. However, a review of the remainder of the [\*1225] Agreement muddies the water; *it is not clear*

<sup>5</sup> There is no argument by Deerpoint that Mahoney misappropriated different trade secrets after the Settlement was signed. Therefore, the Court will view the Complaint as alleging that the trade secrets that Mahoney misappropriated pre-Settlement are the same trade secrets that were allegedly misappropriated post-Settlement.

<sup>6</sup> Deerpoint also cites [Tire Hanger Corp. v. Shinn Fu Co. of Am., 2017 U.S. Dist. LEXIS 178833 \(C.D. Cal. June 7, 2017\)](#) and [Management Action Programs, Inc. v. Global Leadership & Mgmt. Resources, Inc., 2005 U.S. Dist. LEXIS 45627 \(C.D. Cal. May 18, 2005\)](#) for the proposition that parties to a release may sue for post-release conduct that is not covered by the release. The Court does not disagree with this proposition. However, that general principal is not at issue. What is at issue is whether the Settlement bars a CUTSA claim based on post-Settlement conduct and pre-Settlement misappropriated trade secrets. Neither *Tire Hanger* nor *Management Action* involved CUTSA claims, let alone the type of post-Settlement CUTSA claim alleged by Deerpoint. See [Tire Hanger, 2017 U.S. Dist. LEXIS 178833 at \\*1, \\*12](#) (listing the claims in the case, without identifying a CUTSA claim); [Management Action Programs, 2005 U.S. Dist. LEXIS 45627 at \\*12](#) (same).

that Junction intended to release claims arising from defendants' future use of the trade secrets at issue. For example, Paragraphs 6 and 7 of the Settlement Agreement require defendants to return all of Junction's confidential information relating to the trade secrets at issue, renounce ownership of any of the work they did for Junction, reaffirm their confidentiality obligations under their employment agreements with Junction, and agree that the "Junction Developments and Axapta Developments . . . are the property of [Junction]."

Defendants insist that Junction is alleging one continuous claim rather than a new claim because a claim for misappropriation of a trade secret can arise only once, when the confidential relationship between the parties is initially breached. However, *the logical extension of this argument is that Junction agreed to grant defendants complete immunity from all claims relating to their use of Junction's trade secrets, [\*\*23]* a proposition that is contradicted by the aforementioned provisions. . . . If Junction intended to release defendants from any claim arising out of defendants' future use of Junction's trade secrets, why would defendants have had to agree that those trade secrets are the property of Junction and reaffirm their confidentiality agreements with Junction beyond the Settlement Agreement?

*Id.* at \*21-\*23 (emphasis added).

Admittedly, the facts in *Junction Solutions* are very similar to the facts of this case. However, the Court is not persuaded by *Junction Solutions*.

**HN5** [↑] First, as an unpublished district court case, *Junction Solutions* is persuasive authority, it is not binding precedent. Second, no other court has adopted the relevant reasoning of *Junction Solutions*. *Junction Solutions* has been cited by one other court, and only for a proposition involving the res judicata effect of a voluntary dismissal with prejudice pursuant to a settlement. See *Fox v. Will Cnty.*, 2012 U.S. Dist. LEXIS 83122, \*14-\*15 (N.D. Ill. June 8, 2012). Third, as italicized above, the *Junction Solutions* court was not certain that the plaintiff intended to release claims arising from the defendants' future use of the trade secrets. This point depends on the ability for claims to arise [\*\*24] against the defendants in the future for their use of the trade secrets at issue. However, as quoted above, *Cadence Design* has made it clear that there are no such "future" CUTSA claims for misappropriation. **HN6** [↑] There is only one claim that arises for misappropriation under CUTSA, all "future claims," i.e. subsequent uses or disclosures, merely augment that one claim. *Cadence Design*, 29 Cal.4th at 217, 223, 227. Based on *Cadence Design*, for purposes of CUTSA, a separate future misappropriation claim against a single defendant and involving the same previously misappropriated trade secret is a legal impossibility. See *id.* Fourth, the Court cannot agree that a defendant like MBS (or Mahoney) would essentially obtain immunity for all future uses or disclosures of trade secrets. CUTSA does not preempt or displace breach of contract claims that are based on misappropriation of trade secrets. See *Cal. Civ. Code § 3426.7(b)(1)*; *Integral Dev. Corp. v. Tolat*, 675 F. App'x 700, 704 (9th Cir. 2017); *Angelica Textile Servs., Inc. v. Park*, 220 Cal.App.4th 495, 508, 163 Cal. Rptr. 3d 192 (2013). **HN7** [↑] It is possible for plaintiffs like Deerpoint and *Junction Solutions* to obtain monetary damages and injunctive relief for the subsequent use or disclosure of a trade [\*1226] secret as part of a breach of contract/settlement claim. See *Cal. Civ. Code § 3422(3)*; *Densmore v. Manzarek*, 2008 Cal.App.Unpub. LEXIS 4367, \*142-\*143 (2008) (holding that an injunction would be proper in the context of a breach of contract in order to prevent the artist-defendants [\*\*25] from performing under some variation of The Doors, because the artist-plaintiffs would have to file lawsuit after lawsuit to recover profits).

Deerpoint also argues that *Cadence Design* states that "parties to a release in a trade secret dispute remain free to fashion the release as broadly or narrowly as they choose." *Cadence Design*, 29 Cal.4th at 226. Deerpoint contends that the Settlement reaffirmed the confidential relationship between the parties with respect to trade secrets and required Mahoney to return "trade secret properties" to Deerpoint, thus preserving Deerpoint's right to future actions under California law based on new misappropriations. Deerpoint's argument is also a point made by *Junction Solutions*. See *Junction Solutions*, 2007 U.S. Dist. LEXIS 86958 at \*23.

Deerpoint is correct that § 14 of the Settlement in part addresses and reaffirms confidentiality/trade secret provisions of the EIS and requires Mahoney to return "trade secret properties." See *id.* at ¶¶ 14.3-14.5. However, the Court is not convinced that these aspects of the Settlement are sufficient to preserve/create post-Settlement

CUTSA claims. [HN8](#)<sup>7</sup> First, CUTSA does not create any affirmative obligations to return trade secrets.<sup>7</sup> That obligation is created by the Settlement.<sup>8</sup> A failure to return misappropriated [\[\\*\\*26\]](#) trade secrets alone violates only the obligations of the Settlement; it violates no provision of CUTSA. Second, the Court is unaware of any place in the Settlement that addresses either obligations or causes of action under CUTSA. The Settlement reaffirms prior contractual obligations and provides for injunctive relief. However, there is no mention of CUTSA or an express attempt within the Settlement to resurrect or create a future CUTSA claim based on previously misappropriated trade secrets. It is unknown why a reaffirmation of a prior contractual obligation, without any reference to CUTSA, should be read as creating new CUTSA claims that would otherwise be contrary to CUTSA itself/*Cadence Design's* recognition that there is only one misappropriation claim against a single defendant for misappropriation of a particular trade secret.<sup>9</sup> While the Court agrees that the Settlement does not prohibit future actions under "California law" regarding the misappropriated secrets, in the absence of any reference to CUTSA, that [\[\\*1227\]](#) law would likely be the California law of contracts, not CUTSA. Under California law, as explained by *Cadence Design*, the parties have resolved Deerpoint's CUTSA claim. [\[\\*\\*27\]](#) If the parties truly intended to create what would be a claim previously unknown to CUTSA through the Settlement, then language that deals with CUTSA specifically should have been used. As it stands, the Court sees future contract related claims implicated by the Settlement, but not CUTSA claims for previously misappropriated trade secrets. Third, while *Cadence Design* held that parties to a release could make it as broad or as narrow as they like, no explanations or examples were given as to what the California Supreme Court envisioned. It seems to the Court that a release may exclude CUTSA claims, or expressly incorporate CUTSA remedies for a breach of the release, or estop a party from raising certain defenses to a CUTSA claim based on the further use of a previously misappropriated trade secret. Such provisions would affect the breadth of the release, prevent the misappropriator from obtaining a *de facto* license, and, at least with respect to the first and third examples, may give an indication that parties intended for a CUTSA claim to persist. However, *Cadence Design* did not hold that [HN9](#)<sup>10</sup> merely reaffirming a prior existing contractual obligation in a release would have the effect [\[\\*\\*28\]](#) of creating a new CUTSA cause of action where none would otherwise exist. The Court is unaware of any California case that has interpreted the relevant language of *Cadence Design* consistent with Deerpoint's position, and Deerpoint has cited none. Therefore, the Court cannot conclude that the mere fact that prior contractual obligations were reaffirmed, or that Mahoney was obligated to return or destroy Deerpoint property, would create a totally new and heretofore legally unrecognized CUTSA claim.

In sum, pursuant to *Cadence Design*, dismissal of Deerpoint's post-Settlement based CUTSA claims without leave to amend is appropriate.<sup>10</sup>

## (2) DTSA

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<sup>7</sup> To be clear, the Court is not holding that a successful CUTSA plaintiff could not obtain injunctive relief that required the misappropriator to return misappropriated trade secrets and destroy copies. In fact, such relief would seem to be entirely reasonable, considering the nature of a trade secret. The Court is merely noting that this is something that is not expressly part of CUTSA.

<sup>8</sup> The Court notes that Paragraph 4 of the EIS also obligates Mahoney to return Deerpoint's property upon his leaving the company.

<sup>9</sup> [HN10](#)<sup>11</sup> Because Mahoney's misappropriation of trade secrets is clearly a material breach of the EIS, Deerpoint technically had the option to terminate the contract. See *Multani v. Knight*, 23 Cal. App. 5th 837, 852, 233 Cal. Rptr. 3d 537 (2018) ("[W]hen one party to a contract breaches a material term of the contract, the other party has the option to terminate the contract for cause."). Reaffirmance of the relevant portions of the EIS indicates that the various obligations of the EIS remain in effect, irrespective of any contrary argument that might have otherwise been possible from the Settlement.

<sup>10</sup> Again, the Court emphasizes that Deerpoint has not identified any trade secrets that were misappropriated by Mahoney post-Settlement. Therefore, the only trade secrets that are at issue are trade secrets that were misappropriated by Mahoney pre-Settlement.

**HN11**[] The DTSA is largely modelled after the Uniform Trade Secrets Act ("UTSA"). See Great Am. Opportunities, Inc. v. Kent, 352 F. Supp. 3d 1126, 2018 U.S. Dist. LEXIS 180741, \*29-\*30 (D. Colo. Oct. 22, 2018); Brand Energy & Infrastructure Servs. v. Irex Contracting Grp., 2017 U.S. Dist. LEXIS 43497, \*16 (E.D. Pa. Mar. 23, 2017). California adopted the UTSA without significant change through enactment of CUTSA. See Cadence Design, 29 Cal.4th at 221. States that have adopted the UTSA, like California, "consistently apply a single claim theory to misappropriations of trade secrets." Allied Erecting & Dismantling Co. v. Genesis Equip. & Mfg., 805 F.3d 701, 705 (6th Cir. 2015). Further, the CUTSA provisions relied upon and examined by *Cadence Design* are materially the same as the corresponding sections of the DTSA. Cf. Cadence Design, 29 Cal.4th at 221-23 (examining Cal. Code Civ. §§ 3426.1(a) (definition of "improper means"), 3426.1(b) (definition of "misappropriation"), **[\*\*29]** 3426.1(d) (definition of "trade secret"), 3426.6 ("Limitations period; accrual of action") with 18 U.S.C. §§ 1836(d) ("Period of limitations"), 1839(3) (definition of "trade secret"), **[\*1228]** 1839(5) (definition of "misappropriate"), 1839(6) (definition of "improper means"). Of note, both the DTSA and CUTSA provide a three-year limitations period for misappropriation and explain that "a continuing misappropriation constitutes a single claim of misappropriation." 18 U.S.C. § 1836(d); Cal. Code Civ. 3426.6. Deerpoint has cited no cases that indicate the DTSA should be construed differently from the CUTSA, as interpreted by *Cadence Design*.

In the absence of contrary authority, and given the similarity between the DTSA and CUTSA, the Court will interpret Deerpoint's DTSA claims consistently with its CUTSA claims. Therefore, for the same reasons that the Settlement bars Deerpoint's alleged post-Settlement CUTSA claims, the Court concludes that Deerpoint's post-Settlement DTSA claims are also barred by the Settlement. Dismissal without leave to amend of Deerpoint's DTSA claims against Mahoney is appropriate.

## 2. Agrigenix<sup>11</sup>

**HN12**[] "A third-party beneficiary is someone who may enforce a contract because the contract is made expressly for his benefit." Matthau v. Superior Ct., 151 Cal.App.4th 593, 602, 60 Cal. Rptr. 3d 93 (2007). "A putative third **[\*\*30]** party's rights under a contract are predicated upon the contracting parties' intent to benefit it." Hess v. Ford Motor Co., 27 Cal.4th 516, 524, 117 Cal. Rptr. 2d 220, 41 P.3d 46 (2002) (quoting Garcia v. Truck Ins. Exchange, 36 Cal. 3d 426, 436, 204 Cal. Rptr. 435, 682 P.2d 1100 (1984)); see also Rodriguez v. Oto, 212 Cal. App. 4th 1020, 1028, 151 Cal. Rptr. 3d 667 (2013). That is, the "test for determining whether a contract was made for the benefit of a third party is whether an intent to benefit a third person appears from the terms of the contract." Cargill, Inc. v. Souza, 201 Cal.App.4th 962, 967, 134 Cal. Rptr. 3d 39 (2011); Prouty v. Gores Tech. Grp., 121 Cal.App.4th 1225, 1232, 18 Cal. Rptr. 3d 178 (2004). "Ascertaining this intent is a question of ordinary contract interpretation." Hess, 27 Cal.4th at 524; Garcia, 36 Cal.3d at 436. A contract is to be interpreted to give effect to the mutual intention of the parties at the time the contract was made. See Cal. Civ. Code § 1636; Hess, 27 Cal.4th at 524; Rodriguez, 212 Cal.App.4th at 1028. The intent of the parties is "to be ascertained from the writing alone, if possible . . ." Cal. Civ. Code § 1639; Hess, 27 Cal.4th at 524; Rodriguez, 212 Cal.App.4th at 1028. A contract's words are to be understood in their "ordinary and popular sense," unless "used by the parties in a technical sense, or unless a special meaning is given them by usage . . ." Cal. Civ. Code § 1644; Ameron International Corp. v. Insurance Co. of State of Pa., 50 Cal. 4th 1370, 1378, 118 Cal. Rptr. 3d 95, 242 P.3d 1020 (2010). "Extrinsic evidence is admissible, however, to interpret an agreement when a material term is ambiguous." Wind Dancer Prod. Grp. v. Walt Disney Pictures, 10 Cal.App.5th 56, 69, 215 Cal. Rptr. 3d 835 (2017). A contractual term will be "ambiguous" where, in the context of the whole contract and under the circumstances, the term is capable of two or more reasonable constructions. **[\*1229]** TRB Investments, Inc. v. Fireman's Fund Ins. Co., 40 Cal.4th 19, 27, 50 Cal. Rptr. 3d 597, 145 P.3d 472 (2006). **HN13**[] A "contract **[\*\*31]** may be explained by reference to the circumstances under which it was made, and the matter to which it relates." Cal. Civ. Code § 1647; Hess, 27 Cal.4th at 524. "The character of a contract is not to be determined by isolating any single clause or group of clauses," rather a contract "is to be construed as a whole, so as to give effect to every part, if reasonably

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<sup>11</sup> The parties' arguments with respect to Agrigenix and the Settlement relate to the CUTSA and DTSA claims. Therefore, the Court's analysis is limited to Deerpoint's trade secret claims against Agrigenix.

practicable, each clause helping to interpret the other." *Iqbal v. Ziadeh*, 10 Cal.App.5th 1, 10, 215 Cal. Rptr. 3d 684 (2017). A third-party beneficiary "need not be named in the contract where the agreement reflects the intent of the contracting parties to benefit the unnamed party." *Cargill*, 201 Cal.App.4th at 967. However, a "third party who is only incidentally benefitted by performance of a contract is not entitled to enforce it." *Prouty*, 121 Cal.App.4th at 1233. "[T]he circumstance that a literal contract interpretation would result in a benefit to the third party is not enough to entitle [the third party] to demand enforcement [of the contract]." *Hess*, 27 Cal.4th at 524 (quoting *Neverkovec v. Fredericks*, 74 Cal.App.4th 337, 348, 87 Cal. Rptr. 2d 856 (1999)). Generally, whether a third party is an intended beneficiary under a contract is a question of fact, but if the issue "can be answered by interpreting the contract as a whole and doing so in light of the uncontradicted evidence of the circumstances and negotiations of the parties making the contract, the issue becomes one of law . [\*\*32] . . ." *Souza v. Westlands Water Dist.*, 135 Cal.App.4th 879, 891, 38 Cal. Rptr. 3d 78 (2006).

Despite the above principles of third party beneficiary contract law, there is tension in California courts regarding the proof necessary to establish standing as a third-party beneficiary. See *Iqbal*, 10 Cal.App.5th at 13 n.2. By describing the arguments before it, the *Iqbal* court explained the two different approaches taken by California courts:

Plaintiff relies on [Neverkovec] which held a third party could not rely solely on a literal interpretation of the contractual language to prove he was an intended third-party beneficiary. Defendant relies on [Rodriguez], which held if the requisite intent to make someone a third-party beneficiary appears unambiguously from the face of the contract, the third party makes a prima facie showing of entitlement merely by proving the contract where the opposing party introduces no evidence to establish the contract is ambiguous.

*Id.* The *Iqbal* court noted that it had addressed the competing approaches in an earlier case, *Cline v. Homuth*, 235 Cal.App.4th 699, 185 Cal. Rptr. 3d 470 (2015), but in neither case did it take a side. See *id.*

The Court finds a passage from *Cline* to be particularly instructive in this case. *Cline* arose in the context of bench trial. *Cline* examined and analyzed a number of third party beneficiary cases: *Hess*, *Neverkovec*, *Rodriguez*, *General Motors Corp. v. Superior Ct.*, 12 Cal.App.4th 435, 15 Cal. Rptr. 2d 622 (1993), *Lama v. Comcast Cablevision*, 14 Cal.App.4th 59, 17 Cal. Rptr. 2d 224 (1993), and [\*\*33] *Appleton v. Waessl*, 27 Cal.App.4th 551, 32 Cal. Rptr. 2d 676 (1994). *HN14* After describing these cases, *Cline* concluded:

[T]he cases vary as to their approach in determining the scope of a general release and what evidence is necessary to obtain or defeat summary judgment on the basis that the general release bars a claim against another tortfeasor. It is consistently clear, however, that the law permits a plaintiff who opposes enforcement of a general release by a third [\*\*1230] party to offer extrinsic evidence as to the circumstances surrounding negotiation and signing of the release to attempt to show that releasing "any other person," meaning everyone, does not comport with the parties' intent. Such evidence was lacking in *General Motors*, *Lama*, and *Rodriguez*. Such evidence was present in *Appleton*, *Neverkovec* (where the language of the release was ambiguous as well), and *Hess*. The issue here is once Homuth presented evidence to show she was an intended beneficiary of the release, whether Cline offered competent evidence of the parties' intent and, if so, whether this evidence was sufficient to show the parties to the release did not intend to benefit Homuth, but rather to exclude her from the protection of the release, despite its plain language which extended [\*\*34] to the "world."

*Cline*, 235 Cal.App.4th at 709-10.

Here, there is a reasonable argument that Agrigenix is a third-party beneficiary to the contract. The plain language of the release is not limited to claims by or against Mahoney or Agrigenix, nor is limited to claims that arise from Mahoney's employment or to claims that relate to the Lawsuit. The release applies to every possible claim the parties could have against each other, and it identifies numerous other persons and entities as being "released" from those possible claims, including "employees," "agents," and "subsidiaries." If the release were intended to only cover Agrigenix and Mahoney, listing the numerous "third parties" would be unnecessary. Based on the plain language of the release, Agrigenix is arguably an "affiliate" or a "related company" because it was founded and run by Mahoney, or a "person acting under, by, through, or in concert with [Mahoney]," because it used the trade

secrets acquired by Mahoney. Settlement ¶ 7. Through any one of these categories, Agrigenix would be a third-party beneficiary and, as discussed above with respect to Mahoney, all CUTSA claims against it would be barred.

On the other hand, while Deerpoint does not provide alternative [\*\*35] interpretations with respect to creating ambiguous meanings, Deerpoint does address the context of the Settlement, which is consistent with the "Recitals" section of the Settlement, and argues that Agrigenix's arguments depend on Deerpoint knowing that Agrigenix was up and running on January 8, 2018. The Court takes the latter argument as indicating that Deerpoint did not know of Agrigenix's existence. As indicated above, the Recitals explain that Mahoney is a former employee of Deerpoint who filed administrative complaints and the Lawsuit, the Lawsuit was stayed for settlement negotiations, Deerpoint threatened cross-complaints and counterclaims regarding trade secrets, and that the parties "settled, fully and finally, all claims the Parties [i.e. Mahoney and Deerpoint] might have against each other up to and including the date of execution of this Agreement including, but not limited to, those claims which have been or could have been made in the Lawsuit." Settlement at ¶¶ A-E. The context of the Settlement therefore centers around the Lawsuit and the claims that could have been made as part of the Lawsuit, even if the Lawsuit was removed to federal court. The Lawsuit involved claims [\*\*36] by and against Deerpoint and Mahoney only, it would not involve claims against Agrigenix. Although the language of the Settlement and its release are broader than the Lawsuit, the Lawsuit was nevertheless the impetus of the Settlement. It is not clear that Mahoney and Deerpoint would resolve the Lawsuit as well as potential claims against Agrigenix that would not be at issue during the Lawsuit. Further, Agrigenix is not named in the Settlement, [\*1231] nor do there appear to be any obligations under the Settlement that would clearly apply to Agrigenix. The Court understands that Mahoney and Agrigenix are separate entities. Given the zealousness with which Deerpoint appears to protect its trade secrets, it seems unlikely that Deerpoint would fail to mention Agrigenix or fail to include any provisions that would expressly prohibit Agrigenix from using or disclosing Deerpoint's trade secrets.<sup>12</sup> Cf. [Hess, 27 Cal.4th at 527](#) (finding that the small amount of the settlement, along with the failure to mention a third party company despite counsel for both signatories knowing of the plaintiff's claims against the third party company, indicated a lack of intent to bestow a benefit upon the third party company). Finally, if [\*\*37] Deerpoint did not know of Agrigenix's existence, it is debatable whether the parties intended to bestow a benefit on Agrigenix.

**HN15** The discussion in *Cline* illustrates that third-party beneficiary cases are usually decided after the submission of evidence regarding the parties' intent, including evidence about the negotiations and circumstances of the contract. Indeed, *Cline* distilled the legal principle that "the law permits a plaintiff who opposes enforcement of a general release by a third party to offer extrinsic evidence as to the circumstances surrounding negotiation and signing of the release to attempt to show that releasing 'any other person,' meaning everyone, does not comport with the parties' intent." [Cline, 235 Cal.App.4th at 709](#). This principle has generally been followed either through a bench trial or summary judgment. The Court does not have the benefit of such evidence in this case, nor could it **HN16** in the procedural context of a [Rule 12\(b\)\(6\)](#) motion.<sup>13</sup> See [Fed. R. Civ. P. 12\(d\)](#) (explaining that if matters

<sup>12</sup> Paragraph 14.6 in relevant part states that Mahoney recognizes and acknowledges that Deerpoint "shall be entitled to an injunction from any court of competent jurisdiction enjoining and restraining any breach or violation of any or all of the covenants set forth in Paragraphs 14.1 to 14.5 [which includes trade secret confidentiality] by [Mahoney] or any company with which he is affiliated or in which he holds an ownership interest . . . . Nothing contained in this Paragraph 14.6 shall be construed to prevent [Deerpoint] from seeking and receiving from [Mahoney], or from any company with which he is affiliated or in which he holds an ownership interest, damages sustained by [Deerpoint] . . . ." *Id.* at ¶ 14.6. This paragraph clearly addresses companies that Mahoney may work for or have some connection or ownership interest in, which would include Agrigenix. However, Paragraph 14.6 is an acknowledgement by Mahoney that Deerpoint can seek relief against such a company, it creates no actual obligations on, or penalties against, such a company, nor does it guarantee injunctive relief will issue against such a company. Paragraph 14.6 is relevant to the parties' intentions, but it does not definitively show that Agrigenix is or is not an intended third-party beneficiary.

<sup>13</sup> The Court could order the parties to present evidence, which would convert the [Rule 12\(b\)\(6\)](#) motion into a motion for summary judgment. [Fed. R. Civ. P. 12\(d\)](#). However, no party has requested conversion of the [Rule 12\(b\)\(6\)](#) motion, and it is highly likely that necessary discovery has not yet occurred. Cf. [Fed. R. Civ. P. 56\(d\)](#) (addressing denials of summary judgment

outside the pleadings are considered, the motion is converted to a [Rule 56](#) motion for summary judgment); [In re NVIDIA, 768 F.3d at 1051](#) (identifying the matters that may be considered in resolving a [Rule 12\(b\)\(6\)](#) motion). Given the procedural posture of the case, as well as the arguments [\[\\*\\*38\]](#) of the parties and the Settlement itself, Deerpoint should be given the opportunity [\[\\*1232\]](#) to submit evidence regarding the parties' intent, including the negotiations and the circumstances of the Settlement. See [Cline, 235 Cal.App.4th at 709](#).

Agrigenix's reply memorandum correctly points out that the Complaint alleges that Agrigenix acted in concert with Mahoney. Agrigenix contends that this is a judicial admission. [HN17](#)  "Judicial admissions are formal admissions in the pleadings which have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." [American Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 226 \(9th Cir. 1988\)](#). Factual assertions in a complaint, unless amended, are conclusively binding judicial admissions. *Id.*

Here, the Court cannot hold that Deerpoint has made binding judicial admissions. First, Agrigenix's invocation of a judicial admission was made for the first time in its reply, and thus, Deerpoint has not had an opportunity to respond. Second, the relevant allegations were made by Deerpoint on "information and belief." Courts appear to be reluctant to construe allegations expressly made on "information and belief" as binding judicial admissions. See [Corinth Inv'r Holdings v. Evanston Ins. Co., 2014 U.S. Dist. LEXIS 118008, \\*6 n.1 \(E.D. Tex. Aug. 24, 2014\)](#); [Carl E. Woodward, LLC v. Acceptance Indem. Co., 2011 U.S. Dist. LEXIS 3121, \\*11 \(S.D. Miss. Jan. 12, 2011\)](#); [Diarama Trading Co. v. J. Walter Thompson U.S.A., Inc., 2005 U.S. Dist. LEXIS 19496, \\*30 \(S.D. N.Y. Sep. 6, 2005\)](#). Third, even if Agrigenix acted in concert with Mahoney, and thus fits the literal [\[\\*\\*39\]](#) language of the release, that does not necessarily establish that the parties intended for Agrigenix to be a third-party beneficiary. Cf. [Hess, 27 Cal.4th at 525-27](#) (finding that the extrinsic evidence and other aspects of the settlement established that the contracting parties did not intend to release a company from liability, despite the company falling within the literal language of the release). Therefore, the Court will not hold that the relevant allegations made under "information and belief" constitute binding judicial admissions.

In sum, because the Court cannot hold on this record that Agrigenix is a third-party beneficiary, dismissal of the trade secret claims against Agrigenix on the basis of a settlement bar is inappropriate. See [Cline, 235 Cal.App.4th at 709](#).

## **2. CONVERSION OF CONTRACT TO CLAIMS TO TORTS — 1st, 2nd, 5th, 7th, 8th, and 9th Causes of Action**

### Defendants' Arguments

Deerpoint argues that contract and tort law are different branches of law and serve different functions, contract law enforces binding agreements between parties and tort law vindicates social policy. Tort damages are not to be judicially extended in order to fashion a remedy for breach of a contractual provision. The Complaint improperly attempts to bring [\[\\*\\*40\]](#) tort claims that are based on breaches of the duties imposed by the EIS and Settlement. Because these six claims represent an attempt to convert contract claims into tort claims, they should be dismissed.

### Plaintiff's Opposition

Deerpoint argues that the two cases relied upon by Defendants are distinguishable. Neither case supports the notion that tort claims that are exempt from a settlement agreement are somehow per se barred if brought alongside a claim for breach of that agreement. The arguments are merely an attempt to lay the ground [\[\\*1233\]](#) work for a petition to compel arbitration and should be rejected.

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when inadequate discovery has occurred). Therefore, the Court will not order the parties to submit evidence and convert this motion to a [Rule 56](#) motion for summary judgment.

### Discussion

Defendants' arguments are based largely on citations to two California cases: [Foley v. Interactive Data Corp., 47 Cal.3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 \(1988\)](#) and [Lazar v. Superior Ct., 12 Cal.4th 631, 646, 49 Cal. Rptr. 2d 377, 909 P.2d 981 \(1996\)](#). In *Foley*, the California Supreme Court declined to permit the recovery of tort remedies for the breach of the covenant of good faith and fair dealing. See [Foley, 47 Cal.3d at 700. HN18](#) [↑] As part of its analysis, *Foley* recognized the distinction between tort and contract law - contract law enforces the intentions of the individual contracting parties, but tort law vindicates a society's "social policy." [Id. at 683](#). *Lazar* addressed the circumstances in which a plaintiff may pursue a claim of fraudulent inducement of an employment contract. [\*\*41] [Lazar, 12 Cal.4th at 635](#). *Lazar* cited *Foley* for the proposition that tort damages should not be judicially extended in order to fashion remedies for the breach of a contract. [Lazar, 12 Cal.4th at 646](#).

[HN19](#) [↑] Consistent with *Foley* and *Lazar*, a litigant "may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations." [Aas v. Superior Ct., 24 Cal.4th 627, 643, 101 Cal. Rptr. 2d 718, 12 P.3d 1125 \(2000\)](#).<sup>14</sup> However, it is possible for the same conduct to "constitute both a breach of contract and an invasion of an interest protected by the law of torts." [Erlich v. Menezes, 21 Cal.4th 543, 551, 87 Cal. Rptr. 2d 886, 981 P.2d 978 \(1999\)](#). That is, "[c]ourts will generally enforce the breach of a contractual promise through contract law, except when the actions that constitute the breach violate a social policy that merits the imposition of tort remedies." [Aas, 24 Cal.4th at 643; Erlich, 21 Cal.4th at 551](#). "[C]onduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law." [Aas, 24 Cal.4th at 643; Erlich, 21 Cal.4th at 551](#). "An omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty." [Erlich, 21 Cal.4th at 551; Applied Equipment Corp. v. Litton Saudi Arabia Ltd., 7 Cal.4th 503, 515, 28 Cal. Rptr. 2d 475, 869 P.2d 454 \(1994\)](#).

### a. First Cause of Action

The first cause of action is for a violation of federal law, the DTSA ([18 U.S.C. § 1836](#)). As applied to the DTSA, Defendants' arguments essentially amount to [HN20](#) [↑] an attempt to impose a state law defense on a federal cause of [\*\*42] action. Such an attempt is improper and unavailing. See [Wallis v. Spencer, 202 F.3d 1126, 1144 \(9th Cir. 1999\)](#); see also [Haywood v. Drown, 556 U.S. 729, 763, 129 S. Ct. 2108, 173 L. Ed. 2d 920 \(2009\)](#) (Thomas, J., dissenting) ("Second, Florida's sovereign immunity rule violated the *Supremacy Clause* by operating as a state-law defense to a federal law."); [Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 263, 105 S. Ct. 3142, 87 L. Ed. 2d 171 \(1985\)](#) (Brennan, J., dissenting) ("... because state law defenses would not of their own force be applicable to federal causes of action.").

### [\*1234] b. Second Cause of Action

The second cause of action is for violation of CUTSA. As discussed above, there are no viable CUTSA claims alleged against Mahoney. Further, although CUTSA claims remain against Agrigenix, Agrigenix was not a signatory to either the EIS or the Settlement, and Deerpoint alleges no breach of contract claims against Agrigenix. Without a contractual duty owed by Agrigenix to Deerpoint, Agrigenix's arguments have no possible application to the remaining CUTSA claims.

### c. Fifth & Seventh Causes of Action

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<sup>14</sup> Superseded by statute on other grounds as explained in [Rosen v. State Farm Gen. Life Ins. Co., 30 Cal.4th 1070, 1079-80, 135 Cal. Rptr. 2d 361, 70 P.3d 351 \(2003\)](#).

The fifth and seventh causes of action are alleged against Mahoney for breaches of the covenant of good faith and fair dealing. There is no indication that Deerpoint is attempting to obtain tort damages for these claims. Further, there is nothing improper about Deerpoint alleging breach of contract claims as well as separately alleging [\*\*43] related claims for breaches of the covenant of good faith and fair dealing. "[HN21](#)[] Although breach of the implied covenant often is pleaded as a separate count, a breach of the implied covenant is necessarily a breach of contract." [Digerati Holdings, LLC v. Young Money Entm't, LLC](#), 194 Cal.App.4th 873, 885, 123 Cal. Rptr. 3d 736 (2011) (emphasis added) (citing [Careau & Co. v. Security Pac. Bus. Credit, Inc.](#), 222 Cal.App.3d 1371, 1393-94, 272 Cal. Rptr. 387 (1991)). As an example, Foley involved separately alleged claims for breach of contract and breach of the covenant of good faith and fair dealing. See [Foley](#), 47 Cal.3d at 662, 671, 678. Because Deerpoint's claims for breach of the covenant of good faith and fair dealing are contract claims, there is no improper expansion of tort remedies as prohibited by Foley. Dismissal of the fifth and seventh causes of action is not appropriate.

#### d. Eighth Cause of Action - IIPEA

[HN22](#)[] One of the elements of an IIPEA claim is that the defendant engaged in an independently wrongful act, that is, an act that is "wrongful by some legal measure other than the fact of interference." [Della Penna v. Toyota Motor Sales, U.S.A., Inc.](#), 11 Cal.4th 376, 393, 45 Cal. Rptr. 2d 436, 902 P.2d 740 (1995). An act is "independently wrongful" if it is "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." [Korea Supply Co. v. Lockheed Martin Corp.](#), 29 Cal.4th 1134, 1139, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003).

Deerpoint alleges that Mahoney's conduct was independent of the interference because "it violated federal and/or state laws against trade secret misappropriation, and/or [\*\*44] was dependent upon [Mahoney's] breaches of [the EIS] with Deerpoint and the covenant good faith and fair dealing implied therein, and/or was dependent upon Mahoney's breaches of his Settlement Agreement with Deerpoint and the covenant of good faith and fair dealing. . . . Defendants' conduct was wrongful, independent of any interference with the agreement or relationship that existed between Deerpoint and its customers, because such interference was facilitated by Defendants' independent misappropriation of Deerpoint's confidential, proprietary, and trade secret information, and thus falls outside the bounds of fair competition." Complaint ¶¶ 147, 148. From these allegations, Deerpoint's Complaint identifies essentially two types of wrongful acts: breaches of contract and trade secret misappropriation.<sup>15</sup>

[\*1235] [HN23](#)[] With respect to breaches of contract, including breaches of the covenant of good faith and fair dealing, see [Digerati Holdings](#), 194 Cal.App.4th at 885, this conduct does not form the basis of a valid interference with prospective economic advantage claim. Under California law, a breach of contract cannot constitute the "wrongful" conduct required for the tort of interference with prospective economic advantage. [Youngevity Int'l v. Smith](#), 2018 U.S. Dist. LEXIS 168286, \*19 (S.D. Cal. Sept. 28, 2018); [Vigdor v. Super Lucky Casino, Inc.](#), 2017 U.S. Dist. LEXIS 97681, \*22 (N.D. Cal. June 23, 2017); [JRS Products, Inc. v. Matsushita Elec. Corp. of Am.](#), 115 Cal.App.4th 168, 181-82, 8 Cal. Rptr. 3d 840 (2004); [Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.](#), 47 Cal.App.4th 464, 479, 54 Cal. Rptr. 2d 888 (1996). Therefore, dismissal of the eighth cause of action to the extent that it relies on a breach of contract as a "wrongful act" is appropriate.

<sup>15</sup> In a separate portion of Deerpoint's opposition, it references Paragraphs 81, which alleges disparaging comments by Defendants against Deerpoint to third-parties who decided to hire Agrigenix. However, the IIPEA claim expressly identifies the wrongful acts at issue in Paragraphs 147 and 148. "Disparagement" is conspicuously absent from Paragraphs 147 and 148. It is true that Paragraph 144 incorporates by reference Paragraphs 1 to 143. However, incorporating literally all 143 preceding paragraphs, without specific reference to either disparagement or Paragraph 81, does not give Defendants (or the Court) fair notice of the factual bases of the IIPEA claim. See [Weiland v. Palm Beach Cnty. Sheriff's Office](#), 792 F.3d 1313, 1321-23 (11th Cir. 2015) (describing four different types of improper pleadings that fail to give a defendant fair notice, including "the mortal sin of re-alleging all preceding counts"); [JN Grp. Holdings, Inc. v. Ryan](#), 2018 U.S. Dist. LEXIS 9215, \*7 (D. Haw. Jan. 19, 2018); [Salcido v. Vericrest Fin. & Summit Mgmt. Co., LLC](#), 2013 U.S. Dist. LEXIS 158460, \*22 (N.D. Cal. Nov. 5, 2013). The Court will not read the IIPEA claim as being based to any degree on "disparagement." See [Weiland](#), 792 F.3d at 1321-23.

With respect to trade secret misappropriation, i.e. CUTSA, this statutory claim exists separate and apart from any contract. [HN24](#)<sup>↑</sup> The duties imposed by CUTSA do not depend upon any contractual relationship. Because the duties of CUTSA are statutory and independent of contracts, the IIPEA claim does not improperly attempt to obtain tort remedies for breaches of contract. See Aas, 24 Cal.4th at 643; Erlich, 21 Cal.4th at 551. Therefore, dismissal based on an improper attempt to expand tort remedies to contract claims is not appropriate.

#### e. Ninth Cause of Action

The ninth cause of action is a statutory UCL claim. Deerpoint's statutory UCL claim exists separate and apart from any contract. [HN25](#)<sup>↑</sup> The duties imposed by the UCL do not depend upon any contractual relationship. Because the duties of the UCL are statutory and independent of contracts, this claim does not improperly attempt to obtain tort remedies for breaches of contract. See Aas, 24 Cal.4th at 643; Erlich, 21 Cal.4th at 551. Therefore, dismissal of the UCL claim based on an improper attempt to expand tort [\\*\\*46](#) remedies to contract claims is not appropriate.

### 3. CUTSA PREEMPTION — 5th, 7th, 8th, and 9th Causes of Action

#### Defendants' Arguments

Defendants argue that four the Complaint's claims are preempted by CUTSA. CUTSA is a comprehensive statute that is intended to occupy the field of common law trade secret misappropriation law. To that end, CUTSA will preempt civil, non-contractual [\[\\*1236\]](#) claims that if there is no material distinction between the wrongdoing alleged under CUTSA and wrongdoing alleged under the civil claim. The fifth, seventh, eighth, and ninth causes of action all arise from the nucleus of operative facts as Deerpoint's CUTSA claim. Therefore, these claims are preempted and should be dismissed.

#### Plaintiff's Opposition

Deerpoint argues that there are no preemption problems. The fifth and seventh causes of action (breaches of the covenant of good faith and fair dealing) are contract based, and CUTSA expressly does not preempt contractual claims. The eighth cause of action (IIPEA) is based on Defendants' disparagement of Deerpoint to four former Deerpoint clients. Since disparagement is conduct that is different from the acts supporting the CUTSA claim, the eighth cause of action is not [\\*\\*47](#) preempted. Further, the ninth claim (UCL) is properly pled and has a nucleus of fact that is separate from the CUTSA claims. Therefore, it also represents "wrongful conduct" that supports the IIPEA claim. Finally, the ninth cause of action (UCL) includes allegations that track the IIPEA claim, namely that Defendants disparaged Deerpoint. Because the UCL is grounded on disparagement, it has a nucleus of operative fact that is separate from the CUTSA claims.

#### Legal Standard

[HN26](#)<sup>↑</sup> CUTSA enjoys a comprehensive structure and breadth. Angelica Textile, 220 Cal.App.4th at 505; K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations, Inc., 171 Cal.App.4th 939, 957, 90 Cal. Rptr. 3d 247 (2009). CUTSA has a specific provision that addresses preemption. See Cal. Civ. Code § 3426.7; Angelica Textile, 220 Cal.App.4th at 505. CUTSA does not preempt or supersede any statute relating to misappropriation of trade secrets or any statute that otherwise regulates trade secrets. See Cal. Civ. Code § 3426.7(a). Importantly, CUTSA "does not affect (1) contractual remedies, whether or not based upon misappropriation of a trade secret, (2) other civil remedies that are not based upon a misappropriation of a trade secret, or (3) criminal remedies." Cal. Civ. Code § 3426.7(b). Therefore, § 3426.7 "expressly allows contractual and criminal remedies, whether or not based on trade secret misappropriation," but "implicitly preempts alternative civil remedies based on trade secret

misappropriation." [\[\\*\\*48\]](#) [\*Angelica Textile, 220 Cal.App.4th at 505\*](#). CUTSA provides the "exclusive civil remedy for conduct falling within its terms, so as to supersede other civil remedies based upon misappropriation of a trade secret." [\*Silvaco Data Systems v. Intel Corp., 184 Cal.App.4th 210, 236, 109 Cal. Rptr. 3d 27 \(2010\)\*](#).<sup>16</sup> "[T]he determination of whether a claim is based on trade secret misappropriation is largely factual." [\*Angelica Textile, 220 Cal.App.4th at 505\*](#). CUTSA preempts/supersedes civil, non-contract claims "based on the same nucleus of facts as trade secret misappropriation." [\*Silvaco Data, 184 Cal.App.4th at 232; K.C., 171 Cal.App.4th at 962; see also Angelica Textile, 220 Cal.App.4th at 506.\*](#)

### Discussion

#### a. 5th & 7th Causes of Action — Good Faith & Fair Dealing

[HN27](#)  Contract claims are expressly outside of CUTSA's preemptive scope. [See \[\\*1237\]](#) [\*Cal. Civ. Code § 3426.7\(b\)\(1\); Angelica Textile, 220 Cal.App.4th at 505; K.C., 171 Cal.App.4th at 954\*](#). Because a claim for breach of the covenant of good faith and fair dealing is a contract claim, [see Digerati Holdings, 194 Cal.App.4th at 885](#), it is expressly not preempted/superseded by CUTSA. [See Cal. Civ. Code § 3426.7\(b\)\(1\); Angelica Textile, 220 Cal.App.4th at 505; K.C., 171 Cal.App.4th at 954.](#)

#### b. 8th Cause of Action — IIPEA

[HN28](#)  The elements of a claim for IIPEA are: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional wrongful acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm proximately caused by the defendant's actions. [\*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc., 2 Cal.5th 505, 512, 213 Cal. Rptr. 3d 568, 388 P.3d 800 \(2017\); Redfearn v. Trader Joe's Co., Inc., 20 Cal.App.5th 989, 1005, 230 Cal. Rptr. 3d 98 \(2018\)\*](#). Courts have recognized that, if an interference [\[\\*\\*49\]](#) with prospective economic advantage claim is based on the same nucleus of facts as a CUTSA trade secret misappropriation claim, then the IIPEA tort is preempted by CUTSA. [See Switchboard, Inc. v. Panama jack, Inc., 2014 U.S. Dist. LEXIS 197849, \\*15-\\*17 \(C.D. Cal. Dec. 15, 2014\); Farmers Ins. Exch. v. Steele Ins. Agency, Inc., 2013 U.S. Dist. LEXIS 104606, \\*25-\\*27 \(E.D. Cal. July 23, 2013\); RSPE Audio Sols., Inc. v. Vintage King Audio, Inc., 2013 U.S. Dist. LEXIS 2909, \\*5-\\*7 \(C.D. Cal. Jan. 7, 2013\).](#)

As explained above, the Court dismissed the IIPEA claim to the extent that it is based on breaches of contract. Therefore, the allegations in the Complaint show that the remaining basis of the IIPEA claim is trade secret misappropriation in violation of CUTSA. It goes without saying that wholesale reliance on a violation of CUTSA necessarily means that the IIPEA and CUTSA misappropriation claims share a common nucleus of operative facts. Therefore, CUTSA preempts Deerpoint's IIPEA claim to the extent it is based on the misappropriation of trade secrets. Dismissal of the IIPEA claim is appropriate.<sup>17</sup>

#### c. Ninth Cause of Action — UCL<sup>18</sup>

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<sup>16</sup> Disapproved on other grounds by [\*Kwikset Corp. v. Superior Ct., 51 Cal.4th 310, 337, 120 Cal. Rptr. 3d 741, 246 P.3d 877 \(2011\).\*](#)

<sup>17</sup> As discussed in Footnote 15, *supra*, the IIPEA allegations do not provide fair notice that the claim is based on "disparagement." Therefore, the Court does not consider arguments based on "disparagement." [See Weiland, 792 F.3d at 1321-23](#). Further, the Complaint does not indicate that a UCL claim also forms a basis for the IIPEA claim.

**HN29**[] The UCL broadly proscribes the use of any "unlawful, unfair or fraudulent business act or practice." [Cal. Bus. & Prof. Code. § 17200](#); [Beaver v. Tarsadia Hotels, 816 F.3d 1170, 1177 \(9th Cir. 2016\)](#). "The UCL operates as a three-pronged statute: 'Each of these three adjectives [unlawful, unfair, or fraudulent] captures a 'separate and distinct theory of liability.'" [\*1238] [Beaver, 816 F.3d at 1177](#) (quoting [Rubio v. Capital One Bank, 613 F.3d 1195, 1203 \(9th Cir. 2010\)](#)).

In relevant part, the Complaint alleges that Defendants' [\*\*50] conduct "constitutes 'unlawful,' 'unfair,' and/or 'fraudulent' business practices in violation of the unfair competition provisions of the [UCL], in that the alleged conduct by Defendants, and each of them, was a concerted plan directly intended to deprive Deerpoint of customer relationships that Deerpoint expected would continue, in quick succession, in order to disrupt Deerpoint's business for the benefit of Agrigenix." Complaint ¶ 152. Further, Defendants "knew that by stealing and using Deerpoint's confidential, proprietary, and trade secret information . . . they engaged in unfair business practices by acting in violation of [Cal. Civ. Code § 3426](#) and [18 U.S.C. § 1836](#) . . . [Mahoney used, and continues to use], Deerpoint's confidential, proprietary, and trade secret information unlawfully, plainly in violation of [the EIS], [the Settlement], . . . and basic principles of professional decency." *Id.* at ¶ 153. From these allegations, the Court gleans three basic acts that constitute either unfair or unlawful conduct by Defendants: (1) breaches of contract; (2) trade secret misappropriation; and (3) committing IIPEA.

### (1) IIPEA

The Court has found that no plausible IIPEA claim is stated. **HN30**[] To the extent that Deerpoint relies [\*\*51] on an actionable IIPEA claim to support a UCL claim, the UCL claim fails and dismissal is appropriate. [Krantz v. BT Visual Images, L.L.C., 89 Cal.App.4th 164, 178, 107 Cal. Rptr. 2d 209 \(2001\)](#) (holding that a UCL claim will "rise or fall depending on the state of the antecedent substantive causes of action."); see [Fresno Motors, Ltd. Liab. Co. v. Mercedes Benz USA, Ltd. Liab. Co., 771 F.3d 1119, 1135 \(9th Cir. 2014\)](#) (same); [Vargas v. JP Morgan Chase Bank, N.A., 30 F.Supp.3d 945, 953 \(C.D. Cal. 2014\)](#) (same); [Shalaby v. Bernzomatic, 281 F.R.D. 565, 576 \(S.D. Cal. 2012\)](#) (same); [Johnson v. Hewlett-Packard Co., 809 F.Supp.2d 1114, 1139 \(N.D. Cal. 2011\)](#) (same).

### (2) Trade Secrets

**HN31**[] With respect to violations of the trade secret laws, as noted above, CUTSA will not preempt non-trade secret related civil claims if the civil claims do not share a common nucleus of operative facts with the CUTSA misappropriation claim. See [Cal. Civ. Code § 3426.7\(b\)\(2\)](#); [Silvaco Data, 184 Cal.App.4th at 232](#); [K.C., 171 Cal.App.4th at 962](#). Here, because the Complaint's UCL claim identifies the trade secret statutes and then alleges trade secret misappropriation through use and disclosure, the Complaint's UCL claim is clearly based on the same nucleus of operative facts as the CUTSA claim. **HN32**[] Therefore, to the extent that Deerpoint's UCL claim relies on trade secret misappropriation, CUTSA preempts the UCL claim and dismissal is appropriate. See [K.C., 171 Cal.App.4th at 961-62](#) (finding that a UCL claim that was based on the same nucleus of operative facts as a CUTSA claim was preempted); see also [Waymo, LLC v. Uber Techs., Inc., 256 F.Supp.3d 1059, 1064 \(N.D. Cal. 2017\)](#) (same); [Norsat Int'l v. B.I.P. Corp., 2014 U.S. Dist. LEXIS 74953, \\*33-\\*34 \(S.D. Cal. May 30, 2014\)](#) (same); [RSPE Audio Sols., Inc. v. Vintage King Audio, Inc., 2013 U.S. Dist. LEXIS 2909, \\*5-\\*7 \(C.D. Cal. Jan. 7, 2013\)](#) (same).

### [\*1239] (3) Breach of Contract<sup>19</sup>

<sup>18</sup> Deerpoint's opposition defends its UCL claim by arguing it is based on IIPEA and disparagement. The allegations under the UCL do not reference disparagement. The UCL claim suffers from the improper shotgun tactic of incorporating by reference every single paragraph that preceded it. Therefore, just as with the IIPEA claim, the Court will not consider any arguments in support of the UCL claim that are based on disparagement. See [Weiland, 792 F.3d at 1321-23](#); Footnotes 15 & 17, *supra*.

**HN33** [↑] California courts hold that a breach of contract claim will not support a UCL claim unless the [\*\*52] conduct that constitutes a breach of conduct is also "unfair, unlawful, or fraudulent," as those terms are understood under the UCL.<sup>20</sup> See *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1152 (9th Cir. 2008); *Arce v. Kaiser Found. Health Plan, Inc.*, 181 Cal.App.4th 471, 489, 104 Cal. Rptr. 3d 545 (2010); *Puentes v. Wells Fargo Home Mortgage, Inc.*, 160 Cal.App.4th 638, 645, 72 Cal. Rptr. 3d 903 (2008).

Here, the allegations under the UCL claim do not identify "fraudulent" conduct,<sup>21</sup> and they do not explain how any conduct, let alone breaching conduct, fits the "unfair" prong.<sup>22</sup> Rather, the conduct identified as breaching contracts relates to obtaining, disclosing, and using trade secrets, i.e. misappropriation. See Complaint ¶ 153; Doc. No. 14 at 23:27-28 ("Deerpoint acknowledges that [¶ 153] highlights Defendants' alleged trade secret misappropriation.").

**HN35** [↑] This breaching conduct implicates CUTSA, and thus the "unlawful" prong of the UCL. See *In re Vaccine Cases*, 134 Cal.App.4th 438, 457, 36 Cal. Rptr. 3d 80 (2005) (noting that an allegation of a statutory violation is an allegation of "unlawful" conduct, rather than "unfair" or deceptive conduct). However, a violation of CUTSA cannot form the basis of a UCL claim because of CUTSA's preemptive scope. See *Waymo*, 256 F.Supp.3d at 1064; *K.C.*, 171 Cal. App. at 961-62. As Deerpoint does not explain how [\*1240] any breach of contract by Mahoney constituted "unlawful," "unfair," or "fraudulent" conduct, the breaches of contract cannot form the basis of a UCL claim.

In sum, dismissal of the UCL claim is appropriate. See *Sybersound Records*, 517 F.3d at 1152; *Arce*, 181 Cal.App.4th at 489 [\*\*53]; *Puentes*, 160 Cal.App.4th at 645.

#### **4. SUPERFLUOUS CLAIMS — 5th and 7th Causes of Action**

##### **Defendants' Arguments**

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<sup>19</sup> There is no contractual relationship between Deerpoint and Agrigenix. Therefore, a breach of contract based UCL claim is only possible against Mahoney.

<sup>20</sup> **HN34** [↑] The terms "unlawful," "unfair," and "fraudulent" are terms of art under the UCL. "A business practice is 'fraudulent' under the UCL if members of the public are likely to be deceived." *Davis v. HSBC Bank*, 691 F.3d 1152, 1169 (9th Cir. 2012) (citing *Puentes*, 160 Cal.App.4th at 645). The UCL's "unlawful" prong "borrows violations of other laws . . . and makes those unlawful practices actionable under the UCL," and that "virtually any law or regulation — federal or state, statutory or common law — can serve as a predicate . . ." *Candelore v. Tinder, Inc.*, 19 Cal.App.5th 1138, 1155, 228 Cal. Rptr. 3d 336 (2018). California law with respect to "unfair" conduct is currently "in flux." *Hodson v. Mars, Inc.*, 891 F.3d 857, 866 (9th Cir. 2018). Conduct is "unfair" either when it "threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition," or when it "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Id.*

<sup>21</sup> **HN36** [↑] UCL claims that are based on "fraudulent" conduct must meet *Rule 9(b)*'s heightened pleading standard, meaning that the "who, what, when, where, and how" of the fraudulent conduct, as well as what conduct/statement is misleading and why it is false, must be expressly alleged. *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 964 (9th Cir. 2018). Although the allegations under the UCL indicate that Defendants engaged in fraudulent conduct, the allegations do not meet *Rule 9(b)*'s pleading standards. Indeed, the allegations under the UCL do not attempt to identify any "fraudulent" conduct. Although other paragraphs in the Complaint may indicate "fraudulent" conduct, the shotgun incorporation by reference of literally every prior allegation that preceded the UCL claim is improper and does not meet *Rule 8* standards, let alone *Rule 9* standards. See *Weiland*, 792 F.3d at 1321-23.

<sup>22</sup> Again, other allegations in the Complaint may indicate "unfair" conduct. However, Deerpoint's shotgun incorporation by reference of every prior allegation that preceded the UCL claim is improper and does not meet *Rule 8* standards. See *Weiland*, 792 F.3d at 1321-23; Footnotes 15, 17, & 18, *supra*.

Mahoney argues that the fifth and seventh causes of action are nothing more than a straightforward breach of contract claim. Because Deerpoint has already alleged the same breaches as part of its breach of contract claim, the fifth and seventh causes of action should be dismissed as superfluous.

### Plaintiff's Opposition

Deerpoint argues that it has properly alleged two implied covenant claims. First, with respect to the fifth cause of action, the Complaint alleges that Mahoney unfairly interfered with its expectation that its employees would uphold the confidentiality and secrecy of its trade secrets. This expectation flows from Deerpoint's corporate culture. Mahoney breached the covenant/expectation by disclosing protected materials to Agrigenix and by failing to take steps as an Agrigenix executive from publishing portions of Deerpoint's trade secrets. Second, with respect to the seventh cause of action, the Complaint alleges that Mahoney unfairly interfered with its expectation that he would uphold the confidentiality and secrecy of its trade secrets. Mahoney breached that expectation by disclosing trade secrets **[\*\*54]** to Agrigenix and by failing to take steps as an Agrigenix executive to prevent Agrigenix from publishing portions of Deerpoint's trade secrets. Deerpoint argues that, although both the fifth and the seventh causes of actions have facts that overlap with the fourth and sixth causes of action (for breach of contract), two claims can be distinguished, one for breach of contract and one for breach of the implied covenant of good faith and fair dealing.

### Legal Standard

**HN37** [↑] "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made." *Guz v. Bechtel Nat'l, Inc.*, 24 Cal.4th 317, 349, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 (2000); see also *Digerati Holdings*, 194 Cal.App.4th at 885. "[T]he scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract." *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.*, 2 Cal.4th 342, 373, 6 Cal. Rptr. 2d 467, 826 P.2d 710 (1992); see *Digerati Holdings*, 194 Cal.App.4th at 885. "Although breach of the implied covenant often is pleaded as a separate count, a breach of the implied covenant is necessarily a breach of contract." *Digerati Holdings*, 194 Cal.App.4th at 885; see *Careau & Co.*, 222 Cal.App.3d at 1393-94. However, if the plaintiff's allegations of breach of the covenant of good faith "do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek **[\*\*55]** the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated." *Bionghi v. Metro. Water Dist.*, 70 Cal.App.4th 1358, 1370, 83 Cal. Rptr. 2d 388 (1999); *Careau & Co.*, 222 Cal.App.3d at 1395. [\*1241] That is, "where breach of an actual [contract] term is alleged, a separate implied covenant claim, based on the same breach, is superfluous." *Guz*, 24 Cal.4th at 327; see also *id.* at 352.

### Discussion<sup>23</sup>

#### 1. Fifth Cause of Action

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<sup>23</sup> Deerpoint's opposition cites Paragraphs 72, 75, and 77 in support of its assertion that Mahoney did not stop Agrigenix from publishing certain aspects of Deerpoint's trade secrets. See Doc. No. 14 at p.20. As detailed below, neither the substance of Paragraphs 72, 75, and 77 nor an express reference to those paragraphs are found under the fifth and seventh causes of action. Like all of the other causes of action, the fifth and seventh causes of action incorporate by reference literally every prior allegation that preceded them. See Complaint ¶¶ 123, 139. Again, this form of **HN38** [↑] shotgun pleading is improper and does not provide sufficient notice that Deerpoint is relying on conduct by Mahoney as an Agrigenix executive to prevent publication of trade secrets by Agrigenix. See *Weiland*, 792 F.3d at 1321-23. Therefore, the Court's analysis will not consider or discuss any argument based on the incorporation of Paragraphs 72, 75, or 77 of the Complaint. See *id.*; Footnotes 14 and 16, *supra*.

The fifth cause of action is based on the EIS. See Complaint ¶ 124. In relevant part, the fifth cause of action alleges: "Mahoney . . . unfairly interfered with Deerpoint's right to receive the benefit of the [EIS], namely, the expectation that its employees would uphold the confidentiality and trade secret protection of Deerpoint's confidential, proprietary, and trade secret information." Id. at ¶ 126.

Relatedly, the fourth cause of action is for breach of the EIS. The Complaint alleges that, through the EIS, Mahoney "understood that [his] employment at Deerpoint may give him access to Deerpoint's confidential information, and that [he] was not to disclose, use, or publish any confidential information belonging to Deerpoint, either during or after employment with the Company." Complaint ¶ 115. Also under [\*\*56] the EIS, Mahoney had access to a variety of tangible "items" that remained Deerpoint's property, would not be made available to third parties, and were to be returned to Deerpoint if the property was in Mahoney's possession. Id. at ¶ 116. Mahoney allegedly breached the EIS by (1) accessing, copying, using, and/or disclosing to Agrigenix Deerpoint's confidential, proprietary, and trade secret information, and (2) failing to take steps to return Deerpoint's "property." See id. at ¶¶ 117, 118.

From the above allegations, the conduct that allegedly breached the covenant of good faith and fair dealing is the same conduct that breached other provisions of the EIS. Both claims are premised on failing to return property and not using, misappropriating, or divulging Deerpoint's confidential trade secrets. The "expectation" that trade secret information would stay secret is clearly encompassed within the third and fourth paragraphs of the EIS. That expectation is nothing more than the assumption that Mahoney (and all other employees) would follow the contract and not commit a breach of an express contractual term. Because the fifth cause of action does not contain any conduct that is different [\*\*57] or separate from the breaches alleged in the fourth cause of action, the fifth cause of action is redundant and will be dismissed. See Trombley Enters., LLC v. Sauer, Inc., 2018 U.S. Dist. LEXIS 159410, \*9-\*11 (N.D. Cal. Sep. 17, 2018) (relying on Careau & Co. and dismissing redundant implied covenant claim); Dedicato Treatment Ctr. v. Cigna Health & Life Ins. Co., 2017 U.S. Dist. LEXIS 220004, \*12-\*14 (C.D. Cal. Aug. 24, 2017) (same); [\*1242] R Power Biofuels, LLC v. Chemex LLC, 2016 U.S. Dist. LEXIS 156727, \*55-\*56 (N.D. Cal. Nov. 11, 2016) (same); Guz, 24 Cal.4th at 327, 352; Bionghi, 70 Cal.App.4th at 1370; Careau & Co., 222 Cal.App.3d at 1395.

## 2. Seventh Cause of Action

The seventh cause of action is based on the Settlement. See id. at ¶ 140. In relevant part, the seventh cause of action alleges: "Mahoney . . . unfairly interfered with Deerpoint's right to receive the benefit of the [Settlement], namely, the expectation that he would uphold the confidentiality and trade secret protection of Deerpoint's confidential, proprietary, and trade secret information; the expectation that he would return any tangible and/or intangible property belonging to Deerpoint; and that he would not publicly disparage and/or cause the disparagement of Deerpoint." Id. at ¶ 142.

Relatedly, the sixth cause of action is for breach of the Settlement. The Complaint alleges the Settlement obligated Mahoney to: (1) act as a fiduciary to Deerpoint with respect to Deerpoint's confidential, proprietary, and trade secret information, (2) return Deerpoint's "property," (3) not publicly disparage Deerpoint, and (4) not divulge to [\*\*58] third parties or use to Deerpoint's detriment any of Deerpoint's confidential, proprietary, and trade secret information. See id. at ¶¶ 129-133. Mahoney allegedly breached the Settlement by: (1) accessing, copying, using, and/or disclosing to Agrigenix or third parties Deerpoint's confidential, proprietary, and trade secret information, (2) failing to take necessary steps to hold in confidence and protect, and not use or disclose, Deerpoint's confidential, proprietary, and trade secret information, and (3) publicly disparaging Deerpoint. Id. at ¶¶ 134-136.

The seventh cause of action suffers from the same flaw as the fifth cause of action. The conduct that allegedly breached the covenant of good faith and fair dealing is the same conduct that breached other express provisions of the Settlement. Both the sixth and seventh causes of action are premised on failing to return property, not using, misappropriating, or divulging Deerpoint's confidential trade secrets, and not disparaging Deerpoint. The "expectations" that trade secret information would stay secret, that property would be returned, and that no

disparagement would occur, are clearly encompassed within Paragraphs 14 and 15 of [\*\*59] the Settlement. Those expectations are nothing more than the assumption that Mahoney would follow the Settlement and not commit a breach of an express contractual term. Because the seventh cause of action does not contain any conduct that is different or separate from the conduct alleged under the sixth cause of action, the seventh cause of action is redundant and will be dismissed. See *Trombley Enters., 2018 U.S. Dist. LEXIS 159410 at \*9-\*11; Dedicato Treatment, 2017 U.S. Dist. LEXIS 220004 at \*12-\*14; R Power Biofuels, 2016 U.S. Dist. LEXIS 156727 at \*55-\*56; Bionghi, 70 Cal.App.4th at 1370; Guz, 24 Cal.4th at 327, 352; Careau & Co., 222 Cal.App.3d at 1395.*

## **5. LEAVE TO AMEND**

With respect to Mahoney, the Court has dismissed the first, second, fifth, seventh, eighth, and ninth causes of action. Due to application of the settlement bar, amendment will not cure the defects of the first and second causes of action, nor will any claim be permitted to proceed against Mahoney that arose prior to the Settlement. [\*1243] Therefore, dismissal of those causes of action will be without leave to amend. Similarly, by operation of CUTSA preemption, amendment is futile and will not be permitted with respect to the IIPEA and UCL claims based on CUTSA/trade secret misappropriation. Because the Court cannot hold at this time that Deerpoint cannot allege non-CUTSA based IIPEA and UCL claims, dismissal of the eighth and ninth causes of action will be with leave to amend. [\*\*60] Finally, the fifth and seventh causes of action are dismissed as superfluous of the fourth and sixth causes of action. Although the Court harbors doubts whether Deerpoint may allege conduct that is not superfluous to its breach of contract claims, it is not clear that amendment would be futile. Therefore, the dismissal of fifth and seventh causes of action will be with leave to amend.

With respect to Agrigenix, the Court has dismissed the eighth and ninth causes of action. Again, to the extent that Deerpoint attempts to base these claims on CUTSA/trade secret misappropriation, amendment is futile. However, because it is not clear that Deerpoint cannot allege non-CUTSA based IIPEA and UCL claims, dismissal will be with leave to amend.

## **ORDER**

Accordingly, IT IS HEREBY ORDERED that:

1. Defendants' motion to dismiss (Doc. No. 10) is GRANTED as follows:
  - a. The first and second causes of action against Mahoney are DISMISSED without leave to amend;
  - b. The fifth and sixth causes of action are DISMISSED with leave to amend;
  - c. The eighth and ninth causes of action are DISMISSED with leave to amend to allege non-CUTSA based claims;
2. Defendants' motion to dismiss is otherwise DENIED;
3. Plaintiff may [\*61] file an amended complaint, that is consistent with the analysis of this order, within twenty-one (21) days of service of this order;
4. If Plaintiff files an amended complaint, Defendants shall file an answer or other appropriate response to the amended complaint within twenty-one (21) days of service of the amended complaint; and
5. If Plaintiff fails to file a timely amended complaint, then leave to amend shall automatically be withdrawn and, within twenty-one (21) of service of this order, Defendants shall file an answer to the Complaint in light of the analysis of this order.

IT IS SO ORDERED.

Dated: December 4, 2018

/s/ Anthony W. Ishii

Anthony W. Ishii

SENIOR DISTRICT JUDGE

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## In re Disposable Contact Lens Antitrust

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

December 4, 2018, Decided; December 4, 2018, Filed

Case No. 3:15-md-2626-J-20JRK

### **Reporter**

329 F.R.D. 336 \*; 2018 U.S. Dist. LEXIS 212329 \*\*; 2018-2 Trade Cas. (CCH) P80,600

In Re: DISPOSABLE CONTACT LENS ANTITRUST. THIS DOCUMENT RELATES TO: ALL ACTIONS

**Prior History:** [In re Disposable Contact Lens Antitrust, 2015 U.S. Dist. LEXIS 178026 \(M.D. Fla., Oct. 7, 2015\)](#)

## **Core Terms**

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contact lens, prices, Manufacturer, regression, Defendants', Plaintiffs', damages, class certification, retailers, products, antitrust, overcharges, conspiracy, consumers, purchases, pricing policy, Unilateral, discounts, variables, classwide, class member, predominance, horizontal, rebates, documents, reliable, disposable, vertical, estimated, lenses

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For Dana Travis, on behalf of themselves and all others similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Andrew S. Friedman, Francis J. Balint, Jr., LEAD ATTORNEYS, PRO HAC VICE, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Bonny [\*\*4] E. Sweeney, LEAD ATTORNEY, PRO HAC VICE, Hausfeld LLP, San Francisco, CA USA; Christopher L. Lebsock, LEAD ATTORNEY, PRO HAC VICE, Hausfeld, LLP, San Francisco, CA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Gregory Harrison Lercher, LEAD ATTORNEY, LeavenLaw, St Petersburg, FL USA; Ian Richard Leavengood, LEAD ATTORNEY, Leavengood, Dauval, Boyle & Meyer PA, St Petersburg, FL USA; Irving Scher, LEAD ATTORNEY, Hausfeld, LLP, New York, NY USA; J. Andrew Meyer, LEAD ATTORNEY, J. Andrew Meyer, P.A., Redington Beach, FL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Manfred Patrick Muecke, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael P. Lehmann, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler [\*\*5] Phillips Grossman LLP, New York, NY USA; Robert Cecil Gilbert, LEAD ATTORNEY, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; James Dennis Young, Morgan & Morgan, PA, Jacksonville, FL USA.

For Megan Neforos, On behalf of herself and all others similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Christopher Cain, LEAD ATTORNEY, Scott & Cain, Knoxville, TN USA; Daniel O. Herreras, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg [\*\*6] Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Wallace Allen McDonald, LEAD ATTORNEY, Lacy, Price & Wagner, Knoxville, TN USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Beneta D. Burt, On behalf of herself and all others similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Daniel R. Karon, LEAD ATTORNEY, Karon LLC, Cleveland, OH USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Jesse A. Kirchner, LEAD ATTORNEY, PRO HAC VICE, Thurmond Kirchner Timbes & Yelverton, P.A., Charleston, SC USA; John Andrew DeVault, III, Michael E. Lockamy, LEAD ATTORNEYS, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; John Leonard Walker, Kevin B. Bass, LEAD ATTORNEYS, PRO HAC VICE, Walker [\*\*7] Group, PC, Jackson, MS USA; Jon V. Harper, LEAD ATTORNEY, PRO HAC VICE, Anderson & Karrenberg, PC, Salt Lake City, UT USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Willie Dillon, On behalf of himself and all others similarly situated, Brent Halversen, On behalf of himself and all others similarly situated, Stacia Winfield, On behalf of herself and all others similarly situated, Jeanne M. Lyles, On behalf of herself and all others similarly situated, Plaintiffs: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; [\*\*8] Daniel R. Karon, LEAD ATTORNEY, Karon LLC, Cleveland, OH USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Jesse A. Kirchner, LEAD ATTORNEY, PRO HAC VICE, Thurmond Kirchner Timbes & Yelverton, P.A., Charleston, SC USA; John Andrew DeVault, III, Michael E. Lockamy, LEAD ATTORNEYS, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; John Leonard Walker, Kevin B. Bass, LEAD ATTORNEYS, PRO HAC VICE, Walker Group, PC, Jackson, MS USA; Jon V. Harper, LEAD ATTORNEY, PRO HAC VICE, Anderson & Karrenberg, PC, Salt Lake City, UT USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Catherine Dinglem On behalf of herself and all others similarly situated Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & [\*\*9] Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Bryan Clobes, LEAD ATTORNEY, Cafferty Faucher, LLP, Philadelphia, PA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Daniel R. Karon, LEAD ATTORNEY, Karon LLC, Cleveland, OH USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Jesse A. Kirchner, LEAD ATTORNEY, PRO HAC VICE, Thurmond Kirchner Timbes & Yelverton, P.A., Charleston, SC USA; John Andrew DeVault, III, Michael E. Lockamy, LEAD ATTORNEYS, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; John Leonard Walker, Kevin B. Bass, LEAD ATTORNEYS, PRO HAC VICE, Walker Group, PC, Jackson, MS USA; Jon V. Harper, LEAD ATTORNEY, PRO HAC VICE, Anderson & Karrenberg, PC, Salt Lake City, UT USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael D. Hausfeld, LEAD ATTORNEY, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., [\*\*10] Washington, DC USA; Nathaniel C Giddings, LEAD ATTORNEY, Hausfeld LLP, Washington, DC USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Tracy L. Gray, On behalf of herself and all others similarly situated, Danyelle D. Westphal, On behalf of herself and all others similarly situated, Clemente Cesare, On behalf of himself and all others similarly situated., Plaintiffs: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New YorkNY USA; Brooke B. Edenfield, LEAD ATTORNEY, Walters Bender Strohbehn & Vaughan, PC, Kansas City, MO USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Dirk L. Hubbard, LEAD ATTORNEY, Horn Aylward & Brandy, LLC, Kansas City, MO USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEY, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA [\*\*11] USA; J. Brett Milbourn, LEAD ATTORNEY, Walters, Bender, Strohbehn & Vaughan, P.C., Kansas City, MO USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Mark P. Bryant, LEAD ATTORNEY, PRO HAC VICE, Bryant Law Center, P.S.C., Paducah, KY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Thomas V. Bender, LEAD ATTORNEY, Horn Aylward & Bandy, LLC, Kansas City, MO USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Suneeta D Fernandes, on behalf of herself and all others similarly situated, Plaintiff: A. J. Bartolomeo, LEAD ATTORNEY, Girard Gibbs, LLP, San Francisco, CA USA; Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, [\*\*12] NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; David Michael Berger, Eric H. Gibbs, LEAD ATTORNEYS, Gibbs Law Group, Oakland, CA USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEY, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Geoffrey Alan Munroe, LEAD ATTORNEY, Girard Gibbs LLP, San Francisco, CA USA; George W. Sampson, Lucinda M. Dunlap, LEAD ATTORNEYS, Sampson Dunlap LLP, Seattle, WA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Michael Schrag, LEAD ATTORNEY, PRO HAC VICE, Gibbs Law Group LLP, Oakland, CA USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; James Dennis Young, Morgan & Morgan, PA, Jacksonville, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Costco Wholesale Corporation, Plaintiff: Abbye [\*\*13] R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; David J. Burman, LEAD ATTORNEY, Perkins Coie, LLP, Seattle, WA USA; David P. Chiappetta, Mara Boundy, LEAD ATTORNEYS, Perkins Coie LLP, San Francisco, CA USA; David Scott Steele, LEAD ATTORNEY, Perkins Coie LLP, Seattle, WA USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEY, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; George R. Coe, LEAD ATTORNEY, Boies, Schiller & Flexner, LLP-Orlando, Orlando, FL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Shylah R. Alfonso, LEAD ATTORNEY, PRO HAC VICE, Perkins Coie LLP, Seattle, [\*\*14] WA USA; Stuart Harold Singer, LEAD ATTORNEY, Boies, Schiller & Flexner, LLP-Ft. Lauderdale, Ft Lauderdale, FL USA.

For Gordon Mah, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HACVICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Aron K. Liang, Jack Wing Lee, LEAD ATTORNEYS, Minami Tamaki LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HACVICE, Robins Kaplan, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HACVICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HACVICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Sean Tamura-Sato, LEAD ATTORNEY, Minami Tamaki, LLP, San Francisco, CA USA; Robert Cecil [\*\*15] Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Jaquatta Becoats, Laura Brooksbank, Rhonda Carter, Dawn Homan, Kyle Hueser, Jan Johnson, Plaintiffs: Abbye R. Klamann, LEAD ATTORNEY, PRO HACVICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HACVICE, Robins Kaplan, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HACVICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HACVICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Lesley Elizabeth Weaver, Matthew Sinclair Weiler, LEAD ATTORNEYS, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg

Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Peter Safirstein, Peter Safirstein, Esq., New York, NY USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson [\*\*16] Weiselberg Gilbert, Coral Gables, FL USA.

For Tina Miranda, Brooke Salisbury, Luanne Strickland, Kim Seller, Sidney Steen, Christine Teti, Plaintiffs: Abbye R. Klamann, LEAD ATTORNEY, PRO HACVICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HACVICE, Robins Kaplan, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HACVICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HACVICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Lesley Elizabeth Weaver, Matthew Sinclair Weiler, LEAD ATTORNEYS, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Peter Safirstein, Peter Safirstein, Esq., New York, NY USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, [\*\*17] FL USA.

For John Machikawa, on behalf of himself and all others similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HACVICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HACVICE, Robins Kaplan, LLP, New York, NY USA; Bonny E. Sweeney, LEAD ATTORNEY, PRO HACVICE, Hausfeld LLP, San Francisco, CA USA; Bryan Clobes, LEAD ATTORNEY, Cafferty Faucher, LLP, Philadelphia, PA USA; Christopher L. Lebsack, LEAD ATTORNEY, PRO HACVICE, Hausfeld, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HACVICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Dennis Stewart, LEAD ATTORNEY, Hulett Harper Stewart, LLP, San Diego, CA USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HACVICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Irving Scher, LEAD ATTORNEY, Hausfeld, LLP, New York, NY USA; James J. Pizzirusso, LEAD ATTORNEY, Hausfeld, LLP, Washington, DC USA; Jeffrey M. Ostrow, LEAD ATTORNEY, Kopelowitz Ostrow, PA, Ft Lauderdale, FL USA; John Andrew DeVault, III, Michael E. Lockamy, LEAD ATTORNEYS, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Joseph [\*\*18] P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael D. Hausfeld, LEAD ATTORNEY, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Washington, DC USA; Michael P. Lehmann, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA USA; Nathaniel C Giddings, LEAD ATTORNEY, Hausfeld LLP, Washington, DC USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Allan Steyer, D. Scott Macrae, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA USA; James Dennis Young, Morgan & Morgan, PA, Jacksonville, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Bernadette Goodfellow, on behalf of herself and all others similarly situated, Georgina Lepe, on behalf of herself and all others similarly situated, Plaintiffs: Abbye R. Klamann, LEAD ATTORNEY, PRO HACVICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HACVICE Robins [\*\*19] Kaplan, LLP, New York, NY USA; Bonny E. Sweeney, Christopher L. Lebsack, LEAD ATTORNEY, PRO HACVICE, Hausfeld LLP, San Francisco, CA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HACVICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Dennis Stewart, LEAD ATTORNEY, Hulett Harper Stewart, LLP, San Diego, CA USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HACVICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Irving Scher, LEAD ATTORNEY, Hausfeld, LLP, New York, NY USA; Jeffrey D. Kaliel, LEAD ATTORNEY, PRO HACVICE, Tycko & Zavareel, LLP, Washington, DC USA; Jeffrey M. Ostrow, LEAD ATTORNEY, Kopelowitz Ostrow, PA, Ft Lauderdale, FL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael P. Lehmann, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA,

Aventura, FL USA; James Dennis Young, Morgan [\*\*20] & Morgan, PA, Jacksonville, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Stephen Mangum, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Daniel Jay Mogin, LEAD ATTORNEY, MoginRubin LLP, San Diego, CA USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL [\*\*21] USA.

For Rachel Miller, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Christopher M. Burke, Kate Lv, Walter W. Noss, LEAD ATTORNEYS, PRO HAC VICE, Scott & Scott, LLP, San Diego, CA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Gregory Louis Davis, LEAD ATTORNEY, Davis & Taliaferro, Montgomery, AL USA; Jennifer Janine Scott, LEAD ATTORNEY, Crowell & Moring, LLP, Irvine, CA USA; John T. Jasnoch, LEAD ATTORNEY, Scott & Scott, LLP, San Diego, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, PRO HAC VICE, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; [\*\*22] Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; James Dennis Young, Morgan & Morgan, PA, Jacksonville, FL USA; Peter A. Barile, III, PRO HAC VICE, Scott + Scott, Attorneys at Law, LLP, New York, NY USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Caitlin O'Neill, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Christopher M. Burke, LEAD ATTORNEY, PRO HAC VICE, Scott & Scott, LLP, San Diego, CA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Gregory Louis Davis, LEAD ATTORNEY, Davis & Taliaferro, Montgomery, AL USA; Jennifer Janine Scott, LEAD ATTORNEY, Crowell & Moring, LLP, Irvine, CA USA; John T. Jasnoch, LEAD ATTORNEY, Scott & Scott, LLP, San Diego, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, PRO HAC VICE, Scott & Scott, Attorneys At Law, LLP, New [\*\*23] York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; James Dennis Young, Morgan & Morgan, PA, Jacksonville, FL USA; Peter A. Barile, III, PRO HAC VICE, Scott + Scott, Attorneys at Law, LLP, New York, NY USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Tyler Brandafino, on Behalf of Themselves and All Others, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Christopher M. Burke, LEAD ATTORNEY, PRO HAC VICE, Scott & Scott, LLP, San Diego, CA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, [\*\*24] Oakland, CA USA; Jennifer Janine Scott, LEAD ATTORNEY, Crowell & Moring, LLP, Irvine, CA USA; John T. Jasnoch, LEAD ATTORNEY, Scott & Scott, LLP, San Diego, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, PRO HAC VICE,

Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; James Dennis Young, Morgan & Morgan, PA, Jacksonville, FL USA; Peter A. Barile, III, PRO HAC VICE, Scott + Scott, Attorneys at Law, LLP, New York, NY USA; Robert Cecil Gilbert, Kopolowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Barbara Zamora-Valdes, Individually and on Behalf of all Others Similarly Situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; **[\*\*25]** James E. Cecchi, LEAD ATTORNEY, Carella, Byrne, Bain, Gilfillan, Cecchi, Stewart & Olstein, Roseland, NJ USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, PRO HAC VICE, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Criden, LEAD ATTORNEY, Criden & Love, PA, South Miami, FL USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopolowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Marn Larsen-Ball, on behalf of herself and all others similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, **[\*\*26]** LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Gordon Ball, LEAD ATTORNEY, Gordon Ball PLLC, Knoxville, TN USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Lance Kristopher Baker, LEAD ATTORNEY, The Baker Law Firm, Knoxville, TN USA; Joseph P. Guglielmo, LEAD ATTORNEY, PRO HAC VICE, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopolowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Mallory L. Grossman, Individually and on Behalf of all other Similarly Situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon **[\*\*27]** O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; James E. Cecchi, LEAD ATTORNEY, Carella, Byrne, Bain, Gilfillan, Cecchi, Stewart & Olstein, Roseland, NJ USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, PRO HAC VICE, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Joseph C. Kohn, LEAD ATTORNEY, Kohn, Swift & Graf, PC, Philadelphia, PA USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Criden, LEAD ATTORNEY, Criden & Love, PA, South Miami, FL USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopolowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Ginger Hatridge, On behalf of herself an all other similarly situated, Plaintiff: **[\*\*28]** Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; James C. Wyly, LEAD ATTORNEY, Wyly-Rommel, PLLC, Texarkana, TX USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge,

Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, PRO HAC VICE, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Kelley B. Stewart, LEAD ATTORNEY, Krupnick Campbell Malone Buser Slama Hancock Liberman, Ft Lauderdale, FL USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Michael Joseph Ryan, LEAD ATTORNEY, Krupnick Campbell Malone Buser Slama Hancock Liberman, Ft Lauderdale, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Sean [\*\*29] Fletcher Rommel, LEAD ATTORNEY, PRO HAC VICE, Wyly-Rommel, PLLC, Texarkana, TX USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Andee Leeds, On behalf of herself an all other similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Douglas G. Thompson, Jr., Michael G. McLellan LEAD ATTORNEYS, Finkelstein Thompson LLP, Washington, DC USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; John Gravante, III, Robert C. Josefsberg, LEAD ATTORNEYS, Podhurst Orseck, P.A., Miami, FL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, [\*\*30] LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Joseline Dotel, On behalf of herself an all other similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Brian Douglas Penny, LEAD ATTORNEY, Goldman Scarlato & Penny, Wayne, PA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; John Domenick Zaremba, LEAD ATTORNEY, Zaremba Brownell & Brown PLLC, New York, NY USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, [\*\*31] FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Jacqueline Gaston, On behalf of herself an all other similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Brittany N. Resch, LEAD ATTORNEY, PRO HAC VICE, Gustafson Gluek, PLLC, Minneapolis, MN USA; Colson Hicks Eidson, Penthouse, Coral Gables, FL USA; Daniel E. Gustafson, Daniel C. Hedlund, LEAD ATTORNEYS, Gustafson Gluek, PLLC, Minneapolis, MN USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; John Domenick Zaremba, LEAD ATTORNEY, Zaremba Brownell & Brown PLLC, New York, NY USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, [\*\*32] New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Simon Bahne Paris, LEAD ATTORNEY, PRO HAC VICE, Saltz Mongoluzzi Barrett & Bendesky, Philadelphia, PA USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Matt Gustafson, On behalf of herself an all other similarly situated, Marlene Jacobus, On behalf of herself an all other similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Brittany N. Resch, LEAD ATTORNEY, PRO HAC VICE, Gustafson Gluek, PLLC, Minneapolis, MN USA; Daniel E. Gustafson, Daniel C. Hedlund, LEAD ATTORNEYS, Gustafson Gluek, PLLC, Minneapolis, MN USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, [\*\*33] Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Simon Bahne Paris, LEAD ATTORNEY, PRO HAC VICE, Saltz Mongoluzzi Barrett & Bendesky, Philadelphia, PA USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Rachel Berg, On behalf of herself an all other similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Brittany N. Resch, LEAD ATTORNEY, PRO HAC VICE, Gustafson Gluek, PLLC, Minneapolis, [\*\*34] MN USA; Bryan Clobes, LEAD ATTORNEY, Cafferty Faucher, LLP, Philadelphia, PA USA; Daniel E. Gustafson, Daniel C. Hedlund, LEAD ATTORNEYS, Gustafson Gluek, PLLC, Minneapolis, MN USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; John Andrew DeVault, III, Michael E. Lockamy, LEAD ATTORNEYS, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael D. Hausfeld, LEAD ATTORNEY, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Washington, DC; Nathaniel C Giddings, LEAD ATTORNEY, Hausfeld LLP, Washington, DC USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Simon Bahne Paris, LEAD ATTORNEY, PRO HAC VICE, Saltz Mongoluzzi Barrett & Bendesky, Philadelphia, PA USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, [\*\*35] Coral Gables, FL USA.

For Krysta Loera, On behalf of herself an all other similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Craig L. Briskin, LEAD ATTORNEY, PRO HAC VICE, Mehri & Skalet, PLLC, Washington, DC USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; M. Stephen Dampier, LEAD ATTORNEY, Law Offices of M. Stephen Dampler, PC, Fairhope, AL USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Robert C. Josefsberg, LEAD ATTORNEY, Podhurst Orseck, P.A., Miami, FL USA; Scott Adam Edelsberg, LEAD [\*\*36] ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Kathryn E Mabry, On behalf of herself an all other similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Daniel R. Karon, LEAD ATTORNEY, Karon LLC, Cleveland, OH USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Francis J. Flynn,

LEAD ATTORNEY, JEFFREY J. LOWE, P.C., St. Louis, MO USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael J. Flannery, LEAD ATTORNEY, PRO HAC VICE, Cuneo Gilbert & LaDuca, LLP, St. Louis, MO USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, **[\*\*37]** LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Tiffany M. Yiatras, LEAD ATTORNEY, PRO HAC VICE, Consumer Protection Legal LLC, Ellisville, MO USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Jennifer Sineni, On behalf of herself an all other similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Bryan Clobes, LEAD ATTORNEY, Cafferty Faucher, LLP, Philadelphia, PA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Daniel R. Karon, LEAD ATTORNEY, Karon LLC, Cleveland, OH USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Francis J. Flynn, LEAD ATTORNEY, JEFFREY J. LOWE, P.C., St. Louis, MO USA; John Andrew DeVault, III, Michael E. Lockamy, LEAD ATTORNEYS, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, **[\*\*38]** FL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael J. Flannery, LEAD ATTORNEY, PRO HAC VICE, Cuneo Gilbert & LaDuca, LLP, St. Louis, MO USA; Michael D. Hausfeld, LEAD ATTORNEY, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Washington, DC USA; Nathaniel C Giddings, LEAD ATTORNEY, Hausfeld LLP, Washington, DC USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Tiffany M. Yiatras, LEAD ATTORNEY, PRO HAC VICE, Consumer Protection Legal LLC, Ellisville, MO USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Cora Beth Smith, On behalf of herself an all other similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Bryan Clobes, LEAD ATTORNEY, Cafferty Faucher, LLP, Philadelphia, PA USA; Daniel O. Herrera, **[\*\*39]** LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Hollis Lee Salzman, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; John Andrew DeVault, III, Michael E. Lockamy, LEAD ATTORNEYS, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael D. Hausfeld, LEAD ATTORNEY, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Washington, DC USA; Nathaniel C Giddings, LEAD ATTORNEY, Hausfeld LLP, Washington, DC USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Robert C. Josefsberg, LEAD ATTORNEY, Podhurst Orseck, P.A., Miami, FL USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Tracy D. Rezvani, LEAD ATTORNEY, The Rezvani Law Firm LLC, Rockville, MD USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Brett Watson, on behalf of himself **[\*\*40]** and all others situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Bonny E. Sweeney, LEAD ATTORNEY, PRO HAC VICE, Hausfeld LLP, San Francisco, CA USA; Bryan Clobes, LEAD ATTORNEY, Cafferty Faucher, LLP, Philadelphia, PA USA; Christopher L. Lebsack, LEAD ATTORNEY, PRO HAC VICE, Hausfeld, LLP, San Francisco, CA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Irving Scher, LEAD ATTORNEY, Hausfeld, LLP, New York, NY USA; John Andrew DeVault, III, Michael E. Lockamy, LEAD ATTORNEYS, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott &

Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael D. Hausfeld, LEAD ATTORNEY, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., USA; Michael P. Lehmann, **[\*\*41]** LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA USA; Nathaniel C Giddings, LEAD ATTORNEY, Hausfeld LLP, Washington, DC USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Diego Hernandez, On behalf of himself and all other similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Andrew S. Friedman, Francis J. Balint, Jr., LEAD ATTORNEYS, PRO HAC VICE, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Manfred Patrick Muecke, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman, **[\*\*42]** & Balint, P.C., San Diego, CA USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Cregan Smith, On behalf of himself and all other similarly situated, Morgan Devlin, On behalf of himself and all other similarly, situated, Plaintiffs: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Andrew S. Friedman, Francis J. Balint, Jr., LEAD ATTORNEYS, PRO HAC VICES, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICES, Robins Kaplan, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Matthew Sinclair Weiler, Mili Desai, LEAD ATTORNEYS, PRO HAC VICES, Bleichmar **[\*\*43]** Fonti & Auld LLP, Oakland, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Manfred Patrick Muecke, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Jennifer Cristiano, on behalf of herself and all others similarly, situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; BRUCE DANIEL GREENBERG, LEAD ATTORNEY, LITE DEPALMA GREENBERG, LLC, Newark, NJ USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICES, Robins Kaplan, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICES, Bleichmar Fonti & Auld LLP, Oakland, **[\*\*44]** CA USA; JOSEPH LOPICCOLO, LEAD ATTORNEY, Poulos Lopiccolo PC, Ocean, NJ USA; James E. Cecchi, LEAD ATTORNEY, Carella, Byrne, Bain, Gilfillan, Cecchi, Stewart & Olstein, Roseland, NJ USA John N. Poulos, LEAD ATTORNEY, Poulos Lopiccolo PC, Ocean Township, NJ USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Steven J. Greenfogel, LEAD ATTORNEY, Lite DePalma Greenberg, LLC, Philadelphia, PA USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Joanne Buckley, Nick Kehaya, Stephanie Kirkland, Lynne Lagarde, Plaintiffs: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICES, Robins Kaplan, LLP, New

York, NY USA; **[\*\*45]** Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICES, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Lesley Elizabeth Weaver, Matthew Sinclair Weiler, LEAD ATTORNEYS, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Tyler Lambert, Christian Miller, Courtney Riley, Jim Ronecker, individually and all others similarly situated, Plaintiffs: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether **[\*\*46]** & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Lesley Elizabeth Weaver, Matthew Sinclair Weiler, LEAD ATTORNEYS, Bleichmar Fonti & Auld LLP Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Coral Gables, FL USA.

For Dusty Price, on Behalf of Themselves and All Others, Similarly Situated, Jessika Stetler, on Behalf of Themselves and All Others, Similarly Situated, Plaintiffs: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Casey Langston Lott, LEAD ATTORNEY, Langston Lott P A, Booneville, MS USA; Christopher M. Burke, LEAD ATTORNEY, PRO HAC VICE, Scott & Scott, LLP, San **[\*\*47]** Diego, CA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, LEAD ATTORNEY, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Jennifer Janine Scott, LEAD ATTORNEY, Crowell & Moring, LLP, Irvine, CA USA; John T. Jasnoch, LEAD ATTORNEY, Scott & Scott, LLP, San Diego, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, PRO HAC VICE, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Mili Desai, LEAD ATTORNEY, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Thomas Kay Boardman, LEAD ATTORNEY, Scott + Scott, Attorneys at Law, LLP, New York, NY USA; Peter A. Barile, III, PRO HAC VICE, Scott + Scott, Attorneys at Law, LLP, New York, NY USA; Robert Cecil Gilbert, Coral Gables, FL USA.

For Andrew Morales, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO **[\*\*48]** HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Aron K. Liang, LEAD ATTORNEY, Minami Tamaki LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Jack Wing Lee, LEAD ATTORNEY, Minami Tamaki LLP, San Francisco, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Sean Tamura-Sato, LEAD ATTORNEY, Minami Tamaki, LLP, San Francisco, CA USA; Robert Cecil Gilbert, Coral Gables, FL USA.

For Tamara O'Brien, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, **[\*\*49]** Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Aron K. Liang, LEAD ATTORNEY, Minami Tamaki LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC

VICE, Robins Kaplan, LLP, New York, NY USA; Bryan Clobes, LEAD ATTORNEY, Cafferty Faucher, LLP, Philadelphia, PA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Jack Wing Lee, LEAD ATTORNEY, Minami Tamaki LLP, San Francisco, CA USA; John Andrew DeVault, III, Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael D. Hausfeld, LEAD ATTORNEY, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Washington, DC USA; Nathaniel C Giddings, LEAD ATTORNEY, Hausfeld LLP, Washington, DC USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, **[\*\*50]** LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Sean Tamura-Sato, LEAD ATTORNEY, Minami Tamaki, LLP, San Francisco, CA USA; Robert Cecil Gilbert, Coral Gables, FL USA.

For Julie Ewald, on behalf of themselves and all others similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Guri Ademi, LEAD ATTORNEY, Ademi & O'Reilly LLP, Cudahy, WI USA; John D. Blythin, Shpetim Ademi, LEAD ATTORNEY, Ademi & O'Reilly, LLP, Cudahy, WI USA; John Gravante, III, Robert C. Josefsberg, LEAD ATTORNEY, Podhurst Orseck, P.A., Miami, FL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, **[\*\*51]** PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Steven C. Marks, LEAD ATTORNEY, Podhurst Orseck, PA, Miami, FL USA; Robert Cecil Gilbert, Coral Gables, FL USA.

For Jeffrey Robb, on behalf of themselves and all others similarly situated, Erin Depperschmidt, on behalf of themselves and all others similarly situated, Luis Padilla, on behalf of themselves and all others similarly situated, Plaintiffs: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Guri Ademi, LEAD ATTORNEY, Ademi & O'Reilly LLP, Cudahy, WI USA; John D. Blythin, Shpetim Ademi, LEAD ATTORNEY, Ademi & O'Reilly, LLP, Cudahy, WI USA; John Gravante, III, Robert C. Josefsberg, LEAD ATTORNEY, Podhurst **[\*\*52]** Orseck, P.A., Miami, FL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Coral Gables, FL USA.

For Benjamin W. Hewitt, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Bethany Caracuzzo, Elizabeth Cheryl Pritzker, Shiho Yamamoto, LEAD ATTORNEY, Pritzker Levine LLP, Oakland, CA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Jonathan Krasne Levine LEAD ATTORNEY, PRITZKER LEVINE LLP, Oakland, CA USA; Joseph P. Guglielmo, **[\*\*53]** LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA,

Aventura, FL USA; Michael Devon Lee, Rutledge Richardson Liles, Liles Gavin, P.A., Jacksonville, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Gabrielle Pavelko, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Bethany Caracuzzo, Elizabeth Cheryl Pritzker, Pritzker Levine, LEAD ATTORNEYS, Pritzker Levine LLP, Oakland, CA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Jonathan [\*\*54] Krasne Levine, LEAD ATTORNEY, PRITZKER LEVINE LLP, Oakland, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Michael Devon Lee, Rutledge Richardson Liles, Liles Gavin, P.A., Jacksonville, FL USA. Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For John Weissman on behalf of themselves and all others similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Bethany Caracuzzo, Elizabeth Cheryl Pritzker, Pritzker Levine, LEAD ATTORNEYS, Pritzker Levine LLP, Oakland, CA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether [\*\*55] & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Jonathan Krasne Levine, LEAD ATTORNEY, PRITZKER LEVINE LLP, Oakland, CA USA.

Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Mili Desai, LEAD ATTORNEY, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Shiho Yamamoto, LEAD ATTORNEY, Pritzker Levine LLP, Oakland, CA USA; Michael Devon Lee, Liles Gavin, P.A., Jacksonville, FL USA; Rutledge Richardson Liles, Liles Gavin, P.A., Jacksonville, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Madeleine Collins on behalf of themselves and all others similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, [\*\*56] LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Carl A. Frankovich, LEAD ATTORNEY, Frankovich, Anetakis, Colantonio & Simon, Weirton, WV USA; Carla Voigt, LEAD ATTORNEY, Straus & Boies, LLP, Fairfax, VA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Eric J. Pickar, LEAD ATTORNEY, Bangs McCullen Butler Foye & Simmons, Rapid City, SD USA; James M. Terrell, LEAD ATTORNEY, PRO HAC VICE, McCallum, Methvin & Terrell, PA, Birmingham, AL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Joseph Mario Patane, LEAD ATTORNEY, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA USA; Lauren Clare Capurro, LEAD ATTORNEY, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA USA; Mario N. Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott, LLP, San Francisco, CA USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, [\*\*57] Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Michael G. Simon, LEAD ATTORNEY, Frankovich, Anetakis, Colantonio & Simon, Weirton, WV USA; Nathan Cihlar, LEAD ATTORNEY, Straus & Boies, LLP, Fairfax, VA USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Robert A. Blake, Jr., LEAD ATTORNEY, Wyatt & Blake, LLP, Charlotte, NC USA; Robert J. Gralewski, Jr. LEAD ATTORNEY, Kirby McInerney LLP, San Diego, CA USA; Robert G. Methvin, Jr., LEAD ATTORNEY, McCallum, Methvin & Terrell, PA, Birmingham, AL USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert,

Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA. For Amy Greenspan on behalf of themselves and all others similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Carl A. Frankovitch, LEAD ATTORNEY, Frankovitch, Anetakis, Colantonio & Simon, Weirton, WV USA; Carla Voigt, LEAD ATTORNEY, Straus & Boies, LLP, [\*\*58] Fairfax, VA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Eric J. Pickar, LEAD ATTORNEY, Bangs McCullen Butler Foye & Simmons, Rapid City, SD USA; James M. Terrell, LEAD ATTORNEY, PRO HAC VICE, McCallum, Methvin & Terrell, PA, Birmingham, AL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Joseph Mario Patane, LEAD ATTORNEY, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA USA; Lauren Clare Capurro, LEAD ATTORNEY, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA USA; Mario N. Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott, LLP, San Francisco, CA USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Michael G. Simon, LEAD ATTORNEY, Frankovitch, Anetakis, Colantonio & Simon, Weirton, WV USA; Nathan Cihlar, LEAD ATTORNEY, Straus & Boies, LLP, Fairfax, VA USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Robert A. Blake, Jr., LEAD ATTORNEY, Wyatt & Blake, LLP, [\*\*59] Charlotte, NC USA; Robert J. Gralewski, Jr., LEAD ATTORNEY, Kirby McInerney LLP, San Diego, CA USA; Robert G. Methvin, Jr., LEAD ATTORNEY, McCallum, Methvin & Terrell, PA, Birmingham, AL USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Mary K. Shields, on behalf of themselves and all others similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Carl A. Frankovitch, Michael G. Simon, LEAD ATTORNEYS, Frankovitch, Anetakis, Colantonio & Simon, Weirton, WV USA; Carla Voigt, Nathan Cihlar, LEAD ATTORNEYS, Straus & Boies, LLP, Fairfax, VA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Eric J. Pickar, LEAD ATTORNEY, Bangs McCullen Butler Foye & Simmons, Rapid City, SD USA; James M. Terrell, LEAD [\*\*60] ATTORNEY, PRO HAC VICE, McCallum, Methvin & Terrell, PA, Birmingham, AL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Joseph Mario Patane, Lauren Clare Capurro, LEAD ATTORNEYS, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA USA; Mario N. Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott, LLP, San Francisco, CA USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Robert A. Blake, Jr., LEAD ATTORNEY, Wyatt & Blake, LLP, Charlotte, NC USA; Robert J. Gralewski, Jr., LEAD ATTORNEY, Kirby McInerney LLP, San Diego, CA USA; Robert G. Methvin, Jr., LEAD ATTORNEY, McCallum, Methvin & Terrell, PA, Birmingham, AL USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Jane Hart Hargett, on behalf of themselves and all others similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO [\*\*61] HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Carl A. Frankovitch, Michael G. Simon, LEAD ATTORNEYS, Frankovitch, Anetakis, Colantonio & Simon, Weirton, WV USA; Carla Voigt, Nathan Cihlar, LEAD ATTORNEYS, Straus & Boies, LLP, Fairfax, VA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Eric J. Pickar, LEAD ATTORNEY, Bangs McCullen Butler Foye & Simmons, Rapid City, SD USA; James M. Terrell, LEAD ATTORNEY, PRO HAC VICE, McCallum, Methvin & Terrell, PA, Birmingham, AL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Joseph Mario Patane, Lauren Clare Capurro, LEAD ATTORNEYS, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA USA; Mario N. Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott, LLP, San Francisco, CA USA;

Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, [\*\*62] LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Robert A. Blake, Jr., LEAD ATTORNEY, Wyatt & Blake, LLP, Charlotte, NC USA; Robert J. Gralewski, Jr., LEAD ATTORNEY, Kirby McInerney LLP, San Diego, CA USA; Robert G. Methvin, Jr., LEAD ATTORNEY, McCallum, Methvin & Terrell, PA, Birmingham, AL USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

Robert J. Gralewski, Jr., LEAD ATTORNEY, Kirby McInerney LLP, San Diego, CA USA; Robert G. Methvin, Jr., James M. Terrell, Robert G. Methvin, Jr., LEAD ATTORNEYS, McCallum, Methvin & Terrell, PA, Birmingham, AL USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Stephanie Dreyer, on behalf of themselves and all others similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, [\*\*63] Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Carl A. Frankovitch, Michael G. Simon, LEAD ATTORNEYS, Frankovitch, Anetakis, Colantonio & Simon, Weirton, WV USA; Carla Voigt, Nathan Cihlar, LEAD ATTORNEYS, Straus & Boies, LLP, Fairfax, VA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Eric J. Pickar, LEAD ATTORNEY, Bangs McCullen Butler Foye & Simmons, Rapid City, SD USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Joseph Mario Patane, Lauren Clare Capurro, LEAD ATTORNEYS, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA USA; Mario N. Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott, LLP, San Francisco, CA USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Robert A. Blake, Jr., LEAD ATTORNEY, [\*\*64] Wyatt & Blake, LLP, Charlotte, NC USA.

For Christopher Bessette, on behalf of themselves and all others similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Carl A. Frankovitch, LEAD ATTORNEY, Frankovitch, Anetakis, Colantonio & Simon, Weirton, WV USA; Carla Voigt, Nathan Cihlar, LEAD ATTORNEYS, Straus & Boies, LLP, Fairfax, VA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Eric J. Pickar, LEAD ATTORNEY, Bangs McCullen Butler Foye & Simmons, Rapid City, SD USA; James M. Terrell, Robert G. Methvin, Jr., LEAD ATTORNEYS, McCallum, Methvin & Terrell, PA, Birmingham, AL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Joseph Mario Patane, Lauren Clare Capurro, LEAD ATTORNEYS, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA USA; Mario N. Alioto, LEAD ATTORNEY, [\*\*65] Trump Alioto Trump & Prescott, LLP, San Francisco, CA USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Robert A. Blake, Jr., LEAD ATTORNEY, Wyatt & Blake, LLP, Charlotte, NC USA; Robert J. Gralewski, Jr., LEAD ATTORNEY, Kirby McInerney LLP, San Diego, CA USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

Madeline Carey, on behalf of themselves and all others similarly situated, Plaintiff (3:15md2626): Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Carl A. Frankovitch, Michael G. Simon, LEAD ATTORNEYS, Frankovitch, Anetakis, Colantonio & Simon, Weirton, WV USA; Carla Voigt, Nathan Cihlar, LEAD ATTORNEYS, Straus & Boies, LLP, Fairfax, VA USA; Daniel O. [\*\*66] Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti &

Auld LLP, Oakland, CA USA; Eric J. Pickar, LEAD ATTORNEY, Bangs McCullen Butler Foye & Simmons, Rapid City, SD USA; James M. Terrell, LEAD ATTORNEY, PRO HAC VICE, McCallum, Methvin & Terrell, PA, Birmingham, AL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Joseph Mario Patane, Lauren Clare Capurro, LEAD ATTORNEYS, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA USA; Mario N. Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott, LLP, San Francisco, CA USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Robert A. Blake, Jr., LEAD ATTORNEY, Wyatt & Blake, LLP, Charlotte, NC USA; Robert J. Gralewski, Jr., LEAD ATTORNEY, Kirby McInerney LLP, San Diego, CA USA; Robert G. Methvin, Jr., LEAD ATTORNEY, McCallum, Methvin & Terrell, PA, [\*\*67] Birmingham, AL USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Sergio Castillo, On behalf of himself and all other similarly situated, Plaintiff (3:15md2626): Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Alexander Michael Schack, Natasha Azadeh Naraghi, LEAD ATTORNEYS, Law Offices of Alexander M. Schack, San Diego, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; ELLIOT ADLER, LEAD ATTORNEY, Adler Law Group, APLC, San Diego, CA USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEY, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Geoffrey Joseph Spreter, LEAD ATTORNEY, PRO HAC VICE, Spreter Law Firm, APC, Coronado, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael [\*\*68] E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Juliana Brodsky, on behalf of herself and all others similarly situated, Plaintiff (3:15md2626): Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Bonny E. Sweeney, LEAD ATTORNEY, PRO HAC VICE, Hausfeld LLP, San Francisco, CA USA; Christopher L. Lebsack, LEAD ATTORNEY, PRO HAC VICE, Hausfeld, LLP, San Francisco, CA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Irving Scher, LEAD ATTORNEY, Hausfeld, LLP, New York, NY USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, [\*\*69] LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael D. Hausfeld, LEAD ATTORNEY, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Washington, DC USA; Michael P. Lehmann, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Nathaniel C Giddings, LEAD ATTORNEY, Hausfeld LLP, Washington, DC USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA; Mili Desai, LEAD ATTORNEY, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Nathaniel C Giddings, Nathaniel C Giddings, LEAD ATTORNEYS, Hausfeld LLP, Washington, DC USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Amanda Cunha, On behalf of herself an all other similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Ari Y. [\*\*70] Basser, LEAD ATTORNEY, PRO HAC VICE, Markun, Zusman, Freniere and Compton LLP, Pacific Palisades, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Beth T. Seltzer, Gerald Rodos, Jeffrey B. Gittleman, LEAD ATTORNEYS, Barrack, Rodos & Bacine, Philadelphia, PA USA; Bryan Clobes, LEAD ATTORNEY, Cafferty Faucher, LLP,

Philadelphia, PA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; John Andrew DeVault, III, Michael E. Lockamy, LEAD ATTORNEYS, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael D. Hausfeld, LEAD ATTORNEY, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Washington, DC USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Samuel M. Ward, Stephen R. Bassar, LEAD ATTORNEYS, Barrack, Rodos & Bacine, [\*\*71] San Diego, CA USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Amy Lubin, on behalf of herself and all others similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Archana Tamoshunas, LEAD ATTORNEY, Tau, Cebulash & Landau, LLP, New York, NY USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; John Gravante, III, Robert C. Josefsberg, LEAD ATTORNEYS, Podhurst Orseck, P.A., Miami, FL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Kevin Landau, LEAD ATTORNEY, Taus, Cebulash & Landau, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, [\*\*72] Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Kevin Moy, On behalf of himself and all other similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Adam C. Belsky, LEAD ATTORNEY, GROSS & BELSKY P.C., San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Monique Alonso, Terry [\*\*73] Gross, LEAD ATTORNEYS, Gross Belsky Alonso LLP, San Francisco, CA USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Erika Targum, on behalf of herself and all others similarly situated, Racquel Dizon-Ikei, on Behalf of Herself and All Others, Similarly Situated, Plaintiffs: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Christopher M. Burke, LEAD ATTORNEY, PRO HAC VICE, Scott & Scott, LLP, San Diego, CA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; E. Kirk Wood, LEAD ATTORNEY, Law Offices of E. Kirk Wood, Birmingham, AL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Gregory Louis Davis, LEAD ATTORNEY, Davis & Taliaferro, Montgomery, AL USA; Jennifer Janine Scott, [\*\*74] LEAD ATTORNEY, Crowell & Moring, LLP, Irvine, CA USA; John T. Jasnoch, LEAD ATTORNEY, Scott & Scott, LLP, San Diego, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, PRO HAC VICE, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Lawrence W. Cohn, LEAD ATTORNEY, Attorney at Law, Kailua Kona, HI USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP,

New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Thomas Kay Boardman, LEAD ATTORNEY, Scott + Scott, Attorneys at Law, LLP, New York, NY USA; Peter A. Barile, III, PRO HAC VICE, Scott + Scott, Attorneys at Law, LLP, New York, NY USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Stacie Ikei, on Behalf of Herself and All Others Similarly Situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO [\*\*75] HAC VICE, Robins Kaplan, LLP, New York, NY USA; Christopher M. Burke, LEAD ATTORNEY, PRO HAC VICE, Scott & Scott, LLP, San Diego, CA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; E. Kirk Wood, LEAD ATTORNEY, Law Offices of E. Kirk Wood, Birmingham, AL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Gregory Louis Davis, LEAD ATTORNEY, Davis & Taliaferro, Montgomery, AL USA; Jennifer Janine Scott, LEAD ATTORNEY, Crowell & Moring, LLP, Irvine, CA USA; John T. Jasnoch, LEAD ATTORNEY, Scott & Scott, LLP, San Diego, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, PRO HAC VICE, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Lawrence W. Cohn, LEAD ATTORNEY, Attorney at Law, Kailua Kona, HI USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Thomas Kay Boardman, [\*\*76] LEAD ATTORNEY, Scott + Scott, Attorneys at Law, LLP, New York, NY USA; Peter A. Barile, III, PRO HAC VICE, Scott + Scott, Attorneys at Law, LLP, New York, NY USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Sally Weinstein, on Behalf of Herself and All Others Similarly Situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, RO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Christopher M. Burke, LEAD ATTORNEY, PRO HAC VICE, Scott & Scott, LLP, San Diego, CA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; E. Kirk Wood, LEAD ATTORNEY, Law Offices of E. Kirk Wood, Birmingham, AL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Gregory Louis Davis, LEAD ATTORNEY, Davis & Taliaferro, Montgomery, AL USA; Jennifer Janine Scott, LEAD ATTORNEY, Crowell & Moring, LLP, Irvine, CA USA; John T. Jasnoch, LEAD ATTORNEY, Scott & Scott, LLP, San Diego, CA USA; Joseph P. Guglielmo, LEAD [\*\*77] ATTORNEY, PRO HAC VICE, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Lawrence W. Cohn, LEAD ATTORNEY, Attorney at Law, Kailua Kona, HI USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Thomas Kay Boardman, LEAD ATTORNEY, Scott + Scott, Attorneys at Law, LLP, New York, NY USA; Peter A. Barile, III, PRO HAC VICE, Scott + Scott, Attorneys at Law, LLP, New York, NY USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Serge Pentsak, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, RO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Elizabeth A. Fegan, Mark T. Vazquez, LEAD ATTORNEYS, [\*\*78] PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Jeff D Friedman, LEAD ATTORNEY, PRO HAC VICE, Hagens, Berman, Sobol & Shapiro, LLP, Seattle, WA USA; Jennifer F. Connolly, LEAD ATTORNEY, PRO HAC VICE, HAGENS BERMAN SOBOL SHAPIRO LLP, Washington, DC USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Steve W. Berman, LEAD ATTORNEY,

Hagens, Berman, Sobol & Shapiro, LLP, Seattle, WA USA; Thomas M. Sobol, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Cambridge, MA USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Monika Paske, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, [\*\*79] San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Elizabeth A. Fegan, Mark T. Vazquez, LEAD ATTORNEYS, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Jeff D Friedman, LEAD ATTORNEY, PRO HAC VICE, Hagens, Berman, Sobol & Shapiro, LLP, Seattle, WA USA; Jennifer F. Connolly, LEAD ATTORNEY, PRO HAC VICE, HAGENS BERMAN SOBOL SHAPIRO LLP, Washington, DC USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Steve W. Berman, LEAD ATTORNEY, Hagens, Berman, Sobol & Shapiro, LLP, Seattle, [\*\*80] WA USA; Thomas M. Sobol, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Cambridge, MA USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Matthew J. Cardamone, individually and on behalf of all others similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Brendan Patrick Glackin, Dean Michael Harvey, LEAD ATTORNEYS, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Eric B. Fastiff, LEAD ATTORNEY, Lieff Cabraser Heimann & Bernstein LLP, San Francisco, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Linda Phyllis Nussbaum, LEAD ATTORNEY, Nussbaum Law Group, P.C., New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, [\*\*81] CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Peter A. Barile, III, LEAD ATTORNEY, PRO HAC VICE, Scott + Scott, Attorneys at Law, LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Marcia Parker, on behalf of herself and all others similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Christopher Thomas Micheletti, Judith A. Zahid, LEAD ATTORNEYS, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, [\*\*82] New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Susan G Gordon, on behalf of herself and all others similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Azra Z. Mehdi, LEAD ATTORNEY, The Mehdi Firm PC, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Bryan Clobes, LEAD ATTORNEY, Cafferty Faucher, LLP, Philadelphia, PA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC

VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; John Andrew DeVault, III, Michael E. Lockamy, LEAD ATTORNEY, [\*\*83] Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael D. Hausfeld, LEAD ATTORNEY, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Washington, DC USA; Nathaniel C Giddings, LEAD ATTORNEY, Hausfeld LLP, Washington, DC USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Robert S. Kitchenoff, LEAD ATTORNEY, Weinstein Kitchenoff Scarlato & Goldman LTD, Philadelphia, PA USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Marilyn Marlene Dedivanaj, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; David E. Azar, LEAD ATTORNEY, Milberg LLP, [\*\*84] Los Angeles, CA USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Paul F. Novak, LEAD ATTORNEY, Milberg LLP, Detroit, MI USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Kimberly Martin, individually and on behalf of all others similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Brendan Patrick Glackin, Dean Michael Harvey, Eric B. Fastiff, LEAD ATTORNEYS, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Daniel [\*\*85] O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Linda Phyllis Nussbaum, LEAD ATTORNEY, Nussbaum Law Group, P.C., New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For David L. Morse, on behalf of himself and all others similarly situated, Melodie Alley, individually and on behalf of all others similarly situated, Plaintiffs: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, [\*\*86] New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Francis Onofrei Scarpulla, Patrick Clayton, LEAD ATTORNEYS, Law Offices of Francis O. Scarpulla, San Francisco, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Jennifer L. Crose, on behalf of herself and all others similarly situation, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New

York, [\*\*87] NY USA; Daniel E. Becnel, Jr., Kevin Patrick Klibert, Matthew B. Moreland, Salvadore Christina, Jr., LEAD ATTORNEYS, Becnel Law Firm, LLC, Reserve, LA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Debra Denton, on behalf of herself and all others similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, [\*\*88] New York, NY USA; Chris T Cain, Christopher Cain, Thomas S Scott, Jr, LEAD ATTORNEYS, Scott & Cain, Knoxville, TN USA; Daniel E. Becnel, Jr., Kevin Patrick Klibert, Matthew B. Moreland, Salvadore Christina, Jr., LEAD ATTORNEYS, Becnel Law Firm, LLC, Reserve, LA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; W. Allen McDonald, LEAD ATTORNEY, Lacy, Price & Wagner, P.C., Knoxville, TN USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Amanda Heidel, individually and on behalf of all those, similarly situated, Rachel Rondy-Geocaris, Gloria [\*\*89] Goldblatt, Plaintiffs: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Christopher M. Burke, LEAD ATTORNEY, PRO HAC VICE, Scott & Scott, LLP, San Diego, CA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; E. Kirk Wood, LEAD ATTORNEY, Law Offices of E. Kirk Wood, Birmingham, AL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Gregory Louis Davis, LEAD ATTORNEY, Davis & Taliaferro, Montgomery, AL USA; Jennifer Janine Scott, LEAD ATTORNEY, Crowell & Moring, LLP, Irvine, CA USA; John T. Jasnoch, LEAD ATTORNEY, Scott & Scott, LLP, San Diego, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, PRO HAC VICE, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Lawrence W. Cohn, LEAD ATTORNEY, Attorney at Law, Kailua Kona, HI USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, [\*\*90] PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Thomas Kay Boardman, LEAD ATTORNEY, Scott + Scott, Attorneys at Law, LLP, New York, NY USA; Peter A. Barile, III, PRO HAC VICE, Scott + Scott, Attorneys at Law, LLP, New York, NY USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Gaurav Khanna, Plaintiff Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Jayne Arnold Goldstein, Nathan Zipperian, LEAD ATTORNEYS, Shepherd, Finkelman, Miller & Shah, LLC, Fort Lauderdale, FL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar [\*\*91] Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Natalie Finkelman Bennett, LEAD ATTORNEY, PRO HAC VICE, Shepherd, Finkelman, Miller & Shah, LLC, Media, PA USA; Peggy J. Wedgworth,

LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Hazel Pacheco, Allison Maldonado, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD [\*\*92] ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Phillip T. Howard, LEAD ATTORNEY, Howard & Associates, PA, Tallahassee, FL USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Kaysha Izumoto, on behalf of herself and all others similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Gary Charles Rosen, LEAD ATTORNEY, Becker & Poliakoff, PA, Ft Lauderdale, FL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; M. Stephen Dampier, LEAD ATTORNEY, Law Offices of M. Stephen Dampler, PC, Fairhope, [\*\*93] AL USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael Christian Gongora, LEAD ATTORNEY, Becker & Poliakoff, Coral Gables, FL USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Misty Bolen-Carson, on behalf of herself and all others similarly situated, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Bonny E. Sweeney, LEAD ATTORNEY, PRO HAC VICE, Hausfeld LLP, San Francisco, CA USA; Christopher L. Lebsack, LEAD ATTORNEY, PRO HAC VICE, Hausfeld, LLP, San Francisco, CA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, [\*\*94] Bleichmar Fonti & Auld LLP, Oakland, CA USA; Emily P. Rich, LEAD ATTORNEY, Weinberg, Roger & Rosenfeld, Alameda, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Kathleen Styles Rogers, Kimberly Ann Kralowec, LEAD ATTORNEYS, Kralowec Law, P.C., San Francisco, CA USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Judy Hirsch, On behalf of herself and all others similarly situated, Monique Moore, On behalf of herself and all others similarly situated, Brian Cohen, On behalf of herself and all others similarly situated, Amber Davis, On behalf of herself and all others similarly situated, Dan Leyva, On behalf of herself and all others similarly situated, Jon Zeman, On behalf of herself and all others similarly situated, Plaintiffs: Abbye R. Klamann, [\*\*95] LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Gary Charles Rosen, LEAD ATTORNEY, Becker & Poliakoff, PA, Ft Lauderdale, FL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew

Sinclair Weiler, Michael Christian Gongora, LEAD ATTORNEYS, Becker & Poliakoff, Coral Gables, FL USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Sheryl Marean, On behalf of herself and all others similarly situated, Mistelle Gilbert, On behalf of herself and all others similarly [\*\*96] situated, Melissa Silverman, On behalf of herself and all others similarly situated, Kari Lucas, On behalf of herself and all others similarly situated, Plaintiffs: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Bryan Clobes, LEAD ATTORNEY, Cafferty Faucher, LLP, Philadelphia, PA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEY, PRO HAC VICE, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Gary Charles Rosen, Michael Christian Gongora, LEAD ATTORNEYS, Becker & Poliakoff, PA, Ft Lauderdale, FL USA; John Andrew DeVault, III, Michael E. Lockamy, LEAD ATTORNEYS, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael D. Hausfeld, LEAD ATTORNEY, Cohen, Milstein, Hausfeld & Toll, [\*\*97] P.L.L.C., Washington, DC USA; Mili Desai, LEAD ATTORNEY, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Nathaniel C Giddings, LEAD ATTORNEY, Hausfeld LLP, Washington, DC USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Rachel Taylor, On behalf of herself and all others similarly situated, Frances Cameron, On behalf of herself and all others similarly situated, Joanne Hopf, On behalf of herself and all others similarly situated, Nicholas Keaveny, On behalf of herself and all others similarly situated, Plaintiffs: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco , CA USA; Benjamin Steinberg, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York , NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HACVICE, Cafferty Clobes Meriwether & Sprengel, Chicago , IL USA; Eamon O'Kelly, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan, LLP, New York , NY USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, [\*\*98] PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland , CA USA; Gary Charles Rosen, LEAD ATTORNEY, Becker & Poliakoff, PA; Ft Lauderdale , FL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York , NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland , CA USA; Michael Christian Gongora, LEAD ATTORNEY, Becker & Poliakoff, Coral Gables , FL USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville , FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York , NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura , FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables , FL USA.

For Robin Blackenship, On behalf of herself and all others similarly, situated, Delia Druley, On behalf of herself and all others similarly, situated, Heather Butcher, On behalf of herself and all others similarly, situated, Plaintiffs: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, [\*\*99] LLP, New York, NY USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HACVICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Eamon O'Kelly, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Gary Charles Rosen, LEAD ATTORNEY, Becker & Poliakoff, PA, Ft Lauderdale, FL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael Christian Gongora, LEAD ATTORNEY, Becker & Poliakoff, Coral Gables, FL USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg

Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Ashley Lanzarotti, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis [\*\*100] Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Brian C. Gudmundson, LEAD ATTORNEY, PRO HAC VICE, Zimmerman Reed, LLP, Minneapolis, MN USA; Caleb Lucas-Hansen Marker, LEAD ATTORNEY, PRO HAC VICE, Zimmerman Reed LLP, Manhattan Beach, CA USA; Christopher Paul Ridout, LEAD ATTORNEY, Ridout Marker & Ottoson LLP, Long Beach, CA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Kathleen Schirf, Alexis Ito, Elyse Ulino, Plaintiffs: Abbye R. Klamann, LEAD ATTORNEY, PRO [\*\*101] HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA; Benjamin Steinberg, Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Bryan Clobes, LEAD ATTORNEY, Cafferty Faucher, LLP, Philadelphia, PA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEY, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; John Andrew DeVault, III, Michael E. Lockamy, LEAD ATTORNEYS, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael D. Hausfeld, LEAD ATTORNEY, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Washington, DC USA; Nathaniel C Giddings, LEAD ATTORNEY, Hausfeld LLP, Washington, DC USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Monica Pasek, Plaintiff: Abbye R. Klamann, LEAD ATTORNEY, [\*\*102] PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA USA Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Eamon O'Kelly, Hollis Lee Salzman, LEAD ATTORNEYS, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Elizabeth A. Fegan, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Chicago, IL USA; Emily C. Aldridge, Mili Desai, LEAD ATTORNEYS, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Mark T. Vazquez, LEAD ATTORNEY, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Chicago, IL USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Scott Adam Edelsberg, LEAD ATTORNEY, Edelsberg Law, PA, Aventura, FL USA.

For Pamela Mazzarella, Plaintiff: Bryan Clobes, LEAD ATTORNEY, Cafferty Faucher, LLP, Philadelphia, PA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether [\*\*103] & Sprengel, Chicago, IL USA; Emily C. Aldridge, LEAD ATTORNEY, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Hollis Lee Salzman, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, John Andrew DeVault, III, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Nathaniel C Giddings, LEAD ATTORNEY, Hausfeld LLP, Washington, DC USA. Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA Robert Cecil Gilbert, LEAD ATTORNEY, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA John Andrew DeVault, III, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA.

For Joe Felson, Plaintiff: Bryan Clobes, LEAD ATTORNEY, Cafferty Faucher, LLP, Philadelphia, PA USA; Daniel O. Herrera, LEAD ATTORNEY, PRO HAC VICE, Cafferty Clobes Meriwether & Sprengel, Chicago, IL USA; Emily C. Aldridge, LEAD ATTORNEY, PRO HAC VICE, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Hollis Lee Salzman, LEAD ATTORNEY, [\*\*104] PRO HAC VICE, Robins Kaplan, LLP, New York, NY USA; Joseph P. Guglielmo, LEAD ATTORNEY, Scott & Scott, Attorneys At Law, LLP, New York, NY USA; Matthew Sinclair Weiler, LEAD ATTORNEY, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Michael E. Lockamy, LEAD ATTORNEY, John Andrew DeVault, III, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA; Nathaniel C Giddings, LEAD ATTORNEY, Hausfeld LLP, Washington, DC USA; Peggy J. Wedgworth, LEAD ATTORNEY, Milberg Tadler Phillips Grossman LLP, New York, NY USA; Robert Cecil Gilbert, LEAD ATTORNEY, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Coral Gables, FL USA.

For Coopervision, Inc., Defendant: Ana Gardea, LEAD ATTORNEY, Latham & Watkins, LLP, San Francisco, CA USA; Barry Marshall Sabin, LEAD ATTORNEY, Latham & Watkins, Washington, DC USA; Christopher S. Yates, LEAD ATTORNEY, PRO HAC VICE, Latham & Watkins LLP - San Francisco, San Francisco, CA USA; Helen Peacock Roberson, Michael G. Tanner, Thomas Edward Bishop, LEAD ATTORNEY, Tanner Bishop, Jacksonville, FL USA; Dennis Parker Waggoner, Hill Ward Henderson, PA, Tampa, FL USA.

For Cooper Vision, Inc., Defendant: Christopher S. Yates, LEAD ATTORNEY, PRO HAC VICE, Latham & Watkins [\*\*105] LLP - San Francisco, San Francisco, CA USA; Daniel M. Wall, Elif Kimyacioglu, LEAD ATTORNEYS, Latham & Watkins, LLP, San Francisco, CA USA; David F. Oliver, LEAD ATTORNEY, Berkowitz Oliver Williams Shaw & Eisenbrandt LLP, Kansas City, MO USA; Helen Peacock Roberson, Michael G. Tanner, Thomas Edward Bishop, LEAD ATTORNEYS, Tanner Bishop, Jacksonville, FL USA.

For Alcon Laboratories, Inc., Defendant: Caitlin N. Fitzpatrick, Lauren A. Moskowitz, Sarah Warburg-Johnson, LEAD ATTORNEYS, Cravath, Swaine & Moore, LLP\*, New York, NY USA; David R Marriott, LEAD ATTORNEY, PRO HAC VICE, Cravath, Swaine & Moore, LLP, New York, NY USA; Evan R. Chesler, LEAD ATTORNEY, Cravath, Swaine & Moore, LLP, New York, NY USA; Michael G. Tanner, LEAD ATTORNEY, Tanner Bishop, Jacksonville, FL USA; Samuel Olds Patmore, LEAD ATTORNEY, Stearns Weaver Miller Weissler Alhadef & Sitterson, Miami, FL USA; A. Graham Allen, Samuel Joseph Horovitz, Rogers Towers, P.A., Jacksonville, FL USA; Dennis Parker Waggoner, Hill Ward Henderson, PA, Tampa, FL USA; James M. Riley, Rogers Towers, P.A., Ponte Verda Beach, FL USA; Jennifer L. Kifer, Holland & Knight, LLP, Jacksonville, FL USA.

For Bausch & Lomb, Incorporated, Defendant: [\*\*106] Andrew Muscato, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom, LLP\*, New York, NY USA; Eliot Fielding Turner, LEAD ATTORNEY, Norton Rose Fulbright US, LLP, Houston, TX USA; Enrique Daniel Arana, LEAD ATTORNEY, Carlton Fields Jorden Burt, P.A., Miami, FL USA; Jennifer L. Kifer, Holland & Knight, LLP, Jacksonville, FL USA; Jerome W. Hoffman, LEAD ATTORNEY, Holland & Knight, LLP, Tallahassee, FL USA; Justine Haimi, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom, LLP, New York, NY USA; Mark Patrick Angland, LEAD ATTORNEY, Norton Rose Fulbright US, LLP, Washington, DC USA; Mark A. Robertson, Robin D. Adelstein, LEAD ATTORNEYS, Norton Rose Fulbright US, LLP, New York, NY USA; Michael G. Tanner, LEAD ATTORNEY, Tanner Bishop, Jacksonville, FL USA; Paul M. Eckles, LEAD ATTORNEY, PRO HAC VICE, Skadden, Arps, Slate, Meagher & Flom, LLP, New York, NY USA; Peter C Sales, LEAD ATTORNEY, Bradley Arant Boult Cummings LLP (Nashville), Nashville, TN USA; Richard J. Ovelmen, LEAD ATTORNEY, Carlton Fields Jorden Burt, PA, Miami, FL USA; Steven C. Sunshine, LEAD ATTORNEY, PRO HAC VICE, Skadden, Arps, Slate, Meagher & Flom, LLP, Washington, DC USA.

For Bausch Lomb, Defendant: James D. Griffin, [\*\*107] LEAD ATTORNEY, Blackwell Sanders Peper Martin LLP, Overland Park, KS USA; Jennifer L. Kifer, LEAD ATTORNEY, Holland & Knight, LLP, Jacksonville, FL USA; Lisa M. Bolliger, LEAD ATTORNEY, Scharnhorst Ast Kennard Griffin PC, Kansas City, MO USA; Michael G. Tanner, LEAD ATTORNEY, Tanner Bishop, Jacksonville, FL USA.

For Johnson & Johnson Vision Care, Inc., Defendant: Benjamin F. Jackson, Jacob F. Siegel, LEAD ATTORNEY, Patterson, Belknap, Webb & Tyler, LLP, New York, NY USA.

For Johnson & Johnson Vision Care, Inc., Defendant: Jerome A. Swindell, LEAD ATTORNEY, Johnson & Johnson, New Brunswick, NJ USA; John F. Mariani, LEAD ATTORNEY, Shutts & Bowen, LLP, West Palm Beach, FL USA; Jonathan H. Hatch, LEAD ATTORNEY, Patterson, Belknap, Webb & Tyler, LLP, New York, NY USA; Katrina

Szymborski, LEAD ATTORNEY, PRO HACVICE, Patterson, Belknap, Webb & Tyler, LLP, New York, NY USA; Michael G. Tanner, LEAD ATTORNEY, Tanner Bishop, Jacksonville, FL USA; Peter K. Huston, LEAD ATTORNEY, SIDLEY AUSTIN LLP, San Francisco, CA USA; R Dale Grimes, LEAD ATTORNEY, Bass, Berry & Sims, PLC (Nashville), Nashville, TN USA; Robert Troy Smith, LEAD ATTORNEY, GrayRobinson PA, Jacksonville, FL USA; Walter F. Timpone, **[\*\*108]** LEAD ATTORNEY, McElroy, Deutsch, Mulvaney & Carpenter, LLP, Morristown, NJ USA; William F. Cavanaugh, Jr., LEAD ATTORNEY, Patterson, Belknap, Webb & Tyler, New York, NY USA; Jennifer L. Kifer, Holland & Knight, LLP, Jacksonville, FL USA.

For Abb/Con-Cise Optical Group, Llc, also known as ABB Optical Group, Defendant: Anne K. Collesano, LEAD ATTORNEY, Kirkland & Ellis, LLP, Washington, DC USA; Dennis Parker Waggoner, LEAD ATTORNEY, Hill Ward Henderson, PA, Tampa, FL USA; Edwin John U, LEAD ATTORNEY, PRO HACVICE, Kirkland & Ellis, LLP, Washington, DC USA; Michael G. Tanner, LEAD ATTORNEY, Tanner Bishop, Jacksonville, FL USA; Michael Francis Williams, Patrick J. King, LEAD ATTORNEY, PRO HACVICE, Kirkland & Ellis, LLP, Washington, DC USA; Sarah E. Williams, LEAD ATTORNEY, Kirkland & Ellis LLP, Houston, TX USA.

For Abb Optical Group, Defendant: Alexandra Caritis, Anne K. Collesano, Ashley Littlefield, LEAD ATTORNEY, Kirkland & Ellis LLP, Houston, TX USA; Benjamin H. Hill, III, Dennis Parker Waggoner, LEAD ATTORNEY, Hill Ward Henderson, PA, Tampa, FL USA; Edwin John U, Patrick J. King, LEAD ATTORNEY, PRO HACVICE, Kirkland & Ellis, LLP, Washington, DC USA; Michael G. Tanner, LEAD ATTORNEY, **[\*\*109]** Tanner Bishop, Jacksonville, FL USA; Sarah E. Williams, LEAD ATTORNEY, Kirkland & Ellis LLP, Houston, TX USA; William F. Goodman, LEAD ATTORNEY, Bradley, Arant, Boult & Cummings, LLP, Nashville, TN USA; Jennifer L. Kifer, Holland & Knight, LLP, Jacksonville, FL USA; Samuel Joseph Horovitz, Rogers Towers, P.A., Jacksonville, FL USA.

For Wal-Mart Stores, Inc, Defendant: I. William Spivey, II, LEAD ATTORNEY, Greenberg Traurig, LLP, Orlando, FL USA.

For 1-800-Contacts.Com, Defendant: Garth T. Vincent, LEAD ATTORNEY, Munger, Tolles & Olson LLP, Los Angeles, CA USA.

For Lensdiscounters.Com, Defendant: Aaron R. Gott, LEAD ATTORNEY, Bona Law, P.C., La Jolla, CA USA; Jarod Michael Bona, LEAD ATTORNEY, PRO HACVICE, Bona Law, P.C., La Jolla, CA UA.

For Bausch And Lomb, Defendant: Michael G. Tanner, LEAD ATTORNEY, Tanner Bishop, Jacksonville, FL USA; Steven C. Sunshine, LEAD ATTORNEY, PRO HACVICE, Skadden, Arps, Slate, Meagher & Flom, LLP, Washington, DC USA.

Novartis Corporation, Defendant, Pro se.

For Johnson & Johnson, Defendant: Michael G. Tanner, LEAD ATTORNEY, Tanner Bishop, Jacksonville, FL USA.

For Bausch & Lomb, Inc., Defendant: Andrew Muscato, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & **[\*\*110]** Flom, LLP\*, New York, NY USA; Eliot Fielding Turner, LEAD ATTORNEY, Norton Rose Fulbright US, LLP, Houston, TX USA; Enrique Daniel Arana, LEAD ATTORNEY, Carlton Fields Jorden Burt, P.A., Miami, FL USA; Jennifer L. Kifer, LEAD ATTORNEY, Holland & Knight, LLP, Jacksonville, FL USA; Michael G. Tanner, LEAD ATTORNEY, Tanner Bishop, Jacksonville, FL USA; Richard J. Ovelmen, LEAD ATTORNEY, Carlton Fields Jorden Burt, PA, Miami, FL USA; Dennis Parker Waggoner, Hill Ward Henderson, PA, Tampa, FL USA.

For Valeant Pharmaceuticals North America, Llc, Defendant: Eliot Fielding Turner, LEAD ATTORNEY, Norton Rose Fulbright US, LLP, Houston, TX USA; Jennifer L. Kifer, LEAD ATTORNEY, Holland & Knight, LLP, Jacksonville, FL USA; Skadden, Arps, Slate, Meagher & Flom, LLP, New York, NY USA; Luke T. Taeschler, LEAD ATTORNEY, PRO HACVICE, Skadden, Arps, Slate, Meagher & Flom, LLP, New York, NY USA; Mark Patrick Angland, LEAD ATTORNEY, Norton Rose Fulbright US, LLP, Washington, DC USA; Mark A. Robertson, Robin D. Adelstein, LEAD ATTORNEY, Norton Rose Fulbright US, LLP, New York, NY USA.

For Valeant Pharmaceuticals North America, Llc, Defendant: Eliot Fielding Turner, LEAD ATTORNEY, Norton Rose Fulbright US, **[\*\*111]** LLP, Houston, TX USA; Jennifer L. Kifer, LEAD ATTORNEY, Holland & Knight, LLP, Jacksonville, FL USA; Justine Haimi, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom, LLP, New York,

NY USA; Luke T. Taeschler, LEAD ATTORNEY, PRO HAC VICE, Skadden, Arps, Slate, Meagher & Flom, LLP, New York, NY USA; Mark Patrick Angland, LEAD ATTORNEY, Norton Rose Fulbright US, LLP, Washington, DC USA; Mark A. Robertson, LEAD ATTORNEY, Norton Rose Fulbright US, LLP, New York, NY USA; Robin D. Adelstein, LEAD ATTORNEY, Norton Rose Fulbright US, LLP, New York, NY USA.

For Johnson & Johnson Vision Care Inc., Defendant: Michael G. Tanner, LEAD ATTORNEY, Tanner Bishop, Jacksonville, FL USA; Robert Troy Smith, LEAD ATTORNEY, GrayRobinson PA, Jacksonville, FL USA; William F. Cavanaugh, Jr., LEAD ATTORNEY, Patterson, Belknap, Webb & Tyler, New York, NY USA; Dennis Parker Waggoner, Hill Ward Henderson, PA, Tampa, FL USA; Jennifer L. Kifer, Holland & Knight, LLP, Jacksonville, FL USA.

For Abb Consise Optical Group, Llc, Johnson Vision Care, Inc., Defendants: Michael G. Tanner, LEAD ATTORNEY, Tanner Bishop, Jacksonville, FL USA.

For Bausch Lomb Incorporated, CAND 3:15-cv-1301, Defendant: Jennifer L. Kifer, LEAD [\*\*112] ATTORNEY, Holland & Knight, LLP, Jacksonville, FL USA; Luke T. Taeschler, LEAD ATTORNEY, PRO HAC VICE, Skadden, Arps, Slate, Meagher & Flom, LLP, New York, NY USA; Michael G. Tanner, LEAD ATTORNEY, Tanner Bishop, Jacksonville, FL USA.

For Bausch Lomb, Defendant: Michael G. Tanner, LEAD ATTORNEY, Tanner Bishop, Jacksonville, FL USA; Steven C. Sunshine, LEAD ATTORNEY, PRO HAC VICE, Skadden, Arps, Slate, Meagher & Flom, LLP, Washington, DC USA.

For Rachel Rondy-Geocaris, on behalf of herself and all others similarly situated, Defendant: Bonny E. Sweeney, LEAD ATTORNEY, PRO HAC VICE, Hausfeld LLP, San Francisco, CA USA; Carl Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL USA; Christopher L. Lebsock, LEAD ATTORNEY, PRO HAC VICE, Hausfeld, LLP, San Francisco, CA USA; Fred T. Isquith, LEAD ATTORNEY, Wolf, Haldenstein, Adler, Freeman & Herz, New York, NY USA; Irving Scher, LEAD ATTORNEY, Hausfeld, LLP, New York, NY USA; Michael D. Hausfeld, LEAD ATTORNEY, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Washington, DC USA; Michael P. Lehmann, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA USA; Theodore B. Bell, LEAD ATTORNEY, PRO HAC VICE, Ahern and Associates, P.C., [\*\*113] Chicago, IL USA; Thomas H. Burt, LEAD ATTORNEY, PRO HAC VICE, Wolf, Haldenstein, Adler, Freeman & Herz, LLP, New York, NY USA.

For Abb Concise Optical Group, Llc, Defendant: Dennis Parker Waggoner, LEAD ATTORNEY, Hill Ward Henderson, PA, Tampa, FL USA; Michael G. Tanner, LEAD ATTORNEY, Tanner Bishop, Jacksonville, FL USA.

For Lensdiscounters.Com, Defendant: Aaron R. Gott, LEAD ATTORNEY, Bona Law, P.C., La Jolla, CA USA; Jarod Michael Bona, LEAD ATTORNEY, Bona Law, P.C., La Jolla, CA USA.

For John Machikawa, Interested Party: Allan Steyer, LEAD ATTORNEY, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA USA; Christopher L. Lebsock, LEAD ATTORNEY, PRO HAC VICE, Hausfeld, LLP, San Francisco, CA USA; D. Scott Macrae, LEAD ATTORNEY, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA USA; John Andrew DeVault, III, Bedell, Dittmar, DeVault, Pillans & Coxe, PA, Jacksonville, FL USA.

For Rachel Miller, Caitlin O'Neill, Tyler Brandafino, Interested Parties: Christopher M. Burke, LEAD ATTORNEY, PRO HAC VICE, Scott & Scott, LLP, San Diego, CA USA.

For Serge Pentsak, Interested Party: Jeff D Friedman, LEAD ATTORNEY, PRO HAC VICE, Hagens, Berman, Sobol & Shapiro, LLP, [\*\*114] Seattle, WA USA; Mark T. Vazquez, LEAD ATTORNEY, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Chicago, IL USA; Thomas M. Sobol, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Cambridge, MA USA.

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For Diego Hernandez, Cregan Smith, Interested Parties: Manfred Patrick Muecke, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA USA.

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**Judges:** HARVEY E. SCHLESINGER, United States District Judge.

**Opinion by:** HARVEY E. SCHLESINGER

## Opinion

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[EDITOR'S NOTE: THE ORIGINAL SOURCE CONTAINED ILLEGIBLE WORDS AND/OR MISSING TEXT. THE LEXIS SERVICE WILL PLACE THE CORRECTED VERSION ON-LINE UPON RECEIPT.]

### [\*349] ORDER

This multi-district litigation ("MDL") antitrust case involving the pricing of disposable contact lenses is before the Court on the [\*\*116] contact lens consumer Plaintiffs' Motion for Class Certification. (Docs. 396; S-404) (collectively "Motion for Class Certification").<sup>1</sup> The Defendants, contact lens manufacturers, Alcon Laboratories, Inc. ("Alcon"), Johnson & Johnson Vision Care, Inc. ("JJVC"), Bausch & Lomb Inc. ("B&L"), and CooperVision, Inc. ("CV") (collectively "Manufacturer Defendants"), and distributor ABB Concise Optical Group, LLC ("ABB"), have filed a Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification (Docs. 505; S-540). With leave of Court, Plaintiffs filed Plaintiffs' Reply Memorandum of Law in Support of Motion for Class Certification (Docs. 611; S-649), and Defendants filed Defendants' Sur-Reply Memorandum of Law in Further Opposition to Plaintiffs' Motion for Class Certification. (Doc. 674; Doc. S-681). A two-day evidentiary hearing on Plaintiffs' Class Certification Motion was conducted in August of 2018. (See Doc. 866; Doc. 867). Plaintiffs have settled with CV. (Docs. 611 at 10; S-649 at 10; 781). In connection with the pending Motion for Class Certification, the Defendants have filed:

1) Defendants' Motion to Strike Portions of the Expert Report of Dr. John L. Solow and Preclude [\*\*117] Testimony Regarding Purported Collusion Between the Defendants, Pursuant to Fed. R. Evid. 702 and Daubert (Docs. 500; S-

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<sup>1</sup> There are two versions of the motions, responses, and declarations and exhibits filed in support of thereof: a redacted public version; and an unredacted version filed under seal with the Court's permission because it contains confidential information. If there are two docket numbers listed for a particular filing, the docket number beginning with "S-" denotes the version filed under seal.

531 ("Solow *Daubert* Motion")), to which Plaintiffs have filed a Plaintiffs' Opposition to Defendants' Motion to Strike Portions of the Expert Report of Dr. John Solow and Preclude Testimony Regarding Purported Collusion Between the Defendants Pursuant to [Fed. R. Evid. 702](#) and *Daubert* (Docs. 549; S-558);

2) Defendants' Motion to Exclude or Strike the Expert Report of Dr. Michael A. Williams Under [Fed. R. Evid. 702](#) and [Fed. R. Civ. P. 37\(c\)\(1\)](#), (Docs. 503; S-535 ("Williams *Daubert* Motion")), to which Plaintiffs have filed Plaintiffs' Opposition to Defendants' Motion to Exclude the Expert Report of Dr. Michael A. Williams. (Docs. 548; S-559); and

3) Defendants' Motion to Exclude the Supplemental Report of Dr. Michael A. Williams Under [Fed. R. Evid. 702](#) and *Daubert* (Docs. 693; S- 720), and Plaintiffs' Opposition to Defendants' Motion to Exclude the Supplemental Report of Dr. Michael A. Williams. (Doc. 715; S-722).

Also before the Court is Plaintiffs' "Motion for Spoliation Sanctions Against Defendants Johnson & Johnson Vision Care, Inc. and Alcon Laboratories, Inc." (Doc. 854); Defendants' Responses to Plaintiffs' Spoliation Motion (Doc. 879; Doc. 881; Doc. 882; **[\*\*118]** Doc. 886); Plaintiffs' Reply to Defendants' Responses (Doc. 901); and Defendants' Sur Replies (Doc. 913; Doc. 914).

**[\*350]** The pending motions are ripe for the Court's consideration. The Court has considered the parties' papers and evidence submitted, as well as argument of counsel.

## **I. Background**

This multidistrict antitrust litigation was centralized before this Court on June 10, 2015, by order of the United States Judicial Panel on Multidistrict Litigation ("MDL Panel"). (Doc. 1; Transfer Order). It arises out of pricing policies adopted by contact lens manufacturers starting in June 2013 with regard to the distribution and sale of certain contact lens products. The operative complaint, Plaintiffs' Interlineation To Corrected Consolidated Class Action Complaint (Doc. 395; Complaint), filed on March 1, 2017, is a six-count Complaint brought by sixteen individual Plaintiffs suing on behalf of themselves, and on behalf of a class of Plaintiffs consisting of "all persons and entities in the United States who made a retail purchase . . . of disposable contact lenses ("contact lenses") manufactured by [the Manufacturer Defendants] . . . subject to one of the 'Unilateral Pricing Policies' ("UPPs") **[\*\*119]** described herein from June 1, 2013 to the present." Complaint ¶ 1; see also id. 148. The individual Plaintiffs ("Plaintiffs") are Rachel Berg, Miriam Pardoll, Elyse Ulino, Jennifer Sineni, Susan Gordon, Cora Beth Smith, Brett Watson, Kathleen Schirf, Tamara O'Brien, John Machikawa, Amanda Cunha, Alexis Ito, Catherine Dingle, Sheryl Marean, Pamela Mazzarella, and Joe Felson. Complaint ¶¶ 1, 28-41.

### **A. The Complaint**

Plaintiffs contend that the Manufacturer Defendants' adoption, implementation and enforcement of UPPs as they apply to the market for disposable (soft) contact lenses ("contact lenses") violate antitrust law. Disposable contact lenses comprise 90% of the contact lenses sold in the United States. See Complaint ¶ 64.

Plaintiffs allege that

the Manufacturer Defendants conspired with each other and with Defendant [ABB], a wholesaler, as well as independent eye care professionals ("ECPs") (e.g. optometrists and ophthalmologists who sell contact lenses to consumers) and their trade association, the American Optometric Association ("AOA"), to impose minimum resale prices on certain contact lens lines by subjecting them to UPPs, thereby reducing or eliminating price competition on those products **[\*\*120]** from "big box" stores. . . , buying clubs . . . , and internet-based retailers . . . (collectively, "Discount Retailers") by preventing them from discounting those products.

Complaint ¶ 2. Plaintiffs further allege that "the Manufacturer Defendants, working with ABB, conspired to eliminate discounting of contact lenses by ensuring that all retailers charged the same minimum price." Id. ¶ 3.

Plaintiffs allege a complex "interwoven" conspiracy in which

ABB worked with the Manufacturer Defendants to develop UPPs for several of the most advanced and/or most popular lines of contact lenses sold by the Manufacturer Defendants. Over the course of 15 months commencing in June of 2013, each Manufacturer Defendant implemented this strategy in the form of a [UPP] . . . [promulgating] a minimum retail price for its affected product(s) and threaten[ing] to curtail the supply of some of its contact lens lines to retailers who sell below the mandated price.

Complaint ¶ 9. "The Manufacturer Defendants agreed to limit retail price competition only after extensive consultation with independent ECPs and their agent ABB." Id. ¶ 11.

Plaintiffs allege that "the Manufacturer Defendants . . . conspired with each [\*\*121] other in a horizontal, per se illegal agreement in restraint of trade that ABB '(acting as the agent for its ECP clients) helped to orchestrate," and that "these policies were the subject of agreements among the Manufacturer Defendants and independent ECPs, effectuated through ABB." Complaint ¶ 174. They contend that the Manufacturer Defendants, "facing pressure from independent ECPs and ABB about competitive threats posed by the Discount Retailers, . . . agreed with one another and with ABB and the independent [\*351] ECPs to impose UPPs on their most advanced and most popular contact lens lines." Complaint ¶ 133; see also id. ¶¶ 135-158 (citing "plus factors" such as of "Industry Structure", "Opportunities to Conspire," "Information Exchanges," "ABB's and Independent ECPs' Conduct," "Acts Contrary to Economic Self Interest," "Pretextual Reasons for UPPs," "Motive to Conspire, Including Assurances That Competitors Will Also Act," "Abrupt, Near Contemporaneous and Fundamental Shift in Pricing Policies," and "Past Conspiratorial Conduct.").

Plaintiffs also contend that Defendants engaged in a "vertical conspiracy," subdividing the relevant market for disposable contact lenses into distinct markets [\*\*122] for each brand of contact lenses subject to a UPP. Complaint ¶ 183. They alleged that the Manufacturer Defendants, ABB, and the independent ECPs "all share an interest in not reducing the retail price of contact lenses and limiting competition from Discount Retailers," id. ¶ 4, and that ECPs, ABB, and the Manufacturer Defendants communicated up and down the distribution chain regarding the enactment, implementation and enforcement of UPPs. Id. ¶¶ 102, 103, 106, 107, 111, 114, 115, 117-32.

Plaintiffs allege that the UPPs harm competition by increasing prices for contact lenses subject to the UPPs, and depriving consumers of the ability to shop around for retail discounts on contact lenses. Id. ¶ 159.

Plaintiffs bring the following claims (the claims are mis-numbered in the Complaint):

First Cause of Action: Claim of Violation of [15 U.S.C. §§ 1](#) and [3](#) (Per Se Violation of the [Sherman Act](#)) ["Count 1"]

Second Cause of Action: Claim for Violation of [15 U.S.C. §§ 1](#) and [3](#) (Rule of Reason Violations of the Sherman Act) ["Count 2"]

Third Cause of Action: Claim for Violation of the [California Cartwright Act](#) ["Count 3"]

Third Cause of Action: Claim for Violation of the [Maryland Antitrust Act](#) ["Count 4"]

Sixth Cause of Action: Claim [\*\*123] for Violation of the [California Unfair Competition Law](#) ["Count 5"]

Seventh Cause of Action: Claim for Violation of the [Maryland Consumer Protection Act](#). ["Count 6"]

## B. The UPPs

Defendants adopted UPPs as follows (see Doc. S-537 at 131-144 (Cremieux Report Exs. 10-13) (dates that UPPs were adopted)):

Alcon adopted UPPs for its products as follows: Dailies Total I (June 2013 concurrent with the product's release); Dailies Aquacomfort Plus Multifocal (January 2014 concurrent with the product's release); Dailies Aquacomfort Plus Toric (January 2014 concurrent with the product's release); Air Optix Colors (April 2014 concurrent with the product's release); and Dailies Total 1 Multifocal (July 2016 concurrent with the product's release). (Doc. S-537 at 131-32 (Cremieux Report Ex. 10)). Alcon discontinued the UPPs in December 2016. *Id.*

B&L adopted UPPs for its products as follows: Ultra (February 2014); BioTrue ONEday for Presbyopia (June 2014 and December 2016 for different package sizes); and Ultra for Presbyopia (March 2016 concurrent with the product's release). (Doc. S-537 at 134-35 (Cremieux Report Ex. 11)). B&L discontinued the UPPs in February 2017. *Id.*

CV (and predecessor Sauflon Pharmaceuticals [\*\*124] Limited ("Sauflon")) adopted UPPs for its products as follows: Clariti 1 Day (January 2014 (by Sauflon)); Clariti 1 Day Multifocal (January 2014 (by Sauflon)); Clariti 1 Day Toric (January 2014 (by Sauflon)). The Sauflon UPPs were subsequently adopted by CV in August 2014. CV adopted UPPs for its products: MyDay (June 2015 concurrent with the product's release); Biofinity XR Toric (January 2016 concurrent with the product's introduction); and Biofinity Energys (July 2016 concurrent with the product's introduction). (Doc. S-537 at 136-37 ((Cremieux Report Ex. 12)). CV discontinued the UPPs for five of the products (Biofinity XR Toric, Clariti 1 Day, Clariti 1 Day Multifocal, Clariti 1 Day Toric, and MyDay) in March 2017. *Id.*

JJVC adopted UPPs for its products as follows: Acuvue Oasys with Hydraclear (July 2014 with follow up UPPs for different package sizes in August and October 2014 and [\*352] June 2015); 1-Day Acuvue Moist (August 2014); 1-Day Acuvue Moist for Astigmatism (August 2014); 1-Day Acuvue TruEye (August 2014); Acuvue Oasys for Astigmatism (August 2014); Acuvue Oasys for Presbyopia (August 2014); 1-Day Acuvue Define (March 2015); 1-Day Acuvue Moist Multifocal (May 2015 concurrent [\*\*125] with the product's release); Acuvue Oasys with Hydrauixe (August 2015 concurrent with the product's release). (Doc. S-537 at 140 ((Cremieux Report Ex. 13)). JJVC discontinued all UPPs in April 2016. *Id.*

Defendants' expert Dr. Cremieux detailed the specifics about the UPPS regarding price and modality (package size). (Doc. S-537 at 131-144 (Cremieux Report Exs. 10-13))

### **C. Applicable Antitrust Law**

"Section 1 of the Sherman Act broadly prohibits 'every contract, combination or conspiracy, in restraint of trade or commerce[.]'" *Aquatherm Indus.. Inc. v. Fla. Power & Light Co., 145 F.3d 1258, 1262 (11th Cir. 1998)*; see also *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)* ("The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade of commerce. . ."). A manufacturer, however, "generally has a right to deal, or refuse to deal, which whomever it likes, as long as it does so independently." *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 760, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* (citing *Colgate, 250 U.S. at 307*). Thus, a manufacturer is permitted to "announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination." *Id. at 761*. The elements of a conspiracy to restrain trade in violation [\*\*126] of S.1 of the Act, are: "(1) an agreement to enter a conspiracy (2) designed to achieve an unlawful objective . . . [and] (3) actual unlawful effects or facts which radiate a potential for future harm to competition." *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 1001 (11th Cir. 1993)* (internal citation and quotation omitted). See also *Aquatherm Indus., Inc., 145 F.3d at 1262* (citing U.S. Anchor Mfg., Inc.).

**Antitrust law** differentiates between vertical and horizontal price restraints. "Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints." *Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 730, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)* (footnote omitted). With limited exceptions, horizontal agreements are per se unlawful, whereas vertical restraints are unlawful only if an assessment of market

effects, known as the "rule of reason" analysis, reveals that the vertical agreements unreasonably restrain trade. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885-86, 907, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007). Under the "rule of reason," "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Id. at 885* (citation omitted). Vertical and horizontal price arrangements may intersect. See *United States v. Apple, Inc.*, 791 F.3d 290, 314 (2d Cir. 2015), cert. denied, 136 S. Ct. 1376, 194 L. Ed. 2d 360 (2016).

"It is only [\*\*127] in rare cases that a plaintiff can establish the existence of a conspiracy by showing an explicit agreement; most conspiracies are inferred from the behavior of the alleged conspirators, and from other circumstantial evidence (economic and otherwise), such as barriers to entry and other market conditions." *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1299-1300 (11th Cir. 2003) (internal quotations and citations omitted); see also *Apple*, 791 F.3d at 315; *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 629 (7th Cir. 2010) ("Circumstantial evidence can establish an antitrust conspiracy." (citing cases)); *DeLong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1515 (11th Cir. 1989) ("Conspiracies are rarely evidenced by explicit agreements, and must almost always be proven by [\*353] inferences that may be fairly drawn from the behavior of the alleged conspirators.").

To prevail on their claims under *Section 1* of the Sherman Act, Plaintiffs must prove "(1) the existence of a contract, combination or conspiracy in restraint of trade (liability); (2) injury-in-fact (antitrust injury); and (3) the extent of injury (damages)." *In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 695 (S.D. Fla. 2004) (citing *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981)); see also *State of Ala. v. Blue Bird Body Co.*, 573 F.2d 309, 317 (5th Cir. 1978) (observing that "a prerequisite to recovery was a showing by the plaintiff of a violation of the antitrust laws, the fact of damage, and some indication of the amount of damage.").<sup>2</sup> In this case, the claims of the proposed state classes arise out of the same alleged illegal conduct by Defendants and [\*\*128] are based on the same related antitrust theories as the federal claims.

#### **D. Plaintiffs' Motion for Class Certification**

Plaintiffs filed their Motion for Class Certification on March 3, 2017, citing *Rule 23, Federal Rules of Civil Procedure* ("Rule(s)"). Plaintiffs seek class certification

pursuant to the horizontal conspiracy theory, [of] a nationwide class of persons who purchased disposable contact lenses made by the [Manufacturer Defendants] and two subclasses comprised of class members residing in Maryland and California. Alternatively, if the Court declines to certify the Horizontal Class, Plaintiffs seek certification of four Vertical Classes, one for purchasers of each [Manufacturer Defendants'] lenses.

(Docs. 396 at 17-18; S-404 at 17-18). Plaintiffs initially sought certification of the following classes: CLASS AND SUBCLASSES DEFINITIONS

##### **Horizontal Class**

All persons and entities residing in the United States who made retail purchases of disposable contact lenses manufactured by Alcon, JJVC, B&L, or [CV] from June 1, 2013 to the present (the "Class Period") for their own use and not for resale, where the prices for such contact lenses were set pursuant to a "Unilateral Pricing Policy" and the purchase occurred during the [\*\*129] period when the Unilateral Pricing Policy was in effect. Excluded from the Class are Defendants, their parent companies, subsidiaries and [\*354] affiliates, any co-conspirators, all governmental entities, and any judges or justices assigned to hear any aspect of this action.

The proposed Horizontal Class Consists of the following subclasses:

(1) The Maryland Subclass:

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<sup>2</sup> In *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

All persons and entities residing in Maryland who made retail purchases of disposable contact lenses manufactured by Alcon, JJVC, B&L, or CV from June 1, 2013 to the date the Court certifies the Class for their own use and not for resale, where the prices for such contact lenses were set pursuant to a "Unilateral Pricing Policy" and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Class are Defendants, their parent companies, subsidiaries, and affiliates, any co-conspirators, all governmental entities, and any judges, justices, or jurors assigned to hear any aspect of this action.

(2) The California Subclass:

All persons and entities residing in California who made retail purchases of disposable contact lenses manufactured by Alcon, JJVC, B&L, or CV from June 1, 2013 to the [\*\*130] date the Court certifies the Class for their own use and not for resale, where the prices for such contact lenses were set pursuant to a "Unilateral Pricing Policy" and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Class are Defendants, their parent companies, subsidiaries, and affiliates, any co-conspirators, all governmental entities, and any judges, justices, or jurors assigned to hear any aspect of this action.

Vertical Classes:

(1) The JJVC Class

All persons and entities residing in the United States who made retail purchases of disposable contact lenses manufactured by JJVC from June 1, 2013 to the date the Court certifies the Class for their own use and not for resale, where the prices for such contact lenses were set pursuant to a "Unilateral Pricing Policy" and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Class are Defendants, their parent companies, subsidiaries, and affiliates, any co-conspirators, all governmental entities, and any judges, justices, or jurors assigned to hear any aspect of this action.

(2) The Alcon Class

All persons and entities residing [\*\*131] in the United States who made retail purchases of disposable contact lenses manufactured by Alcon from June 1, 2013 to the date the Court certifies the Class for their own use and not for resale, where the prices for such contact lenses were set pursuant to a "Unilateral Pricing Policy" and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Class are Defendants, their parent companies, subsidiaries, and affiliates, any co-conspirators, all governmental entities, and any judges, justices, or jurors assigned to hear any aspect of this action.

(3) The B&L Class

All persons and entities residing in the United States who made retail purchases of disposable contact lenses manufactured by B&L from June 1, 2013 to the date the Court certifies the Class for their own use and not for resale, where the prices for such contact lenses were set pursuant to a "Unilateral Pricing Policy" and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Class are Defendants, their parent companies, subsidiaries, and affiliates, any co-conspirators, all governmental entities, and any judges, justices, [\*\*132] or jurors assigned to hear any aspect of this action.

(4) The CV Class

All persons and entities residing in the United States who made retail purchases of disposable contact lenses manufactured by CV from June 1, 2013 to the date the Court certifies the Class for their own use and not for

resale, where the prices for such contact lenses were set pursuant to a "Unilateral Pricing Policy" and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Class are Defendants, their parent companies, subsidiaries, and affiliates, any co-conspirators, all governmental entities, and any judges, justices, or jurors assigned to hear any aspect of this action.

(Docs. 396 at 40-41; S-404 at 40-41).

In recognition of Plaintiffs' settlement with CooperVision; the discontinuation of the UPPs by the remaining Manufacturer Defendants; and additional findings and opinions by Plaintiffs' expert Dr. Michael A. Williams based upon new data being made available, Plaintiffs, on September 8, 2017, amended their proposed Class and Subclasses Definitions as follows:

Horizontal Class:

All persons and entities residing in the United States who made retail purchases of [\*\*133] disposable contact lenses manufactured by Alcon, JJVC, or B&L from June 1, 2013 to the present (the "Class Period") for their own use and not for resale, where the prices for such contact lenses were set pursuant to a "Unilateral Pricing Policy" and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Class are any purchases from 1-800 Contacts of disposable contact lenses subject to B&L's Unilateral Pricing Policy, [TEXT REDACTED BY THE COURT] [\*355] where the purchase occurred on or after July 1, 2015. Also excluded from the Class are Defendants, their parent companies, subsidiaries and affiliates, any coconspirators, all governmental entities, and any judges or justices assigned to hear any aspect of this action.

The proposed Horizontal Class consists of the following subclasses:

(1) Maryland Subclass:

All persons and entities residing in Maryland who made retail purchases of disposable contact lenses manufactured by Alcon, JJVC, or B&L from June 1, 2013 to the date the Court certifies the Class for their own use and not for resale, where the prices for such contact lenses were set pursuant to a "Unilateral Pricing Policy" and the purchase [\*\*134] occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Class are any purchases from 1-800 Contacts of [TEXT REDACTED BY THE COURT] disposable contact lenses subject to B&L's Unilateral Pricing Policy, where the purchase occurred on or after July 1, 2015. Also excluded from the Class are Defendants, their parent companies, subsidiaries and affiliates, any coconspirators, all governmental entities, and any judges or justices assigned to hear any aspect of this action.

(2) California Subclass:

All persons and entities residing in California who made retail purchases of disposable contact lenses manufactured by Alcon, JJVC, or B&L from June 1, 2013 to the date the Court certifies the Class for their own use and not for resale, where the prices for such contact lenses were set pursuant to a "Unilateral Pricing Policy" and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Class are any purchases from 1-800 Contacts of disposable contact lenses subject to B&L's Unilateral Pricing Policy, where the purchase occurred on or after July 1, 2015. Also excluded from the Class are Defendants, their parent [\*\*135] companies, subsidiaries and affiliates, any coconspirators, all governmental entities, and any judges or justices assigned to hear any aspect of this action.

Vertical Classes:

(1) The JJVC Class

All persons and entities residing in the United States who made retail purchases of disposable contact lenses manufactured by JJVC from June 1, 2013 to the date the Court certifies the Class for their own use and not for resale, where the prices for such contact lenses were set pursuant to a "Unilateral Pricing Policy" and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Class are Defendants, their parent companies, subsidiaries, and affiliates, any co-conspirators, all governmental entities, and any judges, justices, or jurors assigned to hear any aspect of this action.

(2) The Alcon Class:

All persons and entities residing in the United States who made retail purchases of disposable contact lenses manufactured by Alcon from June 1, 2013 to the date the Court certifies the Class for their own use and not for resale, where the prices for such contact lenses were set pursuant to a "Unilateral Pricing Policy" and the purchase occurred during **[\*\*136]** the period when the Unilateral Pricing Policy was in effect. Excluded from the Class are Defendants, their parent companies, subsidiaries, and affiliates, any co-conspirators, all governmental entities, and any judges, justices, or jurors assigned to hear any aspect of this action.

(3) The B&L Class:

All persons and entities residing in the United States who made retail purchases of disposable contact lenses manufactured by B&L from June 1, 2013 to the date the Court certifies the Class for their own use and not for resale, where the prices for such contact lenses were set pursuant to a "Unilateral Pricing Policy" and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from **[\*356]** the Class are any purchases from 1-800 Contacts of disposable contact lenses subject to B&L's Unilateral Pricing Policy, where the purchase occurred on or after July 1, 2015. Also excluded from the Class are Defendants, their parent companies, subsidiaries and affiliates, any co-conspirators, all governmental entities, and any judges or justices assigned to hear any aspect of this action.

(Docs. 611 at 34; S-649-1). Plaintiffs offer an alternative to the "*pursuant to* **[\*\*137]** a UP?" language, which they "view . . . as another way of saying that a contact lens price was *subject to* a UPP." (Docs. 715 at 11; S-722 at 11) (emphasis added).

#### H. Class Certification Standard

To maintain a case as a class action, the party seeking class certification must satisfy each of the prerequisites of [Rule 23\(a\)](#) and at least one of the alternative provisions of [Rule 23\(b\)](#). [Allapattah Servs., Inc. v. Exxon Corp.](#), 333 F.3d 1248, 1260 (11th Cir. 2003); [Rutstein v. Avis Rent-A-Car Sys., Inc.](#), 211 F.3d 1228, 1233 (11th Cir. 2000)). [Rule 23\(a\)](#) provides that a class representative may sue on behalf of its members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

[Fed. R. Civ. P. 23\(a\)](#); see [Carriuolo v. Gen. Motors Co.](#), 823 F.3d 977, 984 (11th Cir. 2016). These prerequisites are commonly referred to as: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. [Cooper v. Southern Co.](#), 390 F.3d 695, 711 n.6 (11th Cir. 2004), overruled in part on other grounds by [Ash v. Tyson Foods, Inc.](#), 546 U.S. 454, 457-58, 126 S. Ct. 1195, 163 L. Ed. 2d 1053 (2006). Failure to establish any one of the four factors precludes certification.

In addition, under [Rule 23\(b\)](#), the individual plaintiffs must convince the Court that: (1) prosecuting separate actions by or against individual [\[\\*\\*138\]](#) members of the class would create a risk of inconsistent or varying adjudications or prejudice to those members of the class not parties to the subject litigation; (2) the party opposing the class has refused to act on grounds that apply generally to the class, necessitating final injunctive or declaratory relief; or (3) questions of law or fact common to the members of the class "predominate over any questions affecting only individual members, and that a class action is superior to other available methods for [fair and efficient adjudication of] the controversy." [Fed. R. Civ. P. 23\(b\)](#). The party seeking class certification bears the burden of proving that these requirements are satisfied. [See Carriuolo, 823 F.3d at 981](#); [Valley Drug Co. v. Geneva Pharms.. Inc., 350 F.3d 1181, 1187 \(11th Cir. 2003\)](#). The decision to grant or deny class certification lies within the sound discretion of the district court. [Klay v. Humana, Inc., 382 F.3d 1241, 1251 \(11th Cir. 2004\)](#), abrogated in part on other grounds by [Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 \(2008\)](#); [Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1386 \(11th Cir. 1998\)](#) (en banc).

When considering the propriety of class certification, the Court should not conduct a detailed evaluation of the merits of the suit. [Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 177-78, 94 S. Ct. 2140, 40 L. Ed. 2d 732 \(1974\)](#). Nevertheless, the Court must perform a "rigorous analysis" of the particular facts and arguments asserted in support of class certification. [Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 \(1982\)](#); [Gilchrist v. Bolger, 733 F.2d 1551, 1555 \(11th Cir. 1984\)](#). That "rigorous analysis" may entail some overlap with the merits of the plaintiff's [\[\\*\\*139\]](#) underlying claim. [Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351-52, 131 S. Ct. 2541, 180 L. Ed. 2d 374 \(2011\)](#).

"T]he Supreme Court has repeatedly 'emphasized that it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.'" [Carriuolo, 823 F.3d at 981](#) (quoting [Comcast Corp. v. Behrend, 569 U.S. 27, 33, \[\\*357\] 133 S. Ct. 1426, 185 L. Ed. 2d 515 \(2013\)](#) (internal quotation marks omitted)); see also [Landeros v. Pinnacle Recovery. Inc., 692 F. App'x 608, 611 \(11th Cir. 2017\)](#).<sup>3</sup> The determination of class certification "will frequently entail overlap with the merits of the plaintiffs underlying claim." [Comcast, 569 U.S. at 33-34](#) (citation omitted). This is because 'class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" [Dukes, 564 U.S. at 351](#) (quoting [Falcon, 457 U.S. at 160](#)). The Plaintiffs, as the moving parties seeking class certification, have the "burden of proof, not the burden of pleading," and "if a question of fact or law is relevant to that determination, then the district court has a duty to actually decide it and not accept it as true or construe it in anyone's favor." [Brown v. Electrolux Home Prods., Inc., 817 F.3d 1225, 1234 \(11th Cir. 2016\)](#) (emphasis in original).

However, "the district court can consider the merits 'only' to the extent 'they are relevant to determining whether the [Rule 23](#) prerequisites for class certification are satisfied.'" [Brown, 817 F.3d at 1234](#) (quoting [Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 455, 466, 133 S. Ct. 1184, 185 L. Ed. 2d 308 \(2013\)](#)). "[I]f a question of fact or law is relevant to that determination, then the district court [\[\\*\\*140\]](#) has a duty to actually decide it and not accept it as true or construe it in anyone's favor. *Id.* (emphasis in original) (citing [Comcast, 569 U.S. at 33-34](#)). The Supreme Court admonishes:

Although we have cautioned that a court's class-certification analysis must be "rigorous" and may "entail some overlap with the merits of the plaintiff's underlying claim," [Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351, 131 S. Ct. 2541, 180 L. Ed. 2d 374\(2011\)](#) (internal quotation marks omitted), [Rule 23](#) grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent - but only to the extent - that they are relevant to determining whether the [Rule 23](#) prerequisites for class certification are satisfied. [See id., at 351 n. 6](#) (a district court has no ""authority to conduct a preliminary inquiry into the merits of a suit' at class certification unless it is necessary "to determine the propriety of certification" (quoting [Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 177, 94 S. Ct. 2140, 40 L. Ed. 2d 732 \(1974\)\)](#); Advisory

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<sup>3</sup> "Although an unpublished opinion is not binding ..., it is persuasive authority." [United States v. Futrell, 209 F.3d 1286, 1289 \(11th Cir. 2000\)](#). See generally [Fed. R. App. P. 32.1; 11th Cir. R. 36-2](#) ("Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority.").

Committee's 2003 Note on [subd. \(c\)\(1\) of Fed. Rule Civ. Proc. 23](#), 28 U.S.C.App., p. 144 ("[A]n evaluation of the probable outcome on the merits is not properly part of the certification decision.").

[Amgen, 568 U.S. at 465-66.](#)

Plaintiffs argue that their motion for Class Certification mirrors their motion filed in a previous antitrust class action brought by customers against the Defendant [\\*\\*141](#) Manufacturers and two trade organizations for ECPs alleging a conspiracy to restrict the supply of replacement contact lenses to drive up prices. They contend that like that earlier class action, their Motion for Class Certification should be granted and a nationwide class certified. (Docs. 396 at .10; S-404 at 10 (citing [In re Disposable Contact Lens Antitrust Litig., 170 F.R.D. 524 \(M.D. Fla. 1996\)](#) ("MDL 1030 ")).

Plaintiffs cite to the testimony of two experts in support of their Motion for Class Certification, Dr. John L. Solow ("Dr. Solow") and Dr. Michael A. Williams ("Dr. Williams"). Noting that Dr. Solow offered expert testimony in MDL 1030, Plaintiffs state that based on his review of documents and data both publically available and produced by Defendants, Dr. Solow offers testimony describing "[t]he features of the contact lens industry that made it conducive to an illegal [minimum resale price maintenance] scheme." (Docs. 396 at 15; S-404 at 15). Dr. Solow concludes that "[e]conomic theory and the facts of this case . . . present a predominant common issue." *Id.* at 16. Plaintiffs offer Dr. Williams' testimony for [\\*358](#) purposes of conducting an economic analysis, using the "standard statistical methodology of multiple regression analysis to demonstrate that Plaintiffs [\\*\\*142](#) paid a higher price for their contact lenses" because of the Defendants' conduct. (Doc. S-404 at 16). Plaintiffs describe Dr. Williams' analysis as using "the well-accepted 'before-during' method to estimate overcharges related to the horizontal and vertical theories," relying on data from third-party distributors in order to estimate overcharges. *Id.*

Defendants argue that the issues presented by the instant case are "very different" from those presented in MDL 1030, which they argue involved an alleged conspiracy between three manufacturers and two trade associations to "boycott sales of the manufacturers" soft contact lenses to any business that sought to compete with independent [ECPs]." (Docs. 505 at 11; S-540 at 11). They contend that this case is not appropriate for class certification because the evidence establishes that:

(1) each of the Manufacturer Defendants came up with a different UPP, on different products, at different times and with different effects; (2) ECPs and retailers charged widely varying prices for contact lenses covered by a UPP and often determined their prices without regard to any UPP; and (3) consumers often paid less and sometimes paid nothing for contact [\\*\\*143](#) lenses subject to a UPP due to rebates, discounts and insurance.

*Id.* at 11-12 (emphasis in original). Defendants argue that whether a contact lens purchaser was impacted by a UPP depends on an individualized inquiry of each individual class plaintiff into whether the person:

- bought a contact lens subject to a UPP at a time when the UPP was in effect;
- purchased a contact lens from an ECP/retailer that was part of an alleged conspiracy;
- acquired a contact lens from an ECP/retailer that determined his or her price pursuant to a UPP price;
- would have bought the same contact lens in the absence of a UPP;
- would have paid any less for the same contact lens in the absence of a UPP; and
- was insulated from any potential impact due to rebates, discounts and insurance reimbursements.

*Id.* at 12. Additionally, Defendants argue that to establish a vertical conspiracy, each Plaintiff must establish that he or she purchased contact lenses from a retailer who actually conspired with Defendants by agreeing to adhere to one or all of the differing UPPs, creating yet another individualized inquiry into whether the Plaintiff was impacted by the alleged conspiracy between Defendants. *Id.* at 12.

Defendants argue that since the MDL [\\*\\*144](#) 1030 Order approving class certification in 1996, the Supreme Court has heightened the requirements for class certification with its decisions in [Wal-Mart Stores. Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 180 L. Ed. 2d 374 \(2011\)](#) and [Comcast, 569 U.S. at 33.](#) (Docs. 505 at 13; S-540 at 13). They contend that Plaintiffs' Motion for Class Certification is "devoid of any evidence related to the experiences of the named Plaintiffs and the ECPs who treated them," *id.* (emphasis in original), and that it fails to survive the "rigorous

analysis" now required. *Id.* at 17. (citing *Brown*, 817 F.3d at 1234). Defendants assert that the "Court . . . cannot certify a class on less than a finding that Plaintiffs' proposed expert proof of common impact and damages is a reliable method of fully adjudicating injury and damages claims for all class members." *Id. at 31*; see also *id. at 34* (arguing that Plaintiffs' reliance on expert testimony to demonstrate how that antitrust impact can be proven on a classwide basis should be rejected because Plaintiffs' expert testimony is inadmissible under *Daubert*.).

### **III. Discussion**

#### **A. Daubert Motions**

In support of their Motion for Class Certification, the Plaintiffs rely on the expert testimony of Drs. Solow and Williams. The Defendants have filed *Daubert* motions challenging the admissibility of both Drs. Williams' and Solow's [\*\*145] opinions. Defendants have proffered the reports of two experts, [\*359] Dr. Edward A. Snyder ("Snyder") and Dr. Pierre-Yves Cremieux ("Cremieux"), in support of their *Daubert* motions. Plaintiffs do not seek to exclude the testimony of Drs. Snyder and Cremieux. Because Plaintiffs' "expert testimony is both challenged and critical to class certification, the Court cannot grant certification without first engaging in the analysis required by *Federal Rule of Evidence 702* ("Evidence Rule(s)") and *Daubert v. Merrell Dow Pharmas.. Inc*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)." *In re Delta/AirTran Baggage Fee Antitrust Litigation*, 317 F.R.D. 675, 683 (N.D. Ga. 2016) (citing *Local 703, I.B. of T. Grocery & Food Employees Welfare Fund v. Regions Fin. Corp.*, 762 F.3d 1248, 1258 n.7 (11th Cir. 2014)); see also *Sher v. Raytheon Co.*, 419 F. App'x 887, 890 (11th Cir. 2011) ("[W]hen an expert's report or testimony is critical to class certification, . . . a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion." (citation omitted)); *PB Prop. Mgmt. v. Goodman Mfg. Co., L.P.*, No. 3:12-cv-1366-HES-JBT, 2016 U.S. Dist. LEXIS 97520, 2016 WL 7666179, at \*9 (M.D. Fla. May 12, 2016).

Defendants assert that the Court is obliged at this juncture to resolve the "battle of the experts" and accept the opinions of their experts over those of Plaintiffs' experts. (See Docs. 674 at 18, 20; S-681 681 at 18, 20 (citing *Sher*, 419 F. App'x at 890).

In *Sher*, the Eleventh Circuit required the Court to "resolve any challenge to the reliability of information" presented in an expert's report which is [\*\*146] being offered in support of a motion for class certification. *Sher*, 419 F. App'x at 890-91 (citation omitted). The Eleventh Circuit held that the district court erred as a matter of law "by not sufficiently evaluating and weighing conflicting expert testimony on class certification," and that it was "error for the district court to decline to declare a proverbial, yet tentative winner." *Id. at 890*. The court concluded that where an expert opinion necessary to class certification is challenged, such as in this case, the Court must perform a full *Daubert* analysis.

Under *Daubert*, this Court serves a gatekeeper role in evaluating the admissibility of expert evidence and testimony. In *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), the Court explained "*Daubert*'s general holding-setting forth the trial judge's general 'gatekeeping' obligation-applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." *Id.* *Federal Rule of Evidence 702*, governing the admissibility of expert evidence provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the [\*\*147] trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702; see also Daubert, 509 U.S. at 589-90. The Eleventh Circuit has adopted a three part analysis for determining whether expert testimony is admissible under *Daubert* and Federal Rule of Evidence 702. Under this analysis, expert evidence is admissible if the court finds: (1) the expert is competent and qualified to testify regarding the matters that he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable; and (3) the expert, through scientific, technical or specialized expertise, provides testimony that will assist the trier of fact to understand the evidence or determine a fact in issue. See Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd., 326 F.3d 1333, 1340-41 (11th Cir. 2003) (citing City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 562 (11th Cir. 1998) (citing Daubert, 509 U.S. at 589)); Maiz v. Virani, 253 F.3d 641, 665 (11th Cir. 2001). In ruling on the admissibility of expert testimony, "[t]he focus must be 'solely' on the expert's 'principles and methodology, not on the conclusions [\*360] that they generate.'" KW Plastics v. United States Can Co., 131 F. Supp. 2d 1289, 1292 (M.D. Ala. 2001) (quoting Daubert, 509 U.S. at 594-95). If the expert predicates his testimony on an assumption that is belied by the evidence, the expert's testimony [\*\*148] is properly excluded. Ferguson v. Bombardier Servs. Corp., 244 Fed Appx. 944, 949 (11th Cir. 2007).

In the end, although rulings on admissibility under *Daubert* inherently require the trial court to conduct an exacting analysis of the proffered expert's methodology, . . . it is not the role of the district court to make ultimate conclusions as to the persuasiveness of the proffered evidence. . . . [A] district court's gatekeeper role under *Daubert* is not intended to supplant the adversary system or the role of the jury . . . . Quite the contrary, vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. . . . By attempting to evaluate the credibility of opposing experts and the persuasiveness of competing scientific studies, the district court conflated the questions of the admissibility of expert testimony and the weight appropriately to be accorded such testimony by a fact finder.

Quiet Tech., 326 F.3d at 1341-42 (internal quotation marks and citations omitted). The party offering the expert's testimony has the burden of proving that it is admissible by a preponderance of the evidence. Allison v. McGhan Med. Corp., 184 F.3d 1300, 1306 (11th Cir. 1999).

## 1. Dr. Solow

Dr. Solow has submitted an Expert Report, dated March 3, [\*\*149] 2017, in support of Plaintiffs' Motion for Class Certification. (Docs. 397; S-405) ("Solow Report"). In the Solow *Daubert* Motion, Defendants request that the Court strike Sections X and XI of the Solow Report "and preclude Dr. Solow from offering testimony regarding alleged collusion relating to any of the Manufacturer Defendants' unilateral proving policies ('UPPs')." (Docs. 500 at 6; S-531 at 6). Defendants characterize Sections X and XI as purporting "to conduct a 'common analysis of conduct' regarding the adoption of UPPs by the various Manufacturer Defendants in this suit, concluding that 'the manufacturers worked cooperatively with influential ECPs and/or ABB to design, promote, and enforce the policies,' including communications supposedly facilitated by Defendant ABB and the third-party Contact Lens Institute ('CLI')." (Doc. S-531 at 6 (citing Doc. S-405 at 39, 67-68, 73 (Solow Report ¶¶ 68, 119, 128))).

Defendants contend that Dr. Solow's opinions regarding alleged collusion are speculative and contrary to the evidence in the record inasmuch as there is "no evidence of direct communications between the Manufacturer Defendants regarding the supposed conspiracy," or indirect [\*150] communications among the Manufacturer Defendant through ABB and CLI. (Docs 500 at 7; S-531 at 7). Defendants criticize Dr. Solow's methodology as unreliable, saying he relied upon a small number of documents handpicked by Plaintiffs' counsel, taking documents out of context, and failing to consider alternative explanations. Id. Defendants argue that Dr. Solow's opinion as "conspiracy advocate" would be of no assistance to the Court, because it does nothing more than review documents that the Court is capable of reviewing. Id. at 7-8. Defendants argue that Dr. Solow has no experience in the contact lens industry. Id. at 8.

### a. The Solow Report

Dr. Solow is a professor of economics at the University of Iowa where he has been employed since 1981. He has taught courses in industrial organization, micro economics, and antitrust economics. (Docs. 397 at 4; S-405 at 4 (Solow Report ¶ 1)). He has been a visiting professor at Stanford University and the University of Auckland in New Zealand, has published numerous articles, and co-authored three volumes in a leading antitrust treatise. Id. ¶¶ 1, 2; (Doc. 399-2 ). He has offered economic expert testimony in antitrust litigation, including the MDL 1030 case. (Docs. [\*\*151] 397 at 4-5; S-405 at 4-5); (Doc. 399-3). Dr. Solow states that he received the following directive from Plaintiffs' counsel:

[\*361] 9. With respect to these proposed classes, I have been asked to focus on whether the liability elements of Plaintiffs' claims are subject to common economic proof. More specifically, my task is to investigate the structure, conduct and performance of the contact lens industry to determine: a) whether common economic proof is available to establish the antitrust liability elements of Plaintiffs' claims on a class-wide basis; and b) whether common economic proof is available to establish the causation elements of Plaintiffs' claims (also known as antitrust "impact") on a classwide basis.

Dr. Michael Williams is providing a separate expert report on how damages to members of the proposed classes can be demonstrated on a class wide basis through common evidence.

(Docs. 397 at 8; S-405 at 8 (Solow Report ¶ 9)). In preparing his Report, Dr. Solow reviewed pleadings filed, including Plaintiffs' Complaint; business documents produced by the parties; publicly available information about the contact lens industry; trade publications; Federal Trade Commission reports regarding [\*\*152] the contact lens industry; federal statutes and regulations regulating the contact lens industry; and pricing and other statistical data. Id. at 6-10 (Solow Report ¶¶ 10, 12-32). Based upon his review, Dr. Solow concludes:

- a) Common economic evidence can be used to support Plaintiffs' allegations of collusive conduct by Defendants. A number of economic factors are conducive to and consistent with the coordinated pricing policies that Plaintiffs have alleged. This economic evidence is common to the proposed classes, that is, all members of the classes would present this type of evidence and benefit from it.
- b) Economic evidence shows that the alleged conspiracy would have been widely and generally successful, impacting all or nearly all members of the proposed classes in that all customers would have paid higher prices than they would have in the absence of the conduct. In particular, the economic structure, conduct and performance of the industry was consistent with coordinated behavior having widespread impact on disposable contact lens prices paid by customers. This evidence can be used by all class members as proof of the causation (or antitrust "impact") element of their claims.

Id. ¶ 11; see [\*\*153] also id. ¶ 67 (Based upon his review of the materials listed, and his "knowledge of the contact industry, it is my opinion as an economist that the wholesale market for replacement disposable contact lenses was in the relevant time period conducive to cooperative behavior coordinated by one or more representatives of the ECPs, as occurred previously."). Dr. Solow further opined:

157. Based on the foregoing, I believe from my analysis of industry structure, conduct, and performance that (I) the characteristics of the disposable contact lens market were conducive to collusion during the relevant period and (ii) there is sufficient evidence and methods from which Plaintiffs could show that the impact from Defendants' conduct was common and widespread to all, or virtually all, of the members of the proposed Classes. Moreover, I believe that the analysis used to establish the foregoing could be applied uniformly to all of the members of the Classes [footnote omitted].

158. To summarize, the following categories of economic analysis and opinion can be used to establish liability and damages in this litigation for all class members: (I) market structure analysis of the contact lens industry; [\*\*154] (ii) analysis explaining the basic economics of minimum resale price maintenance in general and its application in the contact lens industry in particular; and (iii) analysis of conduct and economic performance in the contact lens industry during the relevant period, including the nature, timing, and communications surrounding resale price maintenance, the corresponding trends in pricing over time, and econometric analysis showing widespread impact.

(Docs. 397 at 87-88; S-405 at 87-88 (Solow Report ¶¶ 157, 158)). Dr. Solow added the following:

It should be noted that since (a) discovery is not complete and (b) my analysis to **[\*362]** date has focused on class certification issues (that is, whether common economic proof is available regarding the elements of Plaintiffs' claims), my opinions may be supplemented or amended as discovery proceeds and as I conduct further analysis.

Id. Dr. Solow offers no opinion on the legality of Defendants' alleged conduct. (Doc. S-405 at 40, 42, 45, 65-66 (Solow Report ¶¶ 71, 75, 80, 116)). At the evidentiary hearing, Dr. Solow provided an overview of his findings, supported by citation to evidence in the record.

Concerning the genesis of Defendants' UPPs, Dr. Solow **[\*\*155]** testified that the implementation of the UPPs came about as a response to ECPs' concerns about the difficulties in competing with alternative contact lens distributors who sold contact lenses at lower margins. (Doc. 866 at 65-66). He testified that, at least three years before Alcon announced the first UPP, influential ECPs—"ones who had the ear of the manufacturers"—lobbied Defendants to set minimum retail prices for their products. Id. The idea, according to Dr. Solow, was that if the ECPs could successfully convince one manufacturer to adopt a minimum retail price, it could be leveraged by the ECPs against the remaining manufacturers, who would be pressured to adopt a minimum retail price themselves, or risk losing the ECPs' business. Id. at 67, 70. Dr. Solow supported these assertions with reference to evidence in the record; specifically the emails of Dr. Barry Eiden, an influential ECP and member of Alcon's Global Professional Affairs Advisory Board. In the emails, Dr. Eiden takes some credit for Alcon's decision to implement a UPP, and thought that the other manufacturers would be forced to follow suit or risk losing business. (Id. at 69-70).

Regarding the market impact of the UPPs, Dr. Solow testified **[\*\*156]** that Defendants' adoption of minimum retail prices eased the competitive pressures ECPs were facing from low-cost competitors. Id. at 73-74. He stated that whether or not individual ECPs knew about (or chose to comply with) the UPPs was irrelevant in evaluating the market impact of the policy; that lower-priced sellers of contact lenses were required to raise their prices allowed individual ECPs to also raise their prices without the risk of losing a substantial amount of customers. Id. at 74.

Dr. Solow also testified regarding whether any competitive justifications existed for Defendants' implementation of UPPs. Dr. Solow suggested that while UPPs might be pro-competitive in certain contexts, those considerations were absent in this case:

[T]he impetus for this policy was to restrain competition between Internet sellers and the big box sellers on the one hand, and independent ECPs on the other who felt that they could not -- they couldn't make any money at those prices.

And in a competitive market, if you can't make money against your competitors, then you probably shouldn't be in that business. But here, [the ECPs] reached out to the manufacturers and said: Handicap those people for us. Make -- level **[\*\*157]** the playing field. Make it so that they can't out-compete us, and then we can make money.

Id. at 81.

Defendants, in their *Daubert* motion, seek to exclude Sections X and XI of the Solow Report, which examine the circumstances of each Manufacturer's adoption of a UPP and the roles of ABB and the CLI in the alleged antitrust conspiracy.

## **1) Section X**

Section X of Dr. Solow's Report is entitled "Common Analysis of Conduct in the Contact Lens Industry." (Doc. 397 at 39); (Doc. S-405 at 39). Dr. Solow recounts how the four Manufacturer Defendants adopted UPPs *seriatim*, starting on June 1, 2013, with Alcon, followed in February 2014 by B&L, June 2014 by JJVC, and September 2014 by CV. (Doc. S-405 at 39 (Solow Report ¶ 68 (citing Doc. S-410-8, S-410-9, 5-410-10, 410-11))). He opines that "the manufacturers worked cooperatively with influential ECPs and/or ABB to design, promote, and enforce the policies," and that ABB advocated for the adoption of minimum resale price maintenance to B&L, JJVC, and CV

following Alcon's introduction of its UPP. Id. (Solow Report ¶ 68). Dr. Solow starts with a discussion of Alcon's introduction of a UPP in 2013, [\*363] in the face of "flat to minimum growth." (Doc. S-397 at 39 [\*\*158] (Solow Report ¶ 69 (quoting Doc. S-410-6 at 2))). Dr. Solow cites to evidence that Alcon was being pressured by ECPs prior to the introduction of UPPs in June 2013. (Doc. S-650 at 18-20 (Solow Supp. Report ¶¶ 37-42 (citing Docs. S-661-86, S-661-87, S-661-88, S-661-89, S-661-90, S-661-91, S-661-92))). Alcon introduced UPPs as part of the introduction of its new DAILIES TOTALI® ("DTI") lenses on June 1, 2013. (See Doc. S-405 at 39 (Solow Report ¶ 69)). Alcon's General Manager Jim Murphy, in an April 12, 2013 presentation, announced that the UPP "is designed to alleviate focus on price and allow for features and benefits to become the focus," which will "lead the contact lens market back to more of a medical market model where the doctor and manufacturer share the responsibility for care, education and patient liability." (Doc. S-410-6 at 17); (See also Doc. S-405 at 39-40 (Solow Report ¶ 70)). Alcon recognized the need to have "legal footing" for its UPP, and that merely "suggesting" a price would "not get followed." (Doc. S-405 at 40 (Solow Report ¶ 71 (quoting Docs. S-410-12 at 1, S-410-13, and 410-14 at 1))). Dr. Solow reviewed communications between Alcon representatives and ECPs [\*\*159] regarding pricing and ECPs, including the creation of an ECP advisory board for the planning and introduction of a "minimum retail price." Id. at 40-44 (Solow Report ¶¶ 72-77 (citing Docs. S-410-15 at 1-2, S-410-16, S-410-17 at 1, Doc. S-410-18, Doc. S-410-19)). He cites to documentation that ECPs signed UPP pricing agreements with Alcon. Id. at 45-46 (Solow Report ¶ 80 (citing Docs. S-410-24, S-410-25 at 2, S-410-26, S-410-27 at 3, S-410-28 at 1)). Alcon also sought to elicit the support of ABB in its communication with ECPs regarding the sale of contact lenses on a monthly payment plan. Id. at 46 (Solow Report ¶ 81 (citing Doc. S-410-29)). For example, after receiving a complaint from an ECP that a discount retailer was selling an Alcon lens at less than the UPP price, Alcon "responded by telling ABB not to sell to [the discount retailer]." Id. at 46-47 (Solow Report ¶ 82 (citing Docs. S-410-30; S-410-31; S-410-32)). ABB also notified Alcon about retailers selling Alcon lenses below the UPP price. Id. at 47 (Solow Report ¶ 83 (citing Doc. S-410-33)). Subsequently, Alcon extended UPPs to DAILIES® Aqua Comfort Plus® Multifocal and DAILIES® Aqua Comfort Plus® Toric contact lenses. Id. at 45 (Solow Report ¶ 79 (citing Doc. 410-22 at 2)). In April [\*\*160] 2014, Alcon adopted UPPs for AIR OPTIX® COLORS contact lenses, and "raised wholesale prices by 10% on its older non-UPP products in order to 'encourage migration' to the UPP products" which was the new technology. Id. (Solow Report ¶ 79 (quoting Doc. 410-23 at 9)).

B&L implemented a UPP in February, 2014, for its ULTRA™ line of contact lenses. (Doc. S-405 at 48 (Solow Report ¶ 85 (citing Doc. S-410-9))). B&L received feedback from ECPs in support of UPPS. Id. at 48-49 (Solow Report ¶ 87 (citing Docs. S-410-36; S-410-37)). In adopting its UPP, B&L communicated with ECPs:

Eliminating Internet: No longer have to compete on pricing without Uniform Pricing Policy. Ultra Lens will not be priced below \$60. . . .

Id. at 49 (Solow Report ¶ 88 (quoting Doc. S-410-38)). ECPs communicated with B&L about violations of UPPs, and B&L took action; "we need to be relentless in addressing these [complaints] when they come up." (Doc. S-410-124); (see also Doc. S-405 at 50 (Solow Report ¶ 89 (citing Docs. S-410-124; S-410-40 at 5-6; S-410-41))).

Still in Section X of his Report, Dr. Solow then provides an overview of JJVC's adoption of UPPs for its products in June 2014, at the same time that it discontinued contact lens lines [\*\*161] that would not be subject to a UPP. (Doc. S-405 at 50-57 (Solow Report ¶¶ 90-102 (citing Doc. S-410-10))). JJVC adopted UPPs for the following contact lines: 1-Day ACUVUE® MOIST®, 1-Day ACUVUE® MOIST® for ASTIGMATISM, 1-Day ACUVUE® TruEye®, ACUVUE® OASYS® with HRDRACLEAR®, ACUVUE® OASYS® for ASTIGMATISM, and ACUVUE® OASYS® for PRESBYOPIA. Id. at 50 (Solow Report ¶ 90 (citing Doc. S-410-42)). Leading up to the implementation of UPPs in the summer of 2014, JJVC received its private consultant's Vision Care Pricing Strategy Assessment dated July 22, 2013, which included an assessment of "competitive [\*364] pricing strategies" and "pricing philosophies." (Doc. S-410-44 at 1, 4); (see also Doc. S-405 at 51 (Solow Report ¶ 91)). JJVC considered creating an ECP advisory board in August 2013, (Doc. 5-405 at 51 (Solow Report ¶ 91 (citing Doc. S-410-43))), and created a presentation with ABB, dated March 19, 2014, entitled "Partnership for Category Growth," which included a page listing a UPP price increase for ACUVUE® OASYS®. Id. at 51 (Solow Report ¶ 92 (citing Doc. S-410-45 at 1, 13)). Dr. Carol Alexander, Director of Professional Affairs at JJVC met with ECPs on April 11, 2014. and reported on the positive response [\*\*162] of practitioners to Alcon's UPP, stating:

1. Overwhelmingly positive response by practitioners in private practices and schools as it "levels the playing field, and CL [contact lens] conversations can now center on the care and the product - not the price. We no longer have to justify what we charge for lenses or compete to keep the patient by lowering our prices."

Id. at 47 (Solow Report ¶ 84 (quoting Doc. S-410-34 at 1-2)). An April 16, 2014 JJVC presentation stated that the "Benefits of UPP" included:

- Removes patient incentive to shop online or with big box retailers
- Brings patient sale back to prescribing ECP's office
- Returns revenue back to appreciative ECPs
- Enables manufacturers to regain control of product pricing

The presentation also discussed the "significant risk of NOT enforcing violations promptly." (Doc. S-410-46 at 4, 10); (see also Doc. S-405 at 51-52 (Solow Report ¶ 92)). In May, 2014, a JJVC presentation recounted that

Today, many of [JJVC'S] OASYS contracts and pricing are inconsistent. JJVC has long been interested in standardizing its pricing across the brand and recent introductions of Unilateral Pricing Policies (UPP) by competitors have increased pressure to make this change [\*\*163] sooner rather than later.

(Doc. S-405 at 52 (Solow Report ¶ 92 (quoting Doc. S-410-47 at 3))). JJVC studied Alcon's UPP pricing strategy. Id. at 52 (Solow Report ¶ 92 (citing Doc. S-410-48 at 1-2)). Dr. Solow observes that "[a]s it was considering adoption of UPPs, [JJVC] hired DDP, a third-party, to conduct detailed interviews of personnel who were formerly employed at Alcon and B&L, and who had knowledge about how those respective companies implemented UPPs." Id. at 45, 49 (Solow Report ¶¶ 80, 88) (citing Doc. S-410-24)). In June, 2014, Laura Angelini, former President of JJVC, wrote in a letter to ECPs, that JJVC had six months earlier had asked for ECPs' feedback on pricing strategy, and that JJVC, in response, implemented the changes the ECPs said were needed. Angelini wrote that to "further demonstrate [JJVC's] commitment to prescribers," JJVC was announcing the implementation of its new pricing strategy in the United States, including a UPP. Id. at 52-53 (Solow Report ¶ 93 (quoting Doc. S-410-49 at 2-4)); (see also Doc. S-410-50 at 8 (December 14, 2014 Angelini letter confirming that JJVC had asked for ECP feedback "one year ago")). JJVC received a positive response to the UPPs from the ECPs. (Doc. 5-405 at [\*\*164] 53-54 (Solow Report ¶¶ 95, 96 (citing Docs. S-410-51 at 2; S-410-52, S-410-53)).

JJVC also worked with ABB in connection with JJVC's implementation of the UPPs. On June 19, 2014, Michael Dari, Vice President of sales for ABB, wrote in an email that he "just got [JJVC] to commit to provide us ALL of their communications so we will be sending it to the field by tomorrow." (Doc. S-410-54 at 1); (see also Doc. S-405 at 54 (Solow Report ¶ 97)). Jack Jenkins, director of strategic accounts at ABB wrote to Dari that he had spoken with "the [JJVC] management team" on June 19, 2014, regarding JJVC's new pricing policy and transitioning to UPP covered products, and that "ABB cover half targets and [JJVC] the other half." (Doc. S-410-54 at 1-2); (see also Doc. S-410-55 at 1 (Dari with ABB on June 3, 2014: "We are working through plans with VK [JJVC] now."); Doc. S-410-39 (Dari with ABB on June 4, 2014: "I am working with VK to come up with a plan."); Doc. S-410-56 at 1-2 (June 11, 2014 e-mail chain conversation between Dari with ABB and Angel Alvarez, Chief [\*365] Executive Officer of ABB, regarding ABB's efforts to boost JJVC sales and the "Significant decline in overall pricing/margin of VK [JJVC] [\*\*165] products," by focusing on Oasys 24-pack pricing and selling annual supplies, noting that the "UPP should keep the patient from shopping BUT this completely removes them from the market." Alvarez responded that Dari "please align with Vistakon [JJVC] sales management."); (Doc. S-410-57 (June 20, 2014 email recounting meeting notes and key points of a meeting between JJVC and ABB representatives, including JJVC providing ABB "more detailed information for [ABB] to communicate to the sales team on UPP pricing" and JJVC "will be conducting third party monitoring on the UPP pricing program."). Dr. Solow states that "[t]here is also evidence that [JJVC] and ABB acted co-operatively to enforce UPPs, citing to JJVC's use of ABB's publication Retail Price Monitor, and ABB reports about retailers selling below the UPP price as a "violation of detection tool[s]." (Doc. S-405 at 57 (Solow Report ¶ 102 (citing Docs. S-410 57, S-410-70, S-410-71, S-410-72, S-410-73, S-410-74, S-410-76, S-410-77, S-410-78, S-410-123)). He notes that JJVC "shared 'Do Not Sell' customer lists with ABB for such violations." Id. at 57 (Solow Report ¶ 102 (citing S-410-78 at 3)).

JJVC adjusted and modified its UPPs several times [\*\*166] during the summer of 2014 in response to concerns from customers and retailers. (Doc. S-405 at 55 (Solow Report ¶ 98). For example, Dr. Solow recounts that in response to concerns by discount club retailer reseller Costco Wholesale Corporation ("Costco"), JJVC, working with Costco, announced on October 5, 2014, a "Club Channel Exception" to the UPPs that permitted a 10% discount at club stores which could be used on products other than contact lenses. *Id.* at 56 (Solow Report ¶ 99 (citing Docs. S-410-60, S-410-65, S-410-66, S-410-89)).

JJVC eventually discontinued the UPP in April 2016. In the run-up to announcing the UPP "retirement," JJVC director of professional communications Dr. Carol Alexander wrote to her colleagues at JJVC regarding who to announce the shift:

In our advocacy efforts the story that we use around [JJVC] embraced the UPP as a good one, i.e. because we realized our prices were too high in the market place and we reset wholesale prices, and implemented UPP to draw retail prices down. It worked. The tough part is that in 1:1 sales meetings we may have sold the UPP in to customers as a "gift to the IECP". And it is those customers that are going to feel distrustful.

[W]e know [\*\*167] that retail price differences were at times 40% lower at Costco than the independent channel. Even with UPP we unsettled trust a bit when we allowed Costco to offer additional deals within the warehouse further incenting [sic] patients to buy in that channel.

(Doc. S-410-68 at 1); (see also Doc. S-661-53 at 3 (referring to JJVC "ECP [Wholesale] Reset Required Given New Market Reality" expected to "Breakeven" in 2.3 years")).

In September 2014, CooperVision, Inc. ("CV") made the decision to maintain a UPP for its Clariti contact lens line which it acquired through its August 2014 purchase of Sauflon, another contact lens manufacturer that had instituted a UPP on the Clariti lenses. (Doc. S-405 at 58 (Solow Report ¶ 103 (citing Doc. S-410-11)). Despite initial reservations about the wisdom of enacting a UPP, CV elected to continue with the UPP on Clariti. (Doc. S-405 at 59 (Solow Report ¶¶ 106, 107)). Dr. Solow cites to evidence that CV consulted with ECPs regarding the implementation of UPPs on its contact lens lines, and that ECPs "pressured" CV to adopt UPPs. *Id.* at 59-65 (Solow Report ¶¶ 107-113 (citing Docs. S-410-84 (September 25, 2013 internal CV email exchange about ECPs wanting CV to consider [\*\*168] adopting a UPP and that "some ECPs are embracing this policy"), S-410-85 (April 28, 2014 internal CV e-mail reporting that ECPs were in "unanimous agreement that UPP provides a very positive benefit to their practices," and that they "strongly urge [CV] to adopt this policy as we release new products."), 399-111 (CV President Robert Atkinson testifying before a Congressional subcommittee on July 31, 2014 regarding optometrists' "professional collusion" in conveying their "desire to prescribe UPP lens"), S-410-86 (June 25, 2014 email from the president of United Eye [\*366] Care Providers to CV's president of North America operations, regarding an informal survey of Chicago area ECPs who "have mentioned they are forming 'closer ties' to the companies embracing UPP, and even two have used the word 'boycott' of companies that are not actively moving in that direction."), S-410-87 (notes regarding a September 2014 conversation with owner of internet retailer lens.com that "a group of ECP's are threatening [CV] with the possibility of not prescribing [CV] products unless [CV] adopts a UPP approach."), S-410-88 (July 30, 2014 email in which CV's Dennis Murphy wrote to ABB that "ECPs are starting [\*\*169] to view UPP vendors as champions of the cause," and of CV's "need to let some pressure out of the UPP issue."), S-410-90 (September 2014 CV internal memo reporting on CV's consultation with ECPs regarding UPPs, finding that ECPs are "favorable or somewhat favorable on UPP," and while "not negative" on CV, they "question [CV's] reluctance" to adopt a UPP), S-410-91 (September 21, 2014 internal CV memo discussing loss of sales and damage to reputation among "accounts"), 399-118 (September 19, 2014 CV announcement of UPP for Clariti contact lens line announcing CV "held 12 focus groups and spoke with 100 ECPs, who felt UPP was consistent with helping them maintain their relationships with their patients"), 399-119 at 2 (CV President stating in a September 19, 2014 article that "[t]here was a strong voice that UPP is an important requirement for independent eyecare practitioners. . . . It was important that we understood the voice of the independents, and we're responding to it."), S-410-93 (October 2014 survey finding "most" ECPs view UPP in a positive light."))). Dr. Solow cites to a post-UPP March 2015 CV analysis of UPPs concluding that the "Anticipated Benefits" from the UPP were: [\*\*170]

- Seen as Protecting the ECP's Price Point from substantial internet or Mass Merchandisers as it relates to retail sell price

- Seen as eliminating the threat from "Mom and Pop" internet retailers.
- Demonstrates [contact lens] Share Leaders are dedicated to the ECP in the States.
- Encompasses the Distributor Channel.
- Protects margins for the Contact Lens company - Alcon one price for all with Total 1.

(Doc. S-405 at 65-66 (Solow Report ¶ 115 (citing Doc. S-410-95 at 2). The same analysis listed the "Potential Downsides" of the UPP:

- Does not control the Gray Market which is the biggest source of downward pressure on ECP price management. Internet sites will still be an issue in under cutting retail prices.
- Competitive Pressures for ECP's and retailers will be significant with today's consumer.
- Enforcement will be complex and challenging on a global scale
- Consumer activism may generate government review and potential legal action
- Ensuring the local representations does not resolve or address breaches in the UPP
- Applying UPP's to [contact lenses] already in the market with various price points.
- Global price coordination.

Id. at 3.

## 2) Section XI

Defendants seek to exclude Section XI of Dr. Solow's **[[\*\*171]]** Report, which is entitled "The Roles of ABB and the Contact Lens Institute." In this Section, Dr. Solow opines that ABB "facilitat[ed] collusion" through "inter-firm communications, either through intermediaries or directly through meetings." (Docs. 397 at 67; S-405 at 67). ABB is "America's leading authorized distributor of all major soft contact lens manufactured permeable contact lenses," serving "nearly two-thirds of eye care practitioners nationwide." (Doc. S-399-7 at 1 (ABB promotional material)). The Third Quarter 2014 issue of ABB's publication "The Profit Advisor, Business Strategies for ABB Optical Group Customers," reports that "UPP Brings a Fundamental Shift to **[\*367]** the Industry," that "can level the playing field," and that "Most ABB Optical Group Accounts Say They Welcome UPP." (Doc. S-410-20 at 3-4). Dr. Solow quotes the "Profit Advisor" article as recommending that ECPs price their contact lenses above the UPP price by "several dollars" and promise to match any legitimate price on the contact lens because "'You already know what the price is; it's the UPP price,'" and the competition is bound by the UPP price or "run the risk of being unable to purchase lenses from that **[[\*\*172]]** manufacturer. . . . As a result of UPP, . . . the prescribing practitioner will be able to retain a higher percentage of patient revenue.'" (Doc. S-405 at 69-70 (Solow Report ¶ 122 (citing Doc. S-410-20 at 3)).

Dr. Solow opines that the evidence suggests "that ABB coordinated the adoption of UPPs by the four manufacturers." (Docs. S-405 at 70-71 (Solow Report ¶ 124 (citing Docs. 410-105 (a June 19, 2014 e-mail in which Angel Alvarez, chief executive officer of ABB states that "[w]e have worked hard with manufacturers to develop Universal Product Pricing, UPP, that will not allow any group, including managed care, to under sell the prescribing practitioner."), S-410-106 (September 22, 2014 e-mail from ABB director of marketing Aaron See to Alvarez asking for approval of a proposed quote: "ABB has been working closely with manufacturers to develop Unilateral Pricing Policies, which we believe enables a better overall patient experience, by supporting competitiveness of prescribing practitioners," which was apparently approved and was published in October 2014.))). (See also Doc. 399-136 at 3)); (Doc. S-397 (Solow Report ¶ 119 (citing Doc. S-410-1 at 3 (In a July 2015 analysis Alcon **[[\*\*173]]** set as a goal to "[c]ollaborate externally' and '[s]upport ABB and other distributors in their service and support of ECP sales growth."))).

Dr. Solow also opines that "ABB also apparently played a central role in the implementation of UPPs." (Doc. S-405 at 71 (Solow Report ¶ 124 (citing Doc. 410-107 at 2 (a July 18, 2014 email in which ABB shares with JJVC its strategy to advise ECPs regarding suggested retail pricing with the "UPP as the lowest price and use it as needed."))). On June 24, 2014, Angel Alvarez with ABB wrote:

Concerning UPP...it's a classic brand protection move by the manufacturers to protect their products from becoming a low cost commodity. The bottom line is that there is real time and effort (cost) in fitting contact lenses and this move is to protect the industry by making sure that the prescribing practitioners keep engaged

in the effort. No reason to fit contacts if you cannot make any money . . . I'm a huge fan and have been lobbying for years for UPP!!

(Doc. S-661-64 at 4). On June 19, 2014, Mr. Alvarez wrote: "We have worked hard with the manufacturers to develop Universal Product Pricing, UPP, that will not allow any group, including managed care, to under [\*\*174] sell the prescribing practitioner." (Doc. S-661-156 at 2). On September 22, 2014, Mr. Alvarez approved a statement for an optometry trade publication that "ABB has been working closely with manufacturers to develop Unilateral Pricing Policies, which we believe enables a better overall patient experience, by supporting competitiveness of prescribing practitioners." (Doc. S-661-157 at 2); (see also Docs. S-661-162 at 3; S-661-147 at 4). Dr. Solow cites to evidence in which ABB and the Manufacturer Defendants refer to each other as "partners" and had a "cooperative relationship." (Doc. S-405 at 72-73 (Solow Report ¶¶ 126, 127 (citing Docs. 410-109 at 1 (September 16, 2013 email from B&L to ABB thanking ABB for hosting B&L's team and "providing an overview of ABB's business and the partnership with B&L"), S-410-110 at 1 (September 18, 2013 email in which B&L executive said "I have calls into ABB to understand how our competitors tackle this one," referring to locking in large customers who do not buy inventory), S-410-111 at 2 (January 22, 2015 B&L internal e-mail regarding ABB giving B&L confidential market share data and the need to keep the ABB source of the material confidential [\*\*175] as being from a "third party," in accordance with "the contract with ABB"), S-410-45 (JJVC presentation dated March 19, 2014 titled "Partnership for Category Growth" between JJVC and ABB), S-410-113 (April 7, 2014 JJVC powerpoint presentation about [\*368] Oasys in which JJVC states that it is "[p]artnering with external supplier to monitor compliance with pricing policy"), S-410-114 at 1-2 (July 17, 2014 email regrading the "CooperVision/ABB Visit, July 15, 2014," in which ABB's head of sales Mike Dari states to CV that "[o]ur sales team looks forward to partnering with Cooper in new ways," and that"[w]e will continue to elevate our communication to the sales team so we see the right level of mutual partnership" to which CV replied "it [is] great to see so much mutual opportunity."))).

Dr. Solow opines that in addition to ABB, the Manufacturer Defendants used the CLI (Contact Lens Institute) "to coordinate their activity." (Doc. S-405 at 73 (Solow Report ¶ 128)). CLI "represents[s] the interests of its members,' (Does. 397 at 73; S-405 at 73 (Solow Report ¶ 128 (quoting Doc. 399-146))), and its board of directors consists of one executive from each of the four Defendant Manufacturers. Id. [\*\*176] (Solow Report ¶ 128 (citing Doc. 399-147)). Dr. Solow cites to the CLI website which discusses CLI's quarterly statistical program to provide participants with consolidated market data including "manufacturer shipment data of Contact Lens . . . products," id. at 73-74 (Solow Report ¶ 129 (citing Doc. 399-149 at 2)). He states that "the CLI Board encourages members of the CLI committees and board from each company to communicate with each other.' (Doc. S-405 at 74 (Solow Report ¶ 129 (quoting Doc. 410-64 at 3 (CLI Meeting Minutes dated March 27, 2013)))). In 2014, CLI created a new "Category Growth and Market Creation Committee," with the objective to develop "a plan to help improve trend/growth in the overall market for contact lenses." Id. at 75 (Solow Report ¶ 133 (quoting Doc. S-410-115 at 1 (April 10, 2014 (CLI conference call minutes))). Among the strategies discussed was focusing on ECPs, "so a united CLI approach could look very good to that audience." (Doc. S-410-115 at 2) (see also Doc. S-405 at 75 (Solow Report ¶ 133)). In June, 2014, the Committee discussed the ECP campaign as being positive; "[s]uch a campaign was also felt to provide a positive message for ECPs that CLI members are working together to have an impact on the overall market." (Doc. S-405 at 76 (Solow Report ¶ 133 (quoting Doc. S-410-104 at 3 (June 3, 2014 conference call minutes)))). The Committee members circulated notes regarding the "ECP campaign" with the "objective" of a "united front of four major manufacturers to inspire ECPs to proactively pursue opportunities to fit [contact lenses] so that their patients and practice will benefit." Id. (Solow Report ¶ 133 (quoting Doc. S-410-117 at 8)).

#### **b. Defendants' Arguments**

Defendants contend that aside from citing to a "hodgepodge" of documents, Dr. Solow does not support his testimony with record evidence. They argue that Dr. Solow rendered his opinion prior to reading any deposition testimony, or speaking with any ECPs or the named class members. (Doc. S-531 at 9 (citing Doc. 532-1 at 19-20, 33-34 (Solow Dep. at 18-19,32-33))). Citing to Dr. Solow's deposition testimony, Defendants state that Dr. Solow "admits" that he has seen no direct evidence that any communications among any of the Manufacturer Defendants

took place - whether facilitated by third parties through ABB and ECPs or not. *Id.* at 9, 25-26 (citing Doc. 532-1 at 35-36, 40, 42, 44-45, 49-50, 60-61, 66 (Solow Dep. at 92-93, 95-97, 99, 101-102, 106-107, 114-116, 123-125, 139, 153-154, 192, 217)). They argue that the Solow Report is not based on reliable methodology. **[\*\*177]** (Docs. 500 at 11; S-531 at 11-12), and that he "misrepresents the record" and cites evidence out of context regarding the Manufacturer Defendants' adoption of UPPs and communications between the Manufacturer Defendants. (Doc. S-531 at 17-27). Defendants also contend that in rendering his opinions, Dr. Solow ignored the "broader story" found in the record of the Manufacturer Defendants "myriad" of legitimate reasons for adopting UPPs, including support of new contact lens technology, simplifying price structure by eliminating rebates to increase "transparency." (See Doc. S-531 at 21, 23) (citing Docs. S-532-10 (fact sheet regarding B&L UPP), S-532-5 at 10-16 (Donley Dep. at 305-309, 319-20), S-532-11 at 5-6 (Sommer Dep. at 72-73), S-532-14 at 4-5 (Miura Dep. at 296-297), S-532-15 at 5-7 (Helms Dep. at 51-52,60), S-532-16 at 9 (JJVC presentation))).

**[\*369]** Defendants argue that Dr. Solow's opinions are not based upon "reliable or scientifically valid methodology," because he relied upon only "a small subset of documents - most of which were pre-selected for him by Plaintiffs' counsel," and he "ignores the vast majority of the record evidence." (Doc. S-531 at 12). They cite to Dr. Solow's deposition **[\*\*178]** testimony that he reviewed 380 documents out of 600,000 documents produced, and that he has spoken only with Plaintiffs' counsel and with Dr. Williams. (Doc. S-531 at 13-14 (citing Doc. S-532-1 at 19-20 (Solow Dep. at 18-19) and Doc. S-405 at 89 (Solow Dep. Appendix)). Defendants also criticize Dr. Solow's Report as being "rife with errors and factual misinterpretations of the evidence," and devoid of citation to any evidence providing any details of the alleged antitrust conspiracy. (Doc. S-531 at 12, 16). Defendants argue that Dr. Solow is nothing more than "Plaintiffs' 'conspiracy' advocate." (Docs. 500 at 7; S-531 at 7).

#### **c. Plaintiff's Response**

Plaintiffs respond that the purpose of Dr. Solow's Report and opinion at this stage of the litigation is "only to determine 'whether the liability elements of Plaintiffs' claims are subject to common economic proof.'" (Docs. 549 at 13; S-558 at 13 (citing Docs 397 at 8; S-405 at 8 (Solow Report ¶ 9)). Plaintiffs contend that Dr. Solow's opinion is not due to be stricken as inadmissible under *Daubert* because Dr. Solow did not view all 600,000 documents in the record at the time of the Report. (Docs. 549 at 15; S-558 at 15). Additionally, **[\*\*179]** Plaintiffs cite to Dr. Solow's deposition testimony in which he stated that he reviewed documents not only pointed out by Plaintiffs' attorneys, but also documents he located on the case database as well as from a search for documents on his own. (Doc. S-558 at 16 (citing Doc. 532-1 at 20 (Solow Dep. at 19))).

#### **d. Discussion**

##### **1) Competence**

The Eleventh Circuit observes that "experts may be qualified in various ways." *United States v. Frazier, 387 F.3d 1244, 1260 (11th Cir. 2004)*. "While scientific training or education may provide possible means to qualify, experience in a field may offer another path to expert status." *Id. at 1260-61* ("expert status may be based on 'knowledge, skill, experience, training, or education.'" (quoting Fed. R. Civ. P. 702 (emphasis omitted))). The "proposed expert testimony must be supported by appropriate validation - i.e., "good grounds," based on what is known." *Id. at 1261* (quoting *Daubert, 509 U.S. at 590*). "Determining whether a witness is qualified to testify as an expert requires the trial court to examine the credentials of the proposed expert in light of the subject matter of the proposed testimony." *Feliciano v. City of Miami Beach, 844 F. Supp. 2d 1258, 1262 (S.D. Fla. 2012)* (internal quotation marks and citation omitted).

Dr. Solow satisfies the qualification requirement. Based on his training and experience, Dr. Solow is qualified as an expert to **[\*\*180]** testify regarding whether common economic proof is available to establish antitrust liability and causation of economic damages to a class of Plaintiffs. (See Docs. 397 at 7; S-405 at 7 (Solow Report ¶ 9)). He

has extensive education, and teaching and writing experience in the fields of industrial organization, microeconomics, and antitrust economics. He has been qualified as an expert and has offered economic expert testimony in antitrust litigation, including the MDL 1030 case. Defendants' do not mount a serious challenge to Dr. Solow's qualifications.

## **2) Reliability (Methodology)**

When an expert's proposed testimony is scientific in nature, "the trial judge must assess 'whether the reasoning or methodology underlying the testimony is scientifically valid and ... whether that reasoning or methodology properly can be applied to the facts at issue.'" [Frazier, 387 F.3d at 1261-62](#) (quoting [Daubert, 509 U.S. at 592-93](#)). The Eleventh Circuit considers the following non-exhaustive factors when evaluating the reliability of scientific expert opinion:

- (1) whether the expert's theory can be and has been tested; (2) whether the theory has been subjected to peer review and [\\*370](#) publication; (3) the known or potential rate of error of the particular scientific [\\*\\*181](#) technique; and (4) whether the technique is generally accepted in the scientific community.

[Frazier, 387 F.3d at 1262](#) (citation omitted). "The [Frazier](#) Court went on to explain that "[s]ometimes the specific [Daubert](#) factors will aid in determining reliability; sometimes other questions may be more useful." [PB Prop. Mgmt., 2016 U.S. Dist. LEXIS 97520, 2016 WL 7666179, at \\*8](#) (quoting [Frazier, 387 F.3d at 1262](#)).

"Scientific evidence encompasses so-called hard sciences (such as physics, chemistry, mathematics and biology) as well as soft sciences (such as economics, psychology, and sociology), and it may be offered by persons with scientific, technical, or other specialized knowledge whose skill, experience, training, or education may assist the trier of fact in understanding the evidence or determining a fact in issue."

[Frazier, 387 F.3d at 1261 n.14](#) (quoting William W. Schwarzer & Joe S. Cecil, "Management of Expert Evidence," [Reference Manual on Scientific Evidence](#) 39 (Federal Judicial Center, 2d ed. 2000)). "The trial judge has 'considerable leeway' in deciding the reliability of expert testimony, but importantly, 'what remains constant is the requirement that the trial judge evaluate the reliability of the testimony before allowing its admission at trial' in every case." [PB Prop. Mgmt., 2016 U.S. Dist. LEXIS 97520, 2016 WL 7666179, at \\*8](#) (quoting [Frazier, 387 F.3d at 1262](#)).

Defendants argue that Dr. [\\*\\*182](#) Solow's citation to the record is inaccurate. For example, Defendants argue that Alcon adopted a UPP to support its innovative new contact lens and bring back "drop out" consumers to the contact lens market. (Doc. S-531 at 18 (citing Doc. S-410-6 at 4)). Defendants fail to address the UPP portion of that same Alcon slide show report in which Alcon's general manager Jim Murphy states that Alcon's UPP "is designed to alleviate focus on price and allow for features and benefits to become the focus," which will "lead the contact lens market back to more of a medical market model where the doctor and manufacturer share the responsibility for care, education and patient liability." (Doc. S-410-6 at 17). The latter slide tends to support Dr. Solow's conclusion that Alcon adopted UPPs to "incentivize ECPs to prescribe its new lenses." (Doc. S-405 at 39 (Solow Report ¶ 70)). To be sure, Dr. Solow appears to overstate that an e-mail chain between Alcon, ABB and an influential ECP was directed at "implementing and enforcing UPPS." (See Doc. S-405 at 46 (Solow Report ¶ 81 (citing Doc. S-410-29))). However, the interchange was concerning monthly payment plans for ECPs, and illustrates that Alcon, [\\*\\*183](#) ABB and ECPs collaborated regarding pricing options.

Defendants criticize Dr. Solow's deposition testimony in which he observes that B&L's announcement of its UPP policy "virtually plagiarizes Alcon's policy . . . [T]hey use the exact, almost virtually identical language. . . . [C]ertainly they were aware of what was being done to the point where they actually just copied it." (Doc. S-532-1 at 43 (Solow Dep. at 100)); (see Doc. S-531 at 19). Defendants contend that Dr. Solow could cite to no communications between B&L and Alcon, and that there were differences between Alcon's and B&L's UPPs regarding advertising based on the availability of a manufacturer's rebate. (Doc. S-531 at 18-19 (citing Doc. S-532-5 at 17-18 (Donley Dep. at 354-55))). Defendants fail to cite the Court to the nearly identical UPP announcements to which Dr. Solow was referring. (Compare Doc. S-410-8 (Alcon announcement) with Doc. S-410-9 (B&L announcement)). Dr. Solow's citation to an ECP e-mail to B&L supports his statement that B&L had consulted with

ECPs leading up to the adoption of its UPP, (see Doc. S-405 at 48 (Solow Report ¶ 87)), and was not cited to "concoct a relationship between B&L and Alcon" as Defendants [**\*\*184**] suggest. (Doc. S-531 at 19). Dr. Solow's citation to references that B&L and ABB had a "cooperative relationship" and referred to themselves as "partners" (Doc. S-405 at 72 (Solow Report ¶ 126)), is characterized by Defendants as being "nothing more than a business relationship." (Doc. S-531 at 20). The two characterizations are not irreconcilable and their import is left to the trier of fact.

As to JJVC, Defendants criticize Dr. Solow for citing to a JJVC Power Point presentation, [**\*371**] dated March 19, 2014 for the proposition that JJVC solicited feedback on other manufacturers' UPPs from ABB and ECPs. JJVC created a presentation called "Partnership for Category Growth" with ABB. Defendants argue that the presentation had on its face been created after the JJVC July 2014 implementation of a UPP. (Doc. S-531 at 21-22 (citing Docs. S-405 at 51,72 (Solow Report ¶¶ 92, 127), S-410-45 at 1, 4, and S-532-1 at 63-66 (Solow Dep. at 136-39))). The JJVC power point presentation embracing a "partnership" between JJVC and ABB and explaining that the UPP "enables [ECPs] to feel confident that Eye Health and patient experience will be at the center of your dialogue with patients, not cost," (see Doc. S-410-45 [**\*\*185**] at 1, 4), is relevant to Plaintiffs' allegations of conspiracy and Defendants' motivations, notwithstanding that the presentation was created after JJVC's UPP launch.

Defendants also take issue with Dr. Solow's references to. JJVC's interviews of personnel who were formerly employed at Alcon and B&L regarding those companies' adoptions of UPPs. (Doc. S-531 at 22 (citing Docs. S-405 at 45, 49, 51 (Solow Report ¶¶ 80, 88, 91))). Nothing in Dr. Solow's deposition testimony cited by Defendants dispels the relevance of Dr. Solow's reference to the third party interviews. (See Doc. S-531 at 22 (citing Doc. 532-1 at 58-59 (Solow Dep. at 121-22 ("I think under some circumstances, it could be [competitive intelligence]. I think under some circumstances, it could be anticompetitive."))).

Finally, as to CooperVision, by recounting how CV acquired the Clariti line of contact lenses from a prior owner Sauflon, which had implemented a UPP, Defendants contend that Dr. Solow "concedes" that CV unilaterally adopted a UPP on September 2014, rather than in collusion with the other Defendant Manufacturers. (Doc. S-531 at 23 (citing S-405 at 58 (Solow Report ¶ 103))). Defendants argue that Dr. Solow has no [**\*\*186**] information on how or why Sauflon adopted the UPP on the Clariti line. Id. at 24 (citing Doc. S-532-1 at 67-68 (Solow Dep. at 140-41)). Defendants also contend that Dr. Solow mischaracterized the evidence as supporting his opinion that CV was pressured by ECPs to implement UPPs on its contact lens lines, citing to ECP complaints about other CV lines of contact lenses which did not have a UPP. Id. at 24. The evidence cited by Dr. Solow (see Doc. S-405 at 63, 66 (Solow Report ¶¶ 107, 110 (citing Docs. S-410-84, S-410-91, S-410-95, S-410-98))) demonstrates ECPs' desire that CV maintain UPPs on its products including a communication from an ECP regarding CVs lack of a UPP on another line of contact lenses, Biofinity, and is not contrary to Dr. Solow's opinion that CV was being pressured by ECPs regarding pricing and UPPs. On this point, Dr. Solow testified that CVs decision to maintain the Sauflon UPP on the Clariti contact lens line "is still a decision . . . It chose to do that once it took over [Sauflon]. . . . And then extended that to . . . the MyDay line." (Doc. S-532-1 at 79-80 (Solow Dep. at 195-96)). Dr. Solow testified that CV was "under pressure from ECPs generally. They met with a dozen focus [**\*\*187**] groups and a hundred ECPs, and they heard from Dr. Eiden." Id. at 80 (Solow Dep. at 196).

Defendants also take issue with Dr. Solow's statement that "[e]conomic theory indicates that UPPs could be expected to adversely impact consumers," (see Docs. 397 at 83; S-405 at 83 (Solow Report ¶ 148)) because Defendants contend that Dr. Solow fails to recognize CV provided rebates on three contact lens lines that were subject to UPPs, dropping the actual price for consumers below the UPP price. (Doc. S-531 at 24-25 (citing Doc. 501-18)). And they assert that Dr. Solow was unable to testify regarding any CLI communications at a CLI meeting regarding UPPs, or that there is any evidence that the CLI was "used in an anticompetitive fashion." Id. at 26 (citing Doc. S-532-1 at 74-75 (Solow Dep. at 169-170)). Dr. Solow did respond, however, that he "think[s] the sharing of information among rivals, in an oligoplastic industry, . . . is something that can be anticompetitive, but need not be anticompetitive." (Doc. S-532-1 at 75 (Solow Dep. at 170)).

In *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1255 (10th Cir. 2014), Dr. Solow testified at trial regarding the existence of a manufacturer defendant's conspiracy to fix [**\*372**] prices for polyurethane products, observing "four types of collusive [**\*\*188**] conduct": 1) a series of "'lockstep price increase announcements'" within weeks of each

other; 2) "a widespread pattern of communication" among the top executives of the defendant companies held in secret and close to the time of the price increases; 3) a "price over volume strategy," where the companies would stick to their list prices "even if it meant walking away from opportunities to earn business or make sales at lower, but still profitable, prices"; and 4) the defendant companies monitored one another to prevent cheating and to discipline any supplier that was found cheating. *In re Urethane Antitrust Litig.* 768 F.3d 1264-65 (citing trial testimony). Dr. Solow also testified in *In re Urethane Antitrust Litig.* that the "the polyurethane industry was 'ripe for collusion' based on six features," many of which are present here: 1) "sales of polyurethane products were 'concentrated in the hands of only a handful of firms' during the conspiracy period"; 2) "the market had high barriers to entry"; 3) polyurethane products are homogenous; 4) "there were no close product substitutes available to customers"; 5) there was excess capacity and 6) "the industry has several trade associations, which provided 'an opportunity to engage [\*\*189] in price fixing behavior.'" *Id. at 1265*. The court affirmed the jury verdict in favor of Plaintiffs, finding the evidence was sufficient to support finding that a price fixing agreement was implemented. *Id. at 1264-66*. While Dr. Solow acknowledges that he had found no direct evidence of communications between the executives of the Manufacturer Defendants as he did in *In re Urethane*, he asserts that "there was communication between ABB and the executives of the companies." (Doc. S-532-1 at 27 (Solow Dep. at 26)). Defendants' criticisms and attempts to distinguish *In re Urethane*, (see Doc. S-531 at 27), are properly the subject of cross examination and argument for the eventual trier of fact to consider, and do not amount to a basis to not consider Dr. Solow's Report in conjunction with Plaintiffs' Motion for Class Certification.

"Courts in this circuit and others regularly admit expert testimony that certain conduct or evidence is 'consistent with a finding that Defendants engaged in a conspiracy to fix prices.'" *In re Delta/Airtran Baggage Fee Antitrust Litig.*, 245 F. Supp. 3d 1343, 1359 (N.D. Ga. 2017) (quoting *In re Polypropylene Carpet Antitrust Litig.*, 93 F. Supp. 2d 1348, 1355 (N.D. Ga. 2000) and citing *City of Tuscaloosa*, 158 F.3d at 565 (holding that expert testimony is admissible so long as it "constitute[s] one piece of the puzzle that the plaintiffs endeavor to assemble before the jury"), aff'd *714 F. App'x 986 (11th Cir. 2018)*; see also [\*\*190] *In re Urethane Antitrust Litig.*, 152 F. Supp. 3d 357, 359-61 (D.N.J. 2016) (admitting expert economic testimony that certain evidence was "not consistent with the existence of a price-fixing conspiracy"); *In re Processed Egg Prods. Antitrust Litig.*, 81 F. Supp. 3d 412, 424 (E.D. Pa. 2015) ("An economic expert may permissibly testify as to whether certain conduct is consistent with collusion or an entity or individual's self-interest."); *U.S. Info. Sys. v. IBEW Local Union No. 3*, 313 F. Supp. 2d 213,240 (S.D.N.Y. 2004) ("Economists often explain whether conduct is indicative of collusion."). Expert testimony that certain conduct or evidence is "consistent with a finding that Defendants engaged in a conspiracy to fix prices," has been held to be admissible in antitrust cases. *Polypropylene Carpet*, 93 F. Supp. 2d at 1355. There is no evidence that Dr. Solow formed his opinion prior to reviewing the record evidence, that he relied on one-sided data, or that he ignored certain evidence in the record. Compare *PODS Enters., Inc. v. U-Haul Int'l, Inc.*, No. 8:12-cv-1479-T-27MAP, 2014 U.S. Dist. LEXIS 193896, 2014 WL 12628664, at \*4 (M.D. Fla. June 27, 2014). Dr. Solow conducted an independent investigation of the record evidence available at the time his Report was due to support his conclusions, and does not simply parrot the allegations of Plaintiffs' Complaint, as Defendants suggest. If Defendants believe that the basis for Dr. Solow's opinions is insufficient, they can explore that with Dr. Solow on cross examination and argument for the benefit [\*\*191] of the trier of fact; "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *United States v. Ala. [\*\*373] Power Co.*, 730 F.3d 1278, 1282 (11th Cir. 2013) (quoting *Allison*, 184 F.3d at 1311-12 and citing *Daubert*, 509 U.S. at 596). This Court determines that Dr. Solow's opinion is sufficiently reliable under *Daubert* to support Plaintiffs' Motion for Class Certification.

### **3) Assist the Trier of Fact**

Expert testimony assists the trier of fact "if it concerns matters that are beyond the understanding of the average lay person." *Frazier*, 387 F.3d at 1262. To satisfy the helpfulness requirement, expert testimony must be relevant to an issue in the case and offer insights "beyond the understanding and experience of the average citizen." *United States v. Rouco*, 765 F.2d 983, 995 (11th Cir. 1985). "Proffered expert testimony generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments." *Frazier*, 387 F.3d at 1262-63. Defendants argue that Dr. Solow's report "merely provides his interpretations of business

documents and weaves a factual narrative designed to supplement Plaintiffs' Motion for Class Certification based on these documents." They contend that the Court "is more than capable of reading and interpreting these [\*\*192] materials without Dr. Solow offering his own gloss," (Doc. S-531 at 28), and that testimony by fact witnesses involved in creating the documents relied on by Dr. Solow would better assist the trier of fact in determining the documents meaning. (Docs. 500 at 29; S-531 at 29)

An expert's testimony in an antitrust case

need not show a successful conspiracy to be admitted under [Evidence] Rule 702 as circumstantial evidence of a conspiracy. As expert evidence, the testimony need only assist the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. As circumstantial evidence, [the expert's] testimony need not prove the plaintiffs' case by [itself], must merely constitute one piece of the puzzle that the plaintiffs endeavor to assemble before the jury.

[City of Tuscaloosa, 158 F.3d at 564-65](#) (emphasis in original) (internal quotations and citation omitted) (testimony by statistician characterizing certain bids as "signals" to co-conspirators was outside his expertise, and the trier of fact was capable of drawing such conclusions without technical assistance from experts). But Courts may rely upon expert testimony regarding whether defendants [\*\*193] behavior "is consistent with anticompetitive coordination," which is the focus of Dr. Solow's Report. See [In re Delta/Airtran, 245 F. Supp. 3d at 1358-59](#); see also [Polypropylene Carpet, 93 F. Supp. 2d at 1353](#) (finding that expert's testimony that "the climate of the polypropylene market during the relevant time period was consistent with a finding that Defendants engaged in a conspiracy to fix prices" as general matter "may be helpful to the trier of fact").

If, as Defendants contend, Dr. Solow has based his opinions on misconstrued, misrepresented or overstated facts, provided by a biased source, i.e. Plaintiffs' counsel, Defendants can bring this to the attention of the trier of fact through cross-examination. An expert is permitted "wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation," [Daubert, 509 U.S. at 592](#). "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed." [Fed. R. Evid. 703](#). The potential weaknesses in his testimony only go to the weight of the opinions—not their admissibility—and are thus not grounds for exclusion under [Daubert](#) of Dr. Solow's opinion in support of Plaintiffs Motion for Class Certification. See [Viterbo v. Dow Chem. Co., 826 F.2d 420, 422 \(5th Cir. 1987\)](#) ("[Q]uestions relating to the bases and sources of an expert's opinion [\*\*194] affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration."); [PODS Enters., 2014 U.S. Dist. LEXIS 193896, 2014 WL 12628664, at \\*2](#) (finding that expert's methodology and conclusions are sufficiently reliable to be admissible, notwithstanding that virtually all of the materials he examined were provided to him by . . . counsel. While that may be fruitful cross examination bearing on the weight of his opinions, it [\*\*194] does not render his methodology of usage and context unreliable."). Defendants' criticisms of the factual foundations for Dr. Solow's opinions bear more on the weight of the evidence than its admissibility. Dr. Solow identified documents produced that he considered to support his opinions. Evidence Rule 702 recognizes that "it might also be important in some cases for an expert to educate the factfinder about general principles," and to apply these principles to the facts of the case." [Fed. R. Evid. 702](#) (2000 Amendments advisory committee notes). "For this kind of generalized testimony, [Evidence] [Rule 702](#) simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony 'fit' [\*\*195] the facts of the case." [Id.](#)

One function of an expert in a case such as this, where tens of thousands of documents have been exchanged through discovery, is to review the documentation and highlight and interpret those pieces of evidence by applying their specialized knowledge and skill, that are relevant to the respective theories in the case. To the extent Dr. Solow relied upon documentary exhibits found in the record, and the fact that he did not review deposition testimony—assuming that testimony was in existence at the time he prepared his March 3, 2017 Report—does not negate his analysis of the documents reviewed. See generally [United States v. United States Gypsum Co., 333 U.S. 364, 396, 68 S. Ct. 525, 92 L. Ed. 746 \(1948\)](#).

## **2. Dr. Williams**

Defendants seek to strike the Report of Plaintiffs' economic expert Dr. Williams, proffered by Plaintiffs in support of their Motion for Class Certification. Dr. Williams' Report is relevant to the predominance requirement of [Rule 23](#). Dr. Williams, through his Report, seeks to demonstrate that antitrust impact and damages can be shown as to all members of the proposed classes through common proof.

Defendants contend that Dr. Williams' analytical model regarding impact and damages allegedly caused by the Defendants' UPPs "has nothing to say about **[\*\*196]** whether any consumer suffered any actual injury—it merely assumes that all consumers within a given retail channel suffered an identical injury." (Docs. 503 at 7; S-535 at 7 (emphasis in original) (citing Doc. S-534 at 215 (Williams Dep. at 214 ("[M]y regression doesn't say anything about persons. My regression says that the average effect in the different channels is statistically significant, different than zero."))); see also id. at 11, 18. As a result, Defendants argue that Dr. Williams' Report is not reliable and should be excluded because it does not account for that the fact, for example, that "consumers bought contact lenses from 1-800-Contacts for far less than Dr. Williams' claimed 'average effect' and other consumers paid *nothing* for contact lenses due to rebates, discounts, and insurance." (Doc. S-535 at 7-8 (emphasis is original)).

### **a. The Williams Report**

Dr. Williams is Director of the consulting company Competition Economics, LLC. He specializes in analyses involving antitrust, industrial organization and regulation. (Docs. 398 at 3; S-406 at 3 (Williams Report ¶ 1)). He has produced extensive publications and has testified as an expert in numerous court cases. Id. at 3, 19-26 (Williams Report ¶¶ **[\*\*197]** 1, 2 and Appendix I)). Dr. Williams concluded that Defendants' alleged horizontal and vertical agreements resulting in the UPPs applicable to certain contact lens lines resulted in "statistically significant price increase[s]" for those particular contact lens lines. (Doc. S-406 at 12-16 (Williams Report ¶¶ 21-35)). This is reflected in his Report, dated March 3, 2017. (Docs. 398; S-406).

In compiling his Report, Dr. Williams relied upon numerous documents in the record. (Docs. 396 at 4; 28-33; S-406 at 4, 28-33 (Williams Report ¶ 3 and Appendix II)). Dr. Williams states that Plaintiffs' counsel requested that he assume Defendants "will be found liable on: (1) Plaintiffs' First Cause of Action ('horizontal agreement' claim) and (2) Plaintiffs' Second Cause of Action ('vertical agreements' claim)," and "to determine whether economic methodologies exist and are supported by sufficient data that can be used to reasonably estimate class-wide damages **[\*375]** for both of Plaintiffs' causes of action." Id. at 6 (Williams Report ¶ 6). Dr. Williams says that he focuses his "econometric analysis . . . to determine whether and, if so, to what extent Defendants' illegal actions caused Plaintiffs to pay higher **[\*\*198]** contact lens prices than they would have paid but for the alleged actions," using what he calls a "standard and widely accepted statistical methodology - multiple regression analysis." (Doc. S-406 at 6 (Williams Report ¶ 7)). Dr. Williams concludes that his analysis "demonstrates that Plaintiffs paid higher contact lens prices for products subject to Defendants' unilateral pricing policies' ('UPPs'), than they would have paid but for Defendants' alleged illegal actions." Id. At the evidentiary hearing, Dr. Williams testified that his analysis follows the computational methodology set forth by the American Bar Association. (Doc. 866 at 187).

Dr. Williams describes his multiple regression analysis, which he cites as commonly used in antitrust cases, as follows:

The determination of overcharges, if any, attributable to alleged illegal conduct typically involves the comparison of (1) actual prices during the period affected by the alleged illegal conduct (the "damages period") to (2) estimated but-for prices in the absence of the alleged illegal conduct in that period. Multiple regression analysis is, in my experience, the most common statistical methodology for performing damages analysis. **[\*\*199]** [Footnote omitted]. When used to estimate overcharges in antitrust cases, multiple regression analysis entails the specification of a model - that is, an equation - that relates price (or a function of price) to factors that may affect price when the alleged illegal conduct does not occur. The model analyzes prices during damages and "benchmark" (i.e., non-damages) periods to calculate "but for" prices, i.e., prices that Plaintiffs

would have paid but for the alleged illegal conduct. The comparison of actual prices to but-for prices quantifies the overcharge and provides a reasonable basis for calculating the amount of damages attributable to the alleged illegal conduct.

(Doc. S-406 at 6-7 (Williams Report ¶ 8)). He designated the "damages period" as the period of time in which a given contact lens product was subject to a UPP. Id. at 7 (Williams Report ¶ 9). He did "not assume there were damages during that period for the given UPP product." Id.

Dr. Williams first applies the regression model to estimate overcharges, if any, which resulted from Defendants' "alleged horizontal agreement," Plaintiff's First Cause of Action. "Because the objective is to compare prices between the benchmark and [\*\*200] damages periods, price is specified as the dependent variable in the model." (Doc. S-406 at 7 (Williams Report ¶ 10)). Dr. Williams uses "retail prices from various transactional and survey datasets over the 2008-2016 period" in his analysis, and "estimate[s] the price effect of Defendants' alleged horizontal agreement using a benchmark of two groups: (1) Defendants' pre-UPP-period prices for products that later had a UPP, and (2) Defendants' pre-UPP-period prices for products that never had a UPP." Id. at 8 (Williams Report ¶ 10)). He calls this the "Horizontal Agreement Model." Id.

As to the alleged Vertical Agreements, Dr. Williams states that he "estimate[s] the price effect of each Manufacturer Defendant's alleged illegal vertical agreement using a benchmark of two groups: (1) each Manufacturer Defendant's pre-UPP-period prices for products that later had a UPP and (2) each Defendants' pre-UPP-period prices for products that never had a UPP." (Doc. S-406 at 8 (Williams Report ¶ 11)). In each of the four regressions, Dr. Williams uses "only a given Manufacturer Defendant's data." Id. He calls this the "Vertical Agreement Model." Id.

In conducting his multiple regression analysis, Dr. Williams [\*\*201] considers the following variables which could affect price:

- (1) Product Characteristics ("The regression models allow contact lens prices to differ if the products are (1) in different categories (i.e., sphere, toric, or multifocal); (2) produced by different manufacturers; (3) in different package sizes; or (4) color lenses or not," and
- (2) UPP and Post-UPP Indicators, measuring observed prices during the damages [\*376] period compared to prices in the same period "but for the UPP."

(Doc. S-406 at 8-9 (Williams Report ¶¶ 12, 13)); (Doc. S-561-1 at 98 (Williams Dep. at 97)). This latter variable included observations of (1) non-UPP products during the damages period; (2) UPP products in post-UPP periods; and (3) non-UPP products in post-UPP periods. Id. at 9 (Williams Report ¶ 13).

In his initial Report, Dr. Williams used the following data sets: the retailer 1-800-Contacts Survey, which consists of compilations of competitor gross retail prices collected by 1-800-Contacts between January 6, 2011 through November 30, 2016; retailer Costco transactional datasets, regarding Costco sales, costs, discounts and rebates by time period, manufacturer and product to determine Costco net prices from September [\*\*202] 2013 through November 30, 2016; retailer National Vision datasets of transactions made on its websites, including prices, discounts, and quantities sold by date and product, for the period October 24, 2008 through November 30, 2016; retailer Walgreens monthly transactional datasets on orders shipped, including sales, quantities sold, and retail prices by month, and by manufacturer and product, from January 2013 through December 2016; and retailer 1-800-Contacts transactional data through its website, including data on sales, quantities sold, discounts, rebates, and shipping revenues by date and product to determine 1-800-Contact's net prices, covering September 16, 2008 through June 4, 2016. (Doc. S-406 at 9-11 (Williams Report ¶¶ 14-18)). He eliminated "outlier" sales and prices from his observations, such as prices charged when the products were sold as a "trial." Id. at 11 (Williams Report ¶ 19)). According to Dr. Williams, the 1-800-Survey data "contain the most reliable data with respect to sales through the Retail and ECP channels." Id. (Williams Report ¶ 20); (see also Doc. S-541-34 at 35 (Williams Dep. at 133 ("[T]he ECP data in my report came from . . . 1-800 Contacts survey data, [\*\*203] and those are gross prices."))).

Under various interpolations, using "Quantity-weighted regressions," "Revenue-weighted regressions," and "Unweighted regressions," Dr. Williams' Horizontal Agreement Model reflects a "statistically significant price

increase" or "price effect" under each dataset. (Doc. S-406 at 12-13, 35-37 (Williams Report ¶¶ 21-23; Appendix III Tables 1-3)). Likewise, Dr. Williams' Vertical Agreement Model, under each interpolation and utilizing each data base, results in "statistically significant price increase[s]" for each of the four Manufacturer Defendants. (Doc. S-406 at 13-16, 35-49 (Williams Report ¶¶ 24-35; Appendix III Tables 4-15)).

Dr. Williams then estimated "overcharges and the associated Manufacturer Defendants' respective revenues for UPP products sold during the damages periods . . . [to] estimate the resulting dollar value of damages," by first calculating "the average percentage overcharge for each of the four channels," referring to retailers by Internet, "Club," Retail, and ECP channels. (Doc. S-406 at 16 (Williams Report ¶ 36)). "The damages are calculated as the associated Manufacturer Defendants' respective revenues for UPP products sold during [\*\*204] the damages periods, multiplied by the average percentage overcharges, and then divided by one plus the average percentage overcharges." *Id.* He "estimated overcharges by the various retail channels purportedly affected by each alleged conspiracy, with the estimated overcharges ranging from 3.4 percent to 89.2 percent." (Doc. S-535 at 10-11 (citing Doc. S-406 (Williams Report at 35-49))). Dr. Williams estimates separate damages for the Horizontal Agreement Model, and for the Vertical Agreement Model as to each Manufacturer Defendant, using the "Quantity Weighted Method" and the "Revenue Weighted Method." (Doc. S-406 at 16-17, 50 (Williams Report ¶¶ 36-41, Appendix III Tables 16, 17)).

In his initial Report, Dr. Williams estimates overcharges resulting from Defendants' alleged horizontal agreement, using the "Quantity Weighted Method" to be \$392 million.. (Doc. S-406 at 16, 50 (Williams Report ¶ 37, Appendix Table 16). Using the "Quantity Weighted Method," Dr. Williams estimates the overcharges resulting from the alleged vertical agreements as follows: \$120 million for the JJVC channel; \$144 million for [\*377] the Alcon channel; \$8 million for the CV channel; and \$24 million for the B&L channel. [\*\*205] *Id.* at 17, 60 (Williams Report ¶ 38-41, Appendix Table 16).<sup>4</sup>

### **b. Defendants' Argument**

Defendants contend that "Dr. Williams' regressions do not reflect a legitimate economic approach, but instead reflect exactly the sort of outcome-driven approach for litigation that *Daubert* forbids." (Docs. 503 at 8; S-535 at 8). Defendants argue that Dr. Williams' analysis is flawed in the following ways:

- (1) it produces "false positives," attributing damages where none exist, finding a "purported 'overcharge' attributable to a UPP where no UPP existed," (Docs. 503 at 16; S-535 at 8, 16-17; S-681 at 18);
- (2) it implies that prices on certain lenses have increased when "in fact" prices for four out of eight JJVC contact lens "high volume" lines decreased, (Doc. S-535 at 8, 23 (citing (Doc. S-538 at 44-45 (Snyder Report ¶¶ 92-94));
- (3) it fails to control for new technologies which could have caused an increase in retail price, modality (frequency of replacement of a contact lens), and the wholesale price of contact lenses, (Docs. 503 at 20; S-535 at 8, 13, 20-21);
- (4) it uses unreliable survey data rather than available transactional data, referring to Dr. Williams' reliance on retailer 1-800-Contacts' telephone survey, [\*\*206] contending that he does not know the details of the survey methodology, whereas "actual transactional data for sales by ECPs leads to negative overcharges for most

<sup>4</sup> In his Supplemental Declaration, dated September 8, 2017, Dr. Williams revised his overcharge estimates for Defendants JJVC, Alcon and B&L, taking into consideration additional data that had become available through discovery since his March 3, 2017 initial Report. In these revised estimates, Dr. Williams calculated the percentage change in "Price Effects of the UPP" using data from various sales channels. for both the Horizontal Agreement Model and the Vertical Agreement Model. (See Doc. S-651 at 74-85, 124-41 (Williams Supp. Decl. ¶¶ 135-57, Appendix Tables 2-19). However, because he was continuing to review data and "performing additional economic analysis, [he had] not performed new damages calculations for this report." *Id.* at 85 (Williams Supp. Decl. ¶ 157)). On December 4, 2017, Dr. Williams reported that "[d]ollar values of estimated damages are updated based on new data and information, and they confirm the core conclusion in both of my reports that UPPs caused price increases for all or nearly all class members." (Doc. S-723 at 50 (Williams 2d Supp. Decl. ¶ 40)).

contact lens lines," and takes into consideration the effect of discounts, rebates and other price reductions which can vary with each consumer, (Docs. 503 at 23-24; S-535 at 8-9, 14, 23-24 (citing Doc. S-538 at 53-56 (Snyder Report ¶¶ 109-116) and Doc. S-534 at 38, 137-43, 151-53, 156-160 (Williams Dep. at 37, 136-42, 150-52, 155-159); Doc. S-681 at 18); and

(5) it was not supported by any standard statistical testing by Dr. Williams to "prove the reliability of his model." (Docs. 503 at 9, 14, 25; S-535 at 9, 14, 25-27 (citing Doc. S-534 at 199-215, 229-30 (Williams Dep. at 198-214, 228-29))

Specifically, Defendants contend that Dr. Williams' "regression model does not control for all major factors that likely will affect the retail price of contact lenses, such as whether the contact lenses contained new technologies or materials, higher wholesale prices, or consumer preferences for certain modalities," and thus improperly attributes any difference in retail prices to a UPP, where the price differences "were likely caused [\*\*207] by other explanatory factors." (Doc. S-535 at 21-22). Defendants cite to the fact that Dr. Williams did not interview any witnesses, including the named Plaintiffs or review the named Plaintiffs' purchases; did not review any deposition transcripts; and "did not consider manufacturer rebates, ECP discounts, and insurance payments in his regressions." Id. at 14, 17, 19 (citing Doc. S-534 at 26, 28, 129-30, 134-35 (Williams Dep. at 25, 27, 128-29, 133-134)).

Defendants argue that:

[b]ecause Dr. Williams' regression results speak only to "averages," as opposed to measures of impact on individual persons, any overcharge that the model detects is assumed to apply to the entire class, but the model does not test or address whether any individual member of the class actually paid an overcharge.

[\*378] (Docs. 503 at 11; S-535 at 11) (emphasis in original). As a result, contend Defendants, "Dr. Williams' model detects injury even in situations where an individual consumer paid far less than the UPP price for a particular lens, as Dr. Williams admitted in his deposition." (Doc. S-535 at 11-12 (citing Doc. S-534 at 129, 134, 181-83 (Williams Dep. at 128, 133, 180-82))). They assert that "if Dr. Williams' 'average' overcharge [\*\*208] approach were followed, consumers who paid 40% or more less than the UPP price at 1-800-Contacts would be permitted to recover claimed damages resulting from a UPP of 3.8%-5% and consumers who paid *nothing* for their contact lenses because of manufacturer rebates, ECP and retailer discounts, and insurance would be able to recover because they supposedly paid 'too much.'" Id. at 17 (emphasis in original)); (see also id. at 18, 19 (citing Doc. S-534 at 182-83 (Williams Dep. at 181-82)). (See generally id. at 18 (citing Doc. S-538 at 48-51 (Snyder Report ¶¶ 100-105))). Defendants assert that "[t]he fact that Dr. Williams' model cannot determine whether any individual member of the class was, in fact, injured by the alleged conduct and simply assumes that an average overcharge will apply to all members of the class is enough to exclude his conclusions as irrelevant under [Rule 702](#) and *Daubert* for failing to advance any material aspect of the Plaintiffs' claims." Id. at 19.

Additionally, Defendants argue that Dr. Williams' lack of control for higher cost modalities and new technologies results in his failing to compare "apples to apples." (Doc. S-535 at 22.). For example, relying on their expert Dr. Snyder's own regression analysis of JJVC [\*209] UPP-products, using Dr. Williams' data, Defendants argue the more precise product analysis "shows that the retail prices on four out of eight JJVC contact lens lines declined after the UPP went into effect." Id. at 23 (citing Doc. S-538 at 44-45 (Snyder Report ¶¶ 92-94)).

Defendants criticize the disparity in Dr. Williams estimated damages for the alleged horizontal conspiracy, which is \$100 million more than the total damages for all four alleged vertical conspiracies. (Doc. S-535 at 11 (citing \$392 million and \$297 million respectively)).

At the evidentiary hearing, Defendants' expert, Dr. Snyder, reiterated his criticism of Dr. Williams methodology; specifically, Dr. Williams' assumption that his average overcharge applies to all individuals in the proposed classes. (Doc. 867 at 22). Dr. Snyder noted that, when individual customers are taken into account, around 40 percent of those customers paid less for their contact lenses while the UPPs were in effect than they did when the UPPs were discontinued. (Id. at 23-24).

Defendants also ask the Court to exclude Dr. Williams' opinion pursuant to Rule 37(c)(1), because he "failed to disclose all of the facts and data he considered in forming his opinions as required by Rule 26(a)(2)(B)." [\*\*210] (Docs. 503 at 9-10, 15; S-535 at 9-10, 15 (citing Doc. S-534 at 18-31, 70-76, 99-101, 229-30 (Williams Dep. at 17-30, 69-75, 98-100, 228-29)); (see also Docs. 503 at 27-29; S-535 at 27-29). Defendants contend that Dr. Williams testified in his deposition that he relied upon a "large number" of documents that were produced," but that were not disclosed in his Report, precluding Defendants from cross examining him about the supportive documents. Id. Defendants contend that Dr. Williams' determination of which contact lens features to control for in his regression models "were based on the undisclosed discovery documents." (Doc. S-535 at 28-29).

### **c. Plaintiffs' Response**

#### **1) Plaintiffs' Argument**

Plaintiffs respond that Dr. Williams' use of a multiple regression analysis is appropriate "because it is the standard tool economists use to isolate the effect of a single variable (here, the conspiracy) on the price of a good or service." (Docs. 548 at 6, 15; S-559 at 6, 8, 15 (citing Doc. S-406 at 6-7 (Williams Report ¶¶ 7, 9, 10))). They contend that the "use of averages is appropriate" because the contact lens market "is a national market without significant price discrimination (i.e., different [\*\*211] consumers generally pay the same price for the [contact lens])", and that Dr. Williams relied upon the best data available, controlling for the relevant variables as Defendants defined them in the ordinary course of business. (Docs 548 at 6-7; S-559 at 6-7). Plaintiffs [\*379] noted at the evidentiary hearing that Defendants' experts acknowledged that an individual's antitrust injury is determined by comparing the actual price with the "but for" price, and that Dr. Snyder did not perform a regression analysis. Plaintiffs argue that controlling for the specified product characteristic variables "allowed Dr. Williams to isolate changes in price attributable to the UPPs," showing "'but-for' prices that Plaintiffs and class members would have paid in the absence of UPPs." (Doc. S-559 at 9). Regarding Defendants' request that the Court exclude Dr. Williams' Report as a sanction for not listing all documents relied upon, Plaintiffs' respond that Dr. Williams "identified all documents on which he relied when building and analyzing his regressions, and that he did not list some background documents he reviewed, all but one of which Defendants produced by themselves (the exception is a publicly-available [\*\*212] government report)" and as such, sanctions are not warranted. (Docs. 548 at 7; S-559 at 7) (emphasis omitted).

#### **2) Dr. Williams' Supplemental Declaration**

In response to Defendant's Williams' Daubers Motion, Plaintiffs submit a Declaration of Michael A. Williams, Ph.D. in Support of Plaintiffs' Opposition to Exclude his Expert Report, dated July 10, 2017. (Docs. 550; S-560; Williams Decl.). In the Declaration, Dr. Williams asserts that notwithstanding Defendants' citation to testimony of named Plaintiffs who said they paid less for contact lenses during the UPP period, based on Dr. Solow's opinion that the Manufacturer Defendants imposed UPPs on contact lenses brands in a non-discriminatory manner and retail sellers did not price discriminate, the Williams model "correctly takes the absence of price discrimination into account and estimates the common impact of UPPs on retail prices paid by proposed class members." (Docs. 550 at 6; S-560 at 6 (Williams Decl. ¶ 8)). He reiterates his conclusion that "all or almost all proposed class members did suffer actual injury, i.e., antitrust impact." Id. at 6; S-560 at 6 (Williams Decl. ¶ 9). He states that:

In particular, all 50 regressions in my Opening [\*\*213] Report show the UPPs caused substantial increases in retail prices paid by proposed class members, and these price increases are all statistically significant at the one percent level. [Footnote omitted.] These findings provide evidence that customer-specific factors are unlikely to be important determinants of overcharges.

(Doc. S-560 at 6-7 (Williams Decl. ¶ 9)). Moreover, as "Plaintiffs have not asserted that discounts, rebates, or insurance payments are 'harmful acts' [by Defendants], . . . discounts, rebates, and insurance payments are [considered the to be] the same in the but-for world as they are in the actual world." Id. at 15 (Williams Decl. ¶ 23);

see also id. at 30 (Williams Decl. ¶ 47 ("[T]he but-for world holds all other factors except one - the alleged conduct - the same in order to measure what prices would have been but for the alleged conduct.")). Thus, Dr. Williams' regression analysis applies the same discount, rebate and insurance payment to the "but-for" price as with the actual price paid during the UPP damages period. Id. at 16 (Williams Decl. ¶ 24). He used "net pricing" data, which included rebates and discounts, where it was available, specifically in the Costco transactional datasets, [\*\*214] and the 1-800-Contacts transactional datasets. (Doc. S-406 at 10-11 (Williams Report ¶¶ 15, 18)).

Dr. Williams asserts that his regression model cannot be "tested" or disproved by information from a single Plaintiff. (Doc. S-560 at 8-9 (Williams Decl. ¶¶ 12-14)). In response to Defendants' citation to his testimony that his regression model does not say anything about "persons," Dr. Williams cites to the remainder of the relevant passage in his deposition where he testified that his "regression says that the average affect in the different channels is statistically significant. Different than zero." Id. at 8 (Williams Decl. ¶ 11 (citing Doc. S-543 at 215 (Williams Dep. at 214))). Dr. Williams maintains that the actual price paid by each class member should be compared to the "but for" price he or she would have paid in the-absence of the UPP. (Doc. S-560 at 9 (Williams Decl. ¶ 14)); see also id. at 26-32 (Williams Decl. ¶¶ 42-52)).

[\*380] In response to Defendants' contention that the Williams regression model produces "false positives," because Dr. Williams' model finds that the non-UPP contact lens prices also increased as a result of the UPPs, Dr. Williams states that this phenomenon is attributable to the [\*\*215] so-called "umbrella effect," which results when all the price of all comparable competitive lenses in the same categories increases because of the UPPs. (Doc. S-560 at 9-12 (Williams Decl. ¶¶ 15-18)). Dr. Williams states that his regression model "evaluates the effect of UPPs on retail contact lens pricing using groups of comparable, competitive products" with identifiable characteristics and variables, as set forth in his Report. Id. at 10-11 (Williams Decl. ¶¶ 16, 17). Dr. Williams explained, "[C]ontrolling for these factors, non-UPP and UPP lenses are comparable and competitive, i.e., they are substitutes. Basic economics teaches that when the price of one product increases, the price of a substitute product will also increase." Id. at 11 (Williams Decl. ¶ 17; (see also Doc. 534 at 204 (Williams Dep. at 203)); (Doc. S-649 at 21)).

Dr. Williams addresses Plaintiffs' argument that his regression models failed to control for variables such as new technology. (Doc. S-560 at 17-24 (Williams Decl. ¶¶ 26-37)). Dr. Williams' initial multiple regression model controls for four variables which might impact price: categories (such as spherical, toric or multifocal); manufacturer; package size; and color [\*\*216] - selected as supported by Dr. Solow's description of the market, publically available websites, and Defendants' marketing material. Id. at 17 (Williams Decl. ¶¶ 26, 27). He rejects Plaintiffs' argument that he should have considered wholesale retail prices because to do so would lead to "statistical error." Id. at 22 (Williams Decl. ¶ 33). This is because

Wholesale prices are affected by the alleged conduct because a Manufacturer Defendant's profit-maximizing wholesale price depends on the retail price. Since retail prices were affected by the alleged conduct, so too were wholesale prices. Thus, including wholesale prices in the regression would incorrectly hold constant factors that changed because of the alleged conduct.

Id. As to "modality," (how often a customer must change a lens), Dr. Williams asserts that modality is accounted for by his consideration of the "package size" variable. Id. at 24 (Williams Decl. ¶ 34)). In response to Dr. Snyder's opinion that Dr. Williams did not compare "apples to apples" by estimating overcharges for all JJVC UPP-products as opposed to product by product, Dr. Williams responds that the focus on smaller subgroups of products magnifies the effects of outliers and is less [\*\*217] precise:

[T]he fact that Dr. Snyder found positive overcharges for some products and negative overcharges for other products *in the same category* reveals that his product-specific regressions suffer from product-specific, random price variation that masks the true overcharges. [Footnote omitted]. Product-specific random price variation tends to cancel out when the regressions are correctly performed, combining observations across comparable, competitive products subject to the same alleged conduct."

Id. at 21 (Williams Decl. ¶ 32 (emphasis in original)); (see also Doc. S-559 at 19-20; Docs. 715 at 17-18; S-722 at 17-18 ("Dr. Snyder's product-specific approach is flawed" because it "wrongly assumes separate markets for individual products.")). Dr. Williams testified that he considered categories of JJVC products, grouped in

accordance with the variables considered, rather than a product by product comparison of before benchmark prices with UPP prices, based upon JJVC's internal marketing documents. (Doc. S-534 at 68-72 (Williams Dep. at 67-71)).

Dr. Williams also defends his reliance upon 1-800-Contacts survey data and other sources, noting that his regression model uses "millions of observations **[\*\*218]** of transaction data" from various sources, including the survey data. (Doc. S-560 at 24 (Williams Decl. ¶ 38)). He contends that the survey data is reliable because 1-800-Contacts is a profit-maximizing firm that relies on its own surveys which were gathered in the regular course of business for its own business purposes, providing an indicia of reliability to the data, and argues that Defendants have **[\*381]** provided no evidentiary or empirical support for their dismissing the use of the survey data. *Id.* at 25 (Williams Decl. ¶ 39-40); (Doc. S-534 at 152 (Williams Dep. at 151)). "The survey data includes a database of 56,208 ECPs, and it reflects data acquired by making 100 calls on average per week to each retailer group." (Doc. S-559 at 11 (citing S-534 at 151-54 (Williams Dep. at 150-53 (referring to an industry article))). "The survey also includes data from the internet channel and club retailers, like Sam's Club and Costco." *Id.* (citing Doc. S-543 at 157-59 (Williams Dep. at 156-58 (referring to an industry article))). In response to Defendants' criticism that Dr. Williams has no knowledge regarding the methodology used by 1-800-Contacts in conducting its survey, Dr. Williams testified that **[\*\*219]** he reviewed an industry article which set forth the survey methodology. (Doc. S-534 at 151-53, 159-60 (Williams Dep. at 150-52, 158-59)).

Dr. Williams asserts that because Manufacturer Defendants and sellers did not "price discriminate," by charging "different prices paid by individual customers for the same product," and "UPPs did not vary by retailer, geographic region, or the identity of any given retail customer," "differences in prices paid by individual consumers will not affect the estimated overcharges" as determined by the multiple regression model. (Doc. S-560 at 25-26 (Williams Decl. ¶ 40))

Finally, Dr. Williams responds to Defendants' criticism that his analysis is unreliable because the damages impact estimated for the alleged horizontal conspiracy is greater than the sum of the estimated impact of the four alleged vertical conspiracies. He states that the \$97 million (or 24%) difference is supported by "elementary economics" because "[a] horizontal conspiracy by construction has more market power than a combination of four vertical conspiracies." (Doc. S-560 at 30 (Williams Decl. ¶¶ 48, 49)). Price overcharges varied by channel from 3.4% to 89.2% because "[o]vercharges **[\*\*220]** in club and internet channels [discounters] are generally higher than overcharges in retail and ECP channels," and are consistent with Defendants' "goal" that UPPs "insulate retail and ECP sellers from competition provided by club and internet sellers." *Id.* at 31 (Williams Decl. ¶ 51). Additionally, in his deposition, Dr. Williams testified that there are two reasons for the variance. First, the single average impact variable in the horizontal model is averaged across four manufacturers; if the horizontal model were broken down to each of the four manufacturers, the results for the horizontal model would be closer to the vertical model results. Second, Dr. Williams refers to the so-called "Johnson & Johnson effect." Because JJVC accounts for approximately 75 percent of the revenues of all UPP products in the damages period, and JJVC generally has lower prices than the other Manufacturer Defendants, it produces a larger effect in the horizontal model than in the sum of the vertical models, making the damages calculation lower for the vertical conspiracies as opposed to a horizontal conspiracy. (Doc. S-534 at 205-07 (Williams Dep. at 204-206)); (Doc. S-649 at 22).

#### **d. Discussion**

##### **1) Dr. Williams' **[\*\*221]** Reliance on Documents Not Listed in His Report**

Defendants contend that Dr. Williams' "failure to disclose a 'large number' of documents that he considered" deprived Defendants of the "opportunity to fully cross-examine him at his deposition about his methodology, assumptions and conclusions." (Docs. 503 at 30; S-535 at 30). Defendants contend that they did not learn about Dr. Williams "non-disclosures" until seven days before their response to Plaintiffs' Motion for Class Certification was due, and that Dr. Williams admitted in his deposition that he does not have a list of documents that were not disclosed. *Id.* They argue that "Dr. Williams' non-disclosure cannot be cured through supplementation of Dr.

Williams' expert report," and that the only appropriate remedy is exclusion of Dr. Williams' opinions pursuant to [Rule 37\(c\)\(1\)](#). *Id.*

Dr. Williams responds that he relied on facts set forth in the Complaint, Dr. Solow's Report, and marketing information from publically available websites that describes contact lens features as categorized by the industry. (Doc. S-560 at 33 (Williams Decl. ¶ 382) ¶ 53 (citing Doc. S-534 at 71 (Williams Dep. at 70))). Dr. Williams states that "[a]lthough these documents [\*\*222] were not listed in Appendix 2 of my Opening Report, they were provided to Defendants as part of the backup materials for my Opening Report," affording Defendants with the opportunity to cross examine him on these aspects of his regression analysis. *Id.* (Williams Decl. ¶ 54); (*see also* Doc. S-559 at 23). Plaintiffs contend that Dr. Williams' failure to list the background documents was both "substantially justified" and "harmless," and that exclusion of his testimony is a "drastic sanction" that is not warranted in these circumstances. (Docs. 548 at 23; S-559 at 23). They state that "Dr. Williams listed or produced all of the documents he considered or relied on to build his regression model," and that the only three documents not listed or produced were "three marketing documents Dr. Williams received *after* his report was served." (Doc. S-559 at 24) (emphasis in original).

Under *Federal Rule of Civil Procedure 26(a)*, a party must provide an expert witness report for an expert witness who is retained or specially employed to give expert testimony and who the party may use at trial. *Fed. R. Civ. P.* 26(a)(2). The report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts [\*\*223] or data considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them . . . .

*Fed. R. Civ. P.* 26(a)(2)(B)(i)-(iii). The disclosures must be made "at the times and in the sequence that the court orders." *Fed. R. Civ. P.* 26(a)(2)(D). The disclosure requirements are "intended to provide opposing parties reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses." [\*Reese v. Herbert, 527 F.3d 1253, 1265 \(11th Cir. 2008\)\*](#) (internal quotation marks omitted).

"Under [Rule 37\(c\)](#), if a party fails to make or supplement required disclosures or discovery responses, 'the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.'" [\*United States v. McCarthy Improvement Co., No. 3:14-cv-919-J-PDB, 2017 U.S. Dist. LEXIS 13762, 2017 WL 443486, at \\*5 \(M.D. Fla. Feb. 1, 2017\)\*](#) (citing [\*Fed. R. Civ. P. 37\(c\)\(1\)\*](#)). "Substantial justification is 'justification to a degree that could easily satisfy a reasonable person that parties could differ as to whether the party was required to comply with the disclosure request.'" [\*Poole v. Gee, No. 8:07-CV-912-EAJ, 2008 U.S. Dist. LEXIS 48356, 2008 WL 2397603, at \\*2 \(M.D. Fla. June 10, 2008\)\*](#) (quoting [\*Chapple v. Alabama, 174 F.R.D. 698, 701 \(M.D. Ala. 1997\)\*](#)). "Failure to disclose is 'harmless' where there is no substantial prejudice to the party entitled to receive the disclosure." *Id.* (citing [\*Chapple, 174 F.R.D. at 701\*](#)). The non-disclosing [\*\*224] party bears the burden of establishing that the failure to disclose was substantially justified or harmless. [\*See Prieto v. Malgor, 361 F.3d 1313, 1318 \(11th Cir. 2004\)\*](#).

"[U]nder [Rule 37](#), the Court has discretion to sanction a party who fails to provide information required by *Rule 26*." [\*Collins v. United States, No. 3:08-cv-923-J-32JRK, 2010 U.S. Dist. LEXIS 119095, 2010 WL 4643279, at \\*4 \(M.D. Fla. Nov. 9, 2010\)\*](#) (citing [\*Parrish v. Freightliner, LLC, 471 F. Supp. 2d 1262, 1268 \(M.D. Fla. 2006\)\*](#)). "The main purpose underlying the sanctions in [Rule 37\(c\)\(1\)](#) is to prevent surprise and prejudice to the opposing party." [\*Whetstone Candy Co. v. Nestle USA, Inc., No. 3:01-cv-415-J-25HTS, 2003 U.S. Dist. LEXIS 27625, 2003 WL 25686830, at \\*3 \(M.D. Fla. June 2, 2003\)\*](#) (internal quotation and citation omitted).

Excluding otherwise admissible evidence probative of a core issue is inappropriate if it permits a party "to construct, to maintain, and to proffer to the jury a 'fiction.'" [\*United States ex rel. Ruckh v. CMC II LLC, No. 8:11-cv-1303-T-23TBM, 2016 U.S. Dist. LEXIS 182043, 2016 WL 7665764, at \\* 1 \(M.D. Fla. Dec. 1, 2016\)\*](#) (unpublished). Such a sanction "is warranted, if ever, only in an instance of the most egregious, purposeful, calculated, and otherwise irremediable enormity by a litigant or by counsel or by both and, even then, only if the evidence establishing the enormity and the malevolence that created the enormity is nothing less than distinct

and unmistakable." Id. Other sanctions, including a "steep fine against counsel or against the **[\*383]** party or against both and disciplinary action **[\*\*225]** against counsel," are preferable. Id.

McCarthy, 2017 U.S. Dist. LEXIS 13762, 2017 WL 443486, at \*6. Excluding expert testimony is a "drastic" sanction requiring careful consideration. See Brooks v. United States, 837 F.2d 958, 961 (11th Cir. 1988).

Whether failure to make sufficient expert disclosures is substantially justified or harmless depends on many factors: "(1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party's explanation for its failure to disclose the evidence." Mobile Shelter Sys. USA, Inc. v. Grate Pallet Sols., LLC, 845 F. Supp. 2d 1241, 1250-51 (M.D. Fla. 2012). Sanctions may be warranted if a delayed disclosure deprives a party of the ability to disclose a rebuttal expert, impairs its ability to effectively cross examine the expert at his deposition, changes the scope of the claims, or is part of a pattern of "last minute filings and disclosures" that "have greatly affected the orderly handling of th[e] case." See id. at 1251-52.

McCarthy, 2017 U.S. Dist. LEXIS 13762, 2017 WL 443486, at \*6. "A failure to timely make required disclosures might be harmless if substantially similar evidence has already been produced." 2017 U.S. Dist. LEXIS 13762, [WL] at \*7 (citing *inter alia*, Miele v. Certain Underwriters at Lloyd's of London, 559 Fed. Appx. 858, 861-62 (11th Cir. 2014)).

Dr Williams testified that he "used, reviewed, informed [himself] with a large number of documents that are not listed **[\*\*226]** here. . . . [T]hey're important documents to . . . help me understand the industry, help me form my opinion. . . . They weren't specifically relied on to prepare the regressions, to run the regressions. They weren't specifically listed in footnotes. But they were certainly important to me in understanding the industry." (Doc. S-534 at 19-20 (Williams Dep. at 18-19)). The publicly available GAO Report and Defendants' SEC filings were not directly relevant to Dr. Williams multiple regression analyses but rather assisted in providing Dr. Williams with an overview of the industry. Dr. Williams' reason for not "disclosing" the documents were that they were utilized more for background information and context about the contact lens industry, about which Defendants as participants in the contact lens industry, are well aware. These documents were tangential to his opinions that resulted from his regression models, and were all within Defendants' possession, either belonging to Defendants, or in the public sphere. Additionally, it is undisputed that Defendants were accorded the opportunity to depose Dr. Williams a second time in connection with his Supplemental Declaration (Doc. 612), and **[\*\*227]** to submit additional briefing, curing any alleged prejudice from surprise. (Docs. 668; S-682-10). Dr. Williams' failure to list these documents has not disrupted the trial of this case in any way, and Defendants have been afforded ample opportunity to address all issues raised by their Williams *Daubert* Motion, and Plaintiffs' Motion for Class Certification, pending before the Court. The sanction of excluding Dr. Williams' Report would seriously impair Plaintiffs' ability to support their Motion for Class Certification, particularly on the pinnacle issue of predominance. Moreover, Defendants have not established how Dr. Williams' incomplete disclosure has in anyway impaired their ability to test his regression models or challenge his opinions. The Court determines that Dr. Williams' failure to list all background documents in his Expert Report was harmless in the context of this case, and declines Defendants' request to exclude Dr. Williams' testimony. Defendants have not proposed any lesser appropriate sanction, and the Court does not see the need to sua sponte craft one. See Whetstone Candy, 2003 U.S. Dist. LEXIS 27625, 2003 WL 25686830, at \*3. To the extent that Defendants request the Court to exclude the Expert Report of Dr. Michael A. Williams, **[\*\*228]** Ph.D. (Docs. 398; S-406), for failing to disclose documents he considered in forming his opinion, see (Doc. 505 at 45); (Doc. S-540 at 45), that request is due to be **DENIED**. Defendants have the materials in their possession, and have been given the opportunity to cross-examine Dr. Williams prior to filing their Reply Memorandum.

#### **[\*384] 2) Competence**

Defendants do not challenge Dr. Williams' competence to testify as an expert economist and statistician. "While scientific training or education may provide possible means to qualify, experience in a field may offer another path

to expert status." [Frazier, 387 F.3d at 1260-61](#). Dr. Williams has extensive knowledge and experience in his specialty analyzing antitrust, industrial organization and regulation, and has testified in numerous court cases. (See Doc. 398 at 3, 19-26; S-406 at 3, 19-26 (Williams Report ¶¶ 1, 2 and Appendix 1)). He has never been excluded from testifying under [Daubert](#) (Doc. S-534 at 33 (Williams Dep. at 32)). The Court finds that Plaintiffs have satisfied their burden with respect to Dr. Williams' qualification to testify as an expert witness on the issues presented by Plaintiffs' Motion for Class Certification. See [In re Polypropylene Carpet Antitrust Litig., 93 F. Supp. 2d at 1353](#).

### **3) Reliability (Methodology)**

Defendants [\*\*229] contend that Dr. Williams' report is unreliable, challenging the sufficiency of both the methodology and the underlying data. The method in question is Dr. Williams' use of a multiple regression analysis.

"[W]hen expert 'testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, . . . the trial judge must determine whether the testimony has a 'reliable basis in the knowledge and experience of [the relevant] discipline.'" [In re Polypropylene Carpet Antitrust Litig., 93 F. Supp. 2d at 1352](#) (quoting [Kumho Tire, 526 U.S. at 149](#)). "[T]he Court's inquiry focuses not on whether the expert is correct, but whether the proponent of expert testimony has established by a preponderance of the evidence that the testimony is reliable in the context of the methodologies or techniques applied within the appropriate field." [Id. at 1352-53](#) (citing [Allison, 184 F.3d at 1312](#)). "The Court's evaluation of the reliability of expert testimony . . . does not depend upon a rigid checklist of factors designed to test the foundation of that testimony. Rather, the gatekeeping inquiry must be tailored to the facts of the case and the type of expert testimony at issue." [Id. at 1353](#) (citing [Kumho Tire, 526 U.S. at 150](#) and [City of Tuscaloosa, 158 F.3d at 566 n. 25](#) (discussing reliability of testimony by economic and statistical experts)).

A regression analysis has been described [\*\*230] as follows:

A regression analysis is a mathematical device which estimates the relationships between variables. See, e.g., [In re Flat Glass Antitrust Litig., 191 F.R.D. 472, 486 \(W.D. Pa. 1999\)](#). More specifically, a regression analyzes the relationship between a dependent variable (response variable) and one or more independent variables (explanatory variables), and aims to parse out which independent variables have an effect on the value of the dependent variable. See Franklin M. Fisher, Multiple Regression in Legal Proceedings, 80 Colum. L. Rev. 702, 704 (1980). When a regression includes more than one explanatory variable, it is referred to as a multiple regression. [Id.](#)

To perform a multiple regression analysis, an economist first considers which major explanatory variables are likely to have an effect on a particular dependent variable of interest. [Id. at 705](#). After collecting a dataset that will allow measurement of those effects, the economist then inputs his or her set of data into a statistical program. The statistical program will then output a "model" which shows the effects of each explanatory variable on the dependent variable, holding the others constant. [Id. at 706](#).

[In re Domestic Drywall Antitrust Litig., 322 F.R.D. 188, 212 \(E.D. Pa. 2017\)](#).

A regression is a statistical tool designed to express the relationship between one variable, such as price, and explanatory variables [\*\*231] that may affect the first variable. Regression analysis can be used to isolate the effect of an alleged conspiracy on price, taking into consideration other factors that might also influence price, like costs and demand.

[In re High-Tech Employee Antitrust Litig., 985 F. Supp. 2d 1167, 1208 n.15 \(N.D. Cal. 2013\)](#) (quoting [In re Aftermarket Auto. \[\\*385\] Lighting Prods. Antitrust Litig., 276 F.R.D. 364, 371 \(CD.Cal. 2011\)](#)).

A regression model is an equation that seeks to account for the major independent influences on the dependant variable - the variable that is estimated or forecast by the model - in order to arrive at a reliable prediction of the dependant variable.

Inclusion of irrelevant variables or omission of relevant variables is to be avoided.

*In re Polypropylene Carpet Antitrust Litig.*, 93 F. Supp. 2d at 1359-60 (citations omitted). A multiple regression model includes more than one explanatory variable on one side of the equation. (See Doc. S-538 at 24 (Snyder Report ¶ 45)).

The Court determines that Dr. Williams's selection of variables in his initial Report which could affect price; (1) in different categories (i.e., sphere, toric, or multifocal); (2) produced by different manufacturers; (3) in different package sizes; or (4) color lenses or not—is valid, given the constraints on data available at the time. Notably, in subsequent declarations, after having had the opportunity to review later - produced data of customer-based transactions, [\*\*232] Dr. Williams re-ran his regression models by product, and the results were consistent. Williams states that he based his initial selection of variables upon the Manufacturer Defendants' own marketing information that describes contact lens features as categorized by the industry. (Doc. S-534 at 71-72 (Williams Dep. at 70-71)). While Defendants contend that Dr. Williams omitted key variables such as technological advances which they argue also affect price, Dr. Williams disputes Defendants' assertion and provides his own reasoning for not adding that as a variable. Dr. Williams' multiple regression analysis is a sufficient and reliable means of proving impact on a classwide basis, even if arguably imperfect. *Kleen Prods. LLC v. Int'l Paper*, 306 F.R.D. 585, 605 (N.D. Ill. 2015) (finding that defendants' criticism of expert's selection of variables for multiple regression analysis "is a merits question that the Court does not need to resolve in order to decide whether to certify the class."), aff'd. *831 F.3d 919 (7th Cir. 2016)*, cert. denied, 137 S. Ct. 1582, 197 L. Ed. 2d 705 (2017).

"Regression analyses are admissible even where they omit important variables so long as they account for the 'major variables' affecting a given analysis. . . . But it is the 'proponent who must establish that the major factors have been accounted [\*\*233] for in a regression analysis.'" *Reed Constr. Data Inc. v. McGraw-Hill Cos., Inc.*, 49 F. Supp. 3d 385, 403 (S.D.N.Y. 2014) (quoting *Bazemore v. Friday*, 478 U.S. 385, 400, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986); *Freeland v. AT & T Corp.*, 238 F.R.D. 130, 145 (S.D.N. Y.2006)) aff'd, *638 F. App'x 43 (2d Cir. 2016)*.

Unless the party challenging a regression model proffers evidence that an omitted variable "is correlated with the dependant variable and is likely to affect the result of the regression analysis," the Court will not find that omission of the variable implicates the reliability of the model. *Estate of Hill v. ConAgra Poultry Co., No. 94-CV-0198, 1997 U.S. Dist. LEXIS 13083, 1997 WL 538887*, at \*8 (N.D. Ga. Aug. 25, 1997). Merely pointing to economic conditions that may affect the dependant variable is not enough to call into question the reliability of an econometric model. See *1997 U.S. Dist. LEXIS 13083, [WL] at \*7; In re Industrial Silicon Antitrust Litig., Nos. 95-2104, 95-1131, 96-2003, 96-2111, 96-338, 1998 U.S. Dist. LEXIS 20464, 1998 WL 1031507, at \*3 (W.D. Pa. Oct. 13, 1998)*.

*In re Polypropylene Carpet Antitrust Litig.*, 93 F. Supp. 2d at 1365; see also *Estate of Hill v. ConAgra Poultry Co., No. CIV.A.4:94CV0198-HLM, 1997 U.S. Dist. LEXIS 13083, 1997 WL 538887*, at \*8 (N.D. Ga. Aug. 25, 1997).

"While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors must be considered unacceptable evidence of discrimination." *Bazemore*, 478 U.S. at 400 (internal quotations omitted) (finding multiple regression analysis admissible to prove pattern or practice of racial discrimination).

Defendants also challenge the data underlying Dr. Williams' initial analysis. Dr. Williams' reliance [\*\*234] on aggregate data, found in the 1-800-Contacts survey results, and supplemented by aggregate club channel and retailer data, does not in and of itself render his Report unreliable and inadmissible under [\*386] *Daubert* for consideration in conjunction with Plaintiffs Motion for Class Certification. While Dr. Williams did not conduct the surveys or data collection first-hand, he was sufficiently familiar with the methodology employed, through industry materials, to support his reliance upon the massive survey results. Mr. Williams used what data was available, and indeed later supplemented his analysis with actual transactional data as that became available. The 1-800-Contacts survey data was vast in scope, and Defendants have not presented any evidence that it was flawed. Unlike the expert in *In re Photochromic Lens Antitrust Litig., No. 8:10-CV-00984-T-27EA, 2014 U.S. Dist. LEXIS 46107, 2014 WL 1338605*, at \*24-25 (M.D. Fla. Apr. 3, 2014) cited by Defendants, Dr. Williams establishes the correlation between the survey data and the transactional data, and by using the survey data, Dr. Williams was able to expand his analysis to a larger sampling. Additionally, this is not a case where the prices were widely negotiated by

consumers rather than based on list prices, distinguishing [\*\*235] Dr. Williams' analysis from that excluded in *Photochromic Lens, 2014 U.S. Dist. LEXIS 46107, 2014 WL 1338605, at \*25*. Rather, the starting point for prices for contact lenses to which UPPs applied was the UPP itself. Moreover, it appears that Defendants' expert Dr. Snyder also cites to the 1-800-Contacts survey as a source of data for his own analysis of Dr. Williams' Report. (See Doc. S-538 at 92).

Dr. Williams takes discounts, rebates, insurance payments and other price reductions into account as part of his average results, holding those reductions as a constant in his regression analysis. The UPPs were applied nondiscriminatorily across the board, and Defendants have made no showing that these price reductions were in any way tied to the UPPs. Plaintiffs, at the evidentiary hearing, established that rebates were paid on a very small number of products.

"[E]ven if there is considerable individual variety in pricing because of individual price negotiations, class plaintiffs may succeed in proving classwide impact by showing that the minimum baseline for beginning negotiations, or the range of prices which resulted from negotiation, was artificially raised (or slowed in its descent) by the collusive actions of the defendants." *In re Commercial Tissue Prods., 183 F.R.D. 589, 595 (N.D. Fla. 1998)* (citing cases).

Plaintiffs [\*\*236] contend that any individualized price adjustments through rebates, or discounts began from the UPP floor prices which Plaintiffs allege were artificially and unlawfully inflated by the conspiracy. See id. Additionally, where available, as with the Costco and the 1-800-Contacts transactional "net pricing" data, Dr. Williams folds in actual rebates and discounts into his analysis. Despite some citation to testimony by Defendant manufacturers that the implementation of UPPs was a part of a bigger plan to address prices for consumers, Defendants have not established that the cited price reductions in the forms of rebates, discounts and insurance payments was in any way connected to Defendants' setting UPPs. See In re Nexium Antitrust Litig., 777 F.3d 9, 27 (1st Cir. 2015) ("[A]ntitrust injury occurs the moment the purchaser incurs an overcharge, whether or not that injury is later offset. . . . [I]f a class member is overcharged, there is an injury, even if that class member suffers no damages."); see also Delta/AirTran Baggage Fee, 317 F.R.D. at 683 ("[A] person suffers a cognizable injury and is impacted by a price-fixing conspiracy at the moment he pays an antitrust overcharge, even if the anticompetitive conduct at issue also results in offsetting benefits such as base-fare reductions [\*\*237] or a reduced second-bag fee."). The Court finds no error in Dr. Williams' consideration of the price reductions as a constant in both his "but for" and UPP calculations.

Defendants have forcefully attacked Dr. Williams' conclusion, with the support of their own experts. Defendants' expert, Dr. Snyder re-ran Dr. Williams regressions by substituting an indicator variable for new products never subject to a UPP for products subject to a UPP to demonstrate "false positives." (See Doc. S-538 at 46-47, 93-94 (Snyder Report ¶¶ 96-98 and Exs 9 and 10)). Dr. Williams takes issue with Dr. Snyder's assumptions, specifically his variable for "new" products, as containing "'spurious correlations'" which fail to recognize the "umbrella effect" of the UPPs lifting prices of all comparable and competitive lenses, including those not subject to a [\*387] UPP. Plaintiffs contend that "the 'false positives' that Defendants purport to identify are based on Dr. Snyder's identification of increases in prices of non-UPP products." (Doc. S-722 at 20 (citing Doc. S-651 at 39-50 (Williams Supp. Decl. ¶¶ 56-77)). "[R]ather than correctly evaluating the effect of UPPs on retail contact lens prices using groups of comparable, [\*\*238] competitive products that correspond to 'practical indicia as industry or public recognition,' Dr. Snyder's regression model corresponds to a non-existent marketplace in which the price of each specific type of contact lens can be evaluated in isolation of comparable, competitive contact lenses." (Doc. S-560 at 19-20 (Williams Decl. ¶¶ 29, 31)); See also id. at 28-29 (Williams Decl. ¶ 46) (noting that Dr. Snyder's product-specific regressions "suffer from product-specific, random price variation that masks the true overcharges" and that citing that application of regression models to smaller subgroups of data causes "[t]he effects of potential outliers on regression estimates [to] increase as the number of observations available to estimate each separate coefficient decreases." (citation omitted)). Though Defendants urge the Court to resolve this difference of opinion and to reject Dr. Williams' Report based upon Dr. Snyder's different opinion, this difference of opinion does not preclude admission or consideration of Dr. Williams' Report; it merely goes to its weight.

Defendants also criticize Dr. Williams' failure to "test" his results by analyzing millions of individual contact lens consumer [\*\*239] transactions, which they argue renders the Williams opinion "unreliable" under *Daubert*. But, as

noted by the Eleventh Circuit, the "testing" requirement of *Daubert* is not necessarily applicable to a statistical analysis of alleged antitrust conduct:

Economic or statistical analysis of markets alleged to be collusive, for instance, cannot readily be repeatedly tested, because each such case is widely different from other such cases and because such cases cannot be made the subject of repeated experiments. The proper inquiry regarding the reliability of the methodologies implemented by economic and statistical experts in this context is not whether other experts, faced with substantially similar facts, have repeatedly reached the same conclusions (because there will be few or no cases that have presented substantially similar facts). Instead, the proper inquiry is whether the techniques utilized by the experts are reliable in light of the factors (other than testability) identified in *Daubert* and in light of other factors bearing on the reliability of the methodologies.

*City of Tuscaloosa*, 158 F.3d at 566 n.25. The parties have addressed the reliability of Dr. Williams' methodology and the Court has conducted a rigorous analysis [\*\*240] of the subject. Defendants' argument that Dr. Williams' opinions are not reliable because he failed to "test" them is a "straw man" argument, in light of the Eleventh Circuit's observation in *City of Tuscaloosa*,

"Courts frequently recognize that regression analysis can be used to isolate the effect of an alleged conspiracy on price, taking into consideration other factors that might also influence price, like cost and demand." *In re: Processed Egg Prods. Antitrust Litig.*, 312 F.R.D. 171, 193 (E.D. Pa. 2015) (internal quotations and citations omitted): see also *In re Urethane Antitrust Litig.*, 768 F.3d at 1251-52 (expert testimony in antitrust case based up on multiple-regression analysis to develop models predicting prices that would have existed in a competitive market, compared to the actual prices during the conspiracy period to estimate overcharges was admissible, concluding that Defendant's challenges to the expert's methodology affected the weight of the testimony rather than its admissibility); *City of Tuscaloosa*, 158 F.3d at 566 (finding that methodologies used by statistician in the preparation of his statistics and his testimony were sufficiently reliable to make his expert testimony admissible in antitrust action brought against chemical distributors where statistician generated the statistics underlying his testimony through simple compilation [\*\*241] of data, and his conclusions were the products of simple arithmetic and algebra and of multiple regression analysis); *Domestic Drywall*, 322 F.R.D. at 213 ("Regression analysis has become increasingly common in antitrust litigation as well - specifically it has been used to show antitrust [\*388] impact and as a method of determining damages." (citing cases)); *Processed Egg Prods.*, 81 F. Supp. 3d at 430, 436 (finding that the case law endorses the admissibility of plaintiff's expert's regression model in direct purchasers' overcharge antitrust case, and that expert's model is reliable for *Daubert* purposes); *In re: Cathode Ray Tube (CRT) Antitrust Litig.*, 308 F.R.D. 606, 629 (N.D. Cal. 2015) (finding that expert's "use of regression and correlation analysis is well established as a means of providing classwide proof of antitrust injury and damages"); *United States v. Am. Express Co., No. 10-CV-4496 (NGG) (RER)*, 2014 U.S. Dist. LEXIS 87360, 2014 WL 2879811, at \*4 (E.D.N.Y. June 24, 2014) (observing that the multiple regression analysis is "a well-established and reliable econometric methodology frequently relied upon by federal courts under *Rule 702*." (citing cases)); *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F. Supp. 2d 1335, 1347 (S.D. Fla. 1999) ("Generally, econometric and regression analyses are considered reliable disciplines."), aff'd, 333 F.3d 1248 (11th Cir. 2003), aff'd sub nom. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005); *Polypropylene Carpet*, 93 F. Supp. 2d at 1359-70 (finding that expert testimony based on multiple regression model designed to estimate what competitive prices would have been during relevant period was admissible on issue [\*\*242] of damages in price fixing suit against carpet manufacturers; model reasonably accounted for variables, reasonably defined benchmark period, reasonably used logarithms, and reasonably selected data.).

In industries involving varying products and complex pricing structures, antitrust plaintiffs have in recent years trended toward presenting an econometric formula or other statistical analysis to show class-wide impact. The idea is to account for differences from transaction to transaction by assigning variables to certain conditions relating to the transaction (e.g., product features or type of purchaser) or by establishing some type of correlation between product lines or purchasers.

[In re Graphics Processing Units Antitrust Litig., 253 F.R.D. 478, 491 \(N.D. Cal. 2008\)](#) (citing [In re Dynamic Random Access Memory Antitrust Litig., No. M 02-1486 PJH, 2006 U.S. Dist. LEXIS 39841, 2006 WL 1530166 at \\*9 \(N.D. Cal. June 5, 2006\)](#) and [In re Linerboard Antitrust Litig., 203 F.R.D. 197, 218 \(E.D. Pa. 2001\)](#)).

The reliability of an expert's multiple regression analysis depends on the choices the expert makes in choosing variables and setting up the model. See, Daniel L. Rubinfeld, Reference Guide on Multiple Regression 311-17. In determining whether a model is set up correctly, courts consider several questions: has the expert correctly identified the dependent variable; has he or [\*\*243] she chosen the correct explanatory variable that is relevant to the question at issue; are the additional variables chosen all correct or are some missing [or] irrelevant; is the form of the analysis correct?

[Kleen Prods., 306 F.R.D. at 602](#) (citations omitted). Where such methods are reliable, they should be allowed as a means of common proof. [Graphics Processing Units, 253 F.R.D. at 491](#). "To rule otherwise would allow antitrust violators a free pass in many industries." *Id.*; see also [Tuscaloosa, 158 F.3d at 566](#) (reversing exclusion of expert testimony in antitrust action against chemical distributors based statistics generated through simple compilation of data and estimated damages that were "the products of simple arithmetic and algebra and of multiple regression analysis, a methodology that is well-established and reliable."); [In re Static Random Access Memory \(SRAM\) Antitrust Litig., 264 F.R.D. 603, 616 \(N.D. Cal. 2009\)](#) ("Although each side presents myriad valid challenges to the other's expert, the Court concludes that these challenges are of the type that go to the weight of the evidence, not the admissibility. The economic principles and regression models relied upon by [indirect purchasers] Plaintiffs' experts . . . are solidly grounded in the academic literature, [and] [t]hey cite extensive facts and data from this case that they reviewed and relied upon in rendering [\*\*244] their opinions.").

"Normally, failure to include variables will affect the analysis' probativeness, not its admissibility." [Bazemore, 478 U.S. at 400](#). Only when the "regression[ ] is so incomplete as to be inadmissible as irrelevant" should the Court exclude it. *Id.* [\[\\*389\] at 400 n.10](#). Instead, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." [Daubert, 509 U.S. at 596](#).

The damages arising from the antitrust injury must, as the Supreme Court has said in dicta, be demonstrated by a "common methodology" applicable to the class as a whole. [Comcast, 133 S. Ct. at 1430](#). Even so, it is also clear . . . that "[t]he use of aggregate damages calculations is well established in federal court and implied by the very existence of the class action mechanism itself."

[In re Nexium \(Esomeprazole\) Antitrust Litig., 297 F.R.D. 168, 182 \(D. Mass. 2013\)](#) (quoting [In re Pharm. Indus. Average Wholesale Price Litig., 582 F.3d 156, 197 \(1st Cir. 2009\)](#)) (citing 3 Herbert B. Newberg & Alba Conte, [Newberg on Class Actions](#) § 10.5, at 483-86 (4th ed. 2002) ("Aggregate computation of class monetary relief is lawful and proper. Courts have not required absolute precision as to damages . . . ."), aff'd sub nom., [In re Nexium Antitrust Litig., 777 F.3d 9 \(1st Cir. 2015\)](#).

Dr. Williams does not purport to provide a precise calculation of the exact dollar amount each plaintiff was overcharged. Rather [\*\*245] he seeks to provide a reasonable estimate of each plaintiff's likely overcharge. The use of averages to prove common impact to a putative class is accepted. See [Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1047-49, 194 L. Ed. 2d 124 \(2016\)](#) (holding that representative proof from a sample, based on an expert witness's estimation of average time that employees spent donning and doffing protective gear, could be used to show predominance of common questions of law or fact in employment class action). "[Attacking averaged data is a standard defense tactic in antitrust cases, so it is unsurprising that courts have often evaluated and approved the appropriate use of averages." [Cathode Ray Tube \(CRT\), 308 F.R.D. at 628](#). Indeed, "in a complicated antitrust case such as this, where the theory of harm is that the entire market price of a product was inflated as a result of a conspiracy, 'plaintiffs are permitted to use estimates and analysis to calculate a reasonable approximation of their damages.'" [Kleen Prods., 306 F.R.D. at 605](#) (quoting [Loeb Indus., Inc. v. Sumitomo Corp., 306 F.3d 469, 493 \(7th Cir. 2002\)](#)). "[T]he use of aggregate data in regression analysis is often appropriate 'where [a] small sample size may distort the statistical analysis and may render any findings not statistically probative.' . . .

In such a case, the use of 'aggregate numbers' may 'allow for a [more] robust analysis and yield more [\*\*246] reliable and more meaningful statistical results.'" [Cathode Ray Tube \(CRT\), 308 F.R.D. at 628](#) (quoting [Paige v. California, 291 F.3d 1141, 1148 \(9th Cir.2002\)](#) (amended) and [Ellis v. Costco Wholesale Corp., 285 F.R.D. 492, 523 \(N.D. Cal.2012\)](#)). In short, Dr. Williams regression models present a scatter gram, plotting an average line of prices between numerous data points plotted by variables. Some price points are above the average line and some price points are below the average line. The averages plotted are necessarily not about individual persons, but rather show trends statistically attributable to a given factor—the UPPs, while controlling for other factors. By using averages, Dr. Williams presents a model that he argues follows and demonstrates the general market, averaging out the idiosyncratic outliers both high and low which tend to obscure the average trend of the market price. Dr. Williams' methodology identifies classwide impact that is the result of the wrong alleged. [See Comcast, 569 U.S. at 33-37.](#)

The Court finds that Dr. Williams' Report presents a sufficiently reliable functioning model tailored to the facts of this case, using available aggregate data as opposed to overly minute sub-data that would have produced statistically unreliable and meaningless results. [See In re Cathode Ray Tube \(CRT\), 308 F.R.D. at 628](#). Dr. Williams' multiple regression analysis is a sufficiently reliable means of demonstrating [\*\*247] that nearly all consumers who purchased contact lenses paid more than they would have in the absence of the alleged conspiracy, and of measuring those overcharges. [See In re Blood Reagents Antitrust Litig., No. 09-2081, 2015 U.S. Dist. LEXIS 141909, 2015 WL 1\\*3901 6123211, at \\* 19 \(E.D. Pa. Oct. 19, 2015\)](#). Defendants' objections to the specifics of Dr. Williams' methodology raise debatable issues for cross examination and ultimate determination by the trier of fact. But the objections are not dispositive in terms of striking Dr. Williams' the opinions, and do not affect whether Plaintiffs have offered a reasonable method for determining impact on a class-wide basis.

The Defendants both criticize Dr. Williams' professional methodology employed in conducting his regression analysis, specifically his failure to control for variables they deem to be major factors affecting price, and question the relevance of his conclusion under the regression analysis which necessarily involves averaging, as opposed to individual consumer experiences. For these reasons. Defendants assert that the analysis is not probative of on the issue of impact. That is a merits debate for the factfinder, and not a reason to strike the testimony under *Daubert* from consideration on of the [Rule 23\(b\)\(3\)](#) predominance requirement as to whether antitrust impact is "capable [\*\*248] of proof by evidence common to the class" in consideration of Plaintiffs' Motion for Class Certification. [E.g. In re Scrap Metal Antitrust Litig., 527 F.3d 517, 531 \(6th Cir. 2008\)](#) (concluding that the question of whether an expert's opinion is accurate in light of his use of certain data "goes to the weight of the evidence, not to its admissibility."). Rejecting Dr. Williams' regression analyses, which appear to follow accepted regression methodology, is inappropriate at this juncture. [See Domestic Drywall, 322 F.R.D. at 232.](#)

The issues raised by Defendants' experts regarding specific aspects and merits of Dr. Williams' analysis are open to debate and bear on the weight of Dr. Williams' opinions. [See Urethane Antitrust Litig., 768 F.3d at 1262](#) (finding that the district court had the discretion to accept the expert's explanation for omitting variables addressing domestic demand in his regression analysis). In conducting a *Daubert* analysis, a court may not "evaluate the credibility of opposing experts" or the persuasiveness of their conclusions, [Quiet Tech., 326 F.3d at 1341](#); instead, a court's duty is limited to "ensur[ing] that the fact-finder weighs only sound and reliable evidence." [Frazier, 387 F.3d at 1272; see also Navelski v. Int'l Paper Co., 244 F. Supp. 3d 1275, 1287 \(N.D. Fla.\)](#). [See generally Kumho Tire, 526 U.S. at 153](#) (stating that if an expert's testimony is within "the range where experts might reasonably differ," the jury, not the trial court, should be the [\*\*249] one to "decide among the conflicting views of different experts"); [Rink v. Cheminova, Inc., 400 F.3d 1286, 1293 n.7 \(11th Cir. 2005\)](#) (observing that "a district court may not exclude an expert because it believes one expert is more persuasive than another expert"); [see generally Sher, 419 F. App'x at 891; Navelski v. Int'l Paper Co., 261 F. Supp.3d 1212, 1217 \(N.D. Fla. 2017\).](#)

#### **4) Assist the Trier of Fact**

An expert witnesses may only testify when the expert's "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." [Fed. R. Evid. 702](#). This prong is

geared towards ensuring that the expert testimony is relevant, in addition to being reliable. See [Kumho Tire, 526 U.S. at 152](#). To satisfy this *Daubert* requirement, expert testimony must be relevant to an issue in the case and offer insights "beyond the understanding and experience of the average citizen." [United States v. Rouco, 765 F.2d at 995](#). Plaintiffs have carried their burden of showing, by a preponderance of the evidence, that Dr. Williams' testimony is relevant and will assist the trier of fact in determining whether Defendants' alleged conduct resulted in classwide impact. This conclusion does not necessarily mean that the finder of fact has to accept Plaintiffs' theory, but only that Plaintiffs have satisfied the requisites of *Daubert*. See [Domestic Drywall, 322 F.R.D. at 231-32](#).

## **B. Defendants' Motion to Exclude Dr. Williams' [\*\*250] Supplemental Declaration**

### **1. Dr. Williams' Supplemental Declaration**

In conjunction with Plaintiffs' filing of their Reply Memorandum of Law in Support [[\\*391](#)] of Motion for Class Certification (Doc. 611; Doc. S-649), Plaintiffs on September 8, 2017 submitted the Supplemental Declaration of Dr. Michael A. Williams, Ph.D. (Docs. 612; S-651 (Williams Supp. Decl.)). In the Supplemental Declaration, Dr. Williams further rebuts the criticisms made by Defendants' experts Drs. Snyder and Cremieux. [Id.](#) at 7-11 (Williams Supp. Decl. ¶ 7). He responds to Drs. Snyder and Cremieux as follows:

- 1) Dr. Williams "confirmed that the UPPs caused statistically significant increases in retail prices." Dr. Williams takes issue with Dr. Snyder's use of one regression modification to dispute all 50 of Dr. Williams' regressions. He notes that since the date of his opening Report, he has received additional data from Defendants and third parties, including post-UPP pricing to allow for additional comparisons, all of which support his opinion. (Doc. S-651 at 8-9 (Williams Supp. Decl. ¶ 7.1)).
- 2) Dr. Williams "confirmed that UPPs cause price increases for nearly all class members," and had a common impact. In response to Dr. Snyder's [[\\*\\*251](#)] opinion that Dr. Williams' regressions are not capable of proving common impact, Dr. Williams criticizes Dr. Snyder's "product specific" regression models that reveal "random price variation" as opposed to market variations. Additional data analyzed by Dr. Williams, using ABB Yourlens.com and the 1-800-Contacts transaction data "empirical results" establish the common impact of the UPPs. (Doc. S-651 at 9 (Williams Supp. Decl. ¶ 7.2)).
- 3) Dr. Williams' "damages model does not generate 'false positives.'" Dr. Williams cites to evidence that Alcon raised its wholesale prices by 10% on older non-UPP lenses to "encourage migration" to UPP products." Dr. Williams calls this the "umbrella effect," which empirically exists in the present case." (Doc. S-651 at 10 (Williams Supp. Decl. ¶ 7.3)).
- 4) Dr. Williams "appropriately used aggregate data." Dr. Williams asserts that later available transactional data confirms that his "use of the aggregated data is supported by the fact that the regression results using such data lead to the same conclusion as regression results using transactions data." Specifically, using the later available ABB Yourlens.com transactional data for the ECP channel, Dr. [[\\*\\*252](#)] Williams reasserts that his opinion is that "all or virtually all" class members were affected by Defendants' UPPs. (Doc. S-651 at 10-11 (Williams Supp. Decl. ¶ 7.4)).
- 5) The " 1-800-Contacts survey data are reliable and representative of manufacturers' sales." Dr. Williams cites to his deposition testimony regarding why he considers the survey data reliable, and asserts that Dr. Snyder fails to rebut the survey's reliability. (Doc. S-651 at 11 (Williams Supp. Decl. ¶ 7.5)).
- 6) Dr. Cremieux is incorrect "that individualized inquiry is necessary to determine whether consumers paid higher prices as a result of the alleged conduct," because it is based on the "mistaken and unstated assumption that actual insurance payments, rebates and discounts would have been different in the but-for world." (Doc. S-651 at 11 (Williams Supp. Decl. ¶ 7.6))

(See Doc. S-651 at 8-11 (Williams Supp. Decl. ¶ 7)).

The three remaining Manufacturer Defendants all discontinued their implementation of UPP's in 2016 and 2017. In his Supplemental Declaration, Dr. Williams analyzed "before-during" UPP data for JJVC, and "during-after" UPP

data for Alcon and B&L, noting that Alcon and B&L introduced their UPPs on new [\*\*253] products so that there is no "before" data for Alcon and B&L UPP products. (Doc. S-651 at 65 (Williams Supp. Decl. ¶¶ 113, 114)). According to Dr. Williams, the "after" UPP comparisons "render Dr. Snyder's argument that estimated overcharges in [Dr. Williams'] Opening Report are explained by 'advanced features' of new lenses invalid [s]ince the ["after"] analyses determine estimated overcharges based on prices of the same lenses," accounting for the "advanced features" of new lenses. *Id.* ¶ 114. Dr. Williams has produced updated damages estimates based upon his supplemental analysis. (See Doc. S-684 at 36-37 (Snyder Sur-Reply Report ¶¶ 81-84)).

## [\*392] 2. Defendants' Argument

Defendants argue that Dr. Williams' Supplemental Declaration should be excluded because of "(1) the fundamental methodological flaws that plagued his original report remain and (2) his latest report introduces additional problems as well." (Docs. 693 at 5; S-720 at 5). They criticize Dr. Williams' reliance on "average 'overcharges' that do nothing to answer whether contact lens purchasers really were impacted on a class-wide basis that can be accurately determined using common proof." (Docs. 693 at 5; S-720 at 5, 14). Defendants [\*\*254] reiterate that the terms of each consumer's individual transaction must be examined "one by one." *Id.* at 6. Defendants cite as an example, deposition testimony that B&L offered a rebate to consumers to encourage them to be refit into the "newest technology," presumably covered by a UPP. (Doc. S-720 at 13 (citing (Doc. S-721-2 at 5-6 (Guglielmino Dep. at 58, 326))).

Defendants' expert Dr. Snyder responds that Dr. Williams' "simplistic framework" does not reflect that implementation of a UPP "might not lead to common impact" because the UPP may not be strictly enforced, retailers did not increase prices that were already above the UPP level, or retailers lowered their prices in response to the implementation of a UPP. (Doc. S-684 at 16 (Snyder Sur-Reply Report U 30)). Thus, according to Dr. Snyder, "higher prices alone - which is all that Dr. Williams purports to show - would not constitute proof of common injury." *Id.* Dr. Snyder recounts detailed exceptions: 1) Wal Mart prices for JJVC Acuvue Oasys (6 pack) were at prices below the UPP; 2) US Vision prices for JJVC Acuvue Oasys (24 pack) ranged from \$110 to \$138 before the UPP, whereas during the UPP most sold for the UPP price of \$110 and for [\*\*255] no more than \$120; 3) one-third of the sales of JJVC's 1-Day Acuvue Moist for Astigmatism (30-pack) before the implementation of the UPP was "close" to the \$34.50 UPP level according to National Vision retail data, and after the implementation of the UPP, 70% of the sales were at the same or similar level; 4) National Vision data shows that "[s]ome during-period prices" of the JJVC Acuvue Oasys (24-pack) are below the \$110 UPP price and "many" are at the price, with the average price being "within 1.5 percent of the UPP" and "prices charged to consumers range from 30 percent below the UPP to 20 percent above." *Id.* at 18-19 (Snyder Sur-Reply Report ¶¶ 34, 36, 38, 39); (see Doc. S-720 at 14). Dr. Snyder also states that "[t]he overcharge estimates generated by Dr. Williams's regressions vary greatly depending on the data set used," so, for example, Dr. Williams' overcharge estimates for Alcon products range from 1.5% based on 1-800-Contacts data to 18.2 percent based upon National Vision data. (Doc. S-684 at 20 (Snyder Sur-Reply Report ¶ 41)). Dr. Snyder re-ran the regressions by product, which resulted in a different perspective. Defendants assert,

in order to better understand Dr. Williams's alleged [\*\*256] 3.7% overcharge for all nine JJVCI products sold through ABB Yourlens.com, Dr. Snyder further broke down the regressions by product. After running the regressions separately for each product, he found that the overcharges actually ranged from -7.5% to 5.9%.

(Doc. S-720 at 14 (citing Doc. S-684 at 20-21 (Snyder Sur-Reply Report ¶ 42)). Similarly, Dr. Snyder counters Dr. Williams' conclusion that five Alcon lenses sold through retailer US Vision averaged an overcharge of 2.6% during the UPP period, with a product by product finding that the estimated overcharges ranged from -6.1% to 6.2%. *Id.* at 15.

As to the second criticism, Defendants argue that Dr. Williams "manipulates both his regression models and the underlying data." (Docs. 693 at 6, 16; S-720 at 6, 16). Defendants target three aspects of Dr. Williams' Supplemental Declaration. First, they criticize Dr. Williams' redefinition of the proposed class of B&L consumers based on "a cursory and untested observation of 1-800-Contacts data," after July 1, 2015, while failing to make the same adjustment to the definition of the proposed Alcon class of consumers. Defendants charge that Dr. Williams

made the adjustment to avoid a finding of "negative **[\*\*257]** overcharges" for purchases of B&L lenses through 1-800-Contacts upon the introduction of the UPPs. (Docs 693 at 6, 17; S-720 at 6, 17-19 (citing Doc. S-684 at 10-11 **[\*393]** (Snyder Supp. Sur-Reply Report ¶ 18, 19)). Additionally, Defendants argue that while Dr. Williams now controls for "product fixed effects" when measuring overcharges for Alcon and B&L lenses, "he fails to apply that same approach when analyzing JJVC lenses." *Id.* at 6. Finally, the Defendants question Dr. Williams' inclusion of JJVC wholesale pricing as an independent variable in his updated regressions, "contradict[ing] the very position he took during his deposition concerning his original reports." *Id.* at 7, 19. Defendants contend that "[b]ecause wholesale prices are usually lower than retail prices, their inclusion in a regression analysis could artificially lower the average pre-UPP prices, thereby increasing overcharges under Dr. Williams' model," and that "[e]xclusion of the wholesale prices, therefore, would be necessary if they were enacted in coordination with the UPP." (Docs. 693 at 19; S-720 at 19). Defendants argue that JJVC changed its wholesale prices as part of "an overall change in pricing policy" (Doc. S-720 at 20-21 (quoting **[\*\*258]** Doc. S-721-3 at 11 (Angelini Dep. at 140) and citing Doc. S-541-5 at 3-4 (Miura Decl. ¶¶ 5-8) (discussing JJVC's "business strategy" which included lowering wholesale prices, eliminating consumer rebates, and implementing UPPs) and citing (Doc. S-684 at 12-14 (Snyder Sur-Reply Report ¶¶ 21-23) (stating that inclusion of wholesale prices as a variable increases Dr. Williams' finding of JJVC overcharges)).

Defendants argue that Dr. Williams use of additional data to run "before-during" and "during-after" models "result[s] in substantial changes," including a finding that "his new overcharges are significantly lower than those originally calculated for Alcon and B&L." (Docs. 693 at 8; S-720 at 8) (citing Williams Report Tables); see also id. at 22 (citing Doc. S-684 at 7 (Snyder Sur-Reply Report ¶ 11 & Exs. 1A-1C)). Dr. Williams' consideration of post-UPP prices for Alcon and B&L allowed him to consider "product fixed effects." (Doc. 693 at 22; S-720 at 22). However, Defendants contend that "Dr. Williams's decision to ignore product fixed effects in his [JJVC] before-during regressions causes a higher overcharge in all eleven of the regressions; in fact, for some of his [JJVC] before-during regressions, **[\*\*259]** Dr. Williams's reported overcharge is double what it would have been had he accounted for product fixed effects," increasing Dr. Williams' JJVC damage estimate by \$30 million. (Doc. S-720 at 23 (citing Doc. S-684 at 9 (Snyder Sur-Reply Report ¶ 16 (stating that Dr. Williams' use of three broad product categories instead of fixed product effects for JJVC increases his estimated overcharges; "Dr. Williams's decision to cast aside the fixed product effects method used for all of his other analyses in the Supplemental Report arbitrarily increases estimated overcharges . . . ")))); (Doc. S-721-1 at 85 (Williams Supp. Dep. at 84)).

Defendants also attack Dr. Williams' Supplemental Declaration in their Sur-Reply regarding Plaintiffs' Motion for Class Certification. Citing to their own experts' supplemental reports generated in response, Defendants argue that Dr. Williams' Supplemental Declaration is flawed because it relies on averages "that mask significant numbers of unharmed consumers, generate wildly fluctuating results, and cherrypick transactions counted." (Does. S-681 at 20 (citing Doc. S-684 at 4, 6 (Cremieux Sur-Reply Report ¶¶ 6, 9-10) and S-684 at 4-5, 10-11, 22-26 (Snyder Sur-Reply **[\*\*260]** Report ¶¶ 5(iii), 18, 47-51 (arguing that Dr. Williams inconsistently adjusted the proposed B&L class definition regarding sales through 1-800-Contact after July 2015 but not for Alcon, leading to his reporting "higher estimated overcharges for B&L."))).

Defendants argue that instead of rehabilitating Dr. Williams' opinions, Plaintiffs tender an "entirely new model" from Dr. Williams, in which Dr. Williams revised his horizontal agreement damages model. (Doc. S-681 at 19 (citing (Doc. S-682-10 at 3-4 (Williams 10/17 Dep. at 21-22 (applying the same regression methodology to a different model)))). Defendants argue that Dr. Williams' revised regression models are equally flawed because he fails to address evidence that consumers purchased contact lenses from ECPs who did not participate in the alleged conspiracy; purchased contact lenses at prices that were not set "pursuant to a UPP"; and paid no more for contact **[\*394]** lenses covered by a UPP than they would have if not covered by a UPP. (Doc. S-681 at 19).

### **3. Plaintiffs' Response**

Plaintiffs respond that Dr. Williams' Supplemental Declaration was compiled to address Defendants' criticisms of his initial Report, and to "update his estimated **[\*\*261]** overcharges and damages with previously unavailable data." (Docs. 715 at 8; S-722 at 8); (see also Docs. 611 at 16; S-649 at 16) (stating that Dr. Williams "analyzed additional

data sets only made available to him after he issued his Opening Report," and that "[h]is analysis of that data confirms his additional findings, and rebuts Defendants' experts."). Plaintiffs defend Dr. Williams' use of his multiple regression methodology as offering "the *only* scientific method[ ] for determining what the prices would have been in the 'but-for' world, the hypothetical world in which Defendants' UPPs were not imposed." (Docs. 715 at 8; S-722 at 8) (emphasis in original).

At the time of Dr. Williams' initial Report, Defendants had not produced any data reflecting transactions after December 2016, which did not capture Alcon's, B&L's, and CV's discontinuance of the UPPs. (Does. 715 at 9; S-722 at 9). In his Supplemental Declaration, Dr. Williams applied a "during-after" UPP analysis for Alcon and B&L to compare the same products using "product fixed effects" rather than categorical variables, which he was unable to do in his initial Report, (eliminating a criticism of Defendants), and a "before-during" [\*\*262] analysis for JJVC "rather than the 'before-during-after' approach because the latter is affected by the lingering effects of JJVC's UPP restraint even after its abandonment." (Docs. S-722 at 10). Plaintiffs contend that "while the during-after models provide a more complete (albeit conservative) damages estimate for Alcon and B&L, because JJVC applied its UPP to older products, the before-during model is the most econometrically appropriate model as to JJVC." *Id.* at 21. Plaintiffs note that by the time Dr. Williams filed his Supplemental Declaration on September 8, 2017, the following new data sets had become available: 1) customer-level transactions for ECPs (ABB Yourlens.com); 2) customer-level transactions for internet sales (I-800-Contacts), and 3) additional data from the retailer and club channels. (Docs. 715 at 10; S-722 at 10). This newly produced data permitted Dr. Williams to conduct "customer-specific" regressions (adding 300,000 customer specific variables from the ABB Yourlens.com data, and 5.7 million customers in the 1-800 Contacts transaction data set, addressing a criticism leveled by Defendants, and ultimately bolstering his findings. (Doc. S-722 at 15 (citing Doc. S-651 at [\*\*263] 86-89, 90-93 (Williams Supp. Decl. ¶¶ 159-166 and Figures 7-10)). He concluded that "93-100% of customers in the ABB data set and 96-100% of those in the 1-800-Contacts data set had at least one overcharge during the damages period." *Id.* at 16 (citing Doc. S-651 at 88-89 (Williams Supp. Decl. ¶¶ 164-65)). In his Second Supplemental Declaration, dated December 4, 2017, Dr. Williams reports using the "before-during approach for JJVC customers," and finding that "96-100% of customers in *both* datasets had at least one overcharge during the damages periods." (Doc. S-722 at 16 (citing Doc. S-723 at 13 (Williams 2d Supp. Decl. n.33) (emphasis in original)). Then, in his Second Supplemental Declaration, Dr. Williams reports that running his same regressions with the newly produced customer level indicator variables from National Vision (internet channel) and US Vision (retail channel), he found that "99-100% of customers in *both* of these datasets had at least one overcharge transaction during the damages period." (Doc. S-722 at 16 (citing Doc. S-723 at 18 (Williams 2d Supp. Decl. ¶¶ 22-24) (emphasis added))).

Plaintiffs also sight to a subsequent declaration prepared by Dr. Williams, dated December [\*\*264] 4, 2017, in which he further "refined his overcharge estimates," considering additional data from National Vision - Internet Channel, and US Vision. (Doc. S-722 at 11); (see Doc. S-723 at 18 (Williams 2d Supp. Decl. ¶ 22)). Plaintiffs represent that Dr. Williams also excluded "clearly anomalous transactions from the ABB Yourlens.com database" in compiling this Second Supplemental Declaration. (Doc. S-722 at 11). According to Plaintiffs, "[u]sing the same standard [\*\*395] methodology as before, but with the new data, Dr. Williams finds that more than 96% of class members suffered an antitrust injury when they purchased a disposable contact lens subject to a UPP." *Id.* at 11. Dr. Williams reached similar results using Dr. Snyder's product-by-product regressions, which he opined "when done properly show that the UPPs injured all or nearly all class members," updating data using net rather than gross prices, using a "before-during" approach for JJVC UPP lenses, and removing non-ECP sales by ABB Yourlens.com to two discount retailers from the analysis. (Doc. S-722 at 19-20 (citing S-723 at 27-45 (Williams 2d Supp. Decl. ¶¶ 31-32, Tables 1-11, Figures 9-13)).

Plaintiffs assert that "[b]ecause JJVC imposed [\*\*265] UPPs on its legacy products, Dr. Williams compared the same products in the 'before' and 'during' periods. For the other Manufacturer Defendants, Dr. Williams employed standard industry groupings of lens types for comparable non-UPP lenses to calculate 'before' prices in the benchmark period." (Docs. 715 at 10; S-722 at 10). Dr. Williams criticizes Dr. Snyder's use of the "before-during-after" approach to comparing JJVC's prices because "after JJVC removed its UPPs, it attempted to maintain the retail prices of its contact lenses at levels similar to those in the damages period." (Doc. S-723 at 25 (Williams 2d Supp. Decl. ¶ 29); (Doc. S-651 at 74 (Williams Supp. Decl. ¶ 136 (citing Doc. S-661-62 (JJVC sales call notes))))).

Plaintiffs contend that "[t]he JJVC wholesale prices were lowered not because of UPPs but because JJVC separately recognized its lack of new products and excessively high wholesale prices." (Doc. S-722 at 9, 25-27 (citing *inter alia* Doc. S-723 at 54 (Williams 2d Supp. Decl. ¶¶ 45-51))). Dr. Williams states that he decided to include JJVC's wholesale prices as a variable in his regression analysis because they were implemented independent of the UPPs, based not just [\*\*266] on Laura Angelini's testimony, but also on opinions set forth in Dr. Solow's unchallenged Supplemental Report. (Doc. S-723 at 54 (Williams 2d Supp. Decl. ¶ 46 (citing Doc. S-650 at 13 (Solow Supp. Report ¶ 24)))); (*see also* Doc. S-661-128 at 3-4, 8 (Angelini Dep. at 57-58, 140 ("These [wholesale prices and UPPs] were two separate work streams in our pricing strategy." . . . "[F]irst we changed the selling price, and then we implemented the UPP . . . [I]t was done over the course of a short period of time, and these were two separate actions."))). Additionally, to the extent that JJVC's wholesale prices are "connected" and "exogenous" to the UPPs as opposed to "dependent" on JJVC's UPPs, they may still be properly included as a variable in the regression analysis. (Doc. S-723 at 55 (Williams 2d Supp. Decl. ¶ 47))). According to Plaintiffs, even assuming that wholesale prices were not endogenous and should not be included as an independent variable in determining JJVC's regressions, "whether one includes or excludes wholesale prices, the before-during regressions analyses demonstrate that all or nearly all class members suffered antitrust impact and damages." (Doc. S-722 at 27 (citing [\*\*267] Doc. S-723 at 57, 105-106 (Williams 2d Supp. Decl. ¶¶ 51-52 and Tables A31 and A32))).

Plaintiffs respond that Dr. Williams' decision to shorten the damages period for class members who purchased B&L lenses through 1-800-Contacts, was a result of the ruling by the United States Court of Appeals for the Tenth Circuit Court upholding the State of Utah's statutory prohibition of UPP enforcement, which took effect in June 2015. Inasmuch as 1-800-Contacts is headquartered in Utah, the company responded to the court ruling by lowering prices, and "as to sales by 1-800-Contacts, the B&L UPP effectively ended by July 1, 2015." (Doc. S-722 at 22-24 (citing Doc. S-651 at 77 (Williams Supp. Decl. ¶ 140 n.251))). Dr. Williams states that he did not see similar price reductions to UPP lenses manufactured by JJVC and Alcon. (Doc. S-651 at 77 (Williams Supp. Decl. ¶ 140 n.251))).

Plaintiffs repeat their argument that Dr. Williams' use of averages is appropriate because each contact lens product had a single minimum price under Defendants' UPPs, and contend that Dr. Williams in his two supplemental declarations, "confirms his findings that all or almost all Class members are impacted using both customer-specific [\*\*268] regressions and even Dr. Snyder's product specific [\*396] overcharge regressions." (Docs. 715 at 13-14; S-722 at 13-14). Dr. Williams disputes Defendants' anecdotally based assertion that three named Plaintiffs did not suffer antitrust injury, noting that the anecdotal examples represent 6 out of 3,880,525 transactions for UPP products, and includes transactions with settled CV and transactions outside of the damages period. (Doc. S-723 at 9 (Williams 2d Supp. Decl. ¶ 11)). He also counters that the named Plaintiffs would have received the same manufacturer rebate in a "but for" world; would have paid the higher prices on UPP products for remaining transactions or non-ECP purchases made during the damages period; or would have paid even less for UPP contact lenses after insurance reimbursement in the "but for" world. *Id.* at 9-11 (Williams 2d Supp. Decl. ¶¶ 11-16). Countering Defendants experts Drs. Snyder and Cremieux, Dr. Williams states:

In sum, comparing, in isolation from other products in the same market and without controlling for other factors that may affect prices: (1) the actual price paid (by any specific class member) on a product that was at the time of purchase subject to a UPP to (2) the [\*\*269] actual price paid (by the same class member) on the same product when the product was not subject to a UPP provides no useful information regarding that individual class member's overcharges. Neither does that comparison provide a valid test for whether my regression analysis (which uses the well-known and widely accepted dummy variable regression methodology) [footnote omitted] demonstrates common impact.

(Doc. S-723 at 8-9 (Williams 2d Supp. Decl. ¶ 10)). Dr. Williams contends that Dr. Snyder's comparisons, in isolation from other customers and other products in the same market is not supported by science or peer-reviewed literature. *Id.* at 12 (Williams 2d Supp. Decl. ¶ 16); *see also id.* at 23-24 (Williams 2d Supp. Decl. ¶¶ 26-28 (criticizing Dr. Snyder's "product-specific overcharge regressions")). He also disputes Defendants' assertion that he failed to consider the effect of discounts, and responds that he took discounts into account in 23,466,264 (or 99.8 %) observations, comprising 97.2% of total sales in his datasets. *Id.* at 46 (Williams 2d Supp. Report ¶ 34)).

#### **4. Discussion**

Rebuttal or reply expert reports are "intended solely to contradict or rebut evidence on the same subject matter identified by another [\*\*270] party . . ." *Fed. R. Civ. P.* 26(a)(2)(D)(ii). "Rebuttal expert reports are proper if they contradict or rebut the subject matter of the affirmative expert report." *Leaks v. Target Corp., No. CV414-106, 2015 U.S. Dist. LEXIS 87333, 2015 WL 4092450, at \*3 (S.D. Ga. July 6, 2015)*. "The test under Rule 26(a)(2)(D)(ii) is not whether a rebuttal report contains new information, but whether it is 'intended solely to contradict or rebut evidence on the same subject matter' of an opponent's expert report." *Teledyne Instruments, Inc. v. Cairns, No. 6:12-cv-854-Or1-28TBS, 2013 U.S. Dist. LEXIS 153497, 2013 WL 5781274, at \*17 (M.D. Fla. Oct. 25, 2013)*. "[R]ebuttal and reply reports 'may cite new evidence and data so long as the new evidence and data is offered to directly contradict or rebut the opposing party's expert.'" *Withrow v. Spears, 967 F. Supp. 2d 982, 1002 (D. Del. 2013)* (quoting *Glass Dimensions, Inc. ex rel. Glass Dimensions, Inc. Profit Sharing Plan & Trust v. State St. Bank & Trust Co., 290 F.R.D. 11, 16 (D. Mass. 2013)*).

Defendants have not challenged Dr. Williams' Supplemental Declarations as untimely or procedurally improper. Moreover, Defendants had an adequate opportunity to respond to Dr. Williams' Supplemental Declaration, (see Docs. 674, S-681), and to depose Dr. Williams' regarding his Supplemental Declaration . (See Docs. 668; S-682-10). The Court finds that the Supplemental Declarations are proper rebuttal, and discovery is ongoing. (See, e.g. Docs. 361, 749, 815). Defendants do challenge the admissibility of Dr. Williams' Supplemental Declaration under *Daubert*.

The crux [\*\*271] of Defendants' argument that Dr. Williams' opinions should be discounted and not considered in support of Plaintiffs' Motion for Class Certification is that

there is no class-wide method for determining whether someone was impacted by [\*397] the existence of UPPs and averages cannot accurately answer that question for any member of the putative class given different types of contact lenses sold under different pricing strategies by a multitude of different retailers, compounded by different insurance policies, rebate offerings, and discounts that can impact the out-of-pocket cost to any individual consumer."

(Docs. 693 at 5; S-720 at 5) (emphasis added); *see also id.* at 9. At the evidentiary hearing, Dr. Snyder testified that it was inappropriate to apply a regression model to the circumstances of this case.

The Court recognizes that courts are split regarding the viability and reliability of regression models to prove classwide impact; Plaintiffs and Defendants cite to numerous cases supporting their respective positions. But addressing the specific facts of this case, as set forth in the evidence proffered by Plaintiffs' through their experts Drs. Williams and Solow, the Court concludes that in this [\*\*272] case, a multiple regression analysis is a sufficiently reliable and appropriate means to establish class wide impact of alleged illegal antitrust conduct setting minimum consumer prices. By their very nature, multiple regression models illustrating the average effect on price will necessarily have some individuals paying more after implementation of the UPP and some paying less. That individuals may not establish that they indeed paid more for their contact lenses during the UPP-period goes to individual damages, not predominance. What Dr. Williams' Report and subsequent declarations demonstrate is the "impact" of UPPs on retail prices of contact lenses for which UPPs were implemented. The impact can indeed be demonstrated with different permutations, for instance, by product or by manufacturer, as discussed by Defendants' expert Dr. Snyder. But the detailed observations of individual products sold by individual retailers is a question for the determination of damages for class members, and does not derail Plaintiffs' proffered evidence and expert opinion that impact can be demonstrated on a classwide basis.

While Defendants' experts have identified possible flaws and weaknesses in [\*\*273] Plaintiffs' experts' reports, their critiques do not disqualify Plaintiffs' experts from proffering evidence and opinions in support of Plaintiffs' Motions for Class Certification. After conducting a full and rigorous *Daubert* review of Plaintiffs' experts' reports, and evaluating and weighing Defendants' conflicting experts' reports, the Court determines that Plaintiffs' experts

opinions and reports are sufficiently reliable and persuasive, and are admissible for the Court's consideration of Plaintiff's Motion for Class Certification.

### **C. Plaintiffs' Motion for Class Certification**

Having denied Defendants' *Daubert* Motions to exclude Plaintiffs' experts Drs. Solow and Williams, the Court turns to Plaintiffs' Motion for Class Certification, evaluating each statutory requirement in turn.

#### **1. Standing**

Article III of the United States Constitution permits the court to hear only "Cases" and "Controversies." *U.S. Const. art. III, § 2*; see *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). Article III standing has three elements: (1) injury in fact to "a legally protected interest" that is "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;" (2) "a causal connection between the injury and the conduct complained of" that is fairly traceable to the defendant's action; **[\*\*274]** and (3) a likelihood that the injury will be redressed by a favorable decision. *Fla. Family Policy Council v. Freeman*, 561 F.3d 1246, 1253 (11th Cir. 2009) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

Prior to the certification of a class, "the district court must determine that at least one named class representative has Article III standing to raise each class subclaim." *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1279-80 (11th Cir. 2000). "[A] claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim." *Id. at 1280* (citation omitted). "[T]he Court need not decide whether all putative class members must have standing as the Court is **[\*398]** empowered to amend an over-inclusive class definition; an over-inclusive class may be remedied "by refining the class definition rather than by flatly denying class certification on that basis." *A&M Gerber Chiropractic LLC v. GEICO Gen. Ins. Co.*, 321 F.R.D. 688, 695-96 (S.D. Fla. 2017) (quoting *Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 825 (7th Cir. 2012)).

While the question of standing appears to relate more to the *Rule 23* "typicality" analysis, see *Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1346 (11th Cir. 2001) ("Typicality also encompasses the question of the named plaintiff's standing, for without individual standing to raise a legal claim, a named representative does not have the requisite typicality to raise the same claim on behalf of a class." (internal quotation marks and citation omitted)), Defendants raise the question of Plaintiffs' standing in the context of their **[\*\*275]** predominance argument by contending that Plaintiffs cannot establish standing through common evidence on a classwide basis.

Antitrust standing "involves more than the 'case or controversy' requirement that drives constitutional standing." *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1448 (11th Cir. 1991). It requires "an analysis of prudential considerations aimed at preserving the effective enforcement of the antitrust laws. . . . Antitrust standing is best understood in a general sense as a search for the proper plaintiff to enforce the antitrust laws." *Id.* (citations omitted); see also *Omni Healthcare, Inc. v. Health First, Inc.*, No. 6:13-cv-1509-Orl-37DAB, 2015 U.S. Dist. LEXIS 7284, 2015 WL 275806, at \*7 (M.D. Fla. Jan. 22, 2015). The Eleventh Circuit employs a two-pronged test to determine whether a plaintiff has antitrust standing. See *Palmyra Park Hosp., Inc. v. Phoebe Putney Mem'l Hosp.*, 604 F.3d 1291, 1299 (11th Cir. 2010). "[F]irst, the plaintiff must have alleged an antitrust injury." *Id.* An antitrust injury is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977). Second, "the plaintiff must be an efficient enforcer of the antitrust laws." *Palmyra*, 604 F.3d at 1299. The "efficient enforcer" requirement ensures that a "particular plaintiff will efficiently vindicate the goals of the antitrust laws." *Todorov*, 921 F.2d at 1452; see also *Omni Healthcare, Inc.* 2015 U.S. Dist. LEXIS 7284, 2015 WL 275806, at \*7. Antitrust standing "can be established **[\*\*276]** by showing that consumers paid higher prices for a product due to anticompetitive actions of a defendant, such as a horizontal market allocation scheme." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 914, 922 (9th Cir. 2015).

Related to Defendants' argument regarding individualized impact, Defendants assert that Plaintiffs cannot show injury and standing on a class-wide basis using common evidence. (Docs. 505 at 12, 15, 23, 52; S-540 at 12, 15, 23, 52). "[I]mpact" (or 'injury-in-fact') and 'damages' are two distinct elements of an antitrust claim - injury-in-fact is whether the plaintiffs were harmed and damages quantify by how much." *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82, 88 (D. Conn. 2009) (emphasis in original). To establish standing, Defendants contend that Plaintiffs must prove that the specific retailer from which he or she purchased contact lenses conspired with Defendants regarding the UPP price. (Docs. 505 at 12, 15; S-540 at 12, 15). "[T]he only way to determine whether a putative class member purchased contact lenses from an iECP who participated in the alleged conspiracy is to inquire into the iECP's dealings with the manufacturer or distributor from whom s/he purchased lenses." *Id.* at 52-53. Defendants contend that ECPs of the proposed class representatives provided unrebutted testimony that they did not [\*\*277] participate in the alleged conspiracy. *Id.* at 53 (citing declarations and deposition testimony of ECP's).

As noted by the District Court for the Southern District of Florida, there is no "binding precedent requiring that a district court speculatively determine whether every putative class member has Article III standing." *A & M Gerber Chiropractic*, 321 F.R.D. at 695. The Eleventh Circuit holds that the district court must, at a minimum, be satisfied that at least one named plaintiff has Article III standing. *Prado—Steiman*, 221 F.3d at 1279 (Prior to the certification of a [\*399] class and before undertaking any analysis under Rule 23, the Court "must determine that at least one named class representative has Article III standing to raise each class subclaim."); see also *A&M Gerber Chiropractic*, 321 F.R.D. at 695-96; *Veal v. Crown Auto Dealerships, Inc.*, 236 F.R.D. 572, 577 (M.D. Fla. 2006).

Plaintiffs may prove the existence of an antitrust agreement by circumstantial evidence. In this context, they may through evidence establish the alleged conspiracy to set and enforce minimum prices on consumers circumstantially, as opposed to with direct evidence. Plaintiffs also contend that large retailers' prices were also implicated by Defendants' alleged antitrust conduct. Thus, testimony that ECPs did not "participate" in the alleged conspiracy may be countered by circumstantial [\*\*278] evidence that they too were subject to and required to charge at least the UPP minimum price for the covered conduct lens products, or risk losing access to them. To the extent that ECP conspiracy participation is required, Defendants' concern that the proposed class definitions may include putative class members who did not purchase from an ECP who participated in the alleged conspiracy, and therefor lacked standing, can be remedied by narrowing the scope of the class. See *A & M Gerber Chiropractic*, 321 F.R.D. at 696; see also *Bouton v. Ocean Properties, Ltd.*, 322 F.R.D. 683, 693 (S.D. Fla. 2017) ("[A] plaintiff may seek to certify a class definition narrower than the one proposed in the operative pleading." (emphasis in original)).

Defendants argue that as indirect purchasers of contact lenses, Plaintiffs lack standing to assert their antitrust claims because their alleged injuries are too remote and speculative. (See Docs. 674 at 21; S-681 at 21). They argue that "Plaintiffs cannot show standing without looking at each consumer, each ECP, and each transaction one by one." *Id.* (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 729-36, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)); (see also Docs. 505 at 12, 13, 23-24, 52-54; S-540 at 12, 13, 23-24, 52-54). Defendants contend that Plaintiffs are unable to establish with common evidence, and that the evidence belies, that ECPs participated [\*\*279] in the alleged conspiracy or even paid heed to the UPPs. (Docs. 674 at 21-22; S-681 at 21-22).

*Section 4 of the Clayton Act* provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." *15 U.S.C. § 15(a)*. As set forth above, antitrust injury is

injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

*Brunswick*, 429 U.S. at 489 (quoting *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 125, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)). "The antitrust injury requirement ensures that the plaintiff, although motivated by private

interests, is seeking to vindicate the type of injury to the public that the antitrust laws were designed to prevent." *Palmyra*, 604 F.3d at 1299.

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977) the Supreme Court narrowly interpreted Section 4, and held that under Section 4, indirect purchasers of price-fixed products—that is, persons who pay an overcharge only after it has been passed on to [\*\*280] them through middlemen—suffer no antitrust injury and thus lack standing to sue. The Court held that an indirect purchaser of a product cannot sue a distant manufacturer for alleged antitrust violations under a "pass-on" theory—meaning a theory that the intermediary passed on the unlawful overcharges through the distribution channel to them. *Illinois Brick*, 431 U.S. at 729-36; see also *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 488-94, 88 S. Ct. 2224, 20 L. Ed. 2d 1231, (1968) (prohibiting a manufacturer from asserting a pass-on defense against the direct purchaser of its product); *Glynn-Brunswick Hosp. Auth. v. Becton Dickinson and Co.*, 159 F. Supp. 3d 1361, 1369-70 (S.D. Ga. 2016) (citing [\*400] *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 208-12, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990) (holding that only a customer who purchases goods directly from an alleged antitrust violator has standing to bring claims under Section 4, even if the direct purchaser passes on the entirety of the unlawful overcharges to its downstream customers)). The Supreme Court recognized several rationales for the direct purchaser rule of *Illinois Brick*: (1) it eliminates the complication of apportioning overcharges among purchasers in the chain of distribution; (2) it eliminates a pass-on defense for manufacturers, which would reduce the effectiveness of Clayton Act actions by diminishing the recovery available to plaintiffs; and (3) it eliminates the risk of multiple or duplicative recoveries by direct and indirect purchasers. *Kansas v. Utilicorp United, Inc.*, 497 U.S. at 206-207; see [\*281] *Illinois Brick*, 431 U.S. at 730-31, 745-47.

The Supreme Court, however, has recognized that the rationales underlying the direct purchaser rule "will not apply with equal force in all cases." *Utilicorp*, 497 U.S. at 216. Accordingly, the Supreme Court has enumerated two exceptions to the rule, which provide for indirect purchaser standing "where there is a preexisting cost-plus contract or where the direct purchaser is owned or controlled by its customer." *Lowell v. Am. Cyanamid Co.*, 177 F.3d 1228, 1229 n. 2 (11th Cir. 1999) (citing *Illinois Brick*, 431 U.S. at 735-36 & n. 16). . . . Nevertheless, the Eleventh Circuit Court of Appeals has determined that the direct purchaser standing rule simply does not apply in the case of a vertical conspiracy, with no allegations of pass on, "where the plaintiff has purchased directly from a conspiring party in the chain of distribution." *Lowell*, 177 F.3d at 1230, 1232.

*Glynn-Brunswick Hosp. Auth.*, 159 F. Supp. 3d at 1370-71. "[F]or the indirect purchaser to merit standing under this exception, the conspiracy must fix the price paid by the plaintiffs." *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 749 (9th Cir. 2012).

Illinois Brick does not preclude automatically an antitrust claim by the Plaintiffs as indirect purchasers:

Illinois Brick does not limit suits by consumers against a manufacturer who illegally contracted with its dealers to set the latter's resale price. The consumer plaintiff is a direct purchaser from the dealer who, by hypothesis, has conspired illegally [\*\*282] with the manufacturer with respect to the very price paid by the consumer. There is no problem of duplication or apportionment because the consumer is the only party who has paid any overcharge. Although the manufacturer did not sell directly to the consumer, he is a fellow conspirator with the direct-selling dealer and therefore jointly and severally liable with the dealer for the consumer's injury.

*Lowell*, 177 F.3d at 1230 (quoting 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* 264 (rev. ed.1995)). In Lowell, the plaintiffs sued an upstream supplier for conspiring with middlemen distributors to set a "minimum resale price"—the price at which the distributors would sell the supplier's products to the plaintiffs and other customers - in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. *Id. at 1228-29*. The Eleventh Circuit held that the plaintiffs had standing to sue the supplier, because the direct purchaser rule is inapplicable "where the plaintiff has purchased directly from a conspiring party in the chain of distribution." *Id. at 1232*. The Court reasoned that the rationales for the direct purchaser rule do not apply "to the very different case of vertical conspiracy with no allegations of passing on." *Id. at 1230*. The Eleventh Circuit recognized [\*283] that vertical price-fixing involved conspiracies between retailers, distributors and manufacturers to maintain artificially high resale prices, and found

that there were no problems of double recovery because only one illegal act (the vertical conspiracy) was present and only one set of potential plaintiffs existed. *Id.* Plaintiff purchasers were permitted to proceed against the manufacturer alone, not including the middlemen distributors, "for the full cost of the conspiracy with the dealers." [177 F.3d 1230](#). In short, the Eleventh Circuit has determined that "the direct purchaser rule does not apply in [\*401] the case of a vertical conspiracy." [Glynn-Brunswick Hosp. Auth., 159 F. Supp. 3d at 1374](#).

Though in another context, Plaintiffs' counsel has argued that the decision to name the Defendant Manufacturers and ABB as defendants, and to not include retailers and ECPs as defendants does not defeat their standing under [Illinois Brick](#). This is because

[U]nlike the typical horizontal cartel case, there is no overcharge to be passed down a distribution chain from manufacturer to wholesaler to retailer to consumer. Rather, there is a *single* overcharge paid *only* by the class of consumers who purchased lenses subject to a UPP, regardless of which retailer or ECP [\*\*284] sold the lens. In other words, the UPPs do not require Costco, for example, to *pay* an artificially increased price for the lenses. They only require Costco to *sell* the lenses at a supra-competitive price. Accordingly, there is only one class of consumer plaintiffs in this case - and they are all direct purchasers.

(Doc 150 at 7-8) (citing to [Lowell, 177 F.3d at 1230](#), Plaintiffs contend that all purchasers are "direct purchasers" in both the alleged horizontal and a vertical conspiracies to fix minimum resale prices. *Id.* at 8-9.

Plaintiffs allege, and present evidence through the testimony and opinion of Dr. Solow, that the distributors either agreed to the UPPs or were forced to implement the UPPs under threat from the Manufacturer Defendants of losing their ability to sell the product, making the so-called middle distributors part of the vertical conspiracy chain, contemplated by the Supreme Court's [UtilCorp](#) and the Eleventh Circuit's [Lowell](#) exception. Plaintiffs allege a conspiracy with one goal - to fix the price paid by Plaintiff consumers. They do not allege a "pass on" of the higher price. Under these facts, Plaintiffs have purchased contact lenses "directly" from a "conspiring party," satisfying the exception [\*\*285] set forth in [Lowell](#). Plaintiffs cite to evidence that the Manufacturer Defendants set the retail price to be paid by the Plaintiffs as consumers, and that the Defendant Manufacturers threatened all middle retailers in the vertical chain, be they ECPs or discount retailers, that they would stop distributing the UPP to any retailer who sold the product for less than the UPP.

Defendants' concern that the proposed class definitions may include putative class members who did not purchase from an ECP who participated in the alleged conspiracy, and therefore lacked standing, can be remedied by narrowing the scope of the class. See [A & M Gerber Chiropractic, 321 F.R.D. at 696](#); see also [Bouton, 322 F.R.D. at 693](#) ("[A] plaintiff may seek to certify a class definition narrower than the one proposed in the operative pleading." (emphasis in original)).

Turning to Plaintiffs' standing to assert a horizontal conspiracy between Defendants, Plaintiffs' allege that the Plaintiffs who purchased contact lenses manufactured by the Manufacturer Defendants that were subject to a UPP during the Class Period paid a higher price for the product as a result of the UPPs. They present evidence to this effect through Drs. Solow and Williams. Plaintiffs assert, through Dr. Solow, that [\*\*286] Defendants engaged in a "hub-and-spoke" antitrust conspiracy, involving a horizontal agreement between the Manufacturer Defendants. Where a plaintiff alleges antitrust injury from its purchases of a product at prices inflated by a horizontal conspiracy, the standing analysis is also subject to the "direct purchaser" rule. See [Animal Sci. Prods. v. China Minmetals Corp., 34 F. Supp. 3d 465, 491 \(D.N.J. 2014\)](#).

Plaintiffs allege and through Dr. Solow present evidence of a multi-level "hub-and-spoke" conspiracy involving a horizontal conspiracy between the Manufacturer Defendants to enact the UPPs, with vertical "spokes" facilitated by ABB and the ECPs, resulting in increased prices reaching the consumer Plaintiffs through vertical means. In this context, [Lowell's](#) co-conspirator exception to [Illinois Brick](#) is applicable, and Plaintiffs have standing to assert their horizontal conspiracy claim. In [State of Ariz. v. Shamrock Foods Co., 729 F.2d 1208, 1211 \(9th Cir. 1984\)](#), plaintiffs alleged that dairy producers engaged in horizontal conspiracy to raise prices, and that retail intermediates, the grocery stores, were co-conspirators with the dairy producers to fix the price of dairy products at the retail level. The court determined [\*402] that [Illinois Brick](#) did not apply and that the plaintiff consumers had standing to sue the

dairy producers because [\*\*287] they alleged that the "retail price was the one fixed," and that their theory of recovery did not depend on pass-on of damages. [Shamrock Foods, 729 F.2d at 1211](#); see generally [Glynn-Brunswick Hosp. Auth., 159 F. Supp. 3d at 1374 & n. 8](#).

As in [Shamrock Foods](#), Plaintiffs limit their claims to alleged retail overcharges, and are not alleging pass-through damages from a wholesale price through a distribution chain of the type barred by [Illinois Brick](#). See Complaint ¶ 48 (Plaintiffs are persons "who made a retail purchase or purchases of disposable contact lenses."); ¶ 78 ("The disposable contact lens market also encompasses a Retail Submarket in which Plaintiffs are consumers."). In the context of this case, Plaintiffs are not the typical "indirect purchasers" through a distribution chain from a horizontal conspiracy. They allege, and the testimony of Dr. Solow at this juncture sufficiently establishes that Defendants agreed to set minimum consumer prices. For this reason, Plaintiffs are more properly considered as "direct purchasers" from the alleged horizontal conspiracy. (See Doc. 50 at 7-8). By limiting their claims to retail prices, Plaintiffs eliminate the risk of duplicative recovery by intermediate direct purchaser distributors of the type sought to be avoided [\*\*288] by the [Illinois Brick](#) doctrine. National optical chains, mass merchandisers, and club stores' claims against the Defendants necessarily would involve damages caused by wholesale prices and restrictions on the price they could set to sell UPP-restricted lenses, which are not duplicative of Plaintiffs' alleged injury of paying higher retail prices as a result of the Defendants' alleged horizontal and vertical conspiracies to enact and enforce the UPPs. See [Shamrock Foods Co., 729 F.2d at 1213-14](#). Plaintiffs have antitrust standing to challenge Defendants' alleged conspiracy because their injury, paying higher prices for contact lens products subject to a UPP is "inextricably intertwined with the injury the conspirators sought to inflict on . . . the. . . . market." [Blue Shield of Va. v. McCready, 457 U.S. 465, 479, 484, 102 S. Ct. 2540, 73 L. Ed. 2d 149 \(1982\)](#) (holding that group health plan subscriber had antitrust standing because she was injured as a direct result of the anticompetitive scheme to deny reimbursement to patients who were treated by psychologists instead of medical doctors, implemented to accomplish the exclusion of psychologists; the injury suffered by the Plaintiff was not too remote from the antitrust violation because the plaintiff's injury was not only foreseeable, but was a "necessary step in [\*\*289] effecting the ends of the alleged illegal conspiracy."). Their alleged injury is not remote, but rather is precisely the sort that the Defendants intended, that is, paying a set anticompetitive minimum price to protect the prescription-writing ECPs' interest in charging sufficient prices for contact lenses to ensure their profit margins. This is exactly the type of injury that the antitrust laws were intended to prevent.

Dr. Solow opines that the direct prescribing ECPs, which comprise up to 64% of the sales of contact lens to consumers, lent "extensive support and involvement" in the implementation of the UPPs. (E.g. Doc. S-405 at 5, 15, 19, 38, 40-42, 48-49, 52-54, 63 (Solow Report ¶¶ 4, 20, 31, 67, 72, 73, 87, 93-96, 110)). Additionally, Dr. Williams opines that UPPs caused prices charged by ECPs and national optical chains, mass merchandisers, wholesale clubs and online retailers, which traditionally charge charged less for contact lenses than ECPs, (see Doc. S-405 at 14-16 (Solow Report ¶¶ 22-24)), to increase, under threat of loss of the brand. Putative class members are not remote purchasers through a long distribution chain; they are the target of the alleged horizontal and [\*\*290] vertical interlocking conspiracies. Plaintiffs through Drs. Solow's and Williams' opinions, have provided a reasonable method for determining on a class-wide basis whether and to what extent that alleged retail overcharge created by the UPPs was maintained and imposed directly on each putative plaintiff. The Court determines that Plaintiffs' have standing to assert both their horizontal and vertical antitrust claims.

The California subclass is not affected by [Illinois Brick](#) standing concerns, to the extent it is proceeding under the California Cartwright Act ([Cal. Bus. & Prof. Code §§ 16700 et seq.](#)); and the California Unfair Competition [\*403] Law ("UCL") ([Cal. Bus. and Prof. Code §§ 17200 et seq.](#)). See [Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 991 \(9th Cir. 2000\)](#) (regarding the Cartwright Act); [Clayworth v. Pfizer, Inc., 233 P.3d 1066, 49 Cal. 4th 758, 111 Cal. Rptr. 3d 666 \(Cal. 2010\)](#) (finding that indirect-purchaser pharmacies had standing to bring suit under that Cartwright Act and the UCL). However, the parties did not cite, and the Court could not locate authority supporting that the Maryland Antitrust Act, [Md. Code Ann., Com. Law § 11-201 et seq.](#) ("MATA") is not subject to [Illinois Brick](#) standing limitations for indirect purchasers. See [Davidson v. Microsoft Corp., 143 Md. App. 43, 56, 792 A.2d 336, 344 \(Md. Ct. Spec. App. 2002\)](#) ("In summary, [Illinois Brick](#) controls the issue of whether a purchaser has sustained an injury under MATA, meaning that only direct purchasers may bring suit to recover an alleged illegal

overcharge."). However, **[\*\*291]** for the reasons set forth above, both the California and Maryland putative class has standing.

## **2. Ascertainability**

"Before a district court may grant a motion for class certification, a plaintiff seeking to represent a proposed class must establish that the proposed class is adequately defined and clearly ascertainable." [Little v. T-Mobile USA, Inc., 691 F.3d 1302, 1304 \(11th Cir. 2012\)](#) (citation omitted). "An identifiable class exists if its members can be ascertained by reference to objective criteria," and that identification is "administratively feasible," meaning "that identifying class members is a manageable process that does not require much, if any, individual-inquiry." [Bussey v. Macon Cty. Greyhound Park, Inc., 562 F. App'x 782, 787 \(11th Cir. 2014\)](#) (citations omitted). "Class members need not actually be ascertained prior to certification, but each individual's class membership must be ascertainable at some stage in the proceeding." [Bush v. Calloway Consol. Grp. River City, Inc., No. 3:10-cv-841-J-37MCR, 2012 U.S. Dist. LEXIS 40450, 2012 WL 1016871, at \\*4 \(M.D. Fla. Mar. 26, 2012\)](#) (citation omitted).

Plaintiffs argue in their Motion for Class Certification that the "[c]lass members are easily identifiable because they purchased specific contact lenses manufactured by one of the [Manufacturer Defendants] in the United States (or California or Maryland) during the period UPPs were in effect pursuant **[\*\*292]** to ECP prescriptions." (See also Docs. 396 at 19; S-404 at 19); (Docs. 611 at 24-25; S-649 at 24-25).

Defendants respond that the proposed classes are "overbroad because they include consumers who purchased from retailers of all kinds, even though Plaintiffs allege only that [independent] ECPs conspired with Defendants." (Docs. 505 at 17; S-540 at 17); (see also Docs. 674 at 25; S-681 at 25). They argue Plaintiffs' proposed class definitions include consumers who purchased from not just ECPs, but from "all ECPs and retailers," which can include those ECPs and retailers who were not part of the alleged conspiracy." *Id.* at 60. As a result, "[a]lmost half of the putative class members may have purchased from retailers not alleged to be part of the conspiracy - e.g., national, regional and online retailers, and bigbox stores." (Docs. 674 at 26; S-684 at 26 (citing Doc. S-537 at 116 (Cremieux Report Ex. 4A)); Doc. 395 at 26-27 (Complaint ¶¶ 79-80)). They contend that the only way to identify who is a co-conspirator ECP "is to conduct an individualized analysis of who supposedly conspired with whom, and which putative class members bought contact lenses from those who conspired." (Docs. 505 at 17; **[\*\*293]** S-540 at 17); (see also Docs. 674 at 26; S-681 at 26). In addition to overbreadth, Defendants argue that putative class members cannot be identified absent individualized inquiry into whether the putative class member actually purchased UPP-covered contact lenses from an ECP who participated in the alleged conspiracy. *Id.* at 61-62; (see also Docs. 674 at 27; S-681 at 27 (arguing that the evidence establishes that consumers purchased contact lenses for which there was a UPP price in place, but that the actual price for the lens was not set "pursuant to a UPP.")). Defendants also question Plaintiffs' class definition that includes putative class members who made retail purchases "where the prices for such contact lenses were set pursuant to a 'Unilateral Pricing Policy,'" contending that retailers 1-800-Contacts, Luxottica, and "most of the named Plaintiffs' own ECPs did not price **[\*404]** 'pursuant to UPP.'" (Doc. S-540 at 62 (citing Doc. S-537 at 166-172 (Cremieux Report Exhibits comparing 1-800-Contacts prices for selected lenses); Doc. S-541-1 at 2 (Chang Decl. ¶ 7); Doc. S-541-3 at 3 (Huynh Decl. ¶ 5); Doc. S-541-6 at 3 (Prange Decl. ¶¶ 11, 14)); Doc. S-541-7 at 3 (Ruder Decl. ¶ 7)); Doc. S-541-9 at **[\*\*294]** 3-4 (Takeda Decl. ¶ 13)); Doc. S-541-11 at 3-4 (Sudarsky Decl. ¶¶ 6, 11)); Doc. S-541-13 at 4 (Wessels Decl. ¶¶ 9-10) (discussing Luxottica Retail North America, Inc. pricing above UPP prices)); Doc. S-541-14 at 3 (Williams Decl. ¶ 6)). Additionally, Defendants argue that membership in the class requires individual inquiry.

"[A]scertainability at the class certification stage does not require that a plaintiff *actually* identify all class members, but rather, it only requires a plaintiff to demonstrate that class members *can* be identified in reference to objective criteria." [PB Prop. Mgmt., 2016 U.S. Dist. LEXIS 97520, 2016 WL 7666179, at \\*19](#) (citing [Bush, 2012 U.S. Dist. LEXIS 40450, 2012 WL 1016871, at \\*4](#)). Plaintiffs' claims allege that the contact lens *market* prices were inflated as a result of the UPPs, affecting all consumers who meet the putative class definitions, regardless of from whom they purchased the UPP-controlled contact lens, and regardless of whether rebates, discounts or insurance payments subsequently reduced the price of the lens. Plaintiffs' contend that "all Class members who bought UPP contact

lenses during the period of UPPs were harmed even if they purchased from Discount Retailers." (Docs. 611 at 26; S-649 at 26). Plaintiffs' proposed class definitions are not overbroad, amorphous [\*\*295] or vague. The Court finds that the proposed classes can be ascertained by reference to objective criteria. The proposed horizontal class requires that a class member be (a) a resident of the United States, who (b) made a consumer retail purchase of disposable contact lenses manufactured by Alcon, JJVC, or B&L from June 1, 2013 to the present for their own use and not for resale, (c) "where the prices for such contact lenses were set pursuant to a 'Unilateral Pricing Policy' and the purchase occurred during the period when the Unilateral Pricing Policy was in effect," (d) excluding "any purchases from 1-800 Contacts of disposable contact lenses subject to B&L's Unilateral Pricing Policy after July 1, 2015." (Doc. S-649-1). The horizontal subclasses for Maryland and California residents, and the vertical classes by manufacturer, incorporate similar defining language. *Id.* The Court believes that substituting "subject to a UPP" for "pursuant to a UPP" better describes the putative Plaintiffs' posture.

### **3. Rule 23(a) Requirements**

#### **a. Numerosity**

Federal Rule of Civil Procedure 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). While "mere allegations of numerosity are insufficient," Rule 23(a)(1) imposes a "generally [\*\*296] low hurdle, and a plaintiff need not show the precise number of members in the class." Manno v. Healthcare Revenue Recovery Grp., LLC, 289 F.R.D. 674, 684 (S.D. Fla. 2013) (citations omitted); see Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1267 (11th Cir. 2009); Evans v. U.S. Pipe & Foundry Co., 696 F.2d 925, 930 (11th Cir. 1983) (stating that the class representative is not required to establish the exact number in the proposed class). "Nevertheless, a plaintiff still bears the burden of making some showing, affording the district court the means to make a supported factual finding that the class actually certified meets the numerosity requirement." Manno, 289 F.R.D. at 684 (emphasis added) (quoting Vega, 564 F.3d at 1267). The numerosity requirement is met when it would be inconvenient or difficult to join all of the class members. Terazosin Hydrochloride, 220 F.R.D. at 684-85. Courts may also take into account other factors under Rule 23(a)(1), "including 'the geographic diversity of the class members, the nature of the action, the size of each plaintiff's claim, judicial economy and the inconvenience of trying individual lawsuits, and the ability of the individual class members to institute individual lawsuits.'" *Id. at 685* (citing Walco Invs. v. Thenen, 168 F.R.D. 315, 324 (S.D. Fla. 1996)).

Plaintiffs estimate that the proposed class will "number in the tens of millions," based upon Dr. Solow's observation that 41 million [\*405] Americans wear disposable contact lenses. (Docs. 396 at 20; S-404 at 20 (citing Doc. S-405 at 12 (Solow Report ¶ 19 (citing contact lens industry [\*\*297] publication))). Noting that the Court in MDL 1030 observed that "[n]umerosity does not appear to be an issue in this case," see In re Disposable Contact Lens Litig., 170 F.R.D. at 529, Plaintiffs argue that joinder of millions of proposed class members would be "impracticable." (Docs. 396 at 20; S-404 at 20).

Defendants do not dispute that Plaintiffs have met the Rule 23 numerosity requirement.

Considering the number of putative class members, their geographic diversity, the relatively small size of their individual claims, the inconvenience of trying individual lawsuits, and the ability of individual class members to institute individual lawsuits, the Court finds that Plaintiffs have met their burden in establishing that the proposed classes are "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1).

#### **b. Commonality**

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Commonality pertains to the characteristics of the group or class as a whole, unlike typicality which refers to the individual characteristics of the class representative as compared to those of the class members. Piazza, 273 F.3d

*at 1346* (citing *Prado-Steiman*, 221 F.3d at 1279). Commonality "does not require complete identity of legal claims." *Johnson v. Am. Credit Co. of Ga.*, 581 F.2d 526, 532 (5th Cir. 1978). In fact, commonality can be satisfied even with some factual variations [\*\*298] among class members. *Armstead v. Pingree*, 629 F. Supp. 273, 280 (M.D. Fla. 1986). In *Wal-Mart Stores, Inc. v. Dukes*, *supra*, the Supreme Court clarified the commonality requirement for class certification by specifically rejecting the use of generalized questions to establish commonality. Noting that "any competently crafted class complaint literally raises common questions," *564 U.S. at 349* (citation omitted), the Court focused the required discussion as follows:

What matters to class certification . . . is not the raising of common "questions" - even in droves - but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

*Id. at 350* (citation omitted). The Court explained that the "common contention" underpinning a finding of *Rule 23(a)(2)* commonality "must be of such a nature that it is capable of classwide resolution - which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Id. at 350* (quoting *Falcon*, 457 U.S. at 157).

[Plaintiffs'] claims must depend upon a common contention [\*\*299] . . . . That common contention, moreover, must be of such a nature that it is capable of classwide resolution - which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

*Id.* "[F]or purposes of *Rule 23(a)(2)* even a single common question will do." *Carriuolo*, 823 F.3d at 984 (quoting *Dukes*, 564 U.S. at 359) (quotations omitted). "Commonality requires that there be at least one issue whose resolution will affect all or a significant number of the putative class members." *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1355 (11th Cir. 2009) (internal quotation marks and citation omitted). The "commonality" requirement carries a "light burden," demanding "only that there be 'questions of law or fact common to the class.' . . . This part of the rule 'does not require that all the questions of law and fact raised by the dispute be common,' . . . or that the common questions of law or fact 'predominate' over individual issues." *Vega*, 564 F.3d at 1268 (citations omitted); see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) (observing that the "commonality requirement" [\*406] is less demanding than the "predominance" requirement).

Plaintiffs allege that the individual Class Representatives purchased contact lenses manufactured by one of the four Manufacturer Defendants all subject to a UPP. The Individual [\*\*300] Class Representatives (and their location and product purchased) are:

Name	State	Defendant-Lens
Rachel Berg	WI	Alcon Air Optix Colors
Alexis Ito	CA	Alcon Dailies Total 1
Miriam Pardoll	FL	Bausch & Lomb Ultra
Jennifer Sineni	MO	Bausch & Lomb Ultra
Pamela Mazzarella	CA	Bausch & Lomb Ultra
Joseph Felson	CA	CooperVision Clariti Multifocal
Tamara O'Brien	CA	JJVC 1-Day Acuvue Moist
Susan Gordon	PA	JJVC 1-Day Acuvue Moist
Catherine Dingle	VT	JJVC 1-Day Acuvue Moist
Elyse Ulino	FL	JJVC 1-Day Acuvue Moist
Amanda Cunha	CA	JJVC Acuvue Oasys

Name	State	Defendant-Lens
Sheryl Marean	ME	JJVC Acuvue Oasys 12 Pack
Brett Watson	MD	JJVC Acuvue Oasys for Astigmatism
Kathleen Schirf	MD	JJVC Acuvue Oasys for Astigmatism
Cora Beth Smith	TN	JJVC Acuvue Oasys with Hydraclear
John Machikawa	CA	JJVC Acuvue TrueEye

Complaint ¶¶ 1, 28-41; (Docs. 396 at 45; S-404 at 45). Plaintiffs argue that the putative Plaintiffs' common contention that "Defendants entered into agreements to develop, implement and enforce UPPs operating as unreasonable restraint of trade" "is capable of classwide resolution." (Docs. 396 at 21; S-404 [\*407] at 21). Plaintiffs contend that the "commonality" requirement is satisfied because the following questions of law and fact are common to all claims:

(1) whether the [Manufacturer Defendants] [\*\*301] engaged in a contract, combination, and conspiracy among themselves and with ABB and ECPs to fix, raise, maintain, or stabilize prices of contact lenses in violation of section one of the Sherman Act; (2) whether the UPPs operated as unreasonable restraints of trade; (3) whether Defendants' conduct caused the prices of contact lenses to be sold at artificially high and supra-competitive levels; (4) whether the Defendants' conduct injured Class members, and, if so, the appropriate class-wide measure of damages; and (5) the scope of any injunctive relief available to Class members.

(Docs. 396 at 21-22; S-404 at 21-22) (citing Doc. S-405 at 83-87 (Sow Report ¶¶ 148-156))).

Defendants did not specifically address the commonality requirement of [Rule 23\(a\)\(2\)](#).

Where a complaint alleges that the Defendants have engaged in a standardized course of conduct that affects all class members, the commonality requirement will generally be met. See [Williams, 568 F. 3d at 1355](#). Specifically in the antitrust context, courts in the Eleventh Circuit have consistently held that allegations of price-fixing, monopolization, and conspiracy by their very nature involve common questions of law or fact. [In re Carbon Dioxide Antitrust Litig., 149 F.R.D. 229, 232 \(M.D. Fla. 1993\)](#); see also [Terazosin Hydrochloride, 220 F.R.D. at 685-86 \(S.D. Fla. 2004\)](#); [In re Infant Formula Antitrust Litig., No. MDL-878, 1992 U.S. Dist. LEXIS 21981, 1992 WL 503465, at \\*4 \(N.D. Fla. Jan. 13, 1992\) \[\\*\\*302\]](#).

Plaintiffs cite a number of common questions of law and fact, including whether, under common principles of **antitrust law**, Defendants conspired or agreed to set and enforce minimum consumer prices for their contact lens products; the identity of each member of the alleged conspiracy and the facts surrounding how it was carried out; and the time period during which the alleged conspiracy existed. Because of the many common questions of law and fact applicable to the claims of all class members, the Court finds that the requirements of [Rule 23\(a\)\(2\)](#) have been satisfied. Accord [In re Fla. Cement & Concrete Antitrust Litig., 278 F.R.D. 674, 679 \(S.D. Fla. 2012\)](#) ("[C]ourts have consistently held that the nature of the antitrust conspiracy action compels a finding that common questions of fact and law exist."). The proposed class action could "generate common answers apt to drive the resolution of the litigation," satisfying the commonality requirement. See [Dukes, 564 U.S. at 350](#).

### c. Typicality

Class certification also requires that the claims of the class representatives be typical of those of the class. See [Fed. R. Civ. P. 23\(a\)\(3\)](#). In order to establish typicality, "there must be a nexus between the class representative's claims or defenses and the common questions of fact or law which unite the class." [Kornberg v. Carnival Cruise Lines, Inc., 741 F.2d 1332, 1337 \(11th Cir. 1984\) \[\\*\\*303\]](#). "A sufficient nexus is established if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory." *Id.*; see also [Williams, 568 F.3d at 1357](#); see [Falcon, 457 U.S. at 156](#) ("[A] class representative

must be part of the class and possess the same interest and suffer the same injury as the class members." (citation omitted)). When the class representative's injury is different from that of the rest of the class, his claim is not typical and he cannot serve as the class representative. See Murray v. Auslander, 244 F.3d 807, 811 (11th Cir. 2001). Moreover, when proof of the class representative's claim would not necessarily prove the claims of the proposed class members, the class representative does not satisfy the typicality requirement. Brooks v. S. Bell Tel. & Tel. Co., 133 F.R.D. 54, 58 (S.D. Fla. 1990). Thus, commonality traditionally refers to characteristics of the class as a whole, while typicality "refers to the individual characteristics of the named plaintiff in relation to the class." Prado-Steiman, 221 F.3d at 1279. "Typicality, however, does not require identical claims or defenses." Kornberg, 741 F.2d [\*408] at 1337. "A factual variation will not render a class representative's claim atypical unless the factual position of the representative markedly differs from that of other members of the class." Id.; see also Appleyard v. Wallace, 754 F.2d 955, 958 (11th Cir. 1985) ("[T]he typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members." (citation omitted)), disapproved on other grounds sub nom., Green v. Mansour, 474 U.S. 64, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985).

Plaintiffs argue that the "typicality" requirement is met because "the Proposed Classes' and Subclasses' claims arise from the same alleged practices of Defendants: their conspiracy to restrict prices, which resulted in each Plaintiff paying more for their lenses." (Doc. 396 at 22-23; Doc. S-404 at 22-23) (emphasis in original). They argue that they have met the typicality requirement because all members of the proposed classes have been subjected to increased prices for their contact lenses because of the Defendants' unlawful conduct in connection with the implementation of UPPs. Plaintiffs allege that the same unlawful conduct affected both the class representatives and the class itself.

Defendants assert that the named class representatives are not "typical" of the putative class they purport to represent, arguing that based upon discovery thus far,

[T]he UPPs either had no effect on the named Plaintiffs or affected [\*\*304] them in highly variable and individual ways. For example, many named Plaintiffs were not impacted by any UPP as they paid retail prices far below the UPP price, received manufacturer rebates that reduced their out of pocket cost dramatically (in some cases to \$0), obtained ECP/retailer discounts that took the purchase price well below the relevant UPP price, and/or benefitted from insurance payments that covered all (or almost all) of their acquisition costs for their contact lenses.

(Doc. 505 at 25); (Doc. S-540 at 25).

"[O]nce the party advancing the class establishes that the same unlawful conduct was directed at or affected both the class representatives and the class itself, then 'the typicality requirement is usually met irrespective of varying fact patterns which underlie the individual claims.' Terazosin Hydrochloride, 220 F.R.D. at 687 (quotation and citation omitted) (finding the claims of the consumer class representative were "not only typical of the claims of all class members, they were virtually identical in nature, notwithstanding variations in the amount of damages."). The factual distinctions between some of the named Plaintiffs and the putative class do not negate the shared interest of the Plaintiffs in proving [\*\*305] Defendants' alleged anticompetitive conduct; which they allege caused antitrust injury. The Court determines that the named class representatives are "typical" of the putative class, under Rule 23(a)(3).

#### **d. Adequacy of Representation**

The final requirement for class certification under Rule 23(a) is adequate representation. See Fed. R. Civ. P. 23(a)(4). A plaintiff can meet this requirement by showing that the class representative has common interests with the class members and by demonstrating that the class representative will vigorously prosecute the interests of the class through qualified counsel. Piazza, 273 F.3d at 1346. The adequacy of representation analysis involves two inquiries: "(1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action." Valley Drug Co., 350 F.3d at 1189 (citation omitted); see also Amchem Prods., 521 U.S. at 625 ("The adequacy inquiry under Rule 23(a)(4) serves to uncover

conflicts of interest between named parties and the class they seek to represent."). "It is axiomatic that a putative representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the objectives of those he purports to represent." *Pickett v. Iowa Beef Processors, 209 F.3d 1276, 1280 (11th Cir.2000)* (quotation and citation omitted). "[T]he existence [\*\*306] of minor conflicts alone will not defeat a party's claim to class certification." *Valley Drug, 350 F.3d at 1189*. Rather, "the conflict must be a fundamental one going to the specific issues in [\*409] controversy." *Id.* "A fundamental conflict exists where some party members claim to have been harmed by the same conduct that benefitted other members of the class" and "the economic interests and objectives of the named representatives differ significantly from the economic interests and objectives of unnamed class members." *Id. at 1189-90*. "The adequacy-of-representation requirement 'tend[s] to merge' with the commonality and typicality criteria of *Rule 23(a)*, which 'serve as guideposts for determining whether. ... maintenance of a class action is economical and whether the named plaintiffs claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Amchem Prods., 521 U.S. at 626 n. 20* (quoting *Falcon, 457 U.S. at 157, n. 13*).

Plaintiffs contend that "[e]ach named Plaintiff has a common interest in representing all class members, as the alleged conspiracy involves a nationwide plan to eliminat[e] competition." (Docs. 396 at 23; S-404 at 23) (quoting *In re Disposable Contact Lens Antitrust Litig., 170 F.R.D. at 532*). They assert:

There are no conflicts among the Plaintiffs; they are a cohesive [\*\*307] group seeking damages from Defendants, share the same cause, raise the same liability questions, and will have their claims decided by the same answers deciding Defendants' misconduct. It is "of no moment" that some Plaintiffs purchased their lenses from one Manufacturer Defendant while others made their purchases from different ones. Plaintiffs allege that all [Manufacturer Defendants] were either a part of one horizontal conspiracy or entered into identical, anticompetitive vertical agreements.

(Docs. 396 at 23; Doc. S-404 at 23). They point out that Defendants do not argue, and the evidence does not support that any class member actually benefitted from the implementation of the UPPs, which could give rise to a conflict. (Docs. 611 at 27; S-649 at 27). As to class counsel, Plaintiffs assert that class counsel has experience litigating antitrust class actions, and have to resources to commit to the prosecution of Plaintiffs' claims. Plaintiffs' argue that the Court has already determined that class counsel meets the requirements of *Rule 23(g)(1)(A)(I)-(IV)*, and request that the Court make that same finding and appoint Hausfeld LLP, Robins Kaplan LLP, and Scott + Scott LLP as Class Counsel. (Docs. 396 at [\*\*308] 24; S-404 at 24).

Defendants contend that "[s]ubstantial conflicts of interest preclude the proposed class representatives from adequately representing all putative class members, including those consumers who paid less for contact lenses that were subject to a UPP, than they paid before." (Docs. 505 at 16; S-540 at 16). Defendants argue that, for example, a purchaser of at least two of JJVC's products experienced a decrease in price after JJVC implemented its UPP. (Doc. S-540 at 58 (citing (Doc. S-541-13 at 7 (Wessels Decl. ¶ 11(a)-(b)). Defendants assert that "several of the named Plaintiffs have interests that directly conflict with those of the putative class because the price they paid actually decreased upon the introduction of UPPs, and thus the class itself would include people of diverging and conflicting economic interests." (Docs. 674 at 24; S-681 at 24). Defendants contend that those consumers who paid less for contact lenses after the implementation of UPPs did benefit from the UPPs. (Docs. 647 at 24-25; S-681 at 24-25); (Docs. 505 at 16; S-540 at 16,58-59).

Defendants do not dispute the adequacy of class counsel, and the Court independently determines that Plaintiffs' counsel [\*\*309] are skilled and adequate in all respects.

The Court finds that Plaintiffs are adequate class representatives who have vigorously represented the putative class in this action, and are capable of continuing to do so.

"A conflict is not fundamental when... all class members share common objectives and the same factual and legal positions and have the same interest in establishing the liability of defendants." *Ward v. Dixie Nat'l Life Ins. Co., 595 F.3d 164, 180 (4th Cir.2010)* (internal punctuation omitted); *Telecomm Tech. Servs., Inc. v. Siemens Rolm Commc'nns, Inc., 172 F.R.D. 532, 544 (N.D. Ga.1997)* (Adequacy requirement looks to

"[a]ntagonistic interests" among class members creating risk that "one party's [\*410] interest may be sacrificed for another's").

"Moreover, a conflict will not defeat the adequacy requirement if it is 'merely speculative or hypothetical.'" [Ward, 595 F.3d at 180](#) (internal punctuation omitted). "Potential" conflicts of interest are likewise insufficient to defeat certification; instead, a district court should continue to monitor the matter going forward and may "revisit the issue and de-certify the class if a true conflict ever manifested." [In re Vitamin C Antitrust Litig., 279 F.R.D. 90, 113 \(E.D.N.Y.2012\)](#); see also [Fed. R. Civ. P. 23\(c\)\(1\)](#) (Class certification order "may be altered or amended before final judgment.").

[Delta/AirTran Baggage Fee, 317 F.R.D. at 680-81, 695](#) (finding representation adequate even though some passengers may have benefitted from defendants' conduct where such [\*\*310] benefit was "de minimis" and "incidental to the antitrust overcharge."). Plaintiffs' expert Dr. Williams submits that his regression analysis demonstrates that nearly all putative Plaintiffs paid higher contact lens prices for products subject to Defendants' UPPs, than they would have paid but for Defendants' alleged illegal actions, whether or not the final price was reduced by discounts, rebates or insurance payments. Dr. Williams reviews one-by-one those Named Plaintiffs who Defendants contend paid less for their contact lenses while the UPPs were in effect, (Doc. S-723 at 9-11 (Williams 2d Supp. Decl. ¶¶ 11-15)). Dr. Williams states that under his analysis, the insurance payments and rebates which impacted the Named Plaintiffs' purchases during the UPP period are equally applied in the "but for" calculation, and thus the overall impact of the UPP still increased the price to the Named Plaintiff. He also found that Defendants did not necessarily consider all purchases made by the Named Plaintiffs during the UPP period, and that indeed the prices they paid on these other purchases were also impacted by the UPP in place. *Id.*

Defendants have not established that any Plaintiffs actually [\*\*311] or potentially realized a "net economic benefit" as a result of Defendants' alleged anticompetitive conduct, or that they were subjectively aware that they received a price reduction through rebates, discounts or insurance payments as a result of a UPP. Compare [Photochromic Lens, 2014 U.S. Dist. LEXIS 46107, 2014 WL 1338605, at \\*13-14](#). Rather, the alleged decrease in prices cited by Defendants was occasioned by rebates, discounts and insurance payments, not by the Defendants' alleged agreement to enact UPPs. The potential for individualized damages does not suffice as a fundamental conflict, and is not sufficient to defeat class certification. [Carriuolo, 823 F.3d at 990](#). This is because "[e]ach class member is connected by the common predominate inquiry." *Id.*

#### 4. Rule 23(b) Requirements

In addition to satisfying the requirements of [Rule 23\(a\)](#), a plaintiff seeking class certification must satisfy at least one of the alternative requirements of [Rule 23\(b\)](#). In their Motion for Class Certification, Plaintiffs seeks certification under [Fed. R. Civ. P. 23\(b\)\(2\)](#) and [\(3\)](#).

##### a. Rule 23(b)(2); Injunctive or Declaratory Relief

[Rule 23\(b\)\(2\)](#) applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." [Fed. R. Civ. P. 23\(b\)\(2\)](#). "A hybrid [\*\*312] [Rule 23\(b\)\(2\)](#) class action is one in which class members seek individual monetary relief... in addition to class-wide injunctive or declaratory relief." [Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1554 \(11th Cir. 1986\)](#). A hybrid or [Rule 23\(b\)\(2\)](#) class action is not available where "the appropriate relief relates exclusively or predominantly to monetary damages." [Holmes v. Cont'l Can Co., 706 F.2d 1144, 1155 \(11th Cir. 1983\)](#) (quoting [Fed. R. Civ. P. 23\(b\)\(2\)](#) Advisory Committee Notes (1966 Amendment)). If the declaratory relief is merely incidental to the monetary damages, then a [Rule 23\(b\)\(2\)](#) hybrid class action is inappropriate. [Agan v. Katzman & Korr, P.A., 222 F.R.D. 692, 701-02 \(S.D. Fla.2004\)](#); [Swanson v. Mid Am. Inc., 186 F.R.D. 665,668-69 \(M.D. Fla.1999\)](#); see also [Dukes, 564 U.S. at 363-65](#).

[\*411] Plaintiffs argue that the fact that the three remaining Manufacturer Defendants recently discontinued their UPPs does not foreclose Plaintiffs' ability to seek injunctive relief, as it is not "absolutely clear" that the Defendants will not revive their UPPs in the future. (Docs. 396 at 34; S-404 at 34); (see also Docs. 611 at 29; S-649 at 29) ("There is no guarantee that Defendants' unlawful conduct will not recur, unless the Court issues an injunction."). Plaintiffs seek a "mandatory" injunction, not a voluntary cessation of UPPs. (Docs. 396 at 34; Doc. S-404 at 34)

Defendants respond that the complained-of conduct has ceased, mooted Plaintiffs' claim for injunctive relief. (See Docs. 505 at 16, 57; S-540 at 16,57); [\*313] (see also Doc. S-681 at 24 ("[T]he only UPP ... remaining concern[s] a product of [CV], with whom Plaintiffs have settled."). Moreover, Defendants argue that Plaintiffs primarily seek monetary damages, making the need for [Rule 23\(b\)\(2\)](#) certification inapplicable. (Docs. 505 at 16,56-57; S-540 at 16, 56-57 (noting that Plaintiffs seek statutory, treble and restitution damages); (Docs 674 at 24; S-681 at 24).

Plaintiffs do not meet the criteria for certification under [Rule 23\(b\)\(2\)](#). Their claims are ones primarily seeking money damages. The complained-of conduct has ceased, and Plaintiffs have presented no evidence that the Defendants will revive the UPPs.

#### b. [Rule 23\(b\)\(3\)](#)

##### 1) Predominance

To satisfy the predominance requirement, "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof." *Kerr v. City of W. Palm Beach*, 875 F.2d 1546, 1558 (11th Cir. 1989) (internal citations omitted). "The predominance inquiry requires an examination of 'the claims, defenses, relevant facts, and applicable substantive law,'... to assess the degree to which resolution of the classwide issues will further each individual class member's claim against the defendant." *Babineau v. Fed. Express Corp.*, 576 F.3d 1183, 1191 (11th Cir. 2009) (quoting [\*314] *Klay*, 382 F.3d at 1254). "The 'predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Tyson Foods*, 136 S. Ct. at 1045 (quoting *Amchem Prods.*, 521 U.S. at 623). "[Rule 23\(b\)\(3\)](#)... does not require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof.... What the rule does require is that common questions 'predominate over any questions affecting only individual [class] members.'" *Amgen Inc.*, 568 U.S. at 469 (emphasis in original) (quoting *Fed. Rule Civ. Proc. 23(b)(3)* (emphasis added)).

Under [Rule 23\(b\)\(3\)](#), "[i]t is not necessary that all questions of fact or law be common, but only that some questions are common and that they predominate over individual questions." *Klay*, 382 F.3d at 1254 (citation omitted). "Whether an issue predominates can only be determined after considering what value the resolution of the class-wide issue will have in each class member's underlying cause of action. *Id. at 1255* (citation omitted). Common issues of fact and law predominate if they have a direct impact on every class member's effort to establish liability and on every class member's entitlement to . . . relief." *Id. at 1255* (citations omitted).

The predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, [\*315] aggregation-defeating, individual issues. . . . When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under [Rule 23\(b\)\(3\)](#) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.

*Tyson Foods*, 136 S. Ct. at 1045 (internal quotations and citations omitted).

Common issues of fact and law predominate if they have a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief. On the other hand,

common issues will not predominate [\*412] over individual questions if, as a practical matter, the resolution of an overarching common issue breaks down into an unmanageable variety of individual legal and factual issues.

Carriuolo, 823 F.3d at 985 (quoting Babineau, 576 F.3d at 1191). The predominance requirement in Rule 23(b)(3) is "far more demanding" than the commonality requirement. Id. (quoting Amchem Prods. v. Windsor, 521 U.S. 591, 623-24, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)). "Common issues can predominate *only* if they have a 'direct impact on every class member's effort to establish liability that is more substantial than the impact of individualized issues in resolving the claim or claims of each class member.'" [\*\*316] Id. (quoting Vega, 564 F.3d at 1270).

The Court's analysis of predominance "begins, of course, with the elements of the underlying cause of action." Erica P. John Fund. Inc. v. Halliburton Co., 563 U.S. 804, 809, 131 S. Ct. 2179, 180 L. Ed. 2d 24 (2011).

In conducting the predominance inquiry, courts must take into account the claims, defenses, relevant facts, and applicable substantive law to assess the degree to which resolution of the classwide issues will further each individual class member's claim against the defendant. If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable. Although individual treatment of the *essential* elements of a case precludes certification, it is not necessary that all questions of fact or law be common, but only that some questions are common and that they predominate over individual questions.

Photochromic Lens, 2014 U.S. Dist. LEXIS 46107, 2014 WL 1338605, at \*17 (internal quotation marks and citations omitted) (emphasis in original); see Amgen, 568 U.S. at 469 ("Rule 23(b)(3) . . . does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof." (citation omitted)). On the other hand, "[i]f the effect of class certification is to bring in thousands of possible claimants whose presence will in actuality require a multitude of mini-trials (a [\*\*317] procedure which will be tremendously time consuming and costly), then the justification for class certification is absent." Cardiovascular Care of Sarasota, P.A. v. Cardinal Health, Inc., No. 8:08-cv-1931-T-30TBM, 2009 U.S. Dist. LEXIS 61751, 2009 WL 928321, at \*5 (M.D. Fla. Apr. 3, 2009) (quoting Blue Bird Body Co., Inc., 573 F.2d at 328).

#### **(a) Predominance: Agreement or Conspiracy**

Plaintiffs argue that "[c]ommon questions of liability predominate over individual issues because all Class and Subclass members, regardless of their number of contact lens purchases or what state they reside in, will rely on the same evidence at trial to prove the single, overwhelmingly predominant issue of whether Defendants conspired on a horizontal or vertical basis to eliminate competition in the nationwide contact lens market." (Docs. 396 at 25; S-404 at 25). Plaintiffs contend that they have made a "threshold showing that the proof they intend to offer at trial of the alleged conspiracy will be sufficiently generalized in nature to warrant a certification of the class." Id. at 26 (quoting In re Disposable Contact Lens Antitrust Litig., 170 F.R.D. at 531). Citing to Dr. Solow's Report, Plaintiffs argue that the direct and circumstantial evidentiary "plus factors," which are susceptible to common, class-wide evidence because Plaintiffs all bought contact lenses subject to the UPPs, establish [\*\*318] a horizontal and vertical antitrust conspiracy. (Doc. S-404 at 26-27 (citing Doc. S-405 at 11-76 (Solow Report ¶¶ 17-133))). Plaintiffs rely upon Dr. Solow's Report in which Dr. Solow, citing to evidence produced during the ongoing discovery in this case, recounts the history and structure of the contact lens market in which ECPs both prescribe and sell contact lenses; the Defendant Manufacturers' implementation of UPPs starting in 2013; communications between ECPs and ABB; communications between ECPs and the Manufacturer Defendants; communications between ABB and the Manufacturer Defendants; statements and analyses made by representatives of the Manufacture Defendants; and the pivotal role of distributor ABB in the contact lens market with regards to contact lens pricing, [\*413] demonstrated, in part, by various communications by Manufacturer Defendants, ABB, and the Contact Lens Institute. See Solow Report ¶¶ 17-133.

Defendants argue that each individual Manufacturer Defendant's response to Plaintiffs' claims is different, inasmuch as their respective contact lens products "incorporate different materials, employ different technologies, and offer different modalities (*i.e.* daily, weekly, [\*\*319] monthly)," and "utilize unique proprietary technologies." (Docs. 505 at 20; S-540 at 20 (citing (Doc. S-537 at 26-33 (Cremieux Report ¶¶ 51-61))). Defendants assert that "[e]ach UPP is

a different marketing strategy representing a manufacturer's independent judgment," implemented at a different time and for different marketing reasons. (Docs 505 at 20; S-540 at 20-21 (citing Doc. S-537 at 131-144, 147, 161-65 (Cremieux Report Exs. 10-13, 15, 23-25); Doc. S-541-18 at 25 (Alcon bullet-point presentation "Why We Need to Implement MPP/UPP"); Doc. S-541-19 at 33 (Helms Dep at 122); Doc. S-541-20 at 26 (Miura Dep. at 95 ); Doc. S-537 at 55-57, 59 (Cremieux Report ¶¶ 107, 109, 110, 112, 117, 118))). Defendants state that the UPP set by each Manufacturer Defendant for their respective products, was set at a different price. *Id.* at 22 (citing(Doc. S-537 at 52-53, 65 (Cremieux Report ¶¶ 102, 135); Doc. S-537 at 119-121, 145, 148, 149, 154 (Cremieux Report Exs. 6A-C, 14, 16, 17, 20)). Though Defendant JJVC eliminated rebates with the implementation of the UPPs, "Alcon, B&L and CVI . . . actively issued manufacturer rebates for products subject to a UPP, which had the effect of bringing the purchase price [\*\*320] well below the UPP price if redeemed." (Doc. S-540 at 29 (citing Doc. S-537 at 60, 74-75 (Cremieux Report ¶¶ 119, 165, 167); Doc. S-541-8 at 8 (Seshadri Decl. ¶¶ 11-13))).

Citing to evidence in the record, Dr. Solow states that the four Manufacturer Defendants collectively control 97% of the United States contact lens market (measured by revenue), that "[m]anufacturers distribute the largest share of lenses through independent ECPs and the smallest though the online/mail-order channel," and that the price of a package of contact lenses was roughly 19 percent more expensive when purchased from an independent ECP. (Docs. 397 at 14-15,35; S-405 at 14-15, 35 (Solow Report ¶¶ 21, 23, 61; *see also id.* ¶ 24)). One Manufacturer Defendant, Alcon, observed that ABB "is a dominant player providing turn-key business solutions to private ECP practices and networks, and large regional players." (Doc. S-405 at 68-69 (Solow Report ¶ 120)). By 2017, online retail of contact lenses garnered an estimated 9.2% share of industry revenue, and was projected to continue to increase "'as consumers will continue to view online purchases as a quick and relatively less expensive method to purchase contact lenses.'" [\*\*321] (Doc. S-405 at 34 (Solow Report ¶ 59). Dr. Solow states that:

extensive evidence shows that the structure, conduct, and performance of the contact lens industry is conducive to and consistent with the formation of a cartel and that any such cartel would have been successful in generally raising price to its customers. This common economic evidence can be used by all members of the proposed Classes as proof of the conspiracy and impact elements of their claims.

*Id.* at 23 (Solow Report ¶ 38).

Plaintiffs contend that the scope of the alleged vertical agreements may be established on a class-wide basis for each Vertical Class, through common centralized evidence establishing that the Manufacturer Defendants, ABB and independent ECPs shared an interest in maintaining prices and limiting competition from the Discount Retailers; ABB's and the ECPs' role in encouraging the implementation of UPPs; and the ECPs' support of the UPPs. (Doc. 396 at 27); (Doc. S-404 at 27) (citing Doc. S-405 at 59, 63, 65, 67-73 (Solow Report ¶¶ 107, 109, 110, 113, 117-127)).

In this case, the claims of the proposed putative class members all arise out of the same alleged illegal conduct by Defendants, based upon related antitrust [\*\*322] theories of conspiracy in restraint of trade. Likewise, the claims of the proposed state classes arise out of the same alleged illegal conduct by Defendants and are based on the same related antitrust theories of conspiracy in restraint of trade. Although each proposed [\*414] subclass is proceeding under its own state law of Maryland and California, class certification pursuant to [Rule 23\(b\)\(3\)](#) is nonetheless appropriate where there is a commonality of substantive law applicable to all class members.

In general, a federal or state claim based upon a theory of antitrust conspiracy raises three ultimate issues to be proven at trial: (1) the existence of a contract, combination or conspiracy in restraint of trade (liability); (2) injury-in-fact (antitrust injury); and (3) the extent of injury (damages). *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981). As demonstrated by . . . Plaintiffs, all proof relative to Defendants' alleged conspiracy to restrain trade is common to the members [in all classes]. In fact, "courts repeatedly have held that the existence of a conspiracy is the predominant issue in price fixing cases, warranting certification of the class even where significant individual issues are present." *In re NASDAQ Mkt.-Makers Antitrust Litis.*, 169 F.R.D. 493, 518(S.D.N.Y. 1996); *see also In re Potash Antitrust Litig.*, 159 F.R.D. 682 (D. Minn. 1995).

*In re Terazosin Hydrochloride, 220 F.R.D. at 695.* Plaintiffs have met their **[\*\*323]** burden of showing that the issue of the existence of an agreement or conspiracy among the Defendants is subject to common issues of fact and law, and may be established by generalized proof, applicable to the class as a whole.

**(b) Predominance: Impact and Damages**

**i. Plaintiffs' Argument**

Plaintiffs argue that "Defendants' supra-competitive prices caused by Defendants' UPPs are susceptible to common proof on a class-wide basis." (Docs. 611 at 10; S-649 at 10). Plaintiffs compare the prices paid by consumers in the "actual world" of UPPs with the alleged antitrust conduct to the prices that would have been paid by consumers in a "but for" world (but for or absent the alleged antitrust conduct). They note that Defendants' expert recognizes that this "but for" analysis establishes whether an individual purchaser suffers antitrust injury. (Doc. S-649 at 11 (citing Doc. S-538 at 10 (Snyder Report ¶ 16))). Plaintiffs assert that "[e]vidence that customers paid artificially high prices as a result of Defendants' restraint on trade is susceptible to class-wide proof," (Doc. 396 at 29); (Doc. S-404 at 29) (citing Doc. S-405 at 23-25 (Solow Report at ¶¶ 38-40) and Doc. S-406 at 12-16 (Williams Report ¶¶ 21-23, 24-35)), **[\*\*324]** and that and that "Plaintiffs have demonstrated at least a "colorable method" of proving impact at trial." (Docs. 396 at 29; S-404 at 29 (quoting *In re Disposable Contact Lens Litig., 170 F.R.D. at 531*)). Specifically, Plaintiffs argue that after applying a regression analysis to both the contact lenses produced by all four Manufacturer Defendants to analyze the alleged horizontal conspiracy, and to lenses produced by each Manufacturer Defendant individually to establish the impact of the alleged vertical conspiracies, Dr. Williams concludes that "Plaintiffs paid higher contact lens prices for products subject to Defendants' UPPs than they would have paid in the absence of Defendants' illegal actions." (Doc. S-404 at 29-30). Plaintiffs assert that while damages may differ for each individual class member based on the number and type of contact lenses purchases, that determination does not foreclose class certification, particularly when the overreaching antitrust liability questions are so common to each Class and Subclass member. (Docs. 396 at 32; S-404 at 32 (citing *Carriuolo 823 F.3d at 988*)). Plaintiffs also contend that the same facts and evidence as set forth above can be used to support the Maryland and California state law claims. *Id.* at 30-32.

**ii. Defendants' Argument **[\*\*325]****

Defendants argue that "at least two of the essential elements of Plaintiffs' claims - antitrust injury and standing - cannot be proved on a classwide basis with a common body of evidence." (Docs. 505 at 32; S-540 at 32); see also id. at 14. Defendants focus particularly on the impact element of Plaintiffs' antitrust claims, arguing that "the UPPs at issue did not; have the uniform effect that Plaintiffs assert." (Docs. 505 at 43; S-540 at 43). Rather, they argue that "the undisputed evidence shows that the UPPs either had no impact at **[\*415]** all (e.g., some class members paid *nothing* or far less than the UPP price for contact lenses) or had a highly variable impact that could never be shown with a common body of evidence." *Id.* (emphasis in original).

Among the differing factors cited by Defendants applicable to each individual class Plaintiff are: whether the ECP/retailer who sold the lens to the plaintiff was part of an alleged conspiracy; whether the ECP/retailer determined his or her price pursuant to the relevant UPP price; whether the consumer would have purchased the same lens in the absence of a UPP; whether the price paid by the consumer was higher than it would have been in the absence of the **[\*\*326]** alleged conspiracy; and whether the price paid by the consumer was reduced by rebates or discounts offered by the manufacturer or retailer, or by reimbursement by a third party insurer. (Docs. 505 at 14-15; S-540 at 14-15). They argue that Plaintiffs cannot prove classwide impact with common proof, "because evaluating whether any UPP affected a contact lens purchaser at all requires looking individually at each transaction to compare what the person actually paid against what s/he would have paid (including based on changes in the price of the lens, the amount of any vision care benefits, and rebates and discounts)." (Docs. 674 at 11; S-681 at 11). Additionally, Defendants argue that Dr. Williams' use of a "'but for' impact" analysis embraces an

incorrect definition of impact that is "disconnected" from the impact requirement of [Rule 23](#), which requires evaluating "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.". (Doc. S-681 at 20) (quoting [Brunswick, 429 U.S. at 489](#)). Defendants cite to testimony of putative Plaintiffs and to ECPs and retailers in support of their arguments. They contend that:

- 1) "Plaintiffs cannot show [through common [\\*\\*327](#)] proof] that any meaningful number of putative class members purchased from a participant in the alleged conspiracy" because retailers set prices independently. (Docs. 505 at 26, 35; S-540 at 26, 35; see also Docs. 674 at 10; S-681 at 10 (citing Plaintiff Class Representative and ECP testimony: (Doc. S-541-9 at 4 (Takeda Decl. ¶¶ 13-15); Doc. S-541-11 at 3-4 (Sudarsky Decl. ¶¶ 6, 7, 11); Doc. S-541-7 at 3 (Ruder Decl. ¶¶ 5-7); Doc. 541-1 at 4 (Chang Decl. ¶¶ 8-9); Doc. S-541-4 at 2 (Mann Decl. ¶¶ 7-8); Doc. 541-3 at 3 (Huynh Decl. ¶¶ 5, 7-8); Doc. S-541-36 at 17 (Kikunaga Dep. at 62-64); Doc. 541-17 at 19 (Mason Dep. At 70-73); Doc. S-541-10 at 3 (Sorkin Decl. ¶¶ 6, 7); Doc. S-541-2 at 3-4 (Gray Decl. ¶¶ 12-14); Doc. S-541-12 at 3-4 (Wally Decl. ¶ 10); Doc. S-541-6 at 2-3 (Prange Decl. ¶¶ 7-9, 13, 15); Doc. S-541-23 at 18 (Goldberg Dep. at 67-68); Doc. 510-17 at 3 (Weisband Decl. ¶¶ 6, 7)); (Docs. 674 at 34-40; S-681-1 and S-681-2 (same citations and adding (Doc. 677-2 at 3 (Torres Decl. ¶ 7); (Doc. 510-1 at 2 (Bennett Decl. ¶¶ 5, 7)); (Doc. 682-6 at 3 (Bennett Dep. at 62)); (Doc. 510-9 at 2 (Sakamoto Decl. ¶¶ 5, 7)); (Doc. S-682-5 at 3 (Sheldon Dep. at 114-18)); (Doc. 682-4 at 3 (Uzick [\\*\\*328](#) Dep. at 95)); (Doc. 510-15 at 2 (Uzick Decl. ¶ 7))).
- 2) "Plaintiffs cannot show that putative class members paid more for contact lenses subject to a UPP than they had previously." (Docs. 505 at 27-28; S-540 at 27-28 (citing Doc. S-541-25 at 15,20 (Felson Dep. at 54-55, 73 (plaintiff citing to "an insurance reimbursement" and agreeing that he paid less for the same JJVC lenses in 2015 as compared to 2013 and stating that an ECP offered him a discount)); Doc. S-541-15 at 31-33, 38, 46-47 (Schirf Dep. at 117-18, 121-22, 127-28, 146-47, 179-81 (plaintiff comparing the price she paid for JJVC lenses through the years, including while a UPP was in place with no appreciable change)); Doc. S-541-26 at 13 (Machikawa Dep. at 46-47 (plaintiff testifying he was charged the same for contact lenses in 2013 and 2014 and that insurance paid all but \$14 in 2014)); Doc. S-537 at 50-51, 74 (Cremieux Report ¶¶ 97, 164, 166 (noting that one Vision Source ECP provided discounts for a particular lens and passed along manufacturer rebates to consumers, and some other retailers offer discounts) and discussing insurance reimbursements for contact lenses)); Doc. S-541-24 at (Mazzarella Dep. at 105-06 (plaintiff [\\*\\*329](#) testifying about rebate on Bausch & Lomb lenses)); Doc. S-541-17 at 14 (Mason Dep. [\[\\*416\]](#) at 50 (ECP testifying that some patients use insurance to pay for contact lenses)); Doc. S-541-36 at 13 (Kikunaga Dep. at 45 (ECP testifying that majority of patients use insurance to pay for contact lenses)); (Doc. S-537 at 48 (Cremieux Report ¶ 93 (stating that one, survey shows that 57 percent of contact lens wearers had vision insurance, 33 percent of which had plans that covered some of the cost of contact lenses for one year.)); Doc. S-541-27 (invoice showing insurance reimbursement to class representative plaintiff Felson showing that as a result of an insurance reimbursement and an ECP professional discount, he paid nothing for contact lenses subject to a UPP)).
- 3) "Many putative plaintiff class members paid prices that varied significantly from the UPP price of a given lens." (Docs. 505 at 38; S-540 at 38 (citing Doc. S-541-25 at 20-21 (Felson Dep. at 76-77 (class representative Felson paid \$122 for two boxes of CooperVision lenses when the UPP price was \$178 due to a "courtesy write-off" or "professional discount"))).
- 4) "Plaintiffs cannot show that all putative class members paid more for contact [\\*\\*330](#) lenses as a result of the introduction of the UPPs." (Docs. 505 at 39; S-540 at 39 (citing Doc. S-541-5 at 3, 5 (Miura Decl. ¶¶ 4-5, 9 (JJVC reduced wholesale prices for some products in July 2014, and UPP decreased wholesale prices for 66% consumers)); Doc. S-537 at 183 (Cremieux Report Exs. 32-34 (data charts based upon National Vision, Inc. Data illustrating median price per month of three JJVC lenses showing fluctuations in prices in relation to UPPs); (Doc. S-537 at 153 (Cremieux Report Ex. 19 (chart using Luxottica Data showing retail price drop when UPP implemented for JJVC Acuvue Oasys with Hydraclear (24-pack)); Doc. S-541-25 at 15, 20 (Felson Dep. at 54-55, 73 (class representative plaintiff paid \$48 less for JJVC Acuvue lenses in 2015 than in 2013, noting an insurance reimbursement and that ECP offered him a discount)). In this regard, Defendants assert that in some instances, "manufacturer rebates brought the price paid below the UPP price for the product purchased." (Doc. S-540 at 41 (citing Doc. S-541-24 at 28 (Mazzarella Dep. at 105-06 (plaintiff testifying about a \$100 rebate on

Bausch & Lomb lenses that covered out of pocket costs); (Doc. S-537 at 31 (Cremieux Report [\*\*331] ¶ 57 (discussing CooperVision rebates on products subject to a UPP covering more than 60,000 purchases of two conduct lens products subject to a UPP)); (Doc. 541-8 at 8 (Seshadri Decl. ¶ 13 (discussing CooperVision rebates on UPP products)); (Docs. S-541-29 at 3-4, S-541-30, S-541-32 and 541-33 (Alcon rebate information for customers)). Retailers and ECPs also offered rebates and discounts on UPP-covered contact lens products. (Doc. S-540 at 42 (citing Doc. S-537 at 74 (Cremieux Report ¶ 166 (reporting that Target offered a \$10 discount on the purchase of JJVC 1-Day Acuvue TruEye (90 Pack) which would have resulted in a price of \$81.74 per box, below the UPP price of \$82.50)); Doc. S-537 at 75-76 (Cremieux Report ¶ 168 (reporting that 1-800 Contacts offered new customers discounts of \$20 for \$150 in contact lens purchases, and \$45 for \$200 worth of purchases)).

Defendants cite to the high number of retailers and ECPs involved as a reason why they contend that Plaintiffs are unable to establish impact on a classwide basis.

The Manufacturer Defendants design and make contact lenses. Dozens of distributors of contact lenses buy contact lenses from manufacturers and sell to ECP/retailers. [\*\*332] More than 50,000 ECPs (of whom approximately 35,000 are in independent practice ("iECPs")), prescribe contact lenses and, together with retailers, sell contact lenses to more than 40 million consumers.

(Docs. 505 at 19; S-540 at 19) (citing (Doc. S-537 at 15, 37 (Cremieux Report ¶¶ 31, 70-71))). Defendants contend that each ECP and retailer set its own prices, independently and regardless of the UPPs. As support, Defendants cite to retailers who sold various models of contact lenses at prices below the UPP. (Docs. 505 at 26-27; S-540 at 26-27 (citing Doc. S-537 at 149, 166-71 (Cremieux Report Exs. 17, 27A, 27B, 27C))); (see also Doc. S-540 at 36-37 (citing testimony of ECPs)).

[\*417] Defendants assert that Plaintiffs' experts fail to establish common impact on a classwide basis, and that their reports do not satisfy the "rigorous standards of *Daubert*" that apply to Plaintiffs' Motion for Class Certification. (Docs. 505 at 44; S-541 at 44). (See Docs. 505 at 45-51; S-540 at 45-51 (Defendants' criticisms of Dr. Williams' regression analysis); (Docs. 505 at 51-52; S-540 at 51-52 (characterizing Dr. Solow as "merely a human 'highlighter,'" providing "a voice to describe documents produced in this [\*\*333] litigation," which is insufficient to make an evidentiary showing that impact can be proven on a classwide basis using a common body of evidence)).

Defendants argue that:

Williams purports to compare actual prices to hypothetical prices that he estimates using a "before-during" method for both the alleged horizontal and vertical agreements. . . . On the basis of that analysis, Williams concludes that prices in various channels were higher for products subject to a UPP than they would have been in a hypothetical "but-for" world without the UPPs.

(Doc. S-540 at 44 (citing Doc. S-406 (Williams Report ¶¶ 7-8, 10-11, 21-41))). They argue that Dr. Williams undermines Plaintiffs' Motion for Class Certification because he "relies primarily on non-transactional data as opposed to actual prices paid by the majority, of contact lens purchasers; and employs a regression that uses false comparisons, adopts misleading and impermissible averaging techniques and produces false positives and internally inconsistent results." (Docs. 505 at 18; S-540 at 18); (see also Doc. S-540 at 45-46 (citing Doc. S-541-34 at 47, 55 (Williams Dep. at 181-82, 214); Doc. S-406 at 46 (Williams Table 12) (focusing on his [\*\*334] conclusion that a consumer who paid less than the UPP price for a contact lens through 1-800-Contacts was nevertheless injured, testifying that "the impact of the UPP policy was to cause the prices sold by 1-800-Contacts to be . . . 5 percent to 3.4 percent higher than they otherwise would have been.")); (Doc. S-540 at 46 (citing Doc. S-538 at 14, 19, 46 (Snyder Report ¶¶ 25, 35, 97))). Defendants also criticize Dr. Williams' price comparisons, arguing that the Alcon, B&L and CV UPPs were all placed on new products where there were no "before" prices to compare the post-UPP price to, and that Dr. Williams compared the new products with the UPPs to older dissimilar products, without taking into account differences and improvements in the newer products with the UPPS which were expected to sell at a premium to reflect their increase in value. (Doc. S-540 at 47). Both of Defendants' experts, Drs. Snyder and Cremieux, testified that impact and damages cannot be established by common proof.

### iii. Plaintiffs' Reply

Plaintiffs respond that class members "need not buy identical products at identical prices on identical terms in order to prevail in an antitrust class case." (Does. 611 at 10; **\*\*335** S-649 at 10 (citing *Delta/AirTran Baggage Fee, 317 F.R.D. at 682*)). They argue that the evidence establishes that UPPs increased contact lens base prices. (Doc. S-649 at 11 (citing Doc. S-661-145 at 3 (Chavez Dep. at 10 (testifying Manufacturer Defendants would "indicate to us [Costco] what we had to sell the merchandise for")); Doc. S-661-128 at 5 (Angelini Dep. at 86 (JJVC had the expectation that more than 50 percent of the prices "would tend to gravitate around the UPP price")); Doc. S-661-134 at 3 (McKenna Dep. at 62 ("I believe that all the customers understood that there was a UPP in place and that they could not charge - if they wanted to keep supply they would not charge below \$60 on retail basis."))).

Notwithstanding individual ECP testimony that they did not "conspire" with the Manufacturer Defendants to set prices at the UPP level, Plaintiffs argue that ECP's testified "they were all aware of UPPs and, regardless of whether they specifically admit UPP pricing, the UPP affected their contact lens prices," demonstrating the "pervasive effect of UPPs." (Doc. S-649 at 13 (citing (Doc. S-649-2 at 2-3 (Appendix B summarizing the testimony of 12 ECP's as follows: (Doc. S-541-1 at 3 (Chang Decl. ¶ 7 (set retail prices based **\*\*336** on a number of factors including "the wholesale cost of contact lenses, and competitor's retail pricing. UPP plays a role in my determination as to how to price contact **\*418** lenses because if the minimum UPP price is not met, then my account with the manufacturer would terminate.")); Doc. S-541-2 at 3 (Gray Decl. ¶ 12 (since 2013, the policy was "to price contact lenses competitively by reference to the prices charged by 1-800-Contacts.")); Doc. S-661-142 at 3 (Huynh Dep. at 29 (set price "close to being the same" as the ABB Profit Advisor suggested price for private practitioners)); Doc. 541-36 at 11 (Kikunaga Dep. at 37 (discussed with patients that under the UPPs, "the contact lenses are X price per box and that they are pretty much standardized amongst all - anywhere you buy them")); Doc. S-661-139 at 3-5 (Mason Dep. at 43, 49, 162 (decides prices by matching the "1-800 list price," and that it was his understanding that "1-800-Contacts couldn't lower their price for a UPP product lower than was listed in the UPP" and the patient would pay the same price "no matter where they went.")); Doc. S-661-140 at 3 (Prange Dep. at 86 (agrees that after UPP was implemented, his pricing was "based **\*\*337** off what the UPP price was.")); Doc. S-541-7 at 3 (Ruder Decl. ¶ 7 (stating that prices at clinic were "based on a number of factors, including the wholesale cost of the contact lenses and competitors' retail pricing.")); Doc. 510-12 at (Sheldon Decl. ¶ 7 (stating that while UPP was in effect on Alcon lenses, he "priced at the minimum retail price because I believed it was a fair price for the lenses and because I wanted to be competitive in my pricing.")); Doc. 541-10 at 3 (Sorkin Decl. ¶ 6 (while UPP's "did not play a role in determining the prices that [he] set," he "set the price of contact lenses by taking a markup over the wholesale price, as well as by observing competitive prices.")); Doc. 541-11 at 3 (Sudarsky Decl. ¶¶ 6-7 (retail prices were "based on a number of factors, including the online price of comparable lenses and my acquisition costs.")); Doc. 661-141 at 3, 5 (Takeda Dep. at 55, 57 (factoring in rebates she tries to be "competitive" with the chain stores, and would "look online to see what companies are charging.")); Doc. 541-14 at 3 (Williams Decl. ¶ 6 (group set prices "based on its wholesale costs for the lenses and evaluating the prices charged by its competitors."))). **\*\*338**

### iv. Defendants' Sur-Reply

In their Sur-reply, Defendants argue that Plaintiffs' experts, Drs. Solow and Williams, failed to review the deposition testimony of the named Plaintiffs and their ECPs, to rebut Defendants' evidence of individualized impact. (Does. 674 at 12; S-681 at 12) (citing Doc. 682-9 (Solow Supplemental Dep. testimony); Doc. S-682-10 (Williams Supplemental Dep. testimony)). They contend that the fact that "even some of the named Plaintiffs paid nothing for their contact lenses underscores why a class based on an 'average' overcharge regression model would include scores of people who were not impacted and therefore have no cause of action." (Does. 674 at 13; S-681 at 13). Defendants' also criticize Plaintiffs' experts' opinions that rebates, discounts and insurance payments "would have remained the same" with or without the UPPs, without any evidentiary support. (Doc. S-681 at 16 (citing competing supplemental expert reports by Defendants' experts); (Doc. S-685 at 18-19 (Supp. Cremieux Report ¶¶ 33-35 ("[T]here are many reasons why insurance, rebates and discounts would be different in the but for world . . . [as]

supported by economic theory, documents and testimony," [\*\*339] noting that JJVC "introduced UPPs around the same time it lowered wholesale prices ... [and] to make their products more attractive both to consumers and ECPs, they also simplified their sales practices, eliminating some of the rebates and discounts."). As to Plaintiffs' citation to retailers' testimony that they set prices based upon wholesale prices, competitors' prices, and profit markups, Defendants argue that following competitors' prices is not actionable under antitrust laws. "That ECPs may have conformed to a UPP does not suffice to show the 'conscious commitment to a common scheme designed to achieve an unlawful objective' required" for violation of antitrust laws. (Docs. 674 at 14; S-681 at 14) (citing *Monsanto, 465 U.S. at 764*).

## v. Discussion

In order to prevail on a Section 1 antitrust claim, a plaintiff must establish a "cognizable" or "actual" injury "attributable to an antitrust violation," along with "some approximation of damage." *J. Truett Payne, [\*419] 451 U.S. at 561-62*. The "fact of injury" is also known as "antitrust impact." See *Blue Bird Body Co., 573 F.2d at 320*. Establishing antitrust impact requires proof that "there is a causal relation between the alleged antitrust violation and an injury" to the plaintiff. *Constr. Aggregate Transp., Inc. v. Florida Rock Indus., Inc., 710 F.2d 752, 782 (11th Cir. 1983)*. "Antitrust impact is established in this type of case if [\*\*340] Defendants' activities had the effect of stabilizing prices above competitive levels." *In re Polypropylene Carpet Antitrust Litig., 996 F. Supp. 18, 22 (N.D. Ga. 1997)*.

"In an overcharge case, impact is shown through proof that: (1) Defendants charged more than they would have but-for their antitrust violation; and (2) class members made some purchases at the illegally inflated or stabilized price." *Terazosin Hydrochloride, 220 F.R.D. at 696* (citing *Hanover Shoe, 392 U.S. at 489* and *Blue Bird Body Co., 573 F.2d at 324*). "[O]ne way of demonstrating predominance is to show that there is a common method for proving that the class plaintiffs paid higher actual prices than in the but-for world, such as using an econometric regression model incorporating a variety of factors to demonstrate that a conspiracy variable was at work during the class period, raising prices above the 'but-for' level for all plaintiffs." *Ethylene Propylene Diene Monomer (EPDM), 256 F.R.D. at 88*.

Rebates, discounts and insurance payments do not defeat predominance as to impact. Dr. Solow opines that:

A properly defined "but for" world is one in which all aspects of the actual world remain unchanged except for the effects *caused by* the restraint of trade at issue. Defendants' experts misapprehend the correct definition of the 'but for world, which leads them to focus mistakenly on insurance reimbursements, rebates and discounts, all of which would have remained [\*\*341] unchanged in the 'but for' world." . . . [T]here is no evidence that UPPs *caused* changes in the discounting practices of individual ECPs or interne retailers.

(Doc. S-650 at 4, 12 (Solow Supp. Report ¶¶ 4(b), 21)); (see also Does. S-651 at 57 (Williams Supp. Report ¶ 98 ("Plaintiffs have not asserted that insurance payments, rebates, or discounts are 'harmful acts.' Thus, insurance payments, rebates, and discounts are the same in the but-for world as they are in the actual world."))). Defendants' contention that discounts, rebates and insurance reimbursements defeat Plaintiffs' ability to prove antitrust impact with evidence common to all putative class members is not supported by the evidence. Defendants cite to no evidence that the discounts, rebates and insurance payments were in anyway related to Defendants' conduct giving rise to the UPPs, or that UPPs caused changes in insurance reimbursements, or the discounting practices of the Manufacturer Defendants, individual ECPs, or internet retailers. Thus, Dr. Williams' treatment of these discounts, rebates and insurance payments as remaining constant in the "but for" world absent Defendants' conduct is not disproven. That JJVC enacted [\*\*342] UPPs and then discontinued its discounts in an effort to "simplify" pricing does not put the reductions in pricing into the mix to negate the impact of the alleged illegal conduct complained about by Plaintiffs.

Whether in some circumstances, a putative Plaintiff's contact lens purchase resulted in no out-of-pocket economic loss while UPPs were in place, —be it from rebates, discounts, insurance payments, or a retailer who affirmatively did overruled the UPP requirement and priced below it - does not defeat class certification. In this circumstance,

Defendants' classwide practice of allegedly conspiring to adopt UPPs to artificially constrain certain contact lens prices, if proven, is a common question of fact that predominates over the exact circumstances of each putative plaintiff's individual purchase. A rebate, discount or insurance payment does not necessarily negate the impact of the alleged conspiracy. See *Delta/AirTran Baggage Fee*, 317 F.R.D. at 687 ("Whether any class members were reimbursed for any part of a baggage fee—i.e., whether they were able to pass on some portion of the alleged antitrust overcharge—is legally irrelevant and therefore will not lead to a situation in which individual [\*420] questions of antitrust injury [\*\*343] will dominate over common ones.").

Defendants' expert also contends that Plaintiffs cannot establish classwide impact because "[t]here are dozens of differentiated lenses produced by a variety of manufacturers for [multiple] ... corrective needs," differing in "many" dimensions and innovations to meet the varied needs of patients.. (Doc. S-537 at 21-33 (Cremieux Report ¶¶ 43-61) (detailing examples of different product innovations by Defendant Manufacturers)). Dr. Solow responds that the contact lens market is a homogeneous commodity:

The wholesale market is highly concentrated with the defendants controlling a large share of production. Disposable contact lenses are largely homogeneous across producers and there is little opportunity for consumers to substitute other products in response to higher prices for their contact lenses. There are significant barriers to entry, meaning that successful collusion would not be undermined by lost sales to producers of other products or new entrants.

(Docs. 397 at 39; S-405 at 39 (Solow Report ¶ 67); see also id. at 24 (Solow Report ¶ 39 (discussing factors that tend to make a market more favorable to effective collusion)). Given the unique structure of the [\*\*344] contact lens market, Defendants' argument that the contact lens market is highly differentiated and that a common impact from Defendants' alleged conduct cannot be established is unavailing. Even recognizing Defendants' argument that product differentiation precludes common impact, "variations in products and complexities in a distribution chain do not preclude an estimation of whether an overcharge impacted end purchasers." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583, 603 (N.D. Cal. 2010), amended in part, No. M 07-1827 SI, 2011 U.S. Dist. LEXIS 84476, 2011 WL 3268649 (N.D. Cal. July 28, 2011).

"[The presence of individualized damages cannot, by itself, defeat class certification under *Rule 23(b)(3)*." *Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 514 (9th Cir. 2013).

Proving damages proves injury because damages necessarily indicate that the plaintiff has been impacted or injured by the antitrust violation; the converse, however, is not necessarily true. That is, it is possible for a plaintiff to suffer antitrust injury-in-fact and yet have no damages because it has taken steps to mitigate the actual price paid through rebates, discounts, and other non-price factors such as lowered shipping costs, technical services, or any other type of purchase incentive. By expending resources to negotiate down from the supracompetitive prices established by the cartel, plaintiffs who have suffered no damages may still [\*\*345] have suffered an injury-in-fact from the antitrust conspiracy. The fact that a plaintiff may have successfully employed bargaining power to fend off the effect of the conspiratorial practices does not mean that it has not been put in a worse position but-for the conspiracy.

*Ethylene Propylene Diene Monomer (EPDM)*, 256 F.R.D. at 88-89; see also *In re Urethane Antitrust Litig.*, 251 F.R.D. 629, 638 (D. Kan. 2008) ("[E]vidence of a standardized pricing structure, which (in light of the alleged conspiracy) presumably establishes an artificially inflated baseline from which any individualized negotiations would proceed, provides generalized proof of class-wide impact."); *In re Urethane Antitrust Litig. ("Urethane I. Polyester Polyol")*, 237 F.R.D. 440,450-51 (D. Kan. 2006) (accepting the plaintiffs' expert's structural analysis of the urethane market and opinion that price lists can be used as proof of common impact; "conspiratorial behavior elevates list prices and list prices. serve as a reference or benchmark for pricing or pricing negotiations"); *Fears v. Wilhelmina Model Agency, Inc.*, No. 02 Civ-4911 HB, 2003 U.S. Dist. LEXIS 11897, 2003 WL 21659373, at \*6 (S.D.N.Y.2003) (noting that, even if the plaintiffs had been able to negotiate for a lower commission rate with the defendant modeling agencies, they were nonetheless impacted by the conspiracy because those negotiations still began at the "artificially elevated rate" [\*\*346] established by the cartel); *In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 383 (S.D.N.Y.1996) (noting that "[t]he theory that underlies these decisions is, of course, that the negotiated

transaction prices would have been lower if the starting point for negotiations [\*421] had been list prices set in a competitive market. Hence, if a plaintiff proves that the alleged conspiracy resulted in artificially inflated list prices, a jury could reasonably conclude that each purchaser who negotiated an individual price suffered some injury"). "Neither a variety of prices nor negotiated prices is an impediment to class certification if it appears that plaintiffs may be able to prove at trial that . . . the price range was affected generally." [In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 523 \(S.D.N.Y. 1996\)](#).

Plaintiffs' damages model must establish "that damages are capable of measurement on a classwide basis" to show [Rule 23\(b\)\(3\)](#) predominance, and questions of individual damage calculations cannot overwhelm questions common to the class. [Comcast, 569 U.S. at 34](#). Here, Plaintiffs' damages model for class-wide damages, proffered through the expert testimony of Dr. Williams, is sufficient to meet Plaintiffs' burden of establishing predominance of impact. Dr. Williams utilized the "before and after" "but for" regression analysis to calculate the impact of the UPPs. [\*\*347] As set forth above, courts have accepted this regression analysis in antitrust class actions. E.g., [Kleen Prods., 306 F.R.D. at 602](#) ("Multiple regression analysis is common in antitrust cases, where the plaintiffs use it to show that an alleged 'conspiracy' has a statistically significant impact on the dependent variable - usually price." (citing Rubinfeld, [Reference Guide on Multiple Regression](#) 305-07)); [Terazosin Hydrochloride, 220 F.R.D. at 699](#) ("These economic methods are widely accepted and have been used in numerous other antitrust class actions." (citing cases)). Dr. Williams' use of averaging of aggregate data as a part of his regression analysis is an appropriate statistical tool used to "average out" idiosyncratic outliers. The rationale cited by the court in [Static Access \(SRAM\), supra](#), is persuasive in this regard:

The damages question for trial is presumably not about whether a specific ... price increase found its way through the distribution chain and resulted in an increase in the price paid by a specific class member. Rather, the question is how a series of [defendant's] price increases, and/or a series of [defendant's] failures to reduce prices, impacted the price each consumer paid.

[Static Access \(SRAM\), 264 F.R.D. at 614](#) (emphasis added) (quoting [Gordon v. Microsoft Corp., No. MC 00-5994, 2003 Minn. Dist. LEXIS 9, 2003 WL 23105550, at \\*3 \(D. Minn. Dec. 15, 2003\)](#)); see also [id. at 606, 614](#) (certifying indirect purchasers' national [\*\*348] injunctive relief class action alleging defendants who possessed 60-70% of the market share 7 of total product sales, conspired to fix and maintain artificially high prices during a 10-year period, finding that "the use of averaged and aggregated data is not fatal to [indirect purchasers] Plaintiffs' econometric models.").

Defendants' criticism that Dr. Williams regression methodology lacks precision and is based upon flawed underlying assumptions is not sufficient to defeat class certification. At the class certification stage, the Court need not resolve which expert testimony and approach—that proffered by the Plaintiffs or by the Defendants—"is best suited to the particularities of [the] case." [Terazosin Hydrochloride, 220 F.R.D. at 699](#). "It is sufficient to note at this stage that there are methodologies available, and that [Rule 23\(c\)\(1\)](#) and [\(d\)](#) allow ample flexibility to deal with the individual damages issues that may develop." [Id.](#) (quotations and citation omitted). The Court is charged with making a "rigorous" screening of expert evidence when certifying a class to ensure that the Plaintiffs' damages model seeks to prove damages that flow from the harm alleged. [Kleen Prods., 306 F.R.D. at 602](#) (citing [Comcast, 133 S. Ct. at 1435](#)).

"[I]ndividualized damages calculations are insufficient to foreclose [\*\*349] the possibility of class certification, especially when, as here, the central liability question is so clearly common to each class member." [Carriuolo, 823 F.3d at 988](#). In [Carriuolo](#), the Eleventh Circuit observed that:

[Rule 23](#) permits a class action when "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." [Fed. R. Civ. P. 23\(b\)\(3\)](#). Nothing in this Rule requires plaintiffs to prove [\*422] predominance separately as to both liability and damages.... [The Supreme Court in] [Comcast](#) simply requires that "any model supporting a plaintiff's damages case must be consistent with its liability case."

*Id.* (quoting *Comcast*, 569 U.S. at 35); see also *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1136 (9th Cir. 2016) ("[E]ven a well-defined class may inevitably contain some individuals who have suffered no harm as a result of a defendant's unlawful conduct."); *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 375 (3d Cir. 2015) ("[I]ndividual damages calculations do not preclude class certification under Rule 23(b)(3)." (citation omitted)); *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 407 (2d Cir. 2015) ("Comcast held that a model for determining classwide damages relied upon to certify a class under Rule 23(b)(3) must actually measure damages that result from the class's asserted theory of injury; but the Court did not hold that proponents of class certification must rely upon a classwide damages model to demonstrate [\*\*350] predominance."); *Nexium*, 777 F.3d at 21 (stating that post-*Comcast*, "the Supreme Court . . . and the circuits in other cases have made clear that the need for some individualized determinations at the liability and damages stage does not defeat class certification"); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 823 (7th Cir. 2012) ("[S]ome class members' claims will fail on the merits if and when damages are decided, a fact generally irrelevant to the district court's decision on class certification."); *In re Deepwater Horizon*, 739 F.3d 790, 815 (5th Cir. 2014) (rejecting defendants' argument that *Comcast* requires that class certification be denied "where the class members' damages are not susceptible to a formula for classwide measurement . . . *Comcast* held that a district court errs by premising its Rule 23(b)(3) decision on a formula for classwide measurement of damages whenever the damages measured by that formula are incompatible with the class action's theory of liability."). "[T]he district court is well situated to winnow out those non-injured members at the damages phase of the litigation, or to refine the class definition." *Torres*, 835 F.3d at 1137 (citing Newberg on Class Actions § 2:3). "[P]ursuant to Rule 23, the court's task at certification is to ensure that the class is not defined so broadly as to include a great number of members who for some reason could [\*\*351] not have been harmed by the defendant's allegedly unlawful conduct." *Id.*, 835 at 1138 (quoting Newberg on Class Actions § 2:3). Plaintiffs' proposed putative classes include only consumers who purchased contact lens brands for which the Manufacturer Defendants had adopted UPPs. Pursuant to Plaintiffs' theory, each and every putative plaintiff that meets this class definition could have been harmed. Dr. Williams opines that nearly all putative Plaintiffs experienced at least one overcharge transaction during the damages period. (Doc. S-723 at 13 (Williams 2d Supp. Decl. ¶¶ 19, 20)).

This is not to say that individual damages issues will not arise. But the individualized damages questions have not been shown to be so complex and densely fact specific as to preclude Rule 23(b)(3) certification. See *Brown*, 817 F.3d at 1240; *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, No. 1:04-CV-3066-JEC, 2009 U.S. Dist. LEXIS 30937, 2009 WL 856306, at \*10 (N.D. Ga. Feb. 9, 2009). Moreover, the individualized damages questions that may arise here do not implicate individualized questions regarding liability. *Brown*, 817 F.3d at 1240. Defendants have failed to establish how class-wide adjudication of any antitrust liability on the part of Manufacturer Defendants and ABB and its class wide impact will be subsumed in or overwhelmed by an individualized damages [\*\*352] inquiry. See *Carriuolo*, 823 F.3d at 989; see also *In re Urethane Antitrust Litig.*, 768 F.3d at 1254 ("Under the prevailing view, price-fixing affects all market participants, creating an inference of class-wide impact even when prices are individually negotiated." (citing cases)).

Additionally, "[e]ven if the damages determination does ultimately necessitate individualized calculations," the question of class certification can be revisited if the facts develop otherwise such that separate damages determinations predominate. *Carriuolo*, 823 F.3d at 988.

[T]he certification of a class is always provisional in nature until the final resolution of the case. See *Fed. R. Civ. P. 23(c)(1)(C)* [\*423] (permitting amendment of a certification order at any time prior to judgment). As we have explained, the power of the district court to alter or amend class certification orders at any time prior to a decision on the merits "is critical, because the scope and contour of a class may change radically as discovery progresses and more information is gathered about the nature of the putative class members' claims."

*Id.* (quoting *Prado—Steiman*, 221 F.3d at 1273).

"[T]he reliability of the means of proving classwide impact frequently factors into the predominance determination in antitrust class actions." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 292 F. Supp. 3d 14, 42 (D.D.C. 2017) (citation omitted), appeal filed [\*\*353] No. 18-7010 (U.S. Jan. 23, 2018). The Court has determined that Plaintiffs' expert, Dr. Williams' multiple regression model is a reliable method for establishing classwide antitrust impact

caused by Defendants' alleged illegal conduct. "At class certification, the Court must rule upon the conclusions generated by the principles and methodology, . . . to the extent that they are relevant to determining whether plaintiffs have satisfied [Rule 23\(b\)](#)." [Rail Freight](#), 292 F. Supp. 3d at 43 (citations omitted). "[Rule 23](#) also requires 'the Court to consider questions beyond the reliability' of expert testimony, such as whether the expert testimony is sufficient to demonstrate 'common impact or that there is a reliable means of proving damages on a classwide basis.'" *Id.* (quoting [In re Processed Egg Prods. Antitrust Litig.](#), 81 F. Supp. 3d at 417).

Addressing Defendants' argument that the Court must resolve the "battle of the experts" between the conflicting opinions of Defendants' experts Dr. Snyder and Dr. Cremieux and Plaintiffs' expert Dr. Williams, the Court turns to the recent decision in [Navelski v. Int'l Paper Co.](#), 261 F. Supp. 3d 1212 (N.D. Fla. 2017). There; the court declined to resolve the "battle of the experts" at the class certification stage, finding that the predominance requirement for class certification was satisfied, despite the experts' disagreement regarding causation. In doing so, the court stated that

While a district court's class certification analysis "may entail some overlap with the merits of the plaintiff's underlying claim, [Rule 23](#) grants courts no license to engage in free-ranging merits inquiries at the certification stage." [Amgen](#), 568 U.S. at 466 (citations [\*\*354] omitted). Rather, "[m]erits questions may be considered to the extent - but only to the extent - that they are relevant to determining whether the [Rule 23](#) prerequisites for class certification are satisfied." *Id.*, quoted in [Brown v. Electrolux Home Prods.](#), 817 F.3d at 1234; see also [Valley Drug Co. v. Geneva Pharms., Inc.](#), 350 F.3d 1181, 1187, 1188 n. 15 (11th Cir. 2003) ("Although the trial court should not determine the merits of the plaintiffs' claim at the class certification stage, the trial court can and should consider the merits of the case to the degree necessary to determine whether the requirements of [Rule 23](#) will be satisfied.").

[Navelski](#), 261 F. Supp. 3d at 1215-16. The court in [Navelski](#) found that the conflicting expert reports regarding whether dam failure caused flooding was not material to the question of whether [Rule 23](#) predominance requirements were satisfied, observing that the dispositive question for [Rule 23](#) purposes is whether predominance presents a common question susceptible to generalized classwide proof. *Id.* at 1216 (citing [Tyson Foods](#), 136 S. Ct. 1036, 1045, 194 L. Ed. 2d 124). In [Navelski](#), the competing experts both agreed that the causation question regarding the collapsed dam and flooding claims could be proven or disproven on a classwide basis and was susceptible to generalized classwide proof and common questions predominated; the respective experts were in conflict related to the merits, and the court determined [\*\*355] that it was unnecessary to resolve the conflict in order to certify a class with respect to causation. *Id.* at 1217.

Here, Defendants contend that there is "no class-wide method for determining whether someone was impacted by the existence of UPPs and averages cannot accurately answer the question for any member of the putative class." (Docs. 693 at 5; S-720 at 5). Defendants base their argument on their experts, [\*424] who opine that the impact of Defendants' UPPs is not susceptible to classwide proof. (See Doc. S-538 at 44 (Snyder Report ¶ 92 n.56 ("By conducting these [regression] analyses, I am not endorsing the use of regression analyses as a common method of proof in this litigation.")); Doc. S-684 at 35-36 (Snyder Sur-Reply Report ¶ 79 (stating that he does not "advocate" the regression approach.)); Doc. S-722 at 17 (Dr. Snyder states that he is "not offering any regression results that would serve as a basis for me to offer conclusions about injury." (citing Doc. 716-13 (unredacted copy not filed))). Restated, Defendants argue that there can be no nationwide class action arising out of their alleged agreement to set minimum prices for consumers because the variables involved and the impact of [\*\*356] the alleged conspiracy is so vast.

Plaintiffs estimate that the proposed class will "number in the tens of millions." (Does. 396 at 20; S-404 at 20 (citing Doc. S-405 at 12 (Solow Report ¶ 19)). Dr. Williams has offered a viable solution to the problem by conducting a multiple regression analysis, a well accepted statistical approach, which plots the average movement of prices of contact lenses for which UPPs were adopted. He bases his averages on sufficient data, which he has supplemented as more becomes available to him through the ongoing discovery process.

Defendants' experts expose what they contend are flaws undermining Dr. Williams' multiple regression analysis. Dr. Williams responds to the criticisms, and provides extensive support for his analysis of classwide impact. As more data has become available, Dr. Williams has further refined his opinion, using the same methodology and reaching a consistent result. The "battle" or disagreement between Plaintiffs' expert Dr. Williams and Defendants' experts is over whether a multiple regression analysis can be employed to calculate impact of the Defendants' UPPs on a classwide basis, in order to satisfy the [Rule 23\(b\)](#) predominance requirement. [\*\*357] In response to Dr. Williams' later "customer level" analysis, Defendants' expert Dr. Snyder characterizes Dr. Williarris' multiple regression analysis as a "highly non-standard method of evaluating impact." (Doc. S-684 at 25 (Snyder 2d Supp. Report n.48)). To the extent that the Defendants' experts opinions disagree with Dr. Williams on the question of whether Dr. Williams' multiple regression analysis represents generalized classwide proof of impact, satisfying the [Rule 23](#) predominance requirement, the Court resolves the conflict between Defendants' experts and Dr. Williams in favor of Plaintiffs. Dr. Williams' expert Reports and subsequent Declarations satisfy the rigorous [Daubert](#) requirements and are considered by the Court as evidence in support of Plaintiffs' Motion for Class Certification. In so doing, the Court does not reject the opinions of Drs. Snyder and Cremieux out of hand. The issues they cite, and the alleged weaknesses and flaws in Dr. Williams' opinions, while not dispelling the Court's determination that Dr. Williams' multiple regression analysis may be considered at this juncture as generalized common proof of classwide impact and [Rule 23](#) predominance, do raise legitimate questions [\*\*358] that are the meat of rigorous cross examination and resolution by the ultimate factfinder on the merits. Indeed, while providing Plaintiffs a mechanism and evidence for establishing that Defendants' alleged conduct resulted in generalized common impact and classwide harm in the form of an average percentage overcharge, Dr. Williams' multiple regression analysis has its limitations, both brought on by assumptions employed and selection of data and variables used by Dr. Williams in executing the regression analysis, and by the fact that the average percentage overcharge does not capture each individual consumer experience when purchasing a UPP-covered contact lens. However, a large average overcharge makes it more likely than not that classwide impact occurred. See [In re TFT-LCD \(Flat Panel\) Antitrust Litig., MDL No. 1827, No. M 07-1827 SI, 2012 U.S. Dist. LEXIS 21696, 2012 WL 555090, at \\*3, 5](#) (N.D. Cal. Feb. 21, 2012).

Upon rigorous analysis and review of the parties' submissions and evidentiary record, the Court determines that Plaintiffs have satisfied the predominance requirement of [Rule 23\(b\)\(3\)](#) based on competent evidence common to the class.

#### **[\*425] 2) Superiority**

The superiority requirement of [Rule 23\(b\)\(3\)](#) focuses "not on the convenience or [\*\*359] burden of a class action suit *per se*, but on the relative advantages of a class action suit over whatever other forms of litigation might be realistically available to the plaintiffs." [Klay, 382 F.3d at 1269](#). The relevant factors are: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the difficulties likely to be encountered in the management of a class action. [Fed. R. Civ. P. 23\(b\)\(3\)\(A\)-\(D\)](#). "[T]he predominance analysis . . . has a tremendous impact on the superiority analysis . . . for the simple reason that, the more common issues predominate over individual issues, the more desirable a class action lawsuit will be as a vehicle for adjudicating the plaintiffs' claims." [Klay, 382 F.3d at 1269](#).

Plaintiffs argue that "because 'there exist a large number of small or medium-sized claims against Defendants which would make individual litigation economically infeasible, a class action is a superior method of litigation.'" (Docs. 396 at 33; S-404 at 33) (quoting [\*\*360] [In re Disposable Contact Lens Litig., 170 F.R.D. at 533](#)). Plaintiffs assert that "[a] class action is likely the only viable option for Class Members because, in light of the complexity and costs of antitrust litigation, individual cases will be cost-prohibitive for most Class Members." *Id.*; (see also Docs. 611 at 28; S-649 at 28). Plaintiffs argue that submission of a trial plan is not required to establish the superiority requirement. (Docs. 611 at 29; S-649 at 29) (citing [Vega, 564 F.3d at 1279 n.20](#)).

Defendants respond that given that Plaintiffs assert a "series of vertical conspiracies stacked on top of a horizontal conspiracy that involves (1) tens of thousands of supposed co-conspirators, each of whose individual pricing methods requires examination, and (2) millions of consumers, each of whose individual purchases requires examination, making the proposed class action is "unmanageable." (Docs. 505 at 15-16; S-450 at 15-16). Defendants argue that Plaintiffs have failed to propose a feasible trial plan setting a course for trying the complex claims and defenses at issue. (Docs. 505 at 16, 54; S-540 at 16, 54 (citing [Vega, 564 F.3d at 1279 n. 20](#) and [Fed. R. Civ. P. 23](#) advisory committee note to 2003 amendment)); (see also Docs. 674 at 23; S-681 at 23). Defendants contend that Plaintiffs' horizontal claims [\[\\*\\*361\]](#) cannot be tried in a single trial because of the need to resolve "countless individual questions concerning issues such as standing and impact," and the need to apply three bodies of law - federal, Maryland and California. *Id.* at 55. They argue that the vertical claims "would have to be adjudicated separately to take account of the facts specific to the relevant Manufacturer Defendant's conduct." *Id.* at 55-56 (citing [In re Fine Paper Antitrust Litig., 685 F.2d 810, 822 \(3d Cir. 1982\)](#) (granting class certification for horizontal antitrust conspiracy claims but denying class certification for plaintiffs' vertical claims because proof would vary, depending on the identity of the merchants from whom plaintiffs made purchases)); (See also Docs. 674 at 24; S-681 at 24 (arguing that each vertical class "would require separate trials.")).

Proceeding as a class action offers economies of time, effort and expense for the litigants and for the Court. Multiple lawsuits brought by thousands of purchasers of contact lenses in multiple states "would be costly, inefficient, and would burden the court system." [Terazosin Hydrochloride, 220 F.R.D. at 700](#). "Further, as to the consumer class members, the class action device is particularly appropriate where, as here, it is necessary to 'permit the plaintiffs to pool claims which would [\[\\*\\*362\]](#) be uneconomical to litigate individually.'" *Id.* (quoting [Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809, 105 S. Ct. 2965, 86 L. Ed. 2d 628 \(1985\)](#)). "The class action fills an essential role when the plaintiffs would not have the incentive or resources to prosecute relatively small claims in individual suits, leaving the defendant free from legal accountability." [In re Checking Account Overdraft Litig., 307 F.R.D. 630, 649 \(S.D. Fla. 2015\)](#); see also e.g. [Deposit Guar. I<sup>\\*\\*4261</sup> Nat'l Bank of Jackson. Miss. v. Roper, 445 U.S. 326, 339, 100 S. Ct. 1166, 63 L. Ed. 2d 427 \(1980\)](#) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."). This case is a clear example of the category of cases where the individual members of the proposed class would lack incentive to pursue individual actions as the possible recovery would likely be far outweighed by the expense of such action. Also, where, as here, common issues predominate, it would be far more efficient to have the common issues raised by Plaintiffs' claims litigated in a single action, as opposed to thousands or more individual actions. The Court has determined that common issues predominate over individual issues, balancing the superiority requirement in favor of a class action over thousands of individual lawsuits. The applicable [\[\\*\\*363\]](#) state bodies of law are not so divergent from federal [antitrust law](#) so as to preclude a single trial on all three.

To be sure, management of the class action will present challenges, but Defendants have failed to suggest any superior alternatives. Individual claims may be too small for a separate action by each class member. "Because common questions of law and fact predominate, class-wide adjudication appropriately conserves judicial resources and advances society's interests in judicial efficiency," [Carriuolo, 823 F.3d at 989](#) (citing [Falcon, 457 U.S. at 155](#)), and class treatment is superior to other available methods for the fair and efficient adjudication of this controversy. The Court concludes that the superiority requirement of [Rule 23\(b\)\(3\)](#) has been satisfied.

#### IV. Class Definition

The Eleventh Circuit requires a class definition to "contain[ ] objective criteria that allow for class members to be identified in an administratively feasible way." [Karhu v. Vital Pharms., Inc., 621 Fed. Appx. 945, 946 \(11th Cir. 2015\)](#). It appears that the administratively feasible way for Plaintiffs to identify class putative class members is through self identification affidavits, supported by receipts, banks or credit card statements. See [Karhu, 621 Fed. Appx. at 948](#); [Delta/AirTran Baggage Fee, 317 F.R.D. at 692](#). The business records of each putative plaintiffs ECP may also provide information as [\[\\*\\*364\]](#) to each putative plaintiffs contact lens purchases. Identifying putative class members must be ministerial in nature, and more administratively manageable than multiple individual lawsuits. "The Court is cognizant of the concerns raised by self-identification, but in a case such as this, where the charge at

issue is so small that it is unlikely to induce fraudulent claims and class members can obtain objective records with relative ease that would confirm their membership in the class, those concerns are minimized." [Delta/AirTran Baggage Fee, 317 F.R.D. at 692](#). Additionally, it is unclear whether contact lens prescriptions and refills by product can be tracked through Defendant Manufacturer's business records, and traced to individual consumers. Plaintiffs will be required to support each putative class member's inclusion in the respective class with verifiable documentation to eliminate the need for "a series of mini trials" as to the threshold issue of class membership, while at the same time protecting the Defendants' due process rights. See [Karhu, 621 Fed. Appx. at 947-49](#). "[A]s the process for submitting and confirming class members' claims is further developed, the Court (and no doubt Defendants) will remain vigilant that the process be structured in [\*\*365] a manner to eliminate as much of the uncertainty as possible." [Delta/AirTran Baggage Fee, 317 F.R.D. at 692](#).

The Court also approves of the creation of subclasses proposed by Plaintiffs to address variations in state law. See [Klay, 382 F.3d at 1262](#) (observing that "class certification is appropriate where 'variations [in state law] can be effectively managed through creation of a small number of subclasses grouping the states that have similar legal doctrines.' (citation omitted)). "[T]he Court may certify multi-state classes even if different claims or issues are subject to different bodies of law that are not the same in functional content but nonetheless present a limited number of patterns that the court can manage by means of sub-classing." [Checking \[\\*427\] Account Overdraft Litig., 307 F.R.D. at 652](#) (internal quotation marks and citation omitted).

The Court determines that the following definitions provide objective criteria for ascertaining who is a member of the class, that is not unlimited, overly broad, open-ended or vague, and that feasibly can be managed.

Horizontal Class:

All persons and entities residing in the United States who made retail purchases of disposable contact lenses manufactured by Alcon, JJVC, or B&L from June 1, 2013 to the present (the "Class Period") for their own use and not for [\*\*366] resale, where the prices for such contact lenses were subject to a "Unilateral Pricing Policy" and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Class are any purchases from 1-800 Contacts of disposable contact lenses subject to B&L's Unilateral Pricing Policy, where the purchase occurred on or after July 1, 2015. Also excluded from the Class are Defendants, their parent companies, subsidiaries and affiliates, any coconspirators, all governmental entities, and any judges or justices assigned to hear any aspect of this action.

The proposed Horizontal Class consists of the following subclasses:

(1) Maryland Subclass:

All persons and entities residing in Maryland who made retail purchases of disposable contact lenses manufactured by Alcon, JJVC, or B&L from June 1, 2013 to the date the Court certifies the Class for their own use and not for resale, where the prices for such contact lenses were subject to a "Unilateral Pricing Policy" and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Class [ILLEGIBLE TEXT]

after July 1, 2015. Also excluded from the Class are Defendants, [\*\*367] their parent companies, subsidiaries and affiliates, any coconspirators, all governmental entities, and any judges or justices assigned to hear any aspect of this action.

(2) California Subclass:

All persons and entities residing in California who made retail purchases of disposable contact lenses manufactured by Alcon, JJVC, or B&L from June 1, 2013 to the date the Court certifies the Class for their own use and not for resale, where the prices for such contact lenses were subject to a "Unilateral Pricing Policy" and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Class are any purchases from 1-800 Contacts of disposable contact lenses subject to B&L's Unilateral Pricing Policy, where the purchase occurred on or after July 1, 2015. Also excluded from

the Class are Defendants, their parent companies, subsidiaries and affiliates, any coconspirators, all governmental entities, and any judges or justices assigned to hear any aspect of this action.

Vertical Classes:

(1) The JJVC Class

All persons and entities residing in the United States who made retail purchases of disposable contact lenses manufactured by JJVC from June 1, 2013 [**\*\*368**] to the date the Court certifies the Class for their own use and not for resale, where the prices for such contact lenses were subject to a "Unilateral Pricing Policy" and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Class are Defendants, their parent companies, subsidiaries, and affiliates, any co conspirators, all governmental entities, and any judges, justices, or jurors assigned to hear any aspect of this action.

(2) The Alcon Class:

All persons and entities residing in the United States who made retail purchases of disposable contact lenses manufactured by Alcon from June 1, 2013 to the date the Court certifies the Class for their own use and not for resale, where the prices for such contact lenses were subject to a "Unilateral Pricing Policy" and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded [**\*428**] from the Class are Defendants, their parent companies, subsidiaries, and affiliates, any co conspirators, all governmental entities, and any judges, justices, or jurors assigned to hear any aspect of this action.

(3) The B&L Class:

All persons and entities residing in the United [**\*\*369**] States who made retail purchases of disposable contact lenses manufactured by B&L from June 1, 2013 to the date the Court certifies the Class for their own use and not for resale, where the prices for such contact lenses were subject to a "Unilateral Pricing Policy" and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Class are any purchases from 1-800 Contacts of disposable contact lenses subject to B&L's Unilateral Pricing Policy, where the purchase occurred on or after July 1, 2015. Also excluded from the Class are Defendants, their parent companies, subsidiaries and affiliates, any co-conspirators, all governmental entities, and any judges or justices assigned to hear any aspect of this action.

See (Docs. 611-1; S-649-1); (Docs. 715 at 11; S-722 at 11).

## **V. Plaintiffs' Motion for Sanctions**

Two days before the evidentiary hearing—on July 30, 2018—Plaintiffs filed a motion seeking sanctions for the alleged destruction of evidence. (Doc. 854).<sup>5</sup> The motion alleges that Defendants JJVC and Alcon had a duty to preserve and disclose a Facebook group called "UPP Violations," which was created and administered by Dr. Alan Glazier, an [**\*\*370**] influential optometrist, sometime in 2014. Plaintiffs allege that Defendants utilized the UPP Violations group to exchange non-public information and enforce their UPPs. Plaintiffs submitted evidence documenting that Defendants were aware of the group and utilized the group as an informal means of enforcing their UPPs. Plaintiffs suggest that this evidence is consistent with their allegations of conspiracy. Although the Court has already decided to grant class certification, information contained in the motion's sealed exhibits revealed the following:

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<sup>5</sup> On September 26, 2018, the Court ordered the parties to submit a joint notice indicating their respective positions on whether the Court may consider the Plaintiffs' factual allegations regarding their motion as part of the Court's determination of Plaintiffs' motion for class certification. (Doc. 894). The parties' joint submission indicates that the parties disagree on whether Plaintiffs' factual allegations should be so considered. (Doc. 902). As the remainder of this section indicates, the Court has decided to take Plaintiffs' motion under advisement.

- That information concerning Costco's noncompliance with JJVC's UPP was posted on the UPP Violations group and that JJVC was aware that the information had been posted on the group. (Doc. 854 Exs. 60, 62);
- That Dr. Glazier, through Facebook, encouraged Defendants to address violations listed on the UPP Violations group and described the relationship between the ODs and Defendants as a "partnership." (*Id.* Ex. 52);
- That Dr. Glazier would "tag" Defendants to notify them when violations had been posted to the UPP Violations group. (*Id.* Ex. 53);
- That at least two JJVC employees were members of the UPP Violations group, (Doc. 901 Exs. 1-2), [\*\*371] and encouraged other employees to join. (Doc. 854 Ex. 56);
- That the existence of the UPP Violations group was discussed in emails exchanged between Alcon employees. (*Id.* Ex. 36);
- That the existence of the UPP Violations group was discussed in emails exchanged between CV employees. (*Id.* Ex. 73).

In October 2017, the Court ordered Dr. Glazier—who is not a party to this litigation—to produce content from another Facebook group he created and administered called "ODs on Facebook." (Doc. 687). Plaintiffs allege that the ODs on Facebook group contained numerous references to the UPP Violations group, which, Plaintiffs suggest, is when they first became aware of the second Facebook group. Plaintiffs' subsequent attempts to recover information from the UPP Violations group revealed that the group had [\*429] been deleted by Dr. Glazier during the pendency of this litigation.

Plaintiffs have provided evidence that at least two employees of JJVC were members of the UPP Violations group, (Doc. 901 Exs. 1-2), and that other JJVC employees were aware of the group's existence. (*Id.* Ex. 20; Doc. 881 Exs. 10-11). Alcon acknowledges that a number of its sales representatives had access to the group, but denies [\*\*372] that any of the employees responsible for implementing and enforcing its UPP were members of the group, or asked anyone with access to monitor or post content within the group. (Doc. 886 at 5).<sup>6</sup>

In any case, Plaintiffs contend that the deletion of the UPP Violations' contents, which are not recoverable, deprived Plaintiffs of "likely thousands of Facebook posts and comments" supporting their present claims. (Doc. 854 at 2). As a consequence, Plaintiffs request that the Court impose severe sanctions on JJVC and Alcon in the form of "(1) an adverse presumption from the Court on class certification and summary judgment; and (2) a mandatory adverse jury instruction at trial that the content of the UPP Violations group was unfavorable to Defendants." (*Id.*). Plaintiffs also seek an order compelling B&L and ABB to promptly disclose all employees who had access to the group. (*Id.*). Defendants oppose the motion on various grounds.

"[S]poliation is defined as the destruction of evidence or the significant and meaningful alteration of a document or instrument." *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1308 (11th Cir. 2003). Spoliation of electronically stored information (ESI) is now governed by *Federal Rule of Civil Procedure 37(e)*, which applies to all civil cases commenced after December 1, [\*\*373] 2015. See *Wooden v. Barringer*, No. 3:16-CV-446-MCR-GRJ, 2017 U.S. Dist. LEXIS 183170, 2017 WL 5140518, at \*3 (N.D. Fla. Nov. 6, 2017) ("[W]hen dealing with ESI, *Federal Rule of Civil Procedure 37(e)* now governs a district court's power to sanction a party for spoliation of electronically stored information."). As a consequence, *Rule 37(e)* "foreclose reliance on inherent authority to . . . determine when certain measures should be used." *Id.* (quoting *Fed. R. Civ. P. 37* Advisory Committee's Note (2015)).

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<sup>6</sup> Plaintiffs are not currently seeking sanctions against Defendants B&L and ABB. B&L denies that any of its employees monitored, posted, or otherwise participated in the UPP Violations group. (Doc. 879). ABB avers that one of its document custodians was a member of the group, but that his membership was unrelated to his employment. (Doc. 882). Plaintiffs' request the Court to order B&L and ABB to conduct further investigations into whether its employees were members of the group.

The text of [Rule 37](#) provides:

- (e) If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
  - (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
  - (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
    - (A) presume that the lost information was unfavorable to the party;
    - (B) instruct the jury that it may or must presume the information was unfavorable to the party;
    - (C) dismiss the action or enter a default judgment.

[Fed. R. Civ. P. 37](#). Thus, assuming sanctions are justified, the severity of the sanctions [\[\\*\\*374\]](#) imposed are determined by the spoliating party's culpability in depriving its opponents of the information.

The [Rule 37\(e\)](#) determination is governed by a multi-step analysis. See [Wooden, 2017 U.S. Dist. LEXIS 183170, 2017 WL 5140518, at \\*5](#). The first step asks whether "there was a duty to preserve the data in issue." *Id.* If the Court determines that no such duty exists, the analysis ends. [2017 U.S. Dist. LEXIS 183170, \[WL\] at \\*7](#). Otherwise, the Court proceeds to answer whether "reasonable steps [were] taken to avoid the loss of the data." [2017 U.S. Dist. LEXIS 183170, \[WL\] at \\*5](#). Should the Court conclude that reasonable [\[\\*430\]](#) steps were not taken, and if the lost data cannot be acquired through other means of discovery, the Court must determine whether and to what extent the loss of information prejudiced the other party. *Id.* "If so, the Court may impose 'measures no greater than necessary to cure the prejudice.'" *Id.* (quoting [Fed. R. Civ. P. 37\(e\)\(1\)](#)). However, should the Court find that the data was lost "with the intent to deprive another party of the information's use in the litigation," the Court may impose the harsher sanctions delineated in [Rule 37\(e\)\(2\)](#).

[Rule 37\(e\)](#), however, "does not apply when information is lost before a duty to preserve arises." [Fed. R. Civ. P. 37\(e\)](#) Advisory Committee's Note (2015); [Wooden, 2017 U.S. Dist. LEXIS 183170, 2017 WL 5140518, at \\*7](#) ("If the Court finds [a party] . . . did not have a duty to preserve the evidence, the analysis [\[\\*\\*375\]](#) ends.). Generally, a party's preservation duties attach only to evidence within that party's possession, custody, or control. See [Watson v. Edelen, 76 F. Supp. 3d 1332, 1343 \(N.D. Fla. 2015\)](#) ("For a spoliation sanction to apply, it is essential that the evidence in question be within the party's control, that is, the party actually destroyed or was privy to the destruction of the evidence. Further, the party having control over the evidence must have an obligation to preserve it at the time it was destroyed . . . .").

A party may nonetheless "be in control of information that it does not own or physically possess." [Selectica, Inc. v. Novatus, Inc., No. 6:13-CV-1708-ORL-40, 2015 U.S. Dist. LEXIS 30460, 2015 WL 1125051, at \\*4 \(M.D. Fla. Mar. 12, 2015\)](#). "Control has been construed broadly by the courts as the legal right, authority or practical ability to obtain the materials sought on demand" *Id.* (quoting [NASDAQ Market-Makers Antitrust Litigation, 169 F.R.D. 493, 530 \(S.D.N.Y. 1996\)](#)) (internal quotation marks omitted).

At the outset, it is important to note that Plaintiffs do not dispute that Dr. Glazier created and administered the UPP Violations group, controlled its membership, and ultimately deleted its contents. Moreover, Plaintiffs do not argue that JJVC's retention of Dr. Glazier as a paid consultant established JJVC's control over the UPP Violations group. Instead, Plaintiffs argue that because [\[\\*\\*376\]](#) certain employees of JJVC and Alcon were members of the UPP Violations group—or at least monitored the group—their resultant access established in both Defendants the "practical ability" to control and preserve the group's contents.

Plaintiffs primarily rely on the [Selectica](#) case for the contention that "when a party has access to relevant evidence of Facebook, that evidence falls within that party's 'possession, custody, or control'. . . ." (Doc. 854 at 18-19) (emphasis in original). However, [Selectica's](#) articulation of the "practical ability" test undermines the extraordinarily broad interpretation Plaintiffs advance here:

[Under the "practical ability" test], a party might control a non-party based upon their relationship. The attorney-client relationship and the corporate parent-subsidiary relationship are examples. A party may control a non-party if there is a contract empowering the party to obtain information from the non-party. Control may also exist if it is customary in the industry for the non-party to furnish the information to the party. On the other hand, if extraordinary, unethical, or illegal means are required, then there is no practical ability to obtain the information. [\*\*377]

The employer-employee relationship is one that may result in an employer party having the necessary control over information in the possession of a non-party employee. "Relationships which evidence a legal right of a party to obtain a document from nonparty include ... an employer from current employees." [Bleecker v. Standard Fire Ins. Co., 130 F. Supp. 2d 726, 739 \(E.D.N.C. 2000\)](#). This is consistent with the holdings in cases discussing the control an employer may possess over former employees. See, e.g., [Export-Import Bank of the U.S. v. Asia Pulp & Paper Co. Ltd., 233 F.R.D. 338, 341-42 \(S.D.N.Y. 2005\)](#) ("Analyzing the practical ability of corporations to obtain work-related documents from former employees, courts insist that corporations, at the very least, ask their former employees to cooperate before asserting that they have no control over documents in the former employees' possession."); [In re Folding Carton Antitrust \[\\*431\] Litig., 76 F.R.D. 420, 423 \(N.D. 111. 1977\)](#) ("In the meantime, we assume that, if defendants contact their former employees who still receive compensation from them, they will secure the requested documents and can produce them to plaintiffs.").

[2015 U.S. Dist. LEXIS 30460, \[WL\] at \\*5.](#)

Thus, inherent in the "practical ability" test is some legal right of control over the information possessed by a non-party-a right established by, for instance, the existence of an employer-employee relationship, or a legal (e.g., a contractual) entitlement to the [\*\*378] information possessed by the non-party. In other words, "practical ability" means something more than the naked ability to "access" information. See [Bleecker v. Std. Fire Ins. Co., 130 F. Supp. 2d 726, 739 \(E.D.N.C. 2000\)](#) (stating, "in order for material to be discoverable, [the] defendant must have some type of legal right to the material [the] plaintiff seeks to discover").<sup>7</sup>

Thus, access attributable to membership in a closed Facebook group would not suffice to confer Defendants a legal entitlement to information posted by non-party members within the group. And other than membership access, Plaintiffs fail to articulate any alternative basis from which the Court can conclude that any Defendant had the ability to control Dr. Glaizer, or otherwise enforce his compliance with discovery demands.<sup>8</sup>

<sup>7</sup> Bleeker's interpretation of "practical ability" as encompassing a legal right to information in the possession of a non-party has been reinforced by district courts within this Circuit. See, e.g. [Siegmund v. Bian, No. 12-62539-CIV, 2016 U.S. Dist. LEXIS 46610, 2016 WL 1359595, at \\*3 \(S.D. Fla. Apr. 6, 2016\)](#) ("[E]ven under the most expansive interpretation of 'control', the 'practical ability' to demand production must be accompanied by a similar ability to enforce compliance with that demand." (quoting [Klesch & Co. v. Liberty Media Corp., 217 F.R.D. 517, 520 \(D. Colo. 2003\)](#)); [Mamani v. Sanchez De Lozada Sanchez Bustamante, No. 07-22459-CIV, 2017 U.S. Dist. LEXIS 127818, 2017 WL 3456327, at \\*3 \(S.D. Fla. Aug. 11, 2017\)](#) ("[The plaintiff] can be compelled to produce only documents that he has the 'legal right' to obtain 'upon demand' with the 'ability to enforce compliance with that demand.'").

<sup>8</sup> Plaintiffs cite a litany of cases for the proposition that "when a party has access to relevant evidence on Facebook, that evidence falls within that party's 'possession, custody, or control' and must be preserved and/or produced." (Doc. 854 at 19). Plaintiffs' cases, however, all involve the social media posts of persons who were a party to the litigation. See [Painter v. Atwood, No. 2:12-CV-01215-JCM, 2014 U.S. Dist. LEXIS 35060, 2014 WL 1089694, at \\*4 \(D. Nev. Mar. 18, 2014\)](#) (adverse inference granted in part where the plaintiff deleted Facebook posts and pictures created and maintained by the plaintiff); [Howell v. Buckeye Ranch, Inc., No. 2:11-CV-1014, 2012 U.S. Dist. LEXIS 141368, 2012 WL 5265170, at \\*2 \(S.D. Ohio Oct. 1, 2012\)](#) (motion to compel production of relevant information contained within the plaintiff's private social media accounts granted); [Higgins v. Koch Dev. Corp., No. 3:11-CV-81-RLY-WGH, 2013 U.S. Dist. LEXIS 94139, 2013 WL 3366278, at \\*3 \(S.D. Ind. July 5, 2013\)](#) (compelling plaintiffs to produce their own Facebook posts); [Federico v. Lincoln Military Hous., LLC, 2014 U.S. Dist. LEXIS 178943, \\*18 \(E.D. Va. Dec. 31, 2014\)](#) (motion for sanctions granted in part for the plaintiffs' failure to turn over their own social media posts in timely manner).

It is also critical to note that courts routinely "decline[] to compel production of documents in the hands of one party when the material is equally available to the other party from another source." [SEC v. Strauss, No. 09 CIV. 4150 RMB/1-1BP, 2009 U.S. Dist. LEXIS 101227, 2009 WL 3459204, at \\*11 \(S.D.N.Y. Oct. 28, 2009\)](#); [Shcherbakovskiy v. Da Capo Al Fine, Ltd., 490 F.3d 130, 138 \(2d Cir. 2007\)](#) (stating, "We. [\*\*379] .. think it fairly obvious that a party also need not seek such documents from third parties if compulsory process against the third parties is available to the party seeking the documents"); [Valenzuela v. Smith, 04 Civ. 0900, 2006 U.S. Dist. LEXIS 6078, 2006 WL 403842 at \\*2 \(E.D. Cal. Feb. 16, 2006\)](#) ("Defendants . will not be compelled to produce documents that are equally available to plaintiff."); [Bleecker, 130 F. Supp. 2d at 738](#) ("When information is readily attainable through a subpoena *duces tecum*, no compelling reason exists to expand the definition of control."); [Blair v. Travelers Ins. Co., 9 F.R.D. 99, 99 \(W.D. Mo. 1949\)](#) (motion for production denied where "[n]early all the documents sought can be obtained by the plaintiff as easily as they can be obtained by the defendant").

Whether Plaintiffs were in fact aware of the UPP Violations group at the time they subpoenaed Dr. Glazier in July of 2016 is a matter of dispute. What is not in dispute, [\*432] however, is that Plaintiffs were aware, likely before the commencement of this litigation, that Dr. Glazier controlled information that they believed was relevant to the case.<sup>9</sup>

That Plaintiffs were able to subpoena Dr. Glazier-and also obtain an order from this Court enforcing that subpoena-reflects that Plaintiffs possessed sufficient means to procure the now-deleted information for themselves. [\*\*380] The conclusion is only bolstered in considering that Judge Klindt's enforcement order explicitly noted Defendants' lack of control over Dr. Glazier's ODs on Facebook group. (Dkt. 881-56 (stating, in regard to the ODs on Facebook group, "it does not appear that Defendants have in their control the majority of the information Plaintiffs seek," and "the information is appropriately sought from Dr. Glazier, as the groups administrator"). As such, it would be inappropriate to compel, much less sanction, Defendants for failing to preserve materials-materials controlled by a non-party-that Plaintiffs had the ability to obtain themselves. See [Bleecker, 130 F. Supp. 2d at 738](#) ("When information is readily attainable through a subpoena *duces tecum*, no compelling reason exists to expand the definition of control.").)

Finally, Plaintiffs contend that subpoenas issued on Defendants between October 2014 and May 2015 by New York's Attorney General triggered preservation obligations with respect to Plaintiffs. However, this argument-the "shifting duty" argument-has been considered and uniformly rejected by district courts within the Eleventh Circuit. See [In re Delta/AirTran Baggage Fee Antitrust Litig., 770 F. Supp. 2d 1299, 1308 \(N.D. Ga. 2011\)](#) (rejecting the shifting duty argument and stating, "Plaintiffs have not cited [\*\*381] any authority that would support such a sweeping and novel theory of spoliation"); [In re Abilify \(Aripiprazole\) Prods. Liab. Litig., No. 3:16-MD-2734, 2018 U.S. Dist. LEXIS 172536, 2018 WL 4856767, at \\*5 \(N.D. Fla. Oct. 5, 2018\)](#) ("The fatal flaw ... to Plaintiffs' argument concerning the DOJ investigation is that other courts addressing the same shifting duty argument have rejected it."); [Stanfill v. Talton, 851 F. Supp. 2d 1346, 1366 \(M.D. Ga. 2012\)](#) ("The Court is not aware of any decision by a court in this circuit adopting the 'shifting duty' argument urged by the Plaintiff, and on the facts here, this Court declines the opportunity to be the first."); [Point Blank Solutions, Inc. v. Toyobo Am., Inc., No. 09-61166-CIV, 2011 U.S. Dist. LEXIS 42239, 2011 WL 1456029, at \\*24 \(S.D. Fla. Apr. 5, 2011\)](#) ("The shifting duty theory is incompatible with the basic rule that a duty is owed to a specific party.").

In sum, Plaintiffs' arguments and submitted evidence, at present, do not justify the imposition of sanctions for spoliation. The Court, however, is cognizant of the fact that Plaintiffs learned of the UPP Violations group late in the case, and may not have had adequate time to sufficiently develop evidence concerning the connection between Defendants and Dr. Glazier or the UPP Violations group. For that reason, the Court will take Plaintiffs' motion for sanctions under advisement. The Court will revisit the motion [\*\*382] at trial before the jury instructions are finalized; after the parties have had further opportunities to develop the record with respect to the spoliation issue. The Court will also reopen discovery, for only 60 days, with respect to Defendants B&L and ABB for the limited purpose of investigating whether any connection existed between those Defendants and the UPP Violations group.

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<sup>9</sup> Plaintiffs' First Amended Consolidated Complaint, filed in November of 2015, refers to the "ODs on Facebook" group twice. (See Doc. 133).

## **VI. Trial Plan**

In light of the fact that seven motions for summary judgment are currently pending, (Does. 872-874, 877, 906, 908, 912), the Court will not order the parties to submit a Trial Plan until those motions are resolved. The parties are hereby notified that resolution of the motions may require the pretrial conference and trial be rescheduled for a later date.

Accordingly, it is hereby **ORDERED**:

1. Defendants' Motion to Strike Portions of the Expert Report of Dr. John L. Solow and Preclude Testimony Regarding Purported Collusion Between the Defendants, Pursuant [**\*433**] to [Fed. R. Evid. 702](#) and *Daubert* (Doc. 500, Doc. S-531) is **DENIED**.
2. Defendants' Motion to Exclude or Strike the Expert Report of Dr. Michael A. Williams Under [Fed. R. Evid. 702](#) and [Fed. R. Civ. P. 37\(c\)\(1\)](#) (Doc. 503; Doc. S-535) is **DENIED**.
3. Defendants' Motion to Exclude the Supplemental Report of Dr. [**\*\*383**] Michael A. Williams Under [Fed. R. Evid. 702](#) and *Daubert* (Doc. 693; Doc. S-720) is **DENIED**.
4. Plaintiffs' Motion for Class Certification. (Doc. 396; Doc. S-404) is **GRANTED**.
5. The Court certifies the following classes as to Plaintiffs' claims brought in Plaintiffs' Interlineation To Corrected Consolidated Class Action Complaint (Doc. 395):

### **Horizontal Class:**

All persons and entities residing in the United States who made retail purchases of disposable contact lenses manufactured by Alcon, JJVC, or B&L from June 1, 2013 to the present (the "Class Period") for their own use and not for resale, where the prices for such contact lenses were subject to a "Unilateral Pricing Policy" and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Class are any purchases from 1-800 Contacts of disposable contact lenses subject to B&L's Unilateral Pricing Policy, where the purchase occurred on or after July 1, 2015. Also excluded from the Class are Defendants, their parent companies, subsidiaries and affiliates, any coconspirators, all governmental entities, and any judges or justices assigned to hear any aspect of this action.

The proposed Horizontal Class consists [**\*\*384**] of the following subclasses:

#### **(1) Maryland Subclass:**

All persons and entities residing in Maryland who made retail purchases of disposable contact lenses manufactured by Alcon, JJVC, or B&L from June 1, 2013 to the date the Court certifies the Class for their own use and not for resale, where the prices for such contact lenses were subject to a "Unilateral Pricing Policy" and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Class are any purchases from 1-800 Contacts of disposable contact lenses subject to B&L's Unilateral Pricing Policy, where the purchase occurred on or after July 1, 2015. Also excluded from the Class are Defendants, their parent companies, subsidiaries and affiliates, any coconspirators, all governmental entities, and any judges or justices assigned to hear any aspect of this action.

#### **(2) California Subclass:**

All persons and entities residing in California who made retail purchases of disposable contact lenses manufactured by Alcon, JJVC, or B&L from June 1, 2013 to the date the Court certifies the Class for their own use and not for resale, where the prices for such contact lenses were subject to a "Unilateral [**\*\*385**] Pricing Policy" and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Class are any purchases from 1- 800 Contacts of disposable contact lenses subject to B&L's Unilateral Pricing Policy, where the purchase occurred on or after July 1, 2015. Also excluded from the Class

are Defendants, their parent companies, subsidiaries and affiliates, any coconspirators, all governmental entities, and any judges or justices assigned to hear any aspect of this action.

Vertical Classes:

(1) The JJVC Class

All persons and entities residing in the United States who made retail purchases of disposable contact lenses manufactured by JJVC from June 1, 2013 to the date the Court certifies the Class for their own use and not for resale, where the prices for such contact lenses were subject to a "Unilateral Pricing Policy" and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Class are Defendants, their parent companies, subsidiaries, and affiliates, any co-conspirators, all governmental entities, and any judges, justices, or jurors assigned to hear any aspect of this action.

(2) The Alcon Class: **[\*\*386]**

**[\*434]** All persons and entities residing in the United States who made retail purchases of disposable contact lenses manufactured by Alcon from June 1, 2013' to the date the Court certifies the Class for their own use and not for resale, where the prices for such contact lenses were subject to a "Unilateral Pricing Policy" and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Class are Defendants, their parent companies, subsidiaries, and affiliates, any co-conspirators, all governmental entities, and any judges, justices, or jurors assigned to hear any aspect of this action.

(3) The B&L Class:

All persons and entities residing in the United States who made retail purchases of disposable contact lenses manufactured by B&L from June 1, 2013 to the date the Court certifies the Class for their own use and not for resale, where the prices for such contact lenses were subject to a "Unilateral Pricing Policy" and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Class are any purchases from 1-800 Contacts of disposable contact lenses subject to B&L's Unilateral Pricing Policy, where the **[\*\*387]** purchase occurred on or after July 1, 2015. Also excluded from the Class are Defendants, their parent companies, subsidiaries and affiliates, any co- conspirators, all governmental entities, and any judges or justices assigned to hear any aspect of this action.

6. The determination of the definition of the classes is conditional and may be amended or modified prior to any decision on the merits and final judgment. See [Fed. R. Civ. P. 23\(c\)\(1\)\(C\)](#).

7. Hausfeld LLP, Robins Kaplan LLP, and Scott + Scott LLP remain appointed as class counsel.

8. The following Plaintiffs are appointed as class representatives:

Rachel Berg  
Alexis Ito  
Miriam Pardoll  
Jennifer Sineni  
Pamela Mazzarella  
Joseph Felson  
Tamara O'Brien  
Susan Gordon  
Catherine Dingle  
Elyse Ulino  
Amanda Cunha  
Sheryl Marean  
Brett Watson  
Kathleen Schirf  
Cora Beth Smith  
John Machikawa

7. Pursuant to Rule 23(c)(2)(B), Federal Rules of Civil Procedure, the parties shall confer and submit to the Court, on or before January 16, 2019, a joint proposed class notice plan and form of notice. If the parties are unable to agree on a class notice plan and form of notice, the parties shall each submit one on or before January 30, 2019, accompanied by a memorandum explaining that party's position. Each party shall respond to the other's proposed **[\*\*388]** notice plan and form of notice no later than **February 13, 2019**.

8. Plaintiffs' "Motion for Spoliation Sanctions Against Defendants Johnson & Johnson Vision Care, Inc. and Alcon Laboratories, Inc." (Doc. 854) is **TAKEN UNDER ADVISEMENT**.

9. Discovery shall be **REOPENED**, for **45 days**, with respect to Defendants B&L and ABB for the limited purpose of investigating whether any connection exists between those Defendants and Dr. Glazier and the UPP Violations group.

**DONE AND ORDERED** in Jacksonville, Florida, this 4th day of December, 2018.

/s/ Harvey E. Schlesinger

**HARVEY E. SCHLESINGER**

United States District Judge

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## **Hosp. Auth. of Metro. Gov't of Nashville v. Momenta Pharm. Inc.**

United States District Court for the Middle District of Tennessee, Nashville Division

December 5, 2018, Filed

No. 3:15-cv-01100

### **Reporter**

353 F. Supp. 3d 678 \*; 2018 U.S. Dist. LEXIS 206234 \*\*; 2018-2 Trade Cas. (CCH) P80,606

THE HOSPITAL AUTHORITY OF METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, d/b/a NASHVILLE GENERAL HOSPITAL and AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN, Plaintiffs, v. MOMENTA PHARMACEUTICALS, INC. and SANDOZ INC., Defendants.

**Prior History:** [Hosp. Auth. of Metro. Gov't v. Momenta Pharm. Inc., 2016 U.S. Dist. LEXIS 136004 \(M.D. Tenn., Sept. 29, 2016\)](#)

## **Core Terms**

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enoxaparin, state law claim, motion to dismiss, generic, allegations, amended complaint, unjust enrichment, antitrust, personal jurisdiction, injunctive, consumer protection, residents, class certification, class action, forum state, patent, courts, anticompetitive conduct, Sherman Act, intrastate, rights, statute of limitations, state law, non-resident, effects, parties, lack of personal jurisdiction, declaratory relief, overt act, damages

## **LexisNexis® Headnotes**

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Evidence > Judicial Notice > Adjudicative Facts > Public Records

### [HN1](#) [down arrow] **Adjudicative Facts, Public Records**

In addition to the allegations in the complaint, a court may also consider other materials that are integral to the complaint, are public records, or are otherwise appropriate for the taking of judicial notice.

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

Civil Procedure > Preliminary Considerations > Jurisdiction > Subject Matter Jurisdiction

### [HN2](#) [down arrow] **Motions to Dismiss, Failure to State Claim**

A motion pursuant to [Fed. R. Civ. P. 12\(b\)\(1\)](#) alleges that the court does not have subject matter jurisdiction over the claims as presented. A motion that alleges lack of standing is properly characterized as a motion to dismiss for lack of subject matter jurisdiction.

353 F. Supp. 3d 678, \*678L 2018 U.S. Dist. LEXIS 206234, \*\*206234

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Evidence > Burdens of Proof > Allocation

Constitutional Law > ... > Case or Controversy > Standing > Elements

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

### **HN3** [] Standing, Burdens of Proof

The Article III standing doctrine limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong. Standing is the threshold question in every federal case. In order to establish Article III standing, the plaintiff must have suffered an injury in fact that is fairly traceable to the challenged conduct of the defendants and that is likely to be redressed by a favorable judicial decision. The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing those elements. Where a case is at the pleading stage, the plaintiff must clearly allege facts demonstrating each element of standing.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Constitutional Law > ... > Case or Controversy > Standing > Elements

Evidence > Burdens of Proof > Allocation

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

### **HN4** [] Standing, Burdens of Proof

To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical. For an injury to be particularized, it must affect the plaintiff in a distinct way. A concrete injury must be de facto, in other words, it must actually exist. Moreover, although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes--that the injury is certainly impending.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Constitutional Law > ... > Case or Controversy > Standing > Elements

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

Civil Procedure > Judgments > Declaratory Judgments

Civil Procedure > Remedies > Injunctions

### **HN5** [] Standing, Burdens of Proof

Individuals who seek only injunctive or declaratory relief, must nonetheless show that they are under threat of suffering an injury in fact. The threat of a prospective injury must be real and immediate and not premised upon the existence of past injuries alone. It is the reality of the threat not the plaintiff's subjective apprehensions the emotional consequences of a prior act simply are not a sufficient basis for an injunction absent a real and immediate threat of future injury by the defendant.

Civil Procedure > Special Proceedings > Class Actions > Class Action Fairness Act

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

#### **HN6** [down] **Class Actions, Class Action Fairness Act**

The Class Action Fairness Act, [28 U.S.C.S. § 1711 et seq.](#), vests original jurisdiction in the district courts of the United States for any multi-state class action where the aggregate amount in controversy exceeds \$5 million and where the citizenship of any member of the class of plaintiffs is different from that of any defendant.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > In Personam Actions

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

#### **HN7** [down] **In Rem & Personal Jurisdiction, In Personam Actions**

[Fed. R. Civ. P. 12\(b\)\(2\)](#) allows a defendant to file a motion to dismiss for lack of personal jurisdiction.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

#### **HN8** [down] **In Personam Actions, Due Process**

The [Due Process Clause of the Fourteenth Amendment](#) constrains a State's authority to bind a nonresident defendant to a judgment of its courts, and, thus, in order for the court to have personal jurisdiction over plaintiffs, plaintiffs must show that defendants have or had)sufficient minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Minimum contacts exist where a defendant purposefully avails itself of the privilege of conducting activities within the forum state.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > In Personam Actions

Evidence > Burdens of Proof > Allocation

#### **HN9** [down] **In Rem & Personal Jurisdiction, In Personam Actions**

A plaintiff has the burden of showing personal jurisdiction but that burden is relatively slight where the court rules without conducting an evidentiary hearing. To defeat dismissal in that context, a plaintiff need make only a *prima facie* showing that personal jurisdiction exists. Nevertheless, in response to a motion to dismiss, the plaintiff may not stand on his pleadings, but must show the specific facts demonstrating that the court has jurisdiction.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Long Arm Jurisdiction

#### **HN10** [down] **In Personam Actions, Due Process**

Tennessee's long-arm statute has been interpreted to be coterminous with the limits on personal jurisdiction imposed by the Due Process Clause of the United States Constitution, and, thus, the jurisdictional limits of Tennessee law and of federal constitutional law of due process are identical. Because of that, the court need only determine whether the assertion of personal jurisdiction violates constitutional due process.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

#### [HN11](#)[] In Personam Actions, Substantial Contacts

Personal jurisdiction maybe found either generally or specifically. General jurisdiction depends on continuous and systematic contact with the forum state, so that the courts may exercise jurisdiction over any claims a plaintiff may bring against the defendant. Specific jurisdiction, on the other hand, grants jurisdiction only to the extent that a claim arises out of or relates to a defendant's contacts in the forum state.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

#### [HN12](#)[] In Personam Actions, Purposeful Availment

The United States Court of Appeals for the Sixth Circuit has identified three criteria for specific jurisdiction: First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. If any of the three requirements is not met, personal jurisdiction may not be invoked. That is, each criterion represents an independent requirement, and failure to meet any one of the three means that personal jurisdiction may not be invoked. The court must have personal jurisdiction over each defendant and as to each asserted claim.

Civil Procedure > Special Proceedings > Class Actions

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > In Personam Actions

#### [HN13](#)[] Special Proceedings, Class Actions

In the federal class action context, the cases have universally held that in a putative class action (1) courts are only concerned with the jurisdictional obligations of the named plaintiffs and (2) unnamed class members are irrelevant to the question of specific jurisdiction.

Antitrust & Trade Law > Sherman Act

Governments > Legislation > Statute of Limitations > Time Limitations

#### [HN14](#)[] Antitrust & Trade Law, Sherman Act

In an antitrust lawsuit, the cause of action accrues and the accompanying limitations period commences each time a defendant commits an act that injures the plaintiff's business. For statute of limitations purposes the focus is on the timing of the causes of injury, i.e. the defendant's overt acts, as opposed to the effects of the overt acts. A continuing antitrust violation is one in which the plaintiff's interests are repeatedly invaded.

Antitrust & Trade Law > Sherman Act

Governments > Legislation > Statute of Limitations > Time Limitations

#### [HN15](#) [blue icon] Antitrust & Trade Law, Sherman Act

When a plaintiff alleges a continuing antitrust violation, the cause of action accrues each time a plaintiff is injured by an act of defendants. However, even in the event of an alleged continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act. Such an overt act involves a new and independent act that is not merely a reaffirmation of a previous act that inflicts new and accumulating injury on the plaintiff.

Antitrust & Trade Law > Sherman Act

Governments > Legislation > Statute of Limitations > Time Limitations

#### [HN16](#) [blue icon] Antitrust & Trade Law, Sherman Act

**Antitrust law** provides that, in the case of a continuing violation say, a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and that injures the plaintiff, e.g., each sale to the plaintiff, starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.

Antitrust & Trade Law > Sherman Act > Claims

#### [HN17](#) [blue icon] Sherman Act, Claims

The intrastate effects requirement is met at the pleading stage by a plaintiff's allegations claiming that the anticompetitive conduct caused supracompetitive price effects in the relevant jurisdictions.

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

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

#### [HN18](#) [blue icon] Deceptive & Unfair Trade Practices, State Regulation

Only citizens or residents of Utah may recover under its **antitrust law**. [Utah Code Ann. § 76-10-3109\(1\)\(a\)](#). Allegations that members of the putative class presumably include Utah citizens and residents are sufficient to overcome a motion to dismiss for failure to state a claim.

Antitrust & Trade Law > Sherman Act > Claims

#### [HN19](#) [blue icon] Sherman Act, Claims

With respect unjust enrichment claims in an antitrust case, indirect purchasers confer a benefit only on others in the chain of distribution from whom they purchase.

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**Judges:** WAVERLY D. CRENSHAW, JR., CHIEF UNITED STATES DISTRICT JUDGE.

**Opinion by:** WAVERLY D. CRENSHAW, JR.

## Opinion

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### **[\*683] MEMORANDUM OPINION**

Pending before the Court is Momenta Pharmaceuticals, Inc. ("Momenta") and Sandoz Inc.'s ("Sandoz") (collectively "Defendants") Motion to Dismiss for Lack of Jurisdiction Under [Fed. R. Civ. P. 12\(b\)\(2\)](#) (Lack of Personal Jurisdiction), Motion to Dismiss for Lack of Jurisdiction Under [Fed. R. Civ. P. 12\(b\)\(1\)](#) (Lack of Subject-Matter Jurisdiction), and Motion to Dismiss for Failure to State a Claim Under [Fed. R. Civ. P. 12\(b\)\(6\)](#). (Doc. Nos. 193, 195, **[\*\*3]** 197.) Nashville General Hospital ("NGH") and American Federation of State, County and Municipal Employees District Council 37 Health & Security Plan ("DC 37") (collectively "Plaintiffs") have filed responses to Defendants' motions (Doc. Nos. 208, 209, 210), to which Defendants have replied (Doc. Nos. 213, 214, 215). For the reasons below, the Court will (1) grant Defendants' [Rule 12\(b\)\(1\)](#) motion to dismiss; (2) deny Defendants' [Rule 12\(b\)\(2\)](#) motion; and (3) grant in part and deny in part Defendants' [Rule 12\(b\)\(6\)](#) motion.

### **[\*684] A. Procedural Background**

On October 14, 2015, NGH filed its initial complaint against the Defendants, alleging four separate counts under the [Sherman Antitrust Act \("Sherman Act"\)](#). (Doc. No. 1.) NGH sought damages, as well as declaratory and injunctive relief. (*Id.* at 27.) NGH brought its claims on behalf of itself and a nationwide class of persons and entities, pursuant to the [Class Action Fairness Act of 2005 \("CAFA"\)](#) and [Fed. R. Civ. P. 23\(a\)](#) and [\(b\)](#). (*Id.* at 6, 21.) As explained in more detail in Section B [infra](#), the alleged Sherman Act violations centered on the role that Defendants played in a conspiracy to monopolize the production and distribution of enoxaparin, a generic version of the drug Lovenox®. (*Id.* at 4-23.)

In response to the complaint, Defendants [\*\*4] filed a motion to transfer the case to the District of Massachusetts and a motion to dismiss. (Doc. Nos. 65, 68.) Momenta additionally filed a separate motion to dismiss or transfer for improper venue. (Doc. No. 62.) On September 29, 2016, Magistrate Judge Barbara Holmes entered a Report and Recommendation recommending that the motions be denied. (Doc. No. 114.) Defendants filed joint and separate objections to the Report and Recommendation. (Doc. Nos. 117, 119.) On March 21, 2017, the Court issued a Memorandum Opinion that adopted in part and declined to adopt in part the Report and Recommendation. (Doc. No. 134.) The Court dismissed NGH's Sherman Act claims, to the extent that NGH sought damages in connection with those claims. (*Id.* at 8-14.) The Court found that NGH did not have standing to seek damages for its Sherman Act claims under the "indirect purchaser rule." (*Id.*) However, NGH's Sherman Act claims were permitted to proceed on declaratory and injunctive theories of relief. (*Id.* at 16.)

Thereafter, NGH filed a motion for leave to file an amended complaint. (Doc. No. 140.) The amended complaint contained three primary changes: (1) the addition of DC 37 as a new representative plaintiff; (2) the [\*\*5] addition of various state antitrust and consumer protection claims; and (3) the addition of new substantive allegations pertaining to Defendants' alleged anticompetitive conduct. (Doc. No. 141 at 5.) Defendants filed a response in opposition. (Doc. No. 148.) Ultimately, Magistrate Judge Holmes granted Plaintiffs' motion for leave to file an amended complaint, and Plaintiffs filed their amended complaint on December 21, 2017. (Doc. No. 191.) Defendants then filed the instant motions to dismiss.

#### B. Factual Background

NGH is a metropolitan charity hospital that purchases certain drugs it administers, including the generic anticoagulant enoxaparin. (Doc. No. 191 at 6-7.) DC 37 is a non-profit health and welfare benefit plan covering public sector employees, retirees and their families. (*Id.*) Plaintiffs allege that they have, and will continue to, indirectly purchase and/or provide reimbursement for Lovenox® and enoxaparin. (*Id.* at 7-8.)

The drug at issue, enoxaparin, is used in the prevention and treatment of deep vein thrombosis and in the treatment of heart attacks. (*Id.* at 10.) Sanofi-Aventis ("Aventis"), a non-party to this lawsuit, brought enoxaparin to market in the United States under the brand name [\*\*6] Lovenox® and held a patent on the drug, which was subsequently held to be unenforceable in 2007. (*Id.* at 10-11.)

However, Momenta is the assignee of a patent (the "886 Patent") for a chemical process used to test the quality of enoxaparin ("Method <207>"). (*Id.* at 13.) In 2003, Momenta entered into a collaboration [\*\*685] agreement (the "Collaboration Agreement") with Sandoz, whereby Sandoz eventually began manufacturing and selling generic enoxaparin. (*Id.* at 11-14.) The Collaboration Agreement provided for profit-sharing between Momenta and Sandoz, with regard to Sandoz's sales of its generic enoxaparin, so long as Defendants remained the sole source of generic enoxaparin in the United States. (*Id.* at 13.) Further, the Collaboration Agreement provided for Momenta to receive "milestone payments" if Sandoz remained the sole supplier of generic enoxaparin. (*Id.*) Essentially, the Collaboration Agreement provided Momenta with a powerful incentive to use whatever rights it had to prevent other parties from entering the generic enoxaparin market.

By 2007, Aventis had requested that the United States Pharmacopeial Convention ("USP") adopt criteria for enoxaparin that included a standardized test to assure that enoxaparin produced by drug companies in [\*\*7] the United States met chemical criteria approved by the FDA.<sup>1</sup> (*Id.* at 16.) Aventis's proposed method for testing enoxaparin was Method <207>. (*Id.*) At that time, Aventis had a pending patent application for Method <207>. (*Id.* at 17.) Defendants, who participated in the relevant USP review panel, objected to Aventis having a patent that covered a standardized USP test, contending that the test, once adopted, should be free for anyone to use. (*Id.*) After discussions with USP, Aventis agreed to abandon its patent application. (*Id.* at 18.) However, unbeknownst to the USP panel, Momenta had its own patent application pending—the 886 Patent—that, when granted, would give

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<sup>1</sup> The USP is a scientific nonprofit organization that sets standards for identity, strength, quality, and purity of medicines, food ingredients, and dietary supplements that are manufactured, distributed, and consumed worldwide. (*Id.* at 14.) USP standards are enforceable as binding by the United States Food and Drug Administration ("FDA"). [21 U.S.C. § 351\(b\)](#).

Momenta patent rights that could be asserted against third parties that used Method <207>. (*Id.* at 18-19.) In December 2009, the USP approved and adopted Method <207> as the standardized test to assure enoxaparin quality, and the 886 Patent was issued shortly thereafter. (*Id.* at 13, 19.) Plaintiffs allege that, had Defendants disclosed their own application for the 886 Patent, the USP would have either required Momenta to abandon its patent rights, as it did with Aventis, or chosen an alternative test that would not have been subject to patent protection. (*Id.* at 19.)

Defendants became the first [\*\*8] entities authorized by the FDA to produce generic enoxaparin. (*Id.* at 20.) Thereafter, Amphastar Pharmaceuticals, Inc. ("Amphastar"), a non-party to this case, received FDA approval to sell generic enoxaparin on September 19, 2011. (*Id.* at 21.) Upon approval, the FDA instructed Amphastar to use the USP compendium for enoxaparin, including Method <207>. (*Id.*) Two days later, Defendants sued Amphastar in the District of Massachusetts, contending that it was essentially illegal for Amphastar to comply with Method <207> and produce generic enoxaparin because it could not do so without infringing on the 886 Patent. (*Id.*) After filing their complaint, Defendants obtained a temporary restraining order and preliminary injunction preventing Amphastar from selling enoxaparin. (*Id.* at 22.) However, the U.S. Court of Appeals for the Federal Circuit stayed the preliminary injunction in January 2012 and vacated it in August 2012. (*Id.*)

In July 2013, the U.S. District Court for the District of Massachusetts granted Amphastar's motion for summary judgment, [\*686] finding that Amphastar did not infringe on the asserted claims of the 886 Patent. (*Id.* at 22-23.) Defendants appealed the district court's order, and the U.S. Court of Appeals for the [\*\*9] First Circuit vacated the district court's grant of summary judgment. (*Id.* at 23.) In July 2017, a jury found that Momenta's 886 Patent was invalid for lack of enablement and lack of written description. See [Momenta Pharm., Inc. v. Amphastar Pharm., Inc., No. 1:11-cv-11681-NMG, Doc. No. 1081, 2017 U.S. Dist. LEXIS 113713 \(D. Mass. July 21, 2017\)](#) (jury verdict in favor of defendants).<sup>2</sup> The district court accepted post-trial briefing and, on February 7, 2018, issued its post-trial orders, upholding the jury's verdict. See [Momenta Pharmaceuticals, Inc., Doc. Nos. 1134, 1135, 1136, 1137, 1138, 1139, 1149](#). Defendants have sought an appeal of this order before the Federal Circuit. See [Momenta Pharm., Inc. v. Amphastar Pharm., Inc., Case No. 18-740, Doc. No. 1 \(Fed. Cir. Mar. 29, 2018\)](#) (notice of appeal).

Plaintiffs, in their Amended Complaint, assert four counts under the Sherman Act, seeking declaratory and injunctive relief. (Doc. No. 191 at 30-35.) Plaintiffs allege that Defendants' anticompetitive conduct "is continuing and will continue unless enjoined by the Court." (*Id.*) Plaintiffs also claim, on behalf of themselves and members of the putative class, a host of state violations, pursuant to those states' antitrust, consumer [\*\*10] protection, and unjust enrichment laws. (*Id.* at 35-73.)

### C. Defendants' Motion to Dismiss Under [Federal Rule Civil Procedure 12\(b\)\(1\)](#)

Defendants first filed a Motion to Dismiss Under [Federal Rule of Civil Procedure 12\(b\)\(1\)](#) (Lack of Subject Matter Jurisdiction). (Doc. No. 193.) Defendants' primary argument is that Plaintiffs lack Article III standing to pursue their Sherman Act claims for injunctive and declaratory relief. (Doc. No. 196 at 10-13.) Defendants contend that Plaintiffs sole sought-after relief—permanent injunction of Defendants from asserting their rights in the 886 Patent against other potential entrants in the generic enoxaparin marketplace—would require this Court to prohibit future, hypothetical conduct. (*Id.* at 13.) Moreover, Defendants maintain that (1) it has been more than six years since they have sought to use the 886 Patent to bar others from entering the generic enoxaparin market; and (2) even if they wished to assert their 886 Patent rights to engage in anticompetitive conduct, the litigation in the District of Massachusetts prevents them from doing so. (*Id.* at 11-13.) Accordingly, Defendants argue that the Amended Complaint does not allege facts showing a concrete threat of imminent harm, and, therefore, Plaintiffs fail to present the Court with a justiciable Article [\*\*11] III case or controversy. (*Id.* at 13.)

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<sup>2</sup>The Court takes judicial notice of the District of Massachusetts proceedings, as those proceedings are public record and integral to the Amended Complaint. See [Campbell v. Nationstar Mortg., 611 F. App'x 288, 291 \(6th Cir. 2011\)](#) (HN1[↑]) "In addition to the allegations in the complaint, [the Court] may also consider other materials that are integral to the complaint, are public records, or are otherwise appropriate for the taking of judicial notice.").

## 1. Applicable Law

**HN2** [↑] A motion pursuant to [Federal Rule of Civil Procedure 12\(b\)\(1\)](#) alleges that the Court does not have subject matter jurisdiction over the claims as presented. [Fed. R. Civ. P. 12\(b\)\(1\)](#). A motion that alleges lack of standing is properly characterized as a motion to dismiss for lack of subject matter jurisdiction. See [Forest City Residential Mgmt., Inc. ex rel. Plymouth \[\\*687\] Square Ltd. Dividend Housing Ass'n v. Beasley](#), 71 F. Supp. 3d 715, 722 (E.D. Mich. 2014) (citing [Stalley v. Methodist Healthcare](#), 517 F.3d 911, 916 (6th Cir. 2008)).

**HN3** [↑] The Article III standing doctrine limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong. [Spokeo, Inc. v. Robins](#), 136 S.Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016). Standing is the threshold question in every federal case. [Warth v. Seldin](#), 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). In order to establish Article III standing, the plaintiff must have (1) suffered an injury in fact; (2) that is fairly traceable to the challenged conduct of the defendants; and (3) that is likely to be redressed by a favorable judicial decision. [Spokeo](#), 136 S.Ct. at 1548. The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements. [FW/PBS, Inc. v. Dallas](#), 493 U.S. 215, 231, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990). Where, as here, a case is at the pleading stage, the plaintiff must "clearly . . . allege facts demonstrating" each element of standing. [Warth](#), 422 U.S. at 518.

**HN4** [↑] To establish injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural [\*\*12] or hypothetical." [Lujan v. Defs. of Wildlife](#), 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). For an injury to be particularized, it must affect the plaintiff in a distinct way. [Whitmore v. Arkansas](#), 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990). A concrete injury must be "de facto," in other words, it must actually exist. [Spokeo](#), 136 S. Ct. at 1548. Moreover, "although 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is 'certainly impending.'" [Lujan](#), 504 U.S. at 564 n.2 (citing [Whitmore](#), 495 U.S. 149, 158, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (emphasis in original)).

At issue in this case is whether Plaintiffs have sufficiently alleged the injury-in-fact element. **HN5** [↑] Individuals who, like Plaintiffs, seek only injunctive or declaratory relief, must nonetheless show that they are under threat of suffering an injury in fact. [Summers v. Earth Island Inst.](#), 555 U.S. 488, 493, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009) (citation omitted). The "threat of a prospective injury must be real and immediate and not premised upon the existence of past injuries alone." [Gaylor v. Hamilton Crossing CMBS](#), 582 F. App'x 576, 579 (6th Cir. 2014) (citing [City of Los Angeles v. Lyons](#), 461 U.S. 95, 102-03, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)). "It is the reality of the threat . . . not the plaintiff's subjective apprehensions . . . the emotional consequences of a prior act simply are not a sufficient basis for an injunction absent a real and immediate threat of future injury by the defendant." [Lyons](#), 461 U.S. at 107 n. 8.

## 2. Application to Plaintiffs' Sherman Act Claims

Plaintiffs, [\*\*13] in their Amended Complaint, allege that Defendants' anticompetitive conduct "is continuing and will continue unless enjoined by the Court." (Doc. No. 191 at 31-35.) As set out in greater detail in Plaintiffs' response to Defendants' [Rule 12\(b\)\(1\)](#) motion, Plaintiffs allege that they and the putative class were harmed beginning in September 2011 by paying supracompetitive prices resulting from Defendants' efforts to exclude Amphastar and other potential entrants from the generic enoxaparin market. (Doc. No. 208 at 13.) Plaintiffs argue that, because the Amended [\*688] Complaint alleges that the harm to them and the putative class is "ongoing," they have standing to pursue injunctive and declaratory relief. (*Id.*) Plaintiffs contend that, until there is no possibility that the 886 Patent will be used to exclude competitors from the market—for example, through a permanent injunction barring Defendants from enforcing it (the relief Plaintiffs seek)—Plaintiffs will continue to be threatened with the prospect of future injury and have standing to seek injunctive relief. (*Id.* at 14.)

Here, the Court concludes that Plaintiffs have not made a sufficient threshold demonstration that they have Article III standing to pursue [\*\*14] their Sherman Act claims for injunctive and declaratory relief.<sup>3</sup> In this particular case, Plaintiffs, pursuing only injunctive and declaratory relief, fail to show that they are under threat of suffering a prospective injury that is "real and immediate." *Summers, 555 U.S. at 493* (emphasis added). To be sure, Plaintiffs have detailed a host of factual allegations regarding prior injuries that Defendants have allegedly inflicted. (See Doc. No. 191 at 4-30.) However, these prior injuries are insufficient to demonstrate the threat of an impending future injury. *Lyons, 461 U.S. at 102-03.*

Essentially, Plaintiffs' prospective injury theory is that (1) Defendants' ongoing appeal of their 886 Patent rights before the Federal Circuit might be successful; (2) this successful appeal might result in Amphastar, or other drug companies, being prevented from participating in the generic enoxaparin market; (3) if Defendants decide to enforce their regained 886 Patent rights. (Doc. No. 208 at 14.) Thus, Plaintiffs rely on a hypothetical chain of events, any of which may not occur. This is not "real and immediate" nor "certainly impending." *Lujan, 504 U.S. at 564 n.2; Lyons, 461 U.S. at 102-03.* To be clear, Defendants, as a result of the District of Massachusetts litigation, cannot simply restart [\*\*15] the alleged anticompetitive conduct through the assertion of their presently-invalid 886 Patent rights. The stopgap created by the District of Massachusetts litigation necessarily limits the Plaintiffs' ability to demonstrate that there is a real or immediate threat of prospective injury. Accordingly, because Plaintiffs' theory of prospective harm relies on a string of actions, the occurrence of any of which is speculative, its Sherman Act claims do not reach the level of imminency required to confer standing on a plaintiff seeking injunctive and declaratory relief in federal court. The Court will grant Defendants' *Rule 12(b)(1)* motion to dismiss, and Plaintiffs' Sherman Acts claims will be dismissed.

#### D. Defendants' Motion to Dismiss Pursuant to *Federal Rule Civil Procedure 12(b)(2)*

In their second motion to dismiss, Defendants contend that this Court lacks personal jurisdiction over them regarding Plaintiffs' remaining state law claims.<sup>4</sup> [\*689] (Doc. No. 193.) Defendants' argument primarily relies on the Supreme Court's recent decision in *Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 198 L. Ed. 2d 395 (2017).* (Doc. No. 194 at 9-14.) Defendants contend that, under the holding in *Bristol-Myers*, courts may not exercise personal jurisdiction over non-resident defendants for claims that arise outside the forum state. [\*\*16] (*Id.* at 9.) Defendants assert that (1) they are both non-residents of Tennessee; (2) Plaintiffs' state law claims, brought under the laws of 30 non-Tennessee jurisdictions, necessarily arose out of purchase and reimbursement activity that occurred outside Tennessee; and, consequently (3) the Court lacks jurisdiction to hear those claims. (*Id.* at 11-14.) Plaintiffs respond that (1) Sandoz consented to general personal jurisdiction in Tennessee by registering an agent for service of process in Tennessee; (2) *Bristol-Myers* does not apply to the instant class action; and (3) specific personal jurisdiction exists over the Defendants for all of the state law claims. (See Doc. No. 209.)

##### 1. Applicable Law

**HN7** [↑] *Federal Rule of Civil Procedure 12(b)(2)* allows a defendant to file a motion to dismiss for lack of personal jurisdiction. **HN8** [↑] "The *Due Process Clause of the Fourteenth Amendment* constrains a State's authority to bind a nonresident defendant to a judgment of its courts," *Walden v. Fiore, 571 U.S. 277, 134 S. Ct. 1115, 1121, 188 L.*

<sup>3</sup> As a preliminary matter, Plaintiffs argue that Defendants' *Rule 12(b)(1)* motion confuses jurisdictional and merits-based issues. (Doc. No. 208 at 9-10.) However, the Court is convinced that Defendants' *Rule 12(b)(1)* motion properly raises issues regarding Article III standing. Defendants do not argue that Plaintiffs have failed to satisfy certain statutory elements of federal antitrust law, rather, they raise a facial challenge to Plaintiffs' Article III standing to pursue the Sherman Act claims for injunctive and declaratory relief. (See Doc. No. 196.)

<sup>4</sup> The Court retains subject matter jurisdiction over Plaintiffs' state law claims pursuant to **HN6** [↑] the *Class Action Fairness Act, 28 U.S.C. §§ 1711, et seq.*, which vests original jurisdiction in the district courts of the United States for any multi-state class action where the aggregate amount in controversy exceeds \$5 million and where the citizenship of any member of the class of plaintiffs is different from that of any defendant. Accordingly, the Court proceeds to consider whether it has personal jurisdiction over the Defendants' with regard to Plaintiffs' remaining state law claims.

Ed. 2d 12 (2014), and, thus, in order for the Court to have personal jurisdiction over Defendants, Plaintiffs must show that Defendants have (or had) sufficient minimum contacts with Tennessee such that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>5</sup> International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945). Minimum contacts exist where a defendant [\*\*17] purposefully avails itself of the privilege of conducting activities within the forum state.<sup>6</sup> Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

**HN11**[↑] "Personal jurisdiction maybe found either generally or specifically." Miller, 694 F.3d at 678 (quoting Air Prods. & Controls, Inc., 503 F.3d at 549-50). "General jurisdiction depends on continuous and systematic contact with the forum state, so [\*690] that the courts may exercise jurisdiction over any claims a plaintiff may bring against the defendant." Id. at 678-79 (quoting Kerry Steel, Inc. v. Paragon Indus., Inc., 106 F.3d 147, 149 (6th Cir. 1997)). "Specific jurisdiction, on the other hand, grants jurisdiction only to the extent that a claim arises out of or relates to a defendant's contacts in the forum state." Id.

## 2. Specific Personal Jurisdiction

Plaintiffs argue that Defendants are both subject to specific personal jurisdiction and, with respect to Sandoz, general personal jurisdiction in Tennessee. Because the Court finds that the Defendants, and their state law claims, are subject to specific personal jurisdiction, the Court does not address any other arguments. As noted, specific jurisdiction deals with a Defendant's contacts with the forum state relating to the claims at issue. **HN12**[↑] The Sixth Circuit has identified three criteria for specific jurisdiction:

First, the defendant must purposefully avail [\*\*18] himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

AlixPartners, LLP v. Brewington, 836 F.3d 543, 549-50 (6th Cir. 2016) (quoting Air Prods., 503 F.3d at 550). "If any of the three requirements is not met, personal jurisdiction may not be invoked." Miller, 694 F.3d at 680. That is, "each criterion represents an independent requirement, and failure to meet any one of the three means that personal jurisdiction may not be invoked." LAK Inc. v Deer Creek Enters., 885 F.2d 1293, 1303 (6th Cir. 1989). The court must have personal jurisdiction over each defendant and as to each asserted claim. Bd. of Forensic Document Exam'rs, Inc. v. ABA, No. 16-cv-2641, 2017 U.S. Dist. LEXIS 18806, 2017 WL 549031, at \*3 (W.D. Tenn. Feb. 9, 2017) (citation omitted).

Defendants contend that DC 37 and NGH assert putative class action claims as non-Tennessee residents, on behalf of non-Tennessee residents, and under non-Tennessee laws, based on enoxaparin purchases made outside Tennessee. (Doc. No. 194 at 9.) Indeed, Plaintiffs do assert 69 state-law claims under the laws of 30 jurisdictions.

<sup>5</sup> **HN9**[↑] Plaintiffs have the burden of showing personal jurisdiction but "that burden is 'relatively slight' where, as here, the . . . court rules without conducting an evidentiary hearing." MAG IAS Holdings, Inc. v. Schmückle, 854 F.3d 894, 899 (6th Cir. 2017) (citing Air Prods & Controls Inc. v. Safetech Int'l Inc., 503 F.3d 544, 549 (6th Cir. 2007) (quotation omitted)). "To defeat dismissal in this context, [Plaintiffs] need make only a *prima facie* showing that personal jurisdiction exists." Id. Nevertheless, "[i]n response to a motion to dismiss, the plaintiff may not stand on his pleadings, but must show the specific facts demonstrating that the court has jurisdiction." Miller v. AXA Winterthur Ins. Co., 694 F.3d 675, 678 (6th Cir. 2012) (citing Theunissen v. Matthews, 935 F.2d 1454, 1458 (6th Cir. 1991)).

<sup>6</sup> **HN10**[↑] "Tennessee's long-arm statute has been interpreted to be 'coterminous with the limits on personal jurisdiction imposed' by the Due Process Clause of the United States Constitution," and, thus, "'the jurisdictional limits of Tennessee law and of federal constitutional law of due process are identical.'" Intera Corp. v. Henderson, 428 F.3d 605, 616 (6th Cir. 2005) (citation omitted). Because of that, "the court 'need only determine whether the assertion of personal jurisdiction violates constitutional due process.'" Id. (citation omitted).

(Doc. No. 191 at 35-73.) Defendants argue that, [\[\\*\\*19\]](#) under [Bristol-Myers](#), this Courts lacks jurisdiction to hear those non-Tennessee state law claims. (Doc. No. 194 at 11-14.)

In [Bristol-Myers](#), a group of plaintiffs, the majority of which were not California residents, filed eight separate complaints in California Superior Court, alleging that the drug Plavix had damaged their health. See [137 S. Ct. at 1778](#). In holding that the California Superior Court lacked jurisdiction over the claims brought by those non-resident plaintiffs, the Supreme Court explained that "there must be an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State." [Id. at 1780](#). The Supreme Court noted that the non-residents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California. [Id. at 1781](#). Neither the existence of regular in-state sales, nor the fact that other plaintiffs were prescribed, obtained and ingested Plavix in California, was enough to confer jurisdiction over the non-resident claims. [Id.](#) The Supreme Court stressed that "[w]hat is needed—and what is missing here—is a connection between the forum and [\[\\*\\*20\]](#) the specific [\[\\*691\]](#) claims at issue." [Id.](#) However, whether [Bristol-Myers](#) extends to class actions, like the instant case, is an open question. See [id. at 1789 n. 4](#) (Sotomayor, J., dissenting) ("The Court today does not confront the question of whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there."); see also [Chavez v. Church & Dwight Co., Inc., No. 17-C-1948, 2018 U.S. Dist. LEXIS 82642, 2018 WL 2238191, at \\*10 \(N.D. Ill. May 16, 2018\)](#) ("Whether [Bristol-Myers](#) extends to class actions is a question that has divided courts across the country."); [Molock v. Whole Foods Mkt., Inc., 317 F. Supp. 3d 1, 5 \(D.D.C. 2018\)](#) ("There are only district court cases, and among them there is a near even split on the question.").

In applying [Bristol-Myers](#) to the instant action, the Court first notes that no Court of Appeals has addressed this issue. Second, although district courts are divided on whether [Bristol-Myers](#) applies [HN13](#) in the federal class action context, the cases have "universally held that in a putative class action (1) courts are only concerned with the jurisdictional obligations of the named plaintiffs; and (2) unnamed class members are irrelevant to the question of specific jurisdiction." See [Chernus v. Logitech, Inc., No. 17-673-FLW, 2018 U.S. Dist. LEXIS 70784, 2018 WL 1981481, at \\*7 \(D. N.J. April 27, 2018\)](#). NGH, as a Tennessee resident, purchased [\[\\*\\*21\]](#) its enoxaparin in Tennessee, and, therefore, there is a sufficient connection between "the forum [Tennessee]" and the "underlying controversy [the sale of generic enoxaparin]" that "takes place in the forum state." See [id. at 1780](#). Although there are no allegations in the Amended Complaint regarding where, or from whom, DC 37 purchased its enoxaparin, DC 37 has alleged that it indirectly purchased enoxaparin that was intended for consumption by its members, who reside in multiple states, including Tennessee. (Doc. No. 191 at 7-8.) The Court finds that DC 37's allegation regarding its indirect purchase of enoxaparin is sufficient to confer specific personal jurisdiction over the Tennessee state law claims, especially considering the "relatively slight" burden it faces here. See [MAG IAS Holdings, Inc., 854 F.3d at 899](#). Unlike in [Bristol-Myers](#), here, DC 37 can show an "affiliation between the forum and the underlying controversy" sufficient to confer specific personal jurisdiction because the indirectly purchased enoxaparin was intended for distribution and ultimate consumption by Tennessee members. See [Bristol-Myers, 137 S. Ct. at 1780](#).

Further, because there is specific jurisdiction over Plaintiffs' Tennessee state law claims, they may advance their other various state [\[\\*\\*22\]](#) law claims. See [Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 778-79, 104 S. Ct. 1473, 79 L. Ed. 2d 790 \(1984\)](#). In [Keeton](#), a New York resident sued Hustler in New Hampshire, claiming that she had been libeled in five issues of the magazine, which was distributed throughout the country, including in New Hampshire. [Id. at 776](#). The Supreme Court relied principally on the connection between the circulation of the magazine in New Hampshire and the damages allegedly caused within the state to conclude that specific jurisdiction was present for the non-resident plaintiff's multistate damages claims. [Id.](#) Likewise, here, Defendants' activities with regard to sales of generic enoxaparin have allegedly damaged Plaintiffs, including within Tennessee, and, therefore, Plaintiffs may bring not only their Tennessee claims, but their various other state law claims as well.<sup>7</sup>

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<sup>7</sup> Although Defendants argue that [Keeton's](#) analysis was refuted by [Bristol-Myers](#), the latter analysis was limited to considering the former decision in the context of mass torts. See [Bristol-Myers, 137 S.Ct. at 1782](#). Further, as explained below, the Court concludes that [Bristol-Myers](#) is not applicable to class actions.

[\*692] As to Defendants' argument regarding Bristol-Myers, the Court agrees with Plaintiffs and concludes that Bristol-Myers does not apply to class actions. In reaching this decision, the Court is persuaded by the analyses of several courts that have aptly confronted the issue. These courts have focused their analyses on the sufficient distinctions between class and mass tort actions (as was the case [\*23] in Bristol-Myers). See, e.g., Sanchez v. Launch Tech. Workforce Sols., LLC, 297 F. Supp. 3d 1360, 1365-69 (N.D. Ga. 2018) (stating that, unlike in class actions, each plaintiff is a real party in interest in a mass tort action); In re Chinese—Manufactured Drywall Prods. Liab. Litig., No. 09-2047, 2017 U.S. Dist. LEXIS 197612, 2017 WL 5971622, at \*12-14 (E.D. La. Nov. 30, 2017) ("Class actions, nonetheless, are different from mass torts."); Molock v. Whole Foods Mkt., Inc., 297 F. Supp. 3d 114, 126 (D.D.C. 2018) ("[U]nlike in a mass tort action, 'for a case to qualify for class action treatment, it needs to meet the additional due process standards for class certification under Rule 23 . . .'). Specifically, in a mass tort action, the plaintiff is a real party in interest to the complaints, whereas, in a putative class action, one or more plaintiffs seeks to represent the rest of similarly situated plaintiffs and the named plaintiffs are the only plaintiffs actually named in the complaint. See Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 155, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982) ("The class-action device was designed as an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."). Additionally, unlike a mass tort action, "for a case to qualify for class action treatment, it needs to meet the additional due process standards for class certification under Rule 23— numerosity, commonality, typicality, adequacy of representation, predominance and superiority." In re Chinese—Manufactured Drywall, 2017 U.S. Dist. LEXIS 197612, 2017 WL 5971622, at \*14. "These additional elements of a class action supply [\*24] due process safeguards not applicable in the mass tort context." Molock, 297 F. Supp. 3d at 126.

The Court therefore concludes that it has specific personal jurisdiction over Defendants regarding Plaintiffs' remaining state law claims. Accordingly, the Court will deny Defendants' Rule 12(b)(2) motion to dismiss the Amended Complaint for lack of personal jurisdiction.

#### E. Defendants' Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6)

Defendants' final motion to dismiss, pursuant to Rule 12(b)(6), advances a host of arguments, all of which are aimed at Plaintiffs' various state law claims. (Doc. No. 198.) Defendants assert that (1) the statute of limitations bars almost all of Plaintiffs' state law claims; (2) Plaintiffs do not have standing to assert their state law claims; and (3) Plaintiffs' fail to meet the state law pleading requirements for their state law claims. (Id.) Plaintiffs respond that (1) their state law claims are timely; (2) they have standing to assert those claims; and (3) their Amended Complaint adequately pleads the elements of each state law claim. (See Doc. No. 210.) The Court will address each argument in turn.

##### 1. Statute of Limitations

Defendants argue that the challenged anti-competitive conduct that is the subject of Plaintiffs' state law [\*25] claims ended January 25, 2012, when the Federal Circuit stayed the preliminary injunction preventing [\*693] Amphastar from entering the generic enoxaparin marketplace. (Doc. No. 198 at 13.) As a result, Defendants contend that the statute of limitations began running on January 26, 2012. (Id.) Because NGH sought leave to amend its complaint on June 9, 2017 (and filed the Amended Complaint on December 21, 2017), over five years passed after expiration of the preliminary injunction. (Id. at 14.) Consequently, Defendants argue that Plaintiffs' state law claims are barred by various state statutes of limitation. (Id.) Defendants also assert that the continuing violation doctrine, fraudulent concealment doctrine, and the discovery rule did not toll the various state statutes of limitations periods. (Id. at 14-19.) Plaintiffs respond that each of these doctrines independently applies to extend the state statutes of limitations, making their state law claims timely. (Doc. No. 210 at 10-19.) The Court finds that the continuing violation doctrine extended the Plaintiffs' various limitations periods.<sup>8</sup>

**HN14** [+] In an antitrust lawsuit, the cause of action accrues and the accompanying limitations period commences "each time a defendant [\*26] commits an act that injures the plaintiff's business." In re Southeastern Milk Antitrust

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<sup>8</sup> Accordingly, the parties' arguments regarding the fraudulent concealment doctrine and the discovery rule are not discussed.

Litig., 555 F. Supp. 2d 934, 946-47 (E.D. Tenn. 2008) (citation omitted). "For statute of limitations purposes . . . the focus is on the timing of the causes of injury, i.e. the defendant's overt acts, as opposed to the effects of the overt acts." DXS, Inc. v. Siemens Medical Systems, Inc., 100 F.3d 462, 467 (6th Cir. 1996) (citing Peck v. General Motors Corp., 894 F.2d 844, 849 (6th Cir. 1990)). A continuing antitrust violation is one in which the plaintiff's interests are repeatedly invaded. Peck, 894 F.2d at 849 (quoting Pace Indus., Inc. v. Three Phoenix Co., 813 F.2d 234, 237 (9th Cir. 1987)).

**HN15** When a plaintiff alleges a continuing antitrust violation, the cause of action "accrues each time a plaintiff is injured by an act of defendants." Barnosky Oils, Inc. v. Union Oil Co. of California, 665 F.2d 74, 81 (6th Cir. 1981). However, even in the event of an alleged continuing violation, "an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act." Peck, 894 F.2d at 849. Such an overt act involves: (1) a new and independent act that is not merely a reaffirmation of a previous act; (2) that inflicts new and accumulating injury on the plaintiff. In re Southeastern Milk Antitrust Litig., 555 F. Supp. 2d at 947.

Plaintiffs allege ongoing harm in light of overpaying for generic enoxaparin as a result of Defendants' anti-competitive conduct. (Doc. No. 191 at 24-28.) The Amended Complaint alleges that the wholesale price of generic enoxaparin did not begin to decline until May 2012 and subsequently began plummeting in 2014, [\*\*27] until which time Plaintiffs allegedly suffered hundreds of millions dollars in overcharges. (Id.) As noted in Magistrate Judge Holmes's previous order allowing Plaintiffs to amend their complaint, the Supreme Court, in Klehr v. A.O. Smith Corporation, directly addressed what constitutes a "continuing violation" in an ongoing price-fixing conspiracy:

**HN16** Antitrust law provides that, in the case of a "continuing violation" say, a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, "each overt act that is part of the violation and that [\*694] injures the plaintiff," e.g., each sale to the plaintiff, "starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times."

521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997).

Defendants contend that Klehr is inapplicable because the Amended Complaint does not allege a price-fixing agreement. (Doc. No. 198 at 15.) Defendants argue that Plaintiffs' allegations focus on "discrete past actions involving the enforcement of a patent to the exclusion of a competitor." (Id.) The Court finds this characterization of the allegations unpersuasive. Plaintiffs' allegations detail a price-fixing conspiracy [\*\*28] between Sandoz and Momenta, based on enforcement of the 886 Patent, in order to (1) prevent new entrants from entering the generic enoxaparin market; thereby (2) keeping prices artificially inflated. (See Doc. No. 191 at 24-28.) Thus, under Klehr, each time Defendants sold enoxaparin to Plaintiffs at supracompetitive prices, which, as alleged in the Amended Complaint, extended well past May 2012, the statutory period started again. See Klehr, 521 U.S. at 189. Accordingly, because Plaintiffs allege that Defendants wrongfully sold them enoxaparin at supracompetitive prices until at least 2014, and each sale restarted the five year statute of limitations, the continuing violation doctrine extended the statute of limitations period. Plaintiffs' state law claims are timely.

## 2. Standing for State Law Claims

Defendants next argue that Plaintiffs do not have standing to bring claims under the laws of the states where they do not reside and where they did not purchase generic enoxaparin. (Doc. No. 198 at 19-20.) Plaintiffs respond that Defendants confuse the issue of standing with the adequacy of class representation and argue that, in accordance with Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410, 423 (6th Cir. 1998), the ability of Plaintiffs to seek relief on behalf of unnamed [\*\*29] class members residing in the other 30 jurisdictions should be determined as part of the class certification process. (Doc. No. 210 at 19-21.)

The Sixth Circuit has not directly reached the question of whether class certification must be addressed before considering standing for claims arising under state statutes in which a named plaintiff is not resident. District courts have pursued divergent paths to resolve such standing challenges. Compare In re Packaged Ice Antitrust Litig. (Packaged Ice II), 779 F. Supp. 2d 642, 657 (E.D. Mich. 2011) (addressing standing before class certification) with Hovering v. Transnation Title Insur. Co., 545 F. Supp. 2d 662, 667 (E.D. Mich. 2008) (postponing standing analysis

until class certification). The Court concludes that the weight of authority suggests that the better course is to defer deciding the issue of standing on state law claims until the class certification stage. See In re Cast Iron Soil Pipe And Fittings Antitrust Litig., No. 1:14-MD-2508, 2015 U.S. Dist. LEXIS 121620, 2015 WL 5166014, at \*19 (E.D. Tenn. June 24, 2015) ("If the Court were to decide the standing issue at this juncture on the basis that the named plaintiffs do not reside in some of the states under whose laws they bring claims on behalf of the class, it would not be giving due appreciation to the complex nature of Article III standing in class actions and the nuances of class certification."); see also In re Auto. Parts Antitrust Litig., No. 12-MD-02311, 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612, at \*11 (E.D. Mich. June 6, 2013) [\*\*30] ("[T]he Court finds the better path is to defer this issue until the class certification stage."). Waiting until the class certification stage will enable the Court to most [\*695] properly analyze complex issues of standing. Accordingly, the Court will defer deciding whether the Plaintiffs have standing to assert their various state law claims until the class certification stage.

### 3. State Law Pleading Requirements

Defendants next argue that the Amended Complaint fails to adequately plead the state law claims. (Doc. No. 198 at 22-27.) Defendants' primary argument is that Plaintiffs fail to establish a sufficient nexus to numerous states for purposes of the antitrust and consumer protection statutes of those states. (Id. at 22-23.)

#### i. Intrastate Nexus

The parties are in agreement that the antitrust statutes of certain jurisdictions require a plaintiff to allege a nexus between a defendant's conduct and intrastate commerce; boilerplate allegations are insufficient. (Doc. Nos. 198 at 22-23, 210 at 22-25.) The parties disagree as to whether the allegations in the Amended Complaint satisfy the pleading requirements. (Id.) Those jurisdictions at issue include Arizona, the District of Columbia, [\*\*31] Maine, Minnesota, Mississippi, Nevada, New Mexico, New York, North Carolina, North Dakota, South Dakota, Tennessee, Wisconsin, and West Virginia. (Doc. No. 198 at 22-23.) Defendants also maintain that the consumer protection statutes for California, Nebraska, New York, and North Carolina require the same intrastate nexus, and, therefore, for these same reasons, Plaintiffs fail to adequately plead their state law consumer protection claims for those states. (Id. at 23.)

Plaintiffs allege that, in each aforementioned jurisdiction, Defendants' anticompetitive conduct reduced competition and increased prices, causing a substantial effect on commerce within the jurisdiction. (Doc. No. 191 at 35-57.) HN17 The "intrastate effects" requirement is met at the pleading stage by a plaintiff's allegations, like those in the instant case, claiming that the anticompetitive conduct caused supracompetitive price effects in the relevant jurisdictions. See In re Automotive Parts Antitrust Litig., 29 F. Supp. 3d 982, 1010 (E.D. Mich. 2014) (holding that allegations that anticompetitive conduct caused supracompetitive price effects in relevant jurisdictions meets the intrastate effects requirement); In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538, 581 (M.D. Pa. 2009) (alleging a nationwide price fixing scheme that resulted in price increases in Nevada and elsewhere [\*\*32] sufficiently alleged intrastate effects).

The Court finds that Plaintiffs' set forth facts sufficient at the pleading stage, identifying the relevant jurisdictions and the effect on competition in each of these jurisdictions, to allege the requisite intrastate effects. For these same reasons, Plaintiffs' intrastate nexus allegations are also sufficient to state a claim under the consumer protection statutes of California, New York, and North Carolina.<sup>9</sup>

#### ii. Other State Antitrust Claim Limitations and State Law Consumer Protection Claims

Defendants next contend that Plaintiffs cannot maintain their antitrust claim under Utah state law, as only a person who is a citizen or resident of Utah may bring an action for antitrust violations under that state's antitrust statute. (Doc. No. 198 at 24.) Plaintiffs do not dispute that only citizens or residents of Utah may recover under its antitrust law, but argue that the issue is related to standing and better decided at the class certification stage. [\*696] (Doc. No. 210 at 25.) Defendants also assert that, under the consumer protection laws of Massachusetts, Missouri,

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<sup>9</sup> Defendants argue, and Plaintiffs conceded, that Alabama's antitrust law does not provide a cause of action in the instant case. (Doc. Nos. 198 at 24, 210 at 22 n. 19.) Therefore, the Court will dismiss that claim with prejudice.

Montana, and Vermont only consumers that purchase a product for personal or household [\*\*33] use may bring consumer protection claims. (Doc. No. 198 24-25.) Further, Defendants contend that Plaintiffs' Montana consumer protection claim fails because Montana law does not allow consumer protection class actions. (*Id.* at 25-26.)

Plaintiffs first respond that the Massachusetts and Montana consumer protection statutes no longer include the limiting "personal or household use" language. (Doc. No. 210 at 26-27.) Further, Plaintiffs argue that Vermont's consumer protection statute expressly contemplates suits involving individuals who purchase goods for use or benefit in their business. (*Id.* at 28.) Finally, Plaintiffs maintain the Missouri's consumer protection statute permits suit, even where the product is not purchased for personal or household use. (*Id.* at 29.)

The parties accurately note that [HN18](#)[<sup>1</sup>] only citizens or residents of Utah may recover under its [antitrust law](#). See [Utah Code § 76-10-3109\(1\)\(a\)](#). However, Plaintiffs assert allegations on behalf of a putative class that presumably includes Utah citizens and residents. (See Doc. No. 191 at 27-30, 54-55.) Allegations that members of the putative class presumably include Utah citizens and residents are sufficient to overcome a motion to dismiss. See [In re Liquid Aluminum Sulfate Antitrust Litig., No. CV-16-MD-2687-JLL, 2017 U.S. Dist. LEXIS 115294, 2017 WL 3131977, at \\*28 \(D. N.J. July 20, 2017\)](#) [\*\*34] (citing [In re Asacol Antitrust Litig., 2016 U.S. Dist. LEXIS 94605, 2016 WL 4083333, \\*13 \(D. Mass. July 20, 2016\)](#)). Further, Defendants essentially raise the issue of whether Plaintiffs have standing to pursue the Utah antitrust claim, and, as noted above, this issue is better decided at the class certification stage. See [Fallick, 162 F.3d at 423](#). For this same reason, the Court will also not decide the statutory standing issue with regard to Plaintiffs' Massachusetts, Missouri, Montana, and Vermont consumer protection claims, as Defendants' argument again centers on whether Plaintiffs' have standing to pursue those claims. Accordingly, the Court will not dismiss said claims at this juncture.

### iii. Unjust Enrichment Claims

Defendants assert that Plaintiffs' unjust enrichment claims fail for almost half of the state jurisdictions (14 of 31) on the ground that Plaintiffs failed to allege that they provided a direct benefit to Defendants. (Doc. No. 198 at 26.) Defendants also argue that Plaintiffs' unjust enrichment claims, under the laws of Arizona, Hawaii, Massachusetts, Minnesota, and Tennessee, fail because Plaintiffs do not plead absence of a legal remedy. (*Id.* at 27.) Finally, Defendants contend that Plaintiffs' California unjust enrichment claim fails because California does not recognize [\*\*35] a cause for unjust enrichment. (*Id.*) Plaintiffs respond that (1) the Amended Complaint adequately pleads a direct benefit to Defendants and absence of a legal remedy; and (2) California recognizes unjust enrichment claims where the claim arises out of rights based on other laws. (Doc. No. 210 at 32-33.)

[HN19](#)[<sup>1</sup>] With respect to Plaintiffs' unjust enrichment claims, indirect purchasers confer a benefit only on others in the chain of distribution from whom they purchase. See [In re Aftermarket Filters Antitrust Litig., No. 08-C-2883, 2010 U.S. Dist. LEXIS 32652, 2010 WL 1416259, at \\*3 \(N.D. Ill. Apr. 1, 2010\)](#) ("Only the direct purchasers have conferred a direct benefit on defendants.") However, courts considering indirect consumer price-fixing claims have denied dismissal of unjust enrichment claims where the claims arise out of the alleged antitrust violations that resulted in overpayment. See [In re Automotive Parts Antitrust Litig., 29 F. Supp. 3d at 1029](#). Plaintiffs allege that they conferred a benefit [<sup>697</sup>] on Defendants in the form of overpayments, resulting in Defendants enjoying profits flowing from the anti-competitive conduct. (Doc. No. 191 at 71.) The Court finds these allegations sufficient to state an unjust enrichment claim under those states' laws. However, because Plaintiffs did not plead absence of a legal remedy, their unjust enrichment claims under the laws of Arizona, Hawaii, [\*\*36] Massachusetts, Minnesota, and Tennessee will be dismissed. Moreover, with regard to Plaintiffs' California unjust enrichment claim, California does not recognize unjust enrichment, and, therefore, this claim is also dismissed. See [Hill v. Roll Int'l Corp., 195 Cal. App. 4th 1295, 1307, 128 Cal. Rptr. 3d 109 \(Cal. Ct. App. 2011\)](#) ("Unjust enrichment is not a cause of action . . ."); [Levine v. Blue Shield of Cal., 189 Cal. App. 4th 1117, 1138, 117 Cal. Rptr. 3d 262 \(Cal. Ct. App. 2010\)](#) (holding that there is no cause of action in California for unjust enrichment); accord [Frale v. Facebook, 830 F.Supp.2d 785, 814 \(N.D. Cal. 2011\)](#) ("Plaintiffs' unjust enrichment claim does not properly state an independent cause of action and must be dismissed.").

## F. Conclusion

353 F. Supp. 3d 678, \*697L 2018 U.S. Dist. LEXIS 206234, \*\*36

For the foregoing reasons, Defendants' Motion to Dismiss for Lack of Jurisdiction Under [Fed. R. Civ. P. 12\(b\)\(2\)](#) (Lack of Personal Jurisdiction) will be denied, Defendants' Motion to Dismiss for Lack of Jurisdiction Under [Fed. R. Civ. P. 12\(b\)\(1\)](#) (Lack of Subject-Matter Jurisdiction) will be granted, and Defendants' Motion to Dismiss for Failure to State a Claim Under [Fed. R. Civ. P. 12\(b\)\(6\)](#) will be granted in part and denied in part. The case will proceed on the remaining state law claims.

An appropriate order will enter.

/s/ Waverly D. Crenshaw, Jr.

WAVERLY D. CRENSHAW, JR.

CHIEF UNITED STATES DISTRICT JUDGE

[EDITOR'S NOTE: The following court-provided text does not appear at this cite in F. Supp. 3d.]

**[\*none] ORDER**

Pending before the Court is Defendants Momenta Pharmaceuticals, Inc. and Sandoz Inc.'s Motion to Dismiss for Lack of Jurisdiction Under [Fed. R. Civ. P. 12\(b\)\(2\)](#) (Lack of Personal **[\*\*37]** Jurisdiction), Motion to Dismiss for Lack of Jurisdiction Under [Fed. R. Civ. P. 12\(b\)\(1\)](#) (Lack of Subject-Matter Jurisdiction), and Motion to Dismiss for Failure to State a Claim Under [Fed. R. Civ. P. 12\(b\)\(6\)](#). (Doc. Nos. 193, 195, 197.) For the reasons set out in the accompanying Memorandum Opinion, Defendants' Motion to Dismiss for Lack of Jurisdiction Under [Fed. R. Civ. P. 12\(b\)\(2\)](#) (Lack of Personal Jurisdiction) (Doc. No. 193) is **DENIED**, Defendants' Motion to Dismiss for Lack of Jurisdiction Under [Fed. R. Civ. P. 12\(b\)\(1\)](#) (Lack of Subject-Matter Jurisdiction) (Doc. No. 195) is **GRANTED**, and Defendants' Motion to Dismiss for Failure to State a Claim Under [Fed. R. Civ. P. 12\(b\)\(6\)](#) (Doc. No. 197) is **GRANTED IN PART** and **DENIED IN PART**. Further, the parties Joint Motion Requesting Oral Argument (Doc. No. 216) is **DENIED AS MOOT**. Plaintiffs' Sherman Act claims are **DISMISSED WITH PREJUDICE**. Plaintiffs' Alabama antitrust claim and unjust enrichment claims under the state laws of Arizona, Hawaii, Massachusetts, Minnesota, Tennessee, and California are also **DISMISSED WITH PREJUDICE**. Plaintiffs' remaining state law claims will proceed. This case is **RETURNED** to the Magistrate Judge for further case management.

IT IS SO ORDERED.

/s/ Waverly D. Crenshaw, Jr.

WAVERLY D. CRENSHAW, JR.

CHIEF UNITED STATES DISTRICT JUDGE **[\*\*38]**



## *Hytera Communs. Corp. v. Motorola Sols., Inc.*

United States District Court for the District of New Jersey

December 6, 2018, Decided; December 6, 2018, Filed

Civil Action No. 17-12445 (ES) (JAD)

### **Reporter**

2018 U.S. Dist. LEXIS 207162 \*; 2018-2 Trade Cas. (CCH) P80,608

HYTERA COMMUNICATIONS CORPORATION LTD., HYTERA AMERICA, INC., HYTERA COMMUNICATIONS AMERICA (WEST), INC., and POWERTRUNK, INC., Plaintiffs, v. MOTOROLA SOLUTIONS, INC., Defendant.

**Notice:** NOT FOR PUBLICATION

**Prior History:** [\*Motorola Sols., Inc. v. Hytera Communs. Corp, 2018 U.S. Dist. LEXIS 4320, 2018 WL 1281393 \(N.D. Ill., Jan. 10, 2018\)\*](#)

## **Core Terms**

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district court, factors, parties, Plaintiffs', anticompetitive, cases, compulsory counterclaim, witnesses, dealer, fora, headquarters, convenient, courts, choice of forum, opposing party, unavailable, entities, center of gravity, resides, venue, convenience of the parties, connections, antitrust, suggests, anticompetitive conduct, antitrust claim, take place, familiarity, contends, litigate

**Counsel:** [\*1] For HYTERA COMMUNICATIONS CORPORATION LTD., HYTERA AMERICA, INC., HYTERA COMMUNICATIONS AMERICA (WEST), INC., POWERTRUNK, INC., SEPURA PLC, Plaintiffs: KATELYN O'REILLY, LIZA M. WALSH, MARC D. HAEFNER, TRICIA B. O'REILLY, LEAD ATTORNEYS, WALSH PIZZI O'REILLY FALANGA LLP, NEWARK, NJ; KATHERINE MARIE ROMANO, LEAD ATTORNEY, WALSH PIZZI O'REILLY & FALANGA LLP, NEWARK, NJ.

For MOTOROLA SOLUTIONS INC., Defendant: JAMES S. RICHTER, LEAD ATTORNEY, WINSTON & STRAWN, LLP, New York, NY.

**Judges:** JOSEPH A. DICKSON, United States Magistrate Judge.

**Opinion by:** JOSEPH A. DICKSON

## **Opinion**

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### **JOSEPH A. DICKSON, U.S.M.J.**

This matter comes before the Court by way of Defendant's motion to transfer this matter to the United States District Court for the Northern District of Illinois pursuant to [\*Federal Rule of Civil Procedure 13\(a\)\*](#) and [\*28 U.S.C. § 1404\(a\)\*](#). (ECF No. 22). In accordance with [\*Federal Rule of Civil Procedure 78\*](#), the Court did not hear oral argument on Defendant's application. Upon careful consideration of the parties' submissions, and for the reasons stated below, Defendant's motion is **GRANTED**.

## **I. RELEVANT BACKGROUND AND PROCEDURAL HISTORY**

In this action, Plaintiffs Hytera Communications Ltd., Hytera America, Inc., Hytera Communications America (West), Inc., and Powertrunk, Inc. allege that Defendant Motorola Solutions, [\*2] Inc. ("Motorola") engaged in anticompetitive conduct with regard to the American land mobile radio ("LMR") industry, in violation of both federal and state **antitrust law**. (See generally Am. Compl., ECF No. 45). For instance, Plaintiffs allege that Motorola used various methods, including providing incentives, making express threats, and spreading misinformation, to dissuade dealers from selling competing products, (*id.* ¶¶ 12-19, 91-159), and repeatedly engaged in sham petitioning intended to block Plaintiffs from meaningfully participating in the LMR market. (*Id.* ¶¶ 20-21, 160-171).

It also bears noting that, on March 14, 2017, Motorola filed two lawsuits in the United States District Court for the Northern District of Illinois. In the first, Motorola Solutions Inc. v. Hytera Commc'ns. Corp. Ltd., et al., No. 1:17-cv-1972 (N.D. Ill. March 14, 2017) (the "Patent Action"), Motorola has alleged that Hytera Communications Ltd., Hytera America, Inc., and Hytera Communications America (West), Inc. infringed seven of its United States patents. (See generally Patent Action Compl., Decl. of James S Richter ("Richter Decl."), Ex. A, ECF No. 22-3). In the second, Motorola Solutions Inc., et al. v. Hytera Commc'ns. Corp. Ltd., et al., No. 1:17-cv-1973 (N.D. Ill. March 14, 2017) (the "Trade Secret Action"), Motorola contends that the same Hytera entities misappropriated its confidential and proprietary information by hiring away Motorola engineers who stole thousands of Motorola's documents before departing. (See generally, Trade Secret Action Compl., Richter Decl., Ex. D, ECF No. 22-6).<sup>1</sup> Plaintiff Powertrunk, Inc. ("Powertrunk") is not a party to either of the Illinois Actions.<sup>2</sup>

Defendant Motorola now seeks to transfer this case to the Northern District of Illinois, arguing: (1) that Plaintiffs' claims herein constitute compulsory counterclaims in the Illinois Actions; and (2) that transfer would be appropriate pursuant to 28 U.S.C. § 1404(a). (See generally Pl. Br., ECF No. 22-1). Motorola's motion is fully briefed, (ECF Nos. 28, 34, 46-47), and ready for resolution.

## **II. LEGAL DISCUSSION**

### **a. The Court Will Not Transfer this Action on the Basis of Alleged Compulsory Counterclaims Pursuant to Federal Rule of Civil Procedure 13(a)**

In its primary argument, Motorola contends that the Court must transfer this action to the United States District Court for the Northern District of Illinois on the basis that Plaintiffs' [\*4] claims in this case qualify as compulsory counterclaims vis-à-vis the Illinois Actions. Federal Rule of Civil Procedure 13(a) defines a compulsory counterclaim as "any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." The purpose of Rule 13(a) is to facilitate "judicial economy." Transamerica Occidental Life Ins. Co. v. Aviation Office of Am., Inc., 292 F.3d 384, 389 (3d Cir. 2002).

For a claim to be a compulsory counterclaim, there does not have to be "precise identity of issues and facts between the claim and the counterclaim; rather, the relevant inquiry is whether the counterclaim 'bears a logical relationship to an opposing party's claim.'" Transamerica, 292 F.3d at 389 (citing Xerox Corp. v. SCM Corp., 576 F.2d 1057, 1059 (3d Cir. 1978)). As the aim of Rule 13(a) is to promote judicial economy, the terms "transaction or occurrence" are interpreted broadly to further that end, and a "logical relationship" is considered to exist where individual trials for the separate claims would cause a "substantial duplication of effort and time by the parties and

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<sup>1</sup> The Court will refer to the Patent Action and Trade Secret Action, collectively, as the "Illinois Actions."

<sup>2</sup> In the previous iteration of their pleading, Plaintiffs alleged that the Illinois Actions were pieces of "sham litigation" and, therefore, examples of Motorola's anticompetitive conduct. (See generally Compl., ECF No. 1). Motorola removed those allegations when filing its Amended Complaint. (See generally Am Compl., ECF No. 45).

the courts. Such duplication is likely to occur when claims involve the same factual issues, the same factual [\*5] and legal issues, or are offshoots of the same basic controversy between the parties." [292 F.3d at 389-90](#).

The Court's analysis on this point begins and ends with Plaintiff PowerTrunk. Simply put, PowerTrunk is not a party to the Illinois Actions. As there are no claims against that entity in the Illinois Actions, its claims herein cannot be compulsory counterclaims absent factual circumstances not present in this case.

The Court acknowledges that the United States Court of Appeals for the Third Circuit has found that, like [Rule 13\(a\)](#)'s "transaction and occurrence" language, the Rule's "opposing parties" requirement should be interpreted broadly to help promote the goal of judicial efficiency, particularly where the unnamed party "may be so closely identified with a named party as to qualify as an 'opposing party' under [Rule 13\(a\)](#)." [Transamerica, 292 F.3d at 390](#). In [Transamerica](#), the Court of Appeals observed: "the Tenth Circuit recognized an insurer-subrogee, though not named a party to the original litigation, to be an opposing party for [Rule 13\(a\)](#) purposes because of its close relationship with the named opposing party." [Id. at 390](#) (citing [Avemco Insurance Co. v. Cessna Aircraft Co., 11 F.3d 998, 1001 \(10th Cir. 1993\)](#)). The Third Circuit also cited a Second Circuit decision wherein the court found that "because the parties 'acted as a single entity' [\*6] and because one was the alter ego of the other, both were 'opposing parties' within the meaning of [Rule 13](#)." [Id. at 390-91](#) (citing [Banco Nacional de Cuba v. First National City Bank of New York, 478 F.2d 191 \(2d Cir. 1973\)](#)). Thus, "where parties are functionally equivalent as in [Avemco](#), where an unnamed party controlled the litigation, or where, as in [Banco Nacional](#), an unnamed party was the alter ego of the named party, they should be treated as opposing parties within the meaning of [Rule 13](#)." [Id. at 390](#).

Nothing in the record suggests that the operative facts in this case are similar to those at issue in [Avemco](#), [Banco Nacional](#), or [Transamerica](#).<sup>3</sup> Defendant Hyterra Communications Corp. Ltd. did not acquire PowerTrunk until May 25, 2017, more than two months after Motorola commenced the Illinois Actions. (Decl. of Noah A. Brumfield ("Brumfield Decl."), ¶ 18, Ex. P, ECF No. 28-1). Moreover, nothing in the record indicates that PowerTrunk is an alter ego of any of the Hytera entities named in the Illinois Actions, or that PowerTrunk is somehow controlling those Hytera entities or the Illinois Actions. There is simply no reasonable basis in the record for classifying PowerTrunk as an "opposing party" in the Illinois Actions and, in turn, no legal basis for finding that [\*7] PowerTrunk's claims in this matter constitute compulsory counterclaims in either of those cases pursuant to [Rule 13\(a\)](#).

Motorola argues that PowerTrunk's absence from the Illinois Actions is irrelevant, because PowerTrunk is not necessary to move forward with the litigation of its co-Plaintiffs' antitrust claims. (Def. Br. at 8, n.6, ECF No. 22-1; Def. Reply at 8, ECF No. 34). Motorola suggests that the Court may therefore foist a transfer upon PowerTrunk based solely on its co-Plaintiffs' claims and, if PowerTrunk chooses to maintain its own antitrust claims after transfer, the United States District Court for the Northern District of Illinois could exercise ancillary jurisdiction over those claims. (Def. Br. at 8 n.6, ECF No. 22-1). Neither of the two cases Motorola has cited in support of that argument supports its position. In [In re Texas E. Transmission Corp. PCB Contamination Ins. Coverage Litig., 15 F.3d 1230, 1236-38 \(3d Cir. 1994\)](#), the United States Court of Appeals for the Third Circuit considered whether, in a diversity case, it was appropriate for the District Court to exercise ancillary jurisdiction over non-diverse counterclaim defendants. Similarly, in [Rohm & Haas Co. v. Brotech Corp., 770 F. Supp. 928 \(D. Del. 1991\)](#), Rohm & Hass filed a patent infringement suit against Brotech. [Id. at 929](#). Brotech later filed a separate suit against Rohm & Hass, [\*8] and several of Rohm & Hass's subsidiaries and employees. [Id.](#) The District Court ultimately determined that Brotech's claims constituted compulsory counterclaims under [Rule 13](#), despite the fact that Brotech also sought relief against several parties who, while affiliated with Rohm & Hass, were not involved in the original action. [Id. at 933-34](#). Both [In re Texas E. Transmission Corp. PCB Contamination Ins. Coverage Litig.](#) and [Rohm & Haas Co.](#) therefore considered the impact of adding defendants who were not parties to the original litigation, which is the opposite of the situation at issue in this case. Motorola has not cited any law addressing the real question herein: whether a plaintiff that was a stranger to a previous litigation might nonetheless have its affirmative claims

<sup>3</sup> In [Transamerica](#), the Court of Appeals found that an insurer should be considered an "opposing party" for [Rule 13](#) purposes, as it found that the insurer was the successor in interest and assignee of the rights of the named parties in the original litigation, and that the insurer "was actually the party controlling the litigation in both actions." [Id. at 392](#).

dismissed or transferred on compulsory counterclaim grounds. The Court therefore rejects Motorola's argument that Powertrunk is "of no moment to the transfer analysis." (Def. Reply at 8, ECF No. 34).

Finally, with regard to the three Hytera entities, which are parties to the Illinois Actions, Motorola argues that their claims involve 'many of the same factual issues' as those raised in the Illinois Actions, and are 'offshoots of the [\*9] same basic controversy between the parties' that have a 'single factual focus.'" (Def. Br. at 9, ECF No. 22-1). The Court is mindful of its duty to interpret the same "transaction or occurrence" requirement broadly, and it may very well be that some or all of the claims that the three Hytera entities have asserted in this case constitute compulsory counterclaims vis-à-vis Motorola's claims in the Illinois Actions. The Court need not address that issue here. As it would be inappropriate to transfer this entire action on compulsory counterclaim grounds, Motorola's recourse is to seek dismissal of those specific claims pursuant to [Federal Rules of Civil Procedure 13\(a\)](#) and [12\(b\)\(6\)](#). The Court notes that Motorola did, in fact, file a separate motion to dismiss Plaintiffs' claims, and that the Honorable Esther Salas, U.S.D.J. has administratively terminated that motion pending resolution of Defendant's motion to transfer.

The Court, therefore, will not transfer this action to the Northern District of Illinois on the basis that certain Plaintiffs' claims may be compulsory counterclaims under [Federal Rule of Civil Procedure 13\(a\)](#).

**b. Defendant's Motion to Transfer Pursuant to 28 U.S.C. § 1404(a)**

**i. Standards Applicable on Defendant's Motion to Transfer**

Motorola also asks the Court to transfer [\*10] this action to the Northern District of Illinois pursuant to [28 U.S.C. § 1404\(a\)](#). The statute provides, in pertinent part: "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The purpose of [§ 1404\(a\)](#) is to "prevent the waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." [Van Dusen v. Barrack, 376 U.S. 612, 616, 84 S. Ct. 805, 11 L. Ed. 2d 945 \(1964\)](#) (internal quotations and citations omitted). In a motion to transfer pursuant to [§ 1404\(a\)](#), "the moving party bears the burden of establishing that the transfer is appropriate and must establish that the alternate forum is more convenient than the present forum." [Santi v. National Business Records Management, LLC, 722 F. Supp. 2d 602, 606 \(D.N.J. 2010\)](#) (citing [Jumara v. State Farms Ins. Co., 55 F.3d 873, 879 \(3d Cir. 1995\)](#).

When evaluating whether to transfer an action pursuant to [§ 1404\(a\)](#), the Court must, as a preliminary matter, consider whether the plaintiff could have brought the suit in the proposed forum. [Santi, 722 F. Supp. 2d at 606; 28 U.S.C. § 1404\(a\)](#) ("[A] district court may transfer any civil action to any other district or division where it might have been brought . . ."). If venue would be proper in that forum, the Court must then consider whether the three factors expressly enumerated in [§ 1404\(a\)](#) favor transfer: (1) the convenience of [\*11] the parties; (2) the convenience of the witnesses; and (3) the interests of justice. [Wm. H. McGee & Co., v. United Arab Shipping Co., 6 F. Supp. 2d 283, 288 \(D.N.J. 1997\)](#). The United States Court of Appeals for the Third Circuit has clarified, however, that the transfer analysis should not be limited to those three factors; rather courts should consider "all relevant factors to determine whether on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum." [Tischio v. Bontex, Inc., 16 F. Supp. 2d 511, 519 \(D.N.J. 1998\)](#) (quoting [Jumara, 55 F.3d at 879](#)). To that end, the Third Circuit has established a list of private and public interest factors that District Courts must evaluate when deciding whether to transfer an action:

The private interests have included: plaintiff's forum preference as manifested in the original choice; the defendant's preference; whether the claim arose elsewhere; the convenience of the parties as indicated by their relative physical and financial condition; the convenience of the witnesses — but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and the location of books and records (similarly limited to the extent that the files could not be [\*12] produced in the alternative forum).

The public interests have included: the enforceability of the judgment; practical considerations that could make the trial easy, expeditious, or inexpensive; the relative administrative difficulty in the two fora resulting from court congestion; the local interest in deciding local controversies at home; the public policies of the fora; and the familiarity of the trial judge with the applicable state law in diversity cases.

Jumara, 55 F.3d at 879-80.

A transfer analysis under [§ 1404\(a\)](#) is flexible, individualized and based on the unique facts of each case. [Clark v. Burger King Corp., 255 F. Supp. 2d 334, 337 \(D.N.J. 2003\)](#) ([§ 1404](#) "vests 'discretion in the district court to adjudicate motions to transfer according to an individualized, case-by-case consideration of convenience and fairness.'" (quoting [Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 23, 108 S. Ct. 2239, 101 L. Ed. 2d 22 \(1988\)\)](#); [Lawrence v. Xerox Corp., 56 F. Supp. 2d 442, 450 \(D.N.J. 1999\)](#) ("There is no rigid rule governing a court's determination; 'each case turns on its facts.'" (citing [Lacey v. Cessna Aircraft Co., 862 F.2d 38, 43 \(3d Cir. 1988\)\)](#); [Tischio, 16 F. Supp. 2d at 519](#) (citing [Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249-50, 102 S. Ct. 252, 70 L. Ed. 2d 419 \(1981\)](#)). Furthermore, this determination is an "exercise of structured discretion by trial judges appraising the practical inconvenience posed to the litigants and to the court should a particular action be litigated in one forum rather than another." [Ricoh Co., Ltd. v. Honeywell, Inc., 817 F. Supp. 473, 479 \(D.N.J. 1993\)](#) (quoting [Lony v. E.I. Du Pont de Nemours & Co., 886 F.2d 628, 632 \(3d Cir. 1989\)](#)). Finally, the Court is mindful of the Third Circuit's guidance that courts should not consider [\*13] the merits of a case during the pendency of a transfer application. [McDonnell Douglas Corp. v. Polin, 429 F.2d 30 \(3d Cir. 1970\)](#) ("Judicial economy requires that another district court should not burden itself with the merits of the action until it is decided that a transfer should be effected and such consideration additionally requires that the court which ultimately decides the merits of the action should also decide the various questions which arise during the pendency of the suit instead of considering it in two courts.").

**ii. Plaintiffs Could Have Brought This Action In The United States District Court for the Northern District of Illinois**

In the first step of its [§ 1404\(a\)](#) transfer analysis, this Court must determine whether Plaintiffs could have brought this case in Defendants' proposed forum, the United States District Court for the Northern District of Illinois. If not, then the Court may not transfer the case to that District pursuant to [28 U.S.C. § 1404\(a\)](#). Motorola discussed the venue issue in its initial brief, (Def. Br. at 10-11, ECF No. 22-1), and Plaintiffs did not address it. (See generally Pl. Br., ECF No. 28; Pl. Supp. Br., ECF No. 47).

[28 U.S.C. § 1391](#) governs venue in the United States District Court. See [28 U.S.C. § 1391\(a\)\(1\)](#) ("Except as otherwise provided by law. . . this section shall [\*14] govern the venue of all civil actions brought in district courts of the United States"). [§ 1391\(b\)\(1\)](#) provides that "[a] civil action may be brought in . . . a judicial district in which any defendant resides, if all defendants are residents of the State in which the district court is located." In turn, [§ 1391\(c\)](#) states, in pertinent part, that for venue purposes, an entity "shall be deemed to reside, if a defendant, in any district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question."

Here, Motorola represents that it is headquartered in Chicago, Illinois, which is within the Northern District of Illinois. (Decl. of James A. Niewiara ("Niewiara Decl.") ¶ 3, ECF No. 22-10). Indeed, in its Amended Complaint, Hytera alleges that Motorola maintains its principal place of business in Chicago. (Am. Compl. ¶35, ECF No. 45). As the record reflects that Motorola is headquartered in Chicago, Illinois, it was subject to personal jurisdiction in Northern District of Illinois at the time Plaintiffs filed this action and, in turn, resided in that District for venue purposes. The Court therefore finds that Hytera could have commenced this case in the Northern [\*15] District of Illinois, and that the Court may transfer this matter to that District pursuant to [28 U.S.C. § 1404\(a\)](#) if the transfer would otherwise be appropriate.

### **iii. Analysis of the *Jumara* Factors**

Having determined that venue for this case would be suitable in the Northern District of Illinois, the Court must next balance the private and public interest factors relevant to Motorola's transfer application. As discussed above, the United States Court of Appeals for the Third Circuit provided a list of such factors in [\*Jumara\*, 55 F.3d at 879-80](#). The Court reiterates that Motorola retains the burden of establishing that transfer would be appropriate. See [\*Santi\*, 722 F. Supp. 2d at 606](#).

#### **A. Private Interest Factors**

As to the "private interest" factors relevant to a [§ 1404\(a\)](#) transfer analysis, the Third Circuit has directed courts to consider the "plaintiff's forum preference as manifested in the original choice; the defendant's preference; whether the claim arose elsewhere; the convenience of the parties as indicated by their relative physical and financial condition; the convenience of the witnesses — but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and the location of books and records (similarly limited to the extent [\*16] that the files could not be produced in the alternative forum)" [\*Jumara\*, 55 F.3d at 879-80](#). The Court will address each of these factors in turn.

##### **1. Plaintiffs' Choice of Forum**

When evaluating a motion to transfer, a plaintiff's choice of forum is a "paramount concern" within the Third Circuit. [\*Shutte v. Armco Steel Corp.\*, 431 F.2d 22, 25 \(3d Cir. 1970\)](#). While all Plaintiffs have selected New Jersey as their preferred forum, it bears noting that Plaintiff PowerTrunk resides in New Jersey and has therefore elected to litigate in its home forum. When a plaintiff chooses its home forum, its choice is typically "entitled to greater deference." [\*Sandvik, Inc. v. Cont'l Ins. Co.\*, 724 F. Supp. 303, 307 \(D.N.J. 1989\)](#). Importantly, however, "when the central facts of a lawsuit occur outside of the chosen forum, plaintiff's choice of forum is accorded less weight." [\*NCR Credit Corp. v. Ye Seekers Horizon\*, 17 F. Supp. 2d 317, 321 \(D.N.J. 1998\)](#); [\*Wm. H. McGee & Co.\*, 6 F. Supp. 2d at 290](#) ("[D]eference is curbed when a plaintiff's choice of forum has little connection with the operative facts of the lawsuit.") (citing [\*Job Haines Home for the Aged v. Young\*, 936 F. Supp. 223, 228 \(D.N.J. 1996\)](#)). As discussed in Section II(b)(iii)(A)(3), below, it appears that the operative facts of this lawsuit occurred elsewhere, and that New Jersey's relationship to those facts is relatively tentative.<sup>4</sup> The Court will, therefore, reduce the level of deference given to Plaintiffs' choice of forum. Nevertheless, this factor still weighs against transfer, albeit [\*17] in a reduced form.

##### **2. Defendant's Choice of Forum**

The Court recognizes that Motorola would rather litigate in the Northern District of Illinois, its own home forum. This factor weighs in favor of transfer.

##### **3. Where the Causes of Action Arose**

Generally, this factor involves a "consideration of which forum constitutes the 'center of gravity' of the dispute, its events, and transactions." [\*Travelodge Hotels, Inc. v. Perry Developers, Inc.\*, No. 11-1464 \(DMC\), 2011 U.S. Dist. LEXIS 134478, 2011 WL 5869602, at \\*5 \(D.N.J. Nov. 22, 2011\)](#) (citing [\*Park Inn International, LLC v. Mody Enterprises\*, 105 F. Supp. 2d 370, 377-78 \(D.N.J. 2000\)](#)). There is, however, relatively little guidance in the case law regarding how to determine which forum constitutes the "center of gravity" of the disputes, events, and transactions involved in an antitrust case for the purposes of a [§ 1404\(a\)](#) transfer analysis. In fact, another Court within this

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<sup>4</sup> It also bears noting that only one of the four Plaintiff entities appears to have New Jersey ties. The other three Plaintiff entities would, therefore, be litigating in a foreign jurisdiction regardless of whether the case proceeds in this District or in the Northern District of Illinois.

District has expressly observed that "[t]here is, generally, a dearth of case law on the question of where an antitrust claim arises for purposes of a Jumara analysis, and the Third Circuit has yet to speak on this issue." Church & Dwight v. Mayer Laboratories, Inc., No. 08-5743 (FLW), 2010 U.S. Dist. LEXIS 103939, 2010 WL 3907038, at \*9 (D.N.J. Sept. 28, 2010). Through its own research, this Court has found that observation to be accurate.

While there is relatively little guidance on this issue, the small body of relevant case law features two different methods of identifying the 'center of gravity' of antitrust claims. The first is what could be considered [\*18] an effects test, meaning the center of gravity of a dispute is where the effects of the alleged anticompetitive behavior are felt. See Talone v. Am. Osteopathic Ass'n, No. 16-4644 (NLH), 2017 U.S. Dist. LEXIS 89395, 2017 WL 2539394, at \*8-9 (D.N.J. June 12, 2017) (finding that, while the defendant's allegedly anti-competitive conduct "arguably took place at its headquarters in Illinois," the alleged anti-competitive actions were "directed to and felt in New Jersey"). The second test fixes the center of gravity where the alleged anticompetitive behavior took place. See Ass'n of Am. Physicians & Surgeons, Inc. v. Am. Bd. of Med. Specialties, No. 13-2609, 2014 U.S. Dist. LEXIS 45077, 2014 WL 1334260, at \*7 (D.N.J. Apr. 2, 2014) (finding, during an analysis under 28 U.S.C. § 1391, that venue in the District of New Jersey was improper because the record reflected "that all of the 'substantial' events underlying the plaintiff's claims occurred outside New Jersey. Specifically, nearly all of the activities that [the plaintiff] describe[d] as anticompetitive, namely [the defendant's] development, production, and management of the [relevant] program, occurred at its only headquarters in Chicago, Illinois"); Church & Dwight, 2010 U.S. Dist. LEXIS 103939, 2010 WL 3907038, at \*9-10 (deciding, because of the lack of relevant Third Circuit precedent, to follow the United States Court of Appeals for the Second Circuit's decision focusing on where the alleged anticompetitive conduct took place, and finding that antitrust claims arose in both California and New Jersey [\*19] because the alleged anticompetitive plan was developed at the defendant's headquarters in New Jersey and the contracts enabling the plan were negotiated with drug store chains in California); Liggett Group Inc. v. R.J. Reynolds Tobacco Co., 102 F. Supp. 2d 518, 532 (D.N.J. 2000) (finding that the operative facts of the litigation were centered in North Carolina and not New Jersey because the alleged anticompetitive plan "was not only developed and implemented in North Carolina, but is currently monitored from North Carolina as well").

Given the limited case law addressing where antitrust claims "arise" in the context of § 1404(a) transfer analysis, the Court finds it helpful to examine how Courts in this District have analyzed other types of claims. The general trend appears to focus on where the alleged culpable conduct took place as a means of determining where the claims arose. See Patton Boggs LLP. V. Chevron Corp., No. 12-901 (ES), 2012 U.S. Dist. LEXIS 178841, 2012 WL 6568461 at \*5-7 (D.N.J. July 18, 2012), report and recommendation adopted, 2012 U.S. Dist. LEXIS 177995, 2012 WL 6568526 (D.N.J. Dec. 14, 2012) (Salas, U.S.D.J.) (finding that the claims at issue arose in the Southern District of New York, as they stemmed almost entirely from litigation in that District, and that Plaintiff misconstrued the 'center of gravity' analysis because it failed to "asccribe proper weight to the location at which the operative facts which form the basis of its claims occurred" [\*20] by focusing instead on the fact it allegedly suffered injury in New Jersey); Auto. Techs. Int'l, Inc. v. OnStar, LLC, No. 11-2490 (SRC), 2011 U.S. Dist. LEXIS 144824, 2011 WL 6303251, at \*3 (D.N.J. Dec. 15, 2011) (finding that Michigan was the center of gravity of a trademark infringement suit because Michigan was "where the accused device was researched, developed, tested and produced, and where all the relevant marketing and sales decisions were made"); Travelodge Hotels, Inc. v. Perry Developers, Inc., No. 11-1464 (DMC), 2011 U.S. Dist. LEXIS 134478, 2011 WL 5869602, at \*5-6 (D.N.J. Nov. 22, 2011) (finding that the various connections between the parties' license agreement and New Jersey, as well as the plaintiff's assertion that "the pecuniary injury resulting from the breach and termination of the [l]icense [a]greement occurred in New Jersey", were insufficient to overcome the reality that the central facts of the lawsuit — the alleged sale of a hotel without prior authorization and the failure to remit certain fees following the defendant's breach of the license agreement — occurred in Missouri); NPR, Inc. v. Am. Int'l Ins. Co. of Puerto Rico, No. 00-242 (WGB), 2001 U.S. Dist. LEXIS 3463, 2001 WL 294077, at \*4 (D.N.J. Mar. 28, 2001) (holding that the claims arose in Puerto Rico because "while Plaintiff undoubtedly felt the impact of lowered profitability...in New Jersey...[i]t is the breach of the Policy, not the underlying damages allegedly suffered, which must be considered in determining where the center of gravity of this litigation is"). Considering the foregoing, this Court finds that, [\*21] when determining where claims arose for the purposes of a Jumara analysis, the proper test focuses on where the conduct in question took place as opposed to where a plaintiff allegedly experienced the impact of that conduct. The majority of the relevant case

law, both in the antitrust context and beyond (including a decision by the Hon. Esther Salas, U.S.D.J., who is presiding over this matter), appears to favor this approach.

Plaintiffs raise two primary factual bases for their argument that the claims at issue here arose in New Jersey. (Pl. Br. at 18, ECF No. 28; Pl. Supp. Br. at 3-5, ECF No. 47). First, Plaintiffs contend that their claims involve alleged "dealer exclusivity and dealer channel foreclosure" regarding, among others, a New Jersey-based dealer, as well as other dealers that, while based elsewhere, do business in New Jersey. (Pl. Supp. Br. at 3-5, ECF No. 47). Plaintiffs allege that Motorola's anticompetitive actions have made it all but impossible for Plaintiffs to compete for a meaningful portion of LMR sales in New Jersey. (Am. Compl. ¶ 106, ECF No. 45). Second, Plaintiffs argue that Motorola engaged in serial sham petitioning intended to thwart New Jersey-based Powertrunk's [\*22] business interests. (Pl. Supp. Br. at 3-5, ECF No. 47; Am Compl. ¶¶ 124-33; 163-71). Specifically, Plaintiffs refer to their allegations that Motorola unsuccessfully petitioned the FCC in 2012 in connection with PowerTrunk winning a subcontract for the production of bus radios for the New Jersey Transit Authority, and later took actions to stymie a March 2016 contract between Powertrunk and the New York Metro Transit Authority. (Pl. Supp. Br. at 4, ECF No. 47) (citing Am Compl. ¶¶ 124-33, 163-71). Plaintiffs argue that, even if Motorola developed its corporate plans regarding these activities in Chicago, "the foreclosure and injury caused by [Motorola's] anticompetitive conduct includes New Jersey." (Pl. Br. at 18, ECF No. 28).

The Court, however, finds that these New Jersey ties are insufficient to overcome the clear, strong connections between Plaintiff's claims and the Northern District of Illinois. While Plaintiffs discount the importance of the location where Motorola made and orchestrated the plans underlying its alleged anticompetitive behavior, that location is, as discussed above, central to the analysis of where Plaintiffs' claims arose in this case. See [Ass'n of Am. Physicians & Surgeons, Inc., 2014 U.S. Dist. LEXIS 45077, 2014 WL 1334260, at \\*7](#); [Church & Dwight, 2010 U.S. Dist. LEXIS 103939, 2010 WL 3907038, at \\*10](#). The record reflects [\*23] that Motorola developed the business plans and strategies pertinent to Plaintiffs' allegations in its Chicago offices. (See Niewiara Decl. ¶ 13, ECF No. 22-10). Though Plaintiffs contend that the Court should focus on the effects of Motorola's alleged actions when determining where Plaintiff's claims arose, the Court has determined that an effects-based inquiry would be inappropriate. The proper analysis focuses on where the allegedly culpable conduct took place rather than on where the injury from that conduct manifested. See [Ass'n of Am. Physicians & Surgeons, Inc., 2014 U.S. Dist. LEXIS 45077, 2014 WL 1334260, at \\*7](#); [Patton Boggs, 2012 U.S. Dist. LEXIS 178841, 2012 WL 6568461 at \\*6](#); [Auto. Techs. Int'l, Inc., 2011 U.S. Dist. LEXIS 144824, 2011 WL 6303251, at \\*3](#); [Church & Dwight, 2010 U.S. Dist. LEXIS 103939, 2010 WL 3907038, at \\*9-10](#); [Liggett Group, 102 F. Supp. 2d at 532](#). In this case, Motorola's allegedly anticompetitive conduct stemmed from decisions made at their corporate headquarters in Chicago. Nothing in the record suggests that the actions underlying Plaintiffs' claims originated in New Jersey.

The Court is mindful that at least one judge in this District has adopted an effects-based test to determine where claims arose in the context of a Jumara analysis. See [Talone, 2017 U.S. Dist. LEXIS 89395, 2017 WL 2539394, at \\*8-9](#). Even if the Court were to employ such a standard, however, the New Jersey connections Plaintiffs have identified are still insufficient to establish that their claims arose in this State. In [Talone](#), the court found that the plaintiffs' claims arose [\*24] in New Jersey because the defendant's alleged anticompetitive conduct was "directed to and felt in New Jersey, three of four Plaintiffs [were] citizens of New Jersey and maintain[ed] practices in New Jersey...and...thousands of similarly situated class members live[d] and practice[d] in New Jersey." [2017 U.S. Dist. LEXIS 89395, 2017 WL 2539394, at \\*9](#). This case does not involve similarly extensive ties to New Jersey. While Plaintiffs claim that Motorola filed an unsuccessful petition with the FCC in retaliation for the New Jersey-based corporation PowerTrunk winning a sub-contract connected to the New Jersey Transit Authority, (Am. Compl. ¶ 130-31, ECF No. 45),<sup>5</sup> the other factual scenario specifically involving PowerTrunk concerns conduct that Motorola allegedly directed at a New York entity. (See id. ¶¶ 163-71). Additionally, while Plaintiffs have alleged that Motorola's allegedly anticompetitive conduct extended to New Jersey dealers, (see id. ¶¶ 106, 120), nothing in the record suggests that such conduct was specific to New Jersey, or even more prevalent within the District of New

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<sup>5</sup> Specifically, Plaintiffs allege that the New Jersey Transit Authority "awarded Alcatel-Lucent a contract for bus radios, using PowerTrunk as a subcontractor for the radios." (Id. ¶ 130).

Jersey than in other jurisdictions, such as the Northern District of Illinois. To the contrary, Plaintiffs allege that Motorola engaged in similar anticompetitive [\*25] activities throughout the United States. (See, e.g., *id.* ¶¶ 10-15, 93-121). Finally, while PowerTrunk is headquartered in New Jersey, the other three Plaintiffs in this case are not and, therefore, would have felt the effects of Motorola's alleged anticompetitive actions elsewhere.

Taking all of this information into account, the Court finds that the claims in this case arose in the Northern District of Illinois, and that this factor weighs in favor of transfer. While Plaintiffs identify certain connections to New Jersey, they are insufficient to overcome the fact that Motorola allegedly contemplated and pursued most, if not all, of the conduct at issue in this case from its headquarters in Illinois.

#### **4. The Relative Convenience of the Parties**

The Court must next examine the "convenience of the parties as indicated by their relative physical and financial position." *Jumara, 55 F.3d at 879*. Plaintiffs contend that this factor favors transfer, as Motorola had a 2016 revenue of US \$6 billion as opposed to Hytera's 2016 revenue of US \$530 million. (Brumfield Decl. ¶¶ 13-14, Exs. K-L, ECF No. 28-1). While courts in this District have found that a large financial disparity between parties will sometimes sway this [\*26] factor either in favor of transfer or against it, that typically occurs in scenarios where one party is a large company or conglomerate, the other is an individual or a small business, and the financial disparity is extreme. See *Goldstein v. MGM Grand Hotel & Casino, No. 15-4173 (FLW), 2015 U.S. Dist. LEXIS 150982, 2015 WL 9918414, at \*3 (D.N.J. Nov. 5, 2015)*. While Motorola may have a significantly larger annual revenue than Plaintiffs, Plaintiffs still have an annual revenue of more than half a billion dollars. Nothing in the record suggests that any party's financial condition might impact its ability to litigate in either this District or the Northern District of Illinois.

Regarding the parties' respective physical locations, Plaintiffs argue that New Jersey is more convenient because "one of them has its principal place of business here...and it is, thus, vastly more convenient than traveling to a state where none of the Plaintiffs maintain any offices." (Pl. Br at 20, ECF No. 28). Plaintiffs also contend that Motorola is a global corporation that has pursued litigation against Hytera all over the world, and that Motorola does business in New Jersey. (*Id.*). Motorola argues that the Northern District of Illinois would be more convenient because only one of the four Plaintiffs is connected to New Jersey, whereas [\*27] Motorola's corporate headquarters is located in Chicago and, in turn, so are many of the relevant employees and documents. (Def. Br. at 15, ECF No. 22-1). Motorola notes that all but one of the Plaintiffs would have to travel thousands of miles to either forum, and that three of the four Plaintiffs have already been traveling to the Northern District of Illinois to litigate the Illinois Actions. (*Id.*). While each side makes cogent arguments, the record reflects that one party resides in the Northern District of Illinois, another resides in this District, and the remainder reside elsewhere. Nothing in the record suggests that any party would be unable to litigate in either District. That is the epitome of neutrality.

Having carefully considered the parties' respective locations and financial conditions, the Court finds that the "convenience of the parties" factor is neutral in the transfer analysis.

#### **5. The Convenience of the Witnesses and the Availability of Documents**

When evaluating the convenience of the witnesses, the Court's consideration is limited to determining whether the witnesses in question would actually be unavailable for trial in one of the fora. *Jumara, 55 F.3d at 879*. The record is relatively [\*28] thin regarding this factor. In their Amended Complaint, Plaintiffs refer to a non-party dealer "located in New Jersey and New York". (Am. Compl. ¶ 120, ECF No. 45). Plaintiffs argue that this dealer would not be subject to the subpoena power of the Northern District of Illinois. (Pl. Br. at 21, ECF No. 28). Plaintiffs, however, do not contend that the dealer would refuse to make itself available in Illinois, only that it would most likely find New Jersey to be more convenient than the Northern District of Illinois. (Pl. Br. at 21, ECF No. 28). The same can be said for the two "potential witness dealers operating in New Jersey" that Plaintiffs identified in their supplemental briefing. (Pl. Supp. Br. at 6, ECF No. 47). Moreover, while Plaintiffs suggest that "[e]nd-user customers in New

Jersey and just across the river from this Court in New York may also be witnesses to testify as to their harm", (*id.*), ostensibly suggesting that those witnesses may be unavailable in the Northern District of Illinois, the same theoretical unavailability would also be true for end-users in and around the Northern District of Illinois if the case were to remain in New Jersey. Motorola argues that transfer [\*29] to the Northern District of Illinois would benefit the majority of its potential witnesses. (Def. Br. at 15, ECF No. 22-1). Motorola does not suggest that those witnesses would be unavailable in New Jersey, but only that the witnesses would find the Northern District of Illinois more convenient. In short, while both parties argue, in the abstract, that their preferred fora would be more convenient for certain witnesses, neither party contends that any of those witnesses would be unwilling to travel to, or otherwise unavailable in, either this District or the Northern District of Illinois, which is the only pertinent consideration under [\*Jumara\*, 55 F.3d at 879](#). To extent they are, it suffices to say that neither District would have subpoena power over all potential witnesses. The Court, therefore, finds this factor to be neutral in the transfer analysis.

Regarding the relevant books and records, the Court must focus its analysis on whether those items would be unavailable in either fora. *Id.* While both parties argue that their preferred forum would be more convenient or otherwise present fewer logistical burdens, (Def. Br. at 15, ECF No. 22-1; Pl. Br. at 22, ECF No. 28), that is not the appropriate consideration. [\*30] Nothing in the record indicates that any of the relevant documents would be unavailable in either District. The Court, therefore, finds that this factor is also neutral to the transfer analysis.

## **B. Public Interest Factors**

Beyond the "private interest" factors discussed above, the Third Circuit has also enumerated a list of "public interest" factors for courts to consider when deciding a motion to transfer. Such "public interest" factors include: "the enforceability of the judgment; practical considerations that could make the trial easy, expeditious, or inexpensive; the relative administrative difficulty in the two fora resulting from court congestion; the local interest in deciding local controversies at home, the public policies of the fora, and the familiarity of the trial judge with the applicable state law in diversity cases." [\*Jumara\*, 55 F.3d at 879-80](#).

### **1. Enforceability of Judgments**

The "enforceability of the judgment" factor is neutral, as a judgment rendered in either this District or the Northern District of Illinois could easily be registered and then enforced in another district.

### **2. Practical Considerations Regarding Trial**

Practical considerations are relevant in that they "could make the trial easy, [\*31] expeditious, or inexpensive," and this is particularly true if transferring the case would result in it being in "another jurisdiction where a related matter is pending." [\*LG Elecs., Inc. v. First Int'l Comput., Inc.\*, 138 F. Supp. 2d 574, 592 \(D.N.J. 2001\)](#). Courts transferring cases in those circumstances do so in light of the Supreme Court's warning that "[t]o permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that [1404\(a\)](#) was designed to prevent." [\*Am. Tel. & Tel. Co. v. MCI Commc'n Corp.\*, 736 F. Supp. 1294, 1308 \(D.N.J. 1990\)](#) (quoting [\*Cont'l Grain Co. v. Barge FBL-585\*](#), 364 U.S. 19, 26, 80 S. Ct. 1470, 4 L. Ed. 2d 1540 (1960)). Additionally, the Court notes that the legal claims and issues between cases do not have to be identical for this factor to favor transfer; rather the existence of a similar case supports transfer where the cases are similar enough that transfer would support judicial efficiency or reduce the risk of inconsistent results. See [\*Job Haines Home for the Aged v. Young\*, 936 F. Supp. 223, 233 \(D.N.J. 1996\)](#).

Motorola argues that this factor strongly favors transfer because the present action and the Illinois Actions are closely related. (Def. Br. at 12-13, ECF No. 22-1). Motorola contends that the cases are clearly related as all three

center on Hytera's sale of digital LMR products in the United States.<sup>6</sup> *Id.* Motorola also contends that "resolution of these issues [\*32] will require similar evidence, both documentary and testimonial." (*Id.* at 13). Plaintiffs disagree, contending that the case law Motorola relies on to support its motion is "all inapposite," as it concerns the risk of "inconsistent rulings", which is not at issue here. (Pl. Br. at 23, ECF No. 28). Plaintiffs also argue that "transfer provides no advantage as to 'judicial and litigation efficiency.'" (*Id.*). Furthermore, Plaintiffs contend that the present action and the Illinois Actions involve different parties, different claims, and different products, and that the cases therefore "require vastly different evidentiary requirements, focus, and proof." (*Id.* at 24).

While the Court recognizes that there are connections between the present action and the Illinois Actions, they are relatively distinct from each other. First, the claims involved in the cases are different — antitrust as opposed to patent infringement and misappropriation of trade secrets. While Motorola argues that resolution of the issues at hand would involve similar evidence,<sup>7</sup> it is difficult to see how evidence regarding Motorola's allegedly anticompetitive interactions with dealers or its alleged serial "sham petitioning" would bear [\*33] on whether certain of the Plaintiffs infringed on Motorola's patents or misappropriated Motorola's trade secrets (or vice-versa). Second, the Illinois Actions do not involve all of the same parties as the present case, as PowerTrunk is not a party in either the either of the Illinois Actions. While the Court acknowledges that the Northern District of Illinois' general familiarity with the parties' disputes may, perhaps, foster efficiency, this factor is essentially neutral to the transfer analysis.

### **3. Relative Administrative Difficulty**

Regarding the administrative difficulties associated with proceeding in either District, the Court is required to evaluate this factor in light of the relative docket congestion of the fora. *Jumara, 55 F.3d at 879*. None of the parties have presented the Court with any evidence comparing the respective cases loads of the District of New Jersey and the Northern District of Illinois. The Court recognizes that both Districts are extremely busy, and that transfer would have only a negligible effect on the relative congestion of either District's docket. This factor is therefore neutral in the transfer analysis.

### **4. Local Interests / Public Policies of the Fora**

Regarding [\*34] the local interest in deciding controversies, both Districts have strong interests in handling matters concerning their resident businesses. See *Stringfield v. Honeywell Int'l, Inc., No. 11-1829, 2011 U.S. Dist. LEXIS 70044, 2011 WL 2600739, at \*3 (D.N.J. June 29, 2011)*. Thus, the District of New Jersey has a strong interest in the outcome of a case involving both PowerTrunk, which has its principal place of business in New Jersey, as well as New Jersey-based dealers/customers impacted by Motorola's alleged anticompetitive activity. The Northern District of Illinois has an identically strong interest in the outcome of a case involving Motorola, which has its corporate headquarters in Chicago, as well as the effect of Motorola's alleged conduct on Illinois citizens. The Court, therefore, finds this factor to be neutral in the transfer analysis.

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<sup>6</sup> Motorola also argues that the cases are related because Plaintiffs cite the Illinois Actions as two examples of sham litigation by Motorola in their Complaint, and cite two of the seven patents at issue in the Patent Action as examples of Motorola's anticompetitive conduct. (*Id.*). These arguments, which address the previous iteration of Plaintiffs' pleading, are no longer applicable, as Plaintiffs abandoned those allegations when filing their Amended Complaint. The Court is not suggesting any error on Motorola's part. At the time Motorola filed its briefing, the original Complaint remained Plaintiffs' operative pleading. Plaintiffs did not file their Amended Complaint until several months after the parties finished briefing Motorola's motion.

<sup>7</sup> Again, the Court acknowledges that, at the time Motorola made this argument, Plaintiffs had alleged that the Illinois Actions were themselves examples of Motorola's allegedly anticompetitive conduct. Plaintiffs, however, removed those allegations when filing their Amended Complaint. (*Compare* Compl., ECF No. 1, *with* Am. Compl. ECF No. 45).

## **5. Judges' Familiarity With Applicable State Law**

This factor focuses on whether judges in one of the districts would have greater familiarity with the applicable state law, particularly in diversity cases. *Jumara*, 55 F.3d at 879. While Plaintiffs' claims sound primarily in federal **antitrust law**, Plaintiffs do assert violations of *California's Business & Professions Code §§ 17200, Florida Statutes §§ 501.201* — Deceptive and Unfair Trade Practices, and Section 4 of the *New Jersey Antitrust Act* (for both monopolization and attempted monopolization). (Compl. ¶¶ 269-307). The [\*35] parties do not contend that either this District or the Northern District of Illinois has more familiarity with, or is otherwise better equipped to understand and apply, California or Florida law. Moreover, while common sense suggests that a New Jersey Court would be better suited to address Plaintiffs' newly added claims under the New Jersey Antitrust Act, that is not necessarily true. As one Judge in this District has observed, the "[t]he section of the New Jersey Antitrust Act at issue in this case was modeled after the *Sherman Act*, and New Jersey courts have looked to federal decisions interpreting the Sherman Act for guidance in interpreting the New Jersey statute." *Stephenson v Bell Atl. Corp.*, 177 F.R.D. 279, 284, n.3 (D.N.J. 1997). In any event, neither party has argued this point. The Court, therefore, finds that this factor is neutral in the transfer analysis.

## **C. The Jumara Factors Weigh in Favor of Transfer**

The Court has carefully considered each of the factors discussed above. Most of those factors are essentially neutral to the transfer analysis. Two favor transfer (Defendant's choice of forum and, more importantly, where the claims arose), and only one (Plaintiffs' choice of forum) weigh against it. Moreover, notwithstanding the fact that [\*36] Plaintiff PowerTrunk elected to file suit in its home jurisdiction, Plaintiffs' choice of forum is accorded reduced weight, as the claims at issue arose elsewhere. On balance, the Court finds that the *Jumara* factors weigh in favor of transferring this matter to the United States District Court for the Northern District of Illinois.

## **III. CONCLUSION**

For the reasons set forth above, Motorola's motion to transfer, (ECF No. 22), is **GRANTED**, and this matter shall be transferred to the United States District Court for the Northern District of Illinois. An appropriate form of Order accompanies this Opinion.

/s/ Joseph A. Dickson

**JOSEPH A. DICKSON, U.S.M.J.**

## **ORDER GRANTING MOTION TO TRANSFER**

**JOSEPH A. DICKSON, U.S.M.J.**

This matter comes before the Court by way of Defendant's motion to transfer this matter to the United States District Court for the Northern District of Illinois pursuant to *Federal Rule of Civil Procedure 13(a)* and *28 U.S.C. § 1404(a)*. (ECF No. 22). In accordance with *Federal Rule of Civil Procedure 78*, the Court did not hear oral argument on Defendant's application. Upon careful consideration of the parties' submissions, and for the reasons set forth in this Court's Opinion filed on this date,

**IT IS** on this 6th day of December, 2018,

**ORDERED** that Defendant's motion to transfer, [\*37] (ECF No. 22), is **GRANTED**; and it is further

**ORDERED** that the Clerk of the Court transfer this matter to the United States District Court for the Northern District of Illinois and it is further

**ORDERED** that, pursuant to [Local Civil Rule 72.1\(c\)\(1\)\(C\)](#), this transfer is stayed for 14 days from the date of this Order, so as to afford the parties an opportunity to appeal the undersigned's decision to the District Court. If any party files a timely appeal, then "the Clerk shall take no action until the appeal is decided by the [District] Judge." [L.Civ. R. 72.1\(c\)\(1\)\(C\)](#).

/s/ Joseph A. Dickson

**JOSEPH A. DICKSON, U.S.M.J.**

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## Kleen Prods. LLC v. Georgia-Pacific LLC

United States Court of Appeals for the Seventh Circuit

May 23, 2018, Argued; December 7, 2018, Decided

No. 17-2808

### **Reporter**

910 F.3d 927 \*; 2018 U.S. App. LEXIS 34469 \*\*; 2018-2 Trade Cas. (CCH) P80,601

KLEEN PRODUCTS LLC, et al., Plaintiffs-Appellants, v. GEORGIA-PACIFIC LLC and WESTROCK CP, LLC, Defendants-Appellees.

**Prior History:** [\*\*1] Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 10 C 5711 — Harry D. Leinenweber, Judge.

[Kleen Prods. LLC v. Int'l Paper, 276 F. Supp. 3d 811, 2017 U.S. Dist. LEXIS 122000, 2017 WL 3310975 \(N.D. Ill., Aug. 3, 2017\)](#)

## **Core Terms**

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Purchasers, prices, increased price, containerboard, competitors, conspiracy, manufacturers, hikes, district court, collusion, class period, antitrust, cartel, coordination, customers, meetings, email, announced, conscious, increases, anti trust law, self-interest, parallelism, closures, contacts, machines, output, trier of fact, defendants', employees

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

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

### **HN1 [down arrow] Conspiracy to Monopolize, Sherman Act**

Section 1 of the Sherman Act prohibits every contract, combination, or conspiracy in restraint of trade. Courts have understood for more than a century that this language does not ban all contracts, but instead reaches only agreements that restrict competition. In the absence of an agreement, the antitrust laws forbid only monopolization or attempts to monopolize, 15 U.S.C.S. § 2, as well as a few other arrangements including anticompetitive mergers and acquisitions, 15 U.S.C.S. § 18.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

910 F.3d 927, \*927L 2018 U.S. App. LEXIS 34469, \*\*1

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmoving Party Persuasion & Proof

## **HN2** Conspiracy to Monopolize, Sherman Act

At the summary judgment stage a [§ 1 of the Sherman Act](#), plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently. An antitrust plaintiff, like all others, is entitled to try to meet that burden with either direct or circumstantial evidence. Antitrust plaintiffs do not face a heightened burden to defeat summary judgment. As [Fed. R. Civ. P. 56](#) generally commands, the court draws all reasonable inferences in favor of the non-moving party. It is the substantive law, however, that establishes what the plaintiff must address. An antitrust plaintiff needs evidence that would allow a trier of fact to nudge the ball over the 50-yard line and rationally to say that the existence of an agreement is more likely than not. Put more directly, they must put on the table some evidence which, if believed, would support a finding of concerted behavior.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

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

## **HN3** Conspiracy to Monopolize, Sherman Act

Certain structural features that make it conducive to successful collusion include a small number of manufacturers, vertical integration, inelastic demand, a standardized commodity product, and high barriers to entry. These characteristics make it easier for companies either to form a cartel or to follow the leader independently.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

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

## **HN4** Conspiracy to Monopolize, Sherman Act

Following a competitor's price increases can be consistent with rational self-interest in oligopolies. Each firm in a tight oligopoly might think that it will reap greater profits if it imitates, rather than undermines, its peers' price hikes. And it might reach that conclusion without any conscious coordination with its competitors. For that reason, it is not a violation of [antitrust law](#) for a firm to raise its price, counting on its competitors to do likewise (but without any communication with them on the subject).

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

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

## **HN5** Conspiracy to Monopolize, Sherman Act

The task before any antitrust plaintiff is to find and produce evidence that reveals coordination or agreement (even a wink and a nod, formal agreements have never been required for purposes of [§ 1 of the Sherman Act](#)). For instance, foreknowledge of price increases may be persuasive evidence that an agreement was afoot.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

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

#### [\*\*HN6\*\*](#) **Conspiracy to Monopolize, Sherman Act**

Before an inference of conspiracy can be drawn, courts have looked for a shift in firm behavior, as opposed to external market conditions.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

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

#### [\*\*HN7\*\*](#) **Conspiracy to Monopolize, Sherman Act**

A continuation of a historic pattern, including of parallel price increase announcements, does not plausibly allow one to infer the existence of a cartel.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

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

#### [\*\*HN8\*\*](#) **Conspiracy to Monopolize, Sherman Act**

A cartel cannot survive absent some enforcement mechanism.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

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

#### [\*\*HN9\*\*](#) **Conspiracy to Monopolize, Sherman Act**

A cartel may exist with only soft measures of control or ineffective enforcement. Evidence of an enforcement mechanism is not always required. Even if that is so, however, the absence of evidence about enforcement does nothing to dissipate the inference of independent behavior.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

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

#### [HN10](#) [blue document icon] Conspiracy to Monopolize, Sherman Act

Supply behavior is highly relevant because price-fixing arrangements often function through restrictions of output. But not every supply-side change is equally suggestive of a conspiracy. Conduct that is easily reversed may be consistent with self-interested decision-making.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

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

#### [HN11](#) [blue document icon] Conspiracy to Monopolize, Sherman Act

Firms take significant risks by reducing their output in an inflexible manner, unless there is an enforceable agreement in place to ensure that competitors will follow suit. Because perilous leading makes little economic sense absent coordination, evidence of less-reversible supply restrictions supports an inference of conspiracy.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

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

#### [HN12](#) [blue document icon] Conspiracy to Monopolize, Sherman Act

Information flow, especially between executives, may be probative of conspiracy. But having the opportunity to conspire does not necessarily imply that wrongdoing occurred. Especially when companies have legitimate business reasons for their contacts, plaintiffs must offer some evidence that moves beyond speculation about the content of what was conveyed.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

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

#### [HN13](#) [blue document icon] Conspiracy to Monopolize, Sherman Act

Where companies were not only competitors but also among each other's largest suppliers and largest customers, plaintiffs needed to point to a communication that suggested a meeting of the minds to fix prices.

**Counsel:** For KLEEN PRODUCTS LLC, FERRARO FOODS OF NORTH CAROLINA, LLC, MTM PACKAGING SOLUTIONS OF TEXAS, LLC, FERRARO FOODS, INCORPORATED, RHE HATCO, INCORPORATED, Plaintiffs - Appellants: Michael J. Freed, Attorney, Steven A. Kanner, Attorney, Robert J. Wozniak, Attorney, FREED KANNER LONDON & MILLEN LLC, Bannockburn, IL; Aaron Martin Panner, Attorney, KELLOGG, HANSEN, TODD, FIGEL & FREDERICK PLLC, Washington, DC; Daniel J. Mogin, Attorney, Jodie M. Williams, Attorney, MOGIN LAW FIRM, P.C., San Diego, CA.

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**Judges:** Before WOOD, Chief Judge, and BAUER and ROVNER, Circuit Judges.

**Opinion by:** WOOD

## Opinion

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**[\*931]** Wood, *Chief Judge*. Oligopolies have always posed problems for conventional **antitrust law**: without something that can be called an agreement, they elude scrutiny under [section 1 of the Sherman Act, 15 U.S.C. § 1](#), and yet no individual firm has enough market power to be subject to [Sherman Act section 2, 15 U.S.C. § 2](#). Tacit collusion is easy in those markets, see [In re Text Messaging Antitrust Litigation, 782 F.3d 867 \(7th Cir. 2015\)](#), and firms have little incentive to compete on the basis of price, "preferring to share the profits [rather] than to fight with each other." [Joe Sanfelippo Cabs, Inc. v. City of Milwaukee, 839 F.3d 613, 615 \(7th Cir. 2016\)](#).

This appeal concerns the fine line between agreement and tacit collusion, or, put another way, conscious parallelism. Direct purchasers of containerboard ("the Purchasers") charged multiple manufacturers with conspiring to increase prices and reduce output between 2004 and 2010. We affirmed the district court's decision to certify a nationwide **[\*\*3]** class of buyers. [Kleen Prods. LLC v. Int'l Paper Co., 831 F.3d 919 \(7th Cir. 2016\)](#). Before and after that ruling, most of the defendants settled with the Purchasers. But two companies—Georgia-Pacific LLC and WestRock CP, LLC—decided to fight. They persuaded the district court that there was not enough evidence of a conspiracy to proceed to trial. We agree with that assessment and affirm the judgment dismissing the case.

I

A

Containerboard is the name of the material used in countless boxes: it consists of a corrugated layer of heavy paper sandwiched between two smooth pieces of linerboard. Demand is relatively inelastic, meaning that customers will not defect to other products even if the price goes up, because the available substitutes are inferior. Containerboard is manufactured at large, costly mills, which are hard to duplicate, given both the high cost of construction and the myriad of environmental laws that must be satisfied. A handful of major players dominate the industry. Those players include the original defendants in this suit: International Paper ("IP"), Georgia-Pacific, Temple-Inland, Inc., WestRock,<sup>1</sup> Weyerhaeuser Co., Norampac Holdings U.S. Inc., and Packaging Corporation of America ("PCA").

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<sup>1</sup> Over the lifespan of this case, WestRock has undergone corporate changes and thus has been known by various names, including RockTenn CP, LLC and Smurfit-Stone Container Corporation. We refer to the business by its present name.

During the early 2000s, prices for containerboard **[\*\*4]** were low. But from February 2004 to November 2010, they rose dramatically. The original defendants attempted to institute price increases on 15 different occasions. The pattern was a common one. After one company announced that it **[\*932]** would raise its prices for containerboard, the rest followed suit with identical or comparable increases in the ensuing hours, days, or weeks. (The one exception was a failed attempt in which there were three hold-outs.) Such efforts took place from time to time. For example, in March 2003, the defendants attempted an ultimately unsuccessful increase. Of the proposed hikes from 2004 to 2010, Georgia-Pacific, WestRock, and a non-defendant each led the effort twice. The price increases were sustained nine times, a 60% success rate.

While containerboard prices rose, containerboard production capacity fell in North America (despite the inelasticity of demand and growth throughout the rest of the globe). The initial defendants were not immune from this decline. The Purchasers' expert concluded that the defendant companies reduced their production capacity by an amount almost double that of non-defendants, though they used different strategies to accomplish this **[\*\*5]** goal. They closed a significant number of mills during the class period—WestRock alone was responsible for more than a third of those closures. WestRock also took care, through measures such as buyer selection and machinery sales, to avoid adding containerboard supply into the market. Georgia-Pacific kept all its mills running, but it slowed the rate of production. It would periodically "slow back" production by idling or shutting down machines and taking extra downtime. While these practices diminished supply to the point that it sometimes pinched, in the end Georgia-Pacific never missed an order. And the company actually increased its overall capacity by acquiring a new mill in 2007.

During this period, the defendants were in regular communication. Company executives and other employees spoke by phone and at trade association meetings every few days. The record does not reveal the contents of all these conversations, but at least some dealt with the timing and pricing of interfirm trading of containerboard—a common practice.

Internal and public-facing statements made by the defendants' employees shed light on these economic developments. Some email exchanges may be read to imply that **[\*\*6]** the defendants had foreknowledge of other companies' proposed increases before they were announced. For example, just before three price hikes, a PCA employee offered an opinion about how high prices would need to go over the next year and a half in order to recover the cost of capital. A Georgia-Pacific staffer wrote "the party begins" when discussing an increase attempt. A WestRock vice president emailed that the company "always follow[s] IP," even though in fact "always" was an overstatement. And a Weyerhaeuser employee discussed a specific increase two days before WestRock first made its new price public. Other statements support the inference that a coordinated plan was in place. For instance, a Weyerhaeuser employee wrote that he "made up a bunch" of information in a report about what was learned from customers about competition, asking others to "be more specific" to stay "out of anti-trust legal issues." A Norampac executive, discussing problems with the industry, said "you have to be ready to let go business if you want to keep the price up," and "everybody needs to do the same thing."

Georgia-Pacific and WestRock made their own incriminating remarks. Because some details remain **[\*\*7]** under seal in this court, some of our examples are a bit vague, but we have reviewed the sealed materials and they are consistent with the remainder of the evidence. A WestRock vice-president made remarks in an email that could easily be construed as an undertaking to follow-the-leader. A different **[\*933]** vice-president complained that the company "ha[d] no choice but to support [a price increase] initiative" and that WestRock "ha[d] done [its] part." At one point, a company employee wrote that the "only way to get paid is to have a 1994-95 situation where the tide rises for all boats," perhaps referring to the container-board industry's earlier run-ins with antitrust law. See, e.g., [In re Linerboard Antitrust Litig., 305 F.3d 145 \(3d Cir. 2002\)](#). Publicly, WestRock's CEO was reported to have said that the company had a restructuring plan to "cut supply enough at [WestRock] to force price increases throughout the industry." Georgia-Pacific's president gave a speech during the period in question urging the industry to resist customer requests for price breaks.

In September 2010, the Purchasers filed a putative class action alleging violations of [section 1 of the Sherman Act](#), [15 U.S.C. § 1](#). The district court consolidated the suit with similar actions and denied several motions [\*\*8] to dismiss. Discovery followed. Then in March 2015, the district court granted the Purchasers' motion for class certification under [Federal Rule of Civil Procedure 23](#). It defined the class as follows:

All persons that purchased Containerboard Products directly from any of the Defendants or their subsidiaries or affiliates for use or delivery in the United States from at least as early as February 15, 2004 through November 8, 2010.

[Kleen Prods., 831 F.3d at 922](#). We affirmed the certification decision while making clear that we were not addressing the merits. *E.g.*, [id. at 928](#).

Back in the district court, the litigation rolled onward. The court largely denied the parties' cross-motions to exclude each other's experts. Both sides moved for summary judgment. Before the court acted on those motions, some of the defendants settled with the Purchasers. The district court granted the remaining defendants, Georgia-Pacific and WestRock, summary judgment. In a lengthy opinion that delved deeply into the Purchasers' evidence, the court concluded that the record, viewed holistically in the light most favorable to the Purchasers, did not tend to rule out that the defendants had acted independently. With only the final approval of settlement agreements pending, the district [\*\*9] court entered partial final judgment for the remaining defendants under [Rule 54\(b\)](#). The Purchasers ask us to revisit that ruling.

## II

[HN1](#) [Section 1 of the Sherman Act](#) prohibits every "contract, combination, ... or conspiracy in restraint of trade ..." Courts have understood for more than a century that this language does not ban *all* contracts, but instead reaches only agreements that restrict competition. [Copperweld Corp. v. Indep. Tube Corp.](#), 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984); see also [Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.](#), 441 U.S. 1, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979); [United States v. Socony-Vacuum Oil Co.](#) (1940). In the absence of an agreement, the antitrust laws forbid only monopolization or attempts to monopolize, see [15 U.S.C. § 2](#), as well as a few other arrangements including anticompetitive mergers and acquisitions, see [15 U.S.C. § 18](#). But this case concerns only [section 1](#); the plaintiffs make no claim that any of the defendants has even attempted to monopolize, much less succeeded in such an effort. See [Spectrum Sports, Inc. v. McQuillan](#), 506 U.S. 447, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993). We can therefore disregard all other antitrust theories and focus on the question [\*934] whether the district court correctly decided that the Purchasers did not present enough evidence to permit a trier of fact to find the agreement necessary for [section 1](#) liability. As the Supreme Court put it in [Bell Atlantic Corp. v. Twombly](#), 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), [HN2](#) "at the summary judgment stage a § 1 plaintiff's offer of conspiracy evidence must tend to rule out the [\*\*10] possibility that the defendants were acting independently." *Id. at 554*, citing [Matsushita Elec. Indus. Co. v. Zenith Radio Corp.](#), 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

It is worth recalling that an antitrust plaintiff, like all others, is entitled to try to meet that burden with either direct or circumstantial evidence. [Miles Distrib., Inc. v. Specialty Constr. Brands, Inc.](#), 476 F.3d 442, 449 (7th Cir. 2007). Antitrust plaintiffs do not face a heightened burden to defeat summary judgment. See [Omnicare, Inc. v. UnitedHealth Grp., Inc.](#), 629 F.3d 697, 707 (7th Cir. 2011). As [Rule 56](#) generally commands, we draw all reasonable inferences in favor of the non-moving party, here the Purchasers. It is the substantive law, however, that establishes what the plaintiff must address. The Purchasers needed evidence that would allow a trier of fact to nudge the ball over the 50-yard line and rationally to say that the existence of an agreement is more likely than not. Put more directly, they must put on the table "some evidence which, if believed, would support a finding of concerted behavior." [Toys "R" Us Inc. v. FTC](#), 221 F.3d 928, 935 (7th Cir. 2000); accord [Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan](#), 203 F.3d 1028, 1032 (8th Cir. 2000) (*en banc*) (reading *Matsushita* to require that it be more reasonable to infer a price-fixing conspiracy than permissible activity).

Armed with bountiful circumstantial evidence, the Purchasers accuse the defendant manufacturers of agreeing to restrict the supply of containerboard and thereby to create market conditions that would support significantly higher [\*\*11] prices. The district court properly considered "economic evidence suggesting that the defendants were not in fact competing, and noneconomic evidence suggesting that they were not competing because they had agreed not to compete." *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002). It then drew and compared the corresponding inferences from each data point. See, e.g., *Omnicare*, 629 F.3d at 707-20. After determining that each piece of evidence individually did not rule out the possibility of independent action, it reviewed the evidence in the aggregate, as required. See *id. at 720*. The court concluded that because no individual piece of evidence tended to show collusion, the combined probative value was zero. We are not so sure of that. While no single piece of information may win the day, the whole may be greater than the sum of its parts in tending to exclude the possibility of conscious parallelism. See *High Fructose Corn Syrup*, 295 F.3d at 655 ("[E]vidence can be susceptible of different interpretations ... without being wholly devoid of probative value ... .").

Nonetheless, our assessment of the district court's decision is *de novo*, and so we need only satisfy ourselves that we have the proper standard in mind. *In re Dairy Farmers of Am., Inc., Cheese Antitrust Litig.*, 801 F.3d 758, 762 (7th Cir. 2015). Viewing the evidence and reasonable inferences in the Purchasers' favor, we ask whether they [\*\*12] have produced any evidence that would rule out the hypothesis that the defendants were engaged in self-interested but lawful oligopolistic behavior during the relevant period. Despite the volume of evidence the Purchasers submitted in opposition [\*935] to summary judgment, we find ourselves in agreement with the district court's ultimate conclusion. We discuss below only the most significant evidence against Georgia-Pacific and WestRock; those interested in a more comprehensive account should refer to the district court's opinion, *Kleen Prods. LLC v. Int'l Paper*, 276 F. Supp. 3d 811 (N.D. Ill. 2017). We conclude that nothing in this record would permit a trier of fact to conclude that the defendants were colluding, rather than behaving in their independent self-interest.

### III

#### A

We start with some structural evidence about the container-board industry. As we noted in our earlier encounter with this litigation, the market has [HN3](#) certain structural features that make it "conducive to successful collusion," such as a small number of manufacturers, vertical integration, inelastic demand, a standardized commodity product, and high barriers to entry. *Kleen Prods.*, 831 F.3d at 927-28. These characteristics make it easier for companies either to form a cartel or to follow the leader independently. *Text Messaging*, 782 F.3d at 871-72; *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 397 (3d Cir. 2015). We [\*\*13] explained why this is so in our 2015 *Text Messaging* opinion:

[I]f a small number of competitors dominates a market, they will find it safer and easier to fix prices than if there are many competitors of more or less equal size. For the fewer the conspirators, the lower the cost of negotiation and the likelihood of defection . . . But the other side of this coin is that the fewer the firms, the easier it is for them to engage in "follow the leader" pricing ("conscious parallelism," as lawyers call it, "tacit collusion" as economists prefer to call it)—which means coordinating their pricing without an actual agreement to do so. As for the apparent anomaly of competitors' raising prices in the face of falling costs, . . . this may be not because they've agreed not to compete but because all of them have determined independently that they may be better off with a higher price. That higher price, moreover—the consequence of parallel but independent decisions to raise prices—may generate even greater profits (compared to competitive pricing) if costs are falling, provided that consumers do not have attractive alternatives.

*Text Messaging*, 782 F.3d at 871-72. Because of the competing inferences that can be drawn from this market [\*\*14] structure, the district court properly found that the economic evidence did not tend to exclude the possibility of independent action.

#### B

Next, we turn to more specific evidence that the Purchasers offered. In establishing both defendants' failure to compete, the Purchasers rely heavily on the 15 price hikes that occurred over the class period. But one must take care with the inferences that can be drawn from such evidence. [HN4](#)<sup>↑</sup> Following a competitor's price increases can be consistent with rational self-interest in oligopolies. See [Text Messaging, 782 F.3d at 874-75](#). Each firm in a tight oligopoly might think that it will reap greater profits if it imitates, rather than undermines, its peers' price hikes. [Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227, 113 S. Ct. 2578, 125 L. Ed. 2d 168 \(1993\)](#); [Valspar Corp. v. E.I. Du Pont de Nemours & Co., 873 F.3d 185, 191 \(3d Cir. 2017\)](#). And it might reach that conclusion without any conscious coordination with its competitors. For that reason, "it is not a violation of [antitrust law](#) for a firm to raise its price, counting on its [\*936] competitors to do likewise (but without any communication with them on the subject) ... ." [Text Messaging, 782 F.3d at 876](#).

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[HN5](#)<sup>↑</sup> The task before any plaintiff is thus to find and produce evidence that reveals coordination or agreement (even a wink and a nod—formal agreements have never been required for purposes of [Sherman Act section 1](#)). See *id.*; [Blomkest Fertilizer, 203 F.3d at 1033](#). For instance, foreknowledge [\[\\*\\*15\]](#) of price increases may be persuasive evidence that an agreement was afoot. See [Chocolate Confectionary, 801 F.3d at 408](#); [In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 906 F.2d 432, 455 \(9th Cir. 1990\)](#). The Purchasers here attempt to carry their burden by emphasizing the timing of the price increase attempts, which they describe as "lockstep." They urge us to draw the inference that such tight congruence of price movements could not have occurred unless the competitors had an inside scoop. But a close look at the record reveals that the Purchasers overstate how coordinated these hikes actually were. Different manufacturers, including non-defendants, led the attempts. See [Reserve Supply Corp. v. Owens-Corning Fiberglas Corp., 971 F.2d 37, 54 \(7th Cir. 1992\)](#) (finding that a change in who is the price leader suggests that manufacturers could independently decide whether to participate in price increases). Sometimes companies followed suit over a *month* later. Even the attempts that saw quick turnaround times do little to raise suspicions. If it is in a company's self-interest to imitate a price leader's increase, why wait to enjoy the benefit? The Purchasers accuse the defendants of lying when they claim to have explored independently a possible increase. But there is no evidence supporting this allegation.

The Purchasers' "proof" of prior knowledge amounts to nothing more than speculation. [\[\\*\\*16\]](#) They emphasize a March 2004 PCA memorandum that said "at least three \$40-50 increases over the next 18 months" were needed to recoup the cost of capital. By September 2005, three attempts to raise prices had indeed occurred. But this supposed smoking gun could be nothing more than a somewhat accurate industry prediction. That two of the increases were for \$50 is unsurprising, given that most of the 15 attempts were for \$40 or \$50. More tellingly, the PCA employee did not accurately predict *three* successful increases, since the second one failed and the third was only for \$30.

The evidence that Georgia-Pacific provided or received advance notice is even weaker. The best that the Purchasers offer is a comment made by a Georgia-Pacific employee that "the party begins," following a discussion that a few manufacturers had announced an increase. This remark could merely express enthusiasm about the upward trend in pricing.

Another aspect of the Purchasers' argument is that the rising prices throughout the class period reflect an abrupt change in business practices. If that is an accurate description of what happened, it might support an inference of conspiracy. But [HN6](#)<sup>↑</sup> before the inference can [\[\\*\\*17\]](#) be drawn, we have looked for a shift in firm behavior, as opposed to external market conditions. See [Toys "R" Us, 221 F.3d at 935](#); [Chocolate Confectionary, 801 F.3d at 410](#). In the present case, the Purchasers' evidence reveals only changed market conditions. For instance, they point to complaints that manufacturers made about aggressively competitive pricing that took place before, but not during, the class period. Yet the shift may be explained by external factors, such as the emergence from the economic downturn of 2008, which occurred in the [\*937] middle of the class period. And in terms of the companies' behavior—the relevant inquiry—the manufacturers had attempted to raise prices before the class period as well. [HN7](#)<sup>↑</sup> A continuation of a historic pattern—including of parallel price increase announcements—does not plausibly allow one to infer the existence of a cartel. [Valspar, 873 F.3d at 196](#); [Chocolate Confectionary, 801 F.3d at 410](#).

A further strike against the Purchasers' case is the failure rate of the manufacturers' efforts: 40% of the attempted increases did not hold. The district court pondered why a company would risk treble damages by colluding on an often-ineffective plan when tacitly following price hikes had no downside risk. Cf. [Text Messaging, 782 F.3d at 878](#). Perhaps the Purchasers have a good answer to that question: when potential [\\*\\*18](#) profits are in the billions, even 60% odds provide a substantial incentive. But that at best leaves matters in equipoise.

If this was a cartel, it would have tried to impose disciplinary measures on the "cheaters" who did not go along with the price increases. But that type of evidence is conspicuously absent, even though nearly half the price hikes failed. See [Petrucci's IGA Supermarkets, Inc. v. Darling-Del. Co., Inc., 998 F.2d 1224, 1233 \(3d Cir. 1993\)](#) (noting that [HN8](#)<sup>↑</sup>) "a cartel cannot survive absent some enforcement mechanism"). The Purchasers propose two possible mechanisms for enforcement, but they have not pointed to any evidence indicating that either one was used. It is true that [HN9](#)<sup>↑</sup> a cartel may exist with only soft measures of control or ineffective enforcement. See [In re Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772, 796-97 \(N.D. Ill. 2017\)](#) (evidence of an enforcement mechanism is not always required). Even if that is so, however, the absence of evidence about enforcement does nothing to dissipate the inference of independent behavior. We are still left with price increases that appear to be just as consistent with independent action as with collusion.

The second half of the Purchasers' theory focuses on supposedly coordinated reductions of output through mill closures and machine slowdowns. [HN10](#)<sup>↑</sup> Supply behavior is highly relevant because price-fixing [\\*\\*19](#) arrangements often function through restrictions of output. See [Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 226 \(7th Cir. 1978\)](#). But not every supply-side change is equally suggestive of a conspiracy. Conduct that is easily reversed may be consistent with self-interested decision-making.

An example illustrates the point. Suppose Company X takes its machines offline more frequently in order to reduce its supply. If competitors follow suit, and industry-wide production falls, all companies can charge more for the commodity and potentially reap greater profits. See [Text Messaging, 782 F.3d at 877](#). But what if instead the competitors maintain their supply and woo Company X's customers. Because Company X's reduction strategy was flexible, it can quickly get its machines running and filling orders again, minimizing any losses. In contrast, if Company X had lowered its production by selling its mills or equipment, it could not rapidly undo its efforts while competitors came knocking on customers' doors. This inability to stave off potential losses has earned the name "perilous leading." PHILLIP E. AREEDA & HERBERT HOVENKAMP, [ANTITRUST LAW](#) ¶ 1425d (4th ed. 2018). [HN11](#)<sup>↑</sup> Firms take significant risks by reducing their output in an inflexible manner, unless there is an enforceable agreement in [\\*\\*20](#) place to ensure that competitors will follow suit. [Petroleum Prods., 906 F.2d at 463](#); [In re Plasma-Derivative \[\\*938\] Protein Therapies Antitrust Litig., 764 F. Supp. 2d 991, 1002 \(N.D. Ill. 2011\)](#). Because perilous leading makes "little economic sense" absent coordination, evidence of less-reversible supply restrictions supports an inference of conspiracy. [Broiler Chicken, 290 F. Supp. 3d at 798](#).

During the class period, the North American market saw a drop in overall capacity for containerboard. The original defendants collectively were responsible for 19 mill closures. Yet Georgia-Pacific not only kept its mills open; it also purchased a new mill. The Purchasers respond that Georgia-Pacific underutilized its machines, but Georgia-Pacific has an answer for that: its run-to-demand strategy. Under this strategy, which dated back to 1999, Georgia-Pacific aimed to produce just enough containerboard to fill orders without creating excess inventory. Internal communications suggest that this strategy led to some close calls when filling orders, but Georgia-Pacific always found a way to meet its customer demand. Moreover, its acquisition of a mill allowed it to increase its production capacity over the class period.

The Purchasers' strongest evidence undercutting Georgia-Pacific's account are comments in performance reviews that credit employees for getting price increases [\\*\\*21](#) by keeping inventory low. Because Georgia-Pacific did not have sufficient market power to alter containerboard pricing on its own, the Purchasers insist that these statements can be understood only as proof of an anticompetitive agreement. But underusing machinery is the kind of flexible behavior that is consistent with rational attempts to raise prices through watchful attention to one's competitors' actions. Far from perilous, had Georgia-Pacific's efforts not paid off, it could have increased its output quickly. Georgia-Pacific's supply behavior does not point towards its having a role in any conspiracy.

As ammunition against both defendants, the Purchasers cite the frequent contacts that company executives had by phone and at trade association meetings. They allege that the defendants' regular communications and trades served as opportunities for collusion. Some courts have held that this type of [HN12](#)<sup>15</sup> information flow, especially between executives, may be probative of conspiracy. *E.g., Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, [803 F.3d 1084, 1093 \(9th Cir. 2015\)](#). But having the opportunity to conspire does not necessarily imply that wrongdoing occurred. [Monsanto Co. v. Spray-Rite Serv. Corp.](#), [465 U.S. 752, 762, 104 S. Ct. 1464, 79 L. Ed. 2d 775 \(1984\)](#); [Weit v. Cont'l Ill. Nat'l Bank & Trust Co. of Chi.](#), [641 F.2d 457, 462 \(7th Cir. 1981\)](#). Especially when companies have legitimate business reasons for their contacts, plaintiffs must offer [\[\\*\\*22\]](#) some evidence that moves beyond speculation about the content of what was conveyed. See [Text Messaging](#), [782 F.3d at 878](#) ("And as there is no evidence of what information was exchanged at these [trade association] meetings, there is no basis for an inference that they were using the meetings to plot prices [sic] increases."); accord [Chocolate Confectionary](#), [801 F.3d at 409](#); [In re Musical Instruments & Equip. Antitrust Litig.](#), [798 F.3d 1186, 1196 \(9th Cir. 2015\)](#).

The Purchasers have no evidence indicating that the executives discussed illicit price-fixing or output restriction deals during their calls or meetings. They rely instead on the frequency and timing of the contacts. For example, 20 calls were made in the days around a Georgia-Pacific-led price increase, despite the fact that the company had predicted flat pricing just [\[\\*939\]](#) two weeks earlier. That is not enough. We cannot put much stock in the frequency of contacts, given the amount of trading that was taking place among the firms. See [Dairy Farmers of Am.](#), [801 F.3d at 763](#) ([HN13](#)<sup>15</sup>) where companies were not only competitors but also among each other's largest suppliers and largest customers, plaintiffs needed to point to a communication that "suggest[ed] a meeting of the minds to fix prices"); [High Fructose Corn Syrup](#), [295 F.3d at 659](#) (finding nothing suspicious about occasional interfirm trades unless firms could supply their customers at a lower cost).

Furthermore, we hesitate [\[\\*\\*23\]](#) to impugn the companies' intentions solely from the timing of the contacts. To be clear, we do not see the frequency of the calls and meetings as evidence tending to *exclude* collusion. Such a rule would create an incentive for businesses to make constant phone calls in order to immunize themselves from antitrust liability. Here, however, though some trade association meetings occurred before price-increase proposals, most of Georgia-Pacific's announcements were not preceded by meetings. The Purchasers' speculation about the content of the frequent interfirm contacts is not enough to create a jury issue.

Incriminating remarks by defendants' employees can support the inference that a conspiracy existed. See, e.g., [High Fructose Corn Syrup](#), [295 F.3d at 662](#). The Purchasers flag a few comments that they see as particularly inculpatory. For starters, a Weyerhaeuser employee wrote that he "made up a bunch" of information in a report and instructed others to "be more specific" to keep the company "out of anti-trust legal issues." In addition, while discussing problems with the industry, a Norampac executive said "you have to be ready to let go business if you want to keep the price up," and "everybody needs to do the same thing." [\[\\*\\*24\]](#)

Yet even if these statements are enough to create a triable question about the presence of an agreement generally, they are not enough to show that Georgia-Pacific was a part of that cartel. On this front, the Purchasers present little proof. They point to a speech in which Georgia-Pacific's CEO supposedly suggested that the industry should "say 'no' on deals" that, though competitive, are not profitable. But that is hardly an earthshattering insight, even if proof of the statement were possible without the use of hearsay contained in newspaper articles reporting on the speech. See [Eisenstadt v. Centel Corp.](#), [113 F.3d 738, 742 \(7th Cir. 1997\)](#). And the account of an attendee rejects the rumors, stating that this message "was not said nor implied." And the CEO claimed in his deposition that he was speaking only about *Georgia-Pacific*, not the industry, needing to decline deals. Like their economic proof, the Purchasers' noneconomic evidence—even when viewed with the parallel conduct—does not exclude the possibility that Georgia-Pacific acted in a self-interested but permissible way.

Some of the Purchasers' evidence was particular to WestRock, to which we now turn. There is a wrinkle in its potential liability: in June 2010, just shy of the close [\*\*25] of the class period, WestRock received a discharge in bankruptcy, for which it had filed in 2009. At that moment, it was free of any antitrust liability incurred up to the date of discharge. See *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 902 (6th Cir. 2009). Nonetheless, WestRock is potentially liable for the alleged conspiracy if there is evidence it rejoined the cartel post-discharge. *Kleen I*\*9401 Prods., 831 F.3d at 930; see also *O'Loughlin v. Cnty. of Orange*, 229 F.3d 871, 875 (9th Cir. 2000) ("A 'fresh start' means only that; it does not mean a continuing licence [sic] to violate the law."). We must therefore look to see if there is evidence that would permit a trier of fact both to find the initial agreement, and to find that WestRock rejoined that agreement after its discharge.

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As we have explained, the parallel price hikes alone do not suffice to permit a jury to find a cartel. But the Purchasers cite evidence hinting at WestRock's conspiratorial involvement. For example, they point to an email from Weyerhaeuser that discussed a \$50 increase just days before WestRock announced it. Though a publication's email blast had made public the existence of a future attempt, it had gotten the amount wrong. Weyerhaeuser had the right number.

Yet even if this is enough to create a fact question about WestRock's original participation in the alleged [\*\*26] agreement, it does nothing to establish that it *rejoined* the agreement post-discharge. During the relevant period, in July 2010, WestRock did participate in an unsuccessful attempt to hike prices. The Purchasers insist that this reveals more than parallel conduct, given an email between WestRock staff that the company "always follow[s] IP [International Paper]." But, as we have noted several times, merely following a leader is not the same as agreeing to do something. Also of little probative value is the fact that a WestRock vice president met with other manufacturers on the day between the first defendant's joining the increase and WestRock's decision to follow suit. Before this meeting, the increase had been floated by a non-defendant. See *Valspar Corp. v. E.I. Du Pont de Nemours*, 152 F. Supp. 3d 234, 247 (D. Del. 2016), aff'd 873 F.3d 185 (declining to infer that a meeting provided an opportunity to conspire when price increase announcements occurred before *and* after the meeting). And WestRock offered evidence that since April it had been contemplating that prices would go up. Purchasers' parallel pricing evidence does not provide a hook for WestRock's liability.

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Perhaps the most compelling evidence of collusion is WestRock's supply restrictions. During the class period, [\*\*27] WestRock closed seven of its mills and took other steps to reduce capacity. WestRock attempts to rationalize this behavior in various ways. It claims that the closures were part of a 2003 restructuring plan to get rid of inefficient plants in light of its purchase of a highly efficient mill. It also asserts that it made certain sales decisions in light of a green marketing plan where buyers would assume a mill's associated environmental liabilities. And WestRock reminds us that it sold the mills while it was under the oversight of the bankruptcy court, a committee of creditors, and financial advisors.

These explanations are all plausible. Yet they do not overcome the inference of conspiracy given that, unlike Georgia-Pacific's reversible cuts, WestRock's supply behavior could not be undone easily. Such perilous leading risked significant losses. Furthermore, a vice president wrote that WestRock "had done [its] part," implying it played a role in a larger agreement. And other company emails state that restricting supply would help raise prices, something no manufacturer could do alone.

While this discussion may suggest that the Purchasers win the day, the insurmountable problem is one [\*\*28] of timing: these events occurred pre-discharge. Even assuming [\*941] (favorably to the Purchasers) that WestRock was part of a cartel, they fall short on presenting evidence that WestRock was involved post-discharge. In those months, WestRock did some machine maintenance, but it did not close any mills and generally operated at a high level of production and capacity.

3

Last, we consider the other evidence that the Purchasers lodged against WestRock. This includes incriminating statements made by WestRock employees and an article discussing the CEO's statements that the company needed a restructuring plan to "cut supply enough at [WestRock] to force price increases throughout the industry." The latter is inadmissible hearsay. *Eisenstadt*, 113 F.3d at 742. The Purchasers maintain nonetheless that the CEO's deposition testimony confirms that he was signaling indirectly the company's commitment to a price-fixing plan. It does not.

Worse for WestRock are two vice-presidents' remarks that the company had "little choice" or "no choice" but to join the price increases, even though one was not supported by supply and demand. The most plausible explanation for its decision to go along with a price hike out of obligation, when that [\*\*29] hike is not economically justified, is that WestRock had committed to an agreement. See *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 369 (3d Cir. 2004) (finding probative documents emphasizing that competitors had to hold the line on price increases that were not economically supported). Also inculpatory was a staff member's email to a vice-president, among others, that "the only way to get paid is to have a 1994-95 situation where the tide rises for all boats." The Purchasers encourage us to read this statement as a reference to the container-board industry's earlier antitrust violations. See *Linerboard*, 305 F.3d 145. These statements are some of the Purchasers' strongest evidence that WestRock's price hikes and mill closures were more than just conscious parallelism. But again, they all occurred pre-discharge, and so they say nothing about WestRock's post-discharge conduct.

The Purchasers finally offer some economic and noneconomic evidence that could suggest suspicious activity. But even if it is credited, it is not enough to permit a trier of fact to find impermissible coordination. Statements by Georgia-Pacific staff are not enough to cast a cloud over its follow-the-leader price increases and flexible production adjustments. And while some of WestRock's behavior, [\*\*30] particularly its mill closures, gives us pause, the Purchasers fail to establish that anything the company did post-discharge amounts to rejoining any existing conspiracy. This case shares many similarities with our decision in *Text Messaging*. In both situations, the plaintiffs did not discover a "smoking gun or ... additional circumstantial evidence that further tilts the balance in favor of liability." *Id. at 871* (citation omitted). The Purchasers may be right that the containerboard industry got savvier at hiding its antitrust violations. But unfortunately for them, they "failed to carry the burden" of "establishing a *prima facie* case of explicit collusion," offering "no more than a plausible interpretation" of the defendants' anticompetitive conduct. *Id. at 876*.

#### IV

The outcome of this case flows directly from both the limitation in *section 1 of the Sherman Act* to anticompetitive agreements and the Supreme Court's cautions against interfering with individual firm behavior in ways that could inadvertently distort incentives to compete. In *Matsushita*, the Court warned against "mistaken [\*942] inferences ... [that] chill the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594; see also *Text Messaging*, 782 F.3d at 874 (expressing pragmatic concerns [\*\*31] about prohibiting conscious parallelism).

Scholars, lawmakers, and courts have yet to agree on a regulatory regime that can address oligopolistic behavior that leads to higher prices and reduced consumer choice, without stifling normal business activity. For now, we follow established law to the effect that "conscious parallelism" has not yet read conspiracy out of the *Sherman Act* entirely." *Twombly*, 550 U.S. at 552 (citation omitted).

Because the evidence proffered by the Purchasers does not tend to exclude the possibility that Georgia-Pacific and WestRock engaged only in tacit collusion, we AFFIRM the judgment of the district court.



## **Corporate Transp. Group, Ltd. v Limosys, LLC**

Supreme Court of New York, Kings County

December 11, 2018, Decided

518824/2017

### **Reporter**

2018 N.Y. Misc. LEXIS 6318 \*; 2018 NY Slip Op 33282(U) \*\*

[\*\*1] CORPORATE TRANSPORTATION GROUP, LTD, Plaintiff(s), - against - LIMOSYS, LLC, LIMOSYS SOFTWARE LLC and ISSAC YEHUDA, Defendant(s). Index # 518824/2017

**Notice:** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

### **Core Terms**

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cause of action, allegations, trade secret, renewal, affiliate, motion to dismiss, Vendor's, argues, Confidentiality, customer, tortious interference, propose an amendment, prima facie tort, misappropriation of trade secrets, reargument, contends, motion to amend, Donnelly Act, platform, reargue, network, fraudulent inducement, transit service, prior motion, competitors, contracts, software, amended complaint, renewal motion, fair dealing

**Judges:** [\*1] PRESENT: HON. SYLVIA G. ASH, J.S.C.

**Opinion by:** SYLVIA G. ASH

### **Opinion**

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#### **DECISION AND ORDER**

Plaintiff CORPORATE TRANSPORTATION GROUP, LTD (referred to as Plaintiff or "CTG") moves to amend its complaint to add causes of action for tortious interference with its affiliate contracts, prima facie tort, breach of the implied covenant of good faith and fair dealing and violation of New York General Business Law ("GBL") §340, otherwise known as the Donnelly Act. Defendants, LIMOSYS, LLC and LIMOSYS SOFTWARE LLC (collectively referred to as "Limosys") oppose Plaintiff's motion and cross-move to renew and reargue this Court's Decision and Order dated March 20, 2018, which denied in part and granted in part its motion to dismiss Plaintiff's complaint, and upon renewal and reargument, dismissing Plaintiff's remaining causes of action.

#### **Background**

On or around September 29, 2017, Plaintiff commenced this action against Limosys and Limosys's managing member, Isaac Yehuda ("Yehuda"), alleging the following seven causes of action against Defendants: misappropriation of trade secrets, tortious interference with contract, [\*\*2] fraudulent inducement, fraud, tortious

interference with prospective business advantage and business relationships, [\*2] breach of contract and permanent injunction.

Plaintiff is in the business of providing ground transportation to corporate clients and private individuals in the tri-state area and is the largest private provider of MTA Access-A-Ride services. In addition to providing ground transportation services directly, Plaintiff sends customers to other ground transportation companies, which Plaintiff refers to as its "affiliates." Limosys is engaged in providing software to ground transportation service companies in the New York area. Approximately 250 transportation companies use Limosys's software. It is undisputed that Limosys entered into two agreements with Plaintiff, one dated January 27, 2014, entitled "Confidentiality Agreement" (hereinafter referred to as the "2014 Confidentiality Agreement") and another dated August 1, 2016, entitled "Limosys Member's Network Vendor's Agreement" (hereinafter referred to as the "2016 Vendor's Agreement").

Pursuant to the 2014 Confidentiality Agreement, Limosys agreed not to "use, disseminate or in any way disclose any Confidential Information of the Discloser [CTG] to any person, firm, or business...." The term "Confidential Information" is broadly defined [\*3] as:

"...any and all technical and non-technical information including application programming interface (API), patent, copyright, trade secret, and proprietary information, techniques, sketches, drawings, models, inventions, know-how, processes, apparatus, equipment, algorithms, software programs, software source documents, and formulae related to the current, future and proposed products and services of the Discloser, and includes, without limitation, information concerning research, experimental work, development, design details and specifications, engineering, financial information, procurement requirements, purchasing, manufacturing, customer lists, business forecasts, sales and merchandising, and marketing plans and information."

The 2016 Vendor's Agreement states that "Limosys owns a proprietary network platform ("Network") that allows car companies ("Members") to share rides between affiliated members as well as Vendors to provide rides to the members." It further provides that the "[s]ervices performed under this Agreement are for Limosys to allow CTG as vendor to have access to its members that are part of the Network."

According to Plaintiff's complaint, Defendants have "hijacked [\*4] the proprietary and customer information belonging to CTG in order to set up a competing business and steal CTG's customers and business" (Complaint, Paragraph 1). Plaintiff further alleges that, in connection with the parties' agreement, Plaintiff allowed Defendants to access, through an Application Programming Interface, [\*3] its trade secrets such as client price structures, affiliate payment structures, and CTG infrastructure. And that Defendants used this information to unfairly compete against it.

Previously, on or about October 23, 2017, Defendants moved to dismiss Plaintiff's complaint on the basis that the parties' actual agreements and related documents refuted Plaintiff's claims. It is Defendants' position that Plaintiff has commenced this lawsuit in bad faith in an effort to wrongfully restrain potential competition and preserve its semi-monopoly on the Transit Authority's Access-A-Ride services.

By Decision and Order dated March 22, 2018, this Court granted Defendants' motion to the extent that all claims against Yehuda, the individual Defendant, were dismissed. Plaintiff's cause of action for tortious interference with prospective business advantage was also dismissed for failure [\*5] to state a cause of action. The remainder of Defendants' motion to dismiss was denied without prejudice to renew.

#### Plaintiff's Motion to Amend

Now, Plaintiff moves to amend its complaint to add a claim under New York's **antitrust law** known as the Donnelly Act, add causes of action for breach of the implied covenant of good faith and fair dealing and *prima facie* tort, and to expand on its tortious interference with contract claim to include allegations that Limosys interfered with various affiliate contracts.

According to Plaintiff, the proposed amendments are necessitated by Limosys's recent attempts to drive CTG out of the transportation service industry by coercing CTG's affiliates to terminate their contracts with CTG else risk being denied access to Limosys's platform, which the proposed amended complaint alleges is the preeminent dispatch platform in the transportation service industry. Plaintiff contends that at least six "affiliates" have capitulated to Limosys's demands by terminating their contracts with CTG. It is Plaintiff's position that Limosys's conduct amounts to an unlawful restraint on trade in violation of the Donnelly Act and also satisfies the elements for tortious interference [\*6] with contract and breach of the implied covenant of good faith and fair dealing. In addition, Plaintiff argues that to the extent that the aforementioned conduct was not motivated by a desire to decrease competition and increase revenue, that Limosys was motivated by greed or malice and that such conduct states an action sounding in *prima facie* tort.

In opposition, Limosys argues that Plaintiff's proposed amendments contradict its original complaint and thus establish the general falsity of Plaintiff's claims. According to Limosys, Plaintiff's allegations of Limosys's anticompetitive conduct are patently false, but even if same were presumed to be true, the alleged anticompetitive conduct has no significant impact on either the market or CTG. Limosys submits that its documentary evidence shows that (1) Limosys has less than [\*4] 250 car services using its Limosys network but that there are over 900 TLC-licensed for-hire vehicle services; (2) in 2015, CTG had a sizable percentage of Access-A-Ride trips but not the overwhelming share, indicating that the market remains adequately serviced even if Limosys chooses not to deal with CTG; and, (3) CTG only used Limosys's network car services for [\*7] 1% of its Access-A-Ride trips thereby undermining its claim that not having access to Limosys's platform significantly impacts its business or Access-A-Ride users in general.

Limosys further argues that Plaintiff's proposed amendments regarding tortious interference with contract and *prima facie* tort fail to state a cause of action because these claims require allegations of malice yet, according to Plaintiff's own allegations, Limosys is its competitor which indicates that Limosys is motivated by economic considerations, not malice. Further, Limosys argues that Plaintiff's proposed amendment to add a claim for breach of the implied covenant of good faith and fair dealing should be disallowed because the 2016 Vendor's Agreement contains no restrictions on competition or the use of information despite Plaintiff's attempts to include such restrictions when the parties were negotiating the agreement. And that, as such, Plaintiff cannot attempt to impose restrictions that were never included in the agreement by way of this cause of action.

In reply, Plaintiff contends that it has made out a claim under the Donnelly Act insofar as Plaintiff has pled that Limosys conspired to prevent CTG from [\*8] doing business with the pool of available affiliate black car services that CTG needs to complete reservations to its customers, including under the Access-a-Ride program, thereby stifling competition in the transportation services industry and causing prices to increase. Plaintiff also argues that its claim for breach of the implied covenant of good faith and fair dealing is not precluded because prohibiting parties from undercutting contracts with third parties necessary to reap the fruits of the subject contract is a term that any reasonable person would understand is included in the subject contract. Lastly, Plaintiff contends that it has properly plead a cause of action for *prima facie* tort because, contrary to Limosys's argument, there is nothing preventing competitors from acting maliciously towards each other and that, in any case, Plaintiff should be allowed to plead an alternative theory of liability.

#### Discussion Motion to Amend

It is well established that motions for leave to amend pleadings should be freely granted, in the absence of prejudice or surprise to the opposing party, unless the proposed amendment is palpably insufficient or patently devoid of merit (*Lucido v Mancuso*, 49 AD3d 220, 227, 851 N.Y.S.2d 238 [24 Dept 2008]). [\*9] The court will not examine the merits of the proposed amendment unless the insufficiency or lack of merit is clear and free from doubt (*Norman v Ferrara*, 107 AD2d 739, 740, 484 N.Y.S.2d 600 [2d Dept 1985]). In cases where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit, leave should be denied (*Id.*). Here, Plaintiff's proposed amendments [\*5] regarding a Donnelly Act violation and *prima facie* tort are insufficient as a matter of law and thus, Plaintiff's motion to amend must be denied as to those claims. The remainder of Plaintiff's motion to amend is granted.

New York's antitrust act, the Donnelly Act, states: "Every contract, agreement, arrangement or combination whereby...[a] monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby...[c]ompetition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained...is hereby declared to be against public policy, illegal and void" (GBL § 340[1]). "The principle thrust of antitrust laws is to regulate relations between competitors who, by combining or conspiring, impair competition [\*10] in the marketplace" ([Matter of Encore College Bookstore, Inc. v City University of New York, 2008 NY Misc. LEXIS 9889, \\*23 \[Sup Ct, New York Cty 2008\]](#)). "The principal wrongs regulated by antitrust laws is price fixing or dividing markets between competitors" (*Id.*). "Courts have recognized the right of a company 'to select a person with whom it does business and to refuse to deal or continue to deal with anyone for reasons sufficient to itself'" ([Lopresti v Massachusetts Mut. Life Ins. Co., 5 Misc 3d 1006\[A\], 798 N.Y.S.2d 710, 2004 NY Slip Op 51223\[U\] at \\*3 \[Sup et, Kings Cty 2004\]](#)). "A single concern may choose who it wishes to deal with as long as its decision is not the result of a combination with others to destroy competition so far as the whole relevant product market is concerned" (*Id.*).

"A party asserting a violation of the Donnelly Act is required to (1) identify the relevant product market; (2) describe the nature and effects of the purported conspiracy; (3) allege how the economic impact of that conspiracy is to restrain trade in the market in question; and (4) show a conspiracy or reciprocal relationship between two or more entities...." ([Newsday, Inc. v Fantastic Mind. Inc., 237 AD2d 497, 497, 655 N.Y.S.2d 583 \[2d Dept 1997\]](#)).

In this case, Plaintiff has failed to plead a Donnelly Act violation. Assuming the truth of Plaintiff's allegations that Limosys is using its valuable dispatch platform, specifically access thereto, to coerce at least six of Plaintiff's affiliates to discontinue their relationship [\*11] with Plaintiff, these allegations do not demonstrate a conspiracy or reciprocal relationship between two or more entities for the purpose of destroying competition in the relevant product market. Secondly, Plaintiff's allegation that Limosys's coercion will result in decreased competition and artificially inflated prices in the transportation services industry is wholly conclusory. There is no allegation regarding how access to Limosys's dispatch platform even impacts the relevant market. Thirdly, to the extent that Limosys's alleged coercive conduct is tortious, Plaintiff has an adequate remedy at law by way of its other causes of action. Thus, Plaintiff's motion to amend its complaint to include a violation of the Donnelly Act must be denied.

[\*\*6] With regards to Plaintiff's proposed amendment to include a cause of action for *prima facie tort*, Plaintiff must plead : (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or a series of acts which would otherwise be lawful (see [Epifani v Johnson, 65 AD3d 224, 232, 882 N.Y.S.2d 234 \[2d Dept 2009\]](#)). To assert a claim for *prima facie tort*, the plaintiff must allege that disinterested malevolence was the sole motivation for the conduct [\*12] complained of ([Shaw v Club Mgrs. Assn. of Am., Inc., 84 AD3d 928, 930, 923 N.Y.S.2d 127 \[2d Dept 2011\]](#) [emphasis added]). A mere conclusory statement of malice does not suffice (see [Penn-Ohio Steel Corp. v Allis-Chalmers Mfg. Co., 15 Misc. 2d 752, 754, 183 N.Y.S.2d 40 \[Sup Ct, New York Cty 1958\]](#)). Plaintiff's cannot use *prima facie tort* as a "catch-all" under which they merely reiterate allegations asserted under several of the previously-asserted causes of action ([Gertler v Goodgold, 107 AD2d 481, 490, 487 N.Y.S.2d 565 \[1st Dept 1985\]](#)).

Here, Plaintiff's claim that Limosys was motivated by malice is conclusory and, further, undermined by its other factual allegations asserting that Limosys is motivated by economic self-interest insofar as it is trying to compete with Plaintiff. Accordingly, Plaintiff's motion to amend its complaint to include a cause of action for *prima facie tort* must be denied,

The remainder of Plaintiff's motion to amend is granted.

#### Limosys's Motion to Renew and Reargue

Limosys cross-moves to renew and reargue its prior motion to dismiss Plaintiff's complaint for failure to state a cause of action and/or based upon the documentary evidence, and upon renewal and reargument, seeks an order dismissing Plaintiffs' remaining causes of action.

In support of its motion to renew, Limosys states that it has discovered a federal court action involving CTG wherein CTG disclosed the identities of its independent contractor car services as well as [\*13] its driver compensation without any attempts to seal the record which refutes its claim here that its drivers' identities and compensation are trade secrets and that, accordingly, Plaintiff's cause of action for misappropriation of trade secrets must be dismissed. Limosys also argues that Plaintiff's proposed amended complaint is another basis to renew its motion to dismiss Plaintiff's claim for misappropriation of trade secrets because Plaintiff's new allegation that Limosys's network is so extensive that it is "the predominate platform used by car fleets" undermines its claim that Limosys is making use of CTG's "internal logistical and operational procedures" or the identities of CTG's drivers. Further, Limosys states that, based on the MIA's response to Limosys's FOIL request, Plaintiff's contract with the MTA will be produced which undermines any claim by Plaintiff that its contract with MTA constitutes a trade secret.

[\*\*7] Secondly, Limosys states that it has recently discovered MTA's project announcement regarding the e-hail project that Limosys was invited to participate in, which reflects that the project was the first of its kind. Based upon the announcement, Limosys seeks renewal [\*14] of its motion to dismiss Plaintiff's claim for fraudulent inducement arguing that Limosys could not have misrepresented an intent not to perform services for MTA since the e-hail project did not even exist at the time that Limosys allegedly misrepresented its intention not to compete with Plaintiff.

In addition to renewal, Limosys argues that the Court should grant reargument of its previous motion to dismiss because, although untimely, the Court may nevertheless exercise its discretion and consider the motion since paring down Plaintiff's allegations will promote judicial economy by reducing the number of issues to be litigated. Moreover, if Plaintiff is allowed to amend its complaint, Limosys submits that its motion to reargue would no longer be untimely.

According to Limosys, reargument is warranted because the instant lawsuit is Plaintiff's attempt to restrict competition and maintain its semi-monopoly on the Access-A-Ride business. Limosys argues that a telephone recording of CTG's principal, Eduard Slinin, reveals that CTG is concerned only with safeguarding its \$20 million Access-A-Ride account. Moreover, Limosys contends that the parties' agreements, including the prior draft [\*15] of the 2016 Vendor's Agreement, establishes that the parties never agreed to any confidentiality or non-compete commitment, as alleged herein by Plaintiff, and that Plaintiff's efforts to impose those obligations despite the parties' agreement to exclude them, by way of the instant lawsuit, should be dismissed.

Specifically, Limosys argues that Plaintiff's cause of action for misappropriation of trade secrets is unsustainable because what Plaintiff purports to be "trade secrets" are not, in fact, secret since the information is either public record or has been disclosed by Plaintiff in other lawsuits. Limosys contends that CTG's list of providers or affiliates is public and can be found through the Taxi and Limousine Commission, that CTG's MTA Access-A-Ride contract is subject to FOIL disclosure, and that the identities of CTG's drivers and their compensation was disclosed in a federal class action lawsuit with no attempts to seal the record. Further, that CTG's only other claimed "trade secret," called "internal logistical and operational procedures," is not only vague but untrue since Limosys was never given access to CTG's internal systems, and also meaningless since CTG now alleges [\*16] that Limosys's software is the "predominate platform used by car fleets."

Secondly, Limosys argues that Plaintiff's claim for tortious interference with the MTA contract should be dismissed because Plaintiff fails to plead what portion of the MTA contract was supposedly breached, and that Plaintiff similarly fails to plead what contract provision was breached with regards to its new proposed amendment alleging tortious interference with its affiliate contracts.

[\*\*8] Third, Limosys contends that Plaintiff's breach of contract claim is unsustainable because the 2016 Vendor's Agreement contains a merger clause and therefore supersedes the 2014 Confidentiality Agreement rendering the 2014 Confidentiality Agreement a nullity. Even if the 2014 Confidentiality Agreement was in effect, Limosys contends that said agreement does not contain a restriction on competition. Moreover, that as evidenced by a redline draft of the 2016 Vendor's Agreement, Plaintiff attempted to have restrictive language included in the agreement which would have prohibited Limosys from competing but Plaintiff's proposed restrictions were rejected by Limosys and are thus not reflected in the 2016 Vendor's Agreement.

Lastly, [\*17] Limosys argues that Plaintiff's claim for unjust enrichment should have been dismissed because it is duplicative of Plaintiff's breach of contract and other tort claims.

In opposition, Plaintiff argues that Limosys has not met the requirements to either renew or reargue its dismissal motion because Limosys fails to provide a reasonable justification for not providing the "new" evidence previously and further fails to point to any matter of fact or law that the Court supposedly overlooked when rendering its decision. Also, Plaintiff contends that Limosys fails to provide good cause why the Court should consider its untimely reargument motion.

In the event the Court considers Limosys's motion, Plaintiff argues that the Court properly denied Limosys's prior motion to dismiss. Plaintiff contends that its claim for misappropriation of trade secrets is sufficiently plead, that its customer list has been cultivated over decades and cannot be easily ascertained by outside sources, and that its misappropriation claim is premised on the fact that Limosys had access to CTG's entire business model, including its customers, affiliates, and its pricing, and that Limosys used this information to compete [\*18] with CTG despite its express representations that it would not do so. Further, that Limosys asks the Court to believe on a motion to dismiss that Limosys relationship with MTA was "fortuitous," but given that no discovery has taken place, Plaintiff has had no opportunity to delve into the nature, timing and content of these communications and meetings.

#### Discussion Motion to Renew and Reargue

A motion for leave to renew shall be based upon new facts not offered on the prior motion that would change the prior determination and shall contain reasonable justification for the failure to present such facts on the prior motion ([CPLR 2221\[e\]\[2\]](#), [3]; [Matter of Osorio v Motor Veh. Acc. Indem. Corp., 112 AD3d 831, 832, 977 N.Y.S.2d 663 /2d Dept 2013](#)). "The requirement that a motion for renewal be based on new facts is a flexible one, and it is within the court's discretion to grant renewal upon facts known to the moving party at the time of the original motion if the movant offers a reasonable excuse for the failure to present those facts on the prior motion" (*Id. at 832-33* [citations omitted]).

[\*\*9] "Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly [\*19] arrived at its earlier decision" (*Barnett v Smith, 64 AD3d 669, 670-71, 883 N.Y.S.2d 573 /2d Dept 2009*; see [CPLR 2221\[d\]](#)). "[R]egardless of statutory time limits concerning motions to reargue, every court retains continuing jurisdiction to reconsider its prior interlocutory orders during the pendency of the action" (*In re Estate of Burns, 228 AD2d 674, 675, 646 N.Y.S.2d 18 /2d Dept 1996*).

Here, the Court finds that renewal must be granted. The new factual allegations contained in Plaintiff's amended complaint provide sufficient grounds for renewal as does Limosys's recent discovery of information disclosed by CTG in other litigation that CTG is involved in. The Court also, in its discretion, grants Limosys reargument of its previous motion to dismiss.

Upon renewal and reargument, this Court reverses and finds that Limosys established its entitlement to dismissal of Plaintiff's claims for misappropriation of trade secrets, fraudulent inducement and fraud but adheres to its prior determination with regards to Plaintiff's causes of action for tortious interference with contract and breach of contract. There is no cause of action for unjust enrichment plead in Plaintiff's amended complaint. Thus, Limosys's argument seeking dismissal of said claim is deemed moot.

The Court begins with the principle that the standard for a motion to dismiss [\*20] is that "the court must determine, accepting as true the factual averments of the complaint and according the plaintiff the benefit of all favorable inferences, whether the plaintiff can succeed upon any reasonable view of the facts as stated" ([Manfro v McGivney, 11 AD3d 662, 663, 783 N.Y.S.2d 288 /2d Dept 2004](#) [internal quotations omitted]). For a plaintiff to survive a motion to dismiss for failure to state a cause of action, the factual allegations in the claim cannot be vague, conclusory or speculative in nature (see [Stoianoff v Gahona, 248 AD2d 525, 526, 670 N.Y.S.2d 204](#) [2d Dept 1998]).

Residents for More Beautiful Port Washington, Inc. v North Hempstead, 153 AD2d 727, 729, 545 N.Y.S.2d 303 [2d Dept 1989].

"To prevail on a claim for misappropriation of trade secrets, a plaintiff must demonstrate: '(1) that it possessed a trade secret, and (2) that the defendants used that trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means' ([Schroeder v Pinterest Inc., 133 AD3d 12, 27, 17 N.Y.S.3d 678 \[1st Dept 2015\]](#)). A trade secret is "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it" ([Ashland Mgmt. Inc. v Janien, 82 NY2d 395, 407-08, 624 N.E.2d 1007, 604 N.Y.S.2d 912 \[1993\]](#)).

[\*\*10] "An essential prerequisite to legal protection against the misappropriation of a trade secret is the element of secrecy" ([Tri-Star Light. Corp. v Goldstein, 151 AD3d 1102, 1106, 58 N.Y.S.3d 448 \[2d Dept 2017\]](#)). Generally, where customer information is readily ascertainable outside the plaintiff's business, [\*21] trade secret protection will not attach to such information (see [Leo Silfen, Inc. v Cream, 29 NY2d 387, 392, 278 N.E.2d 636, 328 N.Y.S.2d 423 \[Ct App 1972\]](#)). "Conversely, where the customers are not known in the trade or are discoverable only by extraordinary efforts courts have not hesitated to protect customer lists and files as trade secrets" (*Id.*).

Here, Plaintiff seeks trade secret protection for its customer and affiliate list as well as its pricing, but fails to allege what measures Plaintiff has employed to keep said information confidential (see [Precision Concepts, Inc. v Bonsanti, 172 A.D.2d 737, 569 NYS2d 124, 125-26 \[2d Dept 1991\]](#)). Moreover, Plaintiff fails to dispute Limosys's assertion that such information is a matter of public record and that Plaintiff has also freely disclosed said information in other litigation. The complaint also fails to explain how Limosys's alleged use of CTG's information provides Limosys an advantage over its competitors that it did not have previously. With regards to Plaintiff's claim that its trade secrets also pertain to its "internal logistical and operational procedures," this claim is too conclusory, especially given the foregoing. Accordingly, Plaintiff's cause of action for misappropriation of trade secrets must be dismissed.

Having found that Plaintiff has inadequately plead the existence of any trade secrets, [\*22] it is clear that Plaintiff's causes of action for fraudulent inducement and fraud fail to state a cause of action. "To allege a cause of action based on fraud, plaintiff must assert 'a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury'" ([Connaughton v Chipotle Mexican Grill, Inc., 29 NY3d 137, 142, 53 N.Y.S.3d 598, 75 N.E.3d 1159 \[Ct App 2017\]](#)). "The true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong or what is known as the 'out-of-pocket' rule ([Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 421, 668 N.E.2d 1370, 646 N.Y.S.2d 76 \[Ct App 1996\]](#) [citations omitted]). "Under this rule, the loss is computed by ascertaining the difference between the value of the bargain which a plaintiff was induced by fraud to make and the amount or value of the consideration exacted as the price of the bargain" (*Id.*). "If the fraud causes no loss, then the plaintiff has suffered no damages" ([Sager v Friedman, 270 NY 472, 481, 1 N.E.2d 971 \[Ct App 1936\]](#)).

Here, Plaintiff alleges that Yehuda, on behalf of Limosys, represented that Limosys would not perform the same services or similar to those described in the 2016 Vendor's Agreement for any business entities involved in the business of CTG. Plaintiff [\*23] further alleges this representation was of "material importance to CTG who would not otherwise have agreed to provide Limosys access to CTG's confidential and proprietary information and trade secrets, including its customer and [\*\*11] Affiliates lists" and that "CTG relied on this representation when making its decision to enter into the Limosys Agreement."

According to Plaintiff's allegations, the direct result of Limosys's misrepresentation is the fact that CTG entered into the 2016 Vendor's Agreement with Limosys. But Plaintiff does not allege that it has suffered any pecuniary loss as a result of having entered into said agreement. In fact, there is nothing in the record to indicate anything other than a financial gain (for both sides) as a direct result of the 2016 Vendor's Agreement. The only "loss" alleged by Plaintiff is that Limosys had access to its trade secrets as a result of the parties' relationship and used such information to compete with it. However, even if true, loss profits are not recoverable under a fraud theory (see *MTI/The Image*

*Group, Inc. v Fox Studios East, Inc.*, 262 AD2d 20, 22, 690 N.Y.S.2d 576 [1st Dept 1999]) and, in any case, Plaintiff has failed to sufficiently allege the existence of any trade secrets. Plaintiff's causes of action for fraud and fraudulent [\*24] inducement must therefore be dismissed.

With regards to Plaintiff's claims sounding in breach of contract and tortious interference with contract, said claims are sufficiently plead in Plaintiff's amended complaint. Limosys's arguments for dismissal are more appropriate at the summary judgment stage.

Conclusion

For the reasons set forth above, it is hereby

ORDERED that Plaintiff's motion to amend its complaint is granted to the extent granted herein but otherwise denied; and it is further

ORDERED that Limosys's motion to renew and reargue this Court's Decision dated March 20, 2013 is granted and, upon renewal and reargument, the Court hereby grants Limosys's motion to dismiss to the extent that Plaintiff's causes of action for misappropriation of trade secrets, fraud - and fraudulent inducement are dismissed but that Limosys's motion to dismiss is otherwise denied.

This constitutes the Decision and Order of the Court.

ENTER,

/s/ Sylvia G. Ash

**Sylvia G. Ash, J.S.C.**

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## 8600 Landis, LLC v. City of Sea Isle City

United States District Court for the District of New Jersey

December 12, 2018, Decided; December 12, 2018, Filed

Civil No. 17-2234 (RMB/JS)

### **Reporter**

2018 U.S. Dist. LEXIS 209440 \*; 2018 WL 6522911

8600 LANDIS, LLC, Plaintiff, v. CITY OF SEA ISLE CITY, et al., Defendants.

**Prior History:** [8600 Landis, LLC v. City of Sea Isle City, 2018 U.S. Dist. LEXIS 50003 \(D.N.J., Mar. 27, 2018\)](#)

## **Core Terms**

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allegations, motion to dismiss, zoning, federal claim, conscience, permits, shocks, self-dealing, conspiracy, restaurant, substantive due process claim, factual allegations, improper motive, competitor, asserts, fails, space

**Counsel:** [\*1] For Plaintiff: Timothy J. Bloh, Esq., Christopher C. Fallon, III, Esq., FOX ROTHSCHILD LLP, Atlantic City, New Jersey.

For City of Sea Isle City, Leonard Desiderio, George Savastano and Cornelius R. Byrne, Defendants: Patrick J. Madden, Esq., MADDEN & MADDEN, P.A., Haddonfield, New Jersey.

For Kix McNutley's and Sea Isle Inn, Defendants: Russell L. Lichtenstein, Esq., COOPER LEVISON, P.A., Atlantic City, New Jersey.

For Paul J. Baldini, Esq., Defendant: Joseph A. Venuti, Jr., Esq., SWARTZ CAMPBELL LLC, Mount Laurel, New Jersey.

**Judges:** RENÉE MARIE BUMB, UNITED STATES MAGISTRATE JUDGE.

**Opinion by:** RENÉE MARIE BUMB

## **Opinion**

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[Docket Nos 72, 74, 75]

**BUMB, UNITED STATES DISTRICT JUDGE:**

In a previous Opinion and Order, this Court extensively discussed the multitude of pleading deficiencies contained in Plaintiff's Amended Complaint. See [8600 Landis, LLC v. City of Sea Isle City, No. CV 17-2234 \(RMB/JS\), 2018 U.S. Dist. LEXIS 50003, 2018 WL 1509088 \(D.N.J. Mar. 27, 2018\)](#). Nonetheless, the Court allowed Plaintiff an opportunity to amend its Amended Complaint in an attempt to cure, if possible, the deficiencies identified. See [2018 U.S. Dist. LEXIS 50003, \[WL\] at \\*14](#). Plaintiff did amend, and all Defendants presently move to dismiss the claims

asserted in the Second Amended Complaint, asserting that Plaintiff's attempt to put more factual meat [\*2] on the bones of its pleading still falls short of stating a plausible claim for relief.<sup>1</sup>

The Court stated in its previous opinion that "if upon an appropriate motion the Court determines that the [Second] Amended Complaint fails to state a federal claim, the Court intends to decline to exercise supplemental jurisdiction over this suit pursuant to [28 U.S.C. § 1337\(c\)\(3\)](#)." [8600 Landis, LLC, 2018 U.S. Dist. LEXIS 50003, 2018 WL 1509088 at \\*14](#). The Court now holds that the Second Amended Complaint fails to plausibly plead sufficient facts in support of any federal claim. Accordingly, Defendants' Motions to Dismiss will be granted as to the federal claims and the Court will decline supplemental jurisdiction over the remaining state law claims.<sup>2</sup>

## I. FACTS

As the Second Amended Complaint merely adds additional details and context to the factual allegations contained in the Amended Complaint, the Court will primarily rely on its recitation of the alleged facts in its previous opinion. See [8600 Landis, LLC, 2018 U.S. Dist. LEXIS 50003, 2018 WL 1509088 at \\*1-2](#). Generally and succinctly, this is a local land-use and zoning dispute; a dispute Plaintiff had adjudicated in its favor in state court but which Plaintiff seeks to continue before this Court under various federal and state causes of action. Plaintiff's theory of its case is that Defendant Desiderio, [\*3] who is a member of Sea Isle City's planning board, as well as a local business owner and the Mayor of Sea Isle City, sought to illegally "damage and delay" Plaintiff's development of a 13-unit residential rental and restaurant space allegedly with the motive of eliminating Plaintiff as a competitor in the market for restaurant and hospitality services. (Opposition Brief, Dkt 77, p. 4) The other individual Defendants, allegedly at Defendant Desiderio's direction and/or in conspiracy with him, assisted, or attempted to assist, Desiderio in his alleged plan to keep his alleged competitor out of the market. (Id.)

The Second Amended Complaint asserts the following federal claims: violation of Plaintiff's substantive due process and equal protection rights under [42 U.S.C. § 1983](#), conspiracy under [§ 1983](#) and [42 U.S.C. § 1985](#), and violation of the [Sherman Act, 15 U.S.C. § 1 et seq.](#)<sup>3</sup>

## II. MOTION TO DISMISS STANDARD

The Court incorporates herein by reference, and applies, the legal standard as set forth in its previous opinion in this case. See [8600 Landis, LLC, 2018 U.S. Dist. LEXIS 50003, 2018 WL 1509088 at \\*3](#).

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<sup>1</sup> Plaintiff states that it has "removed" from the Second Amended Complaint its previous claims for: (a) unfair competition, (b) abuse of process, (c) negligence, and (d) its claim for punitive damages against the City of Sea Isle City. (Opposition Brief, Dkt 77, p. 1) Although the Court previously directed that "[i]f Plaintiff decides that it no longer wishes to pursue . . . any . . . claims presently asserted in the Amended Complaint, it shall file the appropriate Notice of Voluntary Dismissal or Stipulation of Dismissal," [8600 Landis, LLC, 2018 U.S. Dist. LEXIS 50003, 2018 WL 1509088 at \\*14 n.23](#), no notice or stipulation has been filed on the Court's docket. In light of the Court's directive, combined with Plaintiff's statement in its brief, the Court construes Plaintiff's inaction as a concession that the pleading deficiencies identified with respect to these claims cannot be cured, and these claims will be dismissed with prejudice. See [Duke University v. Apotex, Inc., 2015 U.S. Dist. LEXIS 64973, 2015 WL 2383408 at \\*2 \(M.D.N.C. 2015\)](#) ("the Court has the discretion to impose conditions on a grant of leave to amend (such as deeming eliminated claims dismissed with prejudice)[.]").

<sup>2</sup> In light of the disposition of the motions filed by the Sea Isle Defendants and Defendant Baldini, the Court need not reach the issues raised by the Restaurant Defendants' Motion to Dismiss which do not relate to the merits of the federal claims.

<sup>3</sup> For completeness, the state law claims are: violation of the [New Jersey Civil Rights Act](#), tortious interference with prospective economic advantage, common law conspiracy, and violations of the [New Jersey Antitrust Act](#). However, as stated above, the Court does not rule on these claims.

### III. ANALYSIS

#### A. Substantive due process

As discussed in the previous Opinion, the issue is whether Plaintiff has plausibly pled facts supporting a conclusion that Defendant Desiderio and others engaged in the type [\*4] of egregious self-dealing that shocks the judicial conscience. [8600 Landis, LLC, 2018 U.S. Dist. LEXIS 50003, 2018 WL 1509088 at \\*4](#).<sup>4</sup> "[T]he standard is sufficiently high to 'avoid converting federal courts into super zoning tribunals.'" [Selig v. N. Whitehall Twp. Zoning Hearing Bd., 653 F. App'x 155, 157 \(3d Cir. 2016\)](#) (quoting [Eichenlaub v. Twp. of Indiana, 385 F.3d 274, 285 \(3d Cir. 2004\)](#), and citing [United Artists Theatre Circuit, Inc. v. Twp. of Warrington, 316 F.3d 392, 402 \(3d Cir. 2003\)](#)). Moreover, in the land-use context, the Third Circuit has cautioned that "not . . . every violation of state law [should be] 'constitutionalized' through the application of the substantive due process clause, and [] District Court[s] [should be] properly concerned with preventing this provision from turning into a broad authorization to review state actors' compliance with state law." [Whittaker v. County of Lawrence, 437 F. App'x 105 \(3d Cir. 2011\)](#).<sup>5</sup>

With this legal foundation in mind, the Court turns to the factual allegations of the Second Amended Complaint. As stated in the previous Opinion, the Court's focus is on the facts-- not bald assertions, conclusions or mere labels.<sup>6</sup> Plaintiff alleges that Defendant Desiderio, at all relevant times, "owned" Kix McNutley's and Sea Isle Inn, both of which are located at 6400 Landis Avenue in Sea Isle City. (Second Amend. Compl., "S.A.C.," ¶¶ 16, 20-21) Defendant Desiderio allegedly holds a liquor license that is associated with one, or both, of those establishments. (S.A.C. ¶ 25-26) Plaintiff allegedly also holds [\*5] a liquor license<sup>7</sup> and allegedly, it was for this reason that on May 10, 2010 Defendant Desiderio recused himself from the consideration of, and abstained from the vote on, Plaintiff's predecessor-in-interest's zoning application. (Id. 1 26) Notably, every other Board Member in attendance at the meeting --seven members total, excluding Defendant Desiderio-- voted in favor of Plaintiff's application, and it was approved. (Id. Ex. D)

<sup>4</sup> The parties do not dispute that Plaintiff has a property interest that is protected by the Due Process Clause.

<sup>5</sup> See also [United Artists, 316 F.3d at 402](#) ("every appeal by a disappointed developer from an adverse ruling of the local planning board involves some claim of abuse of legal authority, but it is not enough simply to give these state law claims constitutional labels such as 'due process' or 'equal protection' in order to raise a substantial federal question under section 1983. Land-use decisions are matters of local concern, and such disputes should not be transformed into substantive due process claims based only on allegations that government officials acted with 'improper' motives."); [Whittaker, 437 F. App'x at 109](#) ("the Property Owners simply allege that the defendants did not follow state law in taking their property. While this certainly is not conduct without a remedy, the remedy is not provided by the Federal Constitution's substantive due process clause. For this reason, we will affirm the District Court's dismissal of the substantive due process claim."); [Blain v. Twp. of Radnor, 167 F. App'x 330, 333 \(3d Cir. 2006\)](#) ("Th[e] [shocks the conscience] standard's stringency reflects maintenance of the proper proportions of constitutional, as opposed to ordinary tort, violations."); [Maple Properties, Inc. v. Twp. of Upper Providence, 151 F. App'x 174, 180 \(3d Cir. 2005\)](#) ("we have previously recognized that the politics and animosities that often animate local decision-making are not matters of constitutional concern."); see generally, [City of Sacramento v. Lewis, 523 U.S. 833, 863-64, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 \(1998\)](#) (rejecting a constitutional standard that "would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States").

<sup>6</sup> This principle is particularly important in the substantive due process analysis where "[w]hat is [conscience] shocking depends on the factual context." [Selig, 653 F. App'x at 157](#) (citing [United Artists](#)). Therefore, Plaintiff's explanation in its opposition brief that the Second Amended Complaint "includes allegations of self-dealing, where public officials took advantage of their positions to benefit themselves and stifle competition to their personal businesses" (Opposition Brief, Dkt 77, p. 24), does little to advance the legal analysis.

<sup>7</sup> Allegedly, in Sea Isle City, there are only eight liquor licenses of the class that Plaintiff and Defendant Desiderio hold. (S.A.C. ¶ 74)

Nonetheless, Plaintiff alleges in conclusory fashion that after the Board Meeting, Defendant Desiderio "stayed involved" "behind the scenes" to "undermin[e] Plaintiff's project." (S.A.C. ¶¶ 27, 44) Only two examples are alleged, one rather conclusorily, and one undermined by the exhibits Plaintiff attaches to the Second Amended Complaint. The actions alleged are: (a) Defendant "had" two unidentified "business owners" "approach . . . a representative of Plaintiff to say that if Plaintiff sold their [sic] units instead of renting them, their [sic] problems would go away"<sup>8</sup>; and (b) twice "received correspondence [from Desiderio despite his purported recusal and abstention] relating to Plaintiff's project." (S.A.C. ¶¶ 28, 49) The "correspondence"-- attached [\*6] as Exhibits H and N to the Second Amended Complaint-- merely reveals that Defendant Desiderio was one of many other town officials carbon-copied on the two letters concerning the progress of Plaintiff's project. Defendant Desiderio allegedly was motivated to take these actions by a desire to indirectly benefit Kix McNutley's and Sea Isle Inn, through alleged decreased competition from Plaintiff's project once it opened. (S.A.C. ¶ 27, 49, 61) In conclusory fashion, Plaintiff also alleges that Defendant Desiderio "directed" unspecified conduct of the other Sea Isle City Defendants, without specifying which Defendants. (S.A.C. ¶¶ 5, 61, 90, 100)

The Second Amended Complaint further alleges that Defendant Byrne, the Zoning Officer who issued the Stop Work Order, is also a bartender at Kix McNutley's. (S.A.C. ¶¶ 3, 88) While bartending one night, Defendant Byrne allegedly told "a representative of Plaintiff" that with regard to Plaintiff's project, Byrne "was acting on orders from" Defendant Desiderio. (S.A.C. ¶ 89)<sup>9</sup>

According to Plaintiff, these allegations support a conclusion that Defendants Desiderio and Byrne engaged in self-dealing, and Plaintiff asserts, [\*7] Eichenlaub states that self-dealing meets the shocks the conscience standard. See [385 F.3d at 286](#) ("as counsel for appellants acknowledged during oral argument, there is no allegation of corruption or self-dealing here."). A comprehensive reading of Eichenlaub and the cases discussed therein, however, demonstrates that the allegations of the Second Amended Complaint are not sufficiently egregious to support a substantive due process claim. Rather, the allegations concern a vigorously contested local land use dispute, one which a state court judge has already adjudicated in part. Thus, this Court will avoid becoming a "super zoning tribunal[]." [Selig, 653 F. App'x at 157](#) (internal citation and quotation omitted).

Eichenlaub provides two "illustrat[ions] [of] the kinds of gross misconduct that have shocked the judicial conscience." [385 F.3d at 285](#). First, [Conroe Creosoting Co. v. Montgomery County, 249 F.3d 337 \(5th Cir. 2001\)](#), as explained by the Third Circuit in Eichenlaub,<sup>10</sup> involved allegations that the defendants "fraudulently converted a tax levy for a \$75,000 deficiency into an unauthorized seizure and forced sale and destruction of an \$800,000 ongoing business." [385 F.3d at 285](#). The Third Circuit explained that, in addition to what "amounted to a claim of an unconstitutional taking," the facts also "carried a whiff of [\*8] self-dealing" insofar as the principal defendant's friends allegedly helped accomplish the taking by performing the auction services. *Id.* Also in Conroe, one of the defendants was alleged to have "signed a false affidavit in support of a tax warrant" in furtherance of the taking. [249 F.3d at 342](#).

<sup>8</sup> It is not clear whether this incident occurred before or after Defendant Zoning Officer Cornelius Byrne allegedly "refused to issue the necessary permits for the first floor restaurant space" of Plaintiff's project. (S.A.C. ¶ 47) If it occurred before, the Second Amended Complaint is not clear as to what "problem" there might have been at that time.

<sup>9</sup> The Second Amended Complaint is vague as to what Defendant Desiderio allegedly "ordered" Defendant Byrne to do. Notably, the Second Amended Complaint clearly pleads that Defendant Byrne issued the Stop Work Order after asking for, and receiving, Defendant Baldini's legal opinion on the matter. (S.A.C. ¶¶ 52-53) The Second Amended Complaint specifically alleges that "[a]s a result of Paul J. Baldini's improper legal opinion and in reliance on Baldini's conclusions, on September 23, 2015, Mr. Byrne improperly issued, by correspondence, a Stop Work Order to Plaintiff, which significantly delayed Plaintiff from finishing construction on the first floor restaurant space and caused substantial monetary damages." (S.A.C. ¶ 57; emphasis added); (see also S.A.C. ¶ 5, alleging that Defendants Byrne and Baldini "improperly revoked Plaintiff's approvals necessary to complete [its] project."). The Second Amended Complaint does not allege that Defendant Desiderio ordered Byrne to issue the Stop Work Order, nor does it allege that Defendant Desiderio had any involvement with the drafting of Defendant Baldini's legal opinion.

<sup>10</sup> [Maple Properties, 151 F. App'x at 180](#), also cites Conroe as an example of "patently egregious behavior recognized . . . to constitute a substantive due process claim."

Second, in Eichenlaub the Third Circuit explained that "Associates in Obstetrics & Gynecology v. Upper Merion Township, 270 F.Supp.2d 633 (E.D. Pa. 2003)", is also a case that implicates more than just disagreement about conventional zoning or planning rules" because Associates in Obstetrics involved "allegations of hostility to constitutionally-protected activity," namely, the provision of abortion services. 385 F.3d at 285.

It is thus clear, after considering Eichenlaub's illustrations, that the factual allegations of the Second Amended Complaint do not amount to conscience shocking behavior by local zoning officials. First, both Conroe and Associates in Obstetrics involved allegations of an underlying violation of constitutional rights; a taking in Conroe, and the interference with access to abortion services in Associates in Obstetrics. In this case, no underlying *constitutional* violation is alleged.<sup>11</sup>

Second, while "[t]here may be zoning disputes [\*9] where, in the absence of a separately protected constitutional right, allegations of personal and political animus sufficiently shock the conscience in order to state a due process claim," Tucker Industrial Liquid Coatings, Inc. v. Borough of East Berlin, 656 F. App'x 1, 7 (3d Cir. 2016) (emphasis added), this is not such a case. In this regard, Ecotone Farm, LLC v. Ward, 639 F. App'x 118 (3d Cir. 2016), provides a contrasting example.

In Ecotone, there was no allegation of interference with a separate constitutional right, yet the Third Circuit held that the plaintiff had stated a substantive due process claim. In that case, the plaintiff alleged a campaign by local officials of "harassment and obstructionism" "over the course of several years motivated by personal vendettas." 639 F. App'x at 126. The Court explained that the factual allegations supported a plausible conclusion that local officials "repeated[ly] abuse[d] government power with the deliberate aim of harming someone." Id.

In this case, Plaintiff does not allege a years long pattern of "corruption and repeated abuse of power," "motivated by personal vendettas," and done with the purpose to harass and injure, like that alleged in Ecotone. 639 F. App'x at 126. Nor does it allege fraudulent-- indeed, potentially criminal-- activity, like that alleged in Conroe. At most, a very generous reading of the Second Amended Complaint [\*10] supports only the inference that Defendant Desiderio, and perhaps Defendant Byrne, attempted-- unsuccessfully-- to pressure Plaintiff to change its intended use of the 13 residential units it planned to build.<sup>12</sup> Perhaps it may be inferred from the facts of the Second Amended Complaint that Defendant Desiderio had an improper motive-- i.e., self-enrichment that might indirectly result from Plaintiff's change of plans-- however, the law has been clear since United Artists was decided 15 years ago that improper motive is not enough. See, e.g., Locust Valley Golf Club, Inc. v. Upper Saucon Twp., 391 F. App'x 195, 199-200 (3d Cir. 2010) (concluding that Plaintiff's evidence of "self-dealing" amounted to, "at worst . . . improper motives. Without more, improper motives do not shock the conscience as a matter of law."); see also,

<sup>11</sup> Plaintiff alleges an underlying violation of the Sherman Act, but Plaintiff's rights in that regard arise from federal statute, not the United States Constitution. Eichenlaub and subsequent cases are clear that the relevant inquiry is whether "local officials are accused of seeking to hamper development in order to interfere with otherwise *constitutionally* protected activity." 385 F.3d at 286 (emphasis added); Button v. Snelson, 679 F. App'x 150, 154 (3d Cir. 2017) (citing Eichenlaub); Selig, 653 F. App'x at 157 (quoting Eichenlaub); Perano v. Twp. of Tilden, 423 F. App'x 234, 238 (3d Cir. 2011) (observing that the local officials' acts in Eichenlaub "were not enough to shock the conscience when those actions were not coupled with interference with a constitutionally protected activity or ethnic bias."); Dotzel v. Ashbridge, 306 F. App'x 798, 801 (3d Cir. 2009) ("There is no evidence that the supervisors' conduct involved self-dealing or interfered with constitutionally protected activity."). In any event, as discussed infra, Plaintiff fails to state a claim for violation of the Sherman Act.

<sup>12</sup> Though not argued in its opposition briefs, Plaintiff's Second Amended Complaint appears to suggest that Defendant Paul Baldini somehow acted *ultra vires*. In particular, the Second Amended Complaint alleges that "Sea Isle City specifically conceded in Court to Judge Mendez that Baldini, as Solicitor, had no legal right to set aside the Plaintiff's Planning Board approvals." (S.A.C. ¶ 56) First, the transcript of the hearing before Judge Mendez, attached as Exhibit S to the Second Amended Complaint, is somewhat equivocal, and it may not be fair to characterize what was said as a "specific[] conce[ssion]." (Id.) In any event, even if, as a legal matter, the City Solicitor lacks authority to "set aside" a zoning board approval or issue a Stop Work Order, this fact would not plausibly support a conclusion that Defendant Baldini acted egregiously as a matter of federal constitutional law because the Second Amended Complaint specifically pleads that Defendant Zoning Officer Byrne, rather than Defendant Baldini, issued the Stop Work Order. (S.A.C. ¶¶ 6, 57)

*Giuliani v. Springfield Twp.*, 726 F. App'x 118, 123 (3d Cir. 2018) ("In United Artists, we applied Supreme Court precedent and rejected the improper-motive standard. We ruled that the substantive due process test is, instead, whether local officials' conduct shocks the conscience."); *Chainey v. Street*, 523 F.3d 200, 220 (3d Cir. 2008) ("merely alleging an improper motive is insufficient, even where the motive is unrelated to the merits of the underlying decision.") (citing United Artists).<sup>13</sup> Accordingly, the Sea Isle Defendants' and Defendant Baldini's Motions to Dismiss [\*11] will be granted as to the substantive due process claim.

## B. Equal protection

In the land use context, substantive due process claims are often accompanied by equal protection "class of one" claims. See, e.g., *Tucker*, 656 F. App'x at 7; *Whittaker*, 437 F. App'x at 109; *Perano*, 423 F. App'x at 238. As the cited cases demonstrate, the class of one claims usually fare no better than the due process claims. See also, *Eichenlaub*, 385 F.3d at 287 ("we do not view an equal protection claim as a device to dilute the stringent requirements needed to show a substantive due process claim. It may be very unlikely that a claim that fails the substantive due process test will survive under an equal protection approach.").<sup>14</sup> The same is true in this case.

In the previous opinion, the Court held that Plaintiff had not adequately identified the relevant comparator upon which its class of one claim is based. *8600 Landis*, 2018 U.S. Dist. LEXIS 50003, LLC, 2018 WL 1509088 at \*5. In the Second Amended Complaint a proposed comparator is more specifically identified; Plaintiff alleges that "the Sea Isle Defendants have engaged in intentional and disparate treatment of Plaintiff compared to other similarly situated Sea Isle City R-2 classified rental properties without a rational basis." (S.A.C. P 133)

The Sea Isle Defendants argue, and this Court [\*12] agrees, that the new proposed comparator does not save Plaintiff's equal protection claim. As the Sea Isle Defendants correctly observe, Plaintiff's case is based on the denial of permits and issuance of a Stop Work Order for the restaurant space. (S.A.C. ¶¶ 47, 57) The Second Amended Complaint specifically pleads that "[o]n April 8, 2015, Plaintiff was issued building permits for the thirteen (13) residential units only." (S.A.C. ¶¶ 46) When these allegations are read in context with the rest of the factual allegations of the Second Amended Complaint, the disconnect between the facts and Plaintiff's proposed comparator becomes apparent.

Plaintiff's alleged injuries flow from the denial of permits and the Stop Work Order as to the restaurant space, and Plaintiff alleges that in this regard it was treated differently than all other R-2 residential rental units in Sea Isle City, yet Plaintiff's Second Amended Complaint also alleges that "the only [other] place with food, liquor, and lodging [all in one location] in between the city centers of Sea Isle City and Avalon" is "Kix McNutley's / Sea Isle Inn." (S.A.C. ¶¶ 2, 76) Thus, it must be the case that the vast majority of R-2 classified [\*13] rental spaces did not even apply for, much less get denied or approved for, permits related to construction of restaurant / food service space, therefore, as a matter of logic, it cannot be that they are "alike in all relevant respects" to Plaintiff. *8600 Landis, LLC*, 2018 U.S. Dist. LEXIS 50003, 2018 WL 1509088 at \*5.

Moreover, as the Sea Isle Defendants also correctly observe, on an even more basic level, "Plaintiff's Second Amended Complaint fails to allege which of the[] 249 R-2 properties received building permits and how these building permits related to the proposed R-2 use." (Reply Brief, Dkt 85, p. 9) See generally, *Freeman v. Town of Hudson*, 714 F.3d 29, 38 (1st Cir. 2013) ("We have held that class-of-one claims require an extremely high degree of similarity between the plaintiffs and the persons to whom they compare themselves. In the land-use context, this means more than pointing to nearby parcels in a vacuum and leaving it to the municipality to disprove conclusory allegations that the owners of those parcels are similarly situated.").

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<sup>13</sup> See also, *Glob. Tower Assets, LLC v. Town of Rome*, 810 F.3d 77, 91 (1st Cir. 2016) ("the Applicants' vague allegations of conflicts of interest and financially motivated conspiracy do not-- at least without far more-- show that the Planning Board acted in the kind of conscience-shocking fashion that we require for substantive due process challenges to make it past the gate.").

<sup>14</sup> See also, *Highway Materials, Inc. v. Whitemarsh Twp.*, 386 F. App'x 251, 259 (3d Cir. 2010) (quoting Eichenlaub).

For these reasons, Plaintiff fails to plausibly plead an equal protection class of one claim, and the Sea Isle Defendants' and Defendant Baldini's Motions to Dismiss will be granted as to this claim.<sup>15</sup>

### C. Conspiracy under 42 U.S.C. §§ 1983, 1985

Plaintiff has failed to state a claim for [\*14] any constitutional violation. Accordingly, the conspiracy claims fail as well. [Whittaker, 437 F. App'x at 109](#); [Perano, 423 F. App'x at 239](#).

Alternatively, as the Court previously ruled, "as a matter of law, [a class of one equal protection claim] cannot serve as the basis for a § 1985(3) conspiracy claim." [8600 Landis, LLC, 2018 U.S. Dist. LEXIS 50003, 2018 WL 1509088, at \\*11 \(D.N.J. Mar. 27, 2018\)](#) (collecting cases).

The Sea Isle Defendants' and Defendant Baldini's Motions to Dismiss will be granted as to the federal statutory conspiracy claims.

### D. Sherman Act

Plaintiff's Sherman Act claim-- the last claim asserted in the eight-count Second Amended Complaint-- is based on the vague assertion that issuing the Stop Work Order and refusing to issue permits "produced adverse anticompetitive effects within the restaurant and hospitality industry and relevant markets." (S.A.C. ¶ 162)

The Court's previous Opinion discussed the various pleading deficiencies associated with this claim. The Second Amended Complaint does not adequately cure all of the deficiencies; the pleading fails to allege sufficient facts to support a plausible claim. Two examples of the remaining deficiencies will suffice.

First, nowhere does Plaintiff identify the "anticompetitive effects" it alleges occurred in the market. It is axiomatic that antitrust law serves to protect competition, [\*15] not competitors. See [NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135, 119 S. Ct. 493, 142 L. Ed. 2d 510 \(1998\)](#) (in a § 1 Sherman Act case, explaining that "the plaintiff here must allege and prove harm, not just to a single competitor, but to the competitive process, i.e., to competition itself."); [Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 829 \(3d Cir. 2010\)](#) ("Because even beneficial legitimate contracts or combinations restrain trade to some degree, § 1 of the Sherman Act has long been interpreted to prohibit only those contracts or combinations that are 'unreasonably restrictive of competitive conditions.'") (quoting [Standard Oil Co. v. United States, 221 U.S. 1, 58, 31 S. Ct. 502, 55 L. Ed. 619 \(1911\)](#)). The Second Amended Complaint merely pleads that Plaintiff, an alleged competitor of Defendants Kix McNutley's and Sea Isle Inn, was harmed as a result of the alleged wrongful actions of Defendants. Such allegations are insufficient.

Second, the Court agrees with Defendant Baldini's observation that "Plaintiff [has] offered no explanation concerning the artificial 'geographic market' that it seemingly created at random." (Moving Brief, Dkt 87, p. 9) The Second Amended Complaint asserts that "the relevant geographic market for purposes of this matter are the town centers of Sea Isle City and Avalon." (S.A.C. ¶ 73) No further factual information is provided, and it is not at all apparent why a portion of Avalon-- a different [\*16] municipality with its own ordinances concerning zoning and liquor licenses-- should be included in the relevant market, while a portion of Sea Isle City should be excluded from the relevant market.<sup>16</sup> Plaintiff has made no attempt to "define the relevant market with reference to the rule of

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<sup>15</sup> In a letter filed with the Court long after briefing on the instant motions was completed (see Dkt 88), Plaintiff asserts additional facts which it says further support its equal protection claim. As an initial matter, as discussed during a telephone conference with the parties (Dkt 93), the Court does not construe Plaintiff's informal letter to be a formal motion to amend its complaint for a third time. Moreover, none of the facts alleged in the letter could potentially change the proposed comparator class, and therefore such facts, if they were to be considered-- which they are not-- would not change the Court's disposition of the equal protection claim.

reasonable interchangeability and cross-elasticity of demand."<sup>16</sup> *8600 Landis, LLC, 2018 U.S. Dist. LEXIS 50003, 2018 WL 1509088 at \*8* (quoting *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 446 (3d Cir. 1997)).

Accordingly, the Court holds that the Second Amended Complaint fails to state a claim for violation of the Sherman Act. Defendants' Motions to Dismiss will be granted as to that claim.

#### IV. CONCLUSION

Plaintiff may, or may not, be entitled to a remedy under state law for the harm it alleges it suffered at the hands of local zoning officials. As set forth above, however, this local dispute does not rise to the level of a claim under the federal laws alleged. Thus, for the foregoing reasons, the Defendants' Motions to Dismiss will be granted as to all federal claims asserted in the Second Amended Complaint, and pursuant to [28 U.S.C. § 1367\(c\)\(3\)](#) this Court will decline to exercise supplemental jurisdiction over the remaining state law claims. An appropriate Order accompanies this Opinion.

Dated: December 12, 2018

s/ Renée Marie Bumb

RENÉE MARIE BUMB

UNITED [\*17] STATES DISTRICT JUDGE

#### ORDER

This matter came before the Court upon Defendants' Motions to Dismiss pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) [Dkt Nos 72, 74, and 75].

For the reasons set forth in the accompanying Opinion of the same date,

IT IS on this 12th day of December 2018, hereby: **ORDERED** that:

- (1) Plaintiff's claims for (a) unfair competition; (b) abuse of process; (c) negligence; and (d) punitive damages against the City of Sea Isle City are **DISMISSED WITH PREJUDICE** pursuant to [Fed. R. Civ. P. 41\(a\)\(2\)](#); and
- (2) The Motion to Dismiss of Defendants City of Sea Isle City, Leonard Desiderio, George Savastano and Cornelius R. Byrne [Dkt No. 74] is **GRANTED** as to all federal claims asserted in the Second Amended Complaint; and
- (3) The Motion to Dismiss of Defendant Paul Baldini, Esq. [Dkt No. 75] is **GRANTED** as to all federal claims asserted in the Second Amended Complaint; and
- (4) The Motion to Dismiss of Defendants Kix McNutley's and Sea Isle Inn [Dkt No. 72] is **GRANTED** as to all federal claims asserted in the Second Amended Complaint; and
- (5) This Court declines to exercise supplemental jurisdiction over the remaining state law claims, therefore remainder of this case is **DISMISSED**.

/s/ Renée Marie Bumb

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<sup>16</sup> For context, it should also be noted that Avalon and Sea Isle City occupy separate barrier islands off the coast of New Jersey. The islands are connected by the Townsends Inlet Bridge. (S.A.C. Ex. A)

RENÉE MARIE BUMB

UNITED STATES DISTRICT JUDGE [\*18]

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End of Document



## Teradata Corp. v. SAP SE

United States District Court for the Northern District of California

December 12, 2018, Decided; December 12, 2018, Filed

Case No. 18-cv-03670-WHO

**Reporter**

2018 U.S. Dist. LEXIS 209872 \*; 2018-2 Trade Cas. (CCH) P80,620; 2018 WL 6528009

TERADATA CORPORATION, et al., Plaintiffs, v. SAP SE, et al., Defendants.

**Subsequent History:** Motion denied by, Without prejudice, in part [Teradata Corp. v. Se, 2019 U.S. Dist. LEXIS 238099, 2019 WL 12275922 \(N.D. Cal., Jan. 16, 2019\)](#)

Motion granted by [Teradata Corp. v. SAP SE, 2019 U.S. Dist. LEXIS 100337 \(N.D. Cal., June 13, 2019\)](#)

Motion granted by, Motion denied by [Teradata Corp. v. SAP SE, 2019 U.S. Dist. LEXIS 232053 \(N.D. Cal., Sept. 9, 2019\)](#)

Decision reached on appeal by, Motion granted by [Teradata Corp. v. SAP SE, 2019 U.S. Dist. LEXIS 192194, 2019 WL 5698057 \(N.D. Cal., Nov. 4, 2019\)](#)

Later proceeding at [Teradata Corp. v. SAP SE, 2020 U.S. Dist. LEXIS 61156 \(N.D. Cal., Apr. 7, 2020\)](#)

Patent interpreted by [Teradata Corp. v. Sap Se, 2020 U.S. Dist. LEXIS 124792, 2020 WL 4001476 \(N.D. Cal., July 15, 2020\)](#)

Request granted [Teradata Corp. v. SAP SE, 2020 U.S. Dist. LEXIS 173316 \(W.D. Wash., Sept. 21, 2020\)](#)

Motion denied by [Teradata Corp. v. SAP SE, 2020 U.S. Dist. LEXIS 182232 \(N.D. Cal., Oct. 1, 2020\)](#)

Motion denied by [Teradata Corp. v. SAP SE, 2020 U.S. Dist. LEXIS 211794, 2020 WL 6684836 \(N.D. Cal., Nov. 12, 2020\)](#)

Motion denied by [Teradata Corp. v. Se, 2021 U.S. Dist. LEXIS 14596 \(N.D. Cal., Jan. 26, 2021\)](#)

Related proceeding at [Teradata US, Inc. v. SAP SE, 2021 U.S. Dist. LEXIS 18763, 2021 WL 326930 \(N.D. Cal., Feb. 1, 2021\)](#)

Motion granted by [Teradata Corp. v. SAP SE, 2021 U.S. Dist. LEXIS 24201, 2021 WL 462658 \(W.D. Wash., Feb. 8, 2021\)](#)

Motion granted by, Motion granted by, in part, Motion denied by, in part [Teradata Corp. v. Se, 2021 U.S. Dist. LEXIS 250985 \(N.D. Cal., May 5, 2021\)](#)

Motion denied by [Teradata Corp. v. Se, 2021 U.S. Dist. LEXIS 250969 \(N.D. Cal., June 24, 2021\)](#)

Motion granted by, in part, Motion denied by, in part, Request granted [Teradata Corp. v. Se, 2021 U.S. Dist. LEXIS 250971 \(N.D. Cal., July 13, 2021\)](#)

Summary judgment granted by, in part, Summary judgment denied by, in part, As moot, Motion denied by, Partial summary judgment granted by, Motion granted by, in part, Motion denied by, in part, As moot [Teradata Corp. v. SAP SE, 2021 U.S. Dist. LEXIS 215825, 2021 WL 5178828 \(N.D. Cal., Nov. 8, 2021\)](#)

## Core Terms

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allegations, customers, trade secret, products, misappropriation, database, motion to dismiss, integrated, relevant market, optimization, contends, argues, infringement, market power, confidential, asserts, survive, tied product, trade secret information, statute of limitations, anticompetitive, quotation, software, pleads, costs, analytical, enterprise, antitrust, combined, aftermarket

**Counsel:** [\*1] For Teradata Corporation, Teradata US, Inc., Teradata Operations, Inc., Plaintiffs: Bradley Stuart Lui, LEAD ATTORNEYS, Mark L. Whitaker, Morrison and Foerster, Washington, DC; Corinna Joy Alanis, LEAD ATTORNEY, Morrison Foerster LLP, Washington, DC; Daniel Pierre Muino, LEAD ATTORNEY, Morrison & Foerster LLP, San Francisco, CA; George Brian Busey, LEAD ATTORNEY, Morrison and Foerster LLP, Washington, DC; Mary Prendergast, LEAD ATTORNEY, Morrison and Foerster LLP, San Diego, CA; Brian L. Hazen, Morrison Foerster LLP, San Diego, CA; Fahd H Patel, Morrison and Foerster, Washington, DC; Wendy Joy Ray, Morrison & Foerster LLP, Los Angeles, CA; Bryan Joseph Wilson, Morrison & Foerster LLP, Palo Alto, CA.

For SAP SE, SAP America, Inc., SAP Labs LLC, Defendants: Tharan Gregory Lanier, LEAD ATTORNEY, Jones Day, Palo Alto, CA; David J. Ball , Jr., Kenneth A. Gallo, PRO HAC VICE, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Joshua Lee Fuchs, PRO HAC VICE, Jones Day, Houston, TX; Nathaniel Peardon Garrett, Jones Day, San Francisco, CA; William Michael, PRO HAC VICE, Paul, Weiss, Rifkind, Wharton and Garrison LLP, New York, NY.

**Judges:** William H. Orrick, United States District Judge.

**Opinion by:** William [\*2] H. Orrick

## Opinion

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

Re: Dkt. No. 39

#### INTRODUCTION

Plaintiffs Teradata Corporation, Teradata US, Inc., and Teradata Operations, Inc. (collectively "Teradata") assert five causes of action in the first amended complaint against defendants SAP SE, SAP America, Inc., and SAP Labs, LLC (collectively "SAP"). Teradata alleges that SAP disingenuously entered a joint venture with it to steal its trade secrets in the Enterprise Data Analytics and Warehousing ("EDAW") market and develop a competing product, misappropriating trade secrets, infringing Teradata's copyrights, and violating antitrust laws in the process. SAP moves to dismiss all these claims with prejudice. I agree with SAP that Teradata must describe its trade secrets with greater specificity to demonstrate that they are not generally known in the trade or by those who are skilled in the trade. None of SAP's other challenges to the pleadings has merit. For the reasons below, SAP's motion to dismiss is GRANTED in part and DENIED in part. Teradata's first amended complaint is DISMISSED WITH LEAVE TO AMEND within ten days of the date of this Order.

#### BACKGROUND

Teradata and its subsidiaries [\*3] conduct research, development, engineering, and other technical operations related to its EDAW products. See First Amended Complaint ("FAC") ¶¶ 4-6 (Dkt. No. 24). Its flagship product is Teradata Database, a relational database management system designed for EDAW. FAC ¶ 16. EDAW products provide centralized data storage collected from numerous sources across a business enterprise in its day-to-day operations to help large companies analyze their business operations. See *id.* Teradata was the first commercial EDAW vendor to utilize massively parallel processing ("MPP") through Teradata Database to execute high volumes of analytical queries on massive amounts of data for EDAW customers. FAC ¶ 17. Teradata Database accomplishes this feat by linear-performance scalability, meaning that it can accommodate a customer's analytical demands by adding parallel processors and data-storage devices as needed. FAC ¶ 18. Teradata released the first commercial system incorporating its MPP architecture in the early 1980s and has improved upon the technology since then, developing other technologies and trade secrets in the EDAW market. FAC ¶¶ 20-21.

SAP and its subsidiaries also work on research, development [\*4] and engineering activities in the EDAW space. FAC ¶ 9. At the same time, SAP is the dominant provider in the separate market for Enterprise Resource Planning ("ERP") Applications, comprised of the world's most complex, large-scale business enterprises ("Top-Tier ERP Applications Market"). FAC ¶ 30. ERP Applications allow companies to manage data required to conduct their day-to-day operations across numerous aspects of the business enterprise and are typically designed around a relational transactional database that can ensure users have access to a uniform and current set of data. FAC ¶ 30. SAP also offers a Business Warehouse reporting tool ("SAP BW"), which allows ERP users to generate reports with their ERP-derived data. FAC ¶ 31. The Top-Tier ERP Applications Market that SAP services includes customers with millions of transactions or data-generating events daily, multiple business lines, diverse geographic operations, multiple sources of data, and revenues typically exceeding \$1 billion. FAC ¶ 58.

In 2009, SAP and Teradata entered into a partnership referred to as the "Bridge Project" to combine SAP's ERP Applications and SAP BW tool interface with Teradata's MPP architecture [\*5] that it uses in Teradata Database for EDAW. FAC ¶¶ 1, 31. Before the agreement was finalized the parties executed two mutual non-disclosure agreements restricting the use of confidential information outside evaluating the potential transaction. FAC ¶ 33. Eventually SAP and Teradata executed two more agreements to formalize the Bridge Project, the Software Development Cooperation Agreement ("SDCA") and the Technology Partner Agreement ("TPA"). *Id.* These agreements restricted disclosures of each parties' confidential information and prohibited reverse engineering while working to connect the SAP and Teradata software. *Id.* Teradata also provided SAP with access to its databases for Bridge Project purposes pursuant to its "standard end user license." FAC ¶ 36.

During the Bridge Project, SAP and Teradata jointly developed "Teradata Foundation" which enabled SAP's Top-Tier ERP Applications Market to use Teradata for the transactional database and data-analytics for EDAW activities. FAC ¶¶ 32, 37. The parties brought Teradata Foundation to market and installed Teradata Foundation on site for one major customer facility. FAC ¶ 37. However, while the Bridge Project was underway, SAP was developing [\*6] a competing EDAW product called SAP HANA. FAC ¶ 38. At SAP's user conference in November 2010, the SAP Chief Technology Officer at the time, Dr. Vishal Sikka, announced SAP had begun shipping the SAP HANA product. FAC ¶ 39. At the next year's user conference, a SAP customer demonstrated a new product, HANA for SAP BW, described as incorporating a "massively parallel" database like the architecture used in Teradata Database. *Id.* By June 2011, SAP HANA was commercially available. *Id.*

After nearly three years in the Bridge Project, and two months after SAP HANA was made available, SAP unilaterally terminated the joint venture and stopped supporting, selling, and marketing Teradata Foundation. FAC ¶ 40. SAP positioned itself as a competitor to Teradata with the SAP HANA product offering to perform the same tasks as Teradata Foundation was intended to achieve. FAC ¶¶ 40, 42. SAP customers were still able to access the data created in their SAP ERP Applications by using Teradata EDAW products, but in February 2015 SAP launched its latest version of ERP Application, SAP S/4HANA, which was incompatible with other EDAW products besides HANA. FAC ¶¶ 77, 86. SAP then combined its ERP Application [\*7] and EDAW products into a single sales offering and announced that it was ending support for prior versions of its ERP Applications by 2025 — an effort Teradata believes was intended to force customers to adopt SAP HANA. FAC ¶¶ 87, 89, 91. Teradata expects that given the costs of licensing and maintaining EDAW products, most Top-Tier SAP ERP Applications customers who

use Teradata EDAW products will abandon them in response to SAP's decision not to facilitate products other than HANA. FAC ¶ 92. Teradata also believes SAP is forcing customers to abandon Teradata by restricting customer ability to access SAP ERP data for use with Teradata's EDAW products. FAC ¶ 93.

## LEGAL STANDARD

Under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a [Rule 12\(b\)\(6\)](#) motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A claim is facially plausible when the plaintiff pleads facts that "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." [Ashcroft v. Iqbal](#), 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citation omitted). There must be "more than a sheer possibility that a defendant has acted unlawfully." [\*8] *Id.* While courts do not require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." [Twombly](#), 550 U.S. at 555, 570.

In deciding whether the plaintiff has stated a claim upon which relief can be granted, the court accepts the plaintiff's allegations as true and draws all reasonable inferences in favor of the plaintiff. See [Usher v. City of Los Angeles](#), 828 F.2d 556, 561 (9th Cir. 1987). However, the court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." [In re Gilead Scis. Sec. Litig.](#), 536 F.3d 1049, 1055 (9th Cir. 2008).

If the court dismisses the complaint, it "should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." [Lopez v. Smith](#), 203 F.3d 1122, 1127 (9th Cir. 2000). In making this determination, the court should consider factors such as "the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party and futility of the proposed amendment." [Moore v. Kayport Package Express](#), 885 F.2d 531, 538 (9th Cir. 1989).

## DISCUSSION

### I. MISAPPROPRIATION OF TRADE SECRETS (COUNTS I AND II)

Teradata alleges that SAP misappropriated its trade secrets under the federal [Defend Trade Secrets Act \("DTSA"\)](#), [\*9] [18 U.S.C. § 1836 et seq.](#), and [California's Uniform Trade Secrets Act \("CUTSA"\)](#), [Cal. Civ. Code § 3426 et seq.](#) The elements of trade secret misappropriation are substantially the same under the federal and state statutes. See [Waymo LLC v. Uber Techs., Inc.](#), No. 17-CV-00939-WHA, 2017 U.S. Dist. LEXIS 73843, 2017 WL 2123560, at \*7 (N.D. Cal. May 15, 2017) (stating that "the California Uniform Trade Secrets Act and the federal Defend Trade Secrets Act...offer essentially the same definitions for our purposes.").

A trade secret is defined to include "all forms and types" of information that derives value from being secret and that the owner took reasonable measures to keep secret. [18 U.S.C. § 1839\(3\)](#); see also [Cal. Civ. Code § 3426.1\(d\)](#). Misappropriation is the "acquisition of a trade secret" by a person who knows or should know the secret was acquired by improper means. [18 U.S.C. § 1839\(5\)](#); [Cal. Civ. Code § 3426.1\(b\)](#). The term "improper means" includes, among other ways, misrepresentation, theft, or breach of a duty to maintain secrecy. [18 U.S.C. § 1839\(6\)](#); [Cal. Civil Code § 3426.1\(a\)](#).

SAP moves to dismiss both trade secret misappropriation claims on the basis that the FAC fails to identify the trade secrets and to allege misappropriation prohibited by the Bridge Project agreements. Further SAP argues that the

claims are barred by applicable statutes of limitations and that the DTSA does not have retroactive effect. I address each [\*10] argument in turn.

#### A. The FAC Does Not Sufficiently Allege Trade Secrets

To identify a trade secret, Teradata "need not spell out the details of the trade secret" the claim is based on, see [Space Data Corp. v. X, No. 16-CV-03260-BLF, 2017 U.S. Dist. LEXIS 22571, 2017 WL 5013363, at \\*2 \(N.D. Cal. Feb. 16, 2017\)](#) (internal quotation marks and citation omitted), but it must "describe the subject matter of the trade secret with sufficient particularity to separate it from matters of general knowledge in the trade or of special knowledge of those persons...skilled in the trade." See [Imax Corp. v. Cinema Techs., Inc., 152 F.3d 1161, 1164-65 \(9th Cir. 1998\)](#) (internal quotation, citation, and emphasis omitted). The pleadings must give defendants "reasonable notice of the issues which must be met at the time of trial and...provide reasonable guidance in ascertaining the scope of appropriate discovery." [Diodes, Inc. v. Franzen, 260 Cal. App. 2d 244, 252-53, 67 Cal. Rptr. 19 \(1968\).](#)

The FAC alleges trade secret information related to massively parallel processing ("MPP"). See FAC ¶¶ 1, 16-23. Teradata contends that its trade secrets include information "on the design and optimization of Teradata's MPP systems and the execution of analytical queries in such systems." FAC ¶ 34. These trade secrets, information and techniques for optimizing the integration and analysis of massive data, are repeated several times. See FAC ¶¶ 24, [\*11] 32, 34, 35. In addition, Teradata asserts that with its trade secrets, SAP "optimize[d] the processing of certain Open SQL queries for large volumes of data, enabling improved performance speed and opportunities for parallel processing and other enhancements on SAP's HANA." FAC ¶ 44.

At the hearing, Teradata repeated its reliance on the paragraphs of the complaint discussed above, arguing that allegations concerning its proprietary methods related to MPP and executing queries were enough to survive the motion to dismiss. However, several cases in this district demonstrate what is currently lacking in Teradata's FAC. In [Farhang v. Indian Inst. of Tech., Kharagpur, No. 08-CV-02658-RMW, 2010 U.S. Dist. LEXIS 53975, 2010 WL 2228936, at \\*14 \(N.D. Cal. June 1, 2010\)](#), Judge Whyte found defendants, on these allegations, could not determine what subject matter of the trade secret was separate from matters of general knowledge in the trade. *Id.*

Similarly, in [Synopsys, Inc. v. ATopTech, Inc., the Hon. Samuel Conti dismissed a trade secret defined as information including "proprietary input \[\\*12\] and output formats, scripts, and technical product documentation..."](#) [Synopsys, Inc. v. AtopTech, Inc., No. 13-CV-02965-SC, 2013 U.S. Dist. LEXIS 153089, 2013 WL 5770542, at \\*6 \(N.D. Cal. Oct. 24, 2013\)](#). Judge Conti found this too vague to determine "where trade secret protection begins and ends as to any of this material." *Id.*

Finally, in [Vendavo, Inc. v. Price f\(x\) AG, the Hon. Richard Seeborg analyzed a trade secret claim that allegedly included things like "...negative knowhow learned through the course of research and development, and other information related to the development of its price-optimization software, including ideas and plans for product enhancements."](#) [2013 U.S. Dist. LEXIS 153089, \[WL\] at \\*3](#) (internal quotations omitted). [Vendavo, Inc. v. Price f\(x\) AG, No. 17-CV-06930-RS, 2018 U.S. Dist. LEXIS 48637, 2018 WL 1456697, at \\*4 \(N.D. Cal. Mar. 23, 2018\)](#). Judge Seeborg dismissed these allegations, finding they were too broad. *Id.*

Teradata's alleged trade secret information is too broad and vague. The repeated allegations that its trade secrets include specific ways to optimize data with its MPP technology is indistinguishable from the allegations in [Farhang, Synopsis, and Vendavo](#). Even the most specific allegation that the trade secret information included an optimization process for "certain Open SQL queries" suffers the same flaw. FAC ¶ 44. As it stands, there are no allegations suggesting what the proprietary information regarding optimization [\*13] was, or how or why it is proprietary besides simply being labeled a trade secret by Teradata in its first amended complaint.

Teradata informed the court of its intention to disclose a trade secrets list to opposing counsel. Although Teradata need not "spell out the details" of its trade secrets, [Space Data Corp., 2017 U.S. Dist. LEXIS 22571, 2017 WL 5013363, at \\*2](#), more particularity is needed to separate Teradata's alleged trade secret information on design and optimization from other information that is "general knowledge in the trade or of special knowledge of those persons who are skilled in the trade." [Diodes, 260 Cal. App. at 253](#).

## B. The FAC Sufficiently Alleges Misappropriation by Improper Means

SAP contends the claim must be dismissed because Teradata failed to comply with its contractual obligation to designate information as confidential when it is disclosed and failed to plead that SAP breached the Bridge Project agreements. See [Convolve Inc. v. Compaq Computer Corp., 527 Fed. App'x 910, 924-25 \(Fed. Cir. 2013\)](#) (finding "a duty to maintain the secrecy of the disclosed information is dictated by the terms of the NDA.").

SAP relies on cases finding a "written non-disclosure agreement supplants any implied duty of confidentiality that may have existed between the parties." [Marketel Inter., Inc. v. Priceline.com, Inc., 36 Fed. Appx. 423, 425 \(Fed. Cir. 2002\)](#) (citing [Union Pac. R.R. Co. v. Mower, 219 F.3d 1069, 1076 \(9th Cir. 2000\)](#)). In response, Teradata argues that whether it complied with the Bridge Project [\*14] agreements is a premature question at the motion to dismiss stage because this requirement is not determinative of the claim. See [PQ Labs, Inc. v. Yang Qi, No. 12-CV-0450-CW, 2014 U.S. Dist. LEXIS 11769, 2014 WL 334453, at \\*4 \(N.D. Cal. Jan. 29, 2014\)](#) (finding the marking requirement was irrelevant at summary judgment because plaintiff "has presented evidence that it used other means to notify its employees and agents that its technological and customer information was confidential.").

As an initial matter, it is appropriate to consider the Bridge Project agreements on a motion to dismiss where they have been incorporated by reference in the complaint. Incorporation by reference is "a judicially created doctrine that treats certain documents as though they are part of the complaint itself." [Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 1002 \(9th Cir. 2018\)](#). A defendant may seek to incorporate documents into the complaint "if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." *Id.* (internal citations and quotations omitted).

Here, SAP seeks to incorporate five documents for review in support of its motion to dismiss. See Lanier Decl. Ex. A-E (Dkt. No. 38-7). There appears to be no dispute of the authenticity of Exhibits A-C, respectively the SDCA, TPA, and a 2009 mutual non-disclosure [\*15] agreement. It is appropriate to incorporate these documents by reference in the complaint under *Khoja*. However, Exhibits D and E are introduced on "information and belief" and are the subject of dispute. For the reasons explained more fully in the forthcoming copyright infringement analysis, Exhibits D and E will not be incorporated by reference. I now turn to SAP's misappropriation arguments.

### 1. Designating Confidential Information

Teradata's reliance on [PQ Labs](#) is persuasive. There, the court found that evidence plaintiffs took other measures to protect information beyond a non-disclosure agreement made the issue of marking documents confidential irrelevant. *Id.* The facts included explicitly warning defendant not to disclose any product design concepts and placing other controls on access to company research. *Id.*; see also [Vesta Corp. v. Amdocs Mgmt., Ltd., No. 14-CV-01142-HZ, 2018 U.S. Dist. LEXIS 155434, 2018 WL 4354301, at \\*15 \(D. Or. Sept. 12, 2018\)](#) (finding the case law "unclear about the extent to which compliance with an NDA is required to succeed on a claim for trade secret misappropriation.").

SAP counters that the facts here are more like [Gemisys Corp. v. Phoenix Am., Inc., 186 F.R.D. 551 \(N.D. Cal. 1999\)](#), in which the court dismissed a trade secret claim on summary judgment for failing to mark the trade secrets as confidential, [\*16] than like *PQ Labs* which did not involve an NDA with a marking requirement. See Reply at 4 (Dkt. No. 47-4). This does not make the dicta in *PQ Labs*, which stated the marking requirement was irrelevant, any less applicable. In *PQ Labs*, the NDA marking requirement was irrelevant because there remained a question of

fact whether plaintiffs notified defendants of confidential information through other means. See [2014 U.S. Dist. LEXIS 11769, 2014 WL 334453, at \\*4](#). Teradata is correct that at the motion to dismiss stage, the mutual non-disclosure agreements could be non-determinative of the outcome.

The mutual non-disclosure agreements were only two of four contracts involved in the Bridge Project to ensure that Teradata's proprietary information would not be misappropriated or reverse engineered. The SDCA and TPA reference the NDA's confidentiality terms but independently also place restrictions on reverse engineering or creating derivative works of software. See Lanier Decl. Ex. A §§ 10.7-8; Ex. B § 8.6. In addition, Teradata pleads specific instances in which it provided SAP information subject to the "parties' agreements" which refers not only the NDAs, but to the SDCA, TPA, and EUL. See, e.g., FAC ¶ 34 (training sessions on Teradata's database); ¶ [\*17] 35 (identifying solutions for SAP's software based on confidential solutions Teradata implements in its own products); ¶ 36 (installing Teradata Database at SAP's COIL facility in Palo Alto, California and its research center in Walldorf, Germany); ¶ 36 (providing access to Teradata Express subject to EUL). Given the other agreements Teradata entered to protect its trade secrets, the NDA's are not determinative of the claim at the pleading stage.

## 2. Bridge Project Agreements

Although *PQ Labs* recognized that an NDA may not be determinative of a trade secret misappropriation claim, Teradata's other measures to protect its information also lie in the Bridge Project agreements. SAP contends the trade secrets, as alleged, are barred by the terms of the SDCA in three respects.

First, the SDCA grants SAP a license to use "Input" in any SAP products, which is defined as "suggestions, comments, and feedback." Lanier Decl. Ex. A §§ 1.6, 9.4. In response, Teradata argues that it has alleged it provided SAP with trade secret information beyond "Input." See FAC ¶¶ 32-36. I agree with Teradata. The FAC, even without sufficiently detailing the trade secrets, already states that Teradata provided SAP with "information, [\*18] software, tools, and other materials," FAC ¶ 33, "conducted training sessions," FAC ¶ 34, and conveyed "techniques for optimizing the speed and efficiency" of the joint product. FAC ¶ 35. Taking these allegations as true, it is plausible that SAP misappropriated information beyond the terms of the SDCA.

Second, the SDCA provides for Teradata to share "optimization" support with SAP. See *id.* Ex. A, Appx. 2 (Task 5B). SAP argues that the alleged trade secrets were limited to optimization support based on allegations that Teradata conveyed "techniques for optimizing" massive amounts of data, see FAC ¶¶ 32,35, and that it shared the "optimization of Teradata's MPP systems." FAC ¶ 34. However, Teradata asserts again that the information it provided went beyond "optimization" as identified above. Teradata also argues that regardless of the agreement, it did not authorize SAP to use the information for its competing product.

Third, SAP contends that the SDCA grants it ownership of "Newly Developed Materials" resulting from the Bridge Project. See *id.* §§ 1.8, 10.3. The agreement defined new materials as those "developed by SAP and/or [Teradata] in connection with or as a result of a party's interaction [\*19] with the other party within the context of this Agreement..." *Id.* § 1.8. As with the argument that Teradata agreed to share "optimization" support to SAP, there is no indication from the agreement that it contemplated using the information outside the context of the Bridge Project, let alone for a competing product. SAP, in its reply, argues that it would own any intellectual property "if SAP learned something proprietary from Teradata during the Bridge Project." Reply at 5. Even this argument, however, does not extend to Teradata's existing trade secrets, which it alleges it developed before the Bridge Project and which was taken from it under the pretense of the agreement. See FAC ¶ 1 ("SAP then stole Teradata's trade secrets (accumulated by Teradata over the course of four decades in the EDAW space)..."); ¶ 34 ("Teradata provided to SAP proprietary, confidential, and trade secret information acquired through decades of research and development.").

Accordingly, assuming the allegations in the complaint as true, the FAC contains plausible allegations that there is misappropriation by improper means.

### C. The Trade Secret Misappropriation Claims Are Not Time Barred

SAP contends that regardless [\*20] of the pleadings, Teradata's trade secret misappropriation claims are barred by the Bridge Project SDCA's two-year limitations period, and the three-year statutory limitations period. These arguments are not well taken.

#### 1. The SDCA Time Bar Is Not In Effect and Would Not Apply

It is a well-settled point of law that parties may contract around a limitations period shorter than the default statute of limitations. See, e.g., [W. Filter Corp. v. Argan, Inc., 540 F.3d 947, 952 \(9th Cir. 2008\)](#). Section 8.5 of the SDCA provides "Any claims for damages" must be filed within two years after the party becomes "aware of the event giving rise to the claim." Lanier Decl. Ex. A § 8.5. The SDCA also contains a survival clause in Section 13.4 that provides "upon such effective date of termination, each Party's rights and obligations hereunder will terminate..." but the terms in Articles 9 through 13 survive. *Id.* at § 13.4.

Teradata argues that the SDCA time bar in Section 8.5 no longer applies after SAP terminated the Bridge Project. See *id.* § 13.4; FAC ¶ 40. SAP insists that there is a presumption that dispute resolution provisions survive the termination of a contract. See [Marcotte v. Micros Sys., Inc., 2014 U.S. Dist. LEXIS 128054, 2014 WL 4477349, at \\*9 \(N.D. Cal. Sept. 11, 2014\)](#) (citing [Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 204, 111 S. Ct. 2215, 115 L. Ed. 2d 177 \(1991\)](#) (finding "a presumption in favor of postexpiration arbitration of matters unless negated expressly or by clear implication.") (internal quotations [\*21] omitted).

I find that the SDCA two-year limitations period is not in effect. The exception in *Litton* concerned arbitration rights that "accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement." [Litton, 501 U.S. at 206](#). *Litton*'s holding has also applied to forum selection clauses. See [Marcotte v. Micros Sys., Inc., 2014 U.S. Dist. LEXIS 128054, 2014 WL 4477349, at \\*9 \(N.D. Cal. Sept. 11, 2014\)](#) (citing [Saleemi v. Gosh Enterprises, Inc., 467 F. App'x 744 \(9th Cir. 2012\)](#)). SAP seeks to extend it further, but I am not aware of, and the parties have not cited, any cases in this jurisdiction that have directly applied *Litton* to a contractual limitations provision.

The only case SAP provides applying the presumption of survivability to a contractual limitations provision is a Massachusetts District Court case, [Creative Playthings Franchising, Corp. v. Reiser, 2011 U.S. Dist. LEXIS 165492, 2011 WL 13250940, at \\*3 \(D. Mass. Apr. 28, 2011\)](#), which found a liability limitation provision was "in the nature" of other dispute resolution provisions. The Ninth Circuit has found, however, that in California "contractual stipulations are not favored" and should be "construed with strictness against the party invoking them" because they are in "derogation" of the statutorily set limitation. [W. Filter Corp., 540 F.3d at 952](#) (internal quotation and citation omitted).

Construing the agreement strictly against SAP, the contract language [\*22] of Section 13.4 is clear that only Articles 9 through 13 survive after the agreement is terminated. Accordingly, absent clear language to the contrary, principles of contract construction require that I not give Section 8.5's contractual limitations clause post-termination effect.

Assuming the contractual limitation was in effect, SAP also argues that Teradata has not alleged "willful misconduct," which the SDCA identifies as an exception to the two-year limitations period. Willful misconduct has been defined similarly in various contexts. See, e.g., [Manuel v. Pac. Gas & Elec. Co., 173 Cal. App. 4th 927, 947, 93 Cal. Rptr. 3d 9 \(2009\)](#) (defining willful misconduct as involving a "positive intent actually to harm another or to do an act with a positive, active and absolute disregard for its consequences.") (quotation marks and citation omitted). In the CUTSA, the statute states if "willful" misappropriation exists, the court can award exemplary damages. See [Cal. Civ. Code § 3426.3\(c\)](#). In turn, the California Code of Civil Procedure defines "malice" related to exemplary damages as conduct intended to cause injury or conduct "with a willful and conscious disregard of the rights" of others. See *id.* at § 3294(c)(1).

Teradata has sufficiently pleaded willful and conscious disregard of its rights. The FAC alleges its trade secrets were [\*23] improperly misappropriated (as discussed above) when SAP intentionally stole its information by entering the Bridge Project under false pretenses. See FAC ¶ 52. Additionally, Teradata alleges that Dr. Sikka was the driving force within SAP behind the plot to steal Teradata's trade secret information and incorporate it into the HANA product. See *id.* ¶¶ 1, 44, 45, 47, 52. At least at the pleading stage, Teradata has alleged facts that plausibly support its theory of a willful and conscious plan by SAP and Dr. Sikka to steal its trade secrets in direct disregard of the Bridge Project, to develop a competing product, and to engage in anticompetitive practices. Therefore, even if the SDCA limitations period was in effect after the agreement was terminated, Teradata's allegations fit within the exception such that the SDCA's time bar would not apply.

## 2. Teradata Pleads a Claim Within the Statutory Limitations Period

Both the DTSA and the CUTSA have a three-year statute of limitations. See [18 U.S.C. § 1836\(d\)](#); [Cal. Civ. Code § 3426.6](#). Teradata alleges that its trade secrets were improperly acquired during the Bridge Project from 2009 to 2011 when SAP developed HANA, and that the information continues to be misused in the present. FAC [\*24] ¶¶ 40, 52. Yet it asserts that it learned of the theft in September 2015, only after a *Der Spiegel* article revealed SAP's conduct. FAC ¶¶ 47, 51. According to the article, SAP concealed an internal investigation from a SAP auditor in 2012 who concluded that SAP had stolen Teradata's intellectual property during the Bridge Project. FAC ¶¶ 47, 48, 51.

SAP's motion essentially contests the truthfulness of these allegations. It proposes that Teradata should have been aware of potential misappropriation in 2011 when HANA was developed, making the misappropriation claim time barred unless there are allegations that it investigated its suspicions. See [Fox v. Ethicon Endo-Surgery, Inc., 35 Cal. 4th 797, 808, 27 Cal. Rptr. 3d 661, 110 P.3d 914 \(2005\)](#) ("a potential plaintiff who suspects than injury has been wrongfully ceased must conduct a reasonable investigation."); see also [Jolly v. Eli Lilly & Co., 44 Cal. 3d 1103, 1111, 245 Cal. Rptr. 658, 751 P.2d 923 \(1988\)](#) (finding the plaintiff must go find the facts "[s]o long as a suspicion exists."). At the hearing, SAP also referred to paragraphs in the complaint purportedly showing Teradata was on notice of potential misappropriation in 2011. See FAC ¶¶ 3, 38-40, 52.

For three reasons, however, Teradata's FAC does not reveal a reasonable basis for suspicion of misappropriation in 2011. First, the general claim early in the FAC [\*25] that SAP "could not have so quickly developed and marketed HANA...without its theft of Teradata's trade secrets" is not a veiled admission of some reasonable suspicion in 2011. FAC ¶ 3. The FAC dedicates an entire section on SAP's quick development of HANA, see FAC ¶¶ 38-46, and a section on the discovery of the theft in which it pleads that based on the *Der Spiegel* article "it has become clear...SAP was able to go to market so quickly only because SAP entered into an agreement with Teradata...and then incorporated [trade secrets] into and used them to develop HANA." FAC ¶ 52 (emphasis added).

Second, SAP's announcement of HANA for SAP BW "just days" after SAP terminated the Bridge Project in 2011 also does not provide a reasonable suspicion of misappropriation because, as the FAC alleges, the product did not perform as well as Teradata's MPP database. See FAC ¶¶ 41, 16-18. SAP argued at the hearing that the announcement alone should have raised suspicions and a duty to investigate for misappropriation. Perhaps if the product performed similarly to Teradata's it would have raised suspicions, but that is not alleged in the FAC.

Finally, the Teradata employees working on HANA during the [\*26] Bridge Project and those who left to work for SAP later were allegedly not known to Teradata until after the *Der Spiegel* article. See FAC ¶ 45 ("Teradata was not aware of this cross-pollination between SAP's Bridge Project and HANA development teams."). This is another allegation that suggests Teradata lacked notice of misappropriation in 2011.

Teradata need not plead that it initiated an investigation sometime after 2011 when it also pleads that it lacked any reasonable suspicion of misappropriation until 2015. Its trade secret claim did not accrue until it discovered the infringement in September 2015. Because the complaint was filed on June 19, 2018, it was within the three-year statute of limitation under the DTSA and CUTSA. The misappropriation claims are not barred.

#### D. The DTSA Can be Based on a Continuing-Use Theory

The DTSA applies to "any misappropriation of a trade secret...for which any act occurs on or after [May 11, 2016,] the date of the enactment of [the] Act." *Defend Trade Secrets Act of 2016*, Pub. L. No. 114-153, 130 Stat. 376, 381-82 (May 11, 2016). When bringing a claim under the DTSA, the plaintiff may rely on one of three theories: "(1) acquisition, (2) disclosure, or (3) use." [\*Cave Consulting Grp., Inc. v. Truven Health Analytics, Inc.\*, No. 15-CV-02177-SI, 2017 U.S. Dist. LEXIS 62109, 2017 WL 1436044, at \\*4 \(N.D. Cal. Apr. 24, 2017\)](#) [\*27]. To state a claim under any of these theories, plaintiffs need to allege "that acts of misappropriation occurred after DTSA came into effect." [\*Avago Techs. U.S. Inc. v. NanoPrecision Prods. Inc.\*, No. 16-CV-3737-JCS, 2017 U.S. Dist. LEXIS 13484, 2017 WL 412524, at \\*9 \(N.D. Cal. Jan 31, 2017\)](#) (emphasis in original).

If the trade secret was "publicly disclosed before the effective date of the DTSA, a plaintiff cannot rely on a theory 'that the same information was disclosed again.'" [\*Veronica Foods Co. v. Ecklin\*, No. 16-CV-07223-JCS, 2017 U.S. Dist. LEXIS 101325, 2017 WL 2806706, at \\*13 \(N.D. Cal. June 29, 2017\)](#) (quoting [\*Avago\*, 2017 U.S. Dist. LEXIS 13484, 2017 WL 412524, at \\*8-9](#)) (emphasis in original). However, where the information was never initially disclosed, "a DTSA claim based on continuous use after May 11, 2016 does not require allegations of 'new or different' misappropriation, unlike a claim based on disclosure of trade secrets." Order Denying Defendants' Motion to Dismiss, [\*Space Data Corp. v. X, Alphabet, Inc., et al.\*, No. 16-cv-03260-BLF, 2017 U.S. Dist. LEXIS 222326 \(N.D. Cal. 2016\)](#) (Dkt. No. 176).

The parties dispute whether the misappropriation claim can have retroactive effect. As discussed above, Teradata alleges a misappropriation that occurred during the Bridge Project but was discovered in September 2015. FAC ¶¶ 47, 51. The misappropriation allegedly continues to the present as SAP [\*28] keeps selling HANA which, according to Teradata, was only possible because of the trade secrets that were stolen from it. FAC ¶¶ 41, 54, 102-103. SAP argues that the DTSA claim should be dismissed because the federal statute does not have retroactive effect for the continued use of the same misappropriated information before DTSA was enacted.

SAP misapplies the law to the facts of this case. In *Avago*, the Hon. Joseph Spero held there is "no authority suggesting that the DTSA allows a misappropriation claim to be asserted based on the continued use of information that was disclosed prior to the effective date of the statute." *Id.* Next, SAP points to *Space Data Corp.*, where the Hon. Beth Freeman found that plaintiff failed to allege a continuing-use theory when the information was disclosed prior to the DTSA and failed to allege any new post-enactment misappropriation. [\*Space Data Corp. v. X, No. 16-CV-03260-BLF, 2017 U.S. Dist. LEXIS 109842, 2017 WL 3007078, at \\*3\* \(N.D. Cal. July 14, 2017\)](#). Finally, SAP relies on *Cave Consulting*, where the Hon. Susan Illston dismissed DTSA claims for failing to allege post-enactment uses in the first instance. [\*2017 U.S. Dist. LEXIS 62109, 2017 WL 1436044, at \\*5\*](#). Consistent with cases where the trade secret is previously disclosed, Judge Illston found plaintiff failed to state a DTSA [\*29] claim without "new or somehow different [information] from the prior misappropriation." *Id.*

Unlike those cases, however, the trade secret information alleged here has not been publicly disclosed or "extinguished" at the time it was initially misappropriated. See, e.g., [\*Avago\*, 2017 U.S. Dist. LEXIS 13484, 2017 WL 412524, at \\*1-3](#) (quoting [\*Ultimax Cement Mfg. Corp. v. CTS Cement Mfg. Corp.\*, 587 F.3d 1339, 1355 \(Fed. Cir. 2009\)](#)); [\*Attia v. Google LLC\*, No. 17-CV-06037-BLF, 2018 U.S. Dist. LEXIS 99400, 2018 WL 2971049, at \\*11](#) (N.D. Cal. June 13, 2018) (dismissing claim for lack of allegations differentiating between secrets disclosed in patent application and secrets remaining that were not disclosed prior to DTSA effective date); [\*Veronica Foods\*, 2017 U.S. Dist. LEXIS 101325, 2017 WL 2806706, at \\*13](#) (stating the rule in *Avago* applied where the trade secret was allegedly "publicly disclosed before the effective date.").

Teradata alleges continuing-use of its trade secrets; that is not disputed. However, there are no factual allegations in this case that Teradata's trade secret information was ever publicly disclosed pre- or post-enactment of the DTSA. Therefore, assuming Teradata can amend the complaint to sufficiently identify its trade secret information as outlined above, it has adequately brought a DTSA claim on a continuing-use theory.

## II. COPYRIGHT INFRINGEMENT (COUNT III)

The FAC alleges copyright infringement prohibited by Teradata's end-user license ("EUL"). SAP moves to dismiss [\*30] the copyright claim because there is no breach of any obligations under the parties' agreements, and because the claim is time-barred under the Bridge Project agreements and [17 U.S.C. § 507\(b\)](#) of the [Copyright Act](#).

SAP's interpretation of the Bridge Project agreements that are incorporated by reference in the complaint fall short when it comes to the EUL. To restate the law briefly, the Ninth Circuit in *Khoja v. Orexigen Therapeutics, Inc.* clarified that incorporation by reference allows courts to treat documents as if they are a part of the complaint "if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." [899 F.3d at 1002](#) (internal citations and quotations omitted). However, "if the document merely creates a defense to the well-pleaded allegations in the complaint, then that document did not necessarily form the basis of the complaint." *Id.*

Here, SAP asserts the Bridge Project agreements allowed it to reverse engineer Teradata's software within the terms of the agreement and that the EUL has its own two-year limitations provision that is distinct from the SDCA terms addressed earlier. However, SAP's request to incorporate the EUL by reference is based on "information [\*31] and belief" that the exhibit has the same license language as the EUL referenced in the first amended complaint. Lanier Decl. ¶ 6, Ex. E. I cannot know or assume on SAP's information and belief that the attached EUL is the same as the EUL plaintiff extensively refers to in the FAC merely because the FAC alleges the EUL was a "standard" agreement. On the specific contract interpretation arguments raised here, treating a different EUL like it contains the same terms as the one referenced in the FAC would permit what the court in *Khoja* cautioned; it would allow SAP to create a defense to an otherwise well-pleaded allegation. See [899 F.3d at 1002](#). Without knowing the terms of the relevant EUL, SAP cannot prove that a contractual limitation provision bars the claim, that reverse engineering for the purpose of interoperability or circumvention was permitted under the EUL, or that no set of facts exists for Teradata to raise a plausible copyright claim.

SAP's remaining argument is that, regardless of the claim, the FAC is time-barred under the three-year statute of limitations in the Copyright Act. This is incorrect. The statute of limitations begins to run "when one has knowledge of a violation or is chargeable [\*32] with such knowledge." [Roley v. New World Pictures, Ltd., 19 F.3d 479, 481 \(9th Cir. 1994\)](#). Each infringing act is considered a distinct harm so the statute of limitations "bars infringement claims that accrued more than three years before suit was filed, but does not preclude infringement claims that accrued within the statutory period." [Oppenheimer v. Allvoices, Inc., No. 14-CV-00499-LB, 2014 U.S. Dist. LEXIS 80320, 2014 WL 2604033, at \\*3 \(N.D. Cal. June 10, 2014\)](#). The point when a plaintiff knew or should have known about an infringement is a "question of fact," [Polar Bear Prods., Inc. v. Timex Corp., 384 F.3d 700, 707 \(9th Cir. 2004\)](#), and courts may dismiss a claim where there is no reasonable basis to conclude a lack of knowledge under the circumstances. [Goldberg v. Cameron, 482 F.Supp.2d 1136, 1148 \(N.D. Cal. 2007\)](#).

SAP asserts that Teradata failed to plead that it could not reasonably discover the infringement within three years of 2011 when HANA for SAP BW was launched. This is a mischaracterization of the FAC and appears to incorrectly presume that the claim accrued when infringement began. Teradata alleges that it learned of the theft of its proprietary information after the September 2015 *Der Spiegel* article. See FAC ¶¶ 47, 51; see also Oppo. at 3:18, 12:11. The article revealed an internal SAP auditor's conclusion that SAP stole Teradata's intellectual property during the Bridge Project, and that SAP concealed the investigation from Teradata and the [\*33] public until the article exposed the infringement. *Id.*

In sum, Teradata's copyright claim did not accrue until it discovered the infringement in September 2015. The complaint was filed on June 19, 2018, within the three-year statute of limitation under [17 U.S.C. § 507\(b\)](#) of the [Copyright Act](#). Accordingly, the motion to dismiss the copyright claim is DENIED.

## III. ANTITRUST VIOLATIONS (COUNTS IV AND V)

Teradata's antitrust claims include unlawful tying under [15 U.S.C. §§ 1, 14](#), and attempted monopolization under [15 U.S.C. § 2](#). SAP moves to dismiss each for failure to state a claim.

## A. Unlawful Tying

In a tying arrangement the seller conditions one product, the tying product, on the buyer's purchase of another product, the tied product, to extend its market power in a distinct product market. See *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 912 (9th Cir. 2008). A tying arrangement is "forbidden on the theory that, if the seller has market power over the tying product, the seller can leverage this market power through tying arrangements to exclude other sellers of the tied product." *Id.*

Teradata appears to accuse SAP of a per se tying violation. See, e.g., Oppo. at 16:13-18. To sufficiently bring a per se tying claim, Teradata must plead that: (i) SAP "tied together the sale of two distinct products or services;" [\*34] (ii) SAP has the "economic power in the tying product market to coerce its customers into purchasing the tied product;" and (iii) the arrangement "affects a not insubstantial volume of commerce in the tied product market." *Cascade Health Sols.*, 515 F.3d at 913 (internal citation and quotation omitted). SAP moves to dismiss, arguing that there are deficient allegations of tied products, coercion, and market power, and that the claim is subject to the rule of reason.

### 1. The FAC Sufficiently Alleges SAP Tied Two Products

SAP contends that S/4HANA is one integrated product and therefore the first element of the tying claim cannot be satisfied. See [Int'l Mfg. Co. v. Landon, Inc.](#), 336 F.2d 723, 730 (9th Cir. 1964)

 ("it is not an unlawful tying arrangement for a seller to include several items in a single mandatory package when the items may be reasonably considered to constitute parts of a single distinct product."). At the hearing, SAP repeated that the allegations in paragraphs 69, 73, 86, 87, 88, and 129 of the FAC support that S/4HANA is an integrated product. See, e.g., FAC ¶ 73 ("SAP developed HANA to function as both a transactional database for managing ERP Applications data and an analytical database with EDAW functionality."). But Teradata asserts that it sufficiently alleged a market [\*35] for different products, the S/4HANA product in the ERP Applications market and the HANA product in the EDAW market.

The existence of distinct products depends on "the character of the demand for the two items." [Jefferson Par. Hosp. Dist. No. 2 v. Hyde](#), 466 U.S. 2, 19, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984). This consideration, known as the purchaser demand test, examines direct and indirect evidence of consumer demand and whether defendants "foreclosed competition on the merits in a product market distinct from the market for the tying item." *Id. at 21*. Direct evidence of demand includes "whether, when given a choice, consumers purchase the tied good from the tying good maker, or from other firms." [Rick-Mik Enterprises, Inc. v. Equilon Enterprises LLC](#), 532 F.3d 963, 975 (9th Cir. 2008) (internal citations and quotations omitted). Indirect evidence includes firm behaviors, for instance a single product is apparent if "competitive firms always bundle the tying and tied goods" together. *Id.*

Here, the FAC contains plausible allegations directly and indirectly evidencing demand in distinct markets. Teradata alleges that EDAW and ERP Applications products perform different functions. FAC ¶ 69. "ERP Applications allow companies to gather and manage the data required to conduct their day-to-day operations across many aspects of the business enterprise," and "typically are designed [\*36] around a relational database that acts as a common repository for all the data used and managed by the ERP Applications..." FAC ¶ 30. An EDAW product, in contrast to ERP Applications and transactional databases, "involves the centralized storage and integration of vast amounts of data collected from numerous sources across an entire business enterprise in its day-to-day operations..." FAC ¶ 16. Teradata further describes the EDAW market as products enabling Top-Tier ERP Applications customers to retain their data, and "to perform complex analytical operations on, vast amounts of data from a wide variety of data streams (i.e., the companies' ERP Applications and numerous other sources)." FAC ¶ 68. EDAW products copy customer ERP Applications data from the transactional database to incorporate it into the EDAW system, which allows customers to "run complex analytical functions against all the data" collected from the ERP data. FAC ¶ 70.

The FAC also alleges that "EDAW products are indispensable for" Top-Tier ERP Application customers, but selling the products together is not necessary. See FAC ¶ 72. In fact, EDAW and ERP Application products were historically sold separately to the same [\*37] customer base. FAC ¶ 69. Both before and after the Bridge Project, customers had the ability to select different ERP Applications and EDAW products when given the freedom to choose. FAC ¶¶ 77-78, 84. When HANA was first released, SAP continued to allow its ERP Application customers to choose their own transactional database and their own EDAW products. FAC ¶ 81. This was purportedly the case until SAP made its HANA products inoperable with other EDAW databases. FAC ¶¶ 86-87. After HANA's release, customers still approached Teradata and encouraged it to develop integration for HANA. FAC ¶ 84.

Nonetheless, SAP argues that the product is bundled, which does not necessarily amount to an unlawful tying arrangement. See *Cascade Health Sols.*, 515 F.3d at 915 n. 27. According to SAP, because the bundling "innovates," "integrates," and "improves" the product, it should be treated as a single product for purposes of an unlawful tying claim. See X.P. Areeda, H. Hovenkamp & E. Elhauge, *Antitrust Law*, ¶ 1746b, p. 208 (3d ed. 2007) (explaining a single product should be found where defendant "integrate[s] previously unbundled inputs into a new product design that results in better combined performance than could be obtained if the items were [\*38] offered unbundled and combined by purchasers or intermediaries."). It relies on two cases to make this argument.

First, SAP asserts that I cannot balance the benefits of "a product improvement against its anticompetitive effects." *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 1000 (9th Cir. 2010) (finding product improvement alone does not render unlawful a monopoly under Section 2). Since the product is an improvement, that would be the end of the matter. The *Allied Orthopedic* case, however, was not concerned with the sufficiency of a plaintiff's tying allegations. Rather, the court analyzed whether "a design change that improves a product by providing a new benefit to consumers" could defeat summary judgment of a Section 2 monopoly claim. *Id. at 998-999*.

Second, SAP contends that because there is a plausible claim that its integrated product offers advantages "unavailable if the functionalities are bought separately and combined by the purchaser," there is no viable tying claim. *United States v. Microsoft Corp.*, 147 F.3d 935, 948, 331 U.S. App. D.C. 121 (D.C. Cir. 1998). However, in *Microsoft Corp.*, the court was operating under its reading of an antitrust consent decree, and left open "[w]hether or not this is the appropriate test for antitrust law generally..." *Id. at 950*. SAP does not provide any Ninth Circuit case law applying the plausibility test since *Microsoft Corp.*

Even [\*39] under the case law SAP relies on, Teradata satisfies its burden to plead tied products. Assuming the court could apply the *Microsoft Corp.* analysis consistent with antitrust law generally, it is arguable whether there are allegations that the S/4HANA and HANA products are integrated. As SAP pointed out, Teradata's FAC recognizes that EDAW and ERP Applications products can operate more efficiently together — as was similarly the aim of the Bridge Project and allegedly achieved in Teradata Foundation. See FAC ¶ 32 ("A key challenge of the Bridge Project was to ensure fast and efficient interoperation between SAP's front-end systems and Teradata's EDAW product."). But the allegations refer only to HANA as it relates to integrating with transactional databases, not integrating with the ERP Applications, S/4HANA. See, e.g., FAC ¶ 42 (stating that like Teradata Foundation, "SAP's HANA product combines a database solution with integrated software to perform data analytics."); ¶ 52 ("...integrating the two companies' technologies" as a reference to Teradata Foundation solution, not HANA or S/4HANA); ¶ 83 (alleging HANA "was ill-suited for integration of enterprise data from third-party sources."). [\*40]

Applying *Allied Orthopedic*, even if a design change leads to improvements it is tolerated in the antitrust context "unless the monopolist abuses or leverages its monopoly power in some other way when introducing the product." *Allied Orthopedic Appliances Inc.*, 592 F.3d at 1000. An abuse of leverage "in some other way" is exactly what the FAC alleges. *Id.* For instance, Teradata asserts that SAP is a dominant player in the ERP Application market and made its newest version of the ERP Application, S/4HANA, incompatible with other EDAW products and transactional databases, FAC ¶¶ 86-87, while at the same time announcing that it is ending support for prior versions of its ERP Applications by 2025. FAC ¶ 89. Teradata also alleges that, in addition to bundling the sales of HANA and S/4HANA, SAP placed restrictive language in its licensing agreements preventing customers from using other databases, FAC ¶ 87, and restricted customers' ability to extract their ERP-derived data stored within HANA. FAC ¶ 93. These are all changes that Teradata alleges are specifically geared toward extending SAP's market

power from the ERP Application market to the distinct EDAW market. See [\*Rick-Mik Enterprises, 532 F.3d at 971\*](#). Accordingly, the FAC contains enough allegations satisfying the first [\*41] element that SAP tied together the sale of two distinct products.

## 2. The FAC Sufficiently Alleges Coercion

SAP contests the second element, that Teradata has not plausibly alleged coercion. The coercion element requires Teradata to "present evidence that the defendant went beyond persuasion and coerced or forced its customers to buy the tied product in order to obtain the tying product." [\*Paladin Assocs., Inc. v. Montana Power Co., 328 F.3d 1145, 1159 \(9th Cir. 2003\)\*](#). The Ninth Circuit recognizes so called "implied" or "de facto" tying claims in which a seller "adopts a policy that makes it unreasonably difficult or costly to buy the tying product...without buying the tied product." [\*Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1179 \(9th Cir. 2016\)\*](#) (quoting [\*Collins Inkjet Corp. v. Eastman Kodak Co., 781 F.3d 264, 272 \(6th Cir. 2015\)\*](#)).

SAP asserts that "products are not tied unless the supplier refuses to accommodate those who prefer one without the other." IX [\*Antitrust Law\*](#), ¶ 1700i, p. 9. It focuses on language in [\*Foremost Pro Color, Inc. v. Eastman Kodak Co.\*](#) that requires plaintiffs plead "some modicum" of facts "that the purchase of the alleged tied products was required as a condition of sale of the alleged tying products." [\*703 F.2d 534, 540, 542 \(9th Cir. 1983\)\*](#). Teradata has done so. SAP's most recent ERP Applications product, S/4HANA, is allegedly now combined with the sale of HANA in a single offering, which requires customers who buy [\*42] S/4HANA to buy HANA as their EDAW product. See FAC ¶ 87. This is a direct allegation that the purchase of the tied product is conditioned on the sale of the tying product. See [\*Eastman Kodak, 703 F.2d at 542\*](#).

The claim becomes stronger when considering the tying allegations that imply coercion. For example, the costs of implementing ERP Applications are allegedly extremely high, as are the costs of switching ERP Applications products. A single customer invests tens of millions of dollars on its ERP Applications each year. FAC ¶¶ 62-66. These expenses include licensing, development, and implementation of ERP Applications for their unique businesses, as well as the needs of training employees to use the product, troubleshooting issues with the product, migrating data to the new service, and other expenses. FAC ¶¶ 63-64. In this context, SAP placed a sunset on its existing ERP Applications and is ending support of prior versions by 2025. FAC ¶ 89. On Teradata's information and belief, SAP also limited the updates for prior versions of its ERP Applications. FAC ¶ 91. Therefore, existing ERP Applications customers can upgrade to S/4HANA before the 2025 sunset period, which is allegedly tied to HANA for EDAW services, [\*43] or they can suffer the switching costs. Teradata alleges that when faced with this choice, customers will upgrade so they can continue to have "the latest features and functionality, most robust support and most recent security and software updates." FAC ¶ 59.

SAP contends there is no coercion because customers can still buy stand-alone versions of SAP's Top-Tier ERP Applications without purchasing HANA. However, that is not an allegation in the FAC. Even if it was alleged that customers can still buy stand-alone ERP Applications from SAP, this does not reconcile with the other allegations such as the high costs of implementing these systems, the lack of updates offered for older versions, and the expected 2025 sunset date for older versions of the product. Accordingly, at the pleading stage, Teradata has alleged coercion.

## 3. The FAC Sufficiently Alleges SAP's Market Power in a Relevant Market

Third, also within the second element of a tying claim, SAP challenges the market power allegations. The definition of a "relevant market" in which defendant has market power is typically a factual rather than legal question. [\*Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1045 \(9th Cir. 2008\)\*](#). The relevant market inquiry need not be pleaded with specificity to [\*44] survive a motion to dismiss. *Id.* Still, claims can be dismissed if they fail to satisfy certain legal principles. *Id.*

In *Newcal*, the Ninth Circuit stated the relevant market: (i) must be "a product market," not one defined by consumers; (ii) must encompass the product as well as "all economic substitutes for the product;" and (iii) may include a submarket if it is "economically distinct from the general product market." *Id.* Submarkets are identified by indicia like "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." [\*Brown Shoe v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 \(1962\)\*](#).

Teradata alleges that there is a product market for ERP Applications in which the customers are large-scale, complex enterprises, referred to in the FAC as the "Top-Tier ERP Applications Market." FAC ¶¶ 56, 131. In the Top-Tier ERP Applications market, Teradata alleges that SAP holds a dominant position in the market of about 60% to 90%, with Oracle as its only significant competitor. FAC ¶ 67. An additional source of SAP's power in the market for Top-Tier ERP Applications [\*45] is the allegedly locked-in customer base due to the severe costs of switching vendors discussed above. See FAC ¶¶ 63-64. This suffices to plead SAP's market power, and it does not appear that SAP disputes this aspect of the complaint.

Instead, SAP argues that other portions of the FAC are "internally contradictory" and make it unclear whether the relevant ERP market includes competitors to SAP or is limited to SAP's ERP Applications alone. See [\*Apple Inc. v. Psystar Corp., 586 F. Supp. 2d 1190, 1200 \(N.D. Cal. 2008\)\*](#) (granting motion to dismiss where antitrust claim did not plausibly allege an independent market because the allegations were internally contradictory). If the relevant market includes only SAP's products, SAP contends this is fatal to the claim. See [\*Datel Holdings, Ltd. v. Microsoft Corp., 712 F. Supp. 2d 974, 986 \(N.D. Cal. 2010\)\*](#) ("In general, single brand markets do not constitute a relevant market."). SAP cites three "internally contradictory" paragraphs of the FAC to that end. See FAC ¶¶ 56, 60, 129. I disagree that there are internal contradictions in the complaint.

First, in paragraph 56 of the FAC, Teradata identifies the product market for ERP 24 Applications, "such as SAP's S/4HANA and SAP's predecessor ERP programs." FAC ¶ 56. This refers to the relevant market discussed above, made up of SAP and Oracle products. [\*46] Referring to SAP's HANA product line as an exemplary product in the ERP Applications market does not introduce a contradiction when, elsewhere in the pleading, it is clear that the market is also alleged to include Oracle and its products. FAC ¶ 67 ("Oracle is the only other significant competitor for these Top-Tier customers.").

Second, in paragraph 60, Teradata alleges "there are not reasonable or adequate economic substitutes for upgrades of SAP ERP Applications for the vast majority of Top-Tier ERP Applications customers because they are locked-in to their current ERP application provider." FAC ¶ 60. This appears to refer to a submarket of customers in the ERP Application market over whom SAP has particularly strong control due to their locked-in relationship. It is legally permissible to plead a submarket which is "economically distinct" from the general product market (in this case distinct customers who are locked-in to SAP as their ERP Applications vendor). [\*Newcal, 513 F.3d at 1045\*](#). An alleged submarket of SAP customers who use SAP ERP Applications products is entirely consistent with the general product market for ERP Applications dominated by SAP with competition from Oracle.

Finally, paragraph 129 [\*47] asserts that SAP's Top-Tier ERP Applications, products like S/4HANA, are a "separate and distinct" market from the market for HANA and EDAW products. FAC ¶ 129. SAP argues it is contradictory to allege a market for SAP's Top-Tier ERP Applications products as well as a market for S/4HANA. I do not see the contradiction. In the context of the alleged submarket of locked-in SAP customers, some customers may use older versions of the ERP Applications and some may use S/4HANA. This paragraph is not contradictory.

The FAC's allegations that SAP exerted market power in a relevant market survive the motion to dismiss. Teradata ultimately must prove the validity of the relevant market factual element "subject to factual testing at summary judgment or trial." [\*Newcal, 513 F.3d at 1045\*](#).

#### 4. The Tying Claim Assessed Under the Rule of Reason

Finally, SAP contends the tying claim should be dismissed because it must be assessed under the rule of reason, which Teradata fails to do. See Mot. to Dismiss at 21. Teradata alleges SAP's tying arrangement is both a per se violation and a rule of reason violation of the *Sherman Act*. I do not need to decide whether the per se or rule of reason analysis applies; that is more appropriate [\*48] on a motion for summary judgment. See, e.g., *In re High-Tech Employee Antitrust Litig.*, 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2012) (finding it inappropriate to determine whether rule or reason analysis applies until summary judgment). If one of the theories is plausible, that is sufficient at this stage.

Under the rule of reason test, Teradata must plead: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce [ ]; (3) which actually injures competition." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008). In addition, Teradata must plead an antitrust injury: "(4) that they were harmed by the defendant's anti-competitive contract, combination, or conspiracy..." *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1197 (9th Cir. 2012) (citations omitted). It satisfies the test.

#### a. Delineating a Relevant Tied Market

Starting with the first element, Teradata "must delineate a relevant market" to plead a restraint on trade that ultimately harms competition in the tied market. *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991). As with SAP's argument concerning the tying market for Top-Tier ERP Applications, it contends that the tied market allegations for EDAW products are internally contradictory. See *Psystar Corp.*, 586 F. Supp. 2d at 1200. Teradata argues not that the relevant market is EDAW products for Top-Tier Applications customers, FAC ¶ 68, but that [\*49] it is limited to existing SAP customers within a derivative aftermarket, FAC ¶¶ 129, 133. See Oppo. at 23:20-21.

SAP contends again that limiting the tied market to a single-product is impermissible, while Teradata claims that it has adequately alleged a tied market comprised of a single-product market for EDAW products used with SAP Top-Tier ERP Applications. Generally, "single brand markets do not constitute a relevant market." *Datel Holdings Ltd.*, 712 F. Supp. 2d at 986. However, the Supreme Court, in *Eastman Kodak*, adopted a limited exception for a single-product "aftermarket" in which customers do not agree on restrictions that were undisclosed at the time of the purchase of the product from the primary market. See *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 464-78, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992). The actual existence of an aftermarket is a factual question. *Newcal*, 513 F.3d at 1051.

In *Newcal*, the Ninth Circuit determined that allegations fit into the exception of *Eastman Kodak* to survive a motion to dismiss because of four relevant aspects of the complaint. First, the court found the complaint sufficiently alleged "two separate but related markets in intrabrand" products and services. *Id. at 1049*. Teradata alleges the first market is the initial market for ERP Applications products for Top-Tier ERP Applications customers, in which SAP and Oracle [\*50] are the only major competitors. The second market is the derivative aftermarket for EDAW products that are "specifically designed for" SAP customer's specific ERP Application and are not "interchangeable" with EDAW products for another ERP Application. FAC ¶ 74.

The alleged aftermarket here has aspects of *Eastman Kodak*, but it also has aspects of an impermissible contractual aftermarket depending on what ERP Application program the customer has. See, e.g., *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1476 (9th Cir. 1997) (rejecting a contractually based restriction on competition could not form the basis for an antitrust submarket). On one hand, the market is derivative from the primary market because EDAW products for SAP ERP Applications customers would exist regardless of SAP's ERP Application products. On the other hand, EDAW products that are "specifically designed" for SAP ERP Applications and that are not "interchangeable" would only exist in a market for SAP ERP customers. Relatedly, SAP's customers who purchased S/4HANA after the alleged policy changes are not subjected to the same information disparities that Teradata alleges with other SAP ERP Applications customers because they would have purchased the product knowing that HANA was the [\*51] only compatible choice for EDAW services.

The three remaining "relevant" allegations identified in *Newcal* are present in Teradata's FAC as well. *Newcal, 513 F.3d at 1050*. Teradata contends that there is a restraint on trade in the tied market for SAP customer's EDAW products but does not allege a restraint in the initial market for ERP Applications, which is competitive between Oracle and SAP. FAC ¶ 67 (alleging that SAP holds a dominant position in the ERP Applications market of about 60% to 90%, with Oracle as its only significant competitor.). Teradata claims that SAP's market power in the tied market for SAP customer EDAW products flows from its relationship with its customers in the ERP Application market because there are extremely high implementation costs for ERP Applications, and high switching costs needed to change ERP Applications providers. FAC ¶¶ 62-66. Finally, Teradata alleges that SAP customers were subjected to a change in practice that is not prevalent in the market for ERP Applications and could not be known at the time they decided to purchase SAP's product. FAC ¶ 90; see *Newcal, 513 F.3d at 1050* ("The fourth relevant aspect of the complaint is that it alleges that market imperfections...prevent consumers from [\*52] realizing that their choice in the initial market will impact their freedom to shop in the aftermarket.").

The relevant tied market allegations are similar to *Eastman Kodak*, though SAP has identified some differences that will be explored in the litigation. Teradata's allegations — taken as true and drawing reasonable inferences in its favor at this stage — are enough to survive a motion to dismiss.

### **b. Allegations of Anticompetitive Harm**

Next, SAP contends the third element of the rule of reason violation claim is not met since there is no unreasonable anticompetitive harm alleged. SAP claims the S/4HANA product was an innovation, as discussed previously, and it relies on *Brantley v. NBC Universal, Inc., 675 F.3d 1192 (9th Cir. 2012)*, to argue that there was no actual anticompetitive effect from the S/4HANA upgrade requiring SAP's HANA product to be used for EDAW.

As an initial matter, the argument that SAP was simply innovating a product and is therefore immune from unlawful tying antitrust claims before discovery is not convincing. The FAC does not claim SAP/4HANA was innovative or integrated the EDAW and ERP Applications products. To the contrary, the allegations concerning integration only refer to HANA as it integrated with transactional databases. [\*53] See, e.g., FAC ¶ 42 (stating that like Teradata Foundation, "SAP's HANA product combines a database solution with integrated software to perform data analytics.").

SAP is right that in *Brantley*, the Ninth Circuit found agreements that effectively reduce customer choices or increase prices were not sufficient to allege an anticompetitive harm because "[b]oth effects are fully consistent with a free, competitive market." *Brantley, 675 F.3d at 1202*. But in that case, the court found that the complaint did not allege injuries to competition that are typically sufficient; such as selling product packages that "excludes other sellers... from the market," placing "barriers to entry" in the market, or causing customers to "forego the purchase of substitutes for the tied product." *Id. at 1201*.

Here, Teradata has alleged that SAP's market behavior excludes Teradata from the market as a direct result of SAP locking in its customer base. FAC ¶ 149. It asserts that SAP's conduct prevents Teradata's EDAW product offerings for Top-Tier ERP Applications customers from entering the market. FAC ¶ 75. It also alleges SAP's customers have little reasonable choice but to adopt HANA for EDAW rather than Teradata's substitute given the prohibitive [\*54] costs of switching services and the lack of information that customers have at the time of purchase. FAC ¶ 92. This is more than enough to plead an anticompetitive injury.

### **B. Attempted Monopolization**

An attempted monopolization claim under *Section 2* of the Sherman Act must first "specify the market [SAP] targeted and [SAP's] economic power within that market." *United Energy Trading, LLC v. Pac. Gas & Elec. Co., 200 F. Supp. 3d 1012, 1020 (N.D. Cal. 2016)*. Teradata must plead that SAP: (i) had "specific intent to control prices or destroy competition;" (ii) engaged in "anticompetitive conduct directed at accomplishing that purpose;" (iii) has a "dangerous probability of achieving monopoly power;" and (iv) a "causal antitrust injury." *Id.* (citing *Rebel Oil Co. v.*

Atl. Richfield Co., 51 F.3d 1421, 1432-33 (9th Cir. 1995)). SAP moves to dismiss the attempted monopolization claim on the ground that Teradata fails to plead a dangerous probability of monopolization. See Mot. to Dismiss at 23.

Under the Sherman Act, "monopoly power" is the power to control prices or exclude competition. United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966). Monopoly power can be inferred "from the predominate share of the market." *Id.* Similarly, a dangerous probability of monopolization is based on "the relevant market and the defendant's ability to lessen or destroy competition in that market." Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993).

SAP argues again that there are no allegations [\*55] about the competitive conditions in the general EDAW market for Top-Tier ERP Applications customers other than to state there are multiple competitors. FAC ¶ 75 ("EDAW products providers, such as Teradata,..."). It also asserts that because the relevant market is only "SAP's Top-Tier Applications customers," ¶¶ 143, 147, the claim must be dismissed. See Todd v. Exxon Corp., 275 F.3d 191, 200 (2d Cir. 2001) (finding cases were dismissal is frequently appropriate involve attempts "to limit a product market to a single brand, franchise, institution, or comparable entity that competes with potential substitutes."). But as I explained earlier in this Order, Teradata has sufficiently alleged a relevant derivative aftermarket of SAP's Top-Tier ERP Applications customers.

The question remaining is whether Teradata has alleged that SAP has market power in the relevant EDAW market for Top-Tier Applications customers. It has. Teradata alleged that it has a market-leading EDAW product generally and that SAP was a dominant player in the Top-Tier ERP Applications market—with 60% to 90% market share on information and belief. FAC ¶¶ 31, 67. Teradata also alleges that 60% of SAP's existing ERP Applications customers "are employing or preparing to employ [\*56] HANA" based on SAP's recent anticompetitive conduct. FAC ¶ 148. The FAC states there are prohibitively high switching costs combined with restrictions on customers' ability to export their own ERP Applications data to use with other EDAW products. FAC ¶¶ 75, 94. Customers in the Top-Tier ERP Applications market also lack the information at the point of purchase to perform detailed cost analyses, contributing to SAP's ability to lock-in those customers. FAC ¶¶ 60-62.

Considering these allegations regarding SAP's market share and conduct that precludes competitors from servicing its Top-Tier Applications customers in the EDAW market, I find Teradata sufficiently states a claim. Accordingly, SAP's motion to dismiss the attempted monopolization claim is DENIED.

## CONCLUSION

In accordance with the foregoing, SAP's motion to dismiss is GRANTED with regards to the trade secret misappropriation claims but DENIED with regards to all other claims. Teradata does not sufficiently allege its trade secrets. Therefore, Teradata's first amended complaint is DISMISSED WITH LEAVE TO AMEND within ten days of the date of this Order.

## IT IS SO ORDERED.

Dated: December 12, 2018

/s/ William H. Orrick

William H. Orrick [\*57]

United States District Judge



## In re Rule 8.1, Rules of Civil Procedure

Supreme Court of Arizona

December 13, 2018, Decided; December 13, 2018, Filed

Arizona Supreme Court No. R-18-0033

**Reporter**

2018 Ariz. LEXIS 442 \*

In the Matter of RULE 8.1, RULES OF CIVIL PROCEDURE

**Subsequent History:** As Amended August 23, 2019.

**Prior History:** [In re Rule 8.1, 2018 Ariz. LEXIS 221 \(Ariz., July 23, 2018\)](#)

### **Core Terms**

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eligible, business organization, cases, assigned, parties, presiding judge, electronically, stored, designee, hether, rises

**Judges:** [\*1] SCOTT BALES, Chief Justice.

**Opinion by:** SCOTT BALES

### **Opinion**

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#### **ORDER PERMANENTLY ADOPTING AND AMENDING EXPERIMENTAL RULE 8.1, ARIZONA RULES OF CIVIL PROCEDURE**

A petition having been filed proposing to adopt permanently and amend Experimental [Rule 8.1 of the Arizona Rules of Civil Procedure](#) and comments having been received, and having considered the petition and comments,

IT IS ORDERED that Experimental [Rule 8.1 of the Arizona Rules of Civil Procedure](#) is permanently adopted and amended in accordance with the attachment to this Order, effective January 1, 2019; and

IT IS FURTHER ORDERED that the amendments to this rule shall apply to all cases commenced on or after January 1, 2019 and to all cases pending before that date, except the \$300,000 minimum in amended [Rule 8.1\(c\)](#) shall not apply to cases pending before January 1, 2019.

DATED this 13th day of December, 2018.

/s/ SCOTT BALES

Chief Justice

**ATTACHMENT<sup>1</sup>****ARIZONA RULES OF CIVIL PROCEDURE****Experimental Rule 8.1. Assignment and Management of Commercial Cases**

**(a) Application; Definitions.** This rule applies in counties that have established specialized courtsprograms for commercial cases, which are referred to in this rule as "the commercial court." The commercial court will hear eligible "commercial cases"

as defined in this Rule except as provided in Rule 8.1(d) assigned to it in accordance with this rule. To \*2 be eligible for the commercial court, a commercial case must meet the requirements of Rule 8.1(b).

**(1)** A "commercial case" is one in which:

**(A)**

~~A~~at least one plaintiff and one defendant are "business organizations;"

**(B)**

~~T~~he primary issues of law and fact concern a "business organization;" or

**(C)**

~~T~~he primary issues of law and fact concern a "business contract or transaction."

**(2)** A "business organization" includes a sole proprietorship, corporation, partnership, limited liability company, limited partnership, master limited partnership, professional association, joint venture, business trust, or a political subdivision or government entity that is a party to a business contract or transaction. A "business organization" excludes an individual, a family trust, or a political subdivision or government entity that is not a party to a business contract or transaction.

**(3)** A "business contract or transaction" is one in which a business organization sold, purchased, licensed, transferred, or otherwise provided goods, materials, services, intellectual property, funds, realty, or other obligations.

**(b) Eligible Case Types.** A commercial case

that meets one of the following descriptions is generally eligible \*3 for the commercial court if it meets one of the following descriptions

a commercial case:

**(1)**

~~C~~oncerns the internal affairs, governance, dissolution, receivership, or liquidation of a business organization;

**(2)**

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<sup>1</sup> Additions to the text of the rule are shown by underscoring and deletions of text are shown by strike-through.

A~~arises~~ out of obligations, liabilities, or indemnity claims between or among owners of the same business organization (including shareholders, members, and partners), or which concerns the liability or indemnity of individuals within a business organization (including officers, directors, managers, member managers, general partners, and trustees);

**(3)**

C~~oncerns~~ the sale, merger, or dissolution of a business organization, or the sale of substantially all of the assets of a business organization;

**(4)**

R~~elates~~ to trade secrets or misappropriation of intellectual property, or arises from an agreement not to solicit, compete, or disclose;

**(5)**

I~~s~~ a shareholder or member derivative action;

**(6)**

A~~arises~~ from a commercial real estate transaction;

**(7)**

A~~arises~~ from a relationship between a franchisor and a franchisee;

**(8)**

I~~nvolves~~ the purchase or sale of securities or allegations of securities fraud; or

**(9)**

C~~oncerns~~ a claim under state **antitrust law**

..

**(10)**

A~~arises~~ from a business contract or **[\*4]** transaction governed by the Uniform Commercial Code;

**(11)**

I~~s~~ a malpractice claim against a professional, other than a medical professional, that arises from services the professional provided to a business organization;

**(12)**

A~~arises~~ out of tortious or statutorily prohibited business activity, such as unfair competition, tortious interference, misrepresentation or fraud; or

**(13)**

Concerns a surety bond, or arises under any type of ~~arises from any dispute between a business organization and an insurer under a commercial insurance policy~~

purchased by a business organization, including an action ~~by either the business or the insurer related to~~

involving coverage

,or bad faith,  
, or a third-party indemnity claim against an insurer.

**(c) Ineligible Case Types.** A case that seeks only monetary relief in an amount less than \$300,000 is not eligible for the commercial court. The following case types are generally not commercial cases unless business issues predominate:

**(1)**

Eevictions;

**(2)**

Eminent domain or condemnation;

**(3)**

Ccivil rights;

**(4)**

Motor vehicle torts and other torts involving personal injury to a plaintiff;

**(5)**

Administrative appeals;

**(6)**

Domestic relations, protective orders, or criminal [\*5] matters, except a criminal contempt arising in a commercial court case; or

**(7)**

Wrongful termination of employment and statutory employment claims; or

**(8)**

Disputes concerning consumer contracts or transactions. A "consumer contract or transaction" is one that is primarily for personal, family, or household purposes.

**(d) Compulsory Arbitration.**

A commercial case that is subject to compulsory arbitration is not eligible for assignment to commercial court.

**(e)(d) Assignment of Cases to the Commercial Court**

s.

**(1) Request.** A party to an eligible commercial case may request assignment of the case to the commercial court.

**(1)(2)**

**Plaintiff's Duties By Plaintiff.** A plaintiff seeking assignment of an eligible case to the commercial court must do so at the time of filing the complaint by (A)

includeincluding in the initial complaint's caption the words "

eligible for commercial court assignment requested," and (B)

completecompleting a civil cover sheet that indicates the action is an eligible commercial case.

**(3) By Other Parties.** If a plaintiff has not sought assignment to the commercial court, another party, within 20 days after that party's appearance, may file a separate notice stating that the case [\*6] is eligible for, and requesting assignment of the case to, the commercial court.

#### **(2)(4) Assignment to Commercial Court.**

The court administrator will review a complaint and civil cover sheet filed in accordance with [Rule 8.1\(e\)\(1\)](#) and will assign an eligible case to a commercial court judge.Upon the filing of a complaint by a plaintiff requesting assignment to the commercial court under (d)(2), or the filing by another party of a Notice Requesting Assignment to the Commercial Court under (d)(3), the case will be assigned to the commercial court.

#### **(3)(5)**

**Motion to Transfer out of Commercial Court by the Presiding Judge.** After assignment of a case to the commercial court,

aif the commercial court judge

, upon motion of a party or on the judge's own initiative, may transfer the case out of commercial court if the judge determines the matter is not an eligible

"commercial case,

" as defined in this Rule. Any party filing a motion under this Rule must do so no later than 20 days after that party's appearance in the case.then the judge may either keep the case or request that the presiding judge or designee transfer the case out of the commercial court. If the presiding judge or designee agrees to transfer [\*7] the case out of the commercial court, the presiding judge or designee may either leave the case with the judge to whom it is currently assigned or reassign the case to a general civil court.

**(6) Discretion of Presiding Judge.** The presiding judge or designee may reassign any case that qualifies under [Rule 8.1\(b\)\(6\), \(7\), \(10\), or \(11\)](#) to a general civil court.

#### **(4)(7)**

**Motion/Judicial Request to Transfer to the Commercial Court.**

On motion of a party filed within 20 days after that party's appearance in the case, or the court's own initiative w\\Within 20 days after the filing of the first responsive pleading or [Rule 12](#) motion, a judge of a general civil court may

order request the presiding judge or designee to  
the transfer  
of a case to the commercial court if that judge determines the matter is an  
"eligible commercial case  
" as defined in this Rule.

**(5)(8) Complex Cases.** Assignment of a case to the commercial court does not impair the right of a party to request reassignment of the case to

at the Maricopa County complex civil litigation program under applicable local rules.

Rule 8(i).

**(f)(e) Case Management.**

Notwithstanding any contrary language in Rule 26.2(d)(1), from the filing of the complaint unless and until the commercial court assigns the case [\*8] to a different tier after the Rule 16(d) scheduling conference, cases in the commercial court are deemed to be assigned to Tier 3. Rules 16(a) through 16(j) apply to cases in the commercial court, except:

**(1) Scheduling Conference.** Scheduling conferences under Rule 16(d) are mandatory.

**(2) Early Meeting.** Before filing a Rule 16(c) Joint Report, and in addition to conferring about the subjects in Rule 16(b)(1), the parties must confer, as set forth in the commercial court's checklist governing the production of electronically stored information, and attempt to reach agreements that may be appropriate in the case concerning the disclosure and production of such information, including:

**(A)**

Requirements and limits on disclosure and production of electronically stored information;

**(B)**

The form or formats in which the electronically stored information will be disclosed or produced; and

**(C)**

If appropriate, sharing or shifting of costs incurred by the parties for disclosing and producing electronically stored information.

**(3) Joint Report and Proposed Scheduling Order.** The parties' Rule 16(b) Joint Report and Proposed Scheduling Order must address the items specified in Forms 14(a) and 14(b), including:

**(A)**

Whether the parties expect electronically stored information to [\*9] be an issue in the case and, if so, whether they have reached an agreement regarding the discovery of electronically stored information, have filed a stipulated order, and have or anticipate disputes concerning electronically stored information;

**(B)**

Wwhether the parties have reached an agreement regarding the inadvertent production of privileged material pursuant to [Arizona Rule of Evidence 502](#), and, if so, whether they have filed a stipulated order;

(C)

Wwhether any issues have arisen or are expected to arise regarding claims of privilege or protection of trial preparation materials under *Rules 26(b)(6)* and [26.1\(h\)](#);

(D)

Wwhether the parties believe that a protective order is necessary and, if so, whether they have filed a stipulated protective order; and

(E)

Wwhether the commercial court should assign the case to a tier other than Tier 3 after the [Rule 16\(d\)](#) scheduling conference, and, if so, why.

**(4) Motions to Dismiss.** Any motion to dismiss pursuant to [Rule 12\(b\)\(6\)](#) must attach a good faith consultation certificate complying with [Rule 7.1\(h\)](#) certifying that the parties have been unable to agree that the pleading is curable by a permissible amendment.

**(g)(f) Motions.** With notice to the parties, a commercial court judge may modify the formal requirements of [Rule 7.1\(a\)](#) and may adopt [\*10] a different practice for the efficient and prompt resolution of motions.

**(g) Cases Not in the Commercial Court.** The case management procedures in [Rule 8.1\(e\)](#) are available to any judge who finds those procedures beneficial, wholly or partially, in managing a commercial case that is not assigned to the commercial court, or that is pending in a county that has not established a commercial court.



## Kls Martin, Inc. v. Medical Modeling, Inc.

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

December 14, 2018, Decided; December 17, 2018, Filed

Case No. 3:18-cv-233-J-20JBT

### **Reporter**

2018 U.S. Dist. LEXIS 225524 \*; 2018 WL 8139133

KLS MARTIN, INC., a Delaware corporation, As general partner of KLS MARTIN L.P., a Delaware Limited Partnership, Plaintiff, v. MEDICAL MODELING, INC., a Colorado corporation, Defendant.

**Subsequent History:** Stay denied by, Without prejudice, Motion denied by, Without prejudice [Kls Martin, Inc. v. Medical Modeling, Inc., 2019 U.S. Dist. LEXIS 57549, 2019 WL 1359256 \(M.D. Fla., Feb. 4, 2019\)](#)

**Prior History:** [Kls Martin v. Medical Modeling, 2018 U.S. Dist. LEXIS 243926 \(M.D. Fla., Sept. 11, 2018\)](#)

## **Core Terms**

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customers, allegations, termination, Modeling, parties, Counts, products, notice, business relationship, unfair, Deceptive, Drafts, trade libel, damages, tortious interference, actual damage, choice of law clause, unfair competition, injunctive relief, motion to dismiss, rule of reason, competitor, Practices, binding, Courts, restraint of trade, alleged facts, market value, state law, technology

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**Judges:** HARVEY E. SCHLESINGER, UNITED STATES DISTRICT JUDGE.

**Opinion by:** HARVEY E. SCHLESINGER

## **Opinion**

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### **ORDER**

Before this Court is "Medical Modeling, Inc.'s Motion to Dismiss Plaintiff's Complaint and Incorporated Memorandum of Law" (Dkt. 14), "Plaintiff's Response in Opposition to Defendant's Motion to Dismiss and Incorporated Memorandum of Law" (Dkt. 28), and "Medical Modeling, Inc.'s Reply in Support of its Motion to Dismiss Plaintiff's Complaint and Incorporated [\*2] Memorandum of Law" (Dkt. 41).

Plaintiff KLS initially sued Defendant, Medical Modeling, Inc. ("MM"), in the Circuit Court for the Fourth Judicial Circuit in and for Duval County, Florida, but MM removed the case to this Court, under [28 U.S.C. § 1441](#) and [1446](#). (Dkt. 1). On February 09, 2018, the operative six-count Amended Complaint was filed alleging violations by MM of KLS's rights under the Florida Antitrust Act of the [Florida Statutes, section 542.15, et seq.](#), (Count I); breach of contract under Colorado law (Count II); tortious interference with advantageous business and contractual relationships (Count III); trade libel (Count IV); unfair competition (Count V); and violations of Florida's Deceptive and Unfair Trade Practices Act (Count VI). (Dkt. 2). In addition, KLS seeks injunctive relief requiring MM to resume providing VSP services and pecuniary damages for its lost business and damage to its reputation. *Id.*

## I. Background<sup>1</sup>

Since 1993, KLS has distributed implantable medical devices and related medical equipment throughout the United States, (Dkt. 2 ¶ 11), distributing products directly to hospitals and physicians. (Dkt. 2 ¶ 12). KLS became well-known in the craniomaxillofacial<sup>2</sup> ("CMF") field for its quality products. (Dkt. 2 ¶ 11). MM was [\*3] a pioneer in manufacturing anatomical models, (Dkt. 2 ¶ 16), and by 2000 it was well established as a vendor in the CMF industry, with KLS as its primary vendor. (Dkt. 2 ¶ 18).

When a customer ordered a CMF model for a surgery, both KLS and MM had a role in the development. (Dkt. 2 ¶ 17). A surgeon would request that KLS provide a model of a particular patient's anatomy. *Id.* KLS would share the patient's information with MM, by way of an electronic image or computer technology, and MM would use that information to create a unique model. *Id.* MM would then provide the model to KLS for distribution to the customer. *Id.*

On August 30, 2001, KLS and MM entered into a formal distribution agreement ("2001 Agreement") which MM drafted. (*Id.* ¶ 19-20). The 2001 Agreement provided:

2. **Products**, The term Products as used In this Agreement shall mean the ClearView™ line of models described on Schedule A hereto (the "ClearView Line"), Including any improvements, changes and extensions that are designed and developed during the term of this Agreement. Any Improvements, changes and extensions with respect to the product will be set forth on an amendment to the appropriate Schedule, executed by an Authorized [\*4] Representative (designated pursuant to Section 13(b) hereof) of each of KLS MARTIN and MEDICAL MODELING, prior to the commencement of commercial marketing thereof.

\* \* \* \*

### 9. Termination,

(a) This Agreement, unless otherwise terminated as provided herein, shall remain in full force and effect for an initial term expiring one year from the date stated on page 1. Not later than one month before that date the parties shall review this Agreement and decide whether [sic] to extend or modify it. Notwithstanding the foregoing, this Agreement shall be automatically renewed for successive one-year terms unless either party gives written notice to the other of its Intention not to renew at least one month prior to the expiration of the initial term and each subsequent renewal term,

(b) Notwithstanding the foregoing, this Distribution Agreement may be terminated at an earlier date upon the earlier to occur of any of the following:

(I) By either party upon 30 days written notice to the other;

(II) By either party for breach of this Agreement by the other, unless the breaching party shall have corrected such breach within 30 days from the receipt by it of written notice thereof from the other party; or

<sup>1</sup> These are not necessarily the facts. For the purposes of a motion to dismiss, courts take a plaintiff's well-pleaded factual allegations as true, without making credibility assessments or engaging in fact-finding. [Ashcroft v. Iqbal, 556 U.S. 662, 677, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#).

<sup>2</sup> "Relating to the whole area of the mouth, jaws, face, skull, and associated structures." craniomaxillofacial, Your Dictionary, <http://www.yourdictionary.com/craniomaxillofacial> (last visited Oct. 8, 2018).

(III) By either [\*5] party in the event that the other shall go into liquidation, or seek the benefit of any bankruptcy or insolvency act, or a receiver or trustee is appointed for its property or estate, or it makes an assignment for the benefit of creditors, whether any of the aforesaid events be the outcome of the voluntary act of such other party or otherwise.

(c) The termination of this Agreement for any reason shall be without prejudice to MEDICAL MODELING's right to receive all payments accrued and unpaid at the effective date of such termination, to the rights of KLS MARTIN and its customers pursuant to Sections 8 and 9 of this Agreement and to the remedy of either party hereto in respect of any previous breach of any of the covenants herein contained. The termination of this Agreement shall not release MEDICAL MODELING from its obligation to deliver all Products theretofore ordered by KLS MARTIN.

\* \* \* \*

13. Entire Agreement, This Agreement and the Schedules hereto constitute the entire agreement between KLS MARTIN and MEDICAL MODELING with respect to the subject matter hereof and supersede all prior agreements, letters of intent, understandings, representations and statements, if any, regarding the subject [\*6] matter contained herein, whether oral or written. No modification or amendment of this Agreement shall be valid and binding upon the parties unless made in writing and signed on behalf of each of such parties by an authorized representative.

14. Governing Law, This Agreement shall be construed and interpreted in accordance with the laws of the State of Colorado.

(Dkt. 2, Exh. A, pgs. 4, 6, 7-8).

In 2005, KLS and MM worked on a digital modeling technology ("VSP") to be used by doctors as an alternative to the models covered in the 2001 Agreement. (*Id.* ¶ 27). VSP provides virtual models for the surgeon's use in planning CMF surgical procedures. The parties signed a non-disclosure agreement regarding the technology being developed on July 20, 2005. (*Id.* ¶ 27).

It was not until 2014, almost ten years later, that KLS and MM engaged in negotiations for a comprehensive long-term contract for exclusive VSP distribution rights. Several drafts were shared (collectively the "2014 Drafts") but no contract was executed. (*Id.* ¶ 38).

In late 2017 through early 2018, representatives of MM and KLS continued discussions regarding the formation of a long-term supply agreement. (Dkt. 2 ¶ 54-55). Despite these [\*7] discussions, on January 13, 2018, Katie Weimer, MM's representative, called KLS and notified them that MM would be terminating the existing arrangement. (*Id.* ¶ 60). That notification was followed on January 18, 2018, by written confirmation of intent to terminate their business relationship, stating that distribution would end on February 19, 2018, under Section 9(b) of the 2001 Agreement. (*Id.* ¶ 71-72). Before that written notification was provided, however, on January 14 and 15, 2018, MM's agents called the majority of KLS' customers to inform them that KLS would be "cut off" on January 31, and that Stryker Corporation would be MM's distributor. (*Id.* ¶ 63-64).

## II. Standard of Review

In deciding on a Rule 12(b)(6) motion, a district court must construe the complaint broadly, Levine v. World Fin. Network Nat'l Bank, 437 F.3d 1118, 1120 (11th Cir. 2006), and the allegations in the complaint must be viewed in the light most favorable to the plaintiff. Hawthorne v. MacAdjustment, Inc., 140 F.3d 1367, 1370 (11th Cir. 1998); Scheuer v. Rhodes, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974). However, as the Supreme Court explained, "a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Although Rule 12(b)(6) allows "a well-pleaded complaint [to] proceed even if it strikes a savvy judge that actual proof of those facts is improbable," the "[f]actual allegations must be enough to raise a right to relief above the speculative [\*8] level." *Id.*; Watts v. Fla. Int'l Univ., 495 F.3d 1289 (11th Cir. 2007).

The Supreme Court teaches in *Twombly* that a complaint must contain "enough factual matter (taken as true) to suggest" the required element. *Twombly*, 550 U.S. at 556. The rule "does not impose a probability requirement at the pleading stage," but "simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the element. *Id.* It is adequate if the complaint succeeds in "identifying facts that are suggestive enough to render [the element] plausible." *Id.*

### III. Analysis

MM seeks dismissal of all counts in KLS' action. This Court will first address two threshold matters emphasized by MM: whether Counts I, V, and VI, KLS' claims arising under Florida law, must be dismissed because Colorado law applies by the plain language of the contracts; and whether Counts II, III, and IV must be dismissed because KLS has not explained which law applies to these claims. This Court will then address the remaining claims.

#### A. Counts I, V, and VI — Choice of Law Clause

MM contends KLS' claims under Florida law, Counts I, V and VI, must be dismissed because Colorado law, not Florida law, applies to all disputes arising out of the parties' various contracts. (Dkt. 14). KLS insists the choice of law clauses [\*9] applied only to disputes related to the contracts themselves, not to tort or statutory claims arising out of that business relationship. (Dkt. 28).

The parties agree Florida's choice of law rules begin this analysis. Whether KLS' claims of unlawful restraint of trade, unfair competition and FDUTPA violations are properly brought under Florida law depend on whether the choice of law clauses applies, and if so, which one.

Florida law explains the specific language of a choice of law provision is decisive. Broadly written clauses such as "all disputes arising out of or in connection with" are construed to include tort and statutory claims that result from the contracted business relationship. *Cooper v. Meridian Yachts*, 575 F.3d 1151, 1162 (11th Cir. 2009). Narrowly written provisions addressing only "the agreement" apply strictly to contract disputes. *Id.* In the event that a choice of law clause is sufficiently narrow not to apply to a particular claim, Florida law applies to a contract made in that state. *Technical Sols. Int'l v. Partech, Inc.*, No. 10-60047-CIV-JORDAN, 2010 WL 11549396 (S.D. Fla. Nov. 9, 2010).

The 2001 Agreement's choice of law clause is written narrowly. The clause provides: "This Agreement shall be construed and interpreted in accordance with the laws of the State of Colorado." (Dkt. [\*10] 2-1 at 14). The choice of law clause in the 2014 Drafts, by contrast, includes "the legal relations between the parties," so it would require all claims to be brought under Colorado law. As discussed below, the 2014 drafts form no binding agreement. Regardless of if the 2001 Agreement applies, or if no VSP contract exists, KLS may bring the tort and statutory claims under Florida law.<sup>3</sup>

#### B. Counts II, III, and IV — Failure to Plead State Law

MM insists that Counts II, III, and IV are insufficiently plead because they do not identify which state law applies. (Dkt. 14 p. 8). KLS responds that it specifically stated Colorado law applied to Count II, and that it can be reasonably concluded from the Complaint that Florida law applied to Counts III and IV, because KLS initially plead them in Florida state court, and because they are based on the commission of tortious acts within Florida. (Dkt. 28 p. 3).

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<sup>3</sup> MM's assertion that "plaintiff cannot have it both ways" regarding the application of the contracts cuts both ways. If the 2014 Agreement is not binding—as MM urges—then MM cannot rely on its choice of law provision to dismiss KLS's tort claims.

MM relies on two cases to support its contention that a claim that does not specify state law should be dismissed: *Knights Armament Co. v. Optical Systems Technology, Inc.*, 568 F. Supp. 2d 1369, 1377 (M.D. Fla. 2008), and *in re TFT-LCD (Flat Panel) Antitrust Litigation*, 781 F. Supp. 2d 955, 966 (N.D. Cal. 2011). However, both *Knights Armament* and *in re TFT-LCD* were dismissed only after the plaintiffs refused to clarify in their responses which state's law was intended. Here, KLS has [\*11] clarified that Florida law governs all claims except for the breach of contract. Hence, Counts II, III and IV appear to be properly pled under Florida law.

### C. Count I — Unlawful Restraint of Trade

KLS alleges that MM is liable for unlawful restraint of trade under the Florida Antitrust Act of 1980 for conspiring with Stryker to restrain trade in violation of *Fla. Stat. § 542.18*; and attempted monopolization in violation of *Fla. Stat. § 542.19*. MM insists these claims must be dismissed because KLS' antitrust claims are based on an economically irrational theory, the allegations do not support the necessary elements of a conspiracy to restrain trade, and the *Colgate* doctrine bars liability.<sup>4</sup>

The parties' dispute depends largely on the standard this Court utilizes in analyzing these allegations. MM insists that KLS' allegations resemble a vertical restraint of trade, which would be analyzed under the rule of reason—a stringent standard. (Dkt. 14). KLS responds that its allegations could suggest a tying arrangement, which would be analyzed "per se," or a more lenient standard.<sup>5</sup>

The parties' emphasis on the standard to be applied reflects the larger challenge facing rule of reason plaintiffs. "Per se" violations [\*12] are those whose conduct is manifestly anticompetitive, and therefore a plaintiff's burden is much lower; only proof of a defendant's agreement to operate in that anticompetitive manner is required. *Levine*, 72 F.3d at 1551. Whereas, the "rule of reason" prohibits commercial actions that *unreasonably* restrain trade; *Standard Oil Co. v. United States*, 221 U.S. 1, 58-64, 31 S. Ct. 502, 55 L. Ed. 619 (1911); *Spanish Broadcasting System of Florida, Inc. v. Clear Channel Communications, Inc.*, 376 F.3d 1065, 1071 (11th Cir. 2004) (citing *Fisher v. City of Berkeley*, 475 U.S. 260, 266, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1986)), so when a plaintiff alleges a rule of reason violation, the plaintiff also must prove the defendant's conduct is anticompetitive and lacks any competitive justification. *Levine*, 72 F.3d at 1551.

KLS maintains that its allegations survive a motion to dismiss even if this Court finds it has alleged a vertical restraint on trade to be analyzed by the rule of reason. This Court will therefore address the sufficiency of KLS' allegations first under the theory of a tying arrangement, and then under the theory of a vertical restraint on trade.

#### a. Tying Arrangement

The Supreme Court teaches that "a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958). Tying agreements are problematic because "[t]hey deny competitors free [\*13] access to the market for the tied product, not because the party imposing the tying requirements has a

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<sup>4</sup> The *Colgate* doctrine refers to the Supreme Court's teaching in *United States v. Colgate & Co.*, 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919) that "a manufacturer has the right to select its customers and refuse to sell its goods to anyone for reasons sufficient to itself without violating the Sherman Act. *Burdett Sound, Inc. v. Altec Corp.*, 515 F.2d 1245, 1248 (5th Cir. 1975). This is true even if the effect of the change is to "seriously damage the former distributor's business." *Id. at 1249*. Since *Colgate*, courts have repeatedly emphasized the rule. See, e.g., *Northwest Power Prods., Inc. v. Omark Indus., Inc.*, 576 F.2d 83 (5th Cir. 1978); *Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke and Liquors, Ltd.*, 416 F.2d 71, 78 (9th Cir. 1969).

<sup>5</sup> KLS insists that even if this Court finds that its allegations are governed by the rule of reason, it has still alleged an antitrust claim.

better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products." *Id. at 6*.

KLS' pleadings indicate VSP is being exclusively provided to Stryker, but do not suggest that separate products are being tied together—or clarify what those separate products might be. KLS mentions it has tied its "VSP services to Stryker's VSP products." (Dkt. 28). But from the allegations, those seem essentially the same thing to the end consumers: a digital surgical model. KLS' general pleading of restraint of trade is insufficient because a tying claim has specific elements that a plaintiff must allege. See *S. Card & Novelty, Inc. v. Lawson Mardon Label, Inc.*, 138 F.3d 869, 874 (11th Cir. 1998); *Clark Mem'l's of Ala., Inc. v. Sci Ala. Funeral Servs. LLC*, 991 F. Supp. 2d 1151, 1159 (N.D. Ala. 2014) (citing *T. Harris Young & Assocs., Inc. v. Marquette Elecs., Inc.*, 931 F.2d 816, 822 (11th Cir. 1991)). Therefore, the facts alleged create no tying claim.

#### **b. Vertical Restraint on Trade**

KLS' allegations suggest no vertical restraint on trade to be analyzed under the rule of reason, because the facts fail to indicate a unique product market. To state a claim under the rule of reason, a plaintiff must plead (1) there is a specifically defined, relevant market; (2) that the defendants possessed [\*14] the ability to affect price or output; and (3) that plaintiff's exclusion from the market was intended to affect the price or supply within that market. *Greenberg v. Mount Sinai Med. Ctr. Of Greater Miami, Inc.*, 629 So. 2d 252, 257 (Fla. 3d DCA 1993). "It is not enough to allege that plaintiffs were injured; there must be an allegation of harm to competition in general." *Id.*

A market has two components—geographic and product. *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 464 (3d Cir. 1998). The existence of a product market is determined by identifying the reasonably interchangeable goods and their availability from other sources. *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 404, 76 S. Ct. 994, 100 L. Ed. 1264 (1956); see also *Levine*, 72 F.3d at 1552. All goods that can be substituted for one another and have the same essential use by consumers comprise a market. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481-82, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992); *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 438 (3d Cir. 1997). "The boundaries of the product market are determined by 'the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.'" *United States v. Engelhard Corp.*, 126 F.3d 1302, 1305 (11th Cir. 1997) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)). The Supreme Court teaches that courts should consider factors such as "industry or public recognition of the submarket . . . the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors" along with the cross-elasticity of demand between products. *Brown Shoe Co.*, 370 U.S. at 325 (emphasis added).<sup>6</sup> In practice this has [\*15] resulted in single brands constituting a market, *Eastman Kodak Co.*, 504 U.S. at 451, and glass and metal containers being grouped together in a market because of their interchangeability. *United States v. Cont'l Can Co.*, 378 U.S. 441, 449, 84 S. Ct. 1738, 12 L. Ed. 2d 953 (1964).

KLS fails to show that VSP constitutes a unique product market and, therefore, no further analysis is required. KLS failed to plead a product market because it refers to VSP only as "state of the art."<sup>7</sup> (Dkt. 2). It does not indicate whether alternatives are used by practicing surgeons, or whether VSP is now the only acceptable option. Without more information about reasonable alternatives or the lack thereof, it is impossible to determine that MM has the power to negatively impact the market for CMF products. Consequently, KLS' claim of unlawful restraint of trade in violation of the Florida Antitrust Act is unsustainable.

<sup>6</sup> The court in *Geneva Pharm. Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 496 (2d Cir. 2004) noted that referring to a product as a distinct "submarket" is essentially another way of defining a market, because the crux of the "market" as applied to *antitrust law* is the offered product's interchangeability. Consumer access to a viable substitute is the concern.

<sup>7</sup> Black's Law Dictionary defines "state of the art" to mean the "total of technical and scientific knowledge that is currently available as applied to a product or design." This does not necessarily exclude all other products; it indicates that VSP is at least equal to other substitutable products which may also be state of the art.

#### D. Count II — Breach of Contract

KLS suggests two theories under which MM is liable for breach of contract under Colorado law.<sup>8</sup> First, KLS argues that MM breached the 2001 Agreement. KLS believes the 2001 Agreement applied to VSP because it is a "natural improvement" to the technology covered by the contract; and that the provisions for termination in the 2001 Agreement only allowed either party to terminate the contract [\*16] without cause within thirty days of the renewal date. In the alternative, KLS contends that the parties' course of dealing, supplemented by the 2014 Drafts, created binding obligations on MM which MM breached by terminating their business relationship.

##### a. Breach of the 2001 Agreement

Whether MM violated a binding obligation of termination notice for the provision of VSP technology under the 2001 Agreement is a two-part question. To prevail KLS must show: (a) the 2001 Agreement applied to VSP when KLS alleges breach; and (b) the notification MM gave for termination was insufficient because the contract required a longer period of notice for termination. The plain meaning of the 2001 Agreement provides no basis for finding insufficient notice because it requires only 30 days' notice, which MM gave, and therefore KLS has not pleaded a claim upon which relief can be granted.

Colorado law rejects contractual interpretation that contradict a contract's plain meaning. Courts "should not rewrite the provisions of an unambiguous document, but must enforce an unambiguous contract in accordance with the plain and ordinary meaning of its terms." [USI Props. E., Inc. v. Simpson, 938 P.2d 168, 173 \(Colo. 1997\)](#). To answer the question of what is ambiguous language, [\*17] "the instrument's language must be examined and construed in harmony with the plain and generally accepted meaning of the words employed." *Id.* Extraneous evidence regarding the intent of the parties is therefore only considered by the court when an ambiguity exists in the contract. [KN Energy, Inc. v. Great W. Sugar Co., 698 P.2d 769, 776 \(Colo. 1985\)](#).

Section 9(a) of the 2001 Agreement details the automatic renewal after a year; and section 9(b) allows either party to exit the contract with 30 days of notice. KLS' claim that section 9(b) pertains only to termination "for cause" which is contrary to the wording of section 9(b) which provide: "Notwithstanding the foregoing, this . . . Agreement may be terminated [upon] any of the following." *Id.* Section 9(b) provides three specific ways to terminate the 2001 Agreement: (I) by either party upon 30 days written notice to the other; (II) by either party for breach, unless the breaching party corrects the breach within 30 days; or (III) by either party if one or the other goes into bankruptcy, liquidation or insolvency. *Id.* The fact that 9(b)(II) and 9(b)(III) both include "for cause" does not also require that 9(b)(I) must also include "for cause." Courts read contracts to avoid redundancy and to "give effect to all the contract's provisions." [Bledsoe Land Co., LLP v. Forest Oil Corp., 277 P. 3d 838, 846 \(Co. Ct. App. 2011\)](#). Reading 9(b)(I) to [\*18] require thirty days' notice "for cause" would make 9(b)(II) surplusage.

The potential breach of the 2001 Agreement premised on the facts alleged in that MM failed to provide 30 days' notice because it cancelled the contract early. KLS has alleged that MM informed members of the industry it would be cancelling the KLS contract on January 31, approximately 19 days earlier than the termination agreement permitted. (Dkt. 2). However, KLS did not allege that as a cause of action.

##### b. Breach of the 2014 Drafts

KLS' theory that the 2014 Drafts formed a binding agreement is incorrect. Even accepting KLS' assumption that the Colorado Uniform Commercial Code ("UCC") governs this agreement, the "Battle of the Forms" section of the UCC applies, C.R.S.A. § 4-2-207 n.1 (amended 1966), where both parties act as if a contract existed even though the

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<sup>8</sup> Both the 2001 Agreement and the 2014 Drafts are subject to Colorado law because as discussed in Section A, both contain choice of law clauses adopting Colorado law for contract disputes.

agreements did not match nor were they signed by both parties. Here the parties had been engaged in a nearly seventeen year existing business relationship. The UCC cannot be read to imply a new contract each time one party to an existing at-will business relationship suggests a more comprehensive agreement. A course of dealing may clarify the meaning of an agreement, [\*19] or to demonstrate the existence of an agreement, but it may not create one.

MM did not breach the 2001 Agreement, and the 2014 Drafts and course of dealing create no binding obligation on MM. KLS has not stated a theory of contract upon which this Court can grant relief, and therefore Count II is due to be dismissed.

#### E. Count III — Tortious Interference

KLS maintains that MM is liable for tortious interference because it improperly interfered with KLS' customer relationships by making false or misleading statements to KLS' customers regarding the timing of the termination of their relationship and KLS' ability to continue providing VSP. (Dkt. 2 ¶ 100).

MM argues, in response, that tortious interference does not exist where, as here, the defendant is no stranger to the relationship it allegedly interfered with. In addition, MM suggests KLS' tortious interference claim also fails because both Colorado and Florida law recognize that the acts of an alleged competitor cannot support a claim unless the competitor acted using improper means, and none is alleged here. Finally, KLS fails, according to MM, to identify any particular contract with which MM allegedly interfered. (Dkt. 14 pp. 17-19). [\*20]

A plaintiff claiming tortious interference must allege: "(1) the existence of a business relationship, not necessarily evidenced by an enforceable contract, under which the plaintiff has legal rights; (2) the defendant's knowledge of the relationship; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff." [Palm Beach Cty. Health Care Dist. v. Prof'l. Med. Educ., Inc., 13 So. 3d 1090, 1094 \(Fla. 4th DCA 2018\)](#) (quoting [Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A., 742 So. 2d 381, 385 \(Fla. 4th DCA 1999\)](#).

MM's argument that KLS failed to properly identify a "particular contract," takes aim at the first element, the existence of a business relationship, but no particular contract need be evidenced. A plaintiff must only show that "an understanding between the parties would have been completed had the defendant not interfered." [Landry v. Hornstein, 462 So. 2d 844, 846 \(Fla. 3d DCA 1985\)](#). KLS has asserted that several longstanding customers who otherwise intended to continue purchasing VSP from KLS abandoned their business relationships. (Dkt. 2, Ex. G).

MM's motion also argues the third element, intentional and unjustified interference, is unmet by claiming the interference privilege. Essentially, the privilege to interfere stands for the principle that a party with an interest in a business relationship cannot unjustly interfere with that relationship. [Rudnick v. Sears, 358 F. Supp. 2d 1201, 1205 \(S.D. Fla. 2005\)](#). The interference [\*21] privilege is not absolute, however it "is divested when the defendant acts solely with ulterior purposes and the advice is not in the principal's best interest." [O.E. Smith's Sons, Inc. v. George, 545 So. 2d 298, 299 \(1st DCA 1989\)](#).

MM cites [Occusafe, Inc. v. EG&G Rocky Flats, Inc., 54 F.3d 618, 623 \(10th Cir. 1995\)](#) in insisting that to defeat the competition privilege, KLS must show improper means such as "physical violence, fraud, civil suits, and criminal prosecution." The Eleventh Circuit does not construe "improper means" so narrowly. See [Bluesky Greenland v. Envtl. Sols., LLC v. 21st Century Planet Fund, LLC, 985 F. Supp. 2d 1356, 1367 \(S.D. Fla. 2013\)](#) (clarifying that misrepresentations also defeat the interference privilege). The rulings in this Circuit are aligned with the Second Restatement of Torts, which states: "the propriety [of the defendant's conduct] is determined in light of all the factors present . . . fraudulent misrepresentations are also ordinarily a wrongful means of interference." [Restatement \(Second\) of Torts § 767 cmt. c.](#) (Am. Law. Inst. 1979) (emphasis added). See [International Sales & Serv., Inc. v. Austral Insulated Products, Inc., 262 F.3d 1152, 1160 \(11th Cir 2001\); Slip-N-Slide Records, Inc. v. T.V.T. Records, LLC, No. 05-21113-CIV-TORRES, 2007 U.S. Dist. LEXIS 9014, 2007 WL 473273, at \\*4 \(S.D. Fla. Feb. 8, 2007\)](#).

KLS alleged that MM represented to KLS' customers that KLS could no longer provide them services, and that MM was dishonest about the date the relationship would be ending. These representations induced customers to switch to a higher priced VSP provider before [\*22] the customers needed to. KLS has demonstrated both an injured business relationship, and it has suggested an improper means which would sever the privilege of interference.

#### **F. Count IV — Trade Libel**

KLS alleges that MM committed trade libel by lying to KLS' customers and slandering its reputation in telling them that KLS could not continue providing them VSP services. (Dkt. 2 ¶ 103-110). However, MM correctly responds that KLS has not alleged special damages, (Dkt. 14 p. 20), a threshold requirement for trade libel, and therefore KLS' claim of trade libel is due to be dismissed.

A claim of trade libel under Florida law requires both a false communication (which induces others not to deal with the plaintiff) and special damages. [\*Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A., 742 So. 2d 381, 388 \(Fla. 4th DCA 1999\)\*](#). "The 'special damage rule requires the plaintiff to establish pecuniary loss that has been realized or liquidated, as in the case of specific lost sales.'" *Id.* (quoting *W. Page Keeton, et al., Prosser and Keeton on The Law of Torts* § 128 at 971 (5th ed.1984)). If a plaintiff claims general diminution, it should allege facts demonstrating the difference in sales prior to the alleged libel and after it, and also explain why it could not identify which particular customers [\*23] withheld business. See [\*National Numismatic Certification, LLC, No. 6:08-cv-42-Or1-19GJK, 2008 U.S. Dist. LEXIS 109793, 2008 WL 2704404, at \\*19 \(M.D. Fla. 2008\)\*](#).

KLS has not alleged special damages. It has only referenced unnamed "customers," without stating a diminution in business. To sustain its claim of trade libel KLS must allege facts demonstrating a difference in business volume resulting from the alleged libel.

#### **G. Count V — Unfair Competition**

KLS alleges that MM engaged in unfair competition to KLS' detriment by misleading KLS' customers, misleading KLS in negotiations, fraudulently misrepresenting to KLS' customers, and engaging in other forms of anticompetitive conduct. (Dkt. 2 ¶ 112-16). MM responds that because KLS has failed to state a claim under tortious interference and trade libel, this claim must be dismissed as well because unfair competition is a mere "umbrella" for other statutory causes of action. (Dkt. 14 p. 21).

MM's contention is that it is not a competitor of KLS. MM directly contests KLS' allegations and it is therefore not proper to consider on a motion to dismiss. Unlike in [\*Home Design Servs., Inc. v. Park Square Enters., Inc., Case No. 6:02-CV-637, 2005 U.S. Dist. LEXIS 33627, 2005 WL 1027370 \(M.D. Fla. May 2, 2005\)\*](#), MM here is alleged to have deliberately "pirated away" customers to a new distributor. [\*24] In *Home Design Servs.*, "any customers confused by . . . allegedly fraudulent practices could have been neither real nor potential customers of [plaintiff]," here MM was seeking KLS' customer pool and directing them towards a preferred competitor. Taking KLS' allegations as true, MM competed with KLS and is therefore a "competitor" for an unfair competition claim.

#### **I. Count VI — Florida's Deceptive and Unfair Trade Practices Act**

MM contends that KLS has not alleged a "deceptive act" or "unfair practice" and also that it has not alleged actual damages. (Dkt. 14 pp. 22-24). MM is incorrect that KLS has not alleged an unfair practice, because "unfair practice" must be liberally construed. MM is correct that no actual damages have been alleged, and therefore KLS' recovery under Count VI must be limited to injunctive relief.

The Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") was passed to "protect . . . legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair . . . practices in the course of any trade or commerce." [\*Fla. Stat. § 501.202\(2\)\*](#) (2018). Deceptive and unfair are not

defined; but the Florida Legislature intended courts to construe [\*25] those terms liberally. *Samuels v. King Motor Co. of Ft. Lauderdale*, 782 So. 2d 489, 499 (Fla. 4th DCA 2001). KLS' allegations of MM's conduct meet a liberal construction of "deceptive" because sham negotiations to prevent a consumer from finding a new supplier before being cut off—and misrepresenting the date that the contract would end to a buyer's customers—are "likely to mislead."

However, to recover damages under FDUTPA a plaintiff must also plead that the deceptive or unfair act caused "actual damages." To determine actual damages under FDUTPA, Florida courts have explained,

"[T]he measure of actual damages is the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties. [ ] A notable exception to the rule may exist when the product is rendered valueless as a result of the defect—then the purchase price is the appropriate measure of actual damages."

[Rollins, Inc. v. Butland](#), 951 So. 2d 860, 869 (Fla. 2d DCA. 2006) (citing [Rollins, Inc. v. Heller](#), 454 So. 2d 580, 585 (Fla. 3d DCA 1984)). Consequential damages are not recoverable under a FDUTPA claim. [Fort Lauderdale Lincoln Mercury, Inc. v. Corgnati](#), 715 So. 2d 311, 314 (Fla. 4th DCA 1998). Courts have granted [Rule 12\(b\)\(6\)](#) dismissals of complaints under FDUTPA that did not allege facts consistent with a loss in market value. See [BPI Sports, LLC v. Labdoor, Inc.](#), No. 15-62212-CIV-BLOOM, 2016 U.S. Dist. LEXIS 23033, 2016 WL 739652, at \*1 (S.D. Fla. Feb. 25, 2016).

As in [\*26] [BPI](#), KLS has not alleged facts demonstrating a change in market value of their services. Their allegations indicate a loss in sales volume; the only allegations that could plausibly relate to their VSP service's "market value" would be the ones in their response to MM's Motion to Dismiss. Plaintiff's claim for damages under FDUTPA is therefore insufficiently pled.

However, if KLS has not alleged specific facts indicating actual damages does not dispense with their FDUTPA claim. [Section 501.211 of the Florida Statutes](#) reads:

(1) *Without regard to any other remedy or relief to which a person is entitled*, anyone aggrieved by a violation of this part may bring an action . . . to enjoin a person who has violated, is violating, or is otherwise likely to violate this part.

[Fla. Stat. § 501.211\(1\)](#) (2001) (emphasis added). The Court in [Galstadi v. Sunvest Communities USA, LLC](#), 637 F. Supp. 2d 1045, 1057 (S.D. Fla. 2009) explained that, "[t]he statute is clear on its face . . . declaratory relief is available regardless of whether an adequate remedy at law also exists." KLS has alleged facts indicating deception by MM and therefore properly alleged a FDUTPA claim for injunctive relief.

## I. Injunctive Relief

To qualify for temporary injunctive relief, a plaintiff must show (1) irreparable harm would result without the relief; (2) an adequate [\*27] remedy at law is unavailable; (3) substantial likelihood of success on the merits; and (4) entry of the temporary injunction is in the best interest of the public. [Foreclosure FreeSearch, Inc. v. Sullivan](#), 12 So.3d 771, 775 (Fla. 4th DCA 2009). KLS' pleadings suggest no basis for finding that irreparable harm will occur without the relief, because (a) if taken as true, pecuniary damages could suffice; and (b) the damage to KLS is not necessarily "irreparable." Consequently, KLS is not entitled to temporary injunctive relief.

Accordingly, it is **ORDERED**:

1. Medical Modeling's "Medical Modeling, Inc.'s Motion to Dismiss Plaintiff's Complaint" (Dkt. 14) is **GRANTED IN PART** and **DENIED IN PART**, as follows:

a. The motion is **DENIED** as to Counts III, V, and VI of the Amended Complaint;

- b. The motion is **GRANTED** as to Counts I, II and IV of the Amended Complaint;
2. Counts I, II and IV of Plaintiff's Amended Complaint are **DISMISSED without Prejudice**; and
3. Plaintiff will have fourteen days from the date of this Order to file a Second Amended Complaint, should it choose to do so.

**DONE AND ORDERED** at Jacksonville, Florida, this 14th day of December, 2018.

/s/ Harvey E. Schlesinger

**HARVEY E. SCHLESINGER**

UNITED STATES DISTRICT JUDGE

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## *Wai Feng Trading Co. v. Quick Fitting, Inc.*

United States District Court for the District of Rhode Island

December 17, 2018, Decided; December 17, 2018, Filed

C.A. No. 13-033WES; C.A. No. 13-056WES

### **Reporter**

2018 U.S. Dist. LEXIS 213358 \*; 2018 WL 6605927

WAI FENG TRADING CO. LTD, and EFF MANUFACTORY CO., LTD., Plaintiffs, v. QUICK FITTING, INC., Defendant.QUICK FITTING, INC., Plaintiff, v. WAI FENG TRADING CO., LTD., EASTERN FOUNDRY & FITTINGS, INC., EASTERN FOUNDRY AND FITTINGS, LLC, NINGO EFF MANUFACTORY CO, LTD., f/k/a/ NINGO W&F MANUFACTORY CO., LTD., WAI MAO COMPANY, LTD., CIXI CITY WAI FENG BALL VALVE COMPANY, LTD., W&F MANUFACTURING, and CHI YAM "ANDREW" YUNG, Defendants.

**Subsequent History:** Adopted by, Summary judgment granted by, in part, Summary judgment denied by, in part  
[Wai Feng Trading Co., Ltd. v. Quick Fitting, Inc., 2019 U.S. Dist. LEXIS 157396 \(D.R.I., Sept. 16, 2019\)](#)

**Prior History:** [Wai Feng Trading Co. v. Quick Fitting, Inc., 2014 U.S. Dist. LEXIS 117251 \(D.R.I., May 30, 2014\)](#)

## **Core Terms**

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parties, push-fit, manufacture, products, License, clauses, customer, summary judgment, entity, license agreement, confidential, recommend, damages, unenforceable, trade secret, confidential information, liquidated damages, summary judgment motion, supplier, intellectual property, termination, plumbing, non-competition, proprietary, compete, defamation, ban, fact finder, geographic, actual damage

**Counsel:** [\*1] For Wai Feng Trading Co. LTD, Eastern Foundry & Fittings Inc., Plaintiffs (1:13-cv-00033-WES-PAS): Thomas W. Lyons, III, LEAD ATTORNEY, Rhiannon S. Huffman, Strauss, Factor, Laing & Lyons, Providence, RI.

For Quick Fitting, Inc., EFF Manufactory Co. Ltd, Defendants (1:13-cv-00033-WES-PAS): Thomas R. Noel, LEAD ATTORNEY, NOEL LAW, Providence, RI; John R. Harrington, Thomas R. Noel, Counselor at Law, P.C., Providence, RI.

For Andrew Yung, Defendant (1:13-cv-00033-WES-PAS): Rhiannon S. Huffman, Strauss, Factor, Laing & Lyons, Providence, RI.

For Watts Water Technologies, Inc., Interested Party (1:13-cv-00033-WES-PAS): Marc E. Finkel, LEAD ATTORNEY, LeClairRyan, Providence, RI.

For Quick Fitting, Inc., Counter Claimant (1:13-cv-00033-WES-PAS): Thomas R. Noel, LEAD ATTORNEY, NOEL LAW, Providence, RI; John R. Harrington, Thomas R. Noel, Counselor at Law, P.C., Providence, RI.

For EFF Manufactory Co. Ltd, Counter Defendant (1:13-cv-00033-WES-PAS): Rhiannon S. Huffman, Strauss, Factor, Laing & Lyons, Providence, RI.

For Wai Feng Trading Co. LTD, Counter Defendant (1:13-cv-00033-WES-PAS): Thomas W. Lyons, III, LEAD ATTORNEY, Rhiannon S. Huffman, Strauss, Factor, Laing & Lyons, Providence, RI.

For Quick [\*2] Fitting, Inc., Plaintiff, Counter Defendant: John R. Harrington, LEAD ATTORNEY, Counselor at Law, P.C., Providence, RI; Thomas R. Noel, LEAD ATTORNEY, NOEL LAW, Providence, RI.

For Wai Feng Trading Co. LTD, Eastern Foundry & Fittings, Inc., also known as EFF Manufactory Co, LTD, EFF Manufactory Co. Ltd, Eastern Foundry & Fittings, LLC, Wai Mao Company, Ltd., Andrew Yung, Defendants: Rhiannon S. Huffman, Thomas W. Lyons, III, Strauss, Factor, Laing & Lyons, Providence, RI; Thomas R. Noel, LEAD ATTORNEY, NOEL LAW, Providence, RI.

For Cixi City Wai Feng Ball Valve Company, Ltd., Defendant: Thomas R. Noel, LEAD ATTORNEY, NOEL LAW, Providence, RI.

For W&F Manufacturing, Ningbo W&F Manufactory Co., Ltd., Jacky Yung, Defendants: Thomas W. Lyons, III, Strauss, Factor, Laing & Lyons, Providence, RI; Thomas R. Noel, LEAD ATTORNEY, NOEL LAW, Providence, RI.

For Watts Water Technologies, Inc., Interested Party: Marc E. Finkel, LEAD ATTORNEY, LeClairRyan, Providence, RI.

For Eastern Foundry & Fittings, Inc., Wai Feng Trading Co. LTD, Wai Mao Company, Ltd., EFF Manufactory Co. Ltd, Eastern Foundry & Fittings, LLC, Counter Claimants: Thomas W. Lyons, III, Strauss, Factor, Laing & Lyons, Providence, RI; [\*3] Thomas R. Noel, LEAD ATTORNEY, NOEL LAW, Providence, RI.

**Judges:** PATRICIA A. SULLIVAN, United States Magistrate Judge.

**Opinion by:** PATRICIA A. SULLIVAN

## Opinion

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### REPORT AND RECOMMENDATION

PATRICIA A. SULLIVAN, United States Magistrate Judge.

The commercial dispute framed by these contentiously litigated cases<sup>1</sup> has finally cleared the discovery hurdles and reached the summary judgment phase, though not without significant bumps along the way.<sup>2</sup> The first of the two cases (13-33) was initially filed in Canada, on August 2, 2012, and was refiled in this Court on January 17, 2013. As framed in the operative pleading, the Fourth Amended Complaint, (ECF No. 80) ("13-33 complaint"), 13-33 is a simple collection action, seeking to recover money for plumbing push-fit products sold, delivered and accepted. The second case — 13-56 — was filed on January 25, 2013. As amended, its operative pleading is the Second Amended Verified Complaint, (13-56 ECF No. 135)<sup>3</sup> ("13-56 complaint"), which counters the collection action with

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<sup>1</sup> Since they were filed in 2013, these cases have been the subject of many judicial decisions. See, e.g., *Wai Feng Trading Co. Ltd v. Quick Fitting, Inc.*, C.A. No. 13-33S, 2016 U.S. Dist. LEXIS 77672, 2016 WL 4184014 (D.R.I. June 14, 2016); *Quick Fitting, Inc. v. Wai Feng Trading Co. Ltd.*, Civil Action No. 13-56S, 2015 U.S. Dist. LEXIS 132900, 2015 WL 5775108 (D.R.I. June 17, 2015), adopted, *No. CA 13-056 S*, 2015 U.S. Dist. LEXIS 132899, 2015 WL 5775149 (D.R.I. Sept. 30, 2015); *Quick Fitting, Inc. v. Wai Feng Trading Co., Ltd.*, No. CA 13-56S, 2015 U.S. Dist. LEXIS 131452, 2015 WL 5719503 (D.R.I. Feb. 27, 2015), adopted, *Civil Action No. 13-056 S*, 2015 U.S. Dist. LEXIS 131451, 2015 WL 5719571 (D.R.I. Sept. 29, 2015); *Wai Feng Trading Co. Ltd. v. Quick Fitting, Inc.*, C.A. No. 13-033 S, 2014 U.S. Dist. LEXIS 117249, 2014 WL 4199174 (D.R.I. Aug. 22, 2014). References to these decisions will be by citation, rather than by docket number.

<sup>2</sup> After considerable wrangling, fact discovery in these cases finally closed on April 15, 2016, with additional time to complete specified discovery. *Wai Feng Trading*, 2016 U.S. Dist. LEXIS 77672, 2016 WL 4184014, at \*7. The Court held its first summary judgment conference on April 10, 2017, and set a briefing schedule. Text Order of May 18, 2017. After briefing began, the Court held a second conference and ordered the parties to start over, requiring them first to file the undisputed and disputed facts and then to refile the summary judgment briefs once the factual record was settled. Following a third conference, the deadlines were extended. Text Orders of Aug. 16, Oct. 20 and Dec. 7, 2017. Additional extensions were also granted. Text Orders of Jan. 8, Jan. 24, Feb. 26 and Mar. 30, 2018. The resulting record — including not only the summary judgment record, but also the record for the related motions — is massive, amounting to almost seven thousand pages of material.

eleven Counts alleging, *inter alia*, breach of various non-competition, confidentiality, non-solicitation and non-disclosure clauses in the agreements between the parties, the misappropriation of trade secrets, the [\*4] stealing of intellectual property, defamation and the delivery of unmerchantable and defective goods. Many (but not all) of the claims in 13-56 are counterclaims in 13-33. ECF No. 81 (Amended Counterclaim) ("13-33 counterclaims"). Ultimately, the cases were consolidated (without prejudice to bifurcation for trial) on September 30, 2015.<sup>4</sup> Unless otherwise indicated, all docket references in this report and recommendation will be to 13-33, which the Court has designated as the lead case.

Now pending before the Court in each of the cases are six motions for summary judgment, five brought by the Wai Feng parties<sup>5</sup> and one brought by Quick Fitting,<sup>6</sup> as well as eight motions to strike brought by the Wai Feng parties

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<sup>3</sup> Quick Fitting moved to amend (13-56 ECF No. 178) its complaint after this iteration to add the verification, which had been omitted. That motion was granted by text order on February 23, 2016, but the amended pleading was never filed, leaving 13-56 ECF No. 135 as the operative complaint.

<sup>4</sup> The cases were initially consolidated, then deconsolidated and eventually reconsolidated. [Quick Fitting, 2015 U.S. Dist. LEXIS 132899, 2015 WL 5775149, at \\*1-3](#).

<sup>5</sup> The "Wai Feng parties" include the plaintiffs in 13-33 and most of the defendants in 13-56. They are:

- Wai Feng Trading Co. Ltd. ("Wai Feng Trading"), a Canadian company, and its sometime alter ego, Eastern Foundry & Fittings, Inc. ("EFF Inc.");
- EFF Manufactory Co., Ltd. ("EFF Manufactory"), [\*5] a Chinese company sometimes called Ningbo EFF Manufactory Co., Ltd. and Ningbo W&F Manufactory Co., Ltd.;
- Eastern Foundry & Fittings, LLC ("EFF LLC"), a Massachusetts limited liability company;
- Wai Mao Company, Ltd. ("Wai Mao"), a Canadian company; and
- Chi Yam Yung ("Andrew Yung"), an individual who resides in Canada and China.

EFF LLC, Wai Mao and Andrew Yung are defendants only in 13-56. In addition to the Wai Feng parties, several other defendants were named in 13-56 but are not parties. These are:

- W&F Manufacturing ("W&F Manufacturing") was held to be a trade name and not an entity subject to suit, ECF No. 132 at 13;
- Chi Pang Yung ("Jacky Yung"), a citizen of Canada and brother of Andrew Yung, was held not to be subject to personal jurisdiction in this District, [Quick Fitting, 2015 U.S. Dist. LEXIS 131451, 2015 WL 5719571, at \\*3-4](#);
- Jimmy Yung, the father of Andrew and Jacky Yung, was voluntarily dismissed, 13-56 ECF No. 93; and
- Cixi City Wai Feng Ball Valve Company, Ltd. ("CCWFBV"), later known as Ningbo Texoon Brass Works Co., Ltd., a Chinese company owned by an uncle of Andrew and Jacky Yung, was never served.

Mentioned by the parties, but not named as a party in either case, is a Chinese entity owned by a cousin of Andrew and Jacky Yung called Cixi Welday Plastic Products, Co., sometimes referred to as China Welday ("Cixi Welday").

In this report and recommendation, the shorthand names above will be used for each entity even though at various times the actual name of the entity may have been different.

The Court cautions the reader that the various entities constituting the Wai Feng parties and the other entities listed above not only have confoundingly similar names, exacerbated by name changes and alterations of corporate structure during the relevant period, but also were repeatedly misidentified in the pleadings and discovery produced in these cases. The resulting confusion has been an ongoing issue. See, e.g., [Quick Fitting, 2015 U.S. Dist. LEXIS 131452, 2015 WL 5719503, at \\*1-3 & nn.2, 6](#) ("While the Yung companies are responsible for the confusion caused by their use of similar names and by their repeated gaffes in misidentifying the appropriate entity, the Court is compelled to observe that Quick Fitting seems to have gone out of its way to exacerbate the confusion, perhaps to enhance its veil-piercing argument.").

<sup>6</sup> "Quick Fitting" is a Rhode Island corporation and is the defendant in 13-33 and the plaintiff in 13-56.

and a motion seeking a finding of spoliation brought by Quick Fitting. All of the motions have been referred to me, some for determination, some for report and recommendation. 28 U.S.C. § 636(b)(1)(A)-(B).

This report and recommendation addresses four of the pending summary judgment motions.<sup>7</sup> Its principal focus is on the Wai Feng parties' motion for summary judgment challenging Count IV of Quick Fitting's 13-33 counterclaim and Count I of Quick Fitting's 13-56 complaint. 13-56 ECF No. 255.<sup>8</sup> This motion [\*6] calls into question the legal enforceability of three categories of challenged clauses contained in the three agreements<sup>9</sup> between various of the parties — a "Liquidated Damages/Contract Penalty" clause, several non-compete clauses and several non-solicitation/confidentiality clauses. For the reasons that follow, I recommend that the Court grant this aspect of the motion because all the challenged clauses are unenforceable as a matter of law. This motion also challenges the sufficiency of Quick Fitting's evidence of breach, including whether it has presented enough to prove damages. I recommend that the Court deny this aspect of the motion because I find that the evidence is adequate for a trial regarding whether there was a breach of the unchallenged restrictive covenants in the Agreements, including whether Quick Fitting is entitled to actual or nominal damages based on any such breach.

The other three summary judgment motions addressed in the report and recommendation challenge the viability of Quick Fitting's claims against Andrew Yung in Count IX of the 13-56 complaint (13-56 ECF NO. 256) and against EFF LLC in all Counts of the 13-56 complaint (13-56 ECF No. 257), as well as the [\*7] viability of Quick Fitting's claims in Counts II through VIII, X and XI in the 13-56 complaint (13-56 ECF No. 254). For the reasons that follow, I recommend that Andrew Yung's motion be denied, that EFF LLC's motion be granted and that judgment should enter in favor of the Wai Feng parties and against Quick Fitting as to the state law claims of defamation and fraud and misrepresentation, but be denied as to the claims based on the Rhode Island Uniform Trade Secrets Act (R.I. Gen. Laws § 6-41-1, et seq.), as well as the related claim of civil conspiracy, and be denied as to the claim for injunctive relief.

## I. BACKGROUND<sup>10</sup>

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<sup>7</sup> Not addressed in this report and recommendation is the Wai Feng parties' motion for judgment with respect to unpaid invoices for goods sold and delivered in excess of \$400,000, as well as Quick Fitting's claims in 13-56 and counterclaims in 13-33 alleging that it was damaged because the goods covered by the invoices were unmerchantable and did not conform to the parties' agreement. ECF No. 180; 13-56 ECF No. 254. Nor does it address Quick Fitting's cross-motion for summary judgment based on its argument that, due to the Wai Feng parties' inter-company transfers and operational switch from Wai Feng Trading to EFF Inc., neither Wai Feng Trading, which issued the invoices, nor EFF Manufactory, which manufactured the product to fill the purchase orders and shipped the product to Quick Fitting, is entitled to recover. 13-56 ECF No. 259. These matters will be addressed in a separate report and recommendation. In addition, the various motions to strike and for a spoliation finding will be addressed separately.

<sup>8</sup> This motion was filed only in 13-56, instead of 13-33. However, it also challenges the counterclaim in 13-33.

<sup>9</sup> The first of the three agreements in issue is the 2010 License and Supply Agreement ("2010 License/Supply Agreement"). WF Ex. 4. The second is the 2011 Non-Disclosure Agreement ("2011 NDA"). WF Ex. 9. The third is the 2011 License Agreement with Terms of Confidentiality, Non-Disclosure, and Non-Competition ("2011 License Agreement"). WF Ex. 11. Collectively, they are referred to as the "Agreements."

<sup>10</sup> Throughout this report and recommendation, with pin cites to numbered paragraphs or page numbers as appropriate, the Court has used the following protocol for short hand references to the factual record. For citations to the facts and evidence marshaled by the Wai Feng parties, the following convention is used:

- WF SUF # 1.... ECF No. 172;
- WF SUF # 2.... ECF No. 176;
- WF SDF # 1.... ECF No. 175; and
- WF Ex.... ECF No. 172-1 to 172-45.

## A. The Industry

This case is focused [**\*8**] on the manufacture and sale of highly engineered plumbing parts and components by entities competing in the plumbing industry; the product in issue is known by the generic term, "push-fit." Push-fit refers to a plumbing technology that allows for the permanent connection of plumbing pipes and fittings simply by pushing them together by hand without the need for soldering or other heat. QF SUF # 1 ¶ 4. The forging, manufacturing, assembly and testing of push-fit requires precise tooling and material standards to be developed and used by the manufacturer. Crompton Aff. # 2 ¶ 35. Plumbing products that can be connected using push-fit are manufactured from metal (such as copper) or synthetic raw materials by an array of manufacturers pursuant to an array of designs; some are sold unbranded and some are branded with a mark and manufactured pursuant to a particular design. WF SUF # 1 ¶ 45; QF SUF # 1 ¶ 4. For example, Mueller Industries ("Mueller") contracted with Quick Fitting for Quick Fitting to supply it with its private label brand name ProLine products, while Quick Fitting ordered ProLine products to be manufactured for Mueller by, *inter alia*, the Wai Feng parties. Crompton Aff. # [**\*9**] 2 ¶ 55; QF SUF # 3 ¶ 70. Other push-fit brands include Shark Bite and Gator Bite, both of which are manufactured pursuant to product designs that are not the intellectual property of Quick Fitting. WF SUF # 1 ¶ 45. To be sold in the United States, all plumbing products, including push-fit, must conform to local, state and federal regulations, as well as various industry standards and certifications. Crompton Aff. # 2 ¶¶ 40-41.

## B. The Wai Feng Parties

Andrew and Jacky Yung are brothers who are originally from China and now live in Ontario, Canada. QF SUF # 1 ¶ 6. Together with their father, Jimmy Yung, they own and operate a network of companies in China, Canada and the United States (namely, Massachusetts) that are engaged in the business of manufacturing, selling and distributing a wide range of plumbing parts and components. *Id.* ¶¶ 7-8. Their Canadian companies — Wai Mao, acting as the importer, and Wai Feng Trading, acting as the seller and distributor — are engaged in importing, selling and distributing in North America. WF SUF # 1 ¶ 4. At some point in 2011, Wai Feng Trading's operations and employees were shifted to EFF Inc., except that Wai Feng Trading continued the activities [**\*10**] related to this

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The Wai Feng parties' supporting affidavits are among their exhibits and therefore are not separately listed. For citation to the facts and evidence presented by Quick Fitting, the following convention is used:

- QF SUF # 1.... ECF No. 173;
- QF SUF # 2.... ECF No. 259-3 (13-56);
- QF SUF # 3.... ECF No. 189-1;
- QF SDF # 1.... ECF No. 177;
- QF SDF # 2.... ECF No. 189-4;
- QF SDF # 3.... ECF No. 210-1;
- QF Ex. # 1.... ECF No. 178-1 to 178-32;
- QF Ex. # 2.... ECF No. 259-4 to 259-31 (13-56);
- QF Ex. # 3.... ECF Nos. 190-1 to 192-20, 196-1;
- Crompton Aff. # 1.... ECF. No. 259-2 (13-56);
- Crompton Aff. # 2.... ECF No. 189-2; and
- Ochoa Aff....ECF No. 189-3.

Quick Fitting's affidavits were not among its exhibits and are cited by the name of the affiant.

litigation, principally the issuing of invoices and the collection of payment, as well as the maintenance of bank and accounting operations to perform those functions.<sup>11</sup> QF SUF # 3 ¶ 8.

Originally, the Wai Feng parties' manufacturing was done at CCWFBV, a factory of a Chinese-based company owned by an uncle of Andrew and Jacky Yung. A trade name, W&F Manufacturing, was used to refer to the venture comprising Wai Mao, Wai Feng Trading and CCWFBV. WF SUF # 1 ¶ 5. At some point between 2008 and 2011, manufacturing shifted from the uncle's factory to EFF Manufactory, a Chinese factory owned and operated by Andrew Yung.<sup>12</sup> *Id.* ¶¶ 6-7. Through EFF Manufactory, the Wai Feng parties manufacture a wide range of plumbing products, including products made from both copper and polyvinyl chloride ("PVC"). In addition, EFF Manufactory purchases components for its plumbing products, such as the retaining and release rings that were made by Cixi Welday. Prior to entering the contractual relationship with Quick Fitting, none of the Wai Feng parties had manufactured or sold push-fit products. QF SUF # 1 ¶ 9.

### C. Quick Fitting

Quick Fitting is a Rhode Island company that specializes in the [\*11] design, manufacture and distribution of push-fit plumbing fittings and valves made of copper or PVC. QF SUF # 1 ¶¶ 1, 3-4. These are manufactured using design features, materials, sourcing and methods of manufacture that constitute Quick Fitting's intellectual property. QF SUF # 1 ¶ 5. According to the first affidavit signed by David Crompton, President and Chief Executive Officer ("CEO") of Quick Fitting, its push-fit products are sold "nationally," Crompton Aff. # 1 ¶ 19, while Crompton's second affidavit asserts that Quick Fitting sells "throughout North America." Crompton Aff. # 2 ¶¶ 2, 40. Although Quick Fitting has not alleged in these cases that any of its patents were infringed, it claims to have patented certain features of its push-fit product line and strives to protect as trade secrets other features, as well as the material, sourcing and methods of manufacture of its push-fit products. QF SUF # 1 ¶ 5. It is unclear whether the push-fit products in issue that were manufactured by the Wai Feng parties and sold to Quick Fitting all included design features protected by patent or as trade secrets. Compare WF Ex. 23 at 2-3 (Ochoa testifies that all Quick Fitting push-fit products [\*12] are patent-protected), with WF Ex. 4 at 1 (2010 License/Supply Agreement states that not all push-fit to be manufactured for Quick Fitting would incorporate Quick Fitting's intellectual property). Quick Fitting's push-fit products are manufactured by various entities (including several manufacturers based in China) with which Quick Fitting has entered into supply agreements requiring manufacture pursuant to Quick Fitting's confidential specifications. WF SUF # 1 ¶ 13. Quick Fitting does not claim to own the exclusive right to manufacture and sell push-fit products. *Id.* ¶ 45. Quick Fitting's push-fit products compete with other push-fit and plumbing products sold in the United States and North America. WF Ex. 8 at 27.

### D. The Buy-Sell Relationship

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<sup>11</sup> In his declaration, Andrew Yung averred that the Wai Feng parties created EFF Inc. to take over the business of Wai Feng Trading, and that the 2011 NDA was crafted to reflect the change. WF SUF # 1 ¶¶ 14-15. While Quick Fitting disputes the link to the 2011 NDA, it is not disputed that, at least as to the Quick Fitting business, Wai Feng Trading continued as the operative entity. WF Ex. 2 ¶ 13; WF SUF # 1 ¶ 15.

<sup>12</sup> The date of the switch is hotly disputed. Quick Fitting's Crompton avers that he was told by Andrew Yung that manufacturing for Quick Fitting initially would be done at CCWFBV and that he was shown a different factory from what he understood was CCWFBV's factory when he came to observe the operations of EFF Manufactory. Crompton Aff. # 2 ¶¶ 7, 9, 13. Crompton is adamant that EFF Manufactory did not take over manufacturing from CCWFBV until April 2011. *Id.* ¶¶ 12-13. The Wai Feng parties are equally vehement that they terminated the manufacturing relationship with CCWFBV in 2008, before their first contact with Quick Fitting, and that all manufacturing for Quick Fitting was done at EFF Manufactory. WF SUF # 1 ¶ 6. The date matters to the extent that, if Quick Fitting is right, its proprietary designs were provided to CCWFBV so it could (and did) manufacture product to be sold to Quick Fitting, while if the Wai Feng parties are right, CCWFBV never had access to Quick Fitting's proprietary information because all manufacturing was done by EFF Manufactory.

In late 2009 or early 2010, Crompton of Quick Fitting and Andrew Yung of the Wai Feng parties met at a trade show and began to discuss setting up a supply relationship whereby the Wai Feng parties would manufacture push-fit products to Quick Fitting's specifications for sale to Quick Fitting, which would resell to its customers. QF Ex. #3 E at 10. These discussions resulted in the formation of a business relationship that began in February 2010 [\*13] and ended in July 2012. In addition to the three Agreements, the array of purchase orders and invoices limn the supply relationship.

During the period from February 2010 until July 2012, pursuant to purchase orders issued by Quick Fitting to "W&F" or to EFF Manufactory, push-fit products manufactured to Quick Fitting's specifications were delivered to Quick Fitting for resale to its customers. WF SUF # 1 ¶¶ 63-67; QF Ex. # 3 N (ECF No. 196-1). Upon the acceptance of the delivered product,<sup>13</sup> invoices were sent to Quick Fitting either by EFF Manufactory or by Wai Feng Trading, which Quick Fitting paid as agreed through October 2011. WF SUF # 1 ¶¶ 61-63. Quick Fitting partially paid an invoice dated October 5, 2011, made an advance payment in March 2012 of \$45,000, and then, in July 2012, stopped paying entirely. It is undisputed that Quick Fitting continued to accept push-fit product for which Wai Feng Trading invoiced Quick Fitting a total of \$432,611.47, but for which Quick Fitting did not pay. WF SUF # 1 ¶ 72; QF Ex. # 3 EEE. It is also undisputed that Quick Fitting sold most of this product to its customers, although it claims that some of it had to be repaired or cleaned before it [\*14] could be sold and some had to be redirected for sale in geographic regions that had not yet mandated that all plumbing parts must be lead-free; a small portion (20,699 items) was quarantined, allegedly because the items were unsalvageable. WF SUF # 1 ¶¶ 70, 71, 73; WF Ex. 1.

Based on the non-payment of these invoices, the Wai Feng parties initiated this litigation in Canada in August 2012.

## II. STANDARD OF REVIEW

Under [Fed. R. Civ. P. 56](#), summary judgment is appropriate if the pleadings, the discovery, disclosure materials and any affidavits show that there is "no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." [Taylor v. Am. Chemistry Council, 576 F.3d 16, 24 \(1st Cir. 2009\)](#); [Commercial Union Ins. Co. v. Pesante, 459 F.3d 34, 37 \(1st Cir. 2006\)](#) (quoting [Fed. R. Civ. P. 56\(c\)](#)). A fact is material only if it possesses the capacity to sway the outcome of the litigation; a dispute is genuine if the evidence about the fact is such that a reasonable jury could resolve the point in favor of the non-moving party. [Estrada v. Rhode Island, 594 F.3d 56, 62 \(1st Cir. 2010\)](#). The evidence must be in a form that permits the court to conclude that it will be admissible at trial. See [Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 \(1986\)](#); see also [Rivera-Rivera v. Medina & Medina, Inc., 898 F.3d 77, 89 \(1st Cir. 2018\)](#) ("Hearsay evidence, inadmissible at trial, cannot be considered on a motion for summary judgment.") (alteration omitted). There are no trial-worthy issues unless there is competent [\*15] evidence to enable a finding favorable to the nonmoving party. [Goldman v. First Nat'l Bank of Bos., 985 F.2d 1113, 1116 \(1st Cir. 1993\)](#).

In ruling on a motion for summary judgment, the court must examine the record evidence in the light most favorable to, and drawing all reasonable inferences in favor of, the nonmoving party. [Mu v. Omni Hotels Mgmt. Corp., 882 F.3d 1, 5-6 \(1st Cir. 2018\)](#), review denied, 885 F.3d 52 (1st Cir. 2018). The court must examine "whether the evidence presents a sufficient disagreement to require submission to a jury . . . or whether it is so one-sided that one party must prevail as a matter of law." [Nortel Networks Inc. v. Foundry Networks, Inc., Civil Action No. 01-CV-10442-DPW, 2003 U.S. Dist. LEXIS 28064, 2003 WL 26476584, at \\*5 \(D. Mass. Mar. 24, 2003\)](#) (quoting [Paragon Podiatry Lab. v. KLM Labs., 984 F.2d 1182, 1185 \(Fed. Cir. 1993\)](#)). However, if the non-movant is the party with the burden of proof and relies on pyramids of inferences upon inferences, summary judgment is appropriate. See [Tyrrell v. Dobbs Inv. Co., 337 F.2d 761, 765 \(10th Cir. 1964\)](#); see also [Bendis v. Alexander & Alexander, Inc., 67 F.3d 312 \(10th Cir. 1995\)](#) (citing [Tyrrell](#)); [Jones v. Bales, 58 F.R.D. 453, 465 \(N.D. Ga. 1972\)](#), aff'd, 480 F.2d 805 (5th Cir. 1973) (same).

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<sup>13</sup> Some items — a small number per the Wai Feng parties, a large number per Quick Fitting — were rejected and returned. WF SUF # 1 ¶¶ 64-68; QF SDF #1 ¶ 46. The Wai Feng parties do not seek payment for these items.

Because these are diversity cases, Rhode Island law provides the substantive rules of decision. See [Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 \(1938\)](#).

### **III. MOTION FOR SUMMARY JUDGMENT CHALLENGING ENFORCEABILITY OF CERTAIN RESTRICTIVE CLAUSES**

#### **A. The Three Agreements**

All of the three Agreements in issue were drafted by Quick Fitting.<sup>14</sup> All were signed by Andrew Yung with no alteration of terms due to negotiation, including no correction corresponding to what the Wai Feng parties now contend [\*16] were drafting errors in naming the wrong entities as parties in the first two Agreements. WF SUF # 1 ¶¶ 10, 16-20. All three call for the application of Rhode Island law; two of the three require that any disputes must be litigated in Rhode Island. WF Ex. 4 ¶ 7; WF Ex. 9 ¶ 7; WF Ex. 11 ¶¶ 5.11-5.12.

#### **1. 2010 License/Supply Agreement**

Effective as of February 16, 2010, the first of the three Agreements is the 2010 License and Supply Agreement. WF Ex. 4. It names "Quick Fitting" as "Licensor." The identity of the counter-parties, defined as "Licensee," has been, and continues to be, disputed. [E.g., Quick Fitting, 2015 U.S. Dist. LEXIS 131452, 2015 WL 5719503, at \\*2](#). Briefly, the Agreement recites that it is between Quick Fitting and "W&F Manufacturing"; the latter is "comprised of three divisions" — Wai Mao, Wai Feng Trading and CCWFBV. [Id.](#) As Quick Fitting's original verified complaint in 13-56 confirms and as the Court has held, the parties understood that "W&F Manufacturing" was not a company, but simply a trade name used by the Wai Feng parties — "just a name to tell our customer that we have these companies, like that we work with these companies." [Id.](#); [see](#) ECF No. 132 at 3, 11-13 (finding W&F Manufacturing "is not an entity").

The three "divisions" [\*17] were three separate entities. [See Quick Fitting, 2015 U.S. Dist. LEXIS 131452, 2015 WL 5719503, at \\*2](#). While Wai Mao and Wai Feng Trading are properly named (as each was to play a critical role in the business relationship as importer and distributor respectively), the Wai Feng parties contend that the naming of CCWFBV was an error committed by Quick Fitting's attorneys that was not noticed by Andrew Yung when he signed the document.<sup>15</sup> [Id.](#) According to the Wai Feng parties, prior to 2010, they had abandoned their venture with CCWFBV, which had been manufacturing for them. Instead, all manufacturing (including all manufacturing of product ordered by Quick Fitting) was done at EFF Manufactory, which should have been named in the 2010 License/Supply Agreement. WF Ex. 1 ¶¶ 11-13. Quick Fitting concedes that it drafted the document, but insists that it was told by Andrew Yung that manufacturing was to be done at CCWFBV, which it was, Quick Fitting claims, until April 2011 when it finally shifted to the Wai Feng parties' new manufacturing entity, EFF Manufactory. QF SDF # 1 ¶¶ 6, 18-19 & 60; Crompton Aff. # 1 ¶ 4; [see](#) WF SUF # 1 ¶ 59; QF SDF # 1 ¶ 59.<sup>16</sup> To avoid confusion, the disputed "Licensee[s]" in the 2010 License/Supply Agreement will be referred to as [\*18] the "2010 WF Contracting parties."

<sup>14</sup> The third of the three, the 2011 License Agreement, provides that construction of the language against the drafter is waived. WF Ex. 11 ¶ 5.18.

<sup>15</sup> Andrew Yung signed the 2010 License/Supply Agreement without authorization to execute agreements on behalf of CCWFBV. Because he signed the 2010 License/Supply Agreement on behalf of an entity for which he lacked authority to sign, and because the Agreement subjects signatories to the jurisdiction of this Court, Andrew Yung's defense of lack of personal jurisdiction was overruled, making him a party to 13-56 in his personal capacity. [Quick Fitting, 2015 U.S. Dist. LEXIS 131452, 2015 WL 5719503, at \\*7](#). Andrew Yung's separate summary judgment motion challenging his joinder is addressed *infra*.

<sup>16</sup> [See](#) n.12 *supra*.

The portion of the 2010 License/Supply Agreement that addresses the supply relationship contemplates that the 2010 WF Contracting parties will manufacture, and Quick Fitting "will purchase," certain "Finished Products," which are listed on Schedule 1 as consisting of "[a]ll sizes and variations" of push-fit fittings, valves, controls, supply line, retail packaged products and accessories, as well as "PEX barb fittings." WF Ex. 4 at 1, 8 (Schedule 1). Importantly, the 2010 License/Supply Agreement expressly provides that the Finished Products "may, or may not include . . . intellectual property of [Quick Fitting]." Id. at 1. Nevertheless, all Finished Products were to be manufactured "for exclusive distribution by Quick Fitting." Id. The 2010 License/Supply Agreement does not address the price of the Finished Products nor does it reference payment or delivery terms. It does require that the Finished Products must comply with applicable laws, regulations, specified testing standards and certifications and must be free of defects, dirt, spotting or discoloration. Id. ¶ 4(b, d). The 2010 WF Contracting parties were obliged to replace non-compliant [\*19] products. Id. ¶ 4(d).

In the provisions of the Agreement addressing the licensing arrangement, the 2010 License/Supply Agreement provides that Quick Fitting has intellectual property (including patents, and related concepts, processes and inventions) that it may in its sole discretion provide to the 2010 WF Contracting parties in connection with the manufacture of certain of the "Finished Products." Id. at 1. The Finished Products that incorporate the designs and other intellectual property of Quick Fitting are the "Licensed Product." Id. The license permits the 2010 WF Contracting parties to use its push-fit patents in connection with the manufacture of Finished Products "containing the Licensed Product." Id. at 1, ¶ 1. Ancillary to the license, the 2010 License/Supply Agreement contains certain unchallenged restrictions on the use and disclosure of the information provided by Quick Fitting. In so doing, it distinguishes information that is not proprietary to Quick Fitting from "proprietary and confidential" information. Id. ¶ 3. As defined, "Information" is anything provided by Quick Fitting to the 2010 WF Contracting parties, whether or not proprietary; the 2010 WF Contracting parties are barred [\*20] from using Information except to manufacture and distribute Finished Products for sale to Quick Fitting. Id. at 1, ¶ 3, 4(b). Only when Quick Fitting provides Information to the 2010 WF Contracting parties that is "designated in writing as being proprietary and confidential," are the 2010 WF Contracting parties also barred from disclosing such Information to any third party. Id. ¶ 3. Excluded from these limits on use and disclosure is any information that is publicly available or that was already known by, was in the possession of, or had been developed by the 2010 WF Contracting parties. Id. ¶ 3.

In addition to the exclusivity provision barring the 2010 WF Contracting parties from selling the Finished Products to any entity other than Quick Fitting, Id. ¶ 4(b), the Agreement also has a clause stating that Quick Fitting "agrees to purchase the Licensed Product described in the attached Purchase Schedule only from [the 2010 WF Contracting parties]." Id. ¶ 4(c). Despite this clause, throughout the period of the parties' course of dealing, Quick Fitting consistently purchased push-fit from a wide array of suppliers. WF SUF # 1 ¶¶ 12-13. Further, this arguable exclusivity clause relates only to [\*21] "Licensed Product," rather than "Finished Product"; moreover, the clause references an "attached Purchase Schedule," yet the Agreement does not have an attachment so labeled.<sup>17</sup>

The termination clause (¶ 5) in the body of the 2010 License/Supply Agreement provides that it continues until terminated; termination without cause requires 120 days' notice, but termination with cause needs only thirty days' notice; and the Agreement may be immediately terminated by a breach of the duties to manufacture to specification or to manufacture exclusively for Quick Fitting.<sup>18</sup> WF Ex. 4 ¶ 5(a-d). Post-termination, the license lapses and all use of Information provided by Quick Fitting (whether or not proprietary) must stop. Id. ¶ 6.

<sup>17</sup> An identical clause came under review in another one of the cases currently pending in this District in which Quick Fitting relies on restrictive covenants in an agreement to avoid the accusation by a Chinese supplier that Quick Fitting had failed to pay for manufactured product. Quick Fitting, Inc. v. Zhejiang Xingxin Aite Copper Mrg., Co., C.A. No. 11-463WES. In that case, the Court found the clause to be ambiguous in the context of a discovery dispute. Text Order of Dec. 27, 2016 (finding "apparent ambiguity" of "exclusivity obligation"). See also Yuhuan Jinquan Copper Co., Ltd v. Quick Fitting, C.A. No. 14-243WES.

<sup>18</sup> The parties dispute when and how the 2010 License/Supply Agreement was terminated. The Wai Feng parties contend that they terminated it for cause (based on Quick Fitting's breach) through notice given by their Canadian solicitor on December 7, 2012. ECF No. 223 at 5; ECF No. 223-1 at 1. Quick Fitting disputes the effectiveness of the Wai Feng parties' letter, claiming that it was not written by the right entities. ECF No. 228 at 7-8. For its part, Quick Fitting now contends that the 2010

The Wai Feng parties do not challenge the validity of any of the restrictive clauses described above. "Schedule 2," which appears on the last page of the 2010 License/Supply Agreement, is a different story. *Id.* at 9.

While undisputedly part of the Agreement,<sup>19</sup> Schedule 2 is unsigned and is not referenced as an attachment in the body of the 2010 License/Supply Agreement. [\*22] It is titled "Purchase Volume and Contract Term" and appears to establish the minimum purchase volumes that Quick Fitting must buy, with the duty imposed on Quick Fitting to "update volume demands on a quarterly basis to assist the Licensee in production planning and performance." *Id.* The record does not reveal whether Quick Fitting complied with this duty.

Consistent with the disconnect between Schedule 2 and the rest of the Agreement, Schedule 2 contradicts the body of the 2010 License/Supply Agreement in several key respects. First, contradicting the ambiguous mutual exclusivity provision in ¶ 4(c), Schedule 2 expressly specifies that exclusivity is unilateral in that the 2010 WF Contracting parties are bound by exclusivity but Quick Fitting is not. *Id.* at 9 ("Licensor manufactures on its own and through its other contract suppliers."). Second, Schedule 2 establishes a completely different term for the length of the relationship: rather than open-ended duration, subject to termination on notice, Schedule 2 provides for a term of "a forty-eight (48) month period" from the date of execution. *Id.* Third, Schedule 2 contains two clauses on non-competition and non-solicitation/ confidentiality, [\*23] both of which are starkly different from the protections baked into the body of the 2010 License/Supply Agreement. These two clauses are the only ones in the 2010 License/Supply Agreement that are challenged by the Wai Feng parties.

The non-competition clause in Schedule 2 provides that the 2010 WF Contracting parties "may not compete with [Quick Fitting], directly or indirectly in any market [Quick Fitting] may serve[,] as well as that the 2010 WF Contracting parties "may not manufacture directly or through a third party any push-fit (push connect) fittings for any party outside of [Quick Fitting]." *Id.* The non-competition clause has no time or geographic limit; nor is it restricted to push-fit products that incorporate Quick Fitting's proprietary or non-proprietary information; nor is it limited to push-fit products, as Quick Fitting "may serve" other plumbing parts or component markets.

Schedule 2's confidentiality/non-solicitation clause is also sweeping. It provides that the 2010 WF Contracting parties "may never contact, either directly or indirectly, any customer or potential customer of [Quick Fitting], whether indicated below,<sup>20</sup> or unknown to [the 2010 WF Contracting parties], [\*24] for any purpose." *Id.* This clause is unlimited in time, geography and subject matter scope. Because it is undisputed that the Wai Feng parties were established as manufacturers and sellers of plumbing products before they entered into the Quick Fitting relationship, see WF SUF # 1 ¶¶ 3-4, this confidentiality clause prohibits them from contacting even their own customers.

The severance clause in ¶ 9(f) of body of the 2010 License/Supply Agreement provides that, "[s]hould all or any portion of any provision of this Agreement be held unenforceable or invalid for any reason, the remaining portions or provisions shall be unaffected." WF Ex. 4 ¶ 9(f).

License/Supply Agreement was terminated by operation of law in May 2011, when the parties entered into two new agreements, the 2011 NDA and License Agreement. This proposition is contradicted by Crompton's *Fed. R. Civ. P. 30(b)(6)* testimony that the 2011 Agreements were signed to add the name of EFF Manufactory, which had become the manufacturing arm of the Wai Feng parties, and that, otherwise the 2010 Agreement continued: "So the manufacturing arm's name had changed while everything else hadn't. So everything else stayed in place, and we created a new agreement surrounding the new manufacturing name." ECF No. 206-5 at 12.

<sup>19</sup> The Wai Feng parties do not challenge the authenticity of Schedule 2 as part of the 2010 License/Supply Agreement, although they do challenge the enforceability of some of its content.

<sup>20</sup> Nothing is "indicated below," leaving this phrase of the confidentiality clause meaningless. Quick Fitting has admitted that it never provided the Wai Feng Parties with a list of customers or even prospective customers to which this prohibition would apply. WF SUF # 1 ¶ 82. In his *Fed. R. Civ. P. 30(b)(6)* deposition, when Crompton was asked whether Quick Fitting ever provided this list of the customers covered by this prohibition, he testified: "I don't know why we would. We would never have been required to. That would have never been anything we would have done with them. They were precluded from selling push fit, period, whether it was customers or not." ECF No. 206-7 at 2; see n.22 *infra*.

## 2. 2011 NDA

Fifteen months into the parties' relationship, on May 4, 2011, the 2011 NDA was executed. WF Ex. 9. The second of the three Agreements, it neither confers a license nor is a supply agreement, but simply imposes non-disclosure obligations. Like the 2010 License/Supply Agreement, there is confusion regarding what entity was meant to be the proper party on the Wai Feng parties' side. Briefly, it names EFF LLC, the Massachusetts entity that had little to do with the relationship with Quick Fitting; the Wai Feng parties say it [\*25] should have named EFF Inc.; while Crompton testified that it should have been "a new company, 'EFF,' that was located in 'Toronto and in China' and that the new company would be taking over the manufacturing operations formerly handled by the 'W&F Manufacturing' factory."<sup>21</sup> Crompton Aff. # 2 ¶¶ 12-13.

The substance of the 2011 NDA is also limited. In scope, it operates solely to protect confidential information ("Information") that was provided by Quick Fitting to the counter-party (whoever it might be) about its push-fit products for the sole purpose of procuring cost estimates for specified components. WF Ex. 9 ¶ I(B). For Information to be protected by the 2011 NDA, Quick Fitting could, but was not obligated, to label it as confidential. Id. ¶ I(3). The 2011 NDA barred the recipient from disclosing Information or using it to compete against Quick Fitting. Id. ¶ I(1).

Only one clause in the 2011 NDA is challenged as overbroad and unenforceable. It is an outright ban on any "contact, communicat[ion] or negotiat[ion] with any competitor, supplier, customer or prospect" of Quick Fitting; this clause has no time or geographic limit and no direct relationship to the protection of the confidential [\*26] information covered by the 2011 NDA. Id. ¶ I(1)(h). Unlike the analogous clause in the 2010 License/Supply Agreement, the 2011 NDA does require that the identity of the companies with which contact is forever prohibited must be "readily known[ or] disclosed by Quick Fitting or made known to the Recipient by any communication" from Quick Fitting.<sup>22</sup> Id.

The 2011 NDA arguably survived only three weeks in that it is expressly "supercede[d] and replace[d]" by the 2011 License Agreement. WF Ex. 11 ¶ 1.2. It is silent regarding the effect of a judicial finding that any of its terms are invalid or unenforceable.

## 3. 2011 License Agreement

Three weeks later, on May 31, 2011, the third agreement, the 2011 License Agreement, was executed. This one correctly names EFF Manufactory as the counter-party. Unlike the 2010 License/Supply Agreement, but like the 2011 NDA, the 2011 License Agreement is not a supply agreement.<sup>23</sup> Rather, it simply licenses EFF Manufactory to receive Quick Fitting's intellectual property<sup>24</sup> regarding its push-fit line of products "exclusively for the purpose of

<sup>21</sup> The Court has previously addressed the confusion over which EFF entity is named in the 2011 NDA. *Quick Fitting, 2015 U.S. Dist. LEXIS 131452, 2015 WL 5719503, at \*3* (naming of EFF LLC in 2011 NDA "appears to be wrong . . . EFF LLC apparently has nothing to do with the business arrangement with Quick Fitting.").

<sup>22</sup> It is undisputed that Quick Fitting never provided any of the Wai Feng parties with a list of entities it considered to be covered by this contact ban. WF SUF # 1 ¶ 82. Quick Fitting counters that it regularly communicated with the Wai Feng parties regarding the identity at least of its "customers, markets, and marketing efforts," QF SDF # 1 ¶ 82, although it makes no mention of who is in the class of "competitor [or] supplier," or how the counter-party to the 2011 NDA would have known what entities were its competitors and suppliers. WF Ex. 9 ¶ I(1)(h); see n.20 *supra*.

<sup>23</sup> Although EFF Manufactory is identified in the preamble to the Agreement as the "Supplier," and although Quick Fitting's briefs repeatedly refer to the 2011 License Agreement as a "supply" agreement, e.g., ECF No. 193 at 5 ("2011 License and Supply Agreement") (emphasis added), it is a license agreement with restrictive covenants that contemplates the possibility of a supply relationship, but expressly eschews forming one. WF Ex. 11 ¶ 5.2.

providing cost estimates and business proposals for the manufacture and supply of certain products and component parts [\*27] of products in the hope that Quick Fitting will purchase said products and components [sic] parts from [EFF Manufactory]." WF Ex. 11 at 1. It also provides a non-exclusive license to EFF Manufactory to use listed patents, trademarks, and drawings and similar materials belonging to Quick Fitting for "the manufacture and supply . . . to Quick Fitting." *Id.* ¶ 3.1. It leaves Quick Fitting free to license any other entity. *Id.* ¶ 3.2. It does not oblige Quick Fitting to place any orders: "Quick Fitting makes no representation that it will enter into a relationship; and is under no obligation to enter into any further agreement." *Id.* ¶ 5.2. Although many of its terms are keyed to "termination," the 2011 License Agreement has no termination clause; under Rhode Island law, this means that it is terminable at will on reasonable notice. See *Chapman v. Vendresca*, 426 A.2d 262, 264 n.2 (R.I. 1981) ("when contract does not specify time within which notice of termination must be given, terminating party has reasonable time") (citing *Coopersmith v. Isherwood*, 219 Md. 455, 150 A.2d 243, 247-48 (Md. 1959)).

The 2011 License Agreement contains a lengthy Section II, which deals with EFF Manufactory's treatment of Quick Fitting's "confidential information," as defined in ¶ 1.3. WF Ex. 11 ¶¶ 2.1-2.8. The Wai [\*28] Feng parties do not challenge any of the clauses contained in Section II, which bar any disclosure or use of the confidential information, except as necessary to manufacture push-fit to be sold to Quick Fitting. Section IV of the 2011 License Agreement is headed "Terms of Non-Competition." *Id.* ¶¶ 4.1-4.7. Its first two clauses focus on the confidential intellectual property covered by the Agreement, preventing EFF Manufactory from using it to "compete with, defame, hinder, or cause harm" to Quick Fitting. *Id.* ¶ 4.1. They also prevent EFF Manufactory from selling products "utilizing" the confidential information covered by the Agreement to any party other than Quick Fitting as directed by Quick Fitting. *Id.* ¶¶ 4.1-4.2. The Wai Feng parties do not challenge these two clauses either. Rather, the motion is focused on three of the remaining clauses, which appear in Section IV.

The first challenged clause is at ¶ 4.6 and titled, "Liquidated Damages/Contract Penalty." It provides that any breach of any clause in the non-competition section of the Agreement shall result in a contract penalty of \$500,000, in addition to any damages Quick Fitting is able to prove. *Id.* ¶ 4.6. During his *Fed. R. Civ. P. 30(b)(6)* deposition, [\*29] Crompton testified that he did not know how the amount in the "Liquidated Damages/Contract Penalty" clause was determined, except that the amount was chosen to be "punitive." WF Ex. 8 at 29-30. After the Wai Feng parties' challenge to this clause was filed, Crompton executed his second affidavit, in which he averred to a changed understanding that the clause reflected an estimate of business losses. Crompton Aff. # 2 ¶¶ 15, 33-37.

The second challenged clause is the non-compete in ¶ 4.3. WF Ex. 11 ¶ 4.3. It permanently bans EFF Manufactory from ever, "directly or indirectly through others, compet[ing] with Quick Fitting in the design, manufacture, supply, sale, or distribution of push-fit connection valves, fittings, supply line or controls." *Id.* Infinite in duration and worldwide in geographic scope, ¶ 4.3 is not limited to push-fit products incorporating either Quick Fitting's intellectual property or its non-proprietary information — it effectively bars EFF Manufactory from ever entering any push-fit market anywhere, including from manufacturing pursuant to the specifications of another owner of push-fit designs, as well as from developing its own push-fit designs. In his *Fed. R. Civ. P. 30(b)(6)* deposition, [\*30] Crompton described his view of the non-competition clause:

It would be my understanding that [the Wai Feng parties] were precluded from selling anything related to push fit products to any potential customers or competitors in North America, period.

WF SUF # 1 ¶ 75 (citing WF Ex. 17 at 7-8).<sup>25</sup>

<sup>24</sup> The 2011 License Agreement defines the covered intellectual property as "all information provided by Quick Fitting to [EFF Manufactory] . . . pertaining to Quick Fitting quick connection valves, fitting and controls," as well as to its designs, product development, customers, prospects, costs, and financial information. WF Ex. 11 ¶ 1.3. It also includes the identities of customers and prospective customers of Quick Fitting "at any time." *Id.* It does not include information that is generally publicly available or information that was provided to EFF Manufactory by a third party or information that was independently developed by EFF Manufactory. *Id.* ¶¶ 1.3-1.5.

<sup>25</sup> No limitation to North America appears in the Agreement. While Quick Fitting has not argued that its restrictive clauses should be interpreted as limited to North America based on this testimony, the Court notes that it could not, in that a party cannot retroactively make the terms of the non-compete provision palatable by now asserting that it did not plan on enforcing the

Third is the challenged non-solicitation/confidentiality clause in ¶ 4.4. WF Ex. 11 ¶ 4.4. Unlike the other challenged restraints, it is limited in duration to three years following the termination of the 2011 License Agreement. *Id.* During that three-year period, EFF Manufactory is barred from any contact or communication with any "customer or prospective customer of Quick Fitting" or with the representatives of such entities, including (but not limited to) any known to be such by EFF Manufactory. *Id.* And, if any such "Prohibited Party" or its representative should contact EFF Manufactory, EFF Manufactory must not respond but must forward such communication to Quick Fitting. *Id.* ¶ 4.5. This ban on all communication and contact is not limited as to subject matter.

The 2011 License Agreement includes a provision that mandates how a court should proceed in the event that [\*31] any of the clauses are held invalid or unenforceable: "such invalidity shall not affect the validity or operation of any other provision and such invalid provision shall be deemed to be severed from the Agreement." *Id.* ¶ 5.21.

## B. Law and Analysis Applicable to Enforceability of Restrictive Clauses

When contract language is clear and unambiguous, summary judgment is an appropriate vehicle for resolving contract interpretation disputes. See Mallane v. Holyoke Mut. Ins. Co., 658 A.2d 18, 20 (R.I. 1995); Elliott v. S.D. Warren Co., 134 F.3d 1, 9 (1st Cir. 1998). "Contract interpretation, including whether any ambiguities exist in the disputed contractual terms, is generally a question of law for the [c]ourt." Doe v. W. New England Univ., 228 F. Supp. 3d 154, 170 (D. Mass. 2017); see Rotelli v. Catanzaro, 686 A.2d 91, 94 (R.I. 1996); Kelly v. Tillotson-Pearson, Inc., 840 F. Supp. 935, 944 (D.R.I. 1994) (quoting In re Navigation Tech. Corp., 880 F.2d 1491, 1495 (1st Cir. 1989)). When a clause is clear and unambiguous on its face, the role of the court is to enforce it as written. Kelly, 840 F. Supp. at 944 (quoting Aetna Casualty & Sur. Co. v. Graziano, 587 A.2d 916, 917 (R.I. 1991)). "In determining whether or not a particular contract is ambiguous, the court should read the contract 'in its entirety, giving words their plain, ordinary, and usual meaning.'" T.G. Plastics Trading Co. Inc. v. Toray Plastics (Am.), Inc., 958 F. Supp. 2d 315, 321-22 (D.R.I. 2013) (quoting Haviland v. Simmons, 45 A.3d 1246, 1258 (R.I. 2012)). "[A] contract is ambiguous only when it is reasonably and clearly susceptible of more than one interpretation." Rotelli, 686 A.2d at 94.

If an ambiguity is found and the extrinsic evidence of the intent of the parties is factually disputed, summary judgment is inappropriate and the proper construction of the contract is a question of fact for the fact finder. Toray, 958 F. Supp. 2d at 322; see OfficeMax Inc. v. Sousa, 773 F. Supp. 2d 190, 216 (D. Me. 2011) (court [\*32] "may look to extrinsic evidence of the intent of the parties") (quoting Villas by the Sea Owners Ass'n v. Garrity, 2000 ME 48, 748 A.2d 457, 461 (Me. 2000)). However, even if a contract is ambiguous, when there are no facts in dispute, the interpretation of a contract is a question of law for the court. OfficeMax Inc., 773 F. Supp. 2d at 216. "The preferable approach is to interpret a contract in a manner which will give effect to all of its provisions," and "where two clauses of an agreement appear to be in direct conflict, it is the duty of the court to reconcile the two clauses to give effect to the whole of the instrument." Jadwin v. Cty. of Kern, 610 F. Supp. 2d 1129, 1191 (E.D. Cal. 2009) (quoting In re Steven A., 15 Cal. App. 4th 754, 771, 19 Cal. Rptr. 2d 576 (1993); In re Marriage of Whitney, 71 Cal. App. 3d 179, 182, 139 Cal. Rptr. 324 (1977)).

### 1. "Liquidated Damages/Contract Penalty" Clause

The clause challenged as an improper penalty is titled "Liquidated Damages/Contract Penalty," and set out in ¶ 4.6 of the 2011 License Agreement. In full, it provides:

Liquidated Damages/Contract Penalty. Supplier acknowledges and agrees that any violation or breach of this Non-Competition section of this Agreement: (i) shall result in a contract penalty against supplier in an amount

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provision as it is written; the acceptance of such a position would effectively allow clauses that violate public policy to flourish until confronted by the prospect of litigation and the reality of unenforceability. See Webster Ins., Inc. v. Levine, No. X06CV074016194S, 2009 Conn. Super. LEXIS 3431, 2009 WL 5698072, at \*3 (Conn. Super. Ct. Apr. 29, 2009).

not less than five-hundred-thousand dollars and zero cents (\$500,000) (the "Contract Penalty"), payable to Quick Fitting within thirty (30) days after invoicing of this amount to Supplier; (ii) that Quick Fitting is authorized to withhold all [\*33] or any portion of the Contract Penalty from any payments otherwise due to Supplier until such Contract Penalty is fully paid; and (iii) that the Contract Penalty amount shall be in addition to and shall not reduce the amount of actual damages Quick Fitting is able to prove for any breach or violation of this or any other section of this Agreement.

WF Ex. 11 ¶ 4.6. It appears only in the third of the three Agreements, in which EFF Manufactory is the only party for the Wai Feng parties. *Id.* The content of ¶ 4.6 is not ambiguous — it crisply and clearly provides that EFF Manufactory must pay a "contract penalty" of \$500,000 in the event of any violation or breach of any of the clauses in Section IV of the Agreement. The Section IV clauses<sup>26</sup> include: (1) the ban on using Quick Fitting's confidential information to compete with Quick Fitting (¶ 4.1); (2) the ban on making push-fit with Quick Fitting designs for sale to third parties (¶ 4.2); (3) the absolute ban on ever competing with Quick Fitting by designing, manufacturing or selling any push-fit product (without regard to whether any Quick Fitting confidential information is used) anywhere in the world (¶ 4.3); and (4) the absolute ban [\*34] on any communication regarding any topic with any customer or prospective customer of Quick Fitting (who may well be pre-existing customers of the Wai Feng parties) for three years following the termination of the Agreement (¶ 4.4). The "Liquidated Damages/Contract Penalty" clause also absolves Quick Fitting from paying what it owes EFF Manufactory until the "Contract Penalty" is paid in full. *Id.* ¶ 4.6. Confirming that it is not in lieu of damages, ¶ 4.6 provides that "the Contract Penalty amount shall be in addition to and shall not reduce the amount of actual damages Quick Fitting is able to prove for any breach or violation of this or any other section of this Agreement." *Id.*

During Quick Fitting's October 27, 2015, [Fed. R. Civ. P. 30\(b\)\(6\)](#) deposition, Crompton testified that he did not know how the amount in the Liquidated Damages/Contract Penalty clause was determined. WF Ex. 8 at 28-29. He stated, "I can't speak to that[,] and offered, "[i]t was put in there to be punitive to really thwart them, deter them from doing it." *Id.* at 28-30 ("the number is picked as a deterrent") (emphasis added). Crompton directly contradicted this [Fed. R. Civ. P. 30\(b\)\(6\)](#) testimony in his second affidavit, which was filed with Quick Fitting's opposition [\*35] to the motion challenging the clause as an unenforceable penalty. In this changed testimony, he avers that the penalty actually represented an "estimate of our loss of business or loss of business profitability over time" that Quick Fitting would incur if one of its contracting manufacturers breached its contractual obligations, as well as the cost of finding a new manufacturer. Crompton Aff. # 2 ¶¶ 15, 33-37. Crompton's second affidavit alters his earlier description of the clause as merely punitive, asserting, "[a]ny reference to the word 'punitive' in deposition testimony was intended to reflect my expectation that the amount would be significant enough to offset the aspects of harm and costs described here, which we anticipated but found difficult to estimate." *Id.* ¶ 37.

Rhode Island law distinguishes contractual penalties from liquidated damages. The former are unenforceable as a matter of public policy, while the latter may be enforceable if the harm caused by the breach is difficult to estimate and the amount fixed is a reasonable forecast of actual harm. See [ADP Marshall, Inc. v. Noresco, LLC, 710 F. Supp. 2d 197, 234-35 \(D.R.I. 2010\)](#) (citing [Howarth v. Feeney, P.C. No. 86-3543, 1992 R.I. Super. LEXIS 18, 1992 WL 813502, at \\*3 n.2 \(R.I. Super. Jan. 15, 1992\)](#)) ("a sum of money . . . to be forfeited in case of breach, may be either a penalty or liquidated damages"), [\*36] amended, [No. C.A. No. 80-265, 1992 R.I. Super. LEXIS 19, 1992 WL 813534 \(R.I. Super. Mar. 17, 1992\)](#); [Psaty & Fuhrman v. Hous. Auth. of City of Providence, 76 R.I. 87, 68 A.2d 32, 38-39 \(R.I. 1949\)](#) (if contract for liquidated damages amounts to imposition of penalty, it is unenforceable; "we consider the provision for liquidated damages . . . as coercive in nature and therefore in substance the imposition of a penalty"). To differentiate a true liquidated damages clause from an unenforceable contract penalty, Rhode Island courts rely on three criteria: first, the injury caused by the breach must be difficult accurately to estimate; second, the parties must intend to provide for damages rather than a penalty; and third, the sum stipulated must be a reasonable pre-estimate of the loss. [Aetna Cas. & Sur. Co. v. R.I. Elec. Protective Co., No. 78-1761, 1979 WL 200238, at \\*1 \(R.I. Super. Jan. 5, 1979\)](#). Reinforcing the importance of this judicially-created policy, the Rhode Island legislature adopted the same principle when it enacted the Rhode Island Uniform Commercial Code. See [R.I. Gen. Laws § 6A-2-718](#) ("[d]amages for breach by either party may be liquidated in the agreement but only at an

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<sup>26</sup> Two of these Section IV clauses (¶¶ 4.3 and 4.4) are challenged as unenforceable. The remainder are not challenged.

amount which is reasonable in light of the anticipated or actual harm caused by the breach"). To be enforceable, the purpose of the clause must be to compensate for loss, not to punish. [Allstate Interiors & Exteriors, Inc. v. Stonestreet Constr., LLC, 907 F. Supp. 2d 216, 247 \(D.R.I. 2012\)](#). The label placed on the clause by the drafter is not dispositive — a self-described liquidated damages clause must be condemned if it [\*37] is punitive in effect. [Omni-Combined W.E., LLC v. 20/20 Commc'nns, Inc., No. PB 10-2530, 2012 R.I. Super. LEXIS 78, 2012 WL 1957733, at \\*4 \(R.I. Super. May 18, 2012\)](#) (accelerated rent clauses are enforceable if "they do not constitute a penalty").

Courts in other states applying the same principles have declined to enforce a fixed penalty because such a set sum can have no rational relationship to anticipated actual damages. [Willard Packaging Co. v. Javier, 169 Md. App. 109, 899 A. 2d 940, 955-56 \(Md. Ct. Spec. App. 2006\)](#) (fixed sum penalty — \$50,000 — is unenforceable); [see XCO Intern. Inc. v. Pac. Scientific Co., 369 F.3d 998, 1004 \(7th Cir. 2004\)](#) (if sanction is fixed and outsized, such as "\$500,000, period," it is highly likely to be prohibited a penalty). A fixed sum is particularly vulnerable to condemnation as a penalty if the same sanction for breach of varying provisions in an agreement is imposed without regard to the differing injury that each breach might inflict. [Monsanto Co. v. McFarling, 363 F.3d 1336, 1346 \(Fed. Cir. 2004\)](#) (applying Missouri law and stating, "[t]his fixed rule of Missouri contract law is not unusual. Variations on this anti-one-size rule are applied in a number of jurisdictions"); [United States v. J.C. Martin Lumber Co., 246 F.2d 58, 62 \(5th Cir. 1957\)](#) (applying Mississippi law and labeling a contractual damages clause a penalty because it provided for double payment and "without discrimination, provides the same penalty for leaving marked trees uncut as for cutting unmarked tress, and, as to trees injured through carelessness, [\*38] provides the same penalty without regard to the extent in each case of the injury").

Another important characteristic of an unenforceable penalty is the ability of the non-breaching party to recover both the so-called liquidated damages, as well as actual damages resulting from the breach. [See Nat'l Fitness Ctr., Inc. v. Atlanta Fitness, Inc., 902 F. Supp. 2d 1098, 1108-09 \(E.D. Tenn. 2012\)](#) (where "liquidated damages" in license agreement is fixed sum that does not supplant other available remedies, it acts as a penalty and may not be enforced); [Webster Ins., 2009 Conn. Super. LEXIS 3431, 2009 WL 5698072, at \\*2](#) ("contract provision that authorizes the non-breaching party to recover both actual damages and all revenues earned as a result of the breach constitutes an invalid penalty, unenforceable as a matter of public policy"). And if a liquidated damages provision is "designed to coerce performance by punishing default[]," any doubt as to its character must be resolved by finding it to be an unenforceable penalty. [Captain D's, LLC v. Arif Enters., Inc. No. 3:09-00809, 2010 U.S. Dist. LEXIS 129242, 2010 WL 5060289, at \\*9 \(M.D. Tenn. Dec. 6, 2010\)](#) (quoting [Guesthouse Int'l Franchise Sys., Inc. v. British Am. Props. MacArthur Inn, LLC, No. 3:07-0814, 2009 U.S. Dist. LEXIS 8570, 2009 WL 278214, at \\*9-10 \(M.D. Tenn. Feb. 5, 2009\)](#)).

The validity of a liquidated damages clause is a pure question of law for the court. [See Clark-Fitzpatrick, Inc./Franki Found. v. Gill, 652 A.2d 440, 443 \(R.I. 1994\)](#) ("Contract interpretation is a question of law; it is only when contract terms are ambiguous [\*39] that construction of terms becomes a question of fact."); [Wholey Boiler Works v. Lewis, 45 R.I. 441, 123 A. 595, 598 \(R.I. 1924\)](#) ("The question whether a deposit or other payment is to be regarded as a penalty or liquidated damages is to be decided upon consideration of the provisions of the whole agreement, in view of the circumstances of each case; and the intention of the parties as thus disclosed is the decisive test."); [see also Olcott Intern. & Co. v. Micro Data Base Sys., Inc., 793 N.E. 2d 1063, 1077 \(Ct. App. Ind. 2003\)](#) ("the question whether a liquidated damages clause is valid, or whether it constitutes an unenforceable penalty, is a pure question of law for the court"). The party challenging the enforceability of a liquidated damages clause has the burden of proving that it is a penalty. [Honey Dew Assocs. v. M & K Food Corp., 241 F.3d 23, 27 \(1st Cir. 2001\)](#).

Applying these principles to the 2011 License Agreement is an easy task in light of the clarity of ¶ 4.6. Apart from the heading, Quick Fitting has drafted the operative clause such that it unambiguously amounts to a penalty. For starters, the \$500,000 consequence is an outsized sum, [XCO Intern. Inc., 369 F.3d at 1004](#), which is expressly defined as a "Contract Penalty," in that the clause expressly recites that "any violation or breach . . . shall result in a contract penalty . . . in an amount not less than [\$500,000]." WF Ex. 11 ¶ 4.6. It clearly operates as a penalty because it [\*40] is a fixed one-size-fits-all consequence applied for breach of an array of non-competition clauses, [Monsanto Co., 363 F.3d at 1346](#), to be imposed without regard to whether the harm caused by a breach is

substantial or mild, [XCO Intern. Inc., 369 F.3d at 1004](#). Also pellucid is that it is not intended as an estimate of hard-to-calculate damages. To the contrary, ¶ 4.6 expressly provides that "the Contract Penalty amount shall be *in addition to* and shall not reduce the amount of actual damages Quick Fitting is able to prove for any breach or violation of this or any other section of this Agreement." WF Ex. 11 ¶ 4.6 (emphasis added). The clause's imposition of a penalty that also permits recovery of actual damages is further reason why it must be condemned as an outright penalty. See [Psaty, 68 A.2d at 39; Nat'l Fitness Ctr., Inc., 902 F. Supp. 2d at 1108-09](#). Accordingly, in reliance on the plain and unambiguous text of ¶ 4.6, I find that Quick Fitting attempted to impose a draconian penalty contrary to the public policy of Rhode Island, so that this Court should hold that ¶ 4.6 is unenforceable.

A lingering issue is whether the ambiguity in the heading — "Liquidated Damages/Contract Penalty" — somehow saves the day. This heading seems to be an attempt by the drafter to straddle the fence between liquidated damages and penalty, [\*41] while actually crafting text that is unambiguously a penalty. There are several problems with this proposition. First, Quick Fitting has not asserted this argument; indeed, it does not contend that any aspect of ¶ 4.6 is ambiguous. Second, traditional principles of construction stipulate that headings cannot alter the plain meaning of the text. See [Bhd. of R. R. Trainmen v. Baltimore & O. R. Co., 331 U.S. 519, 527-28, 67 S. Ct. 1387, 91 L. Ed. 1646 \(1947\)](#) ("[H]eadings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis."); [Lyons v. Ga.-Pac. Corp. Salaried Emps. Ret. Plan, 221 F.3d 1235, 1246 \(11th Cir. 2000\)](#) ("reliance upon headings to determine the meaning of a statute is not a favored method of statutory construction"); see also [Navarro-Ayala v. Hernandez-Colon, 951 F.2d 1325, 1352 \(1st Cir. 1991\)](#) (no individual provision, even a heading, should be interpreted in isolation from its context within the document as a whole). Third, Rhode Island cases teach that the court interpreting such a clause must look beyond labels to substance and condemn those that have the effect of a penalty despite an attempt to hide the penalty in the raiment of liquidated damages. See, e.g., [Allstate Interiors & Exteriors, Inc., 907 F. Supp. 2d at 247-48](#) (with no damages, liquidated damages clause punitive in effect and unenforceable); [Howarth, 1992 R.I. Super. LEXIS 18, 1992 WL 813502, at \\*3](#) (otherwise valid liquidated damages clause becomes punitive and unenforceable if it imposes [\*42] damages when none were incurred); cf. [Applied Elastomerics, Inc. v. Z-Man Fishing Prods., Inc., 521 F. Supp. 2d 1031, 1044-45 \(N.D. Cal. 2007\)](#) (applying California law, whether contract uses label "penalty" or "liquidated damages" is not determinative; court must interpret clause based on substance); see also [Omni-Combined W.E., LLC, 2012 R.I. Super. LEXIS 78, 2012 WL 1957733, at \\*7-8](#) (lease acceleration clause under examination at summary judgment found not to be punitive in effect and therefore enforceable).

To save ¶ 4.6, Quick Fitting asks the Court to focus on Crompton's testimony in his second affidavit, which contradicts his [Fed. R. Civ. P. 30\(b\)\(6\)](#) testimony on the same topic. Without explaining why unambiguous contract language should be interpreted by reference to extrinsic evidence, Quick Fitting argues that the Court should find that it crafted ¶ 4.6 because the harm flowing from a breach would be difficult to quantify and that \$500,000 is reasonable because it approximates the costs of bringing a new supplier up to speed.<sup>27</sup>

This extrinsic evidence argument is unavailing. A threshold problem is that Quick Fitting has not even argued that ¶ 4.6 is ambiguous, which it must be for the Court to consider such extrinsic evidence of what the parties intended. [Toray, 958 F. Supp. 2d at 322](#). And this penalty clause is simply not ambiguous; therefore, the Court must interpret the Agreement's words (chosen by Quick [\*43] Fitting) and cannot rely on Crompton's extrinsic evidence of intent contrary to the meaning of the words. In any event, if the Court were inclined to consider any extrinsic evidence, the operative testimony would be Crompton's answers during his [Fed. R. Civ. P. 30\(b\)\(6\)](#) deposition that \$500,000 was selected to be punitive and that, otherwise, Crompton has no information suggesting any relationship to actual damages. The averments in the clearly contradictory affidavit later submitted to avoid summary judgment, with no satisfactory explanation for why the testimony was changed, should be disregarded as a sham. [A.J. Amer Agency, Inc. v. Astonish Results, LLC, C.A. No. 12-351 S, 2014 U.S. Dist. LEXIS 94324, 2014 WL 3496964, at \\*12-13 \(D.R.I. July 11, 2014\)](#) (contradictory portions of affidavit may be treated as sham and disregarded at summary judgment). So even if the Court did look beyond the Agreement's words, the cognizable extrinsic evidence confirms

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<sup>27</sup> This argument ignores that ¶ 4.6 is embedded in an Agreement that explicitly provides that Quick Fitting was not obligated to purchase any product or to establish EFF Manufactory as a supplier. WF Ex. 11 at 1, ¶ 5.2.

that this clause is a paradigmatic penalty intended to be an *in terrorem* spur to compliance, and not as a fair estimate of damages. It is well-settled contract law that courts do not give their imprimatur to such arrangements. *Priebe & Sons v. United States*, 332 U.S. 407, 413, 68 S. Ct. 123, 92 L. Ed. 32, 109 Ct. Cl. 870 (1947).

Based on the foregoing, I recommend the Court find that ¶ 4.6 [\*44] of the 2011 License Agreement ("Liquidated Damages/Contract Penalty") is unenforceable and deem it severed from the Agreement.<sup>28</sup>

## 2. Non-competition Clauses

The Wai Feng parties challenge two non-competition clauses in Schedule 2 of the 2010 License/Supply Agreement. They provide:

[2010 WF Contracting parties] will only manufacture fittings for [Quick Fitting] exclusively and may not enter into any agreement to manufacture push fit fittings for any other company.

...

[2010 WF Contracting parties] may not compete with [Quick Fitting], directly or indirectly in any market [Quick Fitting] may serve. [2010 WF Contracting Parties] may not manufacture directly or through a third party, any push fit (push connect) fittings for any party outside of [Quick Fitting].

WF Ex. 4 at 9. These clauses lack any limits with respect to time and geography. In scope, they broadly apply not just to the push-fit products manufactured using Quick Fitting's information (whether or not proprietary) but to any push-fit product, including push-fit developed independently by the Wai Feng parties and push-fit manufactured to the specifications of a design developed by a third party unrelated to Quick Fitting. The second of the two clauses goes [\*45] beyond push-fit and beyond direct competition with Quick Fitting, barring the 2010 WF Contracting parties from competing in any market Quick Fitting "may serve," arguably barring the Wai Feng parties from competing in any plumbing product market anywhere in the world, effectively putting them out of business.

The Wai Feng parties also challenge the enforceability of one non-competition clause in the 2011 License Agreement. The challenged 2011 clause provides:

Due to the nature of the Confidential Information and [EFF Manufactory's] unique access to it, [EFF Manufactory] agrees that it shall not, during the term of this Agreement or at any time thereafter, either directly or indirectly through others, compete with Quick Fitting in the design, manufacture, supply, sale, or distribution of push-fit connection valves, fittings, supply line or controls.

WF Ex. 11 ¶ 4.3. Like the challenged clauses from the 2010 License/Supply Agreement, ¶ 4.3 has no temporal or geographic limits and sweeps in all push-fit products without regard to whether any Quick Fitting information — proprietary or not — was used to develop them. *Id.*

The Rhode Island Supreme Court has long enforced the principle that covenants [\*46] not to compete are disfavored and subject to strict judicial scrutiny. *Cranston Print Works Co. v. Pothier*, 848 A.2d 213, 219-20 (R.I. 2004). When considering the validity of a noncompetition agreement, the crucial issue is reasonableness, and that test is dependent upon the particular circumstances surrounding the agreement. *Durapin, Inc. v. Am. Prods., Inc.*, 559 A.2d 1051, 1053 (R.I. 1989). Rhode Island courts enforce such provisions if the party seeking to enforce the non-competition clause can demonstrate that the restriction is ancillary to an otherwise valid transaction or relationship, and that "the contract is reasonable and does not extend beyond what is apparently necessary for the protection of those in whose favor it runs." *Cranston Print Works Co.*, 848 A.2d at 220 & n.2; see also *Macro Niche Software, Inc. v. 4 Imaging Solutions, L.L.C.*, Civil Action No. H-12-2293, 2013 U.S. Dist. LEXIS 194512, 2013 WL 12140417, at \*6 (S.D. Tex. Dec. 18, 2013) (covenant not to compete is enforceable if ancillary to enforceable agreement and "contains limitations as to time, geographical area, and scope of activity to be restrained that are

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<sup>28</sup> Based on this recommendation, I do not address the Wai Feng parties' alternative argument that Quick Fitting never sent the contractually mandated "invoice" and therefore the \$500,000 penalty is not yet due.

reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee").

To aid in this analysis, the Rhode Island Supreme Court has adopted the principles set out in the Restatement (Second) Contracts,<sup>29</sup> which require courts to examine what [\*47] is necessary to protect the specific interest contained in the "valid transaction or relationship" to which the restraint is ancillary. *Home Gas Corp. of Mass. v. DeBlois Oil Co.*, 691 F. Supp. 567, 572-73 (D.R.I. 1987); see *R. J. Carbone Co. v. Regan*, 582 F. Supp. 2d 220, 225 (D.R.I. 2008). In interpreting such a clause in the licensing context, the important public policy interest favoring robust competition must guide the Court's analysis. See *R.I. Gen. Laws § 6-36-2* (purpose of Rhode Island **antitrust law** to "promote the unhampered growth of commerce and industry throughout the state by prohibiting unreasonable restraints of trade and monopolistic practices, inasmuch as these have the effect of hampering, preventing, or decreasing competition"); *Max Garellick, Inc. v. Leonardo*, 105 R.I. 142, 250 A.2d 354, 357 (R.I. 1969) (restrictive covenant may not be "contrary to public policy"); see also *Crye Precision LLC v. Bennettsville Printing*, 15-cv-00221(FB)(RER), 2017 U.S. Dist. LEXIS 159072, 2017 WL 4325817, at \*8 (E.D.N.Y. Sept. 27, 2017) ("Courts analyze restrictive covenants in commercial contracts, such as license agreements, 'under a simple rule of reason, balancing the competing public policies in favor of robust competition and freedom to contract.'"); *Columbia Ribbon & Carbon Mfg. Co. v. A-1-A Corp.*, 369 N.E.2d 4, 6, 42 N.Y.2d 496, 398 N.Y.S.2d 1004 (N.Y. 1977) (When "broad-sweeping language is unrestrained by any limitations keyed to uniqueness, trade secrets, confidentiality or even competitive unfairness[, i]t does no more than baldly restrain competition. This it may not [\*48] do. . . . [O]n its face the covenant is too broad to be enforced as written."). Thus, while "protecting a business's confidential information and goodwill — such as the special relationship its sales force has developed with customers — may qualify as a legitimate interest," *BlueZ4 Corp. v. Macari*, No. KC 2016-1087, 2017 R.I. Super. LEXIS 96, 2017 WL 2620125, at \*3 (R.I. Super. June 13, 2017) (citing *Astro-Med, Inc. v. Nihon Kohden Am., Inc.*, 591 F.3d 1, 17 (1st Cir. 2009)), "the desire to be free from competition, by itself, is not a protectable interest." *Durapin*, 559 A.2d at 1057; see *Home Gas*, 691 F. Supp. at 573-74 ("There is no purpose for the provision other than an anti-competitive purpose, and, it is therefore invalid.").

The reasonableness of a restrictive covenant is a question of law to be determined by the judge. *Durapin*, 559 A.2d at 1053. While not *per se* unenforceable, the lack of temporal and geographic limitations in a non-compete are particularly concerning. *Cranston Print Works Co.*, 848 A.2d at 220 (lack of geographic limit enforceable only if business to which restraint is ancillary is international in character; lack of temporal limit unreasonable if duration longer than necessary to protect legitimate commercial interest in protecting confidential information and trade secrets); see *Max Garellick*, 250 A.2d at 356-57 ("The rule, now generally received, has been recognized in this State, that contract in restraint of trade are not necessarily void by reason of universality of time, . . . nor of space . . . , but they depend upon the reasonableness of the restrictions under the conditions of each case.") (ellipses in original).

<sup>29</sup> These provide:

(1) A promise to refrain from competition that imposes a restraint that is ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade if

- (a) the restraint is greater than is needed to protect the promisee's legitimate interest, or
- (b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public.

(2) Promises imposing restraints that are ancillary to a valid transaction or relationship include the following:

- (a) a promise by the seller of a business not to compete with the buyer in such a way as to injure the value of the business sold;
- (b) a promise by an employee or other agent not to [\*49] compete with his employer or other principal;
- (c) a promise by a partner not to compete with the partnership.

The application of these principles here requires the Court first to focus on the protectable interest arising from the nature of the transactions between Quick Fitting and the Wai Feng parties. The arrangement contained in the 2010 License/Supply Agreement is [\*50] a true license and supply relationship; it establishes that Quick Fitting would provide access to its proprietary and non-proprietary information, which the WF Contracting parties would use to manufacture push-fit for sale only to Quick Fitting, which committed to purchase. WF Ex. 4. By contrast, the challenged non-compete clauses in the 2011 License Agreement are ancillary to an arrangement that is more narrow in that it merely licenses EFF Manufactory to have access to Quick Fitting's confidential information to provide "cost estimates and business proposals . . . in the hope that Quick Fitting will purchase." WF Ex. 11 at 1. Nevertheless, collectively, the "valid transaction or relationship" embodied in these Agreements gives rise to significant and legitimate protectable interests. Thus, Quick Fitting certainly has an interest in protecting itself from competition facilitated by use of the information it provided to the Wai Feng parties; similarly, Quick Fitting has a legitimate interest in ensuring that its customers are not stolen by a supplier who cuts it out, particularly by using its information (whether confidential or not) to sell to the customer directly. In his 30(b)(6) [\*51] deposition, Crompton identified this as key to what he considered to be Quick Fitting's legitimate protectable interest:

If you just run a clean line — if you want to go off and build your own push fit business . . . and do it on your own, be my guest. Go invest in it, do whatever you want . . . If you want to compete with us, that's okay, too.

But if you want to do business with us, don't try to go around us.

WF Ex. 8 at 29-30.

Importantly, the non-compete restrictions that the Wai Feng parties have not challenged are precisely tailored to protect these legitimate interests in that they ban the sale of push-fit manufactured with any information acquired from Quick Fitting (whether or not proprietary) to any entity other than Quick Fitting, they ban the use of Quick Fitting's information (whether or not proprietary) except to manufacture for sale to Quick Fitting, and they ban the use of Quick Fitting's proprietary information to compete with, defame or cause damage to Quick Fitting. WF Ex. 4 at 1 & ¶¶ 3, 6; WF Ex. 11 ¶ 4.1. Thus, the core interest identified by Crompton is already served by the unchallenged clauses in that they contractually bar the Wai Feng parties from ever using [\*52] Quick Fitting's information (whether or not proprietary) to go around Quick Fitting and sell directly to its customers or to compete with Quick Fitting, at the same time that they do not bar the Wai Feng parties from competing in push-fit based on designs, manufacturing methods, suppliers and customers developed without using any Quick Fitting information.

The challenged clauses in the 2010 License/Supply Agreement are very different from the unchallenged ones. Worldwide in reach and temporally unlimited, the first of the two bans the Wai Feng parties from ever making or selling any push-fit — even if the hypothetical, future product is manufactured using information totally unrelated to the Information in which Quick Fitting has a protectable interest and is sold outside of North America. The second bans the 2010 WF Contracting parties from ever competing with Quick Fitting "in any market [it] may serve," anywhere in the world. WF Ex. 4 at 9. Similarly, the challenged non-compete in ¶ 4.3 of the 2011 License Agreement bars EFF Manufactory from ever making or selling any push-fit products anywhere in the world. Read in light of the "the conditions of [the] case," Max Garelick, 250 A.2d at 357, including the protections [\*53] already provided by the unchallenged clauses, the lack of geographic or temporal limitations in these clauses, coupled with the utter lack of any "limitations keyed to uniqueness, trade secrets, confidentiality or even competitive unfairness," Columbia Ribbon & Carbon Mfg. Co., 369 N.E.2d at 6, renders the challenged clauses little more than a naked restraint on competition. Durapin, 559 A.2d at 1057; see Home Gas, 691 F. Supp. at 573-74 (solely "anti-competitive purpose" in restrictive covenant is not proper). As the court held in Columbia Ribbon & Carbon Mfg. Co., "t]his [they] may not do." 369 N.E.2d at 6.

Base on the foregoing, I find that the challenged non-competition clauses in the 2010 License/Supply Agreement and the 2011 License Agreement are not "ancillary to an otherwise valid transaction or relationship," and that they "extend beyond what is apparently necessary for the protection of those in whose favor it runs." Cranston Print Works Co., 848 A.2d at 219-20. Accordingly, I recommend that the Court hold that all three are unenforceable as written. See id.; Durapin, 559 A.2d at 1057-58.

One loose end remains: whether, guided by Durapin, the Court should find that these clauses can or should be equitably modified to what is necessary to protect Quick Fitting's legitimate interests. Since the Rhode Island

Supreme Court abrogated the so-called "blue pencil" rule, [\*54] it has consistently held that such modification is an equity-based job for the trial judge. *Cranston Print Works Co., 848 A.2d at 221* ("hearing justice to decide on remand" with "a free hand to take a 'blue pencil,' if necessary, to draw in any reasonable limitations on such covenants that it concludes are overbroad"); *Durapin, 559 A.2d at 1059* ("court" to use equitable power to modify covenant to what "is reasonably necessary to protect a promisee's legitimate interests"). For the restrictive clause in the 2011 License Agreement, the answer is easy — the Agreement contractually prohibits equitable modification, mandating that any unenforceable clause shall be "deemed to be severed from the Agreement." WF Ex. 11 ¶ 5.21. As to the 2010 License/Supply Agreement, animated by the sufficiency of the protective force of the unchallenged restrictive covenants, I do not recommend equitable modification because it is not necessary.<sup>30</sup> The unchallenged non-compete clauses already fully protect Quick Fitting's legitimate interests in preventing what they allege is the Wai Feng parties' wrongful conduct. Accordingly, there is no need for the Court to use equitable power to modify. *Durapin, Inc., 559 A.2d at 1059* (unless promisor has jeopardized proprietary rights protected by challenged clause, [\*55] "there is no need for the court to exercise its equity powers to modify and enforce an unreasonable noncompetition provision").

Based on the foregoing, I recommend that the Court grant summary judgment in favor of the Wai Feng parties with respect to the challenged non-compete clauses in the 2010 License/ Supply Agreement and the 2011 License Agreement, finding that all of them are unenforceable as a matter of law.

### **3. Non-solicitation/Confidentiality Clauses**

The challenged non-solicitation/confidentiality clauses appear in all three Agreements. Like the non-compete clauses, the challenged clauses supplement confidentiality and non-solicitation clauses that the Wai Feng parties have not challenged.

The unchallenged clauses may be briefly summarized. First, the 2010 License/Supply Agreement protects the information that Quick Fitting "designate[s] in writing as being proprietary and confidential," WF Ex. 4 ¶ 3, by barring the 2010 WF Contracting parties from disclosing the confidential portion of the information to any third party, *id.*, while after termination of the Agreement, the 2010 WF Contracting parties are forever barred from using any of the information. *Id.* ¶ 3, 6. Similarly, the 2011 NDA includes strict prohibitions [\*56] on use and disclosure of Quick Fitting's "trade secret, confidential and proprietary information." WF Ex. 9 ¶ I(A, C, 1(a-g)). And the 2011 License Agreement has an entire section devoted to the protection of confidential information, which bars EFF Manufactory from using Quick Fitting's confidential information except as contemplated by the Agreement and requires EFF Manufactory to safeguard and maintain the information's confidential nature. WF Ex. 11 at 1-2.

The challenged clause in Schedule 2 of the 2010 License/Supply Agreement provides:

[2010 WF Contracting parties] may never contact either directly or indirectly, any customer or potential customer of [Quick Fitting] whether indicated below, or unknown to [the 2010 WF Contracting Parties] for any purpose.

WF Ex. 4 at 9. No customers or potential customers are "indicated below." This clause bars the 2010 WF Contracting parties from ever having contact with any customer or potential customer of Quick Fitting, whether or not the entity is known to have a prospective or existing relationship with Quick Fitting. *Id.* The clause persists in

<sup>30</sup> The Court observes that, in the extensive briefing of this motion, Quick Fitting dedicated hardly more than one sentence to the so-called "blue-pencil" rule and did not argue for equitable modification. ECF No. 193 at 22-23. Therefore, if the Court were inclined to consider equitable modification, I alternatively recommend that it stay its equitable hand because of Quick Fitting's waiver of the issue. *Vargas-Colón v. Fundación Damas, Inc., 864 F.3d 14, 24 (1st Cir. 2017)* (argument not developed in brief need not be considered); see *Landrau—Romero v. Banco Popular De Puerto Rico, 212 F.3d 607, 612 (1st Cir. 2000)* (holding that by failing to sufficiently raise an argument at summary judgment, party has waived it); *FERC v. Silkman, 177 F. Supp. 3d 683, 696 (D. Mass. 2016)* ("[I]ssues which are not raised at an appropriate time may be deemed waived by the reviewing tribunal.").

perpetuity and has no limits either as to topic of the contact or the geographic venue of the other [\*57] party. The challenged non-solicitation clause in ¶ I(1)(h) of the 2011 NDA is broader:

[EFF LLC] may never contact, communicate or negotiate with any competitor, supplier, customer or prospect of Quick Fitting Inc, which readily known, has been disclosed by Quick Fitting or made known to [EFF LLC] by any communication from Quick Fitting. . . . Further, [EFF LLC] is required to keep all customer, prospect and supplier information secret at all times and may not communicate with, or provide information to, any third party without the written agreement from Quick Fitting.

WF Ex. 9 ¶ I(1)(h). This clause forever bars EFF LLC (or whatever entity may be the counter-party) from ever having any contact or communication with "any competitor, supplier, customer or prospect" of Quick Fitting. Finally, the challenged non-solicitation clause in the 2011 License Agreement appears in ¶ 4.4; it provides:

In addition to the permanent prohibitions against using Quick Fitting's Confidential Information Supplier shall not, during the term of this Agreement and for a period of thirty-sixty [sic] (36) months after the termination of this Agreement, contact, communicate with, or negotiate or conduct business [\*58] with any customer or prospective customer of Quick Fitting or any Representative of such customer or prospective customer (a "Prohibited Party"), or with any person or entity that Supplier or any of its Representatives knows or reasonably should know is a customer or prospective customer of Quick Fitting, regardless of the geographic location of such Prohibited Party or its business.

WF Ex. 11 ¶ 4.4 (emphasis in original). This three-year ban on any communication or even contact between EFF Manufactory and any customer or prospective customer of Quick Fitting is without any limit either as to the topic of the communication or as to the geographic location of the other party to the communication. Id.

All three of the challenged non-solicitation clauses are ostensibly breached by a mere contact between any of the Wai Feng parties with any entity that Quick Fitting considers to be its prospective customer, competitor or supplier, without regard to (1) the topic of the contact, (2) who initiates the contact and (3) the geographic location of the other party to the contact. Two of the three Agreements (the 2010 License/Supply and 2011 License Agreements) can be breached even though the Wai [\*59] Feng parties do not know what entities Quick Fitting considers to be covered by the prohibition. Two of the three clauses use the term "never," making clear that there is no time limit on either clause. And although the 2011 License Agreement clause persists for three years following the termination of the Agreement,<sup>31</sup> Quick Fitting has proffered no evidence to buttress its need for three years of such extraordinary protection.

Quick Fitting's legitimate interests in protecting its confidential information and in preventing the Wai Feng parties from selling Quick Fitting's push-fit products to its known customers are already protected by the unchallenged restrictive clauses. Accordingly, I find none of the challenged restraints is reasonably necessary for the protection of those interests. Cranston Print Works Co., 848 A.2d at 219-20; Durapin, 559 A.2d at 1053. Further, these clauses are so draconian that they effectively bar the Wai Feng parties from competing in any aspect of the plumbing industry because they are barred even from contacting their own customers. I find that the clauses are hopelessly overbroad, contrary to public policy and unenforceable as drafted. Cranston Print Works Co., 848 A.2d at 219-20. I therefore recommend that the Court grant summary judgment in favor of the Wai [\*60] Feng parties as to each of them as written.<sup>32</sup>

#### **IV. MOTION FOR SUMMARY JUDGMENT CHALLENGING SUFFICIENCY OF EVIDENCE OF BREACH OF ENFORCEABLE PROVISIONS IN AGREEMENTS**

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<sup>31</sup> Under the Wai Feng parties' theory of termination, the 2011 License Agreement ended in December 2015. See ECF No. 223 at 5-6.

<sup>32</sup> In light of the mandate in the 2011 License Agreement that unenforceable clauses must be severed (WF Ex. 11 ¶ 5.21) and because Quick Fitting's legitimate interests are well protected by the unchallenged clauses, I find equitable modification is not necessary and do not recommend it.

### A. Factual Background Related to Evidence of Breach

During the lengthy discovery period permitted in these cases, Quick Fitting was able to uncover evidence from which a fact finder could infer that Andrew Yung, acting on behalf of some of the Wai Feng parties, including EFF Manufactory, Wai Feng Trading and EFF Inc., and potentially in concert with Cixi Welday, was eager to, and actively tried to, leverage the relationship developed with Quick Fitting, including EFF Manufactory's ability to manufacture push-fit acceptable to Quick Fitting's downstream customers (such as Lowe's), in order to develop and sell a different (non-Quick Fitting) push-fit product line once the relationship with Quick Fitting ended. For example, Andrew Yung used a sample of an item EFF Manufactory had made for Quick Fitting in a late 2012/2013 attempt to sell push-fit to Watts Water Technologies, Inc. ("Watts"); the discussion included requests for quotes by reference to the actual items EFF Manufactory had been making for Quick Fitting, although both [\*61] Watts and Andrew Yung claim that the focus was on Watts placing orders for a push-fit product still to be developed.<sup>33</sup> Similarly, in 2013, there were discussions with the Bow Group ("Bow") about the possibility of developing a push-fit product line.<sup>34</sup> The evidence also fairly permits the inference that the wily buyer from Quick Fitting's important customer, Mueller (through which Quick Fitting's products were sold to Lowe's), initiated indirect communications with Andrew Yung and EFF Manufactory, which Mueller used against Quick Fitting to avoid a price increase.<sup>35</sup>

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<sup>33</sup> Watts had been a ten-year-long customer of the Wai Feng parties when the push-fit discussions in issue began in October 2012 (months after the termination of the Quick Fitting relationship). WF Ex. 18 at 2-3. The evidence establishes that, over several months in 2013, Watts solicited EFF Manufactory for quotes on what Watts described either as "quick fit fittings" or by reference to Quick Fitting product names or numbers. QF Exs. # 3 UU, VV, WW. Andrew Yung brought a sample push-fit item to a meeting with Watts, which had been manufactured for Quick Fitting. QF Ex. # 3 WW at 28-31. The participants in these discussions claim they were focused on a plastic push-fit design to be developed on Watts's specifications and designs. WF Ex. 18 at 6-7. Watts never proceeded with the business. Id.

<sup>34</sup> In 2013, well after the Quick Fitting/Wai Feng parties' relationship ended, John Biduk, a representative of the Bow Group visited a facility of the Wai Feng parties and spoke with Andrew Yung, who "volunteered" that he was "in the process of developing a product line" of metal push-fit plumbing products. QF Ex. #3 AAA at 3. Biduk told Andrew that Bow would be interested once the products were ready — "call me when you have all your ducks lined up." Id. at 4. Biduk also visited Bow's existing supplier, Cixi Welday; he testified to a hearsay statement that Cixi Welday and EFF Manufactory were collaborating on development of a push-fit product line. Id. at 4. The Bow Group never placed any orders with the Wai Feng parties. Id. at 13.

<sup>35</sup> Paul Bell, the Mueller buyer, testified that after contracting to purchase Chinese-manufactured push-fit from Quick Fitting, Mueller was able to land the mega-retailer, Lowe's, as a customer. QF Ex. #3 OO at 12-13. In 2011, Bell and his Chinese assistant, Lisia Wang, toured China. One of the stops Wang arranged was at EFF Manufactory, where Bell observed the manufacturing of Quick Fitting push-fit to be sold to Mueller. Because Bell was "in the process of building a relationship and business with Quick Fitting[.]" he talked with Andrew Yung about the product. Id. at 31. According to Bell, Andrew was "very proud of the fact that he was making the Quick Fitting product" and acknowledged that EFF Manufactory was "under contract, that they were in a, a contract with [Quick Fitting]." Id. at 31-33. While Bell wondered if EFF Manufactory would sell push-fit to Mueller directly, he knew Quick Fitting "was protected, and from either a legal standpoint . . . [Crompton's] product was protected from either a, a legal side, a contract, or patent protection," in addition to the exclusivity restrictions in Mueller's own three-year agreement with Quick Fitting. Id. "[B]ecause [he] did not want to be obvious," id. at 32, Bell had Mueller's attorneys investigate Quick Fitting's patents "to understand if we could get around them if we were so inclined," id. at 46, and he asked Wang to get pricing information and find out if EFF Manufactory would sell directly. Id. at 31-33, 38 & 72-73. His goal was to explore getting lower prices, "price test[ing]," which he did "all the time." Id. at 73. He never communicated directly with Andrew Yung or with any of the Wai Feng parties regarding this inquiry. Id. at 87. Rather, all communication (if there was any) was through a non-testifying declarant (Wang); Quick Fitting and the Wai Feng parties have submitted inconsistent hearsay declarations regarding Wang's account of the facts. Compare QF Ex. # 3 OO at 39-44, with WF Ex. 16. Ultimately, Bell testified that he received a price list; based on his review of whatever it really was, he was satisfied that the prices Mueller was being charged by Quick Fitting were "reasonable." Id. at 47, 83, 98. Mueller continued to buy push-fit from Quick Fitting at increasing volumes, although Quick Fitting claims it was not able to increase Mueller's prices. ECF No. 206-7 at 4-5; QF Ex. # 3 OO at 69-70, 97; Crompton Aff. # 2 ¶¶ 23-24.

The fair implication from these facts is not that Andrew was proposing to sell the same push-fit products that EFF Manufactory was already making with Quick Fitting's confidential drawings and know-how, but rather that he was seeking a new customer for whom a new push-fit product would be developed. The evidence further suggests that, in the six and a half years since the Quick Fitting relationship ended, these efforts have not come to fruition — perhaps because of a pull-back due to the pendency of this case, perhaps because no customer was willing to commit to placing an order, the Wai Feng parties, whether [\*62] acting alone or in a venture with Cixi Welday, have not actually sold any push-fit, including in the North American market in which Quick Fitting competes. Confirming this proposition is the reality that the evidence establishes only efforts to launch a push-fit product line in 2013 and 2014; since then, nothing. That is, Quick Fitting has not presented a scintilla of proof of any efforts to sell push fit since 2014; nor has it presented any proof of actual sales of push-fit products at any time, in North America, or anywhere else in the world, by any of the Wai Feng parties or by Cixi Welday. But see QF Ex. # 3 OO at 53-61.<sup>36</sup>

Quick Fitting argues that a fact finder might also draw far more sinister inferences from this evidence. For example, it relies on the Wang hearsay to draw the inference that the Wai Feng parties used their access to its confidential drawing and other secrets to try to cut it out and sell directly to Mueller Industries, although the effort, if it happened, amounted to nothing.<sup>37</sup> Quick Fitting also seeks to show that its confidential drawings and know-how have been redeployed in a venture with Cixi Welday, the Chinese manufacturer owned by Andrew Yung's cousin, which is now poised [\*63] to enter the push-fit market.<sup>38</sup> Similarly, it claims that its evidence would permit a fact finder to conclude that CCWFBV was manufacturing push-fit for it early in the relationship with the Wai Feng parties,<sup>39</sup> that CCWFBV thus came into possession of its confidential drawings, and that CCWFBV has offered push-fit for sale on

<sup>36</sup> The closest to an actual sale occurred in July 2012, just as the Wai Fang parties' relationship with Quick Fitting was ending. Mueller's Bell testified about a chart (QF Ex. # 3 PP) prepared at Mueller analyzing pricing for PEX products (which are not push-fit) from several suppliers, including EFF Manufactory. QF Ex. # 3 OO at 52-53. Bell did not prepare the chart and did not know the source of the pricing information in it. Although the focus of the chart was PEX, two of the items (of over 150) for which a price is shown for EFF Manufactory were push-fit products of the type sold to Mueller by Quick Fitting, although Bell insisted he considered them to be "tied specifically to the PEX program, . . . not tied to a push-fit program." Id. at 53. The evidence does not reveal whether either of the two items was actually sold to Mueller.

<sup>37</sup> See n.35 *supra*. According to Crompton, sometime in 2012, he received a call from Mueller's Bell, who told him, "[w]e have pricing from one of your factories and they're claiming they can sell us directly [sic], they're not impeded by any contract or agreement." ECF No. 206-7 at 4. Bell told Crompton he had gotten pricing proposals to sell directly not only from EFF Manufactory, but also from two of Quick Fitting's other Chinese suppliers (Xxat and Jinquan). Id. at 3. To salvage the Mueller relationship, Quick Fitting executives traveled to Mueller, apparently in 2013. Crompton Aff. # 2 ¶ 22; QF Ex. # 3 SS; see QF Ex. # 3 OO at 82-83. Quick Fitting retained Mueller as a customer and increased the volume of the business. QF Ex. # 3 OO at 69-70. Notably, Quick Fitting ended up in litigation with all three of the Chinese suppliers accused by Bell. See n.17 *supra*.

<sup>38</sup> Quick Fitting claims that Cixi Welday was provided with push-fit drawings in order to manufacture plastic components for the finished products sold to Quick Fitting. Crompton Aff. # 2 ¶¶ 26-27; QF Ex. # 3 W at 33-35. Such an arrangement appears to have been contemplated by the 2011 License Agreement. WF Ex. 11 ¶¶ 1.5, 2.2. Nevertheless, Quick Fitting now argues that it constitutes a breach. For a later period, in 2013, there is testimony that the Wai Feng parties and Cixi Welday were collaborating to develop a line of push-fit products. See n.34 *supra*; QF Ex. # 3 AAA at 4. Later still, in 2014, Crompton saw Andrew Yung at the Cixi Welday trade show booth where there were push-fit samples on display, as well as a product sheet with photographs of push fit products. Crompton Aff. # 2 ¶ 28; QF Ex. # 3 NN. Relatedly, Quick Fitting proffers the expert opinion of its Vice President of Engineering, Libardo Ochoa, who claims he examined two unauthenticated items — a photograph and a drawing — ostensibly submitted in 2013 by Cixi Welday for certification of two push-fit products. Ochoa Aff. ¶¶ 7-9. The Wai Feng parties have moved both to strike the Ochoa Affidavit incorporating this opinion and to exclude the Ochoa expert opinion. ECF Nos. 182 & 205. The motions are under advisement.

<sup>39</sup> Quick Fitting has proffered circumstantial evidence that CCWFBV was the manufacturer. In their briefs, the Wai Feng parties argue persuasively that every such fragment is readily explained away. At bottom, the best evidence of the charge that CCWFBV was the manufacturer for the first year of the relationship is the slim reed of its naming in the 2010 License/Supply Agreement that Andrew Yung signed.

Alibaba (based on an unauthenticated screen shot of the Alibaba website) — all of which permits the inference that CCWFBV used Quick Fitting's confidential information.<sup>40</sup>

For their part, the Wai Feng parties deny that they have ever disclosed Quick Fitting's confidential information to any other company, including CCWFBV and Cixi Welday (except as authorized to manufacture components for Quick Fitting); they deny that they have ever sold products manufactured using Quick Fitting's technology to any other company; they deny that they have manufactured or distributed push-fit products for any company other than Quick Fitting; and they deny that the prices EFF Manufactory charged Quick Fitting were protected confidential information prohibited from disclosure to Mueller. WF SUF # 1 ¶¶ 23, 24, 28, 83-84. Pointing to Crompton's *Fed. R. Civ. P. 30(b)(6)* testimony, the [\*64] Wai Feng parties contend that Quick Fitting is bound by his admission that it has no facts that prove or permit the inference that the Wai Feng parties wrongly provided Cixi Welday or CCWFBV with Quick Fitting's proprietary information or that the Wai Feng parties transferred Quick Fitting's protected information to any entity that used it to make and sell push-fit products.

The Wai Feng parties ask the Court to find that, with no evidence of any push-fit sales, Quick Fitting has failed to produce any evidence that it has been damaged, which is a mandatory element of its breach of contract claims. *Id.* ¶¶ 41-44, 46-51. At bottom, they ask the Court to scrutinize Quick Fitting's mountain of evidence and to conclude that it fails to "present[] a sufficient disagreement to require submission to a jury or [that] it is so one-sided that [they] must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

## B. Law and Analysis of Sufficiency of Evidence of Breach

Before turning to whether Quick Fitting's factual proffer is sufficient to permit a fact finder to conclude that the Wai Feng parties breached any of the unchallenged restrictive clauses in the three Agreements, I pause briefly for a reprise of what the unchallenged [\*65] clauses provide. First is the 2010 License/Supply Agreement's ban on the 2010 WF Contracting parties selling push-fit products manufactured using information provided by Quick Fitting (whether or not proprietary) to any entity except Quick Fitting, WF Ex. 4 at 1 & ¶ 3, and the requirement that, after termination of the Agreement, all use of Quick Fitting's information (whether or not proprietary) must cease, with Quick Fitting retaining the right to purchase any remaining inventory and with the residual right to freely sell off what is left vested in the 2010 WF Contracting parties. *Id.* ¶ 6. The 2011 NDA provides that Quick Fitting's intellectual property may not be used "to compete, advertise, manufacturer, sell, distribute, import or export Quick Fitting's proprietary information or a similar product; without the expressed written permission of Quick Fitting Inc[.]" WF Ex. 9 ¶ I(1)(d), and that Quick Fitting's "proprietary information may not be used to compete with, defame or cause damage to Quick Fitting Inc." *Id.* ¶ I (1)(h). Similarly, ¶ 4.1 of the 2011 License Agreement bars EFF Manufactory, during the term of the Agreement, from using Quick Fitting's confidential and proprietary [\*66] information and trade secrets to "compete with, defame, hinder, or cause harm to Quick Fitting." WF Ex. 11 ¶ 4.1.

To make out a viable claim for breach of these contractual restrictions, Quick Fitting, as the party alleging the breach, bears the burden of proving the amount of damages it has suffered with a reasonable degree of certainty. *Toray, 958 F. Supp. 2d at 325*. The Court should not deny recovery because damages are difficult to ascertain, as long as they can be proven with reasonable certainty. *Id.*; see *Wurman v. Hodosh, C.A. No. CV 16-202 WES, 2018 U.S. Dist. LEXIS 83025, 2018 WL 3254475, at \*3 (D.R.I. May 17, 2018)* ("In Rhode Island, . . . breach-of-contract . . . claims require — as a threshold element — sufficiently certain damages."). To save a case from summary judgment, the claimant must advance a model or "a formula by which to compute . . . damages" to be presented to

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<sup>40</sup> The evidence of push-fit sales over Alibaba either by CCWFBV or the Wai Feng parties is less than paper-thin. Quick Fitting proffers an unauthenticated screen shot purportedly showing CCWFBV offering push-fit for sale through the Alibaba website. QF Ex. # 3 QQQ. It also relies on a set of unauthenticated inquiries sent in 2014 through the Alibaba website to the Wai Feng parties from various locations in the world (e.g., India, Zimbabwe) asking for quotes on push-fit products. QF Ex. # 3 BBB. After being pressed at the hearing about these exhibits, Quick Fitting conceded in its post-hearing brief that they prove nothing beyond "context and background to Mr. Crompton's state of mind." ECF No. 228 at 7.

the jury. *Fogarty v. Palumbo*, 163 A.3d 526, 538 (R.I. 2017). However, the law of Rhode Island also recognizes that nominal damages may be awarded to a party who can prove breach — but not damages — with sufficient certainty. *A.J. Amer Agency*, 2014 U.S. Dist. LEXIS 94324, 2014 WL 3496964, at \*34 ("[An] unexcused failure to perform a contract is a legal wrong. An action will therefore lie for the breach although it causes no injury. Nominal damages may then be awarded.") (citing [\*67] 4 *Williston on Contracts* § 64:6 (4th ed. 2014)); *Nestle Food Co. v. Miller*, 836 F. Supp. 69, 78 (D.R.I. 1993) (nominal damages for breach of non-compete may be recovered if link to lost business is speculative); see *Acuity Brands, Inc. v. Bickley*, Civil Action No. 13-366-DLB-REW, 2017 U.S. Dist. LEXIS 64894, 2017 WL 1426800, at \*16-19 (E.D. Ky. Mar. 31, 2017) (summary judgment denied for breach of non-compete despite no proof of actual damages because nominal damages are available); but see *O'Coin v. Woonsocket Inst. Tr. Co.*, 535 A.2d 1263, 1266 (R.I. 1988) (when action sounds in contract, nominal damages do not lie, absent egregious circumstances).

Despite years of aggressive discovery, Quick Fitting has failed to prove that the Wai Feng parties have ever sold a push-fit product — whether or not the item included Quick Fitting's intellectual property — to any entity other than Quick Fitting itself. This proof deficit is the more significant in light of Crompton's acknowledgement, during his 2015 *Fed. R. Civ. P. 30(b)(6)* depositions, that, to establish that Quick Fitting's proprietary information was improperly used, it would be "necessary to examine the . . . products to confirm that they're based on Quick Fitting Technology." WF Ex. 8 at 13; see WF Ex. 17 at 15-16 (Quick Fitting has not "concluded that . . . [Cixi] Welday push fit products are based on Quick Fitting's designs or specifications" because it does not yet "have [\*68] samples" of such product being sold). Yet, when discovery closed two years after Crompton gave that testimony, as far as the summary judgment record reveals, Quick Fitting failed to uncover any such evidence. What it instead found is a series of incidents fraught with fact issues, albeit not with significant (or perhaps any) damages.

The incident with the most (relatively speaking) damage heft involves Quick Fitting's good customer, Mueller; it occurred in 2011, before the relationship between the Wai Feng parties and Quick Fitting began to sour; and it relies heavily on Wang's purported information. With no testimony from Wang regarding whom she really talked to, what was really said, what she really gave Bell and from whom she really got it, the obvious inference compelled by this incident is that a wily buyer (Bell) plotted to get enough information about the prices charged by Quick Fitting's Chinese suppliers to achieve Mueller's goal of preventing Quick Fitting from increasing the prices it was charging Mueller.

However, other inferences are also permissible. For example, a reasonable jury could find that someone from the Wai Feng parties provided Mueller with enough information [\*69] regarding the prices they were charging Quick Fitting to allow Mueller to analyze Quick Fitting's costs and that the parties had agreed that such pricing information was confidential under the 2011 License Agreement,<sup>41</sup> so that disclosure to Mueller breached an enforceable duty of non-disclosure. It is also possible that a jury could find that the Wai Feng parties responded to Mueller's overture by proposing to cut out Quick Fitting and sell its push-fit products to Mueller directly. Such a finding would amount to a serious — though feckless in that Mueller did not bite — breach of all three Agreements that cuts to the core of Quick Fitting's protectable and legitimate interest in preventing its suppliers from using its intellectual property to steal its customers. However, without Wang's testimony to fill the proof gap,<sup>42</sup> it is difficult to see how Quick Fitting will prove that the Wai Feng parties really made an offer to sell, which they vehemently deny; nor is this proposition credible when examined in light of Bell's testimony that Andrew Yung told Bell that the Wai Feng parties were under

<sup>41</sup> The 2011 License Agreement is ambiguous regarding whether the price Quick Fitting was charged by the Wai Feng parties was confidential. Compare WF Ex. 11 ¶ 1.3 ("Confidential Information" includes "costs, and financial information," as well as customer "payment information"; prices charged by Wai Feng parties not expressly mentioned), *with id.* ¶ 1.4 ("Confidential Information" does not include information "developed" by EFF Manufactory).

<sup>42</sup> This is not a case where Wang's hearsay declaration that Andrew Yung said the Wai Feng parties would sell to Mueller directly, as described by Bell, has indicia of trustworthiness sufficient to meet *Fed. R. Evid. 807*, particularly where it is contradicted by Wang's other hearsay declaration, WF Ex. 16, and is inconsistent with the admissible declarations of Andrew Yung described by Bell. QF Ex. # 3 OO at 31-33 ("[Andrew Yung] was very proud of the fact that he was making push-fit for Quick Fitting."); *id.* at 33 ("that [the Wai Feng parties] were a partner with Quick Fitting, that they were under contract").

contract with Quick Fitting.<sup>43</sup> Nevertheless, when the hearsay is ignored, Quick Fitting still has [\*70] non-speculative (albeit *de minimis*) evidence of damages arising from this incident based on the expenses associated with a trip to Mueller to smooth over the relationship in February 2013. Crompton Aff. # 2 ¶ 22; QF Ex. # 3 SS.

The other Mueller incident occurred in July 2012 as the parties' relationship was crumbling. Quick Fitting has evidence that the Wai Feng parties allegedly included two push-fit items on the tail end of a proposal that they supposedly sent to Mueller with prices for over one hundred PEX items. Mueller's Bell testified that the two pieces were items Mueller was buying from Quick Fitting, but also stated, "[t]hese all represent PEX, traditional PEX products." QF Ex. # 3 OO at 60-61; see id. at 53 ("This is tied specifically to the PEX program, not speci-, not tied to a push-fit program."). As with the 2011 alleged solicitation, Mueller did not place an order for push-fit (or PEX) with the Wai Feng parties, so Quick Fitting has no lost profits, nor has it proffered any other actual damage evidence other than, arguably, the 2013 Mueller trip to repair the relationship. Nevertheless, a jury could find that the Wai Feng parties solicited Mueller to purchase two push-fit [\*71] items in July 2012 and that the timing permits the inference that these were products made using Quick Fitting's know-how. The lack of actual damages is not fatal because nominal damages are available as a remedy.

Also sufficient to proceed is the allegation that in 2013 and 2014, the Wai Feng parties began a collaboration with Cixi Welday to develop a line of push-fit products using Quick Fitting's confidential drawings. Even if the Court excludes the troublesome Ochoa affidavit, see Ochoa Aff., Quick Fitting's admissible evidence is enough for this allegation to be trial-worthy.<sup>44</sup> As for damages, despite the lack of evidence of any sales by Cixi Welday, Quick Fitting may contend that the loss of control over its intellectual property inflicts an unquantifiable loss for which nominal damages are available. See Acuity Brands, Inc., 2017 U.S. Dist. LEXIS 64894, 2017 WL 1426800, at \*17-18 (nominal damages recoverable for breach of non-compete with only attenuated evidence of loss).

The final incident that has enough heft to be presented to a fact finder involves Watts. A jury could draw the inference that Quick Fitting's confidential information was being used in the Wai Feng parties' 2012-2013 sales effort with Watts based on the terminology used in the email communications, [\*72] despite the failure of the Watts witness to so testify. Relatedly, the Wai Feng parties' admission that they used a left-over Quick Fitting push-fit item as a sample during the sales pitch raises a fact issue on whether this was an improper disclosure or use of Quick Fitting's intellectual property. As with its other claims, Quick Fitting's apparent inability to show actual damage from the sales pitch made to Watts does not remove the right to recover nominal damages.

Rule 56 requires the Court to look at issues through a broad lens and accept legitimate inferences that a reasonable juror might draw from the totality of the evidence. Viewed through that lens, I find that there is enough here for these claims to survive summary judgment and recommend that the motion be denied to the extent that it challenges the sufficiency of the evidence of breach.<sup>45</sup>

## V. MOTION FOR SUMMARY JUDGMENT CHALLENGING JOINDER OF EFF LLC IN 13-56

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<sup>43</sup> See n.35 *supra*.

<sup>44</sup> This evidence includes Cixi Welday's pre-2013 lack of experience in metal manufacturing, the close relationship between Cixi Welday's principal and Andrew Yung, Cixi Welday's involvement with supplying components for the Quick Fitting push-fit products manufactured by EFF Manufactory and the timing of the announcement of a venture for Cixi Welday to offer metal push-fit.

<sup>45</sup> One loose end: the Wai Feng parties have argued that the exclusivity clause in the 2010 License/Supply Agreement, WF Ex. 4 ¶ 4(c), was undisputedly breached by Quick Fitting's purchase of push-fit from other vendors and that this prior breach voided all of the contractual obligations imposed on the Wai Feng parties so that judgment should enter in their favor. Having found that this exclusivity clause is ambiguous, see n.17 *supra*, I do not recommend that the Court enter judgment on this basis.

It is undisputed that the 2011 NDA named the wrong EFF entity. Instead of EFF Inc., as the Wai Feng parties claim was intended, or EFF Manufactory, as Quick Fitting's Crompton appears to suggest,<sup>46</sup> the 2011 NDA names EFF LLC, which is a Massachusetts company partially owned [\*73] by Andrew and Jacky Yung that had almost nothing to do with the relationship with Quick Fitting, except for incidental involvement of its employees in occasional product shipments and pick-ups and performing similar errands. WF SUF # 1 ¶ 17; QF SDF # 1¶ 17. The address of the counter-party that is hand-written into the 2011 NDA is that of EFF Inc., in Canada, not EFF LLC, which is in Walpole, Massachusetts. WF SUF # 1 ¶ 16. There is no evidence that any person acting on behalf of EFF LLC was ever intended to be, or was, the "Recipient" of trade secrets, which is required to trigger the protection of the 2011 NDA.<sup>47</sup> Nor is there evidence that Quick Fitting understood that EFF LLC had the capacity to "provide estimates for the cost of specific components," which is the stated purpose of the 2011 NDA. WF Ex. 9 ¶ I(B). Nor is there a scintilla of evidence that any actionable conduct was engaged in by any person acting on EFF LLC's behalf. It is undisputed that EFF LLC has never sold push-fit products and has never sold anything to Quick Fitting. WF SUF # 1 ¶¶ 148, 160.

Prior to the summary judgment phase, the Court found, and Quick Fitting acquiesced by silence to the proposition, that [\*74] EFF LLC was named by mistake; nevertheless, Quick Fitting was coy about what name it understood should have been inserted. [Quick Fitting, 2015 U.S. Dist. LEXIS 131452, 2015 WL 5719503, at \\*3](#) (naming of EFF LLC in 2011 NDA "appears to be wrong. . . . The Yungs say it was a mutual mistake to name [EFF LLC] when [EFF Inc.] was intended by both, while Quick Fitting does not clearly take a position on the issue."). Now, despite its burden at summary judgment, Quick Fitting still does not argue that EFF LLC was the correct party to the 2011 NDA. Rather, it contends that the Court should keep EFF LLC in the case because some EFF entity was a party to the 2011 NDA and a fact finder may ignore the separate corporate existence of all EFF entities, so that any EFF entity is a proper party. Relatedly, Quick Fitting contends that EFF LLC's summary judgment motion should be denied because intellectual property sent to persons acting for EFF Manufactory, Wai Mao, Wai Feng Trading or EFF Inc. must be deemed to have been sent to EFF LLC since "the lines of distinction between Andrew Yung and the Yung entities were essentially non-existent." 13-56 ECF No. 271 at 11. However, other than some EFF entities' employees using the same email domain name, Quick Fitting has [\*75] presented nothing material to support a veil-piercing theory that the Court has already rejected.<sup>48</sup> See [Lothrop v. N. Am. Air Charter, Inc., 95 F. Supp. 3d](#)

<sup>46</sup> Crompton's second affidavit is consistent either with the Wai Feng parties' contention that EFF Inc. was intended to be the counter-party or with the proposition that the 2011 NDA was intended to name EFF Manufactory. Crompton Aff. # 2 ¶¶ 12-13. Crompton averred that he forwarded the 2011 NDA for execution to Andrew Yung because he had been told in early 2011 that a Canadian entity called "EFF" was being formed to take over the "manufacturing operations formerly handled by the 'W&F Manufacturing' factory." Id. Crompton's averments rule out EFF LLC as the proper party. QF SDF # 1 ¶ 18.

<sup>47</sup> To overcome this lack of evidence, Quick Fitting points to the inadvertent use of the EFF LLC logo on some emails from Andrew Yung and to the use of the EFF LLC name on an email from a Canadian-based employee, both involving matters related to the Quick Fitting relationship. QF SUF # 3 ¶¶ 40-56. However, there is no suggestion that Quick Fitting was ever lead to believe it was dealing with EFF LLC or that Andrew Yung or the Canadian-based employee were actually acting for EFF LLC. See WF SUF # 1 ¶¶ 163, 165.

<sup>48</sup> This Court has previously considered and declined to accept Quick Fitting's veil-piercing theory:

Whether considering the law of Rhode Island, where "courts are loath to act like Vlad the Impaler," [Doe v. Gelineau, 732 A.2d 43, 44 \(R.I. 1999\)](#), or the law of Canada, China or Massachusetts, courts are universally hesitant to disregard independent corporate structure and typically require clear evidence to justify doing so. [Russell v. Enter. Rent-A-Car Co. of R.I., 160 F. Supp. 2d 239, 250-51 \(D.R.I. 2001\)](#). Quick Fitting has not only failed to present clear and convincing evidence, but has not even established prima facie proof of any of the markers that lead courts to ignore the separate existence of the corporate entity. Specifically, it has offered no evidence of the use of a sham entity, of undercapitalization, of the lack of corporate records, of insolvency, or of the improper use of the corporate form by dominant shareholders.

[Quick Fitting, 2015 U.S. Dist. LEXIS 131452, 2015 WL 5719503, at \\*10](#) (footnotes omitted). While the Wai Feng parties have reinforced the factual record establishing the separate corporate existence of EFF LLC, WF SUF # 1 ¶¶ 143-157, Quick Fitting has added nothing material to the summary judgment record to fill the hole already found by the Court. QF SDF # 1 ¶¶ 149-151,

[90, 102 \(D. Mass. 2015\)](#) (same email domain and sharing of resources and employees by corporations with common owners not enough for veil-piercing).

EFF LLC's summary judgment motion (13-56 ECF No. 257) should be granted. The Wai Feng parties persuasively assert, and Quick Fitting does not colorably dispute, that whoever handwrote EFF LLC's name in the space at the head of the 2011 NDA made [\*76] a mistake. Therefore, while the fact finder could twist like a pretzel in attempting to solve the puzzle of which EFF entity was meant to be in the 2011 NDA, it is beyond cavil that the naming of EFF LLC was a mutual mistake appropriate for reformation at the summary judgment phase. [OneBeacon Am. Ins. Co. v. Travelers Indem. Co. of Ill.](#), 465 F.3d 38, 45-46 (1st Cir. 2006) (when there is "full, clear, and decisive proof of mistake," proper for court to reform contract). With EFF LLC reformed out of the 2011 NDA and finding no other basis on which a fact finder conceivably could impose liability on it, I recommend that summary judgment enter in its favor and that it be eliminated as a defendant in the 13-56 case.

An important coda regarding EFF LLC. As the work on these motions was nearing conclusion, the Court focused — *sua sponte* — on the undisputed facts stating that EFF LLC is named as a limited liability company whose "owners" include an individual named Ron Roberts, as well as that Roberts allegedly "lives" in Rhode Island. WF SUF ¶ 143; 13-56 ECF No. 135 ¶¶ 29-31; see [Quick Fitting, 2015 U.S. Dist. LEXIS 131452, 2015 WL 5719503, at \\*4](#) ("Ronald Roberts, a Rhode Island resident"). Since Quick Fitting filed 13-56 in this Court, it has been clear that the Court's power to exercise subject matter jurisdiction over the case is based on diversity [\*77] of citizenship pursuant to [28 U.S.C. § 1332\(a\)](#). 13-56 ECF No. 135 ¶ 57. Assuming EFF LLC is really constituted as a limited liability company, it is well settled that its citizenship for purposes of diversity jurisdiction is derived not from its state of incorporation, but from the citizenship of its members, who are the owners. [Pramco, LLC ex rel. CFSC Consortium, LLC v. San Juan Bay Marina, Inc.](#), 435 F.3d 51, 54-55 (1st Cir. 2006) ("citizenship of a limited liability company is determined by the citizenship of all of its members"). While residency in a state does not necessarily equate to citizenship in the state for purposes of diversity jurisdiction, they often end up conflating. See [Lundquist v. Precision Valley Aviation, Inc.](#), 946 F.2d 8, 10 (1st Cir. 1991) ("[T]he relevant standard is 'citizenship,' i.e., 'domicile,' not mere residence; a party may reside in more than one state but can be domiciled, for diversity purposes, in only one."). Therefore, it is possible — indeed likely — that, like Quick Fitting, EFF LLC is also a citizen of Rhode Island because one of its members, Roberts, is a Rhode Island citizen. And if both Quick Fitting and EFF LLC are Rhode Island citizens, then EFF LLC's joinder, which was initiated after the case had been pending for well over a year, 13-56 ECF No. 59, requires this Court to consider whether it defeats diversity jurisdiction, requiring [\*78] 13-56 to be dismissed. [Pramco](#), 435 F.3d at 52-54.

This state of affairs derives from an unfortunately common error. Quick Fitting's pleading that initiated the joinder of EFF LLC in 13-56 wrongly assumed that EFF LLC's citizenship is based on its state of "incorporation"; the Wai Feng parties acquiesced in the error. See 13-56 ECF Nos. 59 ¶¶ 34-35 & 74 ¶ 57. When the parties make such an error, the discovery of a potentially fatal jurisdictional defect is sometimes not made until the court has plunged deeply into the facts and issues. See, e.g., [D.B. Zwirn Special Opportunities Fund, L.P. v. Mehrotra](#), 661 F.3d 124, 125 (1st Cir. 2011) (no inquiry about citizenship of partners of limited partnership until appeal); [Pramco](#), 435 F.3d at 52-54 (no consideration of citizenship of members of limited liability company from initiation of action in 1999 until raised on appeal in 2005); [Am. Fiber & Finishing, Inc. v. Tyco Healthcare Grp., LP](#), 362 F.3d 136, 138 (1st Cir. 2004) (change of party from corporation to limited partnership should have raised red flag but two years of discovery, summary judgment and appeal passed before diversity questioned); [Augustyniak Ins. Grp., Inc. v. Astonish Results, L.P.](#), CA No. 11-464S, 2013 U.S. Dist. LEXIS 36451, 2013 WL 998770, at \*13 n.10 (D.R.I. Mar. 13, 2013) ("The failure of parties and the district court to focus early on whether there is diversity jurisdiction is like a bad penny that keeps turning up in cases with a party that is either a limited liability company or a limited partnership."). That is what has happened here [\*79] — the Court's discovery was not made until after its work on these motions was nearing conclusion. As a result, as of this writing, the parties have not had an opportunity to

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154; see [Baker v. LivaNova PLC](#), 210 F. Supp. 3d 642, 646 (M.D. Pa. 2016) (use of common logos and email domains not enough to pierce corporate veil). Quick Fitting's veil-piercing facts remain insufficient to meet any of [Gelineau](#) factors.

chime in on the Court's discovery. Therefore, before the Court takes any action with respect to this jurisdictional issue, they must be afforded that opportunity.<sup>49</sup>

If further briefing by the parties leads the Court to determine that Roberts is a diversity-busting citizen of Rhode Island, the Court nevertheless may maintain jurisdiction over 13-56 through the mechanism in [Fed. R. Civ. P. 21](#), which provides that "[o]n motion or on its own, the court may at any time, on just terms, add or drop a party." "[I]t is well settled that [Rule 21](#) invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time, even after judgment has been rendered." [Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 832, 109 S. Ct. 2218, 104 L. Ed. 2d 893 \(1989\)](#). A court may drop a dispensable and nondiverse party under [Fed. R. Civ. P. 21](#) to cure [28 U.S.C. § 1332\(a\)](#) jurisdictional defects. See [Casas Office Machs., Inc. v. Mita Copystar Am., Inc., 42 F.3d 668, 675 \(1st Cir. 1994\)](#) ("[F]ederal courts of appeals have the authority — like that given to the district courts in [Fed. R. Civ. P. 21](#) — to dismiss *dispensable*, nondiverse parties to cure defects in diversity jurisdiction.") (emphasis in original); [\[\\*80\] Aurora Loan Servs., LCC v. Dream House Mortg. Corp., C.A. No. 07-00441-ML, 2009 U.S. Dist. LEXIS 117840, 2009 WL 4884530, at \\*2 \(D.R.I. Dec. 17, 2009\)](#) (citing [Casas Office Machs., 42 F.3d at 675](#)). This is consistent with the "fundamental" and "well-established" responsibility of courts to "take jurisdiction in order to determine jurisdiction." See [Leroux v. Lomas & Nettleton Co., 626 F. Supp. 962, 965, n.4 \(D. Mass. 1986\)](#) (rejecting argument that "absent diversity, [the] Court lacks subject matter jurisdiction over the *entire* proceeding and, therefore, it cannot properly assert jurisdiction over a *part*," namely a [Fed. R. Civ. P. 41\(a\)\(1\)](#) notice of dismissal "to cure a jurisdictional defect") (emphasis in original) (citing [United States v. United Mine Workers of Am., 330 U.S. 258, 67 S. Ct. 677, 91 L. Ed. 884 \(1947\)](#)).

Ruling on dismissal of a dispensable, nondiverse party is made by reference to the [Fed. R. Civ. P. 19\(b\)](#) standard — whether the action "in equity and good conscience" can fairly proceed without the party in question or whether the action "should be dismissed." [Fed. R. Civ. P. 19](#),<sup>50</sup> see [Hearts With Haiti, Inc. v. Kendrick, 192 F. Supp. 3d 181, 206 \(D. Me. 2016\)](#) ("[Rule 21](#) looks to [Rule 19](#) for guidance on whether a litigant is dispensable."), aff'd, [856 F.3d 1 \(1st Cir. 2017\)](#) (Souter, J., sitting by designation). In this instance, the analysis above, which leads to the conclusion that the Court should enter summary judgment in EFF LLC's favor, may be repurposed to support the conclusion that EFF LLC is a dispensable party the Court can drop to maintain jurisdiction over the case. Cf. [Payroll Mgmt. Inc. v. Lexington Ins. Co., Case No. 3:10CV471/MCR/CJK, 2014 WL 12759759, at \\*2-3 \(N.D. Fla. Dec. 29, 2014\)](#)

<sup>49</sup> When the discovery of this possible jurisdictional defect was made, the Court considered whether to halt work and ask the parties to brief the issue of the citizenship of EFF LLC and its impact on subject matter jurisdiction. That option was not chosen because most of the issues covered in this report and recommendation are pending in both 13-33 and 13-56 so the resulting delay would further protract the progress of 13-33 towards trial, and because of the option to dismiss EFF LLC pursuant to [Fed. R. Civ. P. 21](#) discussed *infra*. Instead, with the uncertainty regarding jurisdiction over 13-56 an open question, I have flagged the problem and otherwise laid out my recommendations to give the parties the opportunity to address subject matter jurisdiction in their objections or otherwise as the District Court determines is most appropriate.

<sup>50</sup> [Rule 19\(b\)](#) provides:

[T]he court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

- (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
- (2) the extent to which any prejudice could be lessened or avoided by:
  - (A) protective provisions in the judgment;
  - (B) shaping the relief; or
  - (C) other measures;
- (3) whether a judgment rendered in the person's absence would be adequate; and
- (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(curing a diversity jurisdiction defect [\*81] via [Rule 21](#) dismissal of a dispensable party because it lacked "a real and substantial stake" in the case and other parties "would not be prejudiced"), aff'd, [815 F.3d 1293, 1298-99 \(11th Cir. 2016\)](#) (per curiam). Dismissing EFF LLC on these grounds aligns with the Court's duty to ensure the Rules are "construed, administered, and employed . . . to secure the just, speedy, and inexpensive determination of every action and proceeding." [Fed. R. Civ. P. 1.](#)

Based on the foregoing, I recommend entering summary judgment in favor of EFF LLC because the undisputed facts establish that its naming in the 2011 NDA was a mutual [\*82] mistake and because Quick Fitting spotlights no other trial-worthy facts undergirding a viable theory for its joinder. Alternatively, if further factual development confirms that EFF LLC is a limited liability company and that one of its members is a citizen of Rhode Island, so that its joinder destroys the Court's diversity jurisdiction over 13-56, for the same reasons, I recommend that the Court find that EFF LLC is a dispensable party in 13-56 and dismiss it pursuant to [Fed. R. Civ. P. 21](#) to cure the jurisdictional defect.

## **VI. MOTION FOR SUMMARY JUDGMENT CHALLENGING JOINDER OF ANDREW YUNG IN 13-56**

Andrew Yung is joined in his individual capacity as a party in Count IX of the 13-56 complaint; his argument that the Court lacks personal jurisdiction over him was overruled by [Quick Fitting, 2015 U.S. Dist. LEXIS 131452, 2015 WL 5719503, at \\*6-7 n.10](#), which held that his signature on the 2010 License/Supply Agreement extended his exposure to all of Quick Fitting's claims against him. If a fact finder credits any of Quick Fitting's factual theories as discussed above, there is ample direct and inferential evidence that Andrew Yung is the individual who was at the center of the action. Similarly, if the state law trade secret claim is credited, Andrew Yung is the actor who is pivotal. [\*83] Accordingly, to the extent that Quick Fitting's claims targeting Andrew Yung survive summary judgment, as I recommend that they do, I also recommend that Andrew Yung's motion for summary judgment be denied.

## **VII. MOTION FOR SUMMARY JUDGMENT CHALLENGING OTHER CLAIMS**

The final summary judgment motion addressed in this report and recommendation challenges the viability of Quick Fitting's state law tort claims, which are asserted in its 13-56 complaint as Counts II-IV and X-XI — misappropriation of trade secrets, fraud/misrepresentation, business defamation, civil conspiracy and injunctive relief<sup>51</sup> ECF No. 254.

### **A. Misappropriation of Trade Secrets**

The Rhode Island Uniform Trade Secrets Act ("Trade Secrets Act" or "Act") provides for injunctive relief and recovery of money damages for the misappropriation of a trade secret disclosed or used without consent after it was acquired under circumstances giving rise to a duty to maintain secrecy or limit its use. [R.I. Gen. Laws § 6-41-1, et seq.](#) Damages can include both the actual loss caused by the misappropriation and the unjust enrichment that is not taken into account in computing actual loss. [R.I. Gen. Laws § 6-41-3](#). In lieu of damages measured by any other methods, the damages caused by misappropriation [\*84] may be measured by imposition of liability for a reasonable royalty based on the misappropriator's unauthorized disclosure or use of a trade secret. A "trade secret" is defined as "information, including a formula, pattern, compilation, program, device, method, technique, or process, that . . . (i) [d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its

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<sup>51</sup> The Court disposes only of part of this motion in this report and recommendation. In addition to the tort claims listed in the text, the motion also attacks the viability of Quick Fitting's claims that the push-fit products that it accepted but failed to pay for were nonconforming, defective or negligently manufactured. That aspect of the motion will be addressed in a separate report and recommendation. [See n.7 supra.](#)

disclosure or use; and (ii) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy." [R.I. Gen. Laws § 6-41-1\(4\)](#).

For summary judgment purposes, the Court is satisfied that, as averred by Crompton in his second affidavit, Crompton Aff. #2 ¶¶ 3-4, a fact finder could conclude that Quick Fitting's confidential drawings and specifications amount to trade secrets under the Act.<sup>52</sup> See [Alifax Holding SpA v. Alcor Sci., Inc., Civil Action No. 14-440 S, 2015 U.S. Dist. LEXIS 131455, 2015 WL 5714727, at \\*3-4 \(D.R.I. Sept. 29, 2015\)](#) (under Trade Secrets Act, it is enough to allege that email messages and product drawings were marked as confidential); [Baris v. Steinlage, No. C.A. 99-1302, 2003 R.I. Super. LEXIS 154, 2003 WL 23195568, at \\*23-24 \(R.I. Super. Dec. 12, 2003\)](#) (trade secrets include information that does not exist in the public [\*85] domain, is subject to reasonable efforts to maintain its secrecy, and would be economically valuable to a competitor). Further, while the Wai Feng parties have identified what unquestionably are serious deficiencies with Quick Fitting's Trade Secrets Act claim,<sup>53</sup> there nevertheless is enough for the claim to proceed past summary judgment, particularly where the Act contemplates the availability of injunctive relief for an "[a]ctual or threatened misappropriation," [R.I. Gen. Laws § 6-41-2\(a\)](#), without regard to whether use of the misappropriated secret caused "actual loss" or "unjust enrichment." [R.I. Gen. Laws § 6-41-3\(a\)](#). Based on the facts from which a reasonable juror could find that the Wai Feng entities improperly allowed Quick Fitting's trade secrets to come into the possession of Cixi Welday for the purpose of developing a metal push-fit product line, I find that there is enough for a fact finder to grapple with this claim and recommend that summary judgment be denied on Count II of the 13-56 complaint.

## B. Fraud and Misrepresentation

To establish a *prima facie* case of common law fraud in Rhode Island, "the plaintiff must prove that the defendant 'made a false representation intending thereby to induce plaintiff to rely thereon,' and [\*86] that the plaintiff justifiably relied thereon to his or her damage." [A.J. Amer Agency, 2014 U.S. Dist. LEXIS 94324, 2014 WL 3496964, at \\*14; Women's Dev. Corp. v. City of Central Falls, 764 A.2d 151, 160 \(R.I. 2001\)](#) (quoting [Travers v. Spidell, 682 A.2d 471, 472-73 \(R.I. 1996\)](#)). Liability for fraud cannot attach unless the misrepresentation was intentionally made with intent to deceive. [Fleet Nat'l Bank v. Anchor Media Television, Inc., 45 F.3d 546, 554-55 \(1st Cir. 1995\)](#) (listing cases). Whether the claim is fraud or negligent misrepresentation, the plaintiff must specifically plead and prove with particularity the "time, place and content of [the] alleged false representation[.]" [Hayduk v. Lanna, 775 F.2d 441, 444 \(1st Cir. 1985\)](#); see [N. Am. Catholic Educ. Programming Found., Inc. v. Cardinale, 567 F.3d 8, 15 \(1st Cir. 2009\)](#).

The common law torts involving deceit differ from a claim for breach of contract in that they impose liability on a person who "fraudulently" makes a "misrepresentation" to another who justifiably relies upon that misrepresentation and experiences "pecuniary loss[.]" [Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 343-44, 125 S. Ct. 1627, 161 L. Ed. 2d 577 \(2005\)](#). That is, these torts require proof of actual economic loss. *Id.* (citing [Pasley v. Freeman, 3 T.R. 51, 65, 100 Eng. Rep. 450, 457 \(1789\)](#) (if "no injury is occasioned by the lie, it is not actionable: but if it be attended

<sup>52</sup> With a record replete with references to the confidential nature of Quick Fitting's drawings and ambiguity as to whether any or all are disclosed in a patent, the Wai Feng parties' argument that a patent-protected drawing is not a trade secret functions as a red herring.

<sup>53</sup> For example, any sharing of the trade secrets among CCWFBV, EFF Manufactory or Cixi Welday, as necessary for the purpose of manufacturing the push-fit products for sale to Quick Fitting, does not amount to misappropriation as the term is defined by the Trade Secrets Act. [R.I. Gen. Laws § 6-41-1\(2\)](#). Nor does Quick Fitting's claim that the Wai Feng parties breached their contractual duty of non-disclosure by allowing Mueller's buyer to get access to Quick Fitting's prices; the prices that the Wai Feng parties charged Quick Fitting are not a trade secret under the Trade Secrets Act because they were not "acquired" or "derived" from another entity. [R.I. Gen. Laws § 6-41-1\(2\)\(ii\)\(B\)\(II-III\)](#). And even if Quick Fitting can prove that Cixi Welday really used a Quick Fitting drawing to design a product, with no evidence that such a product was ever sold, it is questionable whether there is enough for a fact finder to conclude that there has been "actual loss" or "unjust enrichment," as the Trade Secrets Act requires for recovery of damages. [R.I. Gen. Laws § 6-41-3](#).

with a damage, it then becomes the subject of an action"); see [Shaulis v. Nordstrom, Inc., 865 F.3d 1, 15 \(1st Cir. 2017\)](#) ("[U]nder Massachusetts law, a claim for fraudulent misrepresentation requires a pecuniary loss."). Critical for purposes of these cases, the plaintiff "must have suffered substantial damage," not simply nominal damages, before "the cause of action can arise." [\*87] [Dura Pharms., 544 U.S. at 344](#) (citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 110, p. 765 (5th ed. 1984)). Rhode Island law embraces these principles. See [Becker v. Independence Bank, 305 F. Supp. 3d 351, 358 \(D.R.I. 2018\)](#) (citing to the Rhode Island Supreme Court in stating "[d]etrimental reliance[ ]" is an "element[ ] a plaintiff must prove[ ]" in fraud and misrepresentation claims). "[I]n an action for deceit based on false representations, a plaintiff must show, not only that false representations have been made by the defendant to the plaintiff, but that, acting in reliance upon such false representations the plaintiff has been injured." [Dunn & McCarthy v. Bishop, 90 A. 1073, 1073 \(R.I. 1914\)](#) (per curiam) (plaintiff "not entitled to recover" because "the plaintiff's injury resulting from the defendant's deceit is entirely contingent and uncertain"); see [Dow Badische Co. v. Wasserman, No. C.A. 73-175, 1976 WL 181972, at \\*5](#) (R.I. Super. Mar. 18, 1976) (citing Dunn for this proposition); see also [Farmer v. Lynch, 67 A. 449, 449 \(R.I. 1907\)](#) (per curiam) ("It does not appear that the plaintiff suffered any damage by reason of the deceit. In this view the other questions become unimportant.").

To buttress its claim of a false representation, Quick Fitting relies on a hotly contested averment from Crompton: that Andrew Yung told him the manufacturing of push-fit pursuant to the 2010 License/Supply [\*88] Agreement would be done at CCWFBV and that Andrew was an owner of that entity. Crompton Aff. # 2 ¶¶ 7-8. Quick Fitting contends that it relied on this intentionally false information in accepting Andrew Yung's signature as binding CCWFBV to the restrictive covenants incorporated into the 2010 License/Supply Agreement. While Quick Fitting has produced no evidence to suggest that confidential information was ever sent directly to CCWFBV, WF SUF # 1 ¶¶ 42-44, it has proffered enough to create a factual dispute regarding whether any manufacturing was actually done at CCWFBV. See n.39 *supra*. If a fact finder concludes that some manufacturing was done at CCWFBV, it is a fair inference that Quick Fitting's technology must have been provided to CCWFBV by someone or it could not have manufactured push-fit to Quick Fitting's specifications. Further, a reasonable juror could find detrimental reliance by Quick Fitting on Andrew Yung's intentionally false representation that he was an owner of CCWFBV in that Quick Fitting accepted Andrew's signature of the 2010 License/Supply Agreement as sufficient to bind CCWFBV to its terms.

This leads to the claim's fatal flaw — the utter lack of proof of any [\*89] actual economic injury. See [Dura Pharms., 544 U.S. at 343-44](#) ("[T]he common law has long insisted that a plaintiff in such a case show not only that had he known the truth he would not have acted *but also* that he suffered actual economic loss.") (emphasis added); [Dunn, 90 A. at 1073](#). Quick Fitting has failed to produce even a scintilla of evidence tending to establish that its intellectual property was wrongly used or disclosed because CCWFBV was (as Quick Fitting claims) manufacturing and shipping push-fit products to it during 2010 and 2011, pursuant to an understanding, if not a binding contract. Moreover, Quick Fitting has failed to marshal even a scintilla of proof that CCWFBV ever used Quick Fitting's trade secrets so as to inflict economic injury on Quick Fitting. Based on that deficit, I recommend that summary judgment enter against Quick Fitting on Count III (fraud and misrepresentation) of its 13-56 complaint.

### C. Defamation

Mueller's Bell authenticated a July 2012 email written by the non-testifying declarant Wang to Bell, her superior, in which she reported that Andrew Yung told her EFF Manufactory had stopped doing business with Quick Fitting because it had failed to pay for "a order worthy 500K\$[sic]" and that Andrew was [\*90] initiating litigation.<sup>54</sup> QF Ex. # 3 QQ at 1. Bell testified that the information had no impact on Mueller's business with Quick Fitting. QF Ex. # 3 OO at 69. Quick Fitting relies on the arguable hearsay in this email as the only evidence underpinning its state law claim of defamation.

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<sup>54</sup> The email also mentioned a similar complaint from another Chinese supplier claiming it too had not been paid by Quick Fitting. QF Ex. # 3 QQ at 1.

To establish a claim for defamation, Quick Fitting must show (1) the utterance of a false and defamatory statement concerning another; (2) an unprivileged communication to a third party; (3) fault amounting to at least negligence; and (4) damages. *Cullen v. Auclair, 809 A.2d 1107, 1110 (R.I. 2002)* (per curiam) (quoting *Nassa v. Hook-SupeRx, Inc., 790 A.2d 368, 373 n.10 (R.I. 2002)*). A statement normally is not actionable unless it contains an objectively verifiable assertion. *Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 127-28 (1st Cir. 1997)*; see *Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993)* ("A statement of fact is not shielded from an action for defamation by being prefaced with the words 'in my opinion,' but if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable."). "The *First Amendment* 'overlays' state defamation law[.]" *RainSoft v. MacFarland, C.A. No. 15-432 WES, 350 F. Supp. 3d 49, 2018 U.S. Dist. LEXIS 170470, 2018 WL 4696737, at \*4 (D.R.I. Sept. 30, 2018)* (quoting *Sindi v. El-Moslimany, 896 F.3d 1, 13 (1st Cir. 2018)*). "[A]n opinion whose factual basis is expressed and (substantially) [\*91] true is protected speech." *2018 U.S. Dist. LEXIS 170470, [WL] at \*5* (citing *Restatement (Second) of Torts § 566* (Am. Law Inst. 1977)). "[S]tatements count as substantially true if they are, in fact, true, but too even if they admit of '[m]inor inaccuracies[,] . . . so long as the substance, the gist, the sting, of the libelous charge be justified.'" *2018 U.S. Dist. LEXIS 170470, [WL] at \*6* (quoting *Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991)*). As the plaintiff in a defamation action, Quick Fitting carries a substantial burden. *Alves v. Hometown Newspapers, Inc., 857 A. 2d 743, 750-51 (R.I. 2004)*. Quick Fitting argues that the actionable statement amounted to unspoken innuendo that Quick Fitting was on shaky financial footing.

Quick Fitting's effort founders on the first and fourth elements — the undisputed truth of the actionable portions of the utterance and the absence of damage. As memorialized in the Wang email, Andrew Yung allegedly stated that he had stopped business with Quick Fitting "as QF did not pay him for a order worthy 500k[sic]," he had "already started the legal process," and that Quick Fitting was critical of the Wai Feng parties' delivery and quality. QF Ex. # 3 QQ at 1; ECF No. 191-15 at 99-101. Every objectively verifiable fact in this statement is true. That is, it is undisputed that, in July 2012, the Wai Feng parties broke off their relationship with Quick Fitting based on non-payment [\*92] of between \$400,000 and \$500,000 and were about to initiate litigation, which they did on August 2, 2012. Considering its legal claim that the Wai Feng parties delivered defective goods, Quick Fitting cannot dispute that it has been critical of the Wai Feng parties' delivery and quality. 13-56 ECF No. 135 at 45. The balance of the statement is non-actionable, amounting to Andrew Yung's opinion that he had been cooperative, but that Quick Fitting "tried all the possible way [sic] to reduce payment using all kinds of excuse[s]." QF Ex. # 3 QQ at 1. At the same time, from other sources, Mueller also learned that other Chinese suppliers of Quick Fitting were making similar claims. Yet, Bell testified that none of this information had any impact on Mueller's business relationship with Quick Fitting. QF Ex. # 3 OO at 69.

True statements coupled with an opinion that caused no damage do not amount to actionable defamation. See *RainSoft, 2018 U.S. Dist. LEXIS 170470, 2018 WL 4696737, at \*4-8*. I recommend that the Court enter summary judgment against Quick Fitting with respect to Count IV of the 13-56 complaint.

#### D. Civil Conspiracy

To prove a civil conspiracy, a plaintiff must show evidence of an unlawful enterprise. *Read & Lundy, Inc. v. Washington Tr. Co. of Westerly, 840 A.2d 1099, 1102 (R.I. 2004)*. Under Rhode Island law, civil conspiracy is not [\*93] an independent basis of liability. *Guilbeault v. R.J. Reynolds Tobacco Co., 84 F. Supp. 2d 263, 268-69 (D.R.I. 2000)*. Absent an underlying tort or predicate wrongful act, conspiracy is not recognized as an independent cause of action. *Murphy v. Central Falls Det. Facility Corp., No. C.A. 14-203 S, 2015 U.S. Dist. LEXIS 56723, 2015 WL 1969178, at \*14 n.10 (D.R.I. Apr. 30, 2015)*. In order for a predicate wrongful act to result in the imposition of liability for civil conspiracy, there must be specific intent to do something illegal or tortious. *Fleet Nat'l Bank v. Anchor Media Television, Inc., 831 F. Supp. 16, 45 (D.R.I. 1993)*, aff'd, *45 F.3d 546 (1st Cir. 1995)*. In light of my recommendation that summary judgment be denied as to Quick Fitting's claims arising under the Trade Secrets Act, which is premised on intentional misappropriation of trade secrets, I also recommend that summary judgment be denied with respect to the derivative civil conspiracy claim in Count X of the 13-56 complaint.

#### E. Injunctive Relief

I recommend that summary judgment be denied with respect to Quick Fitting's claim for injunctive relief in Count XI of the 13-56 complaint. As long as the breach of contract and Trade Secrets Act claims continue, the claim for injunctive relief should remain pending. See WF Ex. 4 ¶ 7(a) (injunction relief available for breach of 2010 License/Supply Agreement); WF Ex. 9 ¶ I(6) (injunction relief [\*94] available for breach of 2011 NDA); WF Ex. 11 ¶ 5.10.

#### VIII. CONCLUSION

Based on the foregoing, I make the following recommendations. I recommend granting in part and denying in part the Wai Feng parties' summary judgment motion taking aim at (a) Count IV of Quick Fitting's counterclaims in 13-33, (b) Count I of Quick Fitting's operative complaint in 13-56 and (c) the sufficiency of the evidence Quick Fitting presents on those alleged breaches of contract. 13-56 ECF No. 255. I find the motion should be granted as to aspects (a) and (b) but denied as to (c). I further recommend that the Court deny Andrew Yung's summary judgment motion challenging Quick Fitting's Count IX in 13-56. 13-56 ECF No. 256. I further recommend granting EFF LLC's motion for summary judgment (13-56 ECF No. 257), or, if necessary as described above, dropping EFF LLC under Fed. R. Civ. P. 21. The final summary judgment motion addressed in this opinion is the Wai Feng parties' challenge to certain state law claims Quick Fitting advances in 13-56, which I find should be granted in part and denied in part. 13-56 ECF No. 254. I recommend granting the motion as to fraud/misrepresentation (Count III) and defamation (Count IV) and denying [\*95] it as to misappropriation of trade secrets (Count II), civil conspiracy (Count X) and injunctive relief (Count XI).

Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan

PATRICIA A. SULLIVAN

United States Magistrate Judge

December 17, 2018



## Innovation Ventures, LLC v. Custom Nutrition Labs, LLC

United States Court of Appeals for the Sixth Circuit

August 3, 2018, Argued; December 20, 2018, Decided; December 20, 2018, Filed

File Name: 18a0278p.06

Nos. 17-1734/1771/1911

### **Reporter**

912 F.3d 316 \*; 2018 U.S. App. LEXIS 35917 \*\*; 2018 FED App. 0278P (6th Cir.) \*\*\*

17-1734 & 17-1771, INNOVATION VENTURES, LLC, a Michigan limited liability company, Plaintiff-Appellant/Cross-Appellee, v. CUSTOM NUTRITION LABORATORIES, LLC, Defendant, NUTRITION SCIENCE LABORATORIES, LLC, a Texas limited liability company; ALAN JONES, Defendants-Appellees/Cross-Appellants.17-1911, INNOVATION VENTURES, LLC, a Michigan limited liability company, Plaintiff-Appellant, v. NUTRITION SCIENCE LABORATORIES, LLC, a Texas limited liability company; ALAN JONES; L.O.D.C. GROUP LIMITED; L.O.D.C. INCORPORATED, Defendants-Appellees.

**Subsequent History:** Rehearing denied by [Innovation Ventures, LLC v. Jones, 2019 U.S. App. LEXIS 2623 \(6th Cir., Jan. 24, 2019\)](#)

Stay denied by [Innovation Ventures, LLC v. Jones, 2019 U.S. App. LEXIS 4311 \(6th Cir., Feb. 12, 2019\)](#)

**Prior History:** [\*1] Appeal from the United States District Court for the Eastern District of Michigan at Flint. No. 4:12-cv-13850; 4:16-cv-11179—Terrence George Berg, District Judge.

[Innovation Ventures, LLC v. Custom Nutrition Labs., LLC, 2014 U.S. Dist. LEXIS 137037 \(E.D. Mich., Sept. 29, 2014\)](#)

[Innovation Ventures, LLC v. Custom Nutrition Labs., LLC, 256 F. Supp. 3d 696, 2017 U.S. Dist. LEXIS 89544 \(E.D. Mich., June 12, 2017\)](#)

[Innovation Ventures, L.L.C. v. Custom Nutrition Labs., L.L.C., 2015 U.S. Dist. LEXIS 129946 \(E.D. Mich., Sept. 28, 2015\)](#)

## **Core Terms**

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Innovation, settlement agreement, district court, parties, Custom, damages, Manufacturing, energy, Choline, personal jurisdiction, Secondary, nominal damages, lost profits, cases, royalty, laches, restrictive covenant, stipulations, antitrust, signature, courts, shots, leading case, calculation, noncompete, incorporates, Appeals, waived, estimated, counterclaim

## **LexisNexis® Headnotes**

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Civil Procedure > Appeals > Standards of Review

## **HN1** Appeals, Appellate Jurisdiction

An appellate court may review jurisdictional objections in any order.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

## **HN2** Appellate Jurisdiction, Final Judgment Rule

Appellate courts have jurisdiction to hear appeals from all final decisions of the district courts. [28 U.S.C.S. § 1291](#). A decision is final for the purposes of [§ 1291](#) if it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. This firm finality principle is designed to guard against piecemeal appeals. There is also a long-standing rule that a party may not appeal a judgment to which it consented. Satisfaction of that rule is a requirement of [§ 1291](#).

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

## **HN3** Appellate Jurisdiction, Final Judgment Rule

There is an important exception to the rule prohibiting appeals from judgments to which the appellant consented. An appeal is permissible when solicitation of the formal dismissal was designed only to expedite review of an order which had in effect dismissed appellants' complaint.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

## **HN4** Appellate Jurisdiction, Final Judgment Rule

There two important limits on the application of *Raceway Props., Inc. v. Emprise Corp.* First, parties may not appeal claims that were dismissed without prejudice. Second, if a party seeks to come within the *Raceway* exception, she should make her intention known to the court and opposing parties. While it is possible for a party to consent to a judgment and still preserve his right to appeal, he must reserve that right unequivocally, as it will not be presumed.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

## **HN5** Appellate Jurisdiction, Final Judgment Rule

A conditional dismissal of unresolved claims or issues, in which the party reserves the right to reinstate those claims or issues does not create finality.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Adverse Determinations

## **HN6** Reviewability of Lower Court Decisions, Adverse Determinations

When a district court enters judgment against a plaintiff on some claims and the plaintiff voluntarily relinquishes the claims that remain, this appellate court will not penalize the plaintiff by dismissing his or her appeal.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions

### [\*\*HN7\*\*](#) Appeals, Reviewability of Lower Court Decisions

Courts have consistently allowed plaintiffs who were awarded nominal damages to appeal despite technically winning their suit. The logic underpinning these cases is obvious: It is a rare defendant indeed who would pay to appeal a case in which she lost a trivial amount of money. A rule forbidding a plaintiff to appeal an award of nominal damages would, in the vast majority of suits awarding nominal damages, be a rule barring any appeal at all.

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

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

### [\*\*HN8\*\*](#) Reviewability of Lower Court Decisions, Preservation for Review

The plaintiff is the master of her complaint and may choose the remedies she wishes to request. A plaintiff should not be forced to pursue every court-conceived theory to preserve her right to appeal.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Challenges

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

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

### [\*\*HN9\*\*](#) In Personam Actions, Challenges

When personal jurisdiction is at issue, it must be settled before reaching the merits of the case. An appellate court reviews questions of personal jurisdiction de novo. Unlike subject-matter and appellate jurisdiction, objections to personal jurisdiction can be and frequently are waived: In the typical waiver scenario, a defendant waives its personal jurisdiction defense if submissions, appearances and filings give the plaintiff a reasonable expectation that the defendant will defend the suit on the merits or cause the court to go to some effort that would be wasted if personal jurisdiction is later found lacking. Similarly, if a defendant makes a motion under [Fed. R. Civ. P. 12\(b\)\(2\) to \(5\)](#) but does not raise lack of personal jurisdiction, any objection is waived by operation of [Fed. R. Civ. P. 12\(h\)\(1\)](#).

Civil Procedure > Pleading & Practice > Motion Practice

### [\*\*HN10\*\*](#) Pleading & Practice, Motion Practice

An objection is not "available" within the meaning of [Fed. R. Civ. P. 12\(g\)\(2\)](#) when the objection is futile in the sense that the law bars the district court from adopting it to dismiss.

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

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Relation Back

### [\*\*HN11\*\*](#) Standards of Review, De Novo Review

An appellate court reviews de novo the district court's conclusion that allegations in an amended pleading do not relate back to the original pleading. An amendment relates back to the date of the original pleading if the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading. [Fed. R. Civ. P. 15\(c\)\(1\)\(B\)](#). When applying this standard, courts ask whether the party asserting the statute of limitations defense had been placed on notice that he could be called to answer for the allegations in the amended pleading.

Antitrust & Trade Law > Sherman Act > Claims

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

## [\*\*HN12\*\*](#) [blue icon] **Sherman Act, Claims**

An antitrust claim must allege an antitrust injury.

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

Contracts Law > Contract Interpretation

Governments > Courts > Judicial Precedent

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

## [\*\*HN13\*\*](#) [blue icon] **Standards of Review, De Novo Review**

In Michigan, contract interpretation is a question of law and therefore subject to de novo review. A federal court looks to the final decisions of Michigan's highest court, and if there is no decision directly on point, then the federal court must make an Erie guess to determine how that court, if presented with the issue, would resolve it. In making that guess, intermediate appellate decisions are viewed as persuasive unless it is shown that the state's highest court would decide the issue differently. Federal courts are also bound by their own published precedent interpreting Michigan law, except where the decisions have subsequently been called into question by Michigan courts.

Contracts Law > Statute of Frauds > Requirements > Performance

Contracts Law > Statute of Frauds > Requirements > Writings

Contracts Law > Statute of Frauds > Requirements > Signatures

## [\*\*HN14\*\*](#) [blue icon] **Requirements, Performance**

The Michigan statute of frauds provides that any contract that, by its terms, is not to be performed within 1 year is void unless it is in writing and signed with an authorized signature by the party to be charged with the agreement. [Mich. Comp. Laws. § 566.132\(1\)](#).

Business & Corporate Law > ... > Corporate Governance > Directors & Officers > Management Duties & Liabilities

Contracts Law > Contract Interpretation > Intent

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

#### **HN15** [ ] Directors & Officers, Management Duties & Liabilities

Michigan courts have explained that, when contracting parties wish to ensure that a corporate officer is bound in both an individual and an official capacity, the nearly universal practice is that the officer signs twice—once as an officer and again as an individual. When the signatory signed only once, Michigan courts apply normal contract law principles to discern the parties' intent. Michigan courts presume that when appropriate words added to the signature of the individual indicated that he signed on behalf of the corporation in the representative capacity designated, the individual is not bound in his personal capacity. But that presumption may be rebutted: Where anything on the face of the paper suggests a doubt as to the party bound, or the character in which any of the signers had acted in affixing his name, testimony may be admitted between the original parties to show the true intent.

Contracts Law > Contract Interpretation > Intent

#### **HN16** [ ] Contract Interpretation, Intent

Under Texas law, it is uniformly held that an unsigned paper may be incorporated by reference in the paper signed by the person sought to be charged. The language used is not important provided the document signed by the defendant plainly refers to another writing. The referenced document may be incorporated in whole or in part, depending on the referring language used. The primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument, and courts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless.

Contracts Law > Contract Interpretation > Intent

#### **HN17** [ ] Contract Interpretation, Intent

Plainly referring to a document requires more than merely mentioning the document. The language in the signed document must show the parties intended for the other document to become part of the agreement.

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

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem

#### **HN18** [ ] Jury Trials, Province of Court & Jury

The meaning of an ambiguous contract is a question of fact that must be decided by the jury. This principle applies with equal strength in the context of noncompete agreements.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

#### **HN19** [ ] Appellate Jurisdiction, Final Judgment Rule

There is simply no rule or case law that requires litigants to move for reconsideration of an interlocutory ruling in order to avoid waiving a challenge to that ruling on appeal of a final decision.

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

#### **HN20** [blue icon] **Per Se Rule & Rule of Reason, Per Se Violations**

The doctrine of per se violations applies only if a restraint clearly and unquestionably falls within one of the handful of categories that have been collectively deemed per se anticompetitive. The classic examples are naked, horizontal restraints pertaining to prices or territories.

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

#### **HN21** [blue icon] **Per Se Rule & Rule of Reason, Per Se Violations**

Horizontality alone does not necessarily justify invocation of the per se rule. Applying the rule of reason is the default position and can be applied to horizontal restraints as well if they do not fit into existing categories of per se violations.

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

Evidence > Burdens of Proof > Allocation

#### **HN22** [blue icon] **Cartels & Horizontal Restraints, Sherman Act**

The burden of showing the existence of an unreasonable restraint on trade lies with defendants.

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > Laches

#### **HN23** [blue icon] **Affirmative Defenses, Laches**

Michigan law provides that the doctrine of laches is triggered by the plaintiff's failure to do something that should have been done under the circumstances or failure to claim or enforce a right at the proper time. However, the doctrine is only applicable in cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party.

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > Laches

#### **HN24** [blue icon] **Affirmative Defenses, Laches**

Michigan courts presume that when a claim is brought within the statute of limitations, as this claim undisputedly was, the doctrine of laches does not apply.

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > Laches

#### [HN25](#) [ ] Affirmative Defenses, Laches

The application of laches can shorten, but never lengthen, the analogous period of limitations. Thus, laches may bar a legal claim even if the statutory period of limitations has not yet expired.

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > Laches

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > Unclean Hands

#### [HN26](#) [ ] Affirmative Defenses, Laches

Under Michigan law, a party with unclean hands may not assert the equitable defense of laches. The unclean hands doctrine allows a court to deny equitable relief when the party applying for such relief is guilty of conduct involving fraud, deceit, unconscionability, or bad faith related to the matter at issue to the detriment of the other party. In determining whether a party comes before a court with clean hands, the primary factor to be considered is whether the party sought to mislead or deceive the other party.

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > Lost Profits

#### [HN27](#) [ ] Foreseeable Damages, Lost Profits

Under Michigan law, lost profits resulting from a breach of contract may be considered by a jury in determining damages. Permitting juries to estimate lost profits comports with the underlying principle of Michigan law that when, from the nature of the case, the amount of the damages can not be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit. While lost profits must be proven with a reasonable degree of certainty and cannot be based solely on conjecture and speculation, the law permits some level of uncertainty to be resolved by the trier of fact.

Contracts Law > ... > Damages > Measurement of Damages > Foreseeable Damages

#### [HN28](#) [ ] Measurement of Damages, Foreseeable Damages

Reasonable royalties are an accepted method of calculating damages in patent infringement and misappropriation of trade secret cases. [35 U.S.C.S. § 284](#); [Mich. Comp. Laws § 445.1904](#).

Contracts Law > Contract Interpretation > Intent

#### [HN29](#) [ ] Contract Interpretation, Intent

Michigan courts, like their Texas counterparts, distinguish between contractual terms that merely mention another document and those that are made for the purpose of making such writing a part of the contract. In so doing, courts must look for the party's intent within the contract.

**Counsel:** ARGUED: John J. Bursch, BURSCH LAW PLLC, Caledonia, Michigan, for Innovations Ventures.

Baxter W. Banowsky, BANOWSKY & LEVINE, P.C., Dallas, Texas, for Nutrition Science Laboratories, Alan Jones, and L.O.D.C.

ON BRIEF: John J. Bursch, BURSCH LAW PLLC, Caledonia, Michigan, Matthew T. Nelson, WARNER NORCROSS & JUDD LLP, Grand Rapids, Michigan, E. Powell Miller, Martha J. Olijnyk, THE MILLER LAW FIRM, P.C., Rochester, Michigan, for Innovations Ventures.

Baxter W. Banowsky, BANOWSKY & LEVINE, P.C., Dallas, Texas, for Nutrition Science Laboratories, Alan Jones, and L.O.D.C.

**Judges:** Before: SILER, GRIFFIN, and STRANCH, Circuit Judges.

**Opinion by:** JANE B. STRANCH

## Opinion

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[\*323] [\*\*\*2] JANE B. STRANCH, Circuit Judge. Some years ago, Plaintiff Innovation Ventures (Innovation), manufacturer of 5-Hour Energy, settled a lawsuit with the now-defunct Custom Nutrition Laboratories (Custom Nutrition) by entering into a noncompete agreement. When Nutrition Science Laboratories (NSL) subsequently purchased Custom Nutrition's assets, it did not abide by the restrictive covenants [\*\*2] in that noncompete agreement. Innovation [\*324] initially sued Custom Nutrition; NSL; and Alan Jones, an officer of both Custom Nutrition and NSL, and later added a suit against a related company, Lily of the Desert (collectively, Defendants). After protracted litigation, Innovation was awarded nominal damages for its core breach of contract claim. For the reasons explained below, we **AFFIRM** in part, **REVERSE** in part, and **REMAND** to the district court for further proceedings consistent with this opinion.

### I. BACKGROUND

#### A. Factual History

The story of the parties' business relationship and its subsequent deterioration is lengthy and complex, and many of its details are hotly disputed. The district court ably described the relevant events in some detail in one of its summary judgment orders. See *Innovation Ventures, LLC v. Custom Nutrition Labs., LLC (Innovation Ventures II)*, No. 12-13850, 2015 U.S. Dist. LEXIS 129946, 2015 WL 5679879, at \*1-7 (E.D. Mich. Sept. 28, 2015). The following is a summary of the critical facts.

#### [\*\*\*3] 1. Breakdown of the Manufacturing Relationship

Plaintiff Innovation is the maker and distributor of 5-Hour Energy, a well-known "energy shot." In 2004, when Innovation was doing business as Living Essentials, it contracted with Custom Nutrition to manufacture and package 5-Hour Energy. Defendant Alan Jones was the President and CEO of Custom Nutrition at the [\*\*3] time and had previously manufactured a two-ounce energy shot called "Shotz." When Living Essentials ended the business relationship some years later—abruptly and unfairly, according to Defendants—Custom Nutrition had a surplus of ingredients and packaging. Jones used the surplus to continue manufacturing 5-Hour Energy for an unspecified amount of time after the relationship ended. Jones averred that his use of the surplus was mitigation of damages protected by the Uniform Commercial Code.

The companies then sued one another, with each claiming that the other had breached the contract, stolen trade secrets or intellectual property, and committed assorted torts. The protracted litigation came to an end almost two

years later when, according to Jones, Custom Nutrition was on the verge of bankruptcy. The companies then entered into the Settlement Agreement that is at the center of this litigation.

The Agreement contains an admission that Custom Nutrition and Jones "wrongfully manufactured" products bearing the 5-Hour Energy label, provides that Living Essentials owns the 5-Hour Energy formula, and forbids Custom Nutrition from manufacturing any new "Energy Liquid" that "contain[s] anything [\*\*4] in the Choline Family." According to Innovation, ingesting choline and related substances improves focus, and including them in the 5-Hour Energy recipe was a critical innovation. In return for these restrictions and admissions, Living Essentials paid Custom Nutrition \$1.85 million. Specific provisions of the Settlement Agreement are discussed in more detail below.

## 2. NSL Purchases Custom Nutrition's Assets

In the words of the district court, Custom Nutrition was "in a precarious financial condition," and the cash infusion was insufficient "to enable the company to regain its financial footing." [Innovation Ventures II, 2015 U.S. Dist. LEXIS 129946, 2015 WL 5679879, at \\*4](#). Jones therefore spoke with Don Lovelace, owner of Lily of the Desert, about the possibility of Lily acquiring Custom Nutrition. [\*\*4] Lovelace [\*325] instead agreed to purchase Custom Nutrition's assets and formed a new corporation, Defendant NSL, which entered into an Asset Purchase Agreement with Custom Nutrition.

The Asset Purchase Agreement provides that NSL acquires Custom Nutrition's listed assets but is not "responsible for any liabilities, liens, security interests, claims, obligations, or encumbrances" of Custom Nutrition except for those listed on an attached schedule—principally, debt Custom [\*\*5] Nutrition owed to a bank. The Asset Purchase Agreement includes one reference to the Settlement Agreement: "[T]he formula for energy drinks manufactured by [Custom Nutrition] and certain related trademark and copyright matters are limited by the settlement agreement between [Custom Nutrition] and Living Essentials."

After the execution of the Asset Purchase Agreement, NSL went into the energy shot business. Jones became an employee of Lily and represented himself as President of NSL. NSL marketed itself as a continuation of Custom Nutrition and took on Custom Nutrition's old orders and customers. Over the next few years, NSL produced and distributed energy shots containing choline citrate, choline bitartrate, betaine, and alpha glycerolphosphorylcholine (alpha GPC). The first two substances are listed in the Choline Family definition in the Settlement Agreement; the latter two are, according to Innovation, chemical equivalents to choline covered by the definition's catch-all clause.

## **B. Proceedings Below**

### 1. Lead Case (Nos. 17-1734/1771)

Innovation sued Custom Nutrition,<sup>1</sup> NSL, and Jones for breaching the Settlement Agreement and for tortious interference. Proceedings in the district court [\*\*6] were protracted.

After rejecting two motions to dismiss raising objections to personal jurisdiction, the district court addressed whether NSL had violated the Choline Family restrictions. It granted partial summary judgment to Innovation based on Defendants' admitted production of energy shots containing choline bitartrate and choline citrate. See [Innovation Ventures, LLC v. Custom Nutrition Labs., LLC \(Innovation Ventures I\), No. 12-13850, 2014 U.S. Dist. LEXIS 137037, 2014 WL 4829582, at \\*3 \(E.D. Mich. Sept. 29, 2014\)](#). The court concluded that whether betaine and alpha GPC (which Defendants also admitted to using) were included in the catch-all clause in the Choline Family definition was ambiguous as a matter of law. See [2014 U.S. Dist. LEXIS 137037, \[WL\] at \\*2-3](#). A jury trial was convened to determine whether the two ingredients were included in the clause's scope; the jury concluded that both were.

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<sup>1</sup> Custom Nutrition did not respond, and default was entered.

The district court then turned to issues related to liability under the Settlement Agreement. The court concluded that: (1) NSL was bound by the Choline Family restrictions in the Settlement Agreement by virtue of their incorporation into the Asset Purchase Agreement, see *Innovation Ventures II, 2015 U.S. Dist. LEXIS 129946, 2015 WL 5679879, at \*16-19*; (2) Jones was bound by the Settlement Agreement because he signed it, see *2015 U.S. Dist. LEXIS 129946, [WL] at \*20-21*; and (3) the twenty-year duration of the Settlement Agreement was unreasonable under Michigan law, necessitating reformation of the [\*\*7] contract to last only three years, see *2015 U.S. Dist. LEXIS 129946, [WL] at \*24-25*.

After another round of briefing, the district court turned to the remaining issues, concluding that: (1) Innovation was not entitled to summary judgment as to liability on its main breach of contract claim because NSL's affirmative defense of laches [\*326] raised factual disputes, see *Innovation Ventures, LLC v. Custom Nutrition Labs., LLC (Innovation Ventures III), 256 F. Supp. 3d 696, 704 (E.D. Mich. 2017)*; and (2) Innovation's three proposed methodologies for calculating damages were impermissible, although Innovation could "still recover lost profits under a non-patent-infringement specific method of calculation," see *id. at 710-12 & n.8*.

That order was handed down about one month before the final jury trial was scheduled to begin. According to Innovation, the order left it "without any theory of actual damages to present to the jury, leaving only the theory of nominal damages" on which it could recover with regard to its primary claim. Count III, alleging that Jones breached the Settlement Agreement by cooperating with adverse parties, had yet to be resolved. See *id. at 715*. The parties therefore entered four stipulations "[f]or the purpose of expediting appeal of the previous orders and judgment":

- [\*\*\*6] 1. The parties stipulate to the dismissal of Count III of Plaintiff's Second Amended Complaint [\*\*8] with prejudice pursuant to *Federal Rule of Civil Procedure 41(a)(1)*.
- 2. The parties stipulate that the meaning of "any successful order" as used in Section 20 of the Settlement Agreement does not encompass a judgment or order for nominal damages.<sup>2</sup>
- 3. The parties stipulate that, if awarded, nominal damages are \$1.
- 4. The parties stipulate that nominal damages in the amount of \$1 do not constitute sufficient prejudice to support the affirmative defense of laches under Michigan law.

The parties submitted a proposed judgment awarding nominal damages to Innovation. Counsel for both parties signed the proposed judgment, indicating that it was "Approved as to Form Only and Preserving All Rights of Appeal."

The district court had reservations about this resolution, explaining that it was "not certain that entering this proposed judgment will actually preserve" either party's right to appeal. It nonetheless entered judgment in Innovation's favor on Count I and awarded nominal damages. Innovation appealed, and NSL cross-appealed.

## 2. Secondary Case (No. 17-1911)

As the Lead Case was proceeding in the district court, Innovation brought a new suit against NSL, adding a new defendant: Lily of the Desert. According to the complaint, discovery in the Lead [\*\*9] Case revealed that Lily was also liable under the Settlement Agreement because of its relationship with NSL. Innovation brought the Secondary Case to prevent NSL from "play[ing] shell games to avoid liability and any potential judgment." All claims in the Secondary Case relate to the same nucleus of fact as in the Lead Case, and Innovation concedes that the claims in the Secondary Case "rise or fall with the rulings in the lead case."

All parties agreed the judgment in the Lead Case rendered the claims in the Secondary Case "effectively moot," so the district court entered judgment in favor of Defendants. *Innovation Ventures, LLC v. Nutrition Sci. Labs., LLC (Innovation Ventures IV), No. 16-11179, [\*\*\*7] 2017 U.S. Dist. LEXIS 211640, 2017 WL 4553429, at \*1-2 (E.D. Mich. July 17, [\*327] 2017)*. Innovation appealed. The two cases were consolidated on appeal.

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<sup>2</sup>Section 20 of the Settlement Agreement provides that a party seeking to enforce the Agreement "shall be entitled to its attorney's fees upon obtaining any successful order against the Party against whom such enforcement is sought."

## II. ANALYSIS

### A. Jurisdiction

Defendants raise two jurisdictional objections: lack of appellate jurisdiction and lack of personal jurisdiction over both Jones and NSL. [HN1](#) We may review jurisdictional objections in any order. See [Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 578, 119 S. Ct. 1563, 143 L. Ed. 2d 760 \(1999\)](#) (explaining that "there is no unyielding jurisdictional hierarchy" as between subject-matter and personal jurisdiction).

#### 1. Appellate Jurisdiction

Defendants argue that the judgment pursuant to stipulations [\[\\*\\*10\]](#) in the Lead Case was not a final appealable decision for purposes of [28 U.S.C. § 1291](#).<sup>3</sup>

Defendants did not raise this argument before the district court. To the contrary, when the district court questioned Defendants' counsel—the same counsel representing them on appeal—about whether the stipulations could result in a "final resolution," counsel responded that "there is Sixth Circuit case law for the proposition that a plaintiff can dismiss with prejudice the remaining claims if they feel that the main thrust of their case has been already decided" and that "the Sixth Circuit does actually authorize a procedure just very much like this in order to finalize a case, resolve all the issues, and make it ripe for appeal." The inconsistency between the representations made to the district court and those included in the motion to dismiss is concerning but does not change our approach to the jurisdictional question at hand. We must satisfy ourselves that appellate jurisdiction exists even when neither party raises the issue. See [Bd. of Trs. of Plumbers, Local Union No. 392 v. Humbert, 884 F.3d 624, 625 \(6th Cir. 2018\)](#).

[HN2](#) Appellate courts have jurisdiction to hear "appeals from all final decisions of the district courts." [28 U.S.C. § 1291](#). A decision is final for the purposes of [§ 1291](#) if it "ends the litigation [\[\\*\\*8\]](#) on the [\[\\*\\*11\]](#) merits and leaves nothing for the court to do but execute the judgment." [Catlin v. United States, 324 U.S. 229, 233, 65 S. Ct. 631, 89 L. Ed. 911 \(1945\)](#). This "firm finality principle [is] designed to guard against piecemeal appeals." [Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1707, 198 L. Ed. 2d 132 \(2017\)](#). There is also a long-standing rule that a party may not appeal a judgment to which it consented. See [United States v. Babbitt, 104 U.S. 767, 768, 26 L. Ed. 921, 17 Ct. Cl. 431 \(1881\)](#); [Scholl v. Belmont Oil Corp., 327 F.2d 697, 700 \(6th Cir. 1964\)](#). Satisfaction of that rule is a requirement of [§ 1291](#). See [Raceway Props., Inc. v. Emprise Corp., 613 F.2d 656, 657 \(6th Cir. 1980\)](#) (per curiam). We therefore must determine whether this judgment entered pursuant to stipulations comports with [§ 1291](#)'s requirements.

##### a. The Raceway Standard

[HN3](#) There is an important exception to the rule prohibiting appeals from judgments to which the appellant consented. As we explained in *Raceway Properties*, an appeal is permissible when "solicitation of the formal dismissal was designed only to expedite review of an order which had in effect dismissed appellants' complaint." *Id.* (citing [United States v. Procter & Gamble Co., 356 U.S. 677, 78 S. Ct. 983, 2 L. Ed. 2d 1077 \(1958\)](#)).

*Procter & Gamble*, the Supreme Court decision upon which *Raceway* relied, was an antitrust case in which the Government had refused to produce a grand jury transcript. [356 U.S. at 678-79](#). On the Government's suggestion, the district court entered an order providing that, if the Government did not produce the transcript by a particular date, the case would be dismissed. [Id. at 679](#). The case was subsequently dismissed and appealed [\[\\*\\*12\]](#) to the

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<sup>3</sup> Defendants have not moved to dismiss the appeal in the Secondary Case, although they argue that that appeal is frivolous and that Innovation should be sanctioned for pursuing it. Appellate jurisdiction in the Secondary Case is not in doubt. The judgment in the Secondary Case was entered on the basis of preclusion, not pursuant to stipulations.

Supreme Court, where Procter & Gamble argued that the appeal should be dismissed because "a plaintiff who has voluntarily dismissed his complaint may not sue out a writ of error." *Id. at 680*. The Court explained that rule "ha[d] no application here" because "[w]hen the Government proposed dismissal for failure to obey, it had lost on the merits and was only seeking an expeditious review." *Id. at 680-81*. The Supreme Court distinguished between consenting to the substance of a judgment and consenting to its form: "The plaintiffs did not consent to a judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that they might come to this court without further delay." *Id. at 681* (quoting *Thomsen v. Cayser*, 243 U.S. 66, 83, 37 S. Ct. 353, 61 L. Ed. 597 (1917)).

[\*\*\*9] In *Raceway*, we held that expeditious review could be sought in this manner in contexts other than discovery disputes. *Raceway*, also an antitrust suit, involved a partial summary judgment decision that had defined the market at issue:

Appellants took issue with the district court's determination of the relevant market. Appellants informed the court they believed the court's order effectively terminated the lawsuit since they were not prepared to and could not [\*\*13] proceed with evidence regarding the relevant market outlined by the court. The appellants requested a formal order of dismissal so that they could proceed with an appeal challenging the district court's ruling on the scope of the relevant market. Such an order was entered and this appeal followed.

613 F.2d at 657. We permitted the appeal on the grounds quoted above: "[S]olicitation of the formal dismissal was designed only to expedite review of an order which had in effect dismissed appellants' complaint." *Id.*

The *Raceway* rule subsequently found purchase. Thus, for example, we heard an appeal pursuant to *Raceway* when a plaintiff sought voluntary dismissal of her suit after the district court "had dismissed finally the only viable claim which she had advanced" even though the court "offered to hear her suit to the degree that it sounded in negligence." *Bogorad v. Eli Lilly & Co.*, 768 F.2d 93, 94 (6th Cir. 1985); see also *Sandul v. Larion*, 52 F.3d 326 (Table) [published in full-text format at 1995 U.S. App. LEXIS 8636], 1995 WL 216919 (6th Cir. Apr. 11, 1995). By contrast, *Raceway*'s requirements were not satisfied when a plaintiff consented to dismissal with prejudice after denial of his motion to remand to state court; we explained that the statute of limitations and failure to exhaust defenses that the plaintiff argued would have doomed his federal claim had not been fully aired and might have [\*\*14] been decided in his favor. *Laczay v. Ross Adhesives, Div. of Conros Corp.*, 855 F.2d 351, 355 (6th Cir. 1988). As recently as four years ago, we considered an appeal of final stipulations entered pursuant to *Raceway* without even pausing to consider whether § 1291 was satisfied. See *Ram Int'l, Inc. v. ADT Sec. Servs.*, 555 F. App'x 493, 496-97 (6th Cir. 2014).

[\*329] Other circuits cite *Raceway* with approval. See, e.g., *Helm Fin. Corp. v. MNVA R.R., Inc.*, 212 F.3d 1076, 1080 (8th Cir. 2000); *Trevino-Barton v. Pittsburgh Nat'l Bank*, 919 F.2d 874, 878 (3d Cir. 1990); *Empire Volkswagen, Inc. v. World-Wide Volkswagen Corp.*, 814 F.2d 90, 94 (2d Cir. 1987). Wright & Miller cites *Empire Volkswagen* (a Second Circuit case which in turn relied on *Raceway*) as an example of a good approach to the problem of voluntary or [\*\*\*10] invited dismissals. See 15A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Jurisdiction and Related Matters* § 3914.8 (2d ed. Supp. 2018) ("There is much to be said for a rule that routinely permits a plaintiff to manufacture finality by abandoning all remaining parts of a case but that forbids any attempt at recapture.").

We have, however, staked out HN4 two important limits on the application of *Raceway*. First, parties may not appeal claims that were dismissed without prejudice. *Libbey-Owens-Ford Co. v. Blue Cross & Blue Shield Mut. of Ohio*, 982 F.2d 1031, 1034 (6th Cir. 1993). Second, if a party seeks to come within the *Raceway* exception, she should make "her intention known to the court and opposing parties." *Laczay*, 855 F.2d at 354. "While it is possible for a party to consent to a judgment and still preserve his right to appeal, he must reserve that right unequivocally, as it [\*\*15] will not be presumed." *Id.* (quoting *Coughlin v. Regan*, 768 F.2d 468, 470 (1st Cir. 1985)).

#### b. The Status of *Raceway* in Light of Microsoft

Defendants point out that *Raceway* and accompanying circuit precedent must be interpreted in light of the recent Supreme Court decision in [\*Microsoft Corp. v. Baker\*, 137 S. Ct. 1702, 198 L. Ed. 2d 132 \(2017\)](#). *Microsoft* involved an appeal by plaintiffs who had been denied class-action certification and [\*Rule 23\(f\)\*](#) permission to appeal that denial. [\*Id. at 1706\*](#). Instead of pursuing their individual claims to final judgment, plaintiffs voluntarily dismissed their claims with prejudice but "reserved the right to revive their claims" in case of remand. [\*Id. at 1706-07\*](#).

The Supreme Court held that this type of voluntary dismissal did not satisfy the finality requirement of [\*§ 1291\*](#). [\*Id. at 1707\*](#). The Court was centrally concerned with the possibility that the plaintiffs' tactic would severely undermine the "careful calibration" of [\*Rule 23\(f\)\*](#). [\*Id. at 1714-15\*](#). *Microsoft* also explained that the finality requirement would be transformed into a "pretty puny" rule if plaintiffs could unilaterally transform interlocutory orders into final ones "simply by dismissing their claims with prejudice—subject, no less, to the right to 'revive' those claims." [\*Id. at 1715\*](#) (citation omitted). In a footnote, *Microsoft* distinguished *Procter & Gamble* because "that case—a civil antitrust [\*\*16] enforcement action—involved neither class-action certification nor the sort of dismissal tactic at issue here." [\*Id. at 1715 n.11\*](#).

[\*\*11] We have discussed *Microsoft* in only one published case. In *Board of Trustees of Plumbers, Local Union No. 392 v. Humbert*, the district court held at summary judgment that two of the three defendant companies were bound by a collective bargaining agreement. [\*884 F.3d at 625\*](#). The plaintiff union and the two bound companies then entered a "Stipulated Judgment Order" providing for approximately \$45,000 in damages. *Id.* The order stated that it was entered "for the sole purpose of proceeding with the appeal" and that "none of the parties are waiving any rights or arguments in any subsequent proceedings, . . . including but not limited to the amount of the damages to which the Plaintiffs are entitled to recover." *Id.* (brackets [\*330] omitted). We held that the order was not final for purposes of [\*§ 1291\*](#) because it "does not even conclusively resolve the single issue that it purports to resolve—namely, Local 392's damages arising between January 2010 and August 2011—because the Order specifically reserves the parties' right to litigate 'the amount of the damages.'" [\*Id. at 626\*](#); see also [\*Wells Fargo Bank, N.A. v. Allstate Ins. Co.\*, 735 F. App'x 208, 210 \(6th Cir. 2018\)](#) (dismissing an appeal pursuant [\*\*17] to *Microsoft* and *Humbert* because "Wells Fargo has demanded an indeterminate amount of damages from Allstate, and the district court has to settle on an amount before we will hear an appeal").

*Microsoft* and *Humbert* are centrally concerned with the principle, helpfully articulated in [\*Page Plus of Atlanta, Inc. v. Owl Wireless, LLC\*, 733 F.3d 658, 659 \(6th Cir. 2013\)](#), that [\*HN5\*](#) a "conditional dismissal of unresolved claims [or issues], in which the party reserves the right to reinstate those claims [or issues]" does not create finality. But appeals pursuant to *Raceway* do not necessarily invoke the specter of reviving claims or subsidiary issues upon remand. Many *Raceway* cases involve an entirely different set of circumstances from those discussed in *Microsoft*, *Humbert*, and *Page Plus*. For example, a *Raceway* dismissal may simply allow parties to stipulate to issues or theories that they are electing not to pursue—as, for example, was the case in *Bogorad*, where the plaintiff voluntarily dismissed her suit rather than accept the court's offer to consider her case as one sounding in negligence. [\*768 F.2d at 94\*](#). It would be perverse indeed if we required a plaintiff to pursue a theory that she did not consider meritorious simply to preserve her right to appeal. And that proposition does not run [\*\*18] afoul of the rule against conditional resolution: Should the plaintiff win remand, she would be barred from changing her mind and electing to pursue a negligence theory after all.

[\*\*12] Importantly, the bases on which the Supreme Court distinguished *Procter & Gamble* apply equally to *Bogorad* and the instant case. Neither involves class-action certification, and neither involves a plaintiff unilaterally dismissing undecided claims subject to a right to revive. See [\*Microsoft\*, 137 S. Ct. at 1715 n.11](#). So although *Microsoft* may have limited *Raceway*'s scope, it did not abrogate *Raceway*'s operation.

#### c. Applying *Raceway* to the Present Case

The remaining question, then, is whether the purported *Raceway* dismissal in this case falls within permissible boundaries.

In the aftermath of the summary judgment order, liability as to Innovation's main claim was undecided due to the factual disputes relating to Defendants' laches defense. See [Innovation Ventures III, 256 F. Supp. 3d at 704](#). Damages had yet to be determined. Although the court had ruled out Innovation's proposed methodologies, it took care to explain that Innovation could "still recover lost profits" by submitting facts and circumstances to the jury that would allow for a reasonable estimate of the amount. See [id. at 710-12 & n.8](#). A factual [\*\*19] dispute also remained on Count III, a secondary claim alleging that Jones had breached the Settlement Agreement by cooperating with adverse parties. See [id. at 715](#). Despite these open questions, the parties agreed that only one outcome was possible: judgment in favor of Innovation for nominal damages.

The parties' logic was this. With regard to Innovation's core breach of contract claim, the district court had refused permission to present to the jury any of the damages evidence that Innovation had prepared. [\*331] With less than a month until trial and discovery and expert report deadlines long past, Innovation saw no feasible way to implement the district court's suggestion to "place before the jury all of the facts and circumstances that tend to prove the probable amount" of lost profits. [Id. at 711 n.8](#). Injunctive relief was likewise impossible; the district court had reformed the Settlement Agreement to last only three years, all of which had already elapsed. See [id. at 706 n.5](#) (clarifying, in 2017, that the restrictive covenants began running in 2009). Only nominal damages remained.

That minimal recovery in turn decided the remaining issues. The only way that Innovation could receive attorney's fees was via the Settlement [\*\*20] Agreement, which provided that [\*\*\*13] a party seeking to enforce that Agreement "shall be entitled to its attorney's fees upon obtaining any successful order against the Party against whom such enforcement is sought." Innovation was willing to concede that an award of nominal damages was not "successful." Likewise, Defendants' only remaining defense to liability on the breach of contract claim was laches, which is triggered only if there is a showing of prejudice. [Township of Yankee Springs v. Fox, 264 Mich. App. 604, 692 N.W.2d 728, 734 \(Mich. Ct. App. 2004\)](#) (per curiam). Defendants were willing to concede that a judgment of nominal damages did not amount to prejudice. As for the lingering Count III, Innovation stipulated to its dismissal with prejudice.

As we turn to our *Raceway* analysis, the first point to be made clear is that Innovation's stipulated dismissal of Count III does not impact the calculus. Count III was dismissed with prejudice, as is required for a *Raceway* appeal. See [Libbey-Owens-Ford Co., 982 F.2d at 1034](#). HN6[<sup>1</sup>] When a district court enters judgment against a plaintiff on some claims and the plaintiff voluntarily relinquishes the claims that remain, "this Court will not penalize the plaintiff by dismissing his or her appeal." [Hicks v. NLO, Inc., 825 F.2d 118, 120 \(6th Cir. 1987\)](#) (per curiam); see also [Page Plus, 733 F.3d at 661](#) (distinguishing the permissible voluntary dismissal in *Hicks* [\*\*21] from the impermissible conditional dismissal at issue in that case).

Second, it is irrelevant that Innovation won an award of nominal damages. We HN7[<sup>1</sup>] have consistently allowed plaintiffs who were awarded nominal damages to appeal despite technically winning their suit. See, e.g., [Pembaur v. City of Cincinnati, 882 F.2d 1101, 1102 \(6th Cir. 1989\)](#); [Hilliard v. Williams, 516 F.2d 1344, 1345 \(6th Cir. 1975\), vacated on other grounds, 424 U.S. 961, 96 S. Ct. 1453, 47 L. Ed. 2d 729 \(1976\)](#); [United States v. Gordin, 9 F.2d 394, 394-95 \(6th Cir. 1925\)](#); [Mosher v. Joyce, 51 F. 441, 444, 1892 Dec. Comm'r Pat. 579 \(6th Cir. 1892\)](#). The logic underpinning these cases is obvious: It is a rare defendant indeed who would pay to appeal a case in which she lost a trivial amount of money. A rule forbidding a plaintiff to appeal an award of nominal damages would, in the vast majority of suits awarding nominal damages, be a rule barring any appeal at all.

Third, like the plaintiff in [Bogorad](#) who was not required to pursue a negligence theory, Innovation is not required to pursue theories it has not prepared and does not wish to pursue. HN8[<sup>1</sup>] The plaintiff is the master of her complaint and may choose the remedies she wishes to request. See [Smith v. Nationwide Prop. & Cas. Ins. Co., 505 F.3d 401, 407 \(6th Cir. 2007\)](#). *Raceway* [\*\*\*14] itself involved a plaintiff with a similar evidentiary dilemma to that faced by Innovation. Subsequent to the summary judgment ruling, "[a]ppellants informed the court they believed the court's order effectively terminated the [\*332] lawsuit since they were not prepared to and could [\*\*22] not proceed with evidence regarding the relevant market outlined by the court." [613 F.2d at 657](#). A plaintiff should not be forced to pursue every court-conceived theory to preserve her right to appeal.

Fourth, unlike in *Humbert* and *Microsoft*, the stipulations at issue in this case do not "specifically reserve[] the parties' right to litigate" the very issues that they purport to resolve. *Humbert*, 884 F.3d at 626; see also *Microsoft*, 137 S. Ct. at 1706-07. There must be some mechanism in place for parties to resolve outstanding issues in the wake of a summary judgment order without necessarily proceeding to trial on each one. See *Brown v. Cinemark USA, Inc.*, 876 F.3d 1199, 1201 (9th Cir. 2017) (order) ("The resolution of the present case was not a unilateral dismissal of claims, but a mutual settlement for consideration reached by both parties which expressly preserved certain claims for appeal."); *Downey v. State Farm Fire & Cas. Co.*, 266 F.3d 675, 682 (7th Cir. 2001) ("Parties often stipulate to issues such as damages once the district court resolves liability, but an agreement on a specific issue differs from asking the court to enter judgment, which winds up the case itself."). On remand, none of the stipulated issues will be open for debate: Count III will not spring back to life, and nominal damages will not support an award of attorney's fees or constitute prejudice for purposes [\*\*23] of laches.

Finally, Innovation's intention to appeal pursuant to *Raceway* was "known to the court and opposing parties." *Laczay*, 855 F.2d at 354. The first line of the stipulations indicated that they were being entered into "[f]or the purpose of expediting appeal of the previous orders and judgment in this case." At a status conference, Innovation explained to the district court that "what we're trying to accomplish here with the stipulations, is to resolve the liability and all the remaining issues, and then the parties can choose, you know, what they are going to take up on appeal."

For all these reasons, this appeal fits within the boundaries of *Raceway* and *Microsoft*, and jurisdiction is proper under § 1291. Defendants' motion to dismiss is therefore denied. Going forward, Innovation "may contest, and we will consider, only those portions of [the] [\*\*\*15] district court's orders in *Innovation I, II, and III*] decided adversely to [it]." *Empire Volkswagen*, 814 F.2d at 94. The same is true, of course, of the cross-appellants.

## 2. Personal Jurisdiction

Defendants make their second jurisdictional argument in their cross-appeal. There, they "conditionally seek review" of the district court's personal jurisdiction determinations if—but only if—we rule that the [\*\*24] Settlement Agreement may be enforced for more than three years or that Innovation can present its damages evidence.

**HN9** When personal jurisdiction is at issue, it must be settled before reaching the merits of the case. *Bird v. Parsons*, 289 F.3d 865, 872-73 (6th Cir. 2002). We review questions of personal jurisdiction de novo. *Stone Surgical, LLC v. Stryker Corp.*, 858 F.3d 383, 388 (6th Cir. 2017).

Unlike subject-matter and appellate jurisdiction, objections to personal jurisdiction can be and frequently are waived:

In the typical waiver scenario, a defendant waives its personal jurisdiction defense if submissions, appearances and filings give the plaintiff a reasonable expectation that the defendant will defend the suit on the merits or cause the court to go to some effort that would be [\*333] wasted if personal jurisdiction is later found lacking.

*Means v. U.S. Conference of Catholic Bishops*, 836 F.3d 643, 648 (6th Cir. 2016) (alterations, citation, and internal quotation marks omitted). Similarly, if a defendant makes a motion under *Rule 12(b)(2) to (5)* but does not raise lack of personal jurisdiction, any objection is waived by operation of *Rule 12(h)(1)*. *Id.* at 648-49.

In the Secondary Case, NSL filed a motion to dismiss "pursuant to *Fed. R. Civ. P. 12(b)(2)* and (6)," but neglected to make any argument under *Rule 12(b)(2)*—that is, to personal jurisdiction. By failing to object to personal jurisdiction in its initial *Rule 12* motion, NSL waived the defense. See *Means*, 836 F.3d at 648-49.

NSL argues that its failure [\*\*25] to raise personal jurisdiction was excused because the defense was not "available" at the time NSL made its *Rule 12* motion. See *Fed. R. Civ. P. 12(g)(2)*. We will accept for purposes of argument the Federal Circuit's rule that **HN10** an objection is not "available" within the meaning of *Rule 12(g)(2)* when the objection "is futile in the sense that the [\*\*\*16] law bars the district court from adopting it to dismiss." *In re Micron Tech., Inc.*, 875 F.3d 1091, 1097 (Fed. Cir. 2017). NSL argues that a personal jurisdiction objection was

futile because the district court made clear in hearings that the rulings in the Lead Case—presumably including those rulings related to personal jurisdiction—controlled in the Secondary Case as well. But the hearing in which the district court expressed that position took place approximately six months after NSL filed its motion to dismiss. So at the time the [Rule 12](#) motion was made, Defendants did not know it was futile. Indeed, the inclusion of [Rule 12\(b\)\(2\)](#)—dismissal for lack of personal jurisdiction—in the motion's header, if not its substance, acknowledges the possibility that it could be raised. NSL's objection to personal jurisdiction was therefore waived in the Secondary Case.

In the Lead Case, by contrast, Defendants filed the [Rule 12](#) motions that would ordinarily suffice to preserve the objection [\[\\*\\*26\]](#) to personal jurisdiction. On appeal, however, they challenge the district court's conclusion as to personal jurisdiction if and only if we reverse those findings by the district court that favored them. Defendants cite no authority for the proposition that it is possible to consent to jurisdiction only on the condition that the court finds in its favor, and we are aware of none. Defendants consented to this court's jurisdiction so long as we found in their favor and so waived the objection.

Because the decision below was final for purposes of [§ 1291](#) and because the objection to lack of personal jurisdiction was waived in both the Lead and the Secondary Cases, we proceed to the merits of the case.

## B. Defendants' Dismissed Antitrust Claim

We begin with an issue that logically precedes the primary issues on appeal: Defendants' challenge to the district court's dismissal of their antitrust counterclaim as barred by the statute of limitations. Defendants argue that their counterclaim relates back to their original counterclaim.

[HN11](#) [↑] We review de novo the district court's conclusion that allegations in an amended pleading do not relate back to the original pleading. [United States ex rel. Bledsoe v. Cnty. Health Sys., Inc.](#), 501 F.3d 493, 516 (6th Cir. 2007). An amendment relates back to the date [\[\\*\\*27\]](#) of [\[\\*\\*\\*17\]](#) the original pleading if "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set [\[\\*334\]](#) out—or attempted to be set out—in the original pleading." [Fed. R. Civ. P. 15\(c\)\(1\)\(B\)](#). When applying this standard, we "ask[] whether the party asserting the statute of limitations defense had been placed on notice that he could be called to answer for the allegations in the amended pleading." [Bledsoe](#), 501 F.3d at 516.

Count III of Defendants' original counterclaim, titled "Declaration that Settlement Agreement is an Illegal Restraint on Trade," alleges that the Choline Family restrictions in the Settlement Agreement are unenforceable because they are "nothing more than an agreement to limit competition." Defendants, without citing any [Rule 15](#) caselaw, argue that the phrase "restraint on trade" and the accompanying factual allegations were "sufficient to place Innovation on notice that its anti-competitive behavior would be at issue in this case." But [HN12](#) [↑] an antitrust claim must allege an antitrust injury. See [Bassett v. NCAA](#), 528 F.3d 426, 432 (6th Cir. 2008). The factual allegations in the second amended counterclaim that might establish an antitrust injury—allegations related to Innovation's history of monopolistic and anticompetitive behavior—were absent from [\[\\*\\*28\]](#) the original and first amended counterclaims. In the absence of any reference to [antitrust law](#) or the [Sherman Act](#), or any description of an antitrust injury, Innovation was not "on notice that [it] could be called to answer for" an antitrust violation. [Bledsoe](#), 501 F.3d at 516.

Because we agree with the district court that the antitrust counterclaim did not relate back to the original counterclaim, we affirm the dismissal of this counterclaim.

## C. Interpreting the Settlement Agreement

We next consider a set of arguments challenging the district court's interpretations of the Settlement Agreement. The parties challenge the district court's conclusions that: (1) Jones is bound by the Settlement Agreement in his personal capacity, see [Innovation Ventures II](#), 2015 U.S. Dist. LEXIS 129946, 2015 WL 5679879, at \*20-21; (2)

NSL is bound by the restrictive covenant provisions in § 5.c of the Settlement Agreement by virtue of their incorporation into the Asset Purchase Agreement, see [2015 U.S. Dist. LEXIS 129946, WL at \\*16-19](#); (3) the catch-all clause in the Choline Family definition is ambiguous as a matter of law, see [Innovation Ventures I, 2014 U.S. Dist. LEXIS 137037, 2014 WL 4829582, at \\*2](#); and (4) the duration of the restrictive [\*\*\*18] covenant provision is unreasonable as written and so must be reformed from twenty years to three, see [Innovation Ventures II, 2015 U.S. Dist. LEXIS 129946, 2015 WL 5679879, at \\*22-24](#). We consider the arguments in this order.

The parties do not dispute that the Settlement [\*\*29] Agreement must be interpreted according to Michigan law.[HN13](#) "In Michigan, contract interpretation is a question of law and therefore subject to de novo review." [Solo v. UPS Co., 819 F.3d 788, 794 \(6th Cir. 2016\)](#). "[W]e look to the final decisions of [Michigan's] highest court, and if there is no decision directly on point, then we must make an *Erie* guess to determine how that court, if presented with the issue, would resolve it." [Conlin v. Mortg. Elec. Registration Sys., Inc., 714 F.3d 355, 358-59 \(6th Cir. 2013\)](#). In making that guess, intermediate appellate decisions are "viewed as persuasive unless it is shown that the state's highest court would decide the issue differently." [Id. at 359](#) (quoting [Savedoff v. Access Grp., Inc., 524 F.3d 754, 762 \(6th Cir. 2008\)](#)). We are also bound by our own published precedent interpreting Michigan law, except where our decisions have subsequently been called into question by Michigan courts. See [Rutherford v. Columbia Gas, 575 F.3d 616, 619 \(6th Cir. 2009\)](#).

#### [\*335] 1. Whether Jones Is Bound

Defendants argue that the Settlement Agreement does not bind Defendant Jones in his personal capacity.

Innovation's first response is that Jones admitted at trial that he is a party to the Settlement Agreement and so is estopped from contesting it now. Jones was asked, "Well, you are a party—and you are a party to the settlement agreement, right? You are a CNL party." He responded, "Right." Jones is not an attorney. His statement is more [\*\*30] properly viewed as a concession that he is listed as a CNL party in the text of the Settlement Agreement than as an admission that he is bound in his personal capacity. We therefore turn to the merits of the capacity issue.

[HN14](#) The Michigan statute of frauds provides that any contract that, "by its terms, is not to be performed within 1 year" is void unless it is "in writing and signed with an authorized signature by the party to be charged with the agreement." [Mich. Comp. Laws. § 566.132\(1\)](#). The [\*\*\*19] restrictive covenants in the Settlement Agreement last "the same length of time that an issued patent would provide protection"—that is, 20 years. See [35 U.S.C. § 154\(a\)\(2\)](#). By operation of the statute of frauds, then, the Settlement Agreement may not be enforced against any party who did not sign it.

Jones signed the Agreement, but he did so only once and labeled his signature "President and CEO." The relevant portion of the signature page appears as follows:

IN WITNESS WHEREOF, each Party has executed this Agreement.

CUSTOM NUTRITION LABORATORIES, LLC  
FOR ITSELF AND ALL OF THE CNL PARTIES

By: 

PRINTED NAME: Alan Jones

ITS: President & CEO

DATE: August 17<sup>th</sup>, 2009

Jones did not sign the Agreement anywhere else, although he did initial each page. The Agreement defines the referenced "CNL Parties" to include Custom Nutrition; its heirs, affiliates, successors, assigns, and so on; and its officers and employees, "including, without limitation, Alan Jones." [\*\*31]

**HN15** Michigan courts have explained that, when contracting parties wish to ensure that a corporate officer is bound in both an individual and an official capacity, "the nearly universal practice is that the officer signs twice—once as an officer and again as an individual." *Livonia Bldg. Materials Co. v. Harrison Constr. Co.*, 276 Mich. App. 514, 742 N.W.2d 140, 146 (Mich. Ct. App. 2007) (per curiam) (quoting *Geresy v. Dommert*, No. 243468, 2004 Mich. App. LEXIS 1397, 2004 WL 1222991, at \*5 (Mich. Ct. App. June 3, 2004) (per curiam)). Following that practice strongly supports a conclusion that the signatory is bound in both capacities. See, e.g., *Lexon Ins. Co. v. Naser*, 781 F.3d 335, 340-41 (6th Cir. 2015) (citing *Livonia* and concluding that an individual who signed a contract once as CEO and once with his social security [\*336] number was bound in his individual capacity). That practice was not followed here.

[\*\*\*20] When the signatory signed only once, Michigan courts apply normal contract law principles to discern the parties' intent. Michigan courts presume that when "appropriate words added to the signature of [the individual] indicated that he signed on behalf of the corporation in the representative capacity designated," the individual is not bound in his personal capacity. *Wright v. Drury Petroleum Corp.*, 229 Mich. 542, 201 N.W. 484, 485 (Mich. 1924). But that presumption may be rebutted: "Where anything on the face of the paper suggests a doubt as to the party bound, or the character in which any of the signers had acted in affixing his name, testimony [\*\*32] may be admitted between the original parties to show the true intent." *Armstrong v. Andrews*, 109 Mich. 537, 67 N.W. 567, 568 (Mich. 1896) (citation omitted).

Past cases provide useful examples of how courts applying Michigan law analyze a single signature. In *Livonia*, the individual signed one time, he labeled his signature "President," and the space for a guarantor was left blank. *742 N.W.2d at 146*. The Michigan Court of Appeals concluded that the "signature on the document was a corporate signature and that [the signatory] did not personally guarantee" the debts at issue. *Id.* In *Andersons, Inc. v. Horton Farms, Inc.*, we applied Michigan law to decide the capacity in which Horton, the president of the eponymous defendant company, had signed nine contracts. *166 F.3d 308, 315-16 (6th Cir. 1998)*. We determined that five of the contracts "unambiguously show[] that the parties intended to bind Mr. Horton only in his corporate capacity" because they were signed "Rodney Horton, Pres.," were addressed to Horton Farms, Inc., and listed Horton Farms as the customer on every page. *Id. at 316*. But four contracts were "signed simply 'Rodney Horton,'" which created ambiguity that could be resolved only by considering parol evidence. *Id.*

*Employees Only, Inc. v. Provenzano*, No. 296575, 2011 Mich. App. LEXIS 819, 2011 WL 1687626 (Mich. Ct. App. May 3, 2011) (per curiam), provides a rare example of a case in which a Michigan court was willing [\*\*33] to partially disregard a corporate label attached to a signature. There, the contract explicitly stated that "officers shall be personally liable for amounts not paid under this Agreement," but it was "undisputed that the contract was signed by [the corporation] through Provenzano in his representative capacity." *2011 Mich. App. LEXIS 819, [WL] at \*4*. The Michigan Court of Appeals concluded that, because "the signature blocks in the Agreement provide no place for additional signatures for individuals to signal they accept personal liability apart from the corporation, which [\*\*\*21] explicitly conflicts with the previously cited provisions that call for such liability," the contract was ambiguous and summary disposition was inappropriate. *Id.*

Perhaps the most helpful example is a recent Michigan case involving very similar facts to the case at hand, including one of the same parties. There, as here, Innovation had entered into a contract containing noncompete provisions that "purport[ed] to bind the employees of defendant." *Innovation Ventures, LLC v. Liquid Mfg., LLC (Liquid Mfg. I)*, No. 315519, 2014 Mich. App. LEXIS 2058, 2014 WL 5408963, at \*1, 6 (Mich. Ct. App. Oct. 23, 2014) (per curiam). The Michigan Court of Appeals made quick work of the argument that the individual defendant was personally liable, citing *Livonia* and explaining that the defendant had signed "in his capacity [\*\*34] as a corporate officer, and not as an individual." *2014 Mich. App. LEXIS 2058, [WL] at \*6*. When that case was appealed to the Michigan Supreme Court and partially overturned, this holding was left undisturbed: "Since the plaintiff has not challenged [\*337] the Court of Appeals' holding [that Paisley is not individually liable], we do not upset its decision. Paisley is not individually liable because he signed the Agreement in his capacity as a corporate officer." *Innovation Ventures, LLC v. Liquid Mfg., LLC (Liquid Mfg. II)*, 499 Mich. 491, 885 N.W.2d 861, 867 n.6 (Mich. 2016).

In this case, Jones's signature is labeled "President and CEO." Both [Livonia, 742 N.W.2d at 146](#), and [Andersons, 166 F.3d at 316](#), make clear that the label attached to a signature is strong evidence of the capacity in which a contract was signed. The Settlement Agreement mentions Jones by name, and the signature block provides that Jones signs "for [Custom Nutrition] and all of the CNL Parties." However, unlike the contract in *Employees Only*, this Agreement is centrally concerned with business negotiations and does not explicitly provide for personal liability. See [2011 Mich. App. LEXIS 819, 2011 WL 1687626, at \\*4](#). Thus, as in [Liquid Manufacturing I](#), which decided this precise issue when interpreting a noncompete contract being enforced by this precise plaintiff, we cannot conclude, as a matter of law, that the Agreement binds Jones in his individual capacity.

We therefore **[\*\*35]** reverse the district court's holding on this issue and conclude that the Settlement Agreement does not bind Jones in his personal capacity.

#### **[\*\*\*22] 2. Whether NSL Is Bound**

NSL was not a party to the Settlement Agreement and so would not ordinarily be bound by its terms. The district court concluded, however, that § 5.c of the Settlement Agreement—containing the Choline Family restrictions—was incorporated by reference into the Asset Purchase Agreement between Custom Nutrition and NSL, such that the restrictive covenants bind NSL. [Innovation Ventures II, 2015 U.S. Dist. LEXIS 129946, 2015 WL 5679879, at \\*16-19](#). Defendants challenge that incorporation decision.

The Asset Purchase Agreement contains a Texas choice of law provision, and the parties do not dispute that Texas law governs the incorporation inquiry. [HN16](#) Under Texas law, "[i]t is uniformly held that an unsigned paper may be incorporated by reference in the paper signed by the person sought to be charged. The language used is not important provided the document signed by the defendant plainly refers to another writing." [Owen v. Hendricks, 433 S.W.2d 164, 166 \(Tex. 1968\)](#). The referenced document may be incorporated in whole or in part, depending on the referring language used. See [Bob Montgomery Chevrolet, Inc. v. Dent Zone Cos., 409 S.W.3d 181, 189 \(Tex. App. 2013\)](#). "[T]he primary concern of the court is to ascertain the true intentions of the parties as **[\*\*36]** expressed in the instrument," and "courts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless." [In re C&H News Co., 133 S.W.3d 642, 645 \(Tex. App. 2003\)](#).

Section 4.2(r) of the Asset Purchase Agreement provides that "the formula for energy drinks manufactured by [Custom Nutrition] and certain related trademark and copyright matters are limited by the settlement agreement between [Custom Nutrition] and Living Essentials and the related consent judgments contained in Schedule 4.2(h)." Schedule 4.2(h) lists, under the header "Settled," that NSL entered into a "Settlement Agreement and Consent Judgment" with Innovation. The parties dispute whether § 4.2(r) "plainly refers" to the Settlement Agreement. [Owen, 433 S.W.2d at 166.](#) [HN17](#) "Plainly referring to a document requires more than merely mentioning the document. The language **[\*338]** in the signed document must show the parties intended for the other document to become part of the agreement." [Bob Montgomery Chevrolet, 409 S.W.3d at 189](#) (citation omitted).

**[\*\*23]** Two Texas cases illustrate the difference between "merely mentioning" and "plainly referring." In *Bob Montgomery Chevrolet*, a car dealership signed a one-page application that stated that "[a]dditional benefits, qualifications **[\*\*37]** and details" related to the program were available at a particular website. [Id. at 184-85](#). Terms on that website included a six-month minimum term, a Texas choice-of-law provision, and a Texas forum-selection clause. [Id. at 185](#). The Texas Court of Appeals concluded that the contractual language did not "plainly refer" to the additional online terms as part of the parties' agreement, but rather "indicates that the internet document contained informative material only, not binding terms and conditions intended to be part of the parties' contract." [Id. at 190](#). By contrast, in *C&H News Co.*, the same court was called upon to interpret a one-page arbitration agreement providing that the employee "agreed to submit all claims or disputes between [the employer and the employee] to binding arbitration as provided in the Handbook." [133 S.W.3d at 646](#). The Texas Court of Appeals had no trouble concluding that "the agreement incorporates, by reference, portions of the employee handbook into the agreement"—in particular, the section labeled "Mutual Arbitration Policy/Procedures." [Id.](#)

The acknowledgment in the Asset Purchase Agreement that NSL's rights to the formula were "limited by the settlement agreement" cannot reasonably be read to indicate [\*\*38] that the Settlement Agreement "contain[s] informative material only." *Bob Montgomery Chevrolet*, 409 S.W.3d at 190. Unlike *Bob Montgomery*'s boilerplate, nonspecific reference to "additional" details, § 4.2(r) is a tailored description of intellectual property rights in a negotiated contract between sophisticated, counseled parties.

As to the portion of the Settlement Agreement that this language incorporates, we agree with the district court that § 4.2(r) incorporates the Choline Family restrictions in § 5.c specifically. These restrictive covenants directly and meaningfully impact "the formula for energy drinks manufactured by [Custom Nutrition]" because they explain what ingredients Custom Nutrition's formula cannot include. In addition, the parties to the Settlement Agreement signaled the importance of the restrictive covenants by allocating \$1.8 million of the \$1.85 million settlement to that section. It would be illogical to conclude that one of the same [\*\*\*24] parties overlooked the existence of that key section only a few months after the Settlement Agreement was executed.

Defendants' main counterargument is that other sections of the Asset Purchase Agreement limit the obligations that NSL incurred on behalf of Custom Nutrition. They point to, for [\*\*39] example, § 1.2, which provides that NSL is not responsible for "any liabilities, obligations, or costs resulting from any claim or lawsuit," except for those described in § 1.3—which does not include the Settlement Agreement. Defendants are correct that the language of § 4.2(r) should, if possible, be read to "harmonize" with the limitations on liability found elsewhere in the Agreement. *C&H News*, 133 S.W.3d at 645. But those limitations should not be read to render § 4.2(r) a nullity; rather, § 4.2(r) should be read as an exception to the limitations. In other words, boilerplate denunciations of obligations do not trump § 4.2(r)'s specific reference to the "limit[]" on the "formula for energy drinks."

We therefore affirm the district court's conclusion that NSL is bound by § 5.c of [\*339] the Settlement Agreement by virtue of its incorporation into the Asset Purchase Agreement. As a result, we do not reach Innovation's conditional argument that, if NSL is not bound by the Settlement Agreement, the tortious interference claim should be reinstated.

### 3. Ambiguity of the Catch-All Clause

Defendants next challenge the district court's conclusion that whether betaine and alpha GPC are covered by the catch-all clause in the Choline Family definition (which prohibits use of listed chemicals' "equivalents [\*\*40] in all forms, derivatives, constituents, and synthetic equivalents or substitutes") is ambiguous as a matter of law.

Defendants argue that the district court failed to construe the catch-all clause narrowly and against the party seeking restraint, as is required by Michigan law in contracts involving noncompete agreements. Neither proposition requires a court to unilaterally disregard reasonable readings of a noncompete agreement. To the contrary, *HN18*↑ "the meaning of an ambiguous contract is a question of fact that must be decided by the jury." *Klapp v. United Ins. Grp. Agency, Inc.*, 468 Mich. 659, 663 N.W.2d 447, 453-54 (Mich. 2003). This principle applies with equal strength in the context of noncompete agreements. See, e.g., *Bar's Prods. Inc. v. Bars Prods. Int'l Inc.*, \*\*\*251 662 F. App'x 400, 406-08 (6th Cir. 2016); *Pitsch Holding Co. v. Pitsch Enters., Inc.*, No. 315800, 2014 Mich. App. LEXIS 1453, 2014 WL 3887186, at \*4-5 (Mich. Ct. App. Aug. 7, 2014) (per curiam). We find no error in the district court's conclusion that the catch-all clause was ambiguous.

### 4. Enforceability and Reformation of the Settlement Agreement

We now reach the first of Innovation's arguments on appeal: that the district court erred when it reformed the Settlement Agreement's restrictive covenants to last only three years instead of the original twenty. According to Innovation, the district court should have applied a different test, the "rule of reason."

Defendants argue that Innovation [\*\*41] waived its rule-of-reason argument as well as any objection to the three-year reformed duration of the agreement. Both arguments are incorrect. Innovation consistently argued that the district court should apply the rule of reason. When a new Michigan Supreme Court case on the issue was decided, Innovation cited the new decision repeatedly for propositions directly related to the rule-of-reason analysis. Innovation was not obliged to also move for reconsideration. See *Walker v. Abbott Labs.*, 340 F.3d 471, 475 (7th

Cir. 2003) ([HN19](#)[] "There is simply no rule or case law that requires litigants to move for reconsideration of an interlocutory ruling in order to avoid waiving a challenge to that ruling on appeal of a final decision.").

As to the purported concession about the duration of the reformed Agreement, the exchange with the district court was as follows:

**THE COURT:** . . . I know you told me that there were various reasons that you believe that the 20-year time limit was reasonable . . . . But as I asked Mr. Banowsky, do you agree that if the Court believed or found that that was too long and that it wasn't reasonable, that the next step would be to reform the contract in some way?

**MS. OLIJNYK:** That would be appropriate, Your Honor, yes. . . .

**[\*\*42] THE COURT:** What do you think would be a reasonable amount of time?

**[\*340] MS. OLIJNYK:** Three to six years . . . .

**[\*\*\*26]** Though this concession might implicate a challenge to whether three years is an appropriate reformed duration, it does not waive the argument that the underlying premise is incorrect. We therefore consider the merits of Innovation's rule-of-reason argument.

#### a. Standards Governing Noncompete Agreements

The district court analyzed the restrictive covenants in the Settlement Agreement under the standard laid out in [Mich. Comp. Laws § 445.774a\(1\)](#), which governs noncompete agreements in the employment context. [Innovation Ventures II, 2015 U.S. Dist. LEXIS 129946, 2015 WL 5679879, at \\*22](#). The court acknowledged the apparent discrepancy in applying an employment statute outside the employment context but explained that Michigan courts had used the framework in precisely that fashion. *Id.* For this proposition, the court cited a recent decision of a Michigan appellate court, [Liquid Manufacturing I, 2014 Mich. App. LEXIS 2058, 2014 WL 5408963, at \\*5](#), and a Sixth Circuit case, [Certified Restoration, 511 F.3d at 546](#).

After the district court issued its decision, the Michigan Supreme Court reversed *Liquid Manufacturing I*, explaining that the statute governing employment noncompete agreements "does not address the proper framework for evaluating a noncompete agreement between businesses." [Liquid Mfg. II, 885 N.W.2d at 873](#). The Court instructed **[\*\*43]** that in the business-to-business context, a different statute governs and instructs courts to "give due deference to interpretations given by the federal courts to comparable antitrust statutes, including, without limitation, the doctrine of per se violations and the rule of reason." [Id. at 874](#) (quoting [Mich. Comp. Laws § 445.784\(2\)](#)). The Court clarified that [Coates v. Bastian Bros., Inc., 276 Mich. App. 498, 741 N.W.2d 539 \(Mich. Ct. App. 2007\)](#), a case on which both the district court's decision and our decision in *Certified Restoration* had relied, was not "instructive" because it arose in the employment context. [Id. at 873-74](#). The Court then remanded the case "to the trial court to consider whether the noncompete provisions . . . were reasonable under the proper standard." [Id. at 874 n.18](#).

*Liquid Manufacturing II* makes clear that business-to-business noncompete agreements like the one at issue here must be "evaluated under the rule of reason," not by analogy to employment noncompete agreements that do not "address the proper framework." [Id. at 873, 874](#).

**[\*\*\*27]** Defendants argue against applying *Liquid Manufacturing II*'s straightforward guidance, claiming the case is inapplicable because Innovation seeks to enforce the Settlement Agreement against an individual and a corporation that was not a party to the original agreement. But in *Liquid Manufacturing II* **[\*\*44]** itself, the plaintiffs sought enforcement against individuals who were party to the agreement. [Id. at 875](#). And as we have already explained, see *supra* Part III.C.2, § 5.c of the Settlement Agreement is binding against NSL, whether or not NSL was originally a party to it.

Defendants also argue that even applying federal common law, the Settlement Agreement should be analyzed under the per se rule rather than the rule of reason. *Liquid Manufacturing II* does contemplate situations that apply "the doctrine of per se violations." *Id. at 874* (quoting *Mich. Comp. Laws § 445.784(2)*). That [HN20](#) [↑] doctrine, however, applies "only if a restraint clearly and unquestionably falls within one of the handful of categories that have been collectively deemed *per se* anticompetitive." [\*341] *Food Lion, LLC v. Dean Foods Co. (In re Se. Milk Antitrust Litig.)*, 739 F.3d 262, 273 (6th Cir. 2014) (quoting *Expert Masonry, Inc. v. Boone County*, 440 F.3d 336, 343-44 (6th Cir. 2006)). "The classic examples are naked, horizontal restraints pertaining to prices or territories." *La. Wholesale Drug Co. v. Hoechst Marion Roussel, Inc. (In re Cardizem CD Antitrust Litig.)*, 332 F.3d 896, 907 (6th Cir. 2003).

We will assume that the Settlement Agreement is a horizontal restraint because it "involve[s] an agreement[] among competitors at the same level of competition to restrain trade." *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 805 (6th Cir. 1988). But [HN21](#) [↑] horizontality alone does not necessarily justify invocation of the per se rule. "[A]pplying the rule of reason is the default position and can be applied to horizontal restraints as well if they [\*\*45] do not fit into existing categories of *per se* violations." *Se. Milk Antitrust*, 739 F.3d at 273. These restrictive covenants do not fix prices or allocate territory, *Cardizem CD Antitrust*, 332 F.3d at 907, and Defendants have not made any other argument to explain why they necessarily fit into any other category of *per se* violation. Because the restrictive covenants do not "clearly and unquestionably fall[]" within the delineated categories of *per se* impermissible restraints, *Se. Milk Antitrust*, 739 F.3d at 273, application of a *per se* rule is not appropriate here.

#### [\*\*\*28] b. Burden of Proof

Proper application of the rule of reason begins with determining which party has the burden of proof. Each party claims the burden lies with the other.

Prior to *Liquid Manufacturing II*, Michigan law was clear that "[t]he burden of demonstrating the validity of the agreement is on the party seeking enforcement." *Coates*, 741 N.W.2d at 545. Because Michigan courts were "reluctant to enforce [noncompete] contracts as being against the policy of the public in encouraging business competition," *Stoia v. Miskinis*, 298 Mich. 105, 298 N.W. 469, 474 (Mich. 1941), it stood to reason that a party seeking to enforce a noncompete agreement bore a heavier burden than a party enforcing a run-of-the-mill contract in which enforceability is presumed.

Though that likely remains the case for employment noncompete agreements, [\*\*46] *Liquid Manufacturing II* upset that consensus with regard to noncompete agreements between businesses. The Michigan Supreme Court explained that *Coates*, the case the district court relied on and one the Defendants rely on now, is not "instructive" in the business-to-business context. 885 N.W.2d at 873-74. Instead, *Liquid Manufacturing II* approvingly cited *Perceptron, Inc. v. Sensor Adaptive Machines, Inc.*, 221 F.3d 913 (6th Cir. 2000). 885 N.W. 2d at 874. In *Perceptron*, we explained that a defendant who contested enforcement of a noncompete agreement on the grounds that it was not a reasonable restraint on competition "was required to show a contract, combination, or conspiracy that affected interstate commerce and unreasonably restrained trade." 221 F.3d at 918. In other words, a defendant invoking the rule of reason as a defense to a breach of contract claim bore the burden of demonstrating that the restraint was invalid. By distinguishing *Coates* and citing *Perceptron* with approval, the Michigan Supreme Court indicated that the party alleging the restraint on trade bears the burden to show that a noncompete agreement between businesses is unreasonable.

The rule of reason provides the proper standard under which the restrictive covenants [\*342] should be evaluated, and [HN22](#) [↑] the burden of showing the existence of an unreasonable [\*\*47] restraint on trade lies with Defendants. But on appeal, neither party has fully briefed application of the rule-of-reason test. This fact-intensive determination falls within the district court's area of expertise [\*\*\*29] and is better resolved there in the first instance. We remand the Lead Case so that the parties may provide the detailed record information necessary for the court to apply the rule-of-reason framework. See *Papas v. Buchwald Capital Advisors, LLC (In re Greektown*

Holdings, LLC, 728 F.3d 567, 570 (6th Cir. 2013) (remanding where certain issues had "not been adequately briefed and argued by the parties and were not addressed below").

#### c. Impact on the Secondary Case

As Innovation concedes, the claims in the Secondary Case are essentially duplicative of those in the Lead Case. Below, both parties agreed that the resolution of the Lead Case rendered the Secondary Case "effectively moot" and so necessitated its dismissal. Innovation Ventures IV, 2017 U.S. Dist. LEXIS 211640, 2017 WL 4553429, at \*1. Innovation then appealed to protect against the eventuality that the district court's decisions in the Lead Case might be reversed—as we have now done.

We have allowed such a protective appeal in the past. See Dykstra v. Wayland Ford, Inc., 134 F. App'x 911, 917 (6th Cir. 2005) (consolidating two appeals where the second case had been determined on the basis of the first's preclusive effect, and reversing the second after concluding [\*\*48] that the first had erred). The Supreme Court has criticized a litigant who failed to pursue this course. See Reed v. Allen, 286 U.S. 191, 198, 52 S. Ct. 532, 76 L. Ed. 1054 (1932) ("If respondent, in addition to appealing from the decree, had appealed from the judgment, the appellate court, having both cases before it, might have afforded a remedy."). *Wright & Miller* approves the tactic, explaining that the unfortunate result of a second judgment becoming conclusive despite relying on a prior judgment that is subsequently reversed "should always be avoided, whether by delaying further proceedings in the second action pending conclusion of the appeal in the first action [or] by a protective appeal in the second action that is held open pending determination of the appeal in the first action." 18A Wright & Miller, *supra*, § 4433. Innovation's protective appeal is therefore well taken and, contrary to Defendants' urging, sanctions are not appropriate.

Defendants urge that we could dismiss portions of the Secondary Case on independent grounds related to the applicable statutes of limitations. But the statute-of-limitations arguments were not considered by the district court, which decided the Secondary Case entirely on the basis [\*\*\*30] of the Lead Case's preclusive effect. Because we reverse [\*\*49] and remand the Lead Case, we likewise remand the Secondary Case.

#### D. Laches

We turn next to the issues that will determine the course of the suit upon remand: the availability of a laches defense and the propriety of Innovation's three proposed damages methodologies. Because both issues were decided below and were fully briefed and argued on appeal, we consider them here.

Innovation argues that it should have been granted summary judgment as to liability on its breach of contract claim because Defendants' laches defense—the only remaining barrier to judgment in its favor—fails as a matter of law. HN23 [↑] Michigan law provides that

[t]he doctrine of laches is triggered by the plaintiff's failure to do something that should have been done under the [\*343] circumstances or failure to claim or enforce a right at the proper time. However, the doctrine is only applicable in cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party.

Dep't of Envtl. Quality v. Gomez, 318 Mich. App. 1, 896 N.W.2d 39, 53 (Mich. Ct. App. 2016) (citations and internal quotation marks omitted).

HN24 [↑] Michigan courts presume that when a claim is brought within the statute of limitations, as this claim undisputedly was, the [\*\*50] doctrine of laches does not apply. The Michigan Supreme Court has summarily disposed of a laches defense on the basis that, "because [the plaintiff] filed this case within the six-year period of limitation, any delay in the filing of the complaint was presumptively reasonable, and the doctrine of laches is simply inapplicable." Mich. Educ. Emps. Mut. Ins. Co. v. Morris, 460 Mich. 180, 596 N.W.2d 142, 152 (Mich. 1999); see also City of Wyandotte v. Consol. Rail Corp., 262 F.3d 581, 589 (6th Cir. 2001).

But more recent Michigan cases have considered the interplay of laches and statutes of limitations and explained when the presumption of reasonableness can be rebutted. The Michigan Court of Appeals held in *Tenneco Inc. v. Amerisure Mutual Insurance Co.* that [HN25](#) "[t]he application of laches can shorten, but never lengthen, the analogous period of limitations. . . . Thus, laches may bar a legal claim even if the statutory period of limitations has not yet [\*\*\*31] expired." [281 Mich. App. 429, 761 N.W.2d 846, 864 \(Mich. Ct. App. 2008\)](#); see also [Gomez, 896 N.W.2d at 54](#) ("[C]ourts may apply the doctrine of laches to bar actions at law even when the period of limitations established by the Legislature has not expired."). Defendants' laches defense is therefore not necessarily barred merely because the case was brought within the statute of limitations.

Turning to the merits, the parties dispute whether there was "an unexcused or unexplained delay [\*\*51] in commencing" this suit. [Gomez, 896 N.W.2d at 53](#). On the one hand, in September 2012, less than two weeks after this suit was filed, an Innovation officer stated that Innovation had "[r]ecently" discovered that NSL was using Choline Family ingredients. On the other hand, Innovation knew that Custom Nutrition was manufacturing at least one energy shot containing Choline Family ingredients ("Rock On") when the Settlement Agreement was executed; Rock On is the first product listed in the Agreement's appendix. Because NSL manufactured Rock On from its inception in 2009, this creates a dispute of material fact. A jury could reasonably infer that Innovation knew or should have known that NSL was manufacturing shots containing Choline Family ingredients almost three years before it filed suit.

A jury might also conclude that NSL was prejudiced by the delay, see [Gomez, 896 N.W.2d at 53](#), because the liability that NSL faced increased with each violative energy shot sold and so with each day that Innovation delayed filing suit. Of course, NSL's decision to continue manufacturing shots containing Choline Family ingredients after the suit was filed could counsel against a finding of prejudice, because a jury could infer from that course of [\*\*52] conduct that NSL would have run up the same potential damages regardless of when Innovation sued. But the available evidence does not require that conclusion. As the district court summarized it, "the entire point of Defendants' argument is that they would have reacted differently because they could have designed the products differently from the outset." [Innovation I\\*344 Ventures III, 256 F. Supp. 3d at 704](#). Here, too, there is a dispute of material fact. The district court, therefore, did not err in deciding to submit these subsidiary factual disputes to a jury before making its ultimate determination on Defendants' laches defense.

Finally, Innovation invokes the unclean hands doctrine. [HN26](#) Under Michigan law, "[a] party with unclean hands may not assert the equitable defense of laches." [Attorney Gen. v. PowerPick](#) [\[\\*\\*\\*321\] Club, 287 Mich. App. 13, 783 N.W.2d 515, 536 \(Mich. Ct. App. 2010\)](#). The unclean hands doctrine allows a court to deny equitable relief when "the party applying for such relief is guilty of conduct involving fraud, deceit, unconscionability, or bad faith related to the matter at issue to the detriment of the other party." [Cyber Sols. Int'l, LLC v. Pro Mktg. Sales, Inc.](#), [634 F. App'x 557, 567 \(6th Cir. 2016\)](#) (quoting [Performance Unlimited, Inc. v. Questar Publishers, Inc.](#), [52 F.3d 1373, 1383 \(6th Cir. 1995\)](#)). "In determining whether [a party] come[s] before this Court with clean hands, the primary factor to be considered is whether the [party] sought to mislead or deceive [\*\*53] the other party." [Stachnik v. Winkel](#), [394 Mich. 375, 230 N.W.2d 529, 534 \(Mich. 1975\)](#). Defendants did not fraudulently induce Innovation to enter into the Settlement Agreement. Defendants subsequently breached the Agreement, but they had a good faith legal argument that they were not bound by the Agreement's terms. There is no evidence that Defendants misled Innovation about which energy shots they manufactured or what ingredients those energy shots contained. Innovation has failed to identify Michigan precedent supporting applying the unclean hands doctrine in these circumstances.

We affirm the district court's conclusion that disputes of material fact exist related to the issue of laches.

## E. Damages Calculation Methodologies

Innovation proposed three ways to calculate its damages: estimated lost profits based on Innovation's market share, an estimated reasonable royalty, and disgorgement. The district court determined that all three methods were impermissible but left open the possibility that Innovation could "still recover lost profits under a non-patent-

infringement specific method of calculation." *Innovation Ventures III, 256 F. Supp. 3d at 710-12 & n.8*. Innovation instead allowed judgment to be entered in its favor for only nominal damages and thereby waived any damages theory other than the [\*\*54] three presented before the district court. Innovation may recover damages only if we determine that one or more of these three theories is viable.

### **[\*\*\*33] 1. Market-Share Based Calculation of Lost Profits**

Innovation argues that it should be allowed to present to the jury an estimate of lost profits calculated by multiplying the number of units Defendants sold by Innovation's market share. This model essentially assumes that, if Defendants had not made these impermissible sales, Innovation, which sells 85% of the energy shots on the market, would have made 85% of those sales. The district court rejected this calculation as exclusive to patent cases. *Id. at 710-11*.

**HN27** Under Michigan law, "[l]ost profits resulting from a breach of contract may be considered by a jury in determining damages." *Eastland Partners LP v. Village Green Mgmt. Co. (In re Brown)*, 342 F.3d 620, 632 (6th Cir. 2003) (citing *Lorenz Supply Co. v. Am. Standard, Inc.*, 100 Mich. App. 600, 300 N.W.2d 335, 340 (Mich. Ct. App. 1980)). Permitting juries to estimate lost [\*345] profits comports with the underlying principle of Michigan law that

when, from the nature of the case, the amount of the damages can not be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable [\*\*55] them to make the most intelligible and probable estimate which the nature of the case will permit.

*Health Call v. Atrium Home & Health Care Servs.*, 268 Mich. App. 83, 706 N.W.2d 843, 856 (Mich. Ct. App. 2005) (quoting *Allison v. Chandler*, 11 Mich. 542, 555-56 (1863)). While "lost profits must be proven with a reasonable degree of certainty and cannot be based solely on conjecture and speculation," *In re Brown*, 342 F.3d at 632, "the law permits some level of uncertainty to be resolved by the trier of fact," *Health Call*, 706 N.W.2d at 856. See also 24 Richard A. Lord, *Williston on Contracts* § 64:10 (4th ed. Supp. 2018) (describing the shift from the historic practice of forbidding the award of lost profits as remote or speculative to the current practice of allowing for estimated lost profits to avoid the iniquity of depriving the plaintiff of any recovery).

At least one Michigan court has determined that testimony related to market share can help quantify lost profits with sufficient certainty. See *Fabbrini Family Foods, Inc. v. United Canning Corp.*, 90 Mich. App. 80, 280 N.W.2d 877, 880 (Mich. Ct. App. 1979) (per curiam) (explaining that an accountant's proof of lost profits was sufficiently concrete where he described the overall dip in [\*\*\*34] gross profits and explained "that the corporation's share of the market dropped from 85% to 55%"); see also *Lakestates Workplace Sols., Inc. v. Spradlin (In re Spradlin)*, Nos. 98-20611/2065, 2000 Bankr. LEXIS 1968, at \*18 (Bankr. E.D. Mich. May 15, 2000) (citing *Fabbrini* to support the conclusion that "[l]ost profits can be quantified based [\*\*56] on loss of market share"); Jill M. Wheaton, *Proving and Defending Commercial Damages Claims, in Michigan Law of Damages and Other Remedies* 301, 307 (Barbara A. Patek et al. eds., 3d. ed. Supp. 2014). To be sure, using loss of market share alongside other data to quantify lost profits is not the same as relying entirely on a stagnant market share for the same task. But forbidding the submission of market-share based estimates to a jury as a matter of law runs afoul of *Fabbrini* and impermissibly limits the scope of the jury's inquiry.

We conclude here only that this theory of relief is available for Innovation to pursue. Upon remand, Innovation may introduce testimony that uses market share to quantify its lost profits. Defendants may then submit rebuttal evidence concerning the weaknesses of this specific calculation. Only then can the determination be made whether all the evidence proves the amount of lost profits "with a reasonable degree of certainty." *In re Brown*, 342 F.3d at 632.

### **2. Reasonable Royalty**

Innovation next argues that it should be permitted to present the jury with evidence of damages based on a calculated reasonable royalty.

**[HN28]** Reasonable royalties are an accepted method of calculating damages in patent [\*\*57] infringement and misappropriation of trade secret cases. See [35 U.S.C. § 284](#) ("[T]he court shall award the claimant damages adequate to compensate for the [patent] infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer . . . ."); [Mich. Comp. Laws § 445.1904](#) ("[T]he damages caused by misappropriation [of trade secrets] may be measured by imposition [\*346] of liability for a reasonable royalty . . . ."). Innovation does not, however, cite any Michigan cases, federal cases applying Michigan law, or even secondary sources that contemplate using a reasonable royalty to calculate damages in breach of contract cases.

[\*\*\*35] Instead, Innovation points to a handful of out-of-state and out-of-circuit cases. We begin with the lone appellate case in Innovation's list, [Celeritas Technologies, Ltd. v. Rockwell International Corp., 150 F.3d 1354 \(Fed. Cir. 1998\)](#). In *Celeritas*, a patent holder "in the business of licensing its technology" met with a manufacturer to demonstrate its proprietary technology. *Id. at 1356, 1359*. The parties entered into a non-disclosure agreement (NDA) covering the subject matter of the meeting. *Id. at 1357*. The manufacturer decided not to license the technology and, instead, "assigned the same engineers who had learned of Celeritas's technology under the NDA to work on" a project to develop [\*\*58] the same technology. *Id.* Celeritas sued for breach of the NDA, misappropriation of trade secrets, and patent infringement. *Id.* The jury awarded the same damages figure on both the patent and contract claims, calculated based on a hypothetical license fee. *Id.* On appeal, the patent was deemed invalid because it had been anticipated by a published article. *Id. at 1361*. But the Federal Circuit determined that Celeritas could nonetheless recover a reasonable royalty as damages for the manufacturer's breach of the NDA: "To compensate Celeritas for the breach, the jury properly determined the license fee Rockwell would have paid had it not breached the agreement." *Id. at 1359*.

In this case, unlike in *Celeritas*, there are no patent infringement or misappropriation claims. The Settlement Agreement was not part of licensing negotiations. And, as Innovation's own expert stated in his report, "Innovation Ventures has no history of licensing its intellectual property to any competitor." So even assuming Michigan law might allow for assessment of royalty-based damages in certain, unusual breach of contract cases, the circumstances that rendered that assessment reasonable in *Celeritas* are not present here.

The remaining [\*\*59] cases—all from out-of-circuit district courts, and largely unpublished—are similarly inapposite. In some, the contract claim was paired with a misappropriation or patent infringement claim, so the court simply allowed the use of the reasonable royalty methodology across both types of claims, or after one had been dismissed. See [Veritas Operating Corp. v. Microsoft Corp., No. C06-0703, 2008 U.S. Dist. LEXIS 112135, 2008 WL 7404617, at \\*2-3 \(W.D. Wash. Feb. 26, 2008\)](#); [Dethmers Mfg. Co. v. Automatic Equip. Mfg. Co., 73 F. Supp. 2d 997, 999, 1007-08 \(N.D. Iowa 1999\)](#). In others, the experts worked from established royalty rates between the parties. See [Loftness Specialized Farm Equip., Inc. v. Twiestmeyer, No. CV 11-1506, 2017 U.S. Dist. LEXIS 135019, 2017](#) [\*\*\*36] [WL 3668757, at \\*8 \(D. Minn. Aug. 23, 2017\)](#) (allowing expert testimony that a royalty rate between two and five percent was reasonable where the parties had previously agreed upon a two-percent royalty, see [Loftness Specialized Farm Equip., Inc. v. Twiestmeyer, 818 F.3d 356, 359 \(8th Cir. 2016\)](#)); [Agrigenetics, Inc. v. Pioneer Hi-Bred Int'l, Inc., No. 1:08-CV-802, 2010 U.S. Dist. LEXIS 120003, 2010 WL 4683936, at \\*4 \(S.D. Ind. Nov. 10, 2010\)](#) (permitting expert testimony that focused exclusively on the "established royalty").<sup>4</sup>

[\*347] In sum, no controlling authority from either this court or any Michigan court holds that damages in the form of a reasonable royalty may be assessed in a breach of contract case. Even the non-binding authority depended on

<sup>4</sup> The remaining case holds only that "[l]ost profits and reasonable royalties are specific allegations of damage that are sufficient to satisfy the requirement to plead actual and appreciable damages under California breach of contract law." [Benedict v. Hewlett-Packard Co., No. 13-CV-00119, 2014 U.S. Dist. LEXIS 7331, 2014 WL 234218, at \\*5 \(N.D. Cal. Jan. 21, 2014\)](#) (internal quotation marks omitted). Even if it were relevant to our determination about Michigan law, this case does not reach the issue of whether a jury can base its damages calculation on a reasonable royalty.

circumstances not present here. An estimated reasonable royalty is not an appropriate theory for proof of damages in this [\*\*60] case.

### 3. Disgorgement

Finally, Innovation argues that, pursuant to § 5.d of the Settlement Agreement, it should be allowed to seek disgorgement of Defendants' proceeds from selling energy shots that violated the Choline Family restrictions. We therefore must decide whether Defendant NSL is bound by § 5.d because it is incorporated by reference into either § 5.c of the Settlement Agreement (which, for the reasons explained above, see Part II.C.2, binds NSL) or the Asset Purchase Agreement (to which NSL is a party).<sup>5</sup>

First, we ask whether § 5.c.i incorporates § 5.d. [HN29](#) Michigan courts, like their Texas counterparts, distinguish between contractual terms that merely "mention" another document and those that are "made for the purpose of making such writing a part of the contract." [Forge v. Smith, 458 Mich. 198, 580 N.W.2d 876, 881 & n.21 \(Mich. 1998\)](#) (citation omitted). In so doing, courts "must look for the party's intent within the contract." [\*Id. at 881\*](#).

[\*\*37] The Choline Family restrictions are found in § 5.c.i of the Settlement Agreement. The key sentence provides that "[n]o Energy Liquid shall contain anything in the Choline Family (defined below) (subject to the Sell-Through Period described in Subsection 5.d. below)." The cross-referenced subsection, § 5.d, titled "Sell-Through Period," has two key [\*\*61] terms. First, it provides for three- and six-month grace periods in which Custom Nutrition can continue to produce and sell, respectively, energy shots containing Choline Family ingredients. Second, it provides for damages: "Remedy for violation is injunctive relief and disgorgement of proceeds plus provable damages, attorneys' fees and indemnification for each such violation."

No Michigan cases have been cited involving the situation where one clause of a contract incorporates another clause by reference. Even if we assume that clause-by-clause incorporation is possible, § 5.c.i refers to the "Sell-Through Period described in Subsection 5.d" (emphasis added) rather than § 5.d in its entirety. The limited reference points more naturally to the grace period in § 5.d than to its damages language.

We turn next to Innovation's argument that the Asset Purchase Agreement incorporates § 5.d. Innovation asserts, without analysis or citation, that "[s]ince §5.d. (setting forth the formula-restriction grace period and remedies for breach) is part and parcel of §5.c.i., there is no way to isolate §5.c. from §5.d." We disagree. Section 5.c describes the prohibited conduct, and § 5.d describes the resulting penalty; these two provisions are logically [\*\*62] distinct. The Asset Purchase Agreement describes limitations on "the formula for energy drinks," which, as explained above, most naturally refers to the ingredient-specific [\*348] restrictive covenants in § 5.c that would change the formula itself. The proposed remedy, on the other hand, does not "limit[] the formula.

We therefore affirm the district court's conclusion that Innovation may not seek disgorgement of Defendants' proceeds.

### **[\*\*38] III. CONCLUSION**

For the foregoing reasons, Defendants' motion to dismiss is **DENIED**; the district court's conclusions as to personal jurisdiction, Defendants' antitrust counterclaim, whether NSL is bound by the Settlement Agreement, the ambiguity of the catch-all clause, laches, reasonable royalty, and disgorgement are **AFFIRMED**; and the district court's conclusions as to whether Jones is bound by the Settlement Agreement, the enforceability and reformation of the restrictive covenant, and lost profits are **REVERSED**. The district court's dismissal of the Secondary Case based on preclusion is therefore also **REVERSED**. We **REMAND** both the Lead and the Secondary Case for further proceedings consistent with this opinion.

<sup>5</sup> For the reasons explained above, see *supra* Part II.C.1, the Settlement Agreement does not bind Defendant Jones in his personal capacity. Because Innovation does not argue that the Asset Purchase Agreement binds Jones in his personal capacity, Innovation may not seek disgorgement from Jones.

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## Sonterra Capital Master Fund, Ltd. v. Barclays Bank PLC

United States District Court for the Southern District of New York

December 21, 2018, Decided; December 21, 2018, Filed

15-CV-3538 (VSB)

### **Reporter**

366 F. Supp. 3d 516 \*; 2018 U.S. Dist. LEXIS 215143 \*\*; 2019-1 Trade Cas. (CCH) P80,629; 2018 WL 6725387

SONTERRA CAPITAL MASTER FUND, LTD., RICHARD DENNIS, FRONTPOINT EUROPEAN FUND L.P., on behalf of themselves and all others similarly situated, Plaintiffs, -against- BARCLAYS BANK PLC, COOPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., DEUTSCHE BANK AG, LLOYDS BANKING GROUP PLC, THE ROYAL BANK OF SCOTLAND PLC, UBS AG, JOHN DOE NOS. 1-50, BARCLAYS CAPITAL, INC., Defendants.

**Subsequent History:** Reconsideration denied by, Motion denied by, Dismissed by [Sonterra Capital Master Fund, Ltd. v. Barclays Bank PLC, 403 F. Supp. 3d 257, 2019 U.S. Dist. LEXIS 138966, 2019 WL 3858620 \(S.D.N.Y., Aug. 16, 2019\)](#)

Motion granted by, Class certification granted by [Sonterra Capital Master Fund, Ltd. v. Barclays Bank PLC, 2023 U.S. Dist. LEXIS 95908 \(S.D.N.Y., June 1, 2023\)](#)

**Prior History:** [Sonterra Capital Master Fund Ltd. v. Credit Suisse Grp. AG, 277 F. Supp. 3d 521, 2017 U.S. Dist. LEXIS 156425, 2017 WL 4250480 \(S.D.N.Y., Sept. 25, 2017\)](#)

## **Core Terms**

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manipulation, allegations, antitrust, Defendants', trading, Plaintiffs', derivatives, transactions, prices, personal jurisdiction, unjust enrichment, conspiracy, domestic, banks, motion to dismiss, quotation, damages, marks, contracts, settlements, artificial, Forwards, contacts, swap, interest rate, Sherman Act, extraterritorial, commerce, statute of limitations, courts

**Counsel:** [\*\*\[\\*\\*1\]\*\* For Plaintiffs and Proposed Interim Class Counsel: Christian Levis, Geoffrey Milbank Horn, Raymond Peter Girnys, Vincent Briganti, Peter Dexter St. Phillip, Jr., Sitso W. Bediako, Lee Jason Lefkowitz, Lowey Dannenberg, P.C., White Plains, New York; Benjamin Martin Jaccarino, Christopher Lovell, Lovell Stewart Halebian Jacobson LLP, New York, NY.](#)

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**Judges:** Vernon S. Broderick, United States District Judge.

**Opinion by:** Vernon S. Broderick

## Opinion

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### [\*529] OPINION & ORDER

VERNON S. BRODERICK, United States District Judge:

Plaintiffs Sonterra Capital Master Fund, Ltd. ("Sonterra"), FrontPoint European Fund L.P. ("FrontPoint"), and Richard Dennis ("Dennis") bring this putative class action against Defendants Barclays Bank PLC ("Barclays"), Cooperatieve Rabobank U.A. (f/k/a Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A.) ("Rabobank"), Deutsche Bank AG ("Deutsche Bank"), Lloyds Banking Group Plc ("Lloyds"), The Royal Bank of [\*3] Scotland PLC ("RBS"), and UBS AG ("UBS") (collectively, the "Foreign Defendants"), and Barclays Capital, Inc. ("BCI," and, together with the Foreign Defendants, "Defendants"). The Consolidated Amended Complaint ("CAC") brings claims (1) under the *Sherman Antitrust Act ("Sherman Act")*, 15 U.S.C. § 1, et seq., (2) under the *Commodity Exchange Act ("CEA")*, 7 U.S.C. § 1, et seq., (3) under the *Racketeer Influenced and Corrupt Organizations Act ("RICO")*, 18 U.S.C. § 1961, et seq., and (4) asserts common-law claims of breach of the implied covenant of good faith and fair dealing and unjust enrichment.

Defendants move to dismiss the CAC for lack of subject matter jurisdiction and for failure to state a claim under *Rules 12(b)(1)* and *12(b)(6)* of the *Federal Rules of Civil Procedure*. The Foreign Defendants also move to dismiss the claims against them for lack of personal jurisdiction under *Rule 12(b)(2)*. For the reasons that follow, the motion to dismiss is GRANTED in part and DENIED in part. The motion is DENIED with regard to Plaintiff FrontPoint's Sherman Act claims and unjust enrichment claim against Defendant UBS; the motion is otherwise GRANTED.

### I. Factual Background<sup>1</sup>

#### A. Overview

This case is one of several civil cases filed in this District alleging that certain banks manipulated and fixed prices of the [\*530] London Interbank [\*4] Offered Rate ("LIBOR"), submitted them to the British Bankers' Association ("BBA"), and thereby made artificial submissions over a period of years, which allegedly harmed Plaintiffs as purchasers or sellers of financial instruments they claim were in some way connected to LIBOR. LIBOR is an interest rate benchmark used in financial markets around the world and intended to reflect the competitive

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<sup>1</sup> The following factual summary is drawn from the allegations in the CAC, (Doc. 95), which I presume to be true for purposes of this motion, see *Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 237 (2d Cir. 2007). My references to these allegations should not be construed as a finding as to their veracity, and I make no such findings.

conditions of the London interbank money market. (CAC ¶¶ 6-7.) LIBOR is calculated by averaging a number of submitting banks' estimates of their own respective costs of borrowing money in the London interbank market in several currencies and for a number of maturities (or "tenors") per currency. (*Id.* ¶¶ 116-17.) It is administered by the BBA, "the leading trade association for the United Kingdom banking and financial services sector." (*Id.* ¶¶ 91, 92.) It is published daily and used to price, benchmark, and/or settle interest rate derivatives traded over-the-counter and on public exchanges, including interest rate swaps, forward rate agreements, foreign exchange forwards, and futures contracts. (*Id.* ¶¶ 8, 121.)

During the relevant time period, the BBA published LIBOR rates for ten different currencies, [\*\*5]<sup>2</sup> including the British Pound Sterling, based upon interest rate quotas that panel banks submit. (*Id.* ¶¶ 7, 103-07.) Defendants in this case were BBA panel banks that controlled the British Pound Sterling LIBOR ("Sterling LIBOR") during the class period. (*Id.* ¶¶ 101, 109, 116.) Other actions filed in this District involve the U.S. Dollar,<sup>3</sup> Japanese Yen,<sup>4</sup> and Swiss Franc<sup>5</sup> LIBOR. The financial instruments used by Plaintiffs in this action were foreign exchange ("FX") forward contracts, interest rate swaps, and FX futures contracts traded on the Chicago [\*531] Mercantile Exchange ("CME"). (See *id.* ¶¶ 37-39.)

To set Sterling LIBOR, the BBA asks the panel banks to answer independently the following question on every banking day in London: "At what rate could you borrow [Sterling], were you to do so by asking for and then accepting inter-bank offers in a reasonable market size, just prior to 11:00 a.m.?" (*Id.* ¶ 101.) The panel members each submit answers reflecting the rate of interest offered on loans for 15 different maturities, or tenors. (*Id.* ¶ 116.) Pursuant to BBA guidelines, each panel bank's answer at each tenor is supposed to reflect actual competitive market rates. (*Id.* ¶ 109.) Each panel bank submits its rates electronically to Thomson Reuters, "as administrator of the LIBOR fixing," including the Sterling LIBOR. (*Id.* ¶ 117.) After all the submissions are received, the quotes in each tenor are ranked. (See *id.*) The Sterling LIBOR is then calculated for each tenor by averaging the middle 50% of submissions. (*Id.*) Because there were sixteen members of the Sterling LIBOR contributing panel, this meant that Thomson Reuters used the middle eight submissions, after discarding the top and [\*\*7] bottom quartiles. (*Id.* ¶ 101.) "This average rate becomes the daily official Sterling LIBOR for that particular tenor and is distributed

<sup>2</sup> See [In re LIBOR-Based Fin. Instruments Antitrust Litig. \("LIBOR I"\)](#), 935 F. Supp. 2d 666, 678 (S.D.N.Y. 2013), vacated and remanded sub nom. [Gelboim v. Bank of Am. Corp.](#), 823 F.3d 759 (2d Cir. 2016).

<sup>3</sup> Judge Buchwald has issued seven decisions in the U.S. Dollar LIBOR multi-district litigation: [LIBOR I](#), 935 F. Supp. 2d 666; [In re LIBOR-Based Fin. Instruments Antitrust Litig. \("LIBOR II"\)](#), 962 F. Supp. 2d 606 (S.D.N.Y. 2013); [In re LIBOR-Based Fin. Instruments Antitrust Litig. \("LIBOR III"\)](#), 27 F. Supp. 3d 447 (S.D.N.Y. 2014); [In re LIBOR-Based Fin. Instruments Antitrust Litig. \("LIBOR IV"\)](#), No. 11 MDL 2262 (NRB), 2015 U.S. Dist. LEXIS 147561, 2015 WL 6243526 (S.D.N.Y. Aug. 4, 2015, as amended Oct. 20, 2015); [In re LIBOR-Based Fin. Instruments Antitrust Litig. \("LIBOR V"\)](#), No. 11 MDL 2262 (NRB), 2015 U.S. Dist. LEXIS 149629, 2015 WL 6696407 (S.D.N.Y. Nov. 3, 2015); [In re LIBOR-Based Fin. Instruments Antitrust Litig. \("LIBOR VI"\)](#), No. 11 MDL 2262 (NRB), 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980 (S.D.N.Y. Dec. 20, 2016, as amended Feb. 2, 2017); [In re LIBOR-Based Fin. Instruments Antitrust Litig. \("LIBOR VII"\)](#), 299 F. Supp. 3d 430 (S.D.N.Y. 2018). Judges Gardephe and Preska have also issued opinions pertaining to the U.S. Dollar LIBOR. See [7 W. 57th St. Realty Co. v. Citigroup, Inc.](#), 314 F. Supp. 3d 497 (S.D.N.Y. 2018); [7 W. 57th St. Realty Co., LLC v. CitiGroup, Inc.](#), No. 13 Civ. 981 (PGG), 2015 U.S. Dist. LEXIS 44031, 2015 WL 1514539 (S.D.N.Y. Mar. 31, 2015); [Mayfield v. British Bankers' Ass'n](#), No. 14-CV-4735, 2014 U.S. Dist. LEXIS 184818, 2014 WL 10449597 (S.D.N.Y. July 22, 2014).

<sup>4</sup> [Laydon v. Mizuho Bank, Ltd. \("Laydon I"\)](#), No. 12-cv-3419 (GBD), 2014 U.S. Dist. LEXIS 46368, 2014 WL 1280464 (S.D.N.Y. Mar. 28, 2014); [Laydon v. Mizuho Bank, Ltd. \("Laydon II"\)](#), No. 12-cv-3419 (GBD), 2015 U.S. Dist. LEXIS 44005, 2015 WL 1499185 (S.D.N.Y. Mar. 31, 2015); [Laydon v. Mizuho Bank, Ltd. \("Laydon III"\)](#), No. 12-cv-3419 (GBD), 2015 U.S. Dist. LEXIS 44007, 2015 WL 1515358 (S.D.N.Y. Mar. 31, 2015); [Laydon v. Mizuho Bank, Ltd. \("Laydon IV"\)](#), No. 12-cv-3419 (GBD), 2015 U.S. Dist. LEXIS 44126, 2015 WL 1515487 (S.D.N.Y. Mar. 31, 2015); [Laydon v. Bank of Tokyo-Mitsubishi UFJ, Ltd. \("Laydon V"\)](#), No. 12 Civ. 3419 (GBD), 2017 U.S. Dist. LEXIS 38270, 2017 WL 1093288 (S.D.N.Y. Mar. 10, 2017) [\*\*6]; [Laydon v. Bank of Tokyo-Mitsubishi UFJ, Ltd. \("Laydon VI"\)](#), No. 12 Civ. 3419 (GBD), 2017 U.S. Dist. LEXIS 38271, 2017 WL 1113080 (S.D.N.Y. Mar. 10, 2017).

<sup>5</sup> [Sonterra Capital Master Fund Ltd. v. Credit Suisse Grp. AG](#), 277 F. Supp. 3d 521 (S.D.N.Y. 2017).

electronically to the market, including within the United States, through Thomson Reuters and Bloomberg among other financial services platforms." (*Id.* ¶ 117.) Thomson Reuters also publishes each member bank's submissions, including those that were in the top and bottom quartiles. (*Id.* ¶ 101.)

Nearly \$100 trillion in Sterling LIBOR-based derivatives were traded within the United States from January 1, 2005 through December 31, 2010 (the "Class Period"). (*Id.* ¶¶ 1, 95.) During this time, Defendants also maintained operations within the United States from which they "transacted in a full range of interest rate derivatives products, including those based upon Sterling LIBOR." (*Id.* ¶ 96.) They "competed against one another and others in the United States in the sales of financial services and products, including sales of interest rate swaps, forward rate agreements, foreign exchange forwards, and other financial products in which the price or payments were based upon the Sterling LIBOR." (*Id.* ¶ 98.) They also competed in the futures markets, including [\*\*8] the Sterling futures contracts traded on the London International Financial Futures and Options Exchange ("LIFFE"), and British pound futures contracts traded on the CME. (*Id.* ¶¶ 39, 98.)

### **B. Defendants' Alleged Conduct**

Barclays, Deutsche Bank, Lloyds, Rabobank, RBS, and UBS were among the members of the sixteen-bank Contributor Panel for Sterling LIBOR during the putative Class Period.<sup>6</sup> (*Id.* ¶¶ 11, 118.) Plaintiffs allege that each member bank over that period "coordinated their Sterling LIBOR submissions and manipulative trading practices to fix the prices of Sterling LIBOR-based derivatives for their financial benefit." (*Id.* ¶ 125.) According to the CAC, "Defendants' derivatives traders frequently [\*532] used electronic communications, including instant messages and chat rooms, to share information regarding their Sterling LIBOR-based derivatives positions and to request Sterling LIBOR submissions that would manipulate and fix the prices of those derivatives at artificial levels for their financial benefit." (*Id.* ¶ 126.) Those communications allegedly took place internally as well as "externally (among Sterling LIBOR-based derivatives traders and submitters located at different, supposedly [\*\*9] competing, Sterling LIBOR contributor banks)." (*Id.* ¶ 127.) "During the Class Period, Defendants entered into a series of agreements designed to create profit or limit liabilities amongst themselves by coordinating the manipulation of Sterling LIBOR and the prices of Sterling LIBOR-based derivatives, by conspiring to, *inter alia*, make false submissions to the BBA designed to artificially suppress, inflate, maintain, or otherwise alter Sterling LIBOR." (*Id.* ¶ 238.) Defendants have entered into various settlements and non-prosecution agreements with government regulators, such as the Department of Justice ("DOJ"), Commodity Futures Trading Commission ("CFTC"), and United Kingdom Financial Conduct Authority ("FCA"), in connection with LIBOR manipulation related to various currencies. (See *id.* ¶¶ 13-25.)<sup>7</sup>

### **C. Plaintiffs' Alleged Injuries**

Plaintiff Sonterra is an investment fund that traded in Sterling foreign exchange forwards ("Sterling FX Forwards") on unspecified dates. (*Id.* ¶ 37.) An FX forward is "[a] transaction that solely involves the exchange of two different currencies on a specific future date at a fixed rate agreed upon on the inception of the contract covering the exchange." [\*\*10] (*Id.* ¶ 121(e).) Sonterra characterizes its forwards as "Sterling LIBOR-based derivatives," (*id.* ¶ 37), because the "cost of buying or selling Sterling under a foreign exchange forward is determined using a formula

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<sup>6</sup> Lloyds, a holding company, was apparently not a member of the BBA's Sterling LIBOR Contributor Panel but its subsidiary, Lloyds Bank plc (formerly, Lloyds TSB Bank plc), was a member throughout the Class Period; in January 2009, Lloyds acquired HBOS plc, whose subsidiary was a member of the Panel through February 6, 2009. Similarly, BCI is a subsidiary of Barclays, (CAC ¶ 44), and was not a member of the Sterling LIBOR Contributor Panel. (See Defs.' SMJ Br. 7 n.6.) "Defs.' SMJ Br." refers to Memorandum of Law in Support of Defendants' Motion to Dismiss the Consolidated Amended Complaint for Lack of Subject Matter Jurisdiction and Failure to State a Claim. (Doc. 100.)

<sup>7</sup> An index of links to the Foreign Defendants' publicly available regulatory settlements, which are incorporated by reference into the CAC, is located at Appendix A to the Foreign Defendants' Reply Memorandum of Law in Further Support of Foreign Defendants' Motion to Dismiss for Lack of Personal Jurisdiction. (Doc. 120-1.)

that incorporates Sterling LIBOR," (*id.* ¶ 206). "The calculation involves taking the 'spot price' of Sterling for immediate delivery, and adjusting it to account for the 'cost of carry,' *i.e.*, the amount of interest paid or received on Sterling deposits, for the duration of the agreement. Sterling LIBOR, the benchmark rate for Sterling deposits, is used in this formula to calculate the cost of carrying Sterling over the duration of the foreign exchange forward." (*Id.*)

Plaintiff Dennis is an individual trader who participated in transactions in Sterling foreign exchange futures contracts ("Sterling FX Futures") on the CME on one occasion—May 11, 2010. (*Id.* ¶¶ 39, 214.) A "CME British pound futures contract is an agreement to buy or sell £62,500, in terms of U.S. Dollars, on some future date." (*Id.* ¶ 212.) Prices of CME Sterling FX Futures are determined using "the same calculation used to determine the price of" Sterling FX Forwards, but CME Sterling FX Futures are traded on **[\*\*11]** the exchange according to standardized terms. (*Id.* ¶ 212.) On May 11, 2010, Dennis entered into a "long position" in CME Sterling FX Futures and, two days later, "liquidated that position," at a loss of approximately \$38,000. (*Id.* ¶ 214.)

Plaintiff FrontPoint is a Delaware limited partnership with its principal place of business in Greenwich, Connecticut. (*Id.* ¶ 38.) FrontPoint claims to have entered into "Sterling LIBOR-based swaps" with UBS on three occasions in 2007—October **[\*533]** 17, 2007, November 22, 2007, and November 29, 2007—with payments ceasing on those swaps in 2008. (*Id.* ¶¶ 209, 211.) These swaps were entered into in accordance with an International Swaps and Derivatives Association, Inc. ("ISDA") Master Agreement dated May 1, 2007.<sup>8</sup> (*Id.* ¶ 29.) "A swap is an over-the-counter Sterling LIBOR-based derivative in which two parties exchange the obligation to make [a] series of payments based on some underlying principal amount for a set period of time." (*Id.* ¶ 208.) FrontPoint only transacted business with Defendant UBS. (See *id.* ¶ 211.)

## **II. Procedural History**

Plaintiff Sonterra filed its complaint on May 6, 2015, (Doc. 1), and amended it on July 24, 2015, (Doc. 18). Defendants requested **[\*\*12]** a pre-motion conference to discuss their proposed motion to dismiss. (Doc. 48.) The pre-motion conference was held on October 19, 2015, during which I granted the parties' request to submit separate briefing on the question of whether this Court lacks personal jurisdiction, as distinct from their briefing on whether to dismiss on other grounds, and set a motion schedule. (Doc. 61.)

On February 16, 2016, I granted Plaintiffs' motion to consolidate the Sonterra action, *Sonterra Capital Master Fund, Ltd. v. Barclays Bank PLC*, Case No. 15-cv-3538, with a similar case brought by Plaintiffs FrontPoint and Dennis, *FrontPoint European Fund, L.P. v. Barclays Bank plc*, No. 16-cv-464, and dismissed Defendants' motion to dismiss with leave to renew after the filing of a consolidated amended complaint. (Doc. 91.) Plaintiffs filed the CAC on February 25, 2016. (Doc. 95.) The CAC asserted federal claims under Section 1 of the Sherman Act (First and Second Claims for Relief), the CEA (Third, Fourth, and Fifth Claims for Relief), RICO (Sixth and Seventh Claims for Relief), as well as state law claims for unjust enrichment and violation of the implied covenant of good faith and fair dealing (Eighth and Ninth **[\*\*13]** Claims for Relief).

On April 11, 2016, Defendants moved to dismiss the CAC, (Doc. 99), and filed two briefs in support—one brief addressing the question of personal jurisdiction and the other brief addressing Defendants' remaining arguments, (Docs. 100, 103).<sup>9</sup> Plaintiffs filed their oppositions, (Docs. 114, 116); and Defendants filed their reply briefs, (Docs. 120, 121). The parties also filed various declarations with exhibits in support of their positions. (Docs. 101, 102, 104-10, 115.) I have since received the parties' letters of supplemental authority addressing recent decisions of the

<sup>8</sup> An ISDA Master Agreement is a standardized form agreement published by the ISDA, used to provide certain legal and credit protections for parties entering into over-the-counter derivatives transactions, including swaps and forward rate agreements. (CAC ¶ 29 n.25.)

<sup>9</sup> Only the Foreign Defendants move to dismiss for lack of personal jurisdiction; Defendant BCI does not challenge the Court's personal jurisdiction over it. (See Defs.' PJX Br. 1 n.1.) "Defs.' PJX Br." refers to the Memorandum of Law in Support of Foreign Defendants' Motion to Dismiss for Lack of Personal Jurisdiction. (Doc. 103.)

Supreme Court and Second Circuit, as well as other cases in the Southern District of New York. (Docs. 119, 123-25, 131-33, 135-38, 142, 143, 154-56, 160, 163, 169, 170, 175-83, 188.) Oral argument on the motion was held on August 4, 2017.<sup>10</sup>

### [\*534] III. Legal Standards

#### A. Rule 12(b)(6)

To survive a motion to dismiss under [Rule 12\(b\)\(6\)](#), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" [\*Ashcroft v. Iqbal\*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#) (quoting [\*Bell Atl. Corp. v. Twombly\*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#)). A claim will have "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is [\*\*14] liable for the misconduct alleged." *Id.* This standard demands "more than a sheer possibility that a defendant has acted unlawfully." *Id.* "Plausibility . . . depends on a host of considerations: the full factual picture presented by the complaint, the particular cause of action and its elements, and the existence of alternative explanations so obvious that they render plaintiff's inferences unreasonable." [\*L-7 Designs, Inc. v. Old Navy, LLC\*, 647 F.3d 419, 430 \(2d Cir. 2011\)](#).

In considering a motion to dismiss, a court must accept as true all well-pleaded facts alleged in the complaint and must draw all reasonable inferences in the plaintiff's favor. See [\*Kassner\*, 496 F.3d at 237](#). A complaint need not make "detailed factual allegations," but it must contain more than mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." [\*Iqbal\*, 556 U.S. at 678](#) (internal quotation marks omitted). Although all allegations contained in the complaint are assumed to be true, this tenet is "inapplicable to legal conclusions." *Id.* A complaint is "deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." [\*Chambers v. Time Warner, Inc.\*, 282 F.3d 147, 152 \(2d Cir. 2002\)](#) (quoting [\*Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.\*, 62 F.3d 69, 72 \(2d Cir. 1995\)](#)).

#### B. Rule 12(b)(2)

When a defendant moves for dismissal for lack of personal jurisdiction pursuant to [Rule 12\(b\)\(2\)](#), the plaintiff [\*\*15] bears the burden of demonstrating that the court has jurisdiction over the defendant. [\*Kernan v. Kurz-Hastings, Inc.\*, 175 F.3d 236, 240 \(2d Cir. 1999\)](#). On a motion under [Rule 12\(b\)\(2\)](#), when the issue of personal jurisdiction "is decided initially on the pleadings and without discovery, the plaintiff need show only a *prima facie* case." [\*Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.\*, 751 F.2d 117, 120 \(2d Cir. 1984\)](#). A plaintiff "can make this showing through [her] own affidavits and supporting materials[] containing an averment of facts that, if credited . . . would suffice to establish jurisdiction over the defendant." [\*Whitaker v. Am. Telecasting Inc.\*, 261 F.3d 196, 208 \(2d Cir. 2001\)](#) (internal citations and quotation marks omitted). Thus, a court may consider materials outside the pleadings when deciding a motion dismiss for lack of personal jurisdiction. [\*Hsin Ten Enter. USA, Inc. v. Clark Enters.\*, 138 F. Supp. 2d 449, 452 \(S.D.N.Y. 2000\)](#). [\*535] IV. Article III Standing

<sup>10</sup> Following oral argument, Plaintiffs submitted a letter indicating their intent to move to substitute an entity named Fund Liquidation Holdings, LLC ("FLH") as assignee and attorney-in-fact for Plaintiffs Sonterra and FrontPoint. (Doc. 171, at 1.) Plaintiffs had learned that both Sonterra and FrontPoint ceased operations no later than 2012; however, before winding down, both assigned certain rights to FLH, including the right to recover any amounts payable on their assets, as well as the right to commence suit in Sonterra's and FrontPoint's names. (*Id.* at 1-2.) Plaintiffs contend that the substitution of FLH for Sonterra and FrontPoint would not affect any of the substantive factual or legal allegations in the CAC, (*Id.* at 2); Defendants disagree, (Doc. 172). Because I conclude that Sonterra's claims fail for reasons other than their lack of capacity to sue, Plaintiffs' request for leave to file a motion to substitute for Plaintiff Sonterra is denied as moot. Plaintiff shall submit any motion to substitute Plaintiff FrontPoint in accordance with my instructions below.

As an initial matter, Defendants argue that Plaintiffs Sonterra and Dennis lack standing under Article III of the Constitution.<sup>11</sup> (Defs.' SMJ Br. 11-13.) Article III standing is "the threshold question in every federal case, determining the power of the court to entertain the suit." *Ross v. Bank of Am., N.A.(USA)*, 524 F.3d 217, 222 (2d Cir. 2008) (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263 (2d Cir. 2006)). To satisfy the requirements of Article III standing, a plaintiff must establish three elements:

(1) the plaintiff must have suffered an injury in fact, i.e., an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not [\*\*16] conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 688 (2d Cir. 2013) (internal quotation marks omitted).

"In considering a *Rule 12(b)(1)* motion, all facts alleged in the complaint are taken as true and all reasonable inferences drawn in Plaintiffs' favor." *Ross v. Bank of AM., N.A. (In re Currency Conversion Fee Antitrust Litig.)*, Nos. M 21-95, 05 Civ. 7116 (WHP), 2009 U.S. Dist. LEXIS 6747, 2009 WL 151168, at \*2 (S.D.N.Y. Jan. 21, 2009). "Dismissal is inappropriate unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief." *Id.* (quoting *Raila v. United States*, 355 F.3d 118, 119 (2d Cir. 2004)).

Defendants argue that neither Sonterra nor Dennis alleges facts showing that the Sterling LIBOR manipulation plausibly affected the financial products they traded in—Sterling FX Forwards and CME Sterling FX Futures—and have thus failed to allege injury in fact. (Defs.' SMJ Br. 11.) An FX forward is "an agreement to buy or sell a certain amount of one currency, e.g., Sterling, in terms of another, e.g. U.S. Dollars, on some future date." (CAC ¶ 206.) Sterling FX Futures are the same as Sterling FX Forwards "except that [Sterling FX Forwards] [\*\*17] are not traded on an exchange and thus [are] not subject to the standardized terms specified by the CME." (*Id.* ¶ 212.) Plaintiffs allege that "[t]he cost of buying or selling Sterling under a foreign exchange forward is determined using a formula that incorporates Sterling LIBOR." (*Id.* ¶ 206.) The CAC describes this "formula":

The calculation involves taking the "spot price" [what it costs today] of Sterling for immediate delivery, and adjusting it to account for the "cost of carry," i.e., the amount of interest paid or received on Sterling deposits, for the duration of the agreement. Sterling LIBOR, the benchmark rate for Sterling deposits, is used in this formula to calculate the cost of carrying Sterling over the duration of the foreign exchange forward. As a result a manipulation of Sterling LIBOR renders the cost of buying or selling Sterling under a foreign exchange forward artificial.

(*Id.*) I find that these non-conclusory allegations about the relationship between Sterling LIBOR and the Sterling FX Futures and FX Forwards are sufficient to establish—for the purpose of determining whether there is constitutional standing—[\*536] that any LIBOR manipulation had an effect on the price of [\*\*18] Plaintiffs' transactions. See *Sullivan v. Barclays PLC*, No. 13-cv-2811 (PKC), 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \*9-10 (S.D.N.Y. Feb. 21, 2017) (finding that plaintiffs who transacted in CME Euro currency futures and FX forwards had standing to challenge Euribor manipulation because industry-based formula incorporated Euribor into those transactions). "That sort of 'paid too much' or 'received too little' harm is classic economic injury-in-fact." *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 175 F. Supp. 3d 44, 53 (S.D.N.Y. 2016). Indeed, in *Gelboim v. Bank of America Corp.*, 823 F.3d 759 (2d Cir. 2016), although constitutional standing was not in question, the Circuit noted in dicta that it was "easily satisfied by appellants' pleading that they were harmed by receiving lower returns on LIBOR-denominated instruments as a result of defendants' manipulation of LIBOR." *Id.* at 770. Given the Circuit's observations in *Gelboim*, I find that the allegations in the CAC that Plaintiffs received lower returns because of Defendants' manipulation of Sterling LIBOR support a finding of Article III standing.

Defendants point to *Sonterra Capital Master Fund, Ltd. v. UBS AG*, No. 15-cv-5844-GBD-HBP, 2017 U.S. Dist. LEXIS 38252, 2017 WL 1091983 (S.D.N.Y. Mar. 10, 2017), in which Judge Daniels concluded that FX forwards are

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<sup>11</sup> Defendants do not argue that Plaintiff FrontPoint lacks Article III standing. (See Defs.' SMJ Br. 11-13.)

not indexed or priced by reference to the Euroyen TIBOR or Yen LIBOR, and therefore the connection between the two is too attenuated and speculative to support standing. (See 3/17/17 [\*\*19] Ltr.)<sup>12</sup> However, Judge Daniels noted that plaintiffs there were unable to establish "that the Yen LIBOR rate is definitively used to price foreign exchange forwards." [Sonterra Capital Master Fund, Ltd. v. UBS AG, 2017 U.S. Dist. LEXIS 38252, 2017 WL 1091983, at \\*2](#). While there appears to be a serious factual question as to the extent to which Plaintiffs' FX forwards took Sterling LIBOR into account and what impact it had on Plaintiffs' investments, I concur with Judge Castel that "[t]he Court cannot resolve these conflicting factual assertions at the pleading stage." [Sullivan, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \\*9](#). Therefore, I find that Plaintiffs have Article III standing to pursue their claims.

## **V. Discussion**

Defendants move to dismiss for failure to state a claim, and the Foreign Defendants also move to dismiss for lack of personal jurisdiction. Although personal jurisdiction is a threshold inquiry, and ordinarily addressed prior to the merits of substantive claims, "that practice is prudential and does not reflect a restriction on the power of the courts to address legal issues." [ONY, Inc. v. Cornerstone Therapeutics, Inc., 720 F.3d 490, 498 n.6 \(2d Cir. 2013\)](#). Because only the Foreign Defendants move for lack of personal jurisdiction, and since the jurisdictional question relies in part on the underlying claims and plausible scope of the conspiracy, see [LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at \\*3](#), I will address the personal jurisdiction questions [\*\*20] last, see [Sullivan, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \\*11](#) (addressing defendants' [12\(b\)\(6\)](#) motion before personal jurisdiction because personal jurisdiction arguments turned in part on substance of [12\(b\)\(6\)](#) motion).

### **A. Statute of Limitations<sup>13</sup>**

Defendants argue that Plaintiffs' [Sherman Act](#), [CEA](#), and [RICO](#) claims are [\*537] all untimely under their respective statutes of limitations. (Defs.' SMJ Br. 25-26 (Sherman Act); 27-31 (CEA); 46-47 (RICO).) As discussed in detail below, because I find that certain of Plaintiffs' claims are tolled by the doctrine of fraudulent concealment, Plaintiffs' claims—with the exception of their CEA claims against Defendants Barclays, UBS, and RBS—are not barred by their respective statute of limitations.

#### **1. Applicable Law**

##### **a. Antitrust Claims**

The statute of limitations for antitrust claims is four years from the date of accrual. [15 U.S.C. § 15b](#). The limitations period begins to run "as soon as there is injury to competition." [Johnson v. Nyack Hosp., 86 F.3d 8, 11 \(2d Cir. 1996\)](#).

In an alleged price-fixing conspiracy, each overt act that is part of the violation and that injures the plaintiff starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times. Plaintiffs may only recover damages based on acts falling within [\*\*21] the statutory period, and not based on previous acts.

<sup>12</sup> "3/17/17 Ltr." refers to Defendants' letter dated March 17, 2017. (Doc. 136.)

<sup>13</sup> "In deciding a motion to dismiss on statute of limitations grounds, 'a district court may take judicial notice of media reports, state court complaints, and regulatory filings' as long as 'the court does not take judicial notice of the documents for the truth of the matters asserted in them, but rather to establish that the matters had been publicly asserted.'" [7 W. 57th St. Realty Co., 2015 U.S. Dist. LEXIS 44031, 2015 WL 1514539, at \\*23 n.8](#) (quoting [Staehr v. Hartford Fin. Servs. Grp., Inc., 547 F.3d 406, 424 \(2d Cir. 2008\)](#)).

Mered Irrigation Dist. v. Barclays Bank PLC, 165 F. Supp. 3d 122, 134-35 (S.D.N.Y. 2016) (citations and internal quotation marks omitted); see also Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971).

#### b. RICO Claims

RICO claims are subject to a four-year statute of limitations. Koch v. Christie's Int'l PLC, 699 F.3d 141, 148 (2d Cir. 2012). "As a general matter, 'the limitations period does not begin to run until a plaintiff has actual or inquiry notice of the injury.'" *Id.* at 150-51 (quoting In re Merrill Lynch Ltd. P'ships Litig., 154 F.3d 56, 60 (2d Cir. 1998)).

Inquiry notice—often called "storm warnings" in the securities context—gives rise to a duty of inquiry "when the circumstances would suggest to an investor of ordinary intelligence the probability that she has been defrauded." In such circumstances, the imputation of knowledge will be timed in one of two ways: (i) "if the investor makes no inquiry once the duty arises, knowledge will be imputed as of the date the duty arose"; and (ii) if some inquiry is made, "we will impute knowledge of what an investor in the exercise of reasonable diligence should have discovered concerning the fraud, and in such cases the limitations period begins to run from the date such inquiry should have revealed the fraud."

Koch, 699 F.3d at 151 (quoting Lentell v. Merrill Lynch & Co., 396 F.3d 161, 168 (2d Cir. 2005)). "Storm warnings' need not detail every aspect of the alleged fraudulent scheme: 'An investor does not have to have notice of the entire fraud [\*\*22] being perpetrated to be on inquiry notice.'" Staehr, 547 F.3d at 427 (quoting Dodds v. Cigna Sec., Inc., 12 F.3d 346, 352 (2d Cir. 1993)). "Rather, a totality-of-the-circumstances analysis applies." *Id.* Whether a plaintiff was on inquiry notice is "analyzed under an objective standard," and may be "resolved as a matter of law." *Id.*

#### c. CEA Claims

An action brought under the CEA "shall be brought not later than two years after the date the cause of action [\*538] arises." 7 U.S.C. § 25(c). "Because the CEA does not define when a cause of action accrues, courts apply a discovery accrual rule wherein discovery of the injury, not discovery of the other elements of a claim, is what starts the clock." In re London Silver Fixing, Ltd., Antitrust Litig. ("In re Silver"), 213 F. Supp. 3d 530, 573 (S.D.N.Y. 2016) (quoting Koch, 699 F.3d at 148-49). "Applying the corollary doctrine of 'inquiry notice,' a court must 'ask at what point the circumstances were such that they would suggest to a person of ordinary intelligence the probability that she has been defrauded.'" LIBOR III, 27 F. Supp. 3d at 471 (quoting LIBOR I, 935 F. Supp. 2d at 698); see also Sullivan, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \*26 ("The limitations period begins to run when a plaintiff is placed on inquiry notice of the alleged wrongdoing through facts that 'suggest to a person of ordinary intelligence' that the CEA has been violated." (quoting Benfield v. Mocatta Metals Corp., 26 F.3d 19, 22 (2d Cir. 1994))); In re Silver, 213 F. Supp. 3d at 573 (comparing inquiry notice in the CEA context to storm warnings [\*\*23] in the securities context).

#### d. Doctrine of Fraudulent Concealment

"Under federal common law, a statute of limitations may be tolled due to the defendant's fraudulent concealment if the plaintiff establishes that: (1) the defendant wrongfully concealed material facts relating to defendant's wrongdoing; (2) the concealment prevented plaintiff's discovery of the nature of the claim within the limitations period; and (3) plaintiff exercised due diligence in pursuing the discovery of the claim during the period plaintiff seeks to have tolled." Koch, 699 F.3d at 157 (quoting Corcoran v. N.Y. Power Auth., 202 F.3d 530, 543 (2d Cir. 1999)). The rationale behind the doctrine "is to prevent a defendant from 'concealing a fraud, or committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it.'" State of N.Y. v. Hendrickson Bros., 840 F.2d 1065, 1083 (2d Cir. 1988) (quoting Bailey v. Glover, 88 U.S. (21 Wall.) 342, 349, 22 L. Ed. 636 (1874)).

The first prong is met where "the nature of the wrong itself" is self-concealing." Sullivan, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \*27 (quoting Nat'l Grp. for Commc'n & Computers Ltd. v. Lucent Techs. Inc., 420 F. Supp. 2d 253, 267 n.20 (S.D.N.Y. 2006)); see also Levy v. BASF Metals Ltd., No. 1:15-cv-7317-GHW, 2017 U.S. Dist. LEXIS 89098, 2017 WL 2533501, at \*8 (S.D.N.Y. June 9, 2017). Allegations of price-fixing conspiracies are

often considered inherently self-concealing. See *Merced, 165 F. Supp. 3d at 135* ("Allegations of price-fixing conspiracies in violation of **antitrust law** constitute the type of unlawful activity that is inherently self-concealing."); [\*\*24] *In re Nine W. Shoes Antitrust Litig., 80 F. Supp. 2d 181, 193 (S.D.N.Y. 2000)* ("[S]ince . . . price-fixing conspiracies are deemed self-concealing, a plaintiff is not required to show defendants took independent affirmative steps to conceal their conduct.").

"A claim for fraudulent concealment must be pled with particularity, in accordance with the heightened pleading standards of *Rule 9(b) of the Federal Rules of Civil Procedure.*" *Merced, 165 F. Supp. 3d at 135*. However, "because resolution of a claim of fraudulent concealment is intimately bound up with the facts of the case, it often cannot be decided at the motion to dismiss stage." *In re Commodity Exch., Inc., 213 F. Supp. 3d 631, 675 (S.D.N.Y. 2016)* (internal quotation marks omitted).

## 2. Application

Sonterra's initial complaint was filed on May 6, 2015. FrontPoint and Dennis's [\*539] complaint was filed on January 21, 2016. The conduct at issue is alleged to have occurred during the Class Period—January 1, 2005 through December 31, 2010. (CAC ¶ 217.) Although Plaintiffs may have been aware of the identities of the panel members, they claim not to have known which of the panel members participated in the conspiracy, and thus lacked notice of their claims, until the Government settlements became public: Barclays on June 27, 2012, (*id.* ¶ 46), UBS on December 18, 2012, (*id.* ¶ 17 n.8), RBS on February 6, 2013, (*id.* ¶ 73), Rabobank on October 29, 2013, (*id.* ¶ 20 [\*\*25] n.15), Lloyds on July 28, 2014, (*id.* ¶ 22 n.20), and Deutsche Bank on April 23, 2015, (*id.* ¶ 13 n.2). Therefore, Plaintiffs concede that their CEA claims against Barclays, UBS, and RBS are time-barred under the applicable two-year statute of limitations, (Pls.' SMJ Opp. 47 n.36)<sup>14</sup>, but argue that their remaining CEA claims against Rabobank, Deutsch Bank, and Lloyds, as well as their antitrust and RICO claims against all Defendants, are tolled by the doctrine of fraudulent concealment.

Defendants argue that Plaintiffs were on notice of their claims as early as May 2008. (Defs.' SMJ Br. 25-30, 46-47.) As support for their argument, Defendants identify and include a number of surveys, articles, and reports (the "2008 press reports") that they assert placed Plaintiffs on inquiry notice in 2008. (See Gottridge Decl. Exs. A-H.)<sup>15</sup> These same materials have been discussed by a number of other courts in this District examining the issue of inquiry notice. As comprehensively summarized by Judge Furman, the 2008 press reports conveyed the following information:

On April 10, 2008, strategists at Citigroup published a report comparing LIBOR to other interest rate measures and concluding that "LIBOR may [\*\*26] underestimate actual interbank lending costs" by twenty to thirty basis points (or twenty to thirty hundredths of a percentage point). The strategists explained:

"The most obvious explanation for LIBOR being set so low is the prevailing fear of being perceived as a weak hand in this fragile market environment. If a bank is not held to transact at its posted LIBOR level, there is little

<sup>14</sup> "Pls.' SMJ Opp." refers to Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim. (Doc. 116.)

<sup>15</sup> "Gottridge Decl." refers to the Declaration of Marc J. Gottridge, dated April 11, 2016. (Doc. 101.) Those surveys, articles and reports include the following: a survey published by *Factiva*, dated June 19, 2008, titled *Market Participants Doubt Libor Rates Reflect [\*\*30] Market Rates*, (Ex. A); an article published by the *Financial Times*, dated April 21, 2008, titled *Doubts over Libor Widen*, (Ex. B); an article published by *Bloomberg*, dated April 16, 2008, titled *Bankers Group Reviews Libor amid Manipulation Concern*, (Ex. C); an article published by the *Wall Street Journal*, dated April 16, 2008, titled *Libor Fog: Bankers Cast Doubt on Key Rate amid Crisis*, (Ex. D); an article published by the *Wall Street Journal*, dated April 18, 2008, titled *Libor Surges After Scrutiny Does, Too*, (Ex. E); an article published by the *Wall Street Journal*, dated April 17, 2008, titled *British Bankers Group Steps Up Review of Widely Used Libor*, (Ex. F); an article published by *Factiva*, dated April 16, 2008, titled *BBA Libor Review Will Look for Past Misquoting from Banks*, (Ex. G); and a research report, dated April 10, 2008, titled *Special Topic: Is LIBOR Broken?*, (Ex. H).

incentive for it to post a rate that is more reflective of real lending levels, let alone one that is higher than its competitors. Because all LIBOR postings are publicly disclosed, any bank posting a high LIBOR level runs the risk of being perceived as needing funding. With markets in such a [\*540] fragile state, this kind of perception could have dangerous consequences."

Six days later, the *Wall Street Journal* published an article citing the Citigroup report and warning that "one of the most important barometers of the world's financial health could be sending false signals." The article reported that the BBA, which oversees LIBOR, was conducting an investigation into potential problems with the rate.

Two more articles in the *Wall Street Journal* followed in quick succession. The following day, April 17, 2008, the [\*27] *Journal* reported that the BBA had "fast-tracked its inquiry into the accuracy of the rate." The *Journal* noted that the BBA's announcement "came as more traders and bankers expressed concerns about" the validity of LIBOR. And on April 18, 2008, the *Journal* reported a "sudden jump in the dollar-denominated London interbank offered rate, or LIBOR," in the wake of the announcement that the BBA was accelerating its inquiry into the rate's accuracy. The article reiterated "concerns among bankers that the LIBOR panel banks were not reporting the high rates they were paying for short-term loans for fear of appearing desperate for cash."

Nor was the *Wall Street Journal* the only news outlet reporting on concerns surrounding LIBOR. On April 21, 2008, the *Financial Times* reported that "the credibility of Libor as a measure is declining." In particular, the *Times* explained that, as the paper had "first revealed" in 2007, "bankers have been questioning the way Libor is compiled ever since the credit turmoil first erupted." On May 16, 2008, *Reuters* published an article discussing "problems with Libor," and noting that "recent concern had focused particularly on the dollar Libor index and worries that [\*28] some banks were understating how much they had to pay to borrow money in order to avoid being labeled desperate for cash and, as a result, vulnerable to solvency rumors." And on May 29, 2008, *Bloomberg* published an article, the first line of which stated: "Banks routinely misstated borrowing costs to the British Bankers' Association to avoid the perception they faced difficulty raising funds as credit markets seized up, said Tim Bond, a strategist at Barclay Capital."

Amidst growing concern about LIBOR's reliability, the *Wall Street Journal* conducted its own study. Its results—published in a May 29, 2008 article—revealed that "in the first four months of 2008, the three-month and six-month dollar Libor rates were about a quarter percentage point lower than" the *Journal*'s analysis suggested they should have been. The data showed, further, that "after banks adjusted their Libor rates following news of the BBA review in mid-April, the difference between the reported rates and what rates should have been shrunk to about 0.15 percentage point." Three experts, the *Journal* reported, approved of its methodology. By May 29, 2008, then, there were at least seven articles in major publications [\*29] reporting that there was substantial evidence to support the conclusion that LIBOR was artificially low and had been so for some time.

[BPP III., LLC v. Royal Bank of Scot. Grp., PLC, No. 13 Civ. 0638\(JMF\), 2013 U.S. Dist. LEXIS 161761, 2013 WL 6003701, at \\*7-8 \(S.D.N.Y. Nov. 13, 2013\)](#) (citations omitted), aff'd in part, vacated in part, [603 F. App'x 57 \(2d Cir. 2015\)](#) (summary order); see also [LIBOR I, 935 F. Supp. 2d at 700-03](#) (describing same articles). Applying Pennsylvania's discovery rule, Judge Furman concluded that these articles were sufficient storm warnings to raise the possibility that the US-dollar LIBOR was not a legitimate and reliable [\*541] market-based interest rate; therefore, the plaintiffs were not reasonably unaware of their injury. [BPP III., LLC v. 2013 U.S. Dist. LEXIS 161761, 2013 WL 6003701, at \\*6-7](#). The Second Circuit reversed in a summary order, stating that the district court erroneously held plaintiffs to too high a standard of proof at the motion to dismiss stage by requiring plaintiffs to exhibit reasonable diligence in not discovering their injury in response to the storm warnings. See [603 F. App'x at 59](#). Because plaintiffs were "not required to plead, in a complaint, facts sufficient to overcome an affirmative defense," the Second Circuit concluded that the record was insufficient to show that the plaintiffs had not exercised reasonable diligence. See [id. at 59](#) (internal quotation marks omitted).

On remand, Judge Furman concluded that the plaintiffs were judicially estopped from bringing LIBOR-based fraud claims because they failed to list them in their schedule of assets in a prior bankruptcy proceeding. See [BPP III.,](#)

[LLC v. Royal Bank of Scot. Grp., PLC, No. 13-CV-638 \(JMF\), 2015 U.S. Dist. LEXIS 141824, 2015 WL 6143702, at \\*9 \(S.D.N.Y. Oct. 19, 2015\)](#). The Second Circuit affirmed and, relying on Fifth Circuit law, held that the 2008 press reports were sufficient to "suggest that [the plaintiffs] may have [had] a possible cause of action." [BPP III., LLC v. Royal Bank of Scot. Grp., PLC, 859 F.3d 188, 193 & n.3 \(2d Cir. 2017\)](#) (quoting [In re Coastal Plains, Inc., 179 F.3d 197, 210 \(5th Cir. 1999\)](#)). In a footnote, the Court reconciled its decisions as follows:

In the previous appeal in this case, we stated that the district court had acted too hastily in concluding, based in part on these newspaper reports, that BPP should have been aware of its potential LIBOR-fraud claims. In that appeal, however, we considered a different question under a different body of law. [\\*\\*31](#) The issue was whether BPP had sufficient inquiry notice under the relevant Pennsylvania statute of limitations. That question turned on when the plaintiff reasonably should have known that he had been injured and that his injury had been caused by another party's conduct. In this appeal, controlled by Fifth Circuit bankruptcy precedents, the question is whether the debtor has enough information prior to confirmation to suggest that it may have a possible cause of action. The tests are different, and a bankruptcy debtor in the Fifth Circuit could be required to list a cause of action in its schedule of assets even though the same debtor would not be deemed to have inquiry notice of his injury for purposes of the Pennsylvania statute of limitations.

[Id. at 193 n.3](#) (citations and internal quotation marks omitted).

The Second Circuit's recent decision in [Charles Schwab Corp. v. Bank of America Corp., 883 F.3d 68 \(2d Cir. 2018\)](#), also addressed the significance of the 2008 press reports. In that case, the Circuit—albeit applying California law—reversed the district court's determination that the plaintiff was on inquiry notice based on reports published by May 29, 2008. See [id. at 96-98](#). The Second Circuit's decision rested, in part, on California law, under which press reports are not [\\*\\*32](#) sufficient to put a plaintiff on inquiry notice "where there is no evidence that the plaintiff was aware of the reporting in question." [Id. at 97](#). The Circuit further stated that

even if Schwab were aware of news articles that raised the possibility that LIBOR had been at artificial levels since August 2007, it is not certain that any of Schwab's claims would be time-barred. The BBA responded to the negative press reporting by assuring investors and journalists that its own investigation had confirmed the accuracy of LIBOR. [\\*\\*542](#) It is plausible that Schwab reasonably relied on those assurances, thus delaying the start of the limitations period.

[Id. at 98](#) (citing [BPP III., LLC, 603 F. App'x at 59](#)). "The Second Circuit's analysis strongly suggests that, even if the news articles published on or about May 29, 2008 are sufficient to place a plaintiff on inquiry notice, the statute of limitations would be tolled under the doctrine of fraudulent concealment where a plaintiff plausibly alleges that it relied on the BBA's assurances that LIBOR was accurate." [7 W. 57th St. Realty Co., 314 F. Supp. 3d at 518](#).

Here, Plaintiffs' allegations clear the first hurdle of the fraudulent concealment test because the nature of LIBOR submissions is inherently secretive, and therefore collusion related to such [\\*\\*33](#) submissions is self-concealing. See [Sullivan, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \\*27](#). As to the second factor, Plaintiffs adequately allege that they remained ignorant of the alleged scheme until a point within the relevant statutes of limitations—when the Government settlements became public. (See CAC ¶ 20 n.15 (Rabobank on October 29, 2013); *id.* ¶ 22 n.20 (Lloyds on July 28, 2014); *id.* ¶ 13 n.2 (Deutsche Bank on April 23, 2015).)

With regard to the third element—whether Plaintiffs exercised due diligence in pursuing the discovery of the claim during the period they seek to have tolled—Defendants argue that the 2008 press reports put Plaintiffs on inquiry notice of a cause of action prior to the Government settlements, thereby triggering the need for diligence. As an initial matter, the 2008 press reports did not explicitly suggest that panel banks were manipulating Sterling LIBOR, which distinguishes this case from the U.S.-dollar LIBOR decisions that tolled the statute of limitations notwithstanding those same reports. Further, it is unclear that the 2008 press reports should have alerted Plaintiffs to their various claims, as those reports may not have provided Plaintiffs with a basis to allege a cognizable theory of liability [\\*\\*34](#) against each specific Defendant. See [Sullivan, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \\*28](#) (rejecting defendants' argument that "October 2011 press reports about possible Euribor manipulation should have alerted plaintiffs to their claims" because "those early reports did not provide plaintiffs with information

sufficient to identify each defendant or a good-faith basis to allege a cognizable theory of liability"). Indeed, Plaintiffs claim not to have known which panel members participated in the conspiracy until the Government settlements became public.

Moreover, even if the 2008 press reports were sufficient to place Plaintiffs on inquiry notice, "the statute of limitations would be tolled under the doctrine of fraudulent concealment where [P]laintiff plausibly alleges that it relied on the BBA's assurances that LIBOR was accurate." *7 W. 57th St. Realty Co., 314 F. Supp. 3d at 518*; see also *Schwab, 883 F.3d at 97-98*. Although Plaintiffs' due diligence allegations are thin, the CAC alleges that Defendants' agreements to manipulate Sterling LIBOR were "intentionally self-concealing" and that through the BBA, Defendants were representing that their Sterling LIBOR quotes were accurate. (See, e.g., CAC ¶ 230.) I therefore find that Plaintiffs have adequately alleged fraudulent concealment, and at the pleading [\*\*35] stage, I need not determine the precise contours of the applicable tolling period. See *In re Commodity Exch., Inc., 213 F. Supp. 3d at 676*. Accordingly, Plaintiffs' antitrust and RICO claims against all Defendants and CEA claims against Rabobank, Deutsche Bank, and Lloyds are not barred by their applicable statutes of limitations.

## B. Antitrust Claims

The Consolidated Amended Complaint asserts two antitrust claims under *Section 1 of the Sherman Act*: [\*543] First, that Defendants conspired with each other and with brokers to make false Sterling LIBOR submissions; and second, that Defendants conspired through trading strategies to affect other banks' Sterling LIBOR submissions. In addition to the statute of limitations arguments addressed above, see *supra* Part V.A, Defendants argue that these claims should be dismissed because (1) Plaintiffs lack antitrust standing; (2) the claims are barred by the *Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA")*, 15 U.S.C. § 6a; and (3) the CAC fails to plausibly allege an antitrust conspiracy.

### 1. Antitrust Standing<sup>16</sup>

Defendants primarily argue that Plaintiffs lack antitrust standing because (1) Plaintiffs do not allege they [\*\*36] were customers or competitors of Defendants (with one exception), and (2) Plaintiffs' injury is too speculative to allow them to be "efficient enforcers" of the antitrust laws. (Defs.' SMJ Br. 16-19.) As discussed below, I find that Plaintiffs Sonterra and Dennis lack antitrust standing, but find that Plaintiff FrontPoint has antitrust standing to pursue its claims against Defendant UBS.

#### a. Applicable Law

*Section 4* of the Clayton Act provides in relevant part that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a). This language has been interpreted in this Circuit to mean that a plaintiff alleging antitrust claims must establish antitrust standing in addition to constitutional standing under Article III. See *In re Aluminum Warehousing Antitrust Litig., 833 F.3d 151, 157 (2d Cir. 2016)*. "Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court [\*\*37] must make a further

<sup>16</sup> Plaintiffs argue that dismissal on this basis is premature, as the CAC alleges that Plaintiffs were damaged by the conduct alleged. (Pls.' SMJ Opp. 15-16.) However, standing is a threshold issue. See *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters ("AGC")*, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983); *Gatt Commc'n, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 75 (2d Cir. 2013) ("Antitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement we must dismiss it as a matter of law." (quoting *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 450 (6th Cir. 2007)). Therefore, it is appropriate to consider the issue at this stage of the case.

determination whether the plaintiff is a proper party to bring a private antitrust action." [Gelboim, 823 F.3d at 770](#) (quoting [AGC, 459 U.S. at 535 n.31](#)).

To adequately plead antitrust standing, a plaintiff must plausibly allege that (1) it suffered an antitrust injury, meaning injury "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful," and (2) it is an acceptable plaintiff to pursue the alleged antitrust violations, in satisfaction of the "efficient enforcer" factors. [Gordon v. Amadeus IT Grp., S.A., 194 F. Supp. 3d 236, 246 \(S.D.N.Y. 2016\)](#) (quoting [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 \(1977\); AGC, 459 U.S. at 538-45](#); see also [Gelboim, 823 F.3d at 778; Aluminum Warehousing, 833 F.3d at 157.](#)

#### **[\*544] b. Application: Antitrust Injury**

As an initial matter, the CAC alleges that Defendants engaged in a horizontal price-fixing scheme, which is a *per se* antitrust violation. See [Gelboim, 823 F.3d at 771](#). As in *Gelboim*, Plaintiffs allege that the banks colluded to manipulate the Sterling LIBOR, and thereby increased the cost to buyers of various LIBOR-based instruments. (See CAC ¶¶ 13-25, 126-42). "Generally, when consumers, because of a conspiracy, must pay prices that no longer reflect ordinary market conditions, they suffer 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" [Gelboim, 823 F.3d at 772](#) (quoting [Brunswick, 429 U.S. at 489](#)). The CAC therefore [\*38] adequately pleads antitrust injury based on the price-fixing's effect on the prices for LIBOR-based financial instruments. "No further showing of actual adverse effect in the marketplace is necessary. This attribute separates evaluation of *per se* violations—which are presumed illegal—from rule of reason violations, which demand appraisal of the marketplace consequences that flow from a particular violation." *Id.*

Prior to the Second Circuit's decision in *Gelboim*, Defendants argued that Plaintiffs failed to allege antitrust injury, relying on Judge Buchwald's conclusion in *LIBOR I* that, because LIBOR-setting is a cooperative rather than competitive process, the alleged conduct cannot be the source of an antitrust injury. (Defs.' SMJ Br 14-15.) *Gelboim* rejected Judge Buchwald's antitrust injury analysis and held that manipulating LIBOR is a *per se* violation of antitrust laws that causes antitrust injury to anyone who transacted in financial instruments with prices influenced by that rate. See [823 F.3d at 771](#). Here, the CAC alleges that the financial instruments purchased by Plaintiffs were priced, benchmarked, or settled based on Sterling LIBOR. In light of [Gelboim](#), Plaintiffs have clearly sufficiently [\*39] alleged that they have suffered an antitrust injury in the form of higher prices flowing from the alleged corruption of the rate-setting process. Accordingly, Plaintiffs have adequately alleged antitrust injury.

#### **c. Application: Efficient Enforcer of the Antitrust Laws**

"The four efficient enforcer factors are: (1) the 'directness or indirectness of the asserted injury,' which requires evaluation of the 'chain of causation' linking appellants' asserted injury and the Banks' alleged price-fixing; (2) the 'existence of more direct victims of the alleged conspiracy'; (3) the extent to which appellants' damages claim is 'highly speculative'; and (4) the importance of avoiding 'either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other.'" [Id. at 778](#) (quoting [AGC, 459 U.S. at 540-45](#)). "Courts sometimes weigh a fifth consideration: 'whether the putative plaintiff is a proper party to perform the office of a private attorney general and thereby vindicate the public interest in antitrust enforcement.'" [Sullivan, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \\*15](#) (quoting [Gatt, 711 F.3d at 80](#)). "A determination of standing in an individual antitrust case is a fact-specific exercise involving a fact-intensive inquiry." [In re Platinum & Palladium Antitrust Litig. \("Platinum"\), No. 1:14-cv-9391-GHW, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at \\*20 \(S.D.N.Y. Mar. 28, 2017\)](#) [\*40] (citing [AGC, 459 U.S. at 536-37](#)).

##### **i. Causation**

The first factor addresses the "directness or indirectness of the asserted injury," which "requires evaluation of the 'chain of causation' linking [plaintiff's] asserted injury and the [defendants'] alleged [\*545] price-fixing." [Gelboim, 823 F.3d at 778](#) (quoting [AGC, 459 U.S. at 540](#)). "The antitrust laws do not require a plaintiff to have purchased directly from a defendant in order to have antitrust standing." [Platinum, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at \\*20](#) (quoting [In re Foreign Exch. Benchmark Rates Antitrust Litig. \("FOREX"\), No. 13 Civ. 7789 \(LGS\),](#)

2016 U.S. Dist. LEXIS 128237, 2016 WL 5108131, at \*9 (S.D.N.Y. Sept. 20, 2016)). However, whether Plaintiffs dealt directly or indirectly with Defendants, as well as the scope of the relevant market, are both relevant to the issue of causation. See Gelboim, 823 F.3d at 778. The Second Circuit in *Gelboim* expressed concern over "umbrella standing"—a plaintiff injured by dealing with a non-defendant by virtue of a defendant's raising of prices in the market as a whole. *Id.* *Gelboim* acknowledged a circuit split concerning whether umbrella purchasers have antitrust standing but declined to adopt a position. *Id.* at 778-79; see also Platinum, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at \*22. The court in *Gelboim* noted that while "there appears to be no difference in the injury alleged by those who dealt in LIBOR-denominated instruments, whether . . . directly or indirectly [\*\*41] with the Banks," the Banks appeared to "control only a small percentage of the ultimate identified market." Gelboim, 823 F.3d at 779. The Second Circuit cautioned that "[r]equiring the Banks to pay treble damages to every plaintiff who ended up on the wrong side of an independent LIBOR-denominated derivative swap would, . . . not only bankrupt 16 of the world's most important financial institutions, but also vastly extend the potential scope of antitrust liability in myriad markets where derivative instruments have proliferated." *Id.*

The concern with so-called umbrella purchasers is that "significant intervening causative factors, most notably, the independent pricing decisions of non-conspiring retailers, attenuate the causal connection between the violation and the injury." LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at \*15 (internal quotation marks omitted). For that reason, courts in this District have "[drawn] a line between plaintiffs who transacted directly with defendants and those who did not" because "the 'independent decision' of contracting parties to incorporate LIBOR 'breaks the chain of causation between defendants' actions and a plaintiff's injury.'" Sullivan, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \*17 (quoting LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at \*16); see also FOREX, 2016 U.S. Dist. LEXIS 128237, 2016 WL 5108131, at \*7; Platinum, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at \*22. Courts have been "able to draw that line in part by acknowledging [\*\*42] that 'plaintiffs who did not purchase directly from defendants continue to face the same hurdle: they made their own decisions to incorporate LIBOR into their transactions, over which defendants had no control, in which defendants had no input, and from which defendants did not profit.'" Platinum, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at \*22 (quoting LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at \*16).

Here, Plaintiffs Sonterra and Dennis assert exactly the sort of "umbrella claims" that the Circuit viewed with skepticism, since their claims are based solely on financial transactions with third-parties, and not with Defendants. See FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A., 16 Civ. 5263 (AKH), 2018 U.S. Dist. LEXIS 171999, 2018 WL 4830087, at \*5-6 (S.D.N.Y. Oct. 4, 2018) (dismissing Sonterra's antitrust claims because "Sonterra's transactions with third-parties [were] insufficient to give it antitrust standing to sue [the defendants]"). Moreover, the relationship between Sterling LIBOR—on the one hand—and Sonterra's Sterling FX Forwards and Dennis's Sterling FX Futures—on the other—while enough to confer Article III standing, *supra* Part IV, is more attenuated than the relationship between LIBOR and the "LIBOR-denominated" [\*546] transactions in *Gelboim*, see 823 F.3d at 779; indeed, the FX Forwards of Sonterra and the FX Futures of Dennis incorporated LIBOR only implicitly [\*\*43] through a complex formula involving numerous other causal factors. These sort of "vaguely defined links," AGC, 459 U.S. at 540, suggest that the causal relationship is too indirect to support the causation element of the efficient enforcer prong for antitrust standing, see Laydon I, 2014 U.S. Dist. LEXIS 46368, 2014 WL 1280464, at \*9; 7 W. 57th St. Realty Co., 314 F. Supp. 3d at 512-14.

Because Plaintiff FrontPoint is alleged to have dealt with Defendant UBS directly, its claims do not suffer from the same causation problems. (See CAC ¶ 38.)

## ii. Existence of More Direct Victims

Whether a plaintiff is a consumer or competitor is relevant to the second factor, but not dispositive. See Gelboim, 823 F.3d at 779. Like the plaintiffs in *Gelboim*, "one peculiar feature of this case is that remote victims (who acquired LIBOR-based instruments from any of thousands of non-defendant banks) would be injured to the same extent and in the same way as direct customers of the Banks." *Id.* Accordingly, I give the existence of more direct victims "diminished weight" in determining whether Plaintiffs are efficient enforcers of the antitrust laws. *Id.*; see also LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at \*17; Sullivan, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \*18.

### iii. Speculative Damages

"[H]ighly speculative damages is a sign that a given plaintiff is an inefficient engine of enforcement." [Gelboim, 823 F.3d at 779](#). While "some degree of uncertainty stems from the nature of [\*\*44] **antitrust law**" and is permitted, plaintiffs must be able to allege that they could arrive at a just and reasonable estimate of damages. *Id.*; see also [Platinum, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at \\*23](#) (stating that plaintiffs "carry the burden of coming forward with a just and reasonable estimate of damages" (internal quotation marks omitted)). "As with most antitrust cases, to establish damages, Plaintiffs will have to offer a reliable 'but-for' world. At a minimum, that 'but-for' world will require Plaintiffs to establish (1) what an alternative Fix Price would have been absent collusion, and (2) the behavior of [defendants] absent a Fix Price affected by collusion." *Id.* (citations omitted). "Whether damages calculations will be too speculative and, therefore, unreliable, depends on 'the nature and complexity of the alleged antitrust violation.'" *Id.* (quoting [Gelboim, 823 F.3d at 779](#)).

[Gelboim](#) noted the "unusual challenges" that are also present in this case: "The disputed transactions were done at rates that were negotiated, notwithstanding that the negotiated component was the increment above LIBOR. And the market for money is worldwide, with competitors offering various increments above LIBOR, or rates pegged to other benchmarks, or rates set without reference [\*\*45] to any benchmark at all." [823 F.3d at 780](#). In evaluating whether damages are unduly speculative in price-fixing cases, considerations include (1) the extent to which the damages claim is conclusory in nature; (2) whether the injury is "so far down the chain of causation from defendants' actions that it would be impossible to untangle the impact of the fixed price from the impact of intervening market decisions," which relates to the causation factor; (3) whether external market factors affected the "relationship between the fixed price and the price that the plaintiffs ultimately paid;" and (4) whether "the non-fixed components of a transaction were heavily negotiated between the parties in relation to the fixed component." [LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at \\*17-18](#) (citations omitted).

[\*547] In *LIBOR VI*, Judge Buchwald found "highly negotiated transactions," such as interest rate swaps,<sup>17</sup> to be the kind of transactions that "absorb[] the effects of LIBOR suppression." [Id. at \\*20](#). Similarly, Plaintiff Sonterra's Sterling FX Forwards are also the sort of highly negotiated contracts that incorporate numerous considerations as to make the effect of Sterling LIBOR manipulation highly speculative. This factor weighs against finding antitrust standing for Sonterra. [\*\*46]

With respect to futures contracts purchased on an exchange, such as those purchased by Plaintiff Dennis, Judge Buchwald found that

[t]he mathematical relationship between LIBOR and the settlement price of Eurodollar futures contracts does not address the relationship, if any, between LIBOR and the *trading* price of . . . futures contracts (that is, the price at which . . . futures contracts were bought and sold prior to settlement). The trading price reflects the market's prediction for what the price will be at settlement, which could be years away—not what LIBOR is at the present moment.

[2016 U.S. Dist. LEXIS 175929, \[WL\] at \\*21](#). Judge Buchwald concluded that the effect of LIBOR on the trading price could only be established if the trading price and settlement price were closely related. *Id.* She found that the Exchange-based plaintiffs had not sufficiently pled a close relationship between the LIBOR and trading prices, and that damages based on an impact of LIBOR manipulation on the futures trading prices was speculative. [2016 U.S. Dist. LEXIS 175929, \[WL\] at \\*22-23](#). The only Exchange-based claims that survived were those of plaintiffs who, "before the suppression period started, shorted contracts that were held to settlement during the suppression period," as they could [\*\*47] "rely on an unmanipulated selling price as well as a settlement price demonstrably impacted by LIBOR suppression." [2016 U.S. Dist. LEXIS 175929, \[WL\] at 23](#).

<sup>17</sup> An interest rate swap is an instrument in which "two parties agree to exchange interest rate cash flows, based on a specified notional amount from a fixed rate to a floating rate (or vice-versa) or from one floating rate to another." [LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at \\*19](#).

Defendants point out that Plaintiff Dennis does not allege that he held any of his futures contracts to settlement. (1/6/17 Ltr. at 4.)<sup>18</sup> Dennis also fails to allege sufficient detail about his transactions to explain how his damages could be calculated. (*Id.*) This factor weighs against finding antitrust standing for Dennis. In addition, there is no direct relationship between Sterling LIBOR and the price of the products purchased by Plaintiffs Sonterra and Dennis, and Plaintiffs fail to allege sufficient details concerning how Defendants' alleged manipulation of Sterling LIBOR caused damages. Specifically, Plaintiffs state, in a conclusory fashion, that "[g]iven the mathematical and formulaic nature of the Sterling LIBOR and the Sterling LIBOR-based derivatives, the amount of injury to Plaintiffs and Class on each Sterling LIBOR-based derivative instrument may be mathematically ascertained and computed." (See CAC ¶ 114.) The CAC, however, does not contain any allegations that demonstrate how the amount of injury can be "mathematically ascertained and computed," and the [\*48] allegations in the CAC are too vague to plausibly allege damages. Moreover, as discussed above, the price of the products purchased by Sonterra and Dennis was not determined based upon Sterling LIBOR; rather, Sterling LIBOR was part of a formula to calculate the cost of carrying Sterling over the duration of the foreign exchange forward or futures contract. (See *id.* ¶¶ 206, 212.)

#### **[\*548] iv. Duplicative Recovery and Complex Damage Apportionment**

The final factor "reflects a 'strong interest in keeping the scope of complex antitrust trials within judicially manageable limits.'" [LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at \\*23](#) (quoting [AGC, 459 U.S. at 543](#)). It traditionally concerns "the prospect of different groups of plaintiffs attempting to recover for the same exact injury." *Id.* The Circuit in *Gelboim* expressed concern over the fact that the conduct at issue in that case was the subject of numerous government and regulatory investigations and cases, as well as ongoing proceedings in several other countries. [823 F.3d at 780](#). "Some of those government initiatives may seek damages on behalf of victims, and for apportionment among them. Others may seek fines, injunctions, disgorgement, and other remedies known to United States courts and foreign jurisdictions. It is wholly unclear [\*49] on this record how issues of duplicate recovery and damage apportionment can be assessed." *Id.*

However, at this stage, "there has been no showing that certain plaintiffs have been made whole through the receipt of restitution payments made to governments." [LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at \\*23](#). The situation here is analogous to *LIBOR VI*. Should duplicate recoveries or apportionment issues become an issue in the future, any restitution payments would be considered to avoid duplicative recovery. *Id.*; see also [Sullivan, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \\*20](#) ("This Court also concludes that government enforcement actions have not been shown to risk duplicative recovery in this case.").

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Based on the foregoing factors, I find that only Plaintiff FrontPoint has antitrust standing, and only with respect to its Sherman Act claims against Defendant UBS. Unlike Plaintiffs Dennis and Sonterra, FrontPoint transacted directly with UBS and can point to specific transactions on specific dates, which obviates concerns about damage calculations and speculative damages. The remaining claims involve transactions with non-defendant third-parties—whose "independent decision[s]" to incorporate Sterling LIBOR into their transactions "breaks the chain of causation between [D]efendants' [\*50] actions and [Plaintiffs'] injury," [LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at \\*17](#) (internal quotation marks omitted)—and damages that are speculative.

## **2. The FTAIA**

Defendants also argue that Plaintiffs' Sherman Act claims are barred by FTAIA, (Defs.' SMJ Br. 19-21), which provides that the Sherman Act:

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<sup>18</sup> "1/6/17 Ltr." refers to Defendants' letter dated January 6, 2017. (Doc. 131.)

shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--

- (1) such conduct has a direct, substantial, and reasonably foreseeable effect--
- (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
- (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of [sections 1 to 7](#) of this title, other than this section.

[15 U.S.C. § 6a](#). "This technical language initially lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the [Sherman Act](#)'s reach. It then brings such conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) sufficiently affects [\*549] American commerce, *i.e.*, it has a 'direct, substantial, and reasonably foreseeable effect' [\*\*51] on American domestic, import, or (certain) export commerce, *and* (2) has an effect of a kind that [antitrust law](#) considers harmful, *i.e.*, the 'effect' must 'give rise to a Sherman Act claim.'" [F. Hoffmann-La Roche Ltd. v. Empagran S.A.](#), 542 U.S. 155, 162, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004) (quoting §§ 6a(1), (2)); accord [Lotes Co. v. Hon Hai Precision Indus. Co.](#), 753 F.3d 395, 398 (2d Cir. 2014). "The FTAIA permits a plaintiff to bring Sherman Act claims 'involving trade or commerce with foreign nations,' provided that defendants' conduct has a 'reasonably proximate causal nexus' to an antitrust injury in the United States." [Sullivan](#), 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \*21 (quoting [Lotes](#), 753 F.3d at 405). "The requirements of the FTAIA go to the merits of an antitrust claim rather than to subject matter jurisdiction." *Id.*

Defendants argue that Plaintiffs fail to allege that the foreign conduct had a "reasonably proximate" effect within the United States. (Defs.' SMJ Br. 19-21.) I disagree. The foreign conduct alleged here easily falls within the FTAIA exception for having "adversely affect[ed] domestic commerce, imports to the United States, or exporting activities of one engaged in such activities within the United States." [Precision Assocs., Inc. v. Panalpina World Transp., \(Holding\) Ltd., No. CV-08-42 \(JG\)\(VP\)](#), 2013 U.S. Dist. LEXIS 177023, 2013 WL 6481195, at \*23 (E.D.N.Y. Sept. 20, 2013) (quoting [F. Hoffmann-La Roche](#), 542 U.S. at 161). The CAC alleges that Defendants manipulated Sterling LIBOR, which caused injury with regard to transactions carried [\*\*52] out in financial instruments with prices influenced by that manipulated rate. Specifically, Plaintiffs allege that the financial instruments purchased by Plaintiffs—U.S. corporations and individuals—were priced, benchmarked, or settled based on Sterling LIBOR. This is the type of injury the [Sherman Act](#) is meant to address. See [F. Hoffmann-La Roche](#), 542 U.S. at 165 ("[O]ur courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused."); see also [Sullivan](#), 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \*22 (holding that similar claims were not barred by FTAIA). Therefore, Plaintiffs have adequately alleged a domestic antitrust injury caused by Defendants' foreign anticompetitive conduct, and Defendants' motion to dismiss based on the FTAIA is therefore denied.

### 3. Antitrust Conspiracy

Plaintiffs' First Claim for Relief alleges that Defendants conspired to restrain trade by making false submissions to the BBA designed to artificially suppress, inflate, maintain, or otherwise alter Sterling LIBOR. (CAC ¶¶ 234-44.) The Second Claim for [\*\*53] Relief alleges that Defendants conspired to manipulate derivative prices. (*Id.* ¶¶ 245-52.) Defendants argue that, for both claims, Plaintiffs fail to either (1) assert direct evidence that Defendants entered into an agreement in violation of the antitrust laws, or (2) present circumstantial facts supporting the inference that a conspiracy existed. (Defs.' SMJ Br. 21-25.)

#### a. Applicable Law

[Section 1](#) of the Sherman Act makes unlawful "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." [15 U.S.C. § 1](#). "Price-fixing 'conspiracies concentrate the power to set prices among the conspirators, including the power to control [\*550] the market and

to fix arbitrary and unreasonable prices."<sup>19</sup> [Sullivan, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \\*23](#) (quoting *United States v. Apple, Inc.*, 791 F.3d 290, 326 (2d Cir. 2015)). "[A]ny conspiracy 'formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity is illegal per se,' and the precise 'machinery employed is immaterial.'" *Apple*, 791 F.3d at 327 (quoting [United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 60 S. Ct. 811, 84 L. Ed. 1129 \(1940\)](#)).

At the pleading stage, a plaintiff "need not show that its allegations suggesting an agreement are more likely than not true or that they rule out the possibility of independent action, as would be required at later [\*\*54] litigation stages such as a defense motion for summary judgment, or a trial." [Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 184 \(2d Cir. 2012\)](#) (citations omitted). "Rather, 'because plausibility is a standard lower than probability, a given set of actions may well be subject to diverging interpretations, each of which is plausible. The choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a *Rule 12(b)(6)* motion.'" [Gelboim, 823 F.3d at 781](#) (quoting [Anderson News, 680 F.3d at 184-85](#)). "Skepticism of a conspiracy's existence is insufficient to warrant dismissal; a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.'" *Id.* (quoting [Twombly, 550 U.S. at 556](#)).

To establish a [Section 1](#) conspiracy, "proof of joint or concerted action is required; proof of unilateral action does not suffice." [Gelboim, 823 F.3d at 781](#) (quoting [Anderson News, 680 F.3d at 183](#)). "Circumstances must reveal a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Id.* Mere "parallel conduct" does not suffice. *Id.* Because "conspiracies are rarely evidenced by explicit agreements," however, a conspiracy "nearly always must be proven through inferences that may fairly be drawn from the behavior of the alleged [\*\*55] conspirators." *Id.* "The line separating conspiracy from parallelism is indistinct, but may be crossed with allegations of interdependent conduct, accompanied by circumstantial evidence and plus factors." *Id.* (internal quotation marks omitted). Those illustrative, non-exhaustive "plus factors" are "(1) a common motive to conspire; (2) evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators; and (3) evidence of a high level of interfirm communications." *Id.* (internal quotation marks omitted). "[A]t the motion-to-dismiss stage, appellants must only put forth sufficient factual matter to plausibly suggest an inference of conspiracy, even if the facts are susceptible to an equally likely interpretation." [Id. at 782](#) (citation omitted).

#### b. Application

With these principles in mind, I find that Plaintiffs adequately allege an antitrust conspiracy.<sup>19</sup> The CAC alleges that Defendants collusively shared information to coordinate their Sterling LIBOR submissions and engaged in manipulative trading practices to fix the prices of Sterling LIBOR-based derivatives for their collective financial benefit. (CAC ¶ 125.) It [\*551] alleges that collusive [\*\*56] communications occurred "among Sterling LIBOR-based derivative traders and submitters located at different, supposedly competing, Sterling LIBOR contributor banks," and in messages "relayed between Defendants by various . . . inter-dealer brokers." (*Id.* ¶ 127.) With respect to UBS, Plaintiffs rely on regulatory settlements between them and the DOJ, CFTC, and other regulators, which brought charges against UBS for LIBOR manipulation. (*Id.* ¶¶ 5, 11-12.) The settlements describe collusive conduct intended to manipulate the LIBOR. (See *id.* ¶¶ 17-19, 120(e).)

For instance, Plaintiffs cite to UBS's non-prosecution agreement with DOJ, in which UBS admitted to manipulating and colluding to manipulate with other Contributor Panel banks LIBOR submissions with respect to other currencies. (CAC ¶¶ 17-19; see also UBS DOJ SOF at ¶¶ 21-22 (describing conduct as to Yen LIBOR and Euroyen

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<sup>19</sup> Because I find that Plaintiff FrontPoint is the only efficient enforcer of any antitrust claims against Defendants, see *supra* Part V.B.1, I need only address the extent to which FrontPoint has alleged an antitrust conspiracy against UBS.

TIBOR).<sup>20</sup> With respect to Sterling, UBS communicated internally with its Sterling derivatives traders to manipulate the Sterling LIBOR. (CAC ¶¶ 17-19; UBS DOJ SOF at ¶¶ 77-82.) Plaintiffs also point to the CFTC's findings that

UBS made knowingly false submissions to rate-fixing panels to benefit its derivatives [\*\*57] trading positions or the derivatives trading positions of other banks in attempts to manipulate Yen, Swiss Franc, Sterling and Euro LIBOR and Euribor, and, periodically, Euroyen TIBOR.

(CAC ¶ 120(e) (quoting UBS CFTC Agmt. at 2);<sup>21</sup> see also UBS CFTC Agmt. at 2 ("UBS, through certain derivatives traders, also colluded with traders at other banks and coordinated with interdealer brokers in its attempts to manipulate Yen LIBOR and Euroyen TIBOR."))

Defendants argue that Plaintiffs have not alleged any communication between or among the Defendants regarding Sterling LIBOR to support their conspiracy claim, and instead only point to intrafirm communications. However, while direct communications among conspirators are relevant, they are not necessary. Accordingly, Defendants' motion to dismiss for failure to allege an antitrust conspiracy is denied.

### C. Commodity Exchange Act (CEA)

The CAC assert three causes of action of under the CEA. (CAC ¶¶ 253-64.) However, Plaintiffs Sonterra and FrontPoint abandoned their claims under the CEA, (Pls.' SMJ Opp. 32 n.24); therefore, I only address Plaintiff Dennis's claims under the CEA. Defendants argue that Dennis (1) lacks standing to pursue his claims and (2) fails to [\*\*58] adequately allege specific intent to manipulate the price of Sterling FX Futures. (Defs.' SMJ Br. 31-45.)

#### 1. Applicable Law

The CEA prohibits any person from "manipulat[ing] or attempt[ing] to manipulate the price of any commodity in interstate commerce." [7 U.S.C. § 13\(a\)\(2\)](#); see also [In re Amaranth Nat. Gas Commodities Litig., 730 F.3d 170, 173 \(2d Cir. 2013\)](#). "While the CEA itself does not define the term, a court will find manipulation where '(1) Defendants possessed an [\*\*552] ability to influence market prices; (2) an artificial price existed; (3) Defendants caused the artificial prices; and (4) Defendants specifically intended to cause the artificial price.'" [Id. at 173](#) (quoting [Hershey v. Energy Transfer Partners, L.P., 610 F.3d 239, 247 \(5th Cir. 2010\)](#)).

To plead the element of specific intent, also known as scienter, a plaintiff must allege that defendants "acted (or failed to act) with the purpose or conscious object of causing or effecting a price or price trend in the market that did not reflect the legitimate forces of supply and demand." [Platinum, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at \\*32](#) (quoting [U.S. Commodity Futures Trading Comm'n v. Wilson, 27 F. Supp. 3d 517, 532 \(S.D.N.Y. 2014\)](#)). It is insufficient to show a mere "generalized intent to obtain trading profits 'which could be imputed to any corporation with a large market presence in any commodity market.'" [Wilson, 27 F. Supp. 3d at 532-33](#) (quoting [In re Crude Oil Commodity Litig., No. 06 CIV. 6677, 2007 U.S. Dist. LEXIS 47902, 2007 WL 1946553, at \\*8 \(S.D.N.Y. June 28, 2007\)](#)). To establish "specific intent to cause a market distortion," a plaintiff can allege facts either "(1) showing that the defendants [\*\*59] had both motive and opportunity to commit the fraud or (2) constituting strong circumstantial evidence of conscious misbehavior or recklessness." [Platinum, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at \\*32](#) (quoting [In re Amaranth Nat. Gas Commodities Litig., 587 F. Supp. 2d 513, 530 \(S.D.N.Y. 2008\)](#)). The factual

<sup>20</sup> "UBS DOJ SOF" refers to DOJ Non-Prosecution Agreement and Appendix A Statement of Facts with UBS AG (Dec. 18, 2012), available at <https://www.justice.gov/iso/opa/resources/6942012121911725320624.pdf>.

<sup>21</sup> "UBS CFTC Agmt." refers to CFTC Order Instituting Proceedings Pursuant to [Sections 6\(c\)](#) and [6\(d\) of the Commodity Exchange Act](#) Making Findings and Imposing Remedial Sanctions against UBS AG and UBS Securities Japan Co., Ltd., CFTC Docket No. 13-09 (Dec. 19, 2012), available at <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfubsorder121912.pdf>.

allegations in the complaint must "give rise to a *strong inference* of scienter." *LIBOR III, 27 F. Supp. 3d at 468* (internal quotation marks omitted).

## 2. Application

### a. CEA Standing

Section 22(a)(1) of the CEA creates an exclusive private right of action "available to any person who sustains loss as a result of any alleged violation" of the CEA. 7 U.S.C. § 25(a)(2). "To have standing under Section 22, a private plaintiff must fall into one of four categories" set forth in Section 22(a)(1). *Loginovskaya v. Batratchenko, 936 F. Supp. 2d 357, 365 (S.D.N.Y. 2013)*, aff'd, 764 F.3d 266 (2d Cir. 2014). Plaintiff Dennis invokes Section 22(a)(1)(D) of the CEA, which conveys standing to any person "who purchased or sold a [futures contract] or swap if the violation constitutes . . . (ii) a manipulation of the price of any such contract." 7 U.S.C. § 25(a)(1)(D); see *Platinum, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at \*28*. He argues that Defendants manipulated the prices of his Sterling futures contracts. (Pls.' SMJ Opp. 32.)

Defendants argue that Plaintiff Dennis lacks standing because he fails to plausibly allege that Defendants manipulated the prices of his FX Futures contracts because their prices are not pegged to Sterling LIBOR. (Defs.' SMJ Br. 39.) This is essentially the same argument as discussed above in the context of antitrust **[\*\*60]** standing—that there is no plausible relationship between Dennis's FX Futures and the alleged Sterling LIBOR manipulation to adequately allege an injury. Thus, for the reasons stated above, *supra* Part V.B.1.b, I find that Dennis has adequately pled that the Sterling LIBOR manipulation had an effect on futures contracts for the purposes of CEA standing. A CME futures contract is an agreement to buy or sell £62,500, in U.S. Dollars, on some future date. (CAC ¶ 212.) The cost of buying or selling Sterling on that future date is determined by a formula that incorporates Sterling LIBOR to adjust the spot price of Sterling to account for the amount of interest paid or received over the duration of the agreement. (*Id.*) A change in the Sterling LIBOR thus affects the price of the contract, at least for the purpose of CEA standing.

**[\*553]** Defendants also argue that Dennis lacks standing under the CEA because he has not pled actual damages, a requirement for CEA standing. (Defs.' SMJ Br. 40-42.) "As several courts in this district have held, however, where plaintiffs allege that they transacted 'at artificial prices, injury may be presumed.'" *Platinum, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at \*28* (quoting *In re Amaranth Nat. Gas Commodities Litig., 269 F.R.D. 366, 380 (S.D.N.Y. 2010)*); see also *In re Crude Oil Commodity Futures Litig., 913 F. Supp. 2d 41, 59-61 (S.D.N.Y. 2012)*. Therefore, I find that Dennis has adequately **[\*\*61]** pled actual damages for standing under the CEA.

In addition, Defendants argue that Dennis lacks standing because he pleads only one specific futures transaction on two dates during the Class Period, but does not allege that Sterling LIBOR was artificial on those dates. (Defs.' SMJ Reply 18.)<sup>22</sup> They rely on *LIBOR II*, in which Judge Buchwald held that certain plaintiffs had failed to allege the requisite actual damages by failing to plead that they transacted in Eurodollar futures contracts on days in which the prices of such contracts were artificial as a result of trader-based manipulation of the LIBOR. See *LIBOR II, 962 F. Supp. 2d at 620-21*. However, Judge Buchwald expressly distinguished between plaintiffs' "trader-based manipulation theory" and their "persistent suppression theory," the latter of which did not require plaintiffs to plead a connection between specific trading days and days of LIBOR manipulation. *Id. at 621-22*; see also *Platinum, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at \*29* (discussing *LIBOR II*'s distinction between trader-based manipulation and persistent suppression). Dennis alleges just such a "persistent suppression theory." The CAC alleges that Dennis engaged in U.S.-based transactions for CME British pound futures contracts during the period in which Defendants **[\*\*62]** were engaged in their ongoing scheme. (CAC ¶ 214.) The allegations that Defendants' persistent conduct rendered the Sterling LIBOR artificial throughout the Class Period is sufficient to plausibly allege

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<sup>22</sup> "Defs.' SMJ Reply" refers to Defendants' Reply Memorandum of Law in Further Support of Defendants' Motion to Dismiss the Consolidated Amended Complaint for Lack of Subject Matter Jurisdiction and Failure to State a Claim. (Doc. 121.)

that Dennis's damages were caused by the alleged Sterling LIBOR manipulation. See [Platinum, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at \\*29; LIBOR II, 962 F. Supp. 2d at 621-22.](#)

Accordingly, Dennis has standing to pursue his CEA claims. However, Dennis must still overcome an additional hurdle to pursue his claims: the element of specific intent.

#### b. Specific Intent

With regard to specific intent, Dennis pleads no facts indicating, much less giving rise to a "strong inference," [LIBOR III, 27 F. Supp. 3d at 468,](#) that Defendants' conduct with respect to Sterling LIBOR was intended to manipulate the prices of any particular financial instrument at issue in this case. Plaintiffs' generalized contention that "Defendants, as some of the largest dealers in the Sterling LIBOR-based derivatives market, all shared a common motive to increase profits through manipulation," (Pls.' SMJ Opp. 35), offers no basis to draw a "strong inference" of intent to manipulate Sterling FX Futures contracts—instruments that are not even tied to the benchmark Defendants allegedly manipulated. See [Hershey, 610 F.3d at 249](#) (no specific intent where effect on certain **[\*\*63]** futures contracts was "merely an unintended consequence of the Defendants' manipulative trading"). Indeed, "[s]uch a generalized motive, one which could be imputed to any corporation **[\*554]** with a large market presence in any commodity market, is insufficient to show intent." [In re Crude Oil Commodity Litig., 2007 U.S. Dist. LEXIS 47902, 2007 WL 1946553, at \\*8.](#)

Nor do Plaintiffs adequately allege conscious misbehavior or recklessness with respect to the price of Dennis's FX Futures. Plaintiffs point to the various Government settlements as evidence of purported conscious misbehavior or reckless. Nothing in Defendants' settlements with regulators, however, reflects any intent by any Defendant to cause artificial pricing of the financial instruments purchased by Dennis in particular (as opposed to Sterling LIBOR in general). In [In re Commodity Exchange, Inc., Silver Futures & Options Trading Litigation](#), the court emphasized that the complaint lacked "reference to specific communications between the defendants about any specific plan to cause artificial prices or an artificial price trend in the silver futures market." [No. 11 Md. 2213\(RPP\), 2012 U.S. Dist. LEXIS 181487, 2012 WL 6700236, at \\*11 \(S.D.N.Y. Dec. 21, 2012\)](#). The same is true here as to the Sterling FX forwards, futures, and interest swaps markets. Accordingly, the CAC fails to adequately allege specific intent on **[\*\*64]** the part of Defendants, and Plaintiff Dennis's CEA claim is dismissed.

Plaintiff Dennis's principal-agent liability and aiding and abetting claims under the CEA must also fail. Both types of claims are viable only where an underlying primary violation of the CEA can survive a motion to dismiss. See [In re Commodity Exch., Inc. Silver Futures & Options Trading Litig., 560 F. App'x 84, 87 \(2d Cir. 2014\)](#) (summary order) ("As plaintiffs failed to allege a CEA violation, their aiding and abetting claim was properly dismissed as well."); [In re Amaranth Nat. Gas Commodities Litig., 730 F.3d at 183](#) ("[A]iding and abetting requires knowledge of the primary violation and an intent to assist it . . . ."). Plaintiff Dennis fails to allege a primary CEA violation for the reasons discussed above, so his principal-agent liability and aiding and abetting claims must be dismissed as well.

#### D. RICO

The CAC also asserts claims under [RICO](#). Defendants argue that (1) Plaintiffs lack RICO standing, (2) the claims are impermissibly extraterritorial, and (3) Plaintiffs fail to plead the elements of a RICO violation or conspiracy. (Defs.' SMJ Br. 46-52.) I agree with Defendants that Plaintiffs fail to overcome the presumption against extraterritoriality; therefore, I do not reach Defendants' remaining arguments.

#### 1. Applicable Law

RICO makes it "unlawful for any person employed **[\*\*65]** by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." [18 U.S.C. § 1962\(c\).](#) [Section 1964\(c\)](#) confers a private right of action to "[a]ny person injured in his business or

property by reason of" such a violation. *Id. § 1964(c)*. "To establish a violation of *§ 1962(c)*, . . . a plaintiff must show that a person engaged in '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'" *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 120 (2d Cir. 2013) (quoting *DeFalco v. Bernas*, 244 F.3d 286, 305 (2d Cir. 2001)). "Racketeering activity" "encompass[es] dozens of state and federal offenses, known in RICO parlance as predicates. These predicates include any act indictable under specified federal statutes, as well as certain crimes chargeable under state law." *RJR Nabisco, Inc. v. European Cmty.*, 136 L\*5551 S. Ct. 2090, 2096, 195 L. Ed. 2d 476 (2016) (internal citations and quotation marks omitted).

The Supreme Court in *RJR Nabisco, Inc. v. European Community* ("RJR"), established that private claims under RICO must overcome a presumption against extraterritoriality. *Id. at 2100-02*. A private plaintiff seeking extraterritorial application of RICO is subject to considerations that do not apply to criminal prosecutions [\*\*66] under the statute, and must specifically allege a domestic injury. *Id. at 2106*. In examining the extraterritorial reach of *§ 1962(c)*, the Supreme Court recently held that, in order for a private plaintiff to plausibly allege a claim for extraterritorial application of RICO, Congress must have intended that the underlying predicate statute have extraterritorial reach and that the plaintiff have suffered a domestic injury. *Id. at 2101-02, 2106*; see also *Bascuñan v. Elsaca*, No. 15-cv-2009 (GBD), 2016 U.S. Dist. LEXIS 133664, 2016 WL 5475998, at \*3-4 (S.D.N.Y. Sept. 28, 2016), rev'd in part, vacated in part on other grounds, 874 F.3d 806 (2d Cir. 2017).

In this Circuit, "the wire fraud statute does not have extraterritorial application and may not serve as a predicate act for a RICO claim premised on foreign-based activities." *Sullivan*, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \*32-33; see also *European Cmty. v. RJR Nabisco, Inc.* ("European Community"), 764 F.3d 129, 140-41 (2d Cir. 2014) ("We conclude that the references to foreign commerce in [the wire fraud statute], do not indicate a congressional intent that the statute[] apply extraterritorially."), rev'd and remanded on other grounds, *136 S. Ct. 2090, 195 L. Ed. 2d 476*; *Petróleos Mexicanos v. SK Eng'g & Constr. Co.*, 572 F. App'x 60, 61 (2d Cir. 2014) (summary order) ("[W]ire fraud cannot serve as such an extraterritorial predicate."). According to the Supreme Court, "[i]f the statute is not extraterritorial, then . . . we determine whether the case involves a domestic application of the [\*\*67] statute, and we do this by looking to the statute's 'focus.' If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *RJR*, 136 S. Ct. at 2101.

There is some ambiguity in this Circuit as to the "focus" of the wire fraud statute. See *Elsevier, Inc. v. Grossman*, 199 F. Supp. 3d 768, 784 (S.D.N.Y. 2016) ("It is not entirely clear what sort of domestic conduct is 'relevant' to this statutory focus."); *United States v. Gasperini*, No. 16-CR-441 (NGG), 2017 U.S. Dist. LEXIS 84116, 2017 WL 2399693, at \*7-8 (E.D.N.Y. June 1, 2017) (explaining that some courts focus on the "wires" while others focus on the "fraud," and ultimately concluding that the wire fraud statute's focus is "the fraudulent scheme"). Nor is it entirely clear what level of domestic conduct is required. See *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 266, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010) (presumption against extraterritoriality applies even where "some domestic activity is involved in [a] case"); *European Community*, 764 F.3d at 142 n.14 ("We need not decide whether domestic conduct satisfying fewer than all of the statute's essential elements could constitute a violation of such a statute."); *Worldwide Directories, S.A. de C.V. v. Yahoo! Inc.*, No. 14-cv-7349 (AJN), 2016 U.S. Dist. LEXIS 44265, 2016 WL 1298987, at \*9-10 (S.D.N.Y. Mar. 31, 2016) [\*\*68] ("The Second Circuit has not determined precisely how much domestic conduct need be alleged to sustain the application of the [wire fraud] statute[] . . . ."). In a recent summary order [\*\*556] (after its decision in *European Community*, but prior to the Supreme Court's decision), the Second Circuit considered whether a wire fraud scheme had sufficient connections with the United States to warrant domestic, rather than extraterritorial, application of RICO. *Petróleos Mexicanos*, 572 F. App'x at 61. In *Petróleos Mexicanos*, the foreign defendants had obtained financing in the United States and transmitted seven false invoices for over \$159 million to a trust in New York, and payment was made through that New York trust; but "[t]he activities involved in the alleged scheme—falsifying the invoices, the bribes, the approval of the false invoices—took place outside of the United States." See *id.*; *Petróleos Mexicanos v. SK Eng'g & Constr. Co.*, No. 12 Civ. 9070, 2013 U.S. Dist. LEXIS 107222, 2013 WL 3936191, at \*3 (S.D.N.Y. July 30, 2013), aff'd, 572 F. App'x 60. The Second Circuit concluded that the domestic contacts were insufficient to support a RICO claim. *572 F. App'x at*

61. In contrast, in *European Community*, plaintiffs "clearly" alleged sufficient domestic conduct to sustain the application of RICO where defendants allegedly "hatched schemes to defraud in the United States," "used [\*\*69] the U.S. mails and wires in furtherance of those schemes and with the intent to do so," and "traveled from and to the United States in furtherance of their schemes." [764 F.3d at 141-42.](#)

Thus, "[s]imply alleging that some domestic conduct occurred cannot support a claim of domestic application." [Petróleos Mexicanos, 572 F. App'x at 61](#) (quoting [Norex Petroleum Ltd. v. Access Indus., Inc., 631 F.3d 29, 32-33 \(2d Cir. 2010\)](#)). An intent to use the U.S. wires to further a wire fraud is insufficient; "if the domestic conduct alleged is peripheral to the overall scheme, and the scheme is not directed to or from the United States, it does not matter that the defendant intentionally used U.S. wires in furtherance of a fraudulent scheme." [Worldwide Directories, 2016 U.S. Dist. LEXIS 44265, 2016 WL 1298987, at \\*10](#) (citing [Petróleos Mexicanos, 572 F. App'x at 61](#)) (concluding that the alleged domestic conduct, revising and drafting draft opinions, was "fundamentally minor and peripheral in comparison to the core allegations of the complaint: that the [defendants] bribed, pressured, and intimidated members of the Mexican judiciary in pursuit of a favorable verdict").

## 2. Application

Plaintiffs assert RICO and RICO conspiracy claims against Defendants based on predicate acts allegedly in violation of the wire fraud statute, [18 U.S.C. § 1343](#). Plaintiffs do not argue that the wire fraud statute has extraterritorial application; rather, Plaintiffs argue that their [\*\*70] RICO claims arise from domestic violations of the wire fraud statute. (Pls.' SMJ Opp. 40-42.) In support, Plaintiffs cite to the following allegations in the CAC: (1) Defendants used U.S. wires to deliver false Sterling LIBOR submissions into the United States by Thomson Reuters, (CAC ¶ 33); (2) Deutsche Bank engaged in "Monday Risk Calls," in which traders in New York, London, Tokyo, and Frankfurt discussed with a supervisor their trading positions and strategies in relation to LIBOR rates," and received directives "promoting manipulation . . . , collusion, and other improper conduct" from this supervisor, (CAC ¶ 58); (3) Defendant RBS transacted in Sterling LIBOR-based derivatives with counterparties in the United States, (*id.* ¶ 71); (4) "at least one senior UBS manager in its Stamford, Connecticut headquarters directly manipulated UBS's LIBOR submissions," and "directed UBS LIBOR submitters to similarly manipulate LIBOR submissions," (*id.* ¶ 85); (5) Defendants Barclays, UBS, RBS, and Deutsche Bank engaged in LIBOR-based transactions from within the United States during [\*557] the Class Period, (*id.* ¶¶ 93-94, 96); (6) Defendant Deutsche Bank's conduct "originated from within its Global [\*\*71] Finance and Foreign Exchange ('GFFX') business unit," which "extended to GFFX desks abroad including in New York," (*id.* ¶ 14); (7) in a settlement with the New York State Department of Financial Services, Deutsche Bank admitted that its New York Branch manipulated the Sterling LIBOR, (*id.* ¶¶ 53, 55); and (8) Defendant RBS employs traders responsible for trading LIBOR-based instruments in New York, (*id.* ¶ 69).

These allegations fall short of demonstrating that the acts of wire fraud in this case were domestic in nature. Instead, it is clear that the scheme was principally foreign in nature and only incidentally touched the United States. See [Sullivan, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \\*33-34](#) (concluding that allegations of similar conduct were "organized outside of the United States through a European trade association," and that "[t]he use of United States wires was, at most, incidental"); [Laydon IV, 2015 U.S. Dist. LEXIS 44126, 2015 WL 1515487, at \\*8-9](#) (concluding that plaintiffs could not pursue RICO claims "based on the alleged actions of foreign and international institutions that submitted false information to the BBA and [Japanese Bankers Association], located in London and Tokyo, respectively"). As the Second Circuit observed in *Petróleos*, "[s]imply alleging that some domestic conduct occurred [\*\*72] cannot support a claim of domestic application" of RICO. [Petróleos Mexicanos, 572 F. App'x at 61](#).

Accordingly, the CAC fails to allege that the acts of wire fraud in this case were domestic in nature. Because I find that the wire fraud statute does not have extraterritorial application and that Plaintiffs have failed to allege acts of

domestic wire fraud, I do not reach Defendants' remaining arguments. Plaintiffs' RICO claims are therefore dismissed.<sup>23</sup>

#### **E. Implied Covenant of Good Faith and Fair Dealing**

Plaintiff FrontPoint asserts a claim against one Defendant, UBS, for breach of the implied covenant of good faith and fair dealing. (CAC ¶¶ 314-19.) FrontPoint's claim arises from three swap transactions that it allegedly entered into with UBS in October and November 2007. (*Id.* ¶ 29.) Defendants argue that FrontPoint's claim is barred by the applicable six-year statute of limitations. (Defs.' SMJ Br. 54-55.) I agree.

"Under New York law, 'a covenant of good faith and fair dealing in the course of contract performance' is 'implicit in all contracts.'" *LIBOR II*, 962 F. Supp. 2d at 631-32 (quoting *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389, 663 N.E.2d 289, 639 N.Y.S.2d 977 (1995)). Claims for breach of the implied covenant of good faith and fair dealing must be brought within six **[\*\*73]** years. *N.Y. C.P.L.R. § 213(2)*; see *Klein v. City of New York, No. 10 Civ. 9568 PAE JLC, 2011 U.S. Dist. LEXIS 125375, 2011 WL 5248169*, at \*9 (S.D.N.Y. Oct. 28, 2011), report and recommendation adopted by *2012 U.S. Dist. LEXIS 21617, 2012 WL 546786* (S.D.N.Y. Feb. 21, 2012). FrontPoint filed its complaint on January 21, 2016, more than eight years after its swap transactions of October and November 2007. (CAC ¶ 211; *Dennis v. Barclays Bank plc*, No. 16-cv-464, Doc. 1.) FrontPoint argues that the claim is timely because it relates back to the filing of the earlier complaint by Sonterra on May 6, 2015. (Pls.' SMJ Opp. 54 n.43.) However, **[\*558]** the earlier complaint did not assert breach of implied covenant claims and, even if it did, they would have still been untimely. See *In re Bear Stearns Cos. Secs., Derivative, and ERISA Litig.*, 995 F. Supp. 2d 291, 303 (S.D.N.Y. 2014). Moreover, to the extent FrontPoint relies on its counsel's June 3, 2016 declaration that "FrontPoint executed Sterling LIBOR-based derivatives trades . . . until at least December 17, 2010 with UBS," (Lefkowitz Decl. ¶ 9; Pls.' SMJ Opp. 54),<sup>24</sup> it is extrinsic to the CAC—no such allegations are asserted in the CAC—and therefore outside the scope of the pleadings, see *Friedl v. City of New York*, 210 F.3d 79, 83-84 (2d Cir. 2000).

#### **F. Unjust Enrichment**

Plaintiffs' only remaining state law claim against Defendants is for unjust enrichment. "To prevail on a claim for unjust enrichment in New York, a plaintiff **[\*\*74]** must establish 1) that the defendant benefitted; 2) at the plaintiff's expense; and 3) that 'equity and good conscience require' restitution." *Kaye v. Grossman*, 202 F.3d 611, 616 (2d Cir. 2000) (quoting *Dolmetta v. Uintah Nat'l Corp.*, 712 F.2d 15, 20 (2d Cir. 1983))). A "specific and direct benefit" is necessary to support an unjust enrichment claim. *Id.* (citing *Wolf v. Nat'l Council of Young Isr.*, 264 A.D.2d 416, 694 N.Y.S.2d 424, 426 (2d Dep't 1999)). "[W]hile a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment,' there must exist a relationship or connection between the parties that is not 'too attenuated.'" *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 516, 973 N.E.2d 743, 950 N.Y.S.2d 333 (2012) (quoting *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 215-16, 863 N.E.2d 1012, 831 N.Y.S.2d 760 (2007))). "Although the nature of the relationship required to establish an unjust enrichment claim has not been clearly defined, the relationship is 'too attenuated' if the parties were not connected in a manner that 'could have caused reliance or inducement,' or if they 'simply had no dealings with each other.'" *Marks v. Energy Materials Corp.*, No. 1:14-cv-8965-GHW, 2015 U.S. Dist. LEXIS 75320, 2015 WL 3616973, at \*6 (S.D.N.Y. June 9, 2015) (quoting *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182, 944 N.E.2d 1104, 919 N.Y.S.2d 465 (2011); *Georgia Malone*, 19 N.Y.3d at 517-18).

<sup>23</sup> Plaintiffs' RICO conspiracy claim "must necessarily fail" where, as here, Plaintiffs fail to plausibly allege a substantive RICO violation. See *Jerome M. Sobel & Co. v. Fleck*, No. 03 Civ. 1041 RMB GWG, 2003 U.S. Dist. LEXIS 21362, 2003 WL 22839799, at \*13 (S.D.N.Y. Dec. 1, 2003), report and recommendation adopted by *2004 U.S. Dist. LEXIS 219*, 2004 WL 48877 (S.D.N.Y. Jan. 8, 2004).

<sup>24</sup> "Lefkowitz Decl." refers to the Declaration of Lee J. Lefkowitz in Support of Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss for Lack of Personal Jurisdiction, dated June 3, 2016. (Doc. 115.)

Defendants argue that the CAC asserts claims of unjust enrichment by Plaintiffs against all Defendants; however, it does not allege that any of Defendants had any direct contractual relationship with Plaintiffs Sonterra and Dennis. (Defs.' SMJ Br. 53.) Therefore, Plaintiffs Sonterra's and Dennis's unjust enrichment claims must be dismissed. See *Laydon I*, 2014 U.S. Dist. LEXIS 46368, 2014 WL 1280464, at \*13-14 (finding insufficient [\*\*75] conclusory assertions that banks financially benefited from LIBOR manipulation which injured plaintiff, and dismissing unjust enrichment claim); *LIBOR I*, 935 F. Supp. 2d at 737 ("[T]he relationship between plaintiffs and defendants, to the extent that there was any relationship, is surely too attenuated to support an unjust enrichment claim."); cf. *Sperry*, 8 N.Y.3d at 215-16.

Plaintiffs do allege, however, that Defendant UBS had a direct contractual relationship with Plaintiff FrontPoint. The CAC alleges that FrontPoint "engaged in U.S.-based swap transactions" with UBS on October 17, November 22, and November 29, 2007. (CAC ¶ 211.) "FrontPoint [\*\*59] entered into swap transactions with UBS AG, agreeing to make monthly interest rate payments on one-month Sterling LIBOR until December 2008, in exchange for receiving payments based on the return of certain shares traded on the London Stock Exchange." (*Id.*) "As a result of Defendants' manipulative conduct, FrontPoint was damaged and suffered legal injury when it paid more and/or received in payments less than it otherwise should have under these swap contracts." (*Id.*) Contrary to Defendants' assertions, (Defs.' SMJ Br. 53), I find that these allegations are sufficiently specific to plausibly allege [\*\*76] that UBS benefited at FrontPoint's expense.

To the extent that Defendants argue Plaintiffs' claims are untimely, my previous analysis of Defendants' fraudulent concealment of their activities governs. Accordingly, Defendants' motion to dismiss Plaintiffs Sonterra's and Dennis's unjust enrichment claims, as well as Plaintiff FrontPoint's unjust enrichment claim against all Defendants other than UBS, is granted. Defendants' motion to dismiss Plaintiff FrontPoint's unjust enrichment claim against UBS is denied.<sup>25</sup>

#### **G. Allegations of BCI's Involvement**

Defendants also argue that Plaintiffs have failed to allege that Defendant BCI had any actual involvement in the conduct in question. (Defs.' SMJ Br. 55.) I agree.

"Group pleading, by which allegations are made against families of affiliated entities[,] is simply insufficient to withstand review on a motion to dismiss." *Concord Assocs., L.P. v. Entm't Props. Tr., No. 12 Civ. 1667(ER), 2013 U.S. Dist. LEXIS 186964, 2014 WL 1396524*, at \*24 (S.D.N.Y. Apr. 9, 2014); see also *In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 417 (S.D.N.Y. 2011) (allegations of "direct involvement of the Parent Companies by way of generic references to 'defendants'" were insufficient).

With regard to BCI, Plaintiffs' claims consist solely of the generic group allegations that courts routinely dismiss. The CAC defines "Barclays" to refer only to London-based Barclays Bank [\*\*77] PLC, (CAC ¶ 11), so Plaintiffs cannot argue that allegations of conduct by "Barclays" implicate the separate BCI entity. By contrast, the only allegation involving BCI is that "BCI actively engaged in trading, including derivative trading, in LIBOR and Euribor-based currencies, from New York." (*Id.* ¶ 44.) The mere fact that BCI was a party to Barclays' regulatory settlements, which were the result of negotiations and not adjudication, is not a basis for imputing specific conduct to BCI. See *LIBOR II*, 962 F. Supp. 2d at 614; *In re Platinum & Palladium Commodities Litig.*, 828 F. Supp. 2d 588, 594 (S.D.N.Y. 2011).

Accordingly, Plaintiffs' claims against BCI are dismissed.

<sup>25</sup> To the extent Defendants argue that FrontPoint's unjust enrichment claim against UBS is duplicative of FrontPoint's breach of implied covenant claim, (Defs.' SMJ Reply 24), their argument is moot because I find that FrontPoint's implied covenant claim is untimely. See *supra* Part V.E.

## H. Personal Jurisdiction

The Foreign Defendants—Barclays, Rabobank, Lloyds, RBS, Deutsche Bank, and UBS—also move to dismiss the CAC for lack of personal jurisdiction pursuant to [Rule 12\(b\)\(2\)](#). Among the claims against the Foreign Defendants, I concluded above that the CAC adequately alleges that they conspired to fix the Sterling LIBOR in violation of [Section 1 of the Sherman Act](#), and that Plaintiff FrontPoint can be an efficient enforcer of those claims against Defendant UBS. See *supra* Part V.B. [\*560] Plaintiff FrontPoint has also adequately alleged an unjust enrichment claim against Defendant UBS. See *supra* Part V.F. In light of the above holdings, I turn to the [\*\*78] question of whether Plaintiffs have established personal jurisdiction over Defendant UBS such that Plaintiff FrontPoint can pursue these remaining claims.<sup>26</sup>

Each Foreign Defendant is incorporated and headquartered in a foreign country. Plaintiffs concede that the Foreign Defendants are not "at home" in New York such that they would be subject to general jurisdiction. (Pls.' PJX Opp. 26 n.24.)<sup>27</sup> Instead, they argue first that certain of the Foreign Defendants consented to jurisdiction either by virtue of registering their offices under New York banking laws or through agreements with FrontPoint, and second, that this Court has specific jurisdiction over the Foreign Defendants based on their contacts with the United States. I address each argument in turn.

### 1. Consent to Jurisdiction

#### a. Defendants Rabobank, Deutsche Bank, RBS, and Barclays did not consent to jurisdiction

Plaintiffs argue that Rabobank, Deutsche Bank, RBS, and Barclays are subject to general jurisdiction by virtue of registering their offices under [New York Banking Law § 200](#). (Pls.' PJX Opp. 22-23.) "Parties can consent to personal jurisdiction through forum-selection clauses in contractual agreements." [D.H. Blair & Co. v. Gottdiener](#), [462 F.3d 95, 103 \(2d Cir. 2006\)](#). Here, Plaintiffs assert that Defendants Rabobank, [\*\*79] Deutsche Bank, RBS, and Barclays consented to general jurisdiction by registering under [New York Banking Law § 200](#), which required them each to appoint the Superintendent of the New York State Department of Financial Services ("NYDFS") as their agent for service of process for "a cause of action arising out of a transaction with [their] New York agency or agencies or branch or branches." [N.Y. Banking Law § 200\(3\)](#). However, "[t]he plain language of [\[§ 200\(3\)\]](#) limits any consent to personal jurisdiction by registered banks to specific personal jurisdiction." [7 W. 57th St. Realty Co., 2015 U.S. Dist. LEXIS 44031, 2015 WL 1514539, at \\*11](#); see also [In re Foreign Exch. Benchmark Rates Antitrust Litig. \("In re FOREX"\), No. 13 Civ. 7789 \(LGS\), 2016 U.S. Dist. LEXIS 44219, 2016 WL 1268267, at \\*2 \(S.D.N.Y. Mar. 31, 2016\)](#) ("By the terms of [\[§ 200\(3\)\]](#), any consent to jurisdiction by virtue of . . . registration with the NYDFS is not general jurisdiction over all claims, but instead is limited to claims arising out of transactions with the . . . Defendants' New York agencies or branches.").

In an attempt to avoid the plain language of [§ 200\(3\)](#), Plaintiffs rely in their opposition on [§ 200-b\(2\)](#), (Pls.' PJX Opp. 23), which provides that an action "against a foreign banking corporation may be maintained by . . . a non-resident in the following cases only: (a) where the action is brought to recover damages for the breach of a contract made or to be performed [\*\*80] within this state, or relating to property situated within this state at the time of the making of the contract; (b) where the subject matter of the litigation is situated within this state; (c) where the cause of action arose within this state, [\*561] except where the object of the action or special proceeding is to affect the title of real property situated outside this state; (d) where the action or special proceeding is based on a liability for acts done

<sup>26</sup> Although, as discussed above, Plaintiffs' claims against the Foreign Defendants—with the exception of Defendant UBS—fail on the merits, I nonetheless address Plaintiffs' argument as to whether Defendants Rabobank, Deutsche Bank, RBS, and Barclays consented to jurisdiction.

<sup>27</sup> "Pls.' PJX Opp." refers to Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss for Lack of Personal Jurisdiction. (Doc. 114.)

within this state by a foreign banking corporation; (e) where the defendant is a foreign banking corporation doing business in this state." [N.Y. Banking Law § 200-b\(2\)](#).

Contrary to Plaintiffs' assertion, [§ 200-b\(2\)](#) does not confer personal jurisdiction. The New York Court of Appeals has interpreted [§ 200-b](#) to "confer subject matter jurisdiction and not personal jurisdiction." [In re FOREX, 2016 U.S. Dist. LEXIS 44219, 2016 WL 1268267, at \\*2](#) (citing [Indosuez Int'l Fin. B.V. v. Nat'l Reserve Bank, 98 N.Y.2d 238, 774 N.E.2d 696, 702, 746 N.Y.S.2d 631 \(N.Y. 2002\)](#)).

Plaintiffs also argue that [§ 200-b](#) is the "Banking Law analogue to [N.Y. Bus. Corp. Law § 1314](#)," that cases discussing whether jurisdiction is conferred by virtue of registration under [§ 1314](#) are therefore instructive, and that [New York Banking Law § 200-b](#) must be interpreted similarly. (Pls.' PJX Opp. 23-24.) Putting to the side whether these decisions continue to be viable post-[Daimler AG v. Bauman, 571 U.S. 117, 134 S. Ct. 746, 187 L. Ed. 2d 624 \(2014\)](#), see [Brown v. Lockheed Martin Corp., 814 F.3d 619, 640-41 \(2d Cir. 2016\); Famulari v. Whirlpool Corp., No. 16 CV 944 \(VB\), 2017 U.S. Dist. LEXIS 8265, 2017 WL 2470844, at \\*4 \(S.D.N.Y. June 7, 2017\)](#), the New York Business Corporation Law does not share the same limiting language [\*\*81] as the New York Banking Law, see [N.Y. Bus. Corp. Law § 1304\(a\)\(6\)](#) (requiring a foreign corporation to designate the Secretary of State "as its agent upon whom process against it may be served," in order to do business in the state). Therefore, I find those cases to be inapposite.

Even assuming either provision conferred general jurisdiction, such an interpretation would appear to "implicate Due Process and other constitutional concerns." [Brown, 814 F.3d at 626](#). "If mere registration and the accompanying appointment of an in-state agent—without an express consent to general jurisdiction—nonetheless sufficed to confer general jurisdiction by implicit consent, every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler's* ruling would be robbed of meaning by a back-door thief." [Id. at 640](#); see also [Motorola Credit Corp. v. Uzan, 132 F. Supp. 3d 518, 521 \(S.D.N.Y. 2015\)](#) (holding that registration with NYDFS under [New York Banking Law § 200](#) "is not constitutionally sufficient to establish general jurisdiction"). Such a result is not supported by the case law or common sense.

Accordingly, Defendants Rabobank, Deutsche Bank, RBS, and Barclays did not consent to general jurisdiction by virtue of registering under the New York Banking Law.

#### **b. Defendant UBS did not consent to jurisdiction in the ISDA Master [\*\*82] Agreements with FrontPoint**

Defendant UBS entered into "ISDA Master Agreements" with FrontPoint. (Lefkowitz Decl. Exs. 2, 3.) Plaintiffs argue that, in doing so, UBS consented to jurisdiction in New York. (Pls.' PJX Opp. 9.) However, the relevant provision in the ISDA Master Agreements merely consents to jurisdiction "[w]ith respect to any suit, action or proceedings relating to this Agreement." (See Lefkowitz Decl. Ex. 3, ¶ 13(b).) These terms expressly limit the parties' consent to claims "relating to this Agreement." The language does not extend to consent to jurisdiction as to any dispute between the parties. See [Sullivan, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \\*38-39](#) (concluding that such ISDA Master Agreements did not establish consent to jurisdiction for claims unrelated to the agreements).

[\*562] Accordingly, Defendant UBS did not consent to general jurisdiction by virtue of the ISDA Master Agreements.

## **2. Specific Jurisdiction**

### **a. Applicable Law**

"In contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." [Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919, 131 S. Ct. 2846, 180 L. Ed. 2d 796 \(2011\)](#) (internal quotation marks omitted); accord [Walden v. Fiore, 571 U.S. 277, 283-84, 134 S. Ct. 1115, 188 L. Ed. 2d 12 \(2014\)](#) ("[S]pecific jurisdiction over a nonresident defendant focuses [\*\*83] on the relationship among the defendant, the forum, and the litigation." (internal quotation marks omitted)). Specific jurisdiction "depends on an affiliation between the forum and the

underlying controversy, principally, activity or an occurrence that takes place in the forum." [Goodyear, 564 U.S. at 919](#) (internal quotation marks omitted). A plaintiff asserting specific personal jurisdiction "must establish the court's jurisdiction with respect to each claim asserted." [Sunward Elecs., Inc. v. McDonald, 362 F.3d 17, 24 \(2d Cir. 2004\)](#).

The exercise of specific jurisdiction requires a two-step analysis. See, e.g., [Licci ex rel. Licci v. Lebanese Canadian Bank, SAL, 732 F.3d 161, 170 \(2d Cir. 2013\)](#). First, courts "evaluate the quality and nature of the defendant's contacts with the forum . . . under a totality of the circumstances test." *Id.* (internal quotation marks omitted). Second, if the defendant purposefully established minimum contacts with the forum, the court must be satisfied that exercising jurisdiction comports with due process pursuant to "traditional notions of fair play and substantial justice." [Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 \(1945\)](#); see also [Walden, 571 U.S. at 284](#) ("For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State.").

To determine whether there are sufficient minimum contacts, "[t]he crucial [\*\*84] question is whether the defendant has 'purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws, such that the defendant should reasonably anticipate being haled into court there.'" [Best Van Lines, Inc. v. Walker, 490 F.3d 239, 242-43 \(2d Cir. 2007\)](#) (quoting [Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474-75, 105 S. Ct. 2174, 85 L. Ed. 2d 528 \(1985\)](#)). It is "insufficient to rely on a defendant's 'random, fortuitous, or attenuated contacts' or on the 'unilateral activity' of a plaintiff" with the forum to establish specific jurisdiction. [Walden, 571 U.S. at 286](#) (quoting [Burger King, 471 U.S. at 475](#)).

A foreign defendant may be subject to specific jurisdiction where the relevant conduct took place entirely outside the forum but that contact had "in-forum effects harmful to the plaintiff." [Licci, 732 F.3d at 173](#). "[W]ith regard to the effects test, the defendant must 'expressly aim' his conduct at the United States." [Waldman v. Palestine Liberation Org., 835 F.3d 317, 337 \(2d Cir. 2016\)](#) (quoting [Licci, 732 F.3d at 173](#)), cert. denied sub nom. [Sokolow v. Palestine Liberation Org., 138 S. Ct. 1438, 200 L. Ed. 2d 716 \(2018\)](#); see also [In re Terrorist Attacks on Sept. 11, 2001, 714 F.3d 659, 674 \(2d Cir. 2013\)](#). It is not enough that certain effects be foreseeable. See [Waldman, 835 F.3d at 337](#) (finding no jurisdiction over terrorists who harmed Americans [\*563] in Israel because they did not intend to target United States citizens).

In addition, even if a defendant has minimum contacts with the forum, the exercise of jurisdiction must still be consistent with due [\*\*85] process, such that it does "not offend traditional notions of fair play and substantial justice." [Int'l Shoe, 326 U.S. at 316](#) (internal quotation marks omitted). Relevant considerations include "(1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies." [Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 568 \(2d Cir. 1996\)](#).

#### b. Application

Here, Plaintiffs' surviving claims arise under the Sherman Act and New York law. With respect to the federal claims under the Sherman Act, nationwide service of process is permissible. See [15 U.S.C. § 22](#). When a civil case arises under federal law and a federal statute authorizes nationwide service of process, courts often consider "contacts with the United States as a whole" as the "relevant contacts for determining personal jurisdiction." [Platinum, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at \\*40](#) (internal quotation marks omitted).<sup>28</sup> "The rationale underlying

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<sup>28</sup> Defendants' assert that "Plaintiffs have not sufficiently alleged . . . that the Clayton Act's venue provisions are satisfied such that its jurisdictional provisions may apply at all." (Defs.' PJX Br. 27 n.32.) Plaintiffs did not address this assertion in their opposition brief, (see generally, Pls.' PJX Opp.), perhaps because Defendants made the assertion in a footnote and "[a]rguments which appear in footnotes are generally deemed to have been waived[.]" see [In re Crude Oil Commodity Litigation, No. 06 Civ. 6677\(NRB\), 2007 U.S. Dist. LEXIS 66208, 2007 WL 2589482, at \\*3 \(S.D.N.Y. Sept. 7, 2007\)](#). Defendants do not elaborate on this conclusory statement or provide any argument in support of it. (Defs. PJC Br. 27 n.32.) At any rate, Plaintiffs

this national contacts approach is that when the national sovereign is applying national law, the relevant contacts [\*\*86] are the contacts between the defendant and the sovereign's nation." [LIBOR IV, 2015 U.S. Dist. LEXIS 147561, 2015 WL 6243526, at \\*23](#) (internal quotation marks omitted).

While the Second Circuit has "not yet decided" whether to adopt the nationwide contacts test, it has observed that several other circuits have held that "when a civil case arises under federal law and a federal statute authorizes nationwide service of process, the relevant contacts for determining personal jurisdiction are contacts with the United States as a whole." [Gucci Am., Inc. v. Bank of China, 768 F.3d 122, 142 n.21 \(2d Cir. 2014\)](#). Further, "several courts in this [D]istrict addressing federal claims with national service of process—including claims based on alleged LIBOR manipulation—have applied the 'national contacts' test." [Sonterra Capital Master Fund Ltd. v. Credit Suisse Grp. AG, 277 F. Supp. 3d at 589](#) (collecting cases); see also [LIBOR IV, 2015 U.S. Dist. LEXIS 147561, 2015 WL 6243526, at \\*23 & n.39](#) (noting that "[c]ourts in this Circuit commonly hold" that the minimum contacts test should consider nationwide contacts and that nothing in recent Supreme Court opinions such as [Daimler, 571 U.S. 117, 15641 134 S. Ct. 746, 187 L. Ed. 2d 624](#), and [Walden, 571 U.S. 277, 134 S. Ct. 1115, 188 L. Ed. 2d 12](#), "so much as hints that the national contacts rule might be unconstitutional where it is supported by a federal statute"). Therefore, with respect to the remaining federal claims—i.e., Plaintiff FrontPoint's Sherman Act claims against Defendant UBS—I assume for the purposes of this [\*\*87] motion that the relevant contacts are UBS's contacts with the United States as a whole.

With respect to the remaining state law claims—i.e., Plaintiff FrontPoint's unjust enrichment claim against UBS—the personal jurisdiction analysis involves the application of New York's long-arm statute, [N.Y. C.P.L.R. § 302](#), and the constitutional due process inquiry, which examines whether the defendants had sufficient minimum contacts with New York, as opposed to the United States as a whole. [Whitaker, 261 F.3d at 208](#). Under New York's long-arm statute, "the party's conduct in New York cannot be unrelated to the lawsuit; rather, 'there must be a substantial nexus between the business and the cause of action.'" [Clopay Plastic Prods. Co. v. Excelsior Packaging Grp., Inc., No. 12-CV-5262 \(JPO\), 2014 U.S. Dist. LEXIS 128011, 2014 WL 4473352, at \\*4 \(S.D.N.Y. Sept. 11, 2014\)](#) (quoting [Grand River Enters. Six Nations, Ltd. v. Pryor, 425 F.3d 158, 166 \(2d Cir. 2005\)](#)).

#### i. Specific Jurisdiction: Sherman Act Claims

Applying the nationwide contacts test to Plaintiff FrontPoint's claims under the Sherman Act, I find that Plaintiffs have alleged facts sufficient to establish personal jurisdiction over Defendant UBS.

UBS is a Swiss banking and financial services company headquartered in Zurich and Basel, Switzerland, and was a member of the BBA LIBOR Panel Bank for Sterling LIBOR throughout the Class Period. (CAC ¶ 7.) The CAC alleges various facts related to UBS's presence in the United States. [\*\*88] (See Pls.' PJX Opp. 5 (collecting allegations in the CAC).) UBS was a reporting bank for the Federal Reserve Bank of New York's ("FRBNY") surveys on the over-the-counter interest rate derivatives and foreign exchange market. The FRBNY surveys indicated that the Sterling foreign exchange and interest rate derivatives market was the fourth largest interest rate derivatives market in the United States. (CAC ¶¶ 94-95; see also Lefkowitz Decl. Exs. 32-33.) FrontPoint traded directly with UBS in the alleged manipulated products pursuant to the ISDA Master Agreements. UBS operated an interest rate derivatives trading desk in Connecticut. (CAC ¶ 81.) Traders at that desk acted as submitters or made requests to submit false Sterling LIBOR rates to harm Plaintiffs and the Class and benefit UBS's trading positions. (*Id.* ¶¶ 81-84.) This United States presence, however, "is relevant only insofar as it has a nexus to the misconduct underlying plaintiffs' claims." [Sullivan, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \\*44](#).

Foreign Defendants argue that Plaintiffs' allegations suffer from the same defects as the allegations in *Sullivan*. (3/14/17 Ltr.)<sup>29</sup> In *Sullivan*, under similar—but not identical—circumstances, the court found that Plaintiffs failed to

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have at least arguably alleged that venue is proper because they allege that UBS is found or "transacts business" in New York. [15 U.S.C. § 22](#) (a suit may be brought under the Clayton Act "in any district wherein [a defendant] may be found or transacts business"); (CAC ¶ 79 ("UBS maintains branches and representative offices in several U.S. states, including . . . New York. UBS's U.S. headquarters are located in New York and Stamford, Connecticut.")).

<sup>29</sup> "3/14/17 Ltr." refers to Defendants' letter filed on March 14, 2017. (Doc. 135.)

allege [\*\*89] minimum contacts between UBS and the United States sufficient to confer specific jurisdiction. *Sullivan*, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at \*44. However, the *Sullivan* court described, in a hypothetical, allegations that would be necessary to satisfy the minimum-contacts prong of the specific jurisdiction test. Specifically, Judge Castel stated that if the complaint had alleged "that a United State[s] branch employed traders [\*565] who requested artificial Euribor rates" or "pointed to directives from United States management that facilitated or encouraged the scheme, such allegations would likely reflect suit-related conduct with a substantial connection to the forum." 2017 U.S. Dist. LEXIS 25756, [WL] at \*45; see also *LIBOR IV*, 2015 U.S. Dist. LEXIS 107225, 2015 WL 4634541, at \*26 ("[I]n principle, we would uphold jurisdiction in the forum containing the office from which a defendant determined, or transmitted, a false LIBOR submission.") These allegations are similar to some of the allegations in the CAC related to UBS and Frontpoint.

Foreign Defendants argue that "Plaintiffs have failed to plausibly allege that Foreign Defendants engaged in manipulative conduct relating to Sterling LIBOR in the forum." (3/14/17 Ltr. 2.) With regard to Defendant UBS, this argument ignores Paragraph 85 of the CAC, which alleges that "[a]t least one senior [\*\*90] UBS manager in its Stamford, Connecticut headquarters directly manipulated UBS's LIBOR submissions," and that the manager "directed UBS LIBOR submitters to manipulate LIBOR submissions across all currencies, including Sterling LIBOR." (CAC ¶ 85 (citing UBS CFTC Agmt. 48<sup>30</sup> ).) This is the type of allegation that Judge Castel found lacking in the *Sullivan* complaint. Plaintiffs allege, by reference to documentary evidence, the involvement of a United States-based UBS employee in LIBOR manipulation. This conduct, which allegedly occurred in the forum, is alleged to have caused, in part, the harm suffered by Plaintiff FrontPoint as a result of Defendant UBS's Sherman Act violations, which is "suit-related conduct" that creates a "substantial connection" with the forum. See *Walden*, 571 U.S. at 284. I find that Plaintiffs have adequately—albeit just barely—alleged a nexus between Defendant UBS's presence in the United States and Defendant UBS's alleged violations of the Sherman Act, which supports the exercise of specific personal jurisdiction with regard to Plaintiff FrontPoint's Sherman Act claims against Defendant UBS.

Having found that Defendant UBS "purposefully availed itself of the privilege of doing [\*\*91] business in the forum and could foresee being haled into court there," I must consider whether the assertion of personal jurisdiction would comport with fair play and substantial justice. *Licci*, 732 F.3d at 170 (internal quotation marks omitted). Applying the five factors the Supreme Court has identified, I find that it is appropriate to exercise jurisdiction over Defendant UBS. The CAC adequately alleges that Defendant UBS has a "substantial presence" in the United States, with one of its United States headquarters located in New York. (CAC ¶¶ 78-79.) Requiring Defendant UBS to answer to allegations in the United States, and specifically in New York, will not impose an unreasonable burden. This is consistent [\*566] with the rulings of other courts in this district. See, e.g., *Sonterra Capital Master Fund Ltd. v. Credit Suisse Grp. AG*, 277 F. Supp. 3d at 598 (having found that Defendant UBS purposefully established minimum contacts with the forum, the inquiry into "whether the assertion of personal jurisdiction would comport with fair play and substantial justice . . . need not detain us for long," because UBS was "alleged to be among the world's largest financial institutions and to maintain a substantial and ongoing presence in the forum" (internal quotation marks omitted)).<sup>31</sup>

<sup>30</sup> The page of the UBS/CFTC agreement cited by Plaintiffs in support of Paragraph 85 discusses the manipulation of both U.S. Dollar LIBOR submissions and of LIBOR submissions generally. In other words, the UBS/CFTC agreement does not specifically state that Stamford-based UBS manager manipulated Sterling LIBOR. Therefore, based on this ambiguity, it is not entirely clear that the Stamford-based UBS manager manipulated *Sterling LIBOR*, as opposed to Dollar LIBOR or LIBOR in some other currency. Because I am considering a motion to dismiss, I must accept the allegations in the CAC as true and draw all inferences in Plaintiffs' favor. Therefore, I resolve this ambiguity in Plaintiffs' favor, and draw the reasonable inference that when the agreement references "LIBOR submissions" without specifying a currency, Sterling LIBOR submissions are included in those references.

<sup>31</sup> Once minimum contacts with the forum have been established, "the burden shifts to the defendant to show that the exercise of jurisdiction would nonetheless be so unreasonable as to offend traditional notions of fair play and substantial justice." *LIBOR IV*, 2015 U.S. Dist. LEXIS 147561, 2015 WL 6243526, at \*28 (citing *Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 113, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987)). The defendant must "present a compelling case that the presence

Accordingly, [\*\*92] this Court has jurisdiction over Plaintiff FrontPoint's Sherman Act claims against Defendant UBS.

ii. *Specific Jurisdiction: Unjust Enrichment Claim*

Plaintiff FrontPoint's unjust enrichment claim against Defendant UBS involves conduct alleged to have taken place in Connecticut, not New York. Therefore the unjust enrichment claim does not meet the standard of New York's long-arm statute, see [N.Y. C.P.L.R. § 302](#) (listing tortious acts *within* New York as a basis for jurisdiction), and cannot serve as a basis for jurisdiction. However, where, as here, a federal statute authorizes nationwide service of process, and the federal and state claims "derive from a common nucleus of operative fact," see [United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 \(1966\)](#), a district court "may assert personal jurisdiction over the parties to the related state law claims even if personal jurisdiction is not otherwise available," [IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1056 \(2d Cir. 1993\)](#); see also [In re Packaged Seafood Prods. Antitrust Litig., Case No. 15-MD-2670 JLS \(MDD\), 338 F. Supp. 3d 1118, 2018 U.S. Dist. LEXIS 151394, 2018 WL 4222506, at \\*32 \(S.D. Cal. Sept. 5, 2018\)](#) (finding that the court had jurisdiction over a state law claim because it arose out of a common nucleus of operative facts with a Sherman Act claim). It is undisputed that Plaintiff FrontPoint's unjust enrichment claim and its Sherman Act claims against Defendant UBS rely on the same [\*\*93] set of operative facts.

Having found that Plaintiffs have made a *prima facie* showing that this Court has personal jurisdiction over Plaintiff FrontPoint's Sherman Act claims against Defendant UBS, and that the Sherman Act claims have a "nucleus of pertinent facts in common" with the unjust enrichment claim, it is appropriate to exercise pendent personal jurisdiction. See [Hargrave v. Oki Nursery, Inc., 646 F.2d 716, 719 \(2d Cir. 1980\)](#).

Accordingly, this Court has jurisdiction over Plaintiff FrontPoint's unjust enrichment claim against Defendant UBS.

**I. *Jurisdictional Discovery***

In the alternative, Plaintiffs seek jurisdictional discovery. (Pls.' PJX Opp. 28-29.) My dismissal on the merits of all of Plaintiffs' [\*567] claims, except for Plaintiff FrontPoint's Sherman Act claims and unjust enrichment claim against Defendant UBS, and my decision to exercise personal jurisdiction over Defendant UBS for those specific claims render Plaintiffs' request for jurisdictional discovery moot.

Accordingly, Plaintiffs' request for jurisdictional discovery is denied.

**VI. *Conclusion***

For the foregoing reasons, Defendants' motion to dismiss for lack of subject matter jurisdiction is DENIED. Defendants' motion to dismiss pursuant to [Rule 12\(b\)\(6\)](#) for failure to state a claim is GRANTED as to [\*\*94] all claims against Defendant BCI. Defendants' motion to dismiss pursuant to [Rule 12\(b\)\(6\)](#) is also GRANTED as to Plaintiffs' CEA claims, RICO claims, and state-law claim of breach of the implied covenant of good faith and fair dealing, as well as to Plaintiffs Sonterra's and Dennis's Sherman Act claims and unjust enrichment claim against all Defendants, and Plaintiff FrontPoint's Sherman Act claims and unjust enrichment claim against all Defendants except UBS.

Because Plaintiffs have made out a *prima facie* case of personal jurisdiction over Defendant UBS with regard to Plaintiff FrontPoint's Sherman Act claims and unjust enrichment claim against Defendant UBS, the Foreign

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of some other considerations would render jurisdiction unreasonable." [Burger King, 471 U.S. at 477](#). Defendants' only argument that the exercise of personal jurisdiction would be unreasonable is that they "had no suit-related connections with the forum." (See Defs.' PJX Br. 28-29.) This is merely a statement that the first requirement for specific personal jurisdiction has not been met. Defendants fail to meet their burden because they do not point to any evidence that the exercise of personal jurisdiction would be unreasonable as to UBS or any other Defendant.

Defendants' motion to dismiss for lack of jurisdiction is DENIED as to those claims. Plaintiffs' request for jurisdictional discovery is DENIED. In light of this Opinion & Order, Plaintiffs shall file any motion to substitute pursuant to [Rule 17\(a\)\(3\)](#), limited in scope to the surviving claims, no later than January 21, 2019; Defendants' response shall be due no later than February 20, 2019; Plaintiffs' reply shall be due no later than February 27, 2019.

The Clerk of Court is respectfully directed to terminate the pending motion.

SO ORDERED.

Dated: **[\*\*95]** December 21, 2018

New York, New York

/s/ Vernon S. Broderick

Vernon S. Broderick

United States District Judge

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## TMT Mgmt. Grp., LLC v. U.S Bank Nat'l Ass'n

Minnesota District Court, County of Dakota, First Judicial District

December 21, 2018, Decided; December 21, 2018, Filed

File No. 19HA-CV-16-991

### **Reporter**

2018 Minn. Dist. LEXIS 88 \*

TMT Management Group, LLC, Plaintiff, v. U.S Bank National Association, Wilbur Tate, III, Jacob vanBrandwijk, Richard Hartnack, United Credit Recovery, LLC, and Leonard Potillo, Defendants.

**Subsequent History:** Affirmed by [TMT Mgmt. Grp., LLC v. U.S. Bank Nat'l Ass'n, 940 N.W.2d 239, 2020 Minn. App. LEXIS 37, 2020 WL 610458 \(Minn. Ct. App., Feb. 10, 2020\)](#)

## **Core Terms**

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portfolio, bid, summary judgment, argues, targeting, alleges, intentional misrepresentation, alleged misrepresentation, purchasing, misrepresentation, two-agency, antitrust, dollar, sales, genuine issue of material fact, programming, unjust enrichment, vanBrandwijk, promise, email, right of first refusal, promissory estoppel, out-of-pocket, conspiracy, considers, contracts, parties, grant summary judgment, punitive damages, public policy

**Judges:** [\*1] Martha M. Simonett, Judge of District Court.

**Opinion by:** Martha M. Simonett

## **Opinion**

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### **ORDER GRANTING SUMMARY JUDGMENT**

The above-entitled matter came on before the undersigned on October 25, 2018 at the Dakota County Judicial Center, Hastings, Minnesota, for hearing on Defendants U.S. Bank National Association and Jacob vanBrandwijk's (collectively the U.S. Bank Defendants) motions for sanctions and summary judgment, as well as Plaintiff TMT Management Group, LLC's (TMT) motion for partial summary judgment. Daniel Rasmus, Esq., Rolf Fiebiger, Esq., and Michael Weidner, Esq. appeared on behalf of TMT. Brooks Poley, Esq., Justin Jenkins, Esq., Karne Newburn, Esq., and Reid Golden, Esq. appeared on behalf of the U.S. Bank Defendants.

The summary judgment motions are addressed herein; the U.S. Bank Defendants' motion for sanctions is addressed by separate Order filed today as well.

Based upon all of the files, records, and proceedings herein, the Court makes the following:

### **STATEMENT OF UNDISPUTED FACTS**

1. A Demand Deposit Account ("DDA") is a traditional consumer checking account. When DDA account balances become negative as a result of overdrafts and fees, the account holder becomes indebted to the bank. To

offset [**\*2**] losses from delinquent DDA, banks sometimes sell portfolios of DDA debt to third-parties. (SAC, ¶¶ 17-19.)

2. Typically, such portfolios are sold for pennies on the dollar, based on the debt's face value. (*Id.*, ¶ 21.) The value of DDA generally decreases with each attempt made to collect the debt from the consumer. (*Id.*, ¶ 22.) In the industry, "zero-agency" DDA means the debt has never been subjected to collection efforts by an outside collection agency; "one-agency" means there has been only one attempt to collect the debt by an outside collection agency; and so on with "two-agency" or "three-agency" debt. (*Id.*)

3. U.S. Bank sold DDA Portfolios from 2006 to 2012 out of its "Recovery" division, located in Cincinnati, Ohio. (See Affidavit of Brooks Poley in Support of U.S. Bank's Motion for Summary Judgment ("Poley Aff."), Ex. 8; Ex. 9, U.S. Bank Dep., Lorenzo at 49:20-22.)

4. Defendant Wilbur Tate, III ("Tate") administered U.S. Bank's DDA portfolio sales until he resigned in January of 2011. (*Id.*, Ex. 10, Tate Dep. 286:12-20.) U.S. Bank replaced Tate with Vincent Lorenzo ("Lorenzo") two months later, in April 2011. (*Id.*, Ex. 11, Lorenzo Dep. 29:4-8, Ex. 12). At all relevant times, Kirk [**\*3**] Villaloboz ("Villaloboz") oversaw Tate (and later, Lorenzo), while Jacob vanBrandwijk ("vanBrandwijk") oversaw Villaloboz.

5. TMT is a debt purchasing company created in 2008 and located in Burnsville, Minnesota. (Poley Aff., Ex. 13.) Its principals, Mark Bugni ("Bugni") and Thomas Lieberman ("Lieberman"), also owned a now-defunct debt collection company, Weinerman & Associates, LLC ("Weinerman"). (*Id.*, Ex. 14, Bugni Dep. at 15:17-22, 34:17-35:21.) Prior to 2011, neither Weinerman nor TMT had ever purchased a DDA portfolio directly from a bank, including U.S. Bank. (*Id.*, Ex. 15, 2017 TMT Dep. at 37:19-38:4; 38:15-18; 67:24:-68:8.)

6. TMT has withdrawn its claims for violation of the Deceptive Trade Practices Act (Count 4) and breach of an alleged March 17, 2011 forward flow agreement (Count 7(a)). (Declaration of Dan Rasmus in Opposition to U.S. Bank's Motion for Summary Judgment ("Rasmus 2nd Deck"), at 5.)

7. Count I of TMT's Second Amended Complaint alleges the existence of an antitrust conspiracy between U.S. Bank and United Credit Recovery ("UCR"). TMT contends that this alleged U.S. Bank/UCR agreement was intended to, and did, preclude *all* prospective purchasers (other than UCR) [**\*4**] from buying U.S. Bank DDA portfolios from 2009 through July 2011. (E.g., SAC, ¶¶ 169, 189, 195, 200, 205, 206, 213; Poley Aff., Ex. 31, 2018 TMT Dep. at 45:21-25, 48:25-49:5, 112:7-11, 129:1-7; *id.*, Ex. 68, at ¶¶ 11-13, 17, 21-24, 27.) TMT seeks to recover lost profits for all five of these portfolio sales, claiming U.S. Bank should have sold each portfolio to TMT. (Poley Aff., Ex. 7 at 24.)

8. Wilbur Tate, a former U.S. Bank employee, received kickback payments or bribes from UCR and its principal, Potillo, in exchange for confidential information and preferential treatment in connection with U.S. Bank's DDA sales from 2007 until Tate's resignation from the bank in January 2011.

9. The indictments provide the background of information that TMT claims evidences the antitrust conspiracy. Federal authorities in Florida charged Potillo with defrauding UCR's customers (second-tier debt purchasers), by falsely representing to them that the less valuable two-agency DDA debt UCR purchased and resold from U.S. Bank and Wells Fargo was actually more valuable zero-agency DDA debt. (See Poley Aff. Exs. 1, 2 at 5.) Federal authorities did not accuse U.S. Bank of any wrongdoing. (*Id.* at 6.) Tate [**\*5**] was not charged or convicted in connection with Potillo's scheme but did plead guilty to an unrelated bribery scheme by federal authorities in Connecticut. (*Id.*, Exs. 3, 4.) Tate was ordered to repay U.S. Bank over \$1 million in restitution for the damage he caused the bank. (*Id.*, Exs. 5, 6.)

10. On or about January 31, 2011, Tate resigned from U.S. Bank. (Poley Aff., Ex. 10, Tate Dep. 286:12-20.) Three weeks later, on February 18, 2011, U.S. Bank and UCR executed a purchase agreement which included a "forward flow" provision, whereby U.S. Bank agreed to sell UCR all of its 2011 DDA for specified prices. (Poley Aff., Ex. 19 at 2603.) This forward flow provision allowed either party to cancel with 30 days' notice. (*Id.*)

11. On March 16, 2011, Bugni, Lieberman, and their local banker, Todd Loosbrock ("Loosbrock"), met with Kirk Villaloboz ("Villaloboz") in a preliminary "meet-and-greet" session to discuss TMT's desire to purchase U.S. Bank's DDA on a "forward flow" basis. (SAC, ¶ 47.) In particular, TMT came to this meeting to pitch a two-year forward flow contract to Villaloboz. (Poley Aff., Ex. 15, 2017 TMT Dep. at 114:5-13; Ex. 21 at 000533.) No agreement was reached at this meeting. [\*6] (*Id.*, Ex. 15 at 114:20-21.)

12. Five days after the March 16, 2011 meeting on March 21, 2011, Leiferman sent Villaloboz an email inquiring into the status of U.S. Bank's internal deliberations regarding TMT's desire for a five-year forward flow agreement for the sale of DDA. (*Id.*, Ex. 24.) Leiferman stated in this email that it "would like to" have a five-year contract in place, and asked Villaloboz if such a contract could realistically be "captured." (*Id.*)

13. On March 28, 2011, U.S. Bank expressly rejected TMT's proposal for a five-year contract. (*Id.*, Ex. 15 at 123:20-124:1; see also *id.*, Ex. 22.)

14. On April 15, 2011, Bugni and Lieberman traveled to Cincinnati to meet with Villaloboz and Loosbrock discuss their interest in purchasing DDA portfolios from U.S. Bank. (E.g., SAC, ¶ 53; Poley Aff., Ex. 15 at 132:6-19; Ex. 30 at 003774.)

15. No agreement was reached at the April 15, 2011 meeting. (E.g., SAC, ¶ 55; Poley Aff. Exs. 18 at 175:21-176:4; Ex. 15 at 145:5-25; Ex. 34.)

16. U.S. Bank encouraged TMT to participate in future auctions for the purchase of DDA which would resume upon the expiration or cancellation of the UCR forward-flow agreement. (Poley Aff. Exs. 36, 38.)

17. U.S. Bank [\*7] sold UCR the May 2011 Portfolio for the price recited in the U.S. Bank/UCR forward flow contract. (*Id.*; see also *id.*, Ex. 40.)

18. On May 11, 2011, Villaloboz sent an email to Bugni and Lieberman informing them that U.S. Bank only sold, and would continue to only sell, DDA that had been worked by two agencies and that they should take that fact into consideration when calculating the value of U.S. Bank's DDA. (*Id.*, Ex. 36 at 1.)

19. Forty-six minutes later, Bugni sent Loosbrock a draft response to Villaloboz's email acknowledging that he knew that U.S. Bank's DDA portfolios contained only two-agency DDA. (*Id.*, Ex. 37.) Bugni also stated that he was still willing to offer U.S. Bank the same price for these portfolios, even though their two-agency status "devalue[d]" them. (*Id.*)

20. In connection with the July 2011 Portfolio, TMT acknowledged that U.S. Bank was advertising its DDA portfolios as two-agency grade. (*Id.*, Ex. 15, 2017 TMTDep. at 193:21-194:8; see also *id.*, Ex. 49.)

21. U.S. Bank canceled the U.S. Bank/UCR forward flow contract by letter dated June 7, 2011. (Poley Aff., Ex. 41.) When it did so, U.S. Bank granted UCR a "right of first refusal" on the next DDA portfolio sold in [\*8] July 2011. (*Id.*) A party with a right of first refusal is permitted to know, after bidding closes, what the highest bid was, and is allowed to exceed the otherwise-winning bid should that party so choose.

22. On July 11, 2011, Weinerman submitted a bid of \$0,045 for the July 2011 Portfolio. (Poley Aff., Ex. 42.) U.S. Bank informed Weinerman that this bid was insufficient. (*Id.*, Ex. 43.) That same day, TMT submitted a bid for \$0.0525. (*Id.*, Ex. 44 at 2.) Leiferman then sent an email to Lorenzo asking for confirmation that its bid had been received.

23. Shortly thereafter, Lorenzo sent a reply email to Leiferman which confirmed that TMT's bid was received and stated, "Kirk [Villaloboz] explained you are aware ... that a company ... has the opportunity of first right of refusal." (*Id.*, Ex. 45, at 1.)

24. Later that day, Lorenzo informed Leiferman that UCR had exercised its right of first refusal to "meet and exceed [TMT's] bid." (*Id.*, Ex. 44 at 1.) Leiferman questioned why UCR was permitted to exceed TMT's bid. (*Id.*) Lorenzo reminded Leiferman that UCR had a right of first refusal. (*Id.*)

25. Two days later, Bugni, acting on behalf of Weinerman, responded by stating that "[w]hile we were disappointed [\*9] to hear that the 3rd quarter DDA portfolio had a 'First Right of Refusal Clause' we do understand that US Bank honors their contractual commitments." (*Id.*, Ex. 46.) Bugni also proposed a five quarter forward flow contract with U.S. Bank. (*Id.*) U.S. Bank did not agree to that proposal but did grant TMT its own right of first refusal for the upcoming September 2011 Portfolio. (*Id.*, Ex. 15 at 253:24-255:6.)

26. On August 26, 2011, U.S. Bank announced the sale of the September 2011 Portfolio though an email to prospective bidders, including TMT, disclosing that the DDA files had been "recall[ed] from agencies prior to this offering." (See *id.*, Ex. 50 at 1.) This disclosure conveyed that the September 2011 Portfolio had been subjected to collection attempts by no less than two outside collection agencies. (*Id.*, Ex. 15 at 227:10-228:24.)

27. There were two files attached to this announcement email: (1) the "Sale File," which contained detailed, sensitive information about the DDA accounts and the individual account debtors within the portfolio, and (2) the Declarations, which provided general descriptive information about the accounts but which contained no sensitive information. (Poley Aff., [\*10] Ex. 11, Lorenzo Dep. 190:17-22; 194:17-195:1.) Because the Sale File contained sensitive personal information it was password-protected. (*Id.*, 190:18-20.) The Declarations, which contained no sensitive information, were not password-protected. (*Id.*, Ex. 11, 190:20-22; 194:24-195:1.)

28. The Declarations made a number of disclosures regarding the September 2011 Portfolio, including the following statement: "The accounts were placed with a primary agency for 4 months. The accounts were then placed with a secondary agency for 5 months. All accounts have been recalled from agencies." (*Id.*, Ex. 51.) TMT admitted that it "couldn't have mistaken" this disclosure to mean anything other than that the September 2011 Portfolio contained two-agency DDA. (*Id.*, Ex. 15, at 231:9-20.)

29. On September 19, 2011, TMT placed its bid for U.S. Bank's September 2011 Portfolio. (Poley Aff., Ex. 56.) TMT executed the purchase agreement for the September 2011 Portfolio on September 30, 2011. (*Id.*, Ex. 57.)

30. On September 22, 2011, U.S. Bank sent TMT a "seller survey" which made various additional disclosures regarding the September 2011 Portfolio. (Poley Aff., Ex. 58.)

31. A seller survey is a document resulting [\*11] from various bidders' questions posed to U.S. Bank, as the seller of the DDA portfolio, regarding the DDA being sold. (*Id.*, Ex. 65, U.S. Bank Dep. at 54:2-16.)

32. The seller survey included, *inter alia*, various questions regarding collection activity on the DDA contained in the September 2011 Portfolio. (Poley Aff., Ex. 58 at 01962.) In response to the question "[w]hat agencies were utilized [for collections]," U.S. Bank responded by stating "River and Bonded for Primes, Apelles for Seconds," indicating the debt had been worked by primary and secondary outside agencies (i.e., was "two agency"). (*Id.*)

33. On September 22, 2011, TMT advised U.S. Bank that it couldn't locate the Declarations document U.S. Bank had furnished three weeks prior. (*Id.*, Ex. 59 at TMT4635.) U.S. Bank provided the Declarations to TMT less than one hour later. (*Id.*) TMT acknowledged receipt that same day. (*Id.* at TMT4634.)

34. On September 29, 2011, TMT requested that U.S. Bank draft a letter for TMT to distribute to its customer base stating that U.S. Bank had always sold two-agency DDA. (*Id.*, Ex. 60.)

35. TMT funded the September 2011 Portfolio on October 3, 2011. (*Id.*, Ex. 15 at 275:4-11; 290:18-22; see also [\*12] *id.*, at 271:7-10.)

36. The next and last DDA portfolio U.S. Bank sold was in March 2012. (Poley Aff., Ex. 8.)

37. UCR bid "in excess of \$0,045" for the July 2011 Portfolio, offering \$0.0526. (Poley Aff., Ex. 62 at USB\_0000771; Ex. 72.)

38. UCR likewise bid in excess of \$.045 on the September 2011 Portfolio, offering \$.051. (*Id.*, Ex. 63.)

39. On May 8, 2013, Bugni and Leiferman met with Kent Stone, a U.S. Bank vice chairman; Christina Froehlich; and Anthony McGill. (SAC ¶ 112.) Although TMT alleges that it reached an agreement for the purchase of DDA from U.S. Bank at this meeting, several of the terms of such agreement were not finalized and remained uncertain, such as price.

40. As set forth in separate Order of the Court, TMT is precluded from introducing evidence of any oral statements made by the U.S. Bank Defendants.

## **CONCLUSIONS OF LAW**

1. Noting TMT's voluntary withdrawal of these claims, TMT's claims for violation of the Deceptive Trade Practices Act (Count 4) and breach of the alleged March 17, 2011 forward flow agreement (Count 7(a)) are hereby dismissed.
2. There are no genuine issues of material fact that preclude granting summary judgment to the U.S. Bank Defendants on all remaining [\*13] Counts in the Second Amended Complaint, and the U.S. Bank Defendants are entitled to summary judgment thereon.
3. TMT's motion for partial summary judgment is denied. Based upon the foregoing Findings of Fact, Conclusions of Law, and attached Memorandum, the Court makes the following:

## **ORDER**

1. TMT's claims for violation of the Deceptive Trade Practices Act (Count 4) and breach of the alleged March 17, 2011 forward flow agreement (Count 7(a)) are dismissed.
2. The U.S. Bank Defendants' motion for summary judgment on the all remaining Counts in the Second Amended Complaint is granted.
3. TMT's Second Amended Complaint is dismissed with prejudice.
4. Dakota County Court Administration will send a copy of this Order to both parties and attorneys of record, and upon that delivery, service shall be deemed proper.
5. The attached Memorandum is hereby incorporated by reference.

## **LET JUDGMENT BE ENTERED ACCORDINGLY.**

Dated: December 24, 2018

BY THE COURT:

/s/ Martha M. Simonett

Martha M. Simonett

Judge of District Court

## **Judgment**

I hereby certify that the foregoing order constitutes the Judgment of this Court.

Dated: Dec 24 2018, 8:38 am

Heidi Carstensen

Court Administrator, Dakota County, MN

Deputy

/s/ [Signature] [\*14]

## **MEMORANDUM**

### ***Summary Judgment Standard***

Pursuant to Rule 56 of the Minnesota Rules of Civil Procedure, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to judgment as a matter of law." [Minn. R. Civ. P. 56.03](#). Although a summary judgment proceeding "is intended to secure a just, speedy, and inexpensive disposition, it is not designed as a substitute for trial where there are issues to be determined." [Vieths v. Thorp Finance Co., 305 Minn. 522, 525, 232 N.W.2d 776, 778 \(Minn. 1975\)](#). "The function of the court on a motion for summary judgment is not to resolve issues of fact but to determine whether they exist." [Anderson v. Mikel Drilling Co., 257 Minn. 487, 494, 102 N.W.2d 293, 299 \(Minn. 1960\)](#). Because summary judgment is a "blunt instrument," it should not be employed unless it is clear that no material issue of fact is involved and it is not necessary to inquire further into facts that might clarify the application of law. [Donnay v. Boulware, 275 Minn. 37, 144 N.W.2d 711, 716 \(Minn. 1966\)](#).

A fact is "material," for purposes of a summary judgment motion, if its resolution will affect the outcome of the case. [Bebo v. Delander, 632 N.W.2d 732 \(Minn. Ct. App. 2001\)](#) rev. denied (Minn. Oct. 16, 2001). If there is any doubt as to whether a genuine issue of material fact exists, that doubt must be resolved in favor of finding that one does. [Jonathan v. Kvaal, 403 N. W.2d 256 \(Minn. Ct. App. 1987\)](#). The moving party [\*15] has the burden of demonstrating the absence of any genuine issues of material fact, and the Court "must view the evidence in the light most favorable to the nonmoving party." [W.J.L. v. Bugge, 573 N.W.2d 677, 680 \(Minn. 1998\)](#).

Once the moving party has made out a prima facie case that it is entitled to summary judgment, the burden shifts to the nonmoving party, who "must come forward with affirmative evidence sufficient to create a genuine issue of material fact." [Musicland Group, Inc. v. Ceridian Corp., 508 N.W.2d 524, 531 \(Minn. Ct. App. 1993\)](#). In doing so, the nonmoving party must do more than rely on "unverified and conclusionary allegations in his pleading or by postulating evidence which might be developed at trial." [Rosvall v. Provost, 279 Minn. 119, 124, 155 N.W.2d 900, 904 \(Minn. 1968\)](#). If the court then decides that reasonable persons could draw different conclusions on how the issue should be resolved, then summary judgment is not appropriate and the matter should proceed to trial. However, "[s]ummary judgment is not to be avoided simply because there is some metaphysical doubt as to a factual issue." [Bob Useldinger & Sons, Inc. v. Hangsleben, 505 N.W.2d 323, 328 \(Minn. 1993\)](#) (citing [Anderson v. Liberty Lobby, Inc., 477 U.S. 242 at 247-50, 106 S.Ct. 2505 at 2509-11, 91 L.Ed.2d 202 \(1986\)](#)). Indeed, "[m]ere speculation, without some concrete evidence, is not enough to avoid summary judgment." *Id.*

In the present matter, the U.S. Bank Defendants move for summary judgment on the following remaining claims: (1) antitrust violation (Count 1), (2) intentional [\*16] misrepresentation (fraud) (Count 5), (3) negligent misrepresentation (Count 6), (4) Breach of contract (Count 7(b)), (5) promissory estoppel (Count 8), (6) unjust enrichment (Count 9), (7) *respondeat superior* (Count 10), (8) civil conspiracy (Count 11). TMT moves for partial summary judgment on its claim for an antitrust violation (Count 1).

### ***Antitrust Violation (Count 1)***

The Court first considers Count 1 of TMT's Second Amended Complaint which asserts an antitrust violation claim against U.S. Bank.<sup>1</sup> TMT alleges that U.S. Bank violated [Minn.Stat. § 325D.53, subd. 1\(3\)](#), Minnesota's "refusal to deal" statute, which provides:

Without limiting section 325D.51 [describing an unreasonable restraint of trade or commerce], the following shall be deemed to restrain trade or commerce unreasonably and are unlawful:

(3) A contract, combination, or conspiracy between two or more persons refusing to deal with another person, except a refusal to deal by associations, trading boards, or exchanges when predicated upon a failure to comply with rules of membership.

Only two Minnesota cases address and govern consideration of "refusal to deal" claims, [Minn.-Iowa Television Co. v. Watonwan TV. Imp. Ass'n](#), 294 N.W.2d 297 (Minn. 1980) and [Hough Transit, Ltd. v. Nat'l Farmers Org.](#), 472 N.W.2d 358 (Minn. Ct. App. 1991). In *Watonwan*, an allegedly anticompetitive agreement between a television station, [\*17] KAAL, and a re-broadcasting service, Watonwan, was challenged as a refusal to deal. The agreement provision at issue prohibited Watonwan from carrying any network programming that duplicated KAAL's network programming. [294 N.W.2d at 301](#). When Watonwan breached the provision by carrying another station's, KSTP's, duplicate programming, KAAL sued. [Id. at 302](#). Watonwan sought to invalidate the non-duplication provision of the agreement, arguing that it constituted a refusal to deal with KSTP in violation of [Minn.Stat. § 325.8015, subd. 1\(3\)](#) (1978).<sup>2</sup> The Minnesota Supreme Court concluded that the provision did not constitute a refusal to deal under the statute, observing that:

For a number of reasons, the provision here is unlike the type of agreement classified as a refusal to deal. First, the contract does not refer to KSTP but only to any station carrying ABC network programming. Second, the contract does not prohibit the broadcasting of KSTP's programming but only of ABC programming carried by KSTP; local programming, such as nonnetwork shows, sports events or news programs would not be precluded. Third, the contract does not actually prohibit the ABC programming as such, as it is still broadcast using KAAL's signal. Finally, the contract does [\*18] not preclude KSTP or other stations from broadcasting in the county by using facilities other than Watonwan's.

[Id. at 307](#). Thus, because the contract did not "target" KTSP for exclusion from the marketplace, the provision at issue was not a "refusal to deal" with KSTP under Minnesota law, and because KSTP had access to the market, notwithstanding the agreement provision at issue, there was no statutory violation.

In *Hough*, a driver entered into a contract to haul all of a farming co-op's milk, effectively preventing all other milk haulers from servicing the co-op. [472 N.W.2d at 359](#). A competing milk hauler sued the co-op, claiming that the co-op violated [Minn.Stat. § 325D.53, subd. 1\(3\)](#) by refusing to deal with the competitor. [Id. at 360](#). The Minnesota Court of Appeals rejected this argument, holding that the agreement at issue did not constitute a refusal to deal in violation of the statute. [Id. at 361](#). In reaching this conclusion, the Court of Appeals focused on the same two factors identified in *Watonwan*, targeting and market foreclosure, stating:

Although that contract effectively is a refusal to deal with [the competitor], it also is a refusal to deal with every other milk hauler as well. Nothing in the record indicates there was a concerted effort between [\*19] the co-op and the driver to refuse to deal specifically with [competitor]. See [Watonwan, 294 N.W.2d at 307](#) (contract not a refusal to deal because it did not refer to a specific third party). The contract also did not prevent [the competitor] from hauling for other dairy farmers. See *id.* Finally, the contract at issue had no significant anticompetitive-effect because it actually added a competitor to the milk hauling business. Under these circumstances, the co-op/driver contract is not the type of agreement which can be called a per se illegal refusal to deal.

<sup>1</sup> The Court notes that TMT alleges several violations of state antitrust laws in its Second Amended Complaint but has since limited Count 1 to allege only a "refusal to deal" claim. (Poley Aff., Ex. 31, 2018 TMT Dep. at 40:16 - 24; 43:22-45:6.)

<sup>2</sup> [Minn.Stat. § 325.8015, subd. 1\(3\)](#) has since been renumbered to [Minn.Stat. § 325D.53, subd. 1\(3\)](#), the statutory provision currently at issue.

*Id.*

Thus, the foundational requirements indicate that agreements whereby two parties deal solely with each other and exclude everyone else are not refusals to deal and agreements that do not foreclose the plaintiff from the relevant market are likewise not refusals to deal. In opposition, TMT first argues that it is not required to demonstrate that it was "targeted" by contracts at issue between U.S. Bank and UCR to support its antitrust claim. It argues that this case is distinguishable from both *Watonwan* and *Hough* because those cases dealt with exclusive dealing contracts where no criminal conspiracy existed. TMT argues that the targeting concept was introduced [\*20] by the Minnesota Supreme Court as an exception that was read into the antitrust statute as a means to salvage what the Court considered to be economically and socially acceptable conduct exemplified by exclusive buying and selling arrangements. It contends that the exception should not be applied universally and without careful consideration, especially in this case where the facts differ so dramatically from *Watonwan* and *Hough*, given the criminal conspiracy that existed between U.S. Bank and UCR/Potillo.

TMT warns that this Court should apply the targeting exception cautiously and very narrowly. As a matter of policy, it argues that the Court can and should conclude the targeting provision, which is not present in the statute itself, should not be used to protect criminal conspiracies, like the one in this case. It further argues that, in other words, just because the Minnesota Supreme Court created the targeting exception, this does not mean that this Court must extend the rule to protect U.S. Bank's allegedly illegal, criminal conduct that is neither economically nor socially acceptable.

Similarly, TMT requests that, to the extent that it is required to show targeting, the Court create [\*21] a public policy exception for situations where a criminal conspiracy exists. It argues that application of the targeting requirement in the instant case would function to protect U.S. Bank's allegedly illegal, criminal conduct that is neither economically nor socially acceptable and thus would undermine good public policy. In response, U.S. Bank argues that existing law does not support TMT's position. It points out that there is nothing in *Watonwan* or *Hough* that specifically states, or even implies, that there may be a public policy limitation on the targeting requirement. It further notes that it is well-settled in Minnesota that antitrust law does not concern itself with the good faith, or lack thereof, of an antitrust defendant, citing *Am. Amusement Co. v. Ludwig*, 82 F.Supp. 265, 267 (D. Minn. 1949). Thus, it reasons that any alleged bribery on the part of a former U.S. Bank employee is irrelevant to the instant motion.

It is well-settled that "[t]he public policy of a state is for the legislature to determine and not the courts." *Mattson v. Flynn*, 216 Minn. 354, 13 N.W.2d 11, 16 (Minn. 1944). See also *In re Clarification of an Appropriate Unit*, 880 N.W.2d 383, 390 (Minn. 2016). "After all, all laws implicate some public policy ... and we can hardly enunciate a rule that says that we know an actionable public-policy violation when we see it." *Dukowitz v. Hannon Sec. Servs.*, 841 N.W.2d 147, 152 (Minn. 2014) (citations [\*22] and internal quotations omitted). Moreover, courts are generally reluctant to find public policy exemptions where doing so would require a departure from well-settled legal principles. See *id.* As U.S. Bank Defendants point out, it is long-established that antitrust law does not concern itself with the good faith, or lack thereof, of an antitrust defendant. *Am. Amusement Co.*, 82 F.Supp. at 267. To the contrary, "[t]he prohibitions of the [antitrust laws] cannot be evaded by good motives." *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 44, 51 S. Ct. 42, 75 L. Ed. 145 (1930) (citations omitted). Instead, antitrust law principles condemn the actions of defendants who act in good faith as harshly as those that do not. See, e.g., *Prof. Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993). Thus, there is no general public policy that creates antitrust liability for those acting in bad faith in situations where liability would not otherwise exist.

The Court agrees with U.S. Bank's arguments on this point. The Court is unable to find support in law for TMT's position that good public policy requires that the Court not analyze targeting or market foreclosure in this instance. Moreover, the Court finds TMT's arguments unsupported by any authorities, given that, as previously indicated, targeting and market foreclosure were central concepts in the Court's analysis into [\*23] whether the contracts at issue were per se illegal as refusals to deal under *Minn.Stat. § 325D.53* in both *Watonwan* and *Hough*. See *294 N.W.2d at 307; 472 N.W.2d at 361*.

In this case, U.S. Bank argues that it has made a *prima facie* case that it is entitled to summary judgment on the antitrust violation claim as the facts show that TMT was neither targeted nor denied access to the market by the agreements at issue. With regard to targeting, U.S. Bank argues that available evidence demonstrates that the contractual arrangements between U.S. Bank and UCR impacted all other DDA purchasers, excluding them from purchasing U.S. Bank's DDA portfolios. It points out that the written contracts between U.S. Bank and UCR make no mention of TMT or otherwise suggest that the parties' intent was to specifically target TMT.

TMT, on the other hand, argues that a genuine issue of material fact exists as to whether it was targeted by U.S. Bank and UCR's forward flow agreement and subsequent right of first refusal in favor of UCR for the purchase of U.S. Bank's DDA portfolios. It contends that the record can be read to show that as TMT became more aggressive in its efforts to purchase DDA, it became the main threat to Tate and Potillo's conspiratorial activities [\*24] and the focus of action by Tate and others at U.S. Bank. It points out that Tate did not return several of Bugni's phone calls after learning of TMT's interest in purchasing DDA from U.S. Bank and that the December 2010 DDA portfolio was withdrawn after TMT continually expressed interest in buying it. Additionally, it notes that contracts regarding DDA sales between U.S. Bank and UCR were put into place in contradiction to TMT's understanding that no DDA deals were being considered by U.S. Bank and that TMT was unable to purchase the May 2011 and July 2011 because of U.S. Bank and UCR's agreements.<sup>3</sup>

It is the Court's view that none of these points, taken as true, shows that a genuine issue of material fact exists as to whether the agreements between U.S. Bank and UCR constitute a refusal to deal with TMT. It is clear that TMT wanted to purchase DDA from U.S. Bank long before it was first able to in September 2011. However, like in *Hough*, the Court is unable to find support in the record for TMT's contention that it was thwarted from purchasing DDA from U.S. Bank before September 2011 as a result of a concerted effort by U.S. Bank and UCR specifically aimed at TMT. Instead, it appears [\*25] that agreements between U.S. Bank and UCR were meant to benefit those entities. Additionally, the Court is unable to find evidence in the record demonstrating that these agreements somehow prevented TMT from purchasing DDA from other entities during the relevant time period and thus cannot say that TMT was foreclosed from the DDA market prior to purchasing the September 2011 DDA portfolio from U.S. Bank.

Given the undisputed facts showing that the contracts between U.S. Bank and UCR had the effect of excluding everyone other than UCR from purchasing DDA portfolios, the Court enters judgment for U.S. Bank on Count 1.

#### ***Intentional Misrepresentation (Fraud) (Count 5)***

The Court next considers Count 5 of TMT's Second Amended Complaint which asserts a claim for intentional misrepresentation (fraud) against the U.S. Bank Defendants. To prevail on its claim, TMT must prove:

- (1) there was a false representation by a party of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made as of the party's own knowledge without knowing whether it was true or false; (3) with the intention to induce another to act in reliance thereon; [\*26] (4) that the representation caused the other party to act in reliance thereon; and (5) that the party suffer[ed] pecuniary damage as a result of the reliance.

See [HoytProps., Inc. v. Prod. Res. Group, L.L.C.](#), 736 N.W.2d 313, 318 (Minn. 2007).

TMT's allegations fall into three general categories: 1) alleged misrepresentations relating to DDA portfolio sales occurring prior to September 2011, (2) alleged misrepresentations relating to the September 2011 DDA portfolio sale, and 3) alleged misrepresentations relating to the March 2012 DDA portfolio sale. The Court will address each in turn.

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<sup>3</sup> UCR purchased the May 2011 portfolio pursuant to the forward flow agreement and the July 2011 portfolio in accordance with its right of first refusal.

First, TMT alleges that the U.S. Bank Defendants made a number of misrepresentations regarding DDA portfolio sales occurring prior to September 2011. In essence, TMT alleges that the U.S. Bank Defendants created a number of artificial barriers which prevented TMT from purchasing DDA from U.S. Bank prior to September 2011, including, but not limited to, falsely representing to TMT (1) that its bid for the September 2010 DDA portfolio sale was not allowed because U.S. Bank did not have a Non-Disclosure Agreement (NDA) for TMT on file (SAC ¶ 242), (2) that TMT would be permitted to bid on future U.S. Bank DDA portfolios at various times prior to September 2011 (SAC ¶¶ 247, 249), (3) [\*27] that DDA portfolios were sold through an open bid process (SAC ¶ 249), and (4) that TMT did not win the July 2011 DDA auction because UCR had chosen to exercise its right of first refusal to meet or exceed TMT's bid and purchase the July 2011 DDA portfolio. (SAC ¶¶ 246, 260.) TMT argues that it was harmed by these alleged misrepresentations because it was prevented from purchasing DDA from U.S. Bank and therefore was prevented from being able to re-sell the DDA portfolios to third parties, resulting in lost profits. (SAC ¶ 259.)

Here, it is the Court's conclusion that TMT's intentional misrepresentation claim with respect to DDA sales occurring prior to September 2011 fails as a matter of law because (1) many of the alleged misrepresentations were, in fact, not misrepresentations, and (2) Minnesota's out-of-pocket rule precludes recovery on the allegations that remain in dispute. As an initial matter, several of these alleged misrepresentations—including that U.S. Bank required an NDA for a prospective bidder to participate in its DDA auctions and that TMT was unable to participate in the September 2010 DDA auction because it did not have an NDA on file and that TMT was unable to purchase [\*28] the July 2011 DDA portfolio because UCR had chosen to exercise its right of first refusal for the purchase of that portfolio—were, in fact, true. (See Poley Aff., Ex. 15, 2017 TMT Dep., at 71:20 - 72:2; 110:3 - 23, and 189:6 - 21.) TMT cannot recover on a claim for intentional misrepresentation based upon true statements. See [\*TCI Bus. Capital v. Five Star Am. Die Casting, L.L.C.\*, 890 N.W.2d 423, 432 \(Minn. Ct. App. 2017\)](#). Nor can it recover for statements of intention made by the U.S. Bank Defendants absent an intent to deceive. See [\*Proulx v. Hirsch Bros. Inc.\*, 279 Minn. 157, 155 N.W.2d 907, 911-12 \(Minn. 1968\)](#).

With respect to those allegations that remain in dispute, it is the Court's conclusion that TMT's intentional misrepresentation claim fails as a matter of law due to the out-of-pocket rule. In Minnesota, damages in intentional misrepresentation claims like that set forth by TMT "are the difference between the actual value of the property received and the price paid for the property, along with any special damages naturally and proximately caused by the fraud prior to its discovery, including expenses incurred in mitigating the damages." [\*B.F. Goodrich v. Masabi Tire Co., Inc.\*, 430 N.W.2d 180, 182 \(Minn. 1988\)](#). "[T]he out-of-pocket rule assumes that plaintiff received something from defendant that was less than what plaintiff anticipated receiving." [\*Nelson v. Am. Fam. Mutual Ins. Co.\*, 262 F.Supp.3d 835, 861 \(D. Minn. 2017\)](#) (citations and internal quotations omitted). "Under this rule it is not [\*29] a question of what the plaintiff might have gained through the transaction but what was lost by reason of defendant's deception." [\*Lewis v. Citizens Agency of Madelia, Inc.\*, 306 Minn. 194, 235 N.W.2d 831, 835 \(Minn. 1975\)](#) (citations omitted). "Exceptions to the out-of-pocket rule have been allowed only where the defendant's misrepresentation prevents the plaintiff from taking measures to protect the value of property he already owned." *Id.* (citations omitted).

TMT argues that the out-of-pocket rule does not preclude its recovery because another exception to the general rule applies here. TMT points to cases like *Jensen v. Peterson*, where Minnesota Courts have been "flexible in the past where the strict application of an out of pocket damage rule would fail to do substantial justice." [\*264 N.W.2d 139, 143 \(Minn. 1978\)\*](#). In those cases, Courts have determined that a plaintiff may recover for economic injury that is the direct and natural consequence of having acted in reliance on the alleged misrepresentation. See [\*Lewis\*, 235 N.W.2d at 836](#). TMT argues this exception applies, allowing it to recover for profits it allegedly lost due to its inability to purchase DDA from U.S. Bank before September 2011.

Here, the Court agrees with the U.S. Bank Defendants' argument that TMT is precluded from recovering on its intentional misrepresentation [\*30] claim with respect to alleged misrepresentations regarding DDA portfolio sales occurring prior to September 2011 by the out-of-pocket rule as there is nothing in the record showing that TMT paid anything to U.S. Bank, or received anything from U.S. Bank, prior to September 2011. Accordingly, TMT suffered no out-of-pocket losses. Similarly, none of U.S. Bank's alleged misrepresentations prior to September 2011 prevented TMT from taking measures to protect property that it already owned, so TMT's claim does not fall into the

exception contemplated by the *Nelson* Court. See [262 F.Supp.3d at 861](#). Additionally, it seems to the Court that the exception described in *Jensen* contemplates restoring the aggrieved party to its former position and because TMT did not pay anything to U.S. Bank or receive anything from it, the Court is unable to conclude that this exception is applicable to the instant situation.

Next, the Court considers TMT's intentional misrepresentation claim regarding alleged misrepresentations relating to the September 2011 DDA portfolio sale. TMT claims that U.S. Bank, through Tate and vanBrandwijk, repeatedly and knowingly falsely represented to TMT that the September 2011 portfolio contained [\*31] zero-agency DDA when, in fact, it contained less valuable two-agency DDA. (See SAC ¶¶ 91-99, 239, 249.)

The U.S. Bank Defendants argue that summary judgment on this claim in their favor is appropriate for two reasons: (1) TMT's alleged reliance on the alleged misrepresentations was not reasonable, and (2) TMT waived any right to recovery on this claim by performing on the contract after discovering the falsity of the alleged misrepresentations. Because the Court finds the U.S. Bank Defendants' second point dispositive, it will not address their first argument.

Minnesota law provides that a party waives its right to recover for intentional misrepresentation when it performs on a contract after discovering the misrepresentation. See [Dawson v. Thuet Bros., 147 Minn. 429, 180 N.W. 534, 535 \(Minn. 1920\)](#). "If a party, induced by fraud to enter into a contract, discovers the fraud while the contract is still executory and thereafter executes the contract, he is held to have waived the fraud, for he has, in effect, reaffirmed the contract in the light of the actual facts and conditions as he then knows them to exist." *Id.* (citations omitted). In holding that a party had waived an intentional misrepresentation (fraud) claim by performing on a contract after discovering [\*32] the other's misrepresentation, the Minnesota Supreme Court explained that:

[T]o allow a person who has discovered the fraud while the contract is still wholly executory to go on and execute it, and then sue for the fraud, looks very much like permitting him to speculate upon the fraud of the other party. It is virtually to allow a man to recover for self-inflicted injuries. The fraud is really consummated, and the damages incurred, by the acceptance of the property and paying for it. And if this is done after the fraud is discovered, the purchaser cannot say that he sustained this damage by reason of the fraud. It seems to us that if a party discovers the fraud before he enters upon the performance of the contract, he must decide whether he will go on under it or rescind. He cannot say it is a good contract for the purpose of authorizing him to accept the property, but not binding on him as to the price to be paid for it.

[Thompson v. Libby, 36 Minn. 287, 31 N.W. 52, 53 \(Minn. 1886\).](#)

In this case, it is undisputed that TMT's performance of the September 2011 DDA sales contract was its payment to U.S. Bank. This payment occurred on October 3, 2011. It is also undisputed that TMT unquestionably knew that the September 2011 DDA portfolio contained [\*33] two-agency debt on that date. (Poley Aff., Ex. 14, Bugni Dep. at 277:11 - 14; Ex. 70, at 2.) As such, regardless of whether TMT believed the September 2011 portfolio contained zero-agency debt in the weeks and months leading up to its performance of the sales contract, TMT waived any intentional misrepresentation claim with respect to the September 2011 portfolio by performing on the contract when it knew that the portfolio contained two-agency debt. See [Dawson, 180 N.W. at 535](#).

Finally, the Court considers TMT's intentional misrepresentation claim with respect to alleged misrepresentations relating to the March 2012 DDA portfolio sale. TMT alleges that it overbid on the March 2012 portfolio due to a misrepresentation by vanBrandwijk as to UCR's bid amount. (SAC ¶ 102.) Specifically, TMT alleges that vanBrandwijk falsely stated that UCR bid "in excess of \$0,045" per dollar of DDA in the July 2011 Portfolio, and based upon that misrepresentation, TMT's bid for the March 2012 Portfolio was too high. (*Id.*)

Here, it is clear to the Court that vanBrandwijk's alleged statement regarding UCR's bid on the July 2011 DDA portfolio was, in fact, true, as UCR bid \$0.0526 per dollar of DDA in said portfolio. (Poley Aff., [\*34] Ex. 72.) As such, the U.S. Bank Defendants are entitled to summary judgment on this claim. See *TCI*, 890 N.W.2d at 432.

#### ***Negligent Misrepresentation (Count 6)***

The Court first considers Count 6 of TMT's Second Amended Complaint which assert claims for negligent misrepresentation against the U.S. Bank Defendants. To prevail on its claim, TMT must establish must establish:

(1) a duty of care owed by the defendant to the plaintiff; (2) the defendant supplies false information to the plaintiff; (3) justifiable reliance upon the information by the plaintiff; and (4) failure by the defendant to exercise reasonable care in communicating the information.

See [Bonhiver v. Graff, 311 Minn. 111, 248 N.W.2d 291, 299 \(Minn. 1976\)](#).

TMT sets forth the same allegations in support of its negligent misrepresentation claim as its intentional misrepresentation (fraud) claim, specifically alleged misrepresentations relating to DDA sales occurring prior to September 2011, alleged misrepresentations relating to the September 2011 DDA portfolio sale, and alleged misrepresentations relating to the March 2012 DDA portfolio sale. For the same reasons as set forth above in its analysis of TMT's intentional misrepresentation claim, the Court concludes that the U.S. Bank Defendants are entitled to summary [\*35] judgment in their favor.

#### ***Breach of Contract (Count 7(b))***

The Court next considers TMT's claim for breach of contract against U.S. Bank. In its Second Amended Complaint, TMT alleges that "[o]n May 8, 2013, TMT and U.S. Bank, through its Vice Chairman Kent Stone, entered into an agreement for the purchase by TMT of \$200,000,000 of U.S. Bank DDA Portfolio at \$0.03, as a one-time transaction." (SAC ¶ 271.) The Court understands this to be an allegation that Stone, on behalf of U.S. Bank, orally agreed to sell TMT a DDA portfolio containing accounts worth \$200,000,000 for \$0.03 per dollar of DDA in said portfolio. TMT further alleges that it had arranged to sell this portfolio to a third party for \$0.0775 per dollar of DDA in the portfolio but that ultimately U.S. Bank failed to honor the agreement and did not sell the portfolio to TMT.

In order to prevail on its breach of contract claim, TMT must establish "(1) formation of a contract, (2) performance by plaintiff of any conditions precedent to his right to demand performance by the defendant, and (3) breach of the contract by defendant." [Park Nicollet Clinic v. Hamann, 808 N.W.2d 828, 833 \(Minn. 2011\)](#) (citing [Briggs Transp. Co. v. Ranzenberger, 299 Minn. 127, 217 N.W.2d 198, 200 \(Minn. 1974\)](#)). "For an enforceable agreement to exist, the offeror and offeree both must express agreement [\*36] on every material term of the contract." [Travelers Ins. Co. v. Westridge Mall Co., 826 F. Supp. 289, 292 \(D. Minn. 1992\)](#). "When the parties know that an essential term of their intended transaction has not yet been agreed upon, there is no contract." [Malevich v. Hakola, 278 N.W.2d 541, 544 \(Minn. 1979\)](#). Price is an essential term of a contract for sale. [Olson v. Sharpless, 53 Minn. 91, 55 N.W. 125, 125 \(Minn. 1893\)](#).

TMT argues that genuine issues of material fact exist with respect to the agreed-upon price that TMT would pay for the DDA. It argues that at the meeting on May 8, 2013, Bugni, on behalf of TMT, offered to purchase all of the DDA which U.S. Bank had been accumulating since its March 2012 DDA auction for \$0.025. (Declaration of Dan Rasmus in Support of Plaintiff's Motion for Partial Summary Judgment ("Rasmus 1st Deck"), Ex. B, Bugni Dep., at 308:23 - 309:4; 315:24 - 316:17.) It further points out that a third party, Christina Bohlke, was also present at this meeting and testified that she "recalled] that [Bugni] and [Leiferman] threw out a number of what they would be willing to pay on this stale DDA portfolio. My best recollection - I don't know 100 percent, but I believe - what I recall was 3 and a half cents on the dollar." (Rasmus 2nd Decl., Ex. BB, Bohlke Dep., at 31:11-15.) When asked about whether Stone or the other U.S. Bank officer, Anthony McGill, orally [\*37] agreed to Bugni and Leiferman's proposed price, Bohlke testified, "I don't recall that, that they verbally agreed to it. I can't recall 100 percent." (*Id.* at 31:18 - 19.)

Based on the undisputed facts before the Court, the Court finds that this alleged contract fails because there was no agreement as to the material term of price. In TMT's predecessor lawsuit, it claimed it was to pay \$0,035 per dollar of DDA debt. (Poley Aff., Ex. 64, ¶ 235.) TMT's complaint here alleged a price of \$0,030. (SAC, ¶ 271.) Its interrogatory responses stated it was to pay only \$0,025. (Poley Aff., Ex. 32 at 24, Interrogatory 28(b).) TMT's initial disclosures stated that it was to pay a fixed \$5 million sum, regardless of whether the portfolio contained \$200 million, \$300 million, or any amount in between, which works out to a price between \$0,166 and \$0,025 per dollar of DDA debt. (*Id.*, Ex. 47 at 5, ¶ 3.) TMT's expert witness also offered four different damages scenarios based on four

different purchase prices, \$0,025, \$0.03, \$0.0525, and \$0,055. (*Id.*, Ex. 7 at 28.) In addition, Leiferman testified that no price term had been agreed to at all; rather, that U.S. Bank was supposed to review the contemplated [\*38] DDA portfolio, at which point the parties could continue to negotiate a price term. (*Id.*, Ex. 15 at 323:19-25.)

Price is an essential term of this alleged agreement because, absent a price term, the Court cannot ascertain damages. *Wilhelm Lubrication Co. v. Battrud*, 268 N.W.2d 634, 635 (Minn. 1936). Equally important, where an alleged contract "remain[s] in a state of negotiation," there is no contract. *Mannheimer Realty Co.*, 247 N.W. at 804; 451 Corp., 310 N.W.2d at 924. Because the parties never agreed to a price, there was no contract. *Westridge Mall*, 826 F. Supp. at 292; *Malevich*, 278 N.W.2d at 544. Further, as set forth in separate Order of the Court, TMT is precluded from introducing evidence of any oral statements made on behalf of the U.S. Bank Defendants and therefore is unable to establish that Stone orally agreed to TMT's proposal at the May 8, 2013 meeting. Accordingly, the Court will grant U.S. Bank's motion for summary judgment on this claim.

#### **Promissory Estoppel (Count 8)**

Count 8 of the Second Amended Complaint sets forth a claim for promissory estoppel against U.S. Bank. TMT premises this claim upon Stone's alleged promise to Bugni and Leiferman that TMT could purchase \$200,000,000 of DDA from U.S. Bank at \$0.03 on the dollar.<sup>4</sup> (SAC ¶ 276.) TMT alleges that this occurred at the May 8, 2013 meeting in Cincinnati.

Promissory estoppel is an [\*39] equitable claim. See *UnitedElec. Corp. v. All Service Elec., Inc.*, 256 N.W.2d 92, 96 (Minn. 1977). It requires a plaintiff to demonstrate "(1) a clear and definite promise; (2) intent to induce reliance; (3) actual reliance; and (4) a need to enforce the promise in order to prevent injustice." *Minn. Deli Provisions, Inc. v. Boar's Head Provisions Co., Inc.*, 606 F.3d 544, 551 (8th Cir. 2010) (citing *Ruud v. Great Plains Supply, Inc.*, 526 N.W.2d 369, 372 (Minn. 1995)). In order to be "clear and definite," the promise must possess "sufficient clarity and definiteness to determine if there has been performance." *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 746 n. 27 (Minn. 2000) (adding that absent this, "proof would be equally lacking as to on what the respondents could rely for purposes of their promissory estoppel claim"). If a promise is not sufficiently definite to support a contract claim, it is insufficient to support a promissory estoppel claim. See *Aberman v. Maiden Mills Indus., Inc.*, 414 N.W.2d 769, 772-73 (Minn. Ct. App. 1987).

TMT argues that genuine issues of material fact exist regarding the elements of its promissory estoppel claim. It argues that the May 8, 2013 meeting was arranged to discuss the sale of the DDA portfolio that U.S. Bank had accumulated since its last auction. It contends that Kent, on behalf of U.S. Bank, made a clear, definite promise to sell the DDA to TMT at that meeting, after which TMT took affirmative steps to contact investors to line up funding and seek financing for the DDA purchase.

Here, it seems to the Court as though the record [\*40] demonstrates that there are no genuine issues of material fact which would preclude summary judgment in favor of U.S. Bank at this juncture. For the same reasons set forth herein explaining why the Court is granting U.S. Bank's motion for summary judgment on TMT's breach of contract claim, it is the Court's determination that no clear and definite promise to sell DDA to TMT was made by Stone at the May 8, 2013 meeting. Additionally, as set forth in separate Order of the Court, TMT is precluded from introducing evidence of any oral statements made on behalf of the U.S. Bank Defendants and therefore is unable to establish that Kent made a clear and definite oral promise on behalf of U.S. Bank.

#### **Unjust Enrichment (Count 9)**

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<sup>4</sup> In its Second Amended Complaint, TMT also bases its claim upon a purported five-year forward flow agreement between TMT and U.S. Bank which was allegedly reached on March 17, 2011. It has since withdrawn this allegation.

In Count 9 of its Second Amended Complaint, TMT sets forth a claim for unjust enrichment against U.S. Bank. It alleges that it overpaid for the September 2011 and March 2012 DDA portfolios after U.S. Bank (1) misrepresented the DDA as zero-agency debt when it was actually less valuable two-agency debt, and (2) falsely indicated that UCR had paid \$0,045 on the dollar for past DDA portfolios when it had actually paid less than \$0.03 on the dollar. (SAC ¶¶ 282 - 285.) It [\*41] indicates that U.S. Bank voluntarily accepted TMT's overpayments and that it would be unjust and inequitable to allow U.S. Bank to benefit from these overpayments. (SAC ¶¶ 286, 287.)

"The theory of unjust enrichment or money had and received has salutary and beneficial uses and has been invoked in support of claims based upon failure of consideration, fraud, mistake, and in other situations where it would be morally wrong for one party to enrich himself at the expense of another." [Cady v. Bush, 283 Minn. 105, 166 N.W.2d 358, 361-62 \(Minn. 1969\)](#). The claim "is founded on the principle that a defendant who has received money, which in equity and good conscience should have been paid to the plaintiff, should pay the money over." [Fort Dodd Partnership v. Trooien, 392 N.W.2d 46, 48 \(Minn. Ct. App. 1986\)](#). However, "[e]quitable relief [based on unjust enrichment] cannot be granted where the rights of the parties are governed by a valid contract." [U.S. Fire Insur. Co. v. Minn. State Zoological Bd., 307 N.W.2d 490, 497 \(Minn. 1981\)](#) (citing [Cady, 166 N.W.2d at 358](#)).

It is the Court's opinion that TMT's unjust enrichment claim fails for two reasons. First, the sale of the September 2011 and March 2012 DDA portfolios, the only two ever sold to TMT by U.S. Bank, are governed by valid sale contracts. (Poley Aff., Exs. 57, 75.) Thus, they cannot form the basis of an unjust enrichment claim. Second, as stated more fully herein, the record [\*42] demonstrates that U.S. Bank correctly represented the two-agency status of the DDA sold to TMT and the price paid by UCR for the DDA portfolios it purchased from U.S. Bank prior to September 2011. Because it paid for what it received, TMT cannot establish an unjust enrichment claim under Minnesota law. See [ServiceMaster of St. Cloud v. GAB Bus., Servs., Inc., 544 N.W.2d 302, 306 \(Minn. 1996\)](#).

### **Respondeat Superior and Civil Conspiracy (Counts 10 & 11)**

In Counts 10 and 11 of the Second Amended Complaint, TMT asserts that Tate and vanBrandwijk's alleged misconduct with respect to DDA sales can be imputed to U.S. Bank under theories of *respondeat superior* and civil conspiracy. Neither of these claims can stand on their own, instead requiring underlying tort liability by U.S. Bank employees for U.S. Bank to be held liable under either theory. See [Ayer v. Chicago, Milwaukee, St. Paul, & Pac. Ry. Co., 187 Minn. 169, 244 N.W. 681, 682 \(Minn. 1932\)](#) (*respondeat superior*); [Harding v. Ohio Cas. Ins. Co., 230 Minn. 327, 41 N.W.2d 818, 824-25 \(Minn. 1950\)](#) (civil conspiracy). Because the Court grants summary judgment in favor of the U.S. Bank Defendants on all of TMT's underlying tort claims, the Court shall also grant summary judgment in favor of U.S. Bank on TMT's *respondeat superior* and civil conspiracy claims.

### **Punitive Damages (Count 12)**

Finally, the Court considers TMT's claim for punitive damages set forth in Count 12 of the Second Amended Complaint. TMT [\*43] bases this claim upon Tate's alleged conspiratorial and fraudulent acts with respect to DDA sales, contending that Tate's employment at U.S. Bank provided him with authority to establish policy and make planning-level decisions on U.S. Bank's behalf. (SAC ¶¶ 317 - 319.) It further claims that U.S. Bank, through Tate, "acted with deliberate disregard for the rights and safety of [TMT]," thus entitling TMT to an award of punitive damages. (*Id.* at ¶ 320.)

Punitive damages are "allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others." [Minn.Stat. § 549.20, subd. 1\(a\)](#). The statute further provides that:

(b) A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:

(1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or

(2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

*Id.* at subd. 1(b). [\*44] "Punitive damages are intended to punish a defendant, or to make an example of a defendant's wrongdoing, and not to compensate the plaintiff who has already been compensated. As a consequence, punitive damages may only be awarded when a defendant's conduct reaches a threshold level of culpability." *Ulrich v. City of Crosby*, 848 F.Supp. 861, 867 (D. Minn. 1994) (internal citations omitted). Because the Court grants summary judgment in favor of the U.S. Bank Defendants on all of TMT's underlying tort and breach of contract claims, the Court shall also grant summary judgment in favor of U.S. Bank on TMT's punitive damages claim as well.

**M.M.S.**

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## **Sergeants Benevolent Ass'n Health & Welfare Fund v. Actavis, PLC**

United States District Court for the Southern District of New York

December 26, 2018, Decided; December 26, 2018, Filed

15 Civ. 6549 (CM)

### **Reporter**

2018 U.S. Dist. LEXIS 220574 \*

SERGEANTS BENEVOLENT ASSOCIATION HEALTH & WELFARE FUND, individually and on behalf of itself and all others similarly situated, Plaintiff, -against- ACTAVIS, PLC, and FOREST LABORATORIES, LLC, MERZ PHARMA GMBH & CO. KGAA, MERZ GMBH & CO. KGAA, MERZ PHARMACEUTICALS GMBH, AMNEAL PHARMACEUTICALS, LLC, TEVA PHARMACEUTICAL INDUSTRIES, LTD., BARR PHARMACEUTICALS, INC., COBALT LABORATORIES, INC., UPSHER-SMITH LABORATORIES, INC., WOCKHARDT LIMITED, WOCKHARDT USA LLC, SUN PHARMACEUTICALS INDUSTRIES, LTD., DR. REDDY'S LABORATORIES LTD., AND DR. REDDY'S LABORATORIES INC., Defendants.

**Subsequent History:** Motion denied by [\*In re Namenda Indirect Purchaser Antitrust Litig., 2020 U.S. Dist. LEXIS 247078, 2021 WL 100489 \(S.D.N.Y., Dec. 18, 2020\)\*](#)

**Prior History:** [\*Sergeants Benevolent Ass'n Health & Welfare Fund v. Actavis, PLC, 2016 U.S. Dist. LEXIS 128349 \(S.D.N.Y., Sept. 13, 2016\)\*](#)

## **Core Terms**

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unjust enrichment, Generic, motion to dismiss, Defendants', antitrust, purchasers, alleges, consumer, monopolization, consumer protection, Suppl, indirect, cases, courts, settlement agreement, deceptive, patent, manufacturer, switch, unfair, direct benefit, class action, cause of action, state law, FDA, state law claim, brand, anticompetitive, conspiracy to monopolize, anti trust law

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Procedural Matters

**HN1** **Antitrust & Trade Law, Procedural Matters**

Indirect purchasers of products sold at supra-competitive prices may bring suit under state antitrust laws, if a state permits such claims.

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

**HN2** **Anticompetitive & Predatory Practices, Predatory Pricing**

A product hop raises antitrust scrutiny when it coerces consumers and impedes competition.

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

### **HN3** Motions to Dismiss, Failure to State Claim

In deciding a motion to dismiss pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#), a court must liberally construe all claims, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. To survive a motion to dismiss, a complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. A motion to dismiss must be supported by information contained in the four corners of the complaint. This principally includes facts alleged in the complaint and materials attached to or incorporated by reference into the complaint. It also includes information of which the court takes judicial notice.

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

### **HN4** Actual Monopolization, Anticompetitive & Predatory Practices

Product redesign is anticompetitive when it coerces consumers and impedes competition. While withdrawing an old product and substituting a new product does not constitute anticompetitive conduct *per se*, when a monopolist combines product withdrawal with some other conduct, the overall effect of which is to coerce consumers rather than persuade them on the merits, and to impede competition, its actions are anticompetitive.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

### **HN5** Estoppel, Collateral Estoppel

Collateral estoppel, or issue preclusion, prevents the relitigation of an issue that was raised, litigated, and actually decided by a judgment in a prior proceeding. In order to establish that an issue was determined in a former adjudication, a party asserting collateral estoppel must establish four things: (1) the issues in the prior proceeding and the current proceeding are identical; (2) the issue raised in the current action was in fact actually decided in the prior proceeding; (3) there was full and fair opportunity to litigate the issue in the prior proceeding; and (4) the issue previously litigated and decided was necessary to support a valid and final judgment on the merits.

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

### **HN6** Actual Monopolization, Anticompetitive & Predatory Practices

When a patent holder provides favorable terms to an alleged infringer as part of a settlement agreement, this is called a reverse payment. A reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects. Reverse payments comprised of cash, nominally conferred as compensation for avoided litigation costs, are most suspect, but reverse payments may also provide value in the form of early entry licenses, a period of exclusivity, or cash for avoided litigation costs.

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

#### **HN7** Actual Monopolization, Anticompetitive & Predatory Practices

All benefits conferred as part of a settlement agreement are subject to antitrust review under the Rule of Reason. Regarding cash payments for avoided litigation costs, courts must compare a given payment to estimated future litigation costs and consider whether a payment reflects traditional settlement considerations, such as avoided litigation costs or fair value for services' to determine if it was justified. These intrinsically fact-based determinations cannot be made on a pre-answer motion to dismiss.

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

#### **HN8** Complaints, Requirements for Complaint

Courts do not require that the plaintiffs provide precise figures and calculations at the pleading stage because very precise and particularized estimates of fair value and anticipated litigation costs may require evidence in the exclusive possession of the defendants, as well as expert analysis.

Antitrust & Trade Law > Procedural Matters

#### **HN9** Antitrust & Trade Law, Procedural Matters

The Florida Antitrust Act does not permit indirect purchaser recovery. Florida adheres to the direct purchaser rule enunciated in Illinois Brick.

Antitrust & Trade Law > Procedural Matters

#### **HN10** Antitrust & Trade Law, Procedural Matters

Because the Massachusetts Antitrust Act is to be construed in harmony with judicial interpretations of comparable Federal antitrust statutes, the rule of law established in Illinois Brick would apply with equal force to preclude claims brought under Mass. Gen. Laws ch. 93 by indirect purchasers in Massachusetts.

Antitrust & Trade Law > Procedural Matters

#### **HN11** Antitrust & Trade Law, Procedural Matters

The Supreme Court of Puerto Rico has interpreted the private damages section of the Puerto Rico Antitrust Act (PRAA), 10 P.R. Laws §§ 263, et seq., to hold that private remedies were available to any plaintiff who met the following conditions: (1) the person was harmed in his business or property (2) by reason of (3) actions prohibited by law. In order to satisfy this second prong, a plaintiff need only allege that as a consequence of the legal violation, he has been injured. Because Puerto Rico liberally construes its standing requirements in private antitrust cases, it is immaterial whether plaintiffs are direct or indirect purchasers.

Antitrust & Trade Law > Procedural Matters

## **HN12**[] Antitrust & Trade Law, Procedural Matters

The majority of courts that have been presented with [Utah Code § 76-10-3109](#) require at least one Utah citizen or resident be a named plaintiff.

Antitrust & Trade Law > Procedural Matters

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

## **HN13**[] Antitrust & Trade Law, Procedural Matters

Hawaii's limitation on class actions is a state law that restricts the types of claims eligible for class treatment beyond the limits established by [Fed. R. Civ. P. 23](#). It thus conflicts with the federal rule. Therefore, the Hawaii Antitrust Act's notice provision would yield to [Rule 23](#).

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

## **HN14**[] Class Actions, Certification of Classes

[Fed. R. Civ. P. 23](#) is not silent on the question of whether a particular claim is eligible for class treatment. [Rule 23](#) contains its own limitations on those claims eligible for class treatment; therefore, a state law that restricts the types of claims eligible for class treatment beyond the limits established by [Rule 23](#) conflicts with the federal rule.

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

## **HN15**[] Actual Monopolization, Claims

In Kansas holds that an indirect purchaser plaintiff may not proceed on a theory of monopolization unless accompanied by allegations of conspiracy.

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

## **HN16**[] Actual Monopolization, Claims

The Donnelly Act prohibits every contract, agreement, arrangement or combination that establishes a monopoly or restrains competition. [N.Y. Gen. Bus. Law § 340\(1\)](#). The term arrangement must be interpreted as contemplating a reciprocal relationship of commitment between two or more legal or economic entities similar to but not embraced within the more exacting terms, contract, combination or conspiracy. An antitrust claim under the Donnelly Act must allege both concerted action by two or more entities and a consequent restraint of trade within an identified relevant product market. In other words, a plaintiff must allege concerted action to bring a claim under the Donnelly Act. There is no requirement that a plaintiff use the word conspiracy in order to state a claim.

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

## [HN17](#) [blue document icon] Actual Monopolization, Claims

The Tennessee Trade Practices Act (TTPA) declares unlawful all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or which tend to lessen, full and free competition, as well as those designed, or which tend to control prices. [Tenn. Code. § 47-25-101](#). The Supreme Court of Tennessee interprets the TPPA broadly. Its broad and comprehensive provisions cover every conceivable case of an agreement or contract made to lessen or destroy competition and control prices.

Antitrust & Trade Law > Procedural Matters

## [HN18](#) [blue document icon] Antitrust & Trade Law, Procedural Matters

The Illinois Antitrust Act (IAA), 740 Ill. Comp. Stat. 10/3, et seq., states a procedural rule applicable in Illinois state courts, rather than a substantive rule applicable to federal courts sitting in diversity jurisdiction in New York.

Antitrust & Trade Law > Procedural Matters

## [HN19](#) [blue document icon] Antitrust & Trade Law, Procedural Matters

An indirect purchaser plaintiff (IPP) is not required to identify the particular sections of the code under which antitrust claims are brought, as long as defendants are on notice of the theory plaintiffs are pursuing.

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

## [HN20](#) [blue document icon] Deceptive & Unfair Trade Practices, State Regulation

For purposes of the California Unfair Competition Law (CUCL), unfair practices include, among other things, any unlawful, unfair or fraudulent business act or practice. [Cal. Bus. & Prof. Code § 17200](#). Because the prohibitions on unlawful, unfair or fraudulent practices are written in the disjunctive, each of those prongs gives rise to a separate and distinct theory of liability.

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

## [HN21](#) [blue document icon] Deceptive & Unfair Trade Practices, State Regulation

[Cal. Bus & Prof. Code § 17209](#), by its terms, applies only to appellate proceedings in state court.

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

## [HN22](#) [blue document icon] Deceptive & Unfair Trade Practices, State Regulation

The D.C. Consumer Protection and Procedures Act (DCCPPA) was designed to police trade practices arising only out of consumer-merchant relationships, and does not apply to commercial dealings outside the consumer sphere. The CCPA does not protect merchants in their commercial dealings with suppliers or other merchants. The relevant question is whether the plaintiffs activity is akin to that of a merchant. Transactions along the distribution chain that do not involve the ultimate retail customer are not consumer transactions that the DCCPPA seeks to reach. Rather,

it is the ultimate retail transaction between the final distributor and the individual member of the consuming public that the DCCPPA covers.

Healthcare Law > Managed Healthcare

**HN23** [+] **Healthcare Law, Managed Healthcare**

When a health insurance plan makes a purchase, it does so, not for personal purposes, but for the plan's business purposes, i.e., to fulfill its side of a contractual relationship with its members, who pay premiums for its coverage.

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

**HN24** [+] **Deceptive & Unfair Trade Practices, State Regulation**

Most of the conducted enumerated in the Idaho Consumer Protection Act (ICPA) focuses on deceptive, fraudulent, or misleading practices. [Idaho Code § 48-603](#). Nonetheless, there is no firm requirement that a plaintiff show deception since. Plaintiffs may state a claim for anticompetitive conduct, even if that conduct is not deceptive, under this prong of the ICPA. The ICPA must be liberally construed to effect the legislative intent to deter deceptive or unfair trade practices and to provide relief for consumers exposed to proscribed practices.

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

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

**HN25** [+] **Deceptive & Unfair Trade Practices, State Regulation**

A plaintiff may allege that conduct is unfair under the Illinois Consumer Fraud Act without alleging that the conduct is deceptive. A deceptive practices claim must meet [Fed. R. Civ. P. 9\(b\)](#)'s heightened pleading standard, while an unfair practices claim need not because it is not based on fraud.

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

**HN26** [+] **Deceptive & Unfair Trade Practices, State Regulation**

The Kansas Consumer Protection Act (KCPA) is intended to protect consumers from suppliers who commit deceptive and unconscionable practices. [Kan. Stat. § 50-623](#). In order to render a contract between the parties unconscionable, there must be some element of deceptive bargaining conduct present as well as unequal bargaining power.

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

**HN27** [+] **Deceptive & Unfair Trade Practices, State Regulation**

Both class actions and indirect purchaser actions are permitted under Massachusetts' consumer protection law.

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

#### **HN28[] Deceptive & Unfair Trade Practices, State Regulation**

The pre-suit notice provisions of Mass. Gen. Laws ch. 93A do not apply if the prospective respondent does not maintain a place of business or does not keep assets within the commonwealth.

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

#### **HN29[] Deceptive & Unfair Trade Practices, State Regulation**

The Michigan Consumer Protection Act (MCPA) is broader than common law torts of fraud inasmuch as it prohibits not only deceptive business practices but also those which are unfair and unconscionable.

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

#### **HN30[] Deceptive & Unfair Trade Practices, State Regulation**

The Michigan Consumer Protection Act (MCPA) enables injured persons to bring a class action caused by a method, act, or practice in trade or commerce declared by a circuit court of appeals or the supreme court of the United States to be an unfair or deceptive act or practice within the meaning of section 5(a)(1) of the Federal Trade Commission Act. [Mich. Comp. Laws § 445.911\(3\)\(c\)](#). Moreover, federal courts have sustained causes of action under the MCPA for antitrust conduct.

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

#### **HN31[] Deceptive & Unfair Trade Practices, State Regulation**

The Montana Unfair Trade Practices and Consumer Protection Act (MUTCPA) enables a consumer to bring an action for damages, [Mont. Code § 30-14-133\(1\)](#), and defines consumer as a person who purchases or leases goods, services, real property, or information primarily for personal, family, or household purposes, [Mont. Code § 30-14-102\(1\)](#).

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

#### **HN32[] Deceptive & Unfair Trade Practices, State Regulation**

The Nevada Deceptive Trade Practices Act (NDTPA) enumerates deceptive trade practices at Nev. Rev. Stat. §§ 598.015 through 598.025. [Nev. Rev. Stat. § 598.0923](#) makes it a violation to knowingly violate a state or federal statute or regulation relating to the sale or lease of goods or services. [Nev. Rev. Stat. § 598.0923\(3\)](#). A plaintiff can state a claim under this section of the NDTPA where the claims were predicated on allegations of anticompetitive conduct, which are considered prohibited acts under [Nev. Rev. Stat. § 598A.060](#).

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

#### **HN33[] Deceptive & Unfair Trade Practices, State Regulation**

[Nev. Rev. Stat. § 41.600](#) operates to provide a right of action to any person who is a victim of consumer fraud. The statute defines consumer fraud to encompass acts that violate the Nevada Deceptive Trade Practices Act (NDTPA). [Nev. Rev. Stat. § 41.600\(2\)\(e\)](#). "Person," as used in [Nev. Rev. Stat. § 41.600](#), can include a corporate competitor, which indicates that private relief under the statute is not restricted to elderly or disabled persons. The fact that the law makes special provision for the elderly and disabled does not mean that private relief under the statute is not restricted to elderly or disabled persons.

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

#### [HN34](#) **Deceptive & Unfair Trade Practices, State Regulation**

Sales of the offending goods into New Hampshire alleges sufficient intrastate conduct to satisfy the New Hampshire Consumer Protection Act.

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

#### [HN35](#) **Deceptive & Unfair Trade Practices, State Regulation**

In addition to deceptive conduct, the New Mexico Unfair Practices Act (NMUPA) also makes unlawful unconscionable trade practices, which include those that result in a gross disparity between the value received by a person and the price paid. [N.M. Stat. § 57-12-2\(E\)\(2\)](#). A plaintiff need not allege consumer deception.

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

#### [HN36](#) **Deceptive & Unfair Trade Practices, State Regulation**

[N.Y. Gen. Bus. Law § 349](#) does not contain an unfair or unconscionable practices prong, and therefore a plaintiff must plead consumer fraud or deception in order to bring a claim. In addition, while antitrust conduct is actionable under [§ 349](#), plaintiffs still must allege deception to state a claim.

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

#### [HN37](#) **Deceptive & Unfair Trade Practices, State Regulation**

Consumers injured by anticompetitive conduct have an exclusive remedy under the state antitrust statute, the Tennessee Trade Practices Act.

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

#### [HN38](#) **Deceptive & Unfair Trade Practices, State Regulation**

The Utah Consumer Sales Practices Act expressly allows a plaintiff to plead unconscionable conduct as the basis of its claim, and this does not require a showing of fraud or deception. [Utah Code § 13-11-5](#). The list of deceptive practices in the statute is not exclusive, by its own terms. [Utah Code § 13-11-4\(2\)](#).

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

**HN39** [blue icon] **Deceptive & Unfair Trade Practices, State Regulation**

The Utah Consumer Sales Practices Act contemplates sales made both to and apparently to a person for personal, family, or household purposes. [Utah Code § 13-11-3\(2\)\(a\)](#).

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

**HN40** [blue icon] **Deceptive & Unfair Trade Practices, State Regulation**

Class plaintiffs proceeding under the Utah Consumer Sales Practices Act must allege that the specific action was declared unlawful pursuant to an administrative rule, a court order, or (in limited cases) a consent judgment before the consumer transactions on which the action was based occurred.

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

**HN41** [blue icon] **Deceptive & Unfair Trade Practices, State Regulation**

The language of the Vermont Consumer Protection Act clearly restricts the term consumer to end users of the product.

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

**HN42** [blue icon] **Deceptive & Unfair Trade Practices, State Regulation**

The state court remedy for noncompliance with the pre-filing notice requirement of the West Virginia Consumer Credit and Protection Act appears to be dismissal of the claim.

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

**HN43** [blue icon] **Deceptive & Unfair Trade Practices, State Regulation**

Under the West Virginia Consumer Credit and Protection Act, a cure offer, where accepted, tolls the applicable statute of limitations for the period the effectuation of the cure offer is being performed. [W. Va. Code § 46A-6-106\(e\)](#). Moreover, where the accepted cure offer is performed, it constitutes a complete defense to the action. [§ 46A-6-106\(h\)](#). And, if a defendant accepts and performs a cure offer, and a plaintiff brings suit anyway, the defendant is entitled to attorneys' fees and costs for defending the action. In other words, the cure offer creates substantive defenses and additional remedies under state law.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

**HN44** [blue icon] **Equitable Relief, Quantum Meruit**

The elements of unjust enrichment are as follows: (1) plaintiff conferred a benefit upon the defendant, who had knowledge of the benefit; (2) the defendant accepted and retained the conferred benefit; and (3) under the circumstances, it would be inequitable for the defendant to retain the benefit without paying for it.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

**HN45** [L] **Equitable Relief, Quantum Meruit**

Unjust enrichment takes at least two forms: autonomous and parasitic. Parasitic claims are where the unjust enrichment is based upon a predicate wrong, such as a tort, breach of contract or other wrongful conduct such as an antitrust violation. Conversely, unjust enrichment may provide an independent ground for restitution, and this is known as autonomous restitution.

Antitrust & Trade Law > Procedural Matters

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

**HN46** [L] **Antitrust & Trade Law, Procedural Matters**

Indirect purchasers may not allege autonomous unjust enrichment claims if that state follows Illinois Brick as to standing in antitrust claims.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

**HN47** [L] **Equitable Relief, Quantum Meruit**

At the pleading stage, the parties moving to dismiss bear the burden of arguing that a state does not recognize an autonomous cause of action for unjust enrichment. In the alternative, the party moving to dismiss may argue that the policy reasons barring recovery under the predicate statutes are strong enough to require dismissing any autonomous unjust enrichment claim in that state.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

**HN48** [L] **Equitable Relief, Quantum Meruit**

The essence of the theories of unjust enrichment or money had and received is that a plaintiff can prove facts showing that defendant holds money which, in equity and good conscience, belongs to plaintiff or holds money which was improperly paid to defendant because of mistake or fraud.

Antitrust & Trade Law > Consumer Protection

**HN49** [L] **Antitrust & Trade Law, Consumer Protection**

It is a foundational principle of **antitrust law** that overcharges are passed along the distribution chain to consumers.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

**HN50** [+] **Equitable Relief, Quantum Meruit**

Arizona unjust enrichment law does not require that the plaintiff confer any benefit directly on the defendant.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

**HN51** [+] **Equitable Relief, Quantum Meruit**

In California, when a plaintiff alleges unjust enrichment, a court may construe the cause of action as a quasi-contract claim seeking restitution.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

**HN52** [+] **Equitable Relief, Quantum Meruit**

Florida courts have confirmed that recovery under quasi-contract is available even where the parties had no dealings at all with each other.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

**HN53** [+] **Equitable Relief, Quantum Meruit**

Illinois appears to recognize an independent cause of action for unjust enrichment. To state a cause of action based on a theory of unjust enrichment, a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience. A plaintiff in Illinois is likewise not required to allege privity or allege a direct benefit.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

**HN54** [+] **Equitable Relief, Quantum Meruit**

Kansas does not require privity for an unjust enrichment claim. Recovery under quasi-contract or unjust enrichment is not prohibited simply because the subcontractor and the owner of the property are not in privity. This conclusion is consistent with the theory of quasi-contract and unjust enrichment, which does not depend on privity.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

**HN55** [+] **Equitable Relief, Quantum Meruit**

Michigan law strictly grounds a claim for unjust enrichment in quasi-contract.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

## [HN56](#) [blue document icon] Equitable Relief, Quantum Meruit

The doctrine of unjust enrichment or recovery in quasi-contract applies to situations where there is no legal contract but where the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

## [HN57](#) [blue document icon] Equitable Relief, Quantum Meruit

A plaintiff need not be in privity with the defendant to state a claim for unjust enrichment. The New York Court of Appeals has announced a rule that the relationship between the parties may not be too attenuated in a claim for unjust enrichment.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

## [HN58](#) [blue document icon] Equitable Relief, Quantum Meruit

An unjust enrichment plaintiff must plead some relationship between the parties that could have caused reliance or inducement and the relationship cannot be too attenuated.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

## [HN59](#) [blue document icon] Equitable Relief, Quantum Meruit

The North Carolina Supreme Court has defined the elements of an unjust enrichment claim without reference to a direct benefit: In order to establish a claim for unjust enrichment, a party must have conferred a benefit on the other party. The benefit must not have been conferred officially, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances. The benefit must not be gratuitous and it must be measurable. An indirect benefit can support an unjust enrichment claim.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

## [HN60](#) [blue document icon] Equitable Relief, Quantum Meruit

North Dakota courts have upheld unjust enrichment claims even where no direct benefit was alleged.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

## [HN61](#) [blue document icon] Equitable Relief, Quantum Meruit

In Rhode Island, there are three elements of unjust enrichment. First, a benefit must be conferred upon the defendant by the plaintiff. Second, there must be an appreciation by the defendant of such benefit. Finally, there must be an acceptance of such benefit under such circumstances that it would be inequitable for him to retain the benefit without paying the value thereof. None of these elements requires conferral of a direct benefit.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

#### [HN62](#) [+] **Equitable Relief, Quantum Meruit**

The most significant requirement for a recovery on quasi contract is that the enrichment to the defendant be unjust. The Rhode Island courts have not stated clearly that an action for unjust enrichment requires that the plaintiff have conferred a benefit on the defendant directly.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

#### [HN63](#) [+] **Equitable Relief, Quantum Meruit**

Utah law does not require a direct benefit for a claim of unjust enrichment.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

#### [HN64](#) [+] **Equitable Relief, Quantum Meruit**

The Supreme Court of Wyoming described the elements of unjust enrichment as follows: (1) Valuable services were rendered, or materials furnished, (2) to the party to be charged, (3) which services or materials were accepted, used and enjoyed by the party, and, (4) under such circumstances which reasonably notified the party to be charged that the plaintiff, in rendering such services or furnishing such materials, expected to be paid by the party to be charged. Without such payment, the party would be unjustly enriched. A plaintiff seeking to recover under a theory of unjust enrichment under Wyoming law must allege a direct benefit.

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**Judges:** Colleen McMahon, Chief United States District Judge.

**Opinion by:** Colleen McMahon

## Opinion

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### ORDER

McMahon, C.J.:

The Complaint in this action, which was filed following an earlier civil enforcement action by the New York Attorney General, alleges a two-part scheme to prolong the monopoly of Defendant Forest Laboratories, LLC ("Forest"), over the blockbuster Alzheimer's drug memantine hydrochloride, or Namenda®. According to the Complaint, Forest and its patent licensor Merz<sup>1</sup> first entered into agreements with generic manufacturers to stay out of the market until the exclusivity period for Forest's existing, twice-a-day Namenda IR formulation had nearly expired ("pay for delay"). With this maneuver, Forest bought itself time to gain regulatory approval for a new, once-a-day Namenda XR formulation [\*4] and to pull from the market the old, twice-a-day Namenda IR formulation (the "product hop" or "hard switch"). Although a preliminary injunction prevented Forest from withdrawing the old formulation, a successful switch would have effectively forestalled generic competition until the year 2029.

**HN1** [↑] Under the United States Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745-46, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977), indirect purchasers of products sold at supra-competitive prices lack standing to sue under federal antitrust statutes. However, under its later decision in *California v. ARC Am. Corp.*, 490 U.S. 93, 105-06, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989), indirect purchasers may still bring suit under state antitrust laws, if a state permits such claims. Therefore, it is common in private antitrust litigation for two groups of purchasers, direct and indirect, to file separate cases arising out of the same nucleus of operative fact, but to allege different causes of action—direct purchasers under federal law and indirect purchasers under state laws.

That is precisely what happened here. In a parallel "direct purchaser" case, drug wholesaler plaintiffs, which bought Namenda directly from Forest, brought a suit alleging five counts under the federal antitrust laws against Forest, Merz, and Forest's parent company Actavis, plc ("Actavis"). [\*5] That case, captioned *In re Namenda Direct Purchaser Antitrust Litigation*, No. 15-cv-7488 (S.D.N.Y.), is currently pending before this Court. I refer to the drug wholesaler plaintiffs in that case as the Direct Purchaser Plaintiffs, or "DPPs," and I refer to that case as the "DP Action."

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<sup>1</sup> "Merz" refers to three entities, all named as Defendants in the Complaint: Merz GmbH & Co. KGaA, Merz Pharma GmbH & Co. KGaA, and Merz Pharmaceuticals GmbH.

In the instant case, employee health plan Sergeants Benevolent Association Health & Welfare Fund, which purchased Namenda indirectly, separately brought a suit alleging 123 Claims under state antitrust, consumer protection, and restitution laws.<sup>2</sup> This case, captioned *Sergeants Benevolent Association Health & Welfare Fund v. Actavis, plc*, No. 15-cv-6549 (S.D.N.Y.), names Actavis, Forest, Merz, and eight generic drug manufacturers<sup>3</sup> (the "Generic Defendants"), which were not named in the DP Action. I refer to the Plaintiff here, Sergeants Benevolent Association Health & Welfare Fund, as the Indirect Purchaser Plaintiff, or "IPP," and I refer to this case as the "IP Action."

The complaints in the DP and IP Actions were filed around the same time. The parties, with the exception of Merz, sought consolidated briefing on motions to dismiss, (Dkt No. 63), which was granted, (Dkt. No. 64). Merz eventually joined [\*6] the consolidated briefing. (See, e.g., Dkt. No. 85.)

Ruling on the motions to dismiss both the DPPs' and IPP's complaints, this Court held that most of the federal antitrust counts in the DPPs' complaint survived. *Sergeants Benevolent Association Health & Welfare Fund v. Actavis, PLC, Nos. 15-cv-6549, 15-cv-7488, 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at \*16-\*17 (S.D.N.Y. Sept. 13, 2016)*. In the interest of efficiently resolving common factual and legal issues, it then denied without prejudice the motions to dismiss the IPP complaint, and placed all 123 state law claims on its suspense calendar while the federal antitrust claims in the DP Action were pending. *2016 U.S. Dist. LEXIS 128349, [WL] at \*17*.

The DP Action proceeded through class certification and denial of Defendants' motion for summary judgment before the parties expressed interest in mediation. (See Dkt. No. 122.)<sup>4</sup> However, it was determined that mediation would be successful only if the IP Action came off of the suspense calendar and the IPP came back into the proceedings. (*Id.*)

As a result, the IPP's 123 state law claims are presently before the Court on separate motions to dismiss by (1) Actavis, Forest, and Merz and (2) the Generic Defendants. The parties have also [\*7] recently submitted supplemental briefing. (See Dkt. Nos. 129-33, 146, 149-56.)

For the reasons below, the motions to dismiss the IP Action are **GRANTED IN PART** and **DENIED IN PART**.

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<sup>2</sup>The IPP's Complaint includes four counts, with dozens of state law claims under each count. I recognize that plaintiffs will sometimes style their complaints this way. Frankly, however, each of these state law claims should be its own cause of action, such that the IPP Complaint would properly contain 123 separate counts.

<sup>3</sup>These are: Barr Pharmaceuticals, Inc. ("Barr"); Teva Pharmaceuticals Industries, Ltd. and Teva Pharmaceuticals USA, Inc. (jointly, "Teva"); Cobalt Laboratories, Inc. ("Cobalt"); Upsher-Smith Laboratories, Inc. ("UPher-Smith"); Amneal Pharmaceuticals, LLC ("Amneal"); Wockhardt Lmuted and Wockhardt USA LLC (jointly, "Wokhardt"); Sun India Pharmaceuticals Industries, Ltd. ("Sun"); and Dr. Reddy's Laboratories Ltd. and/or Dr. Reddy's Laboratories, Inc. (jointly, "Dr. Reddy's").

<sup>4</sup> Unless otherwise noted, all references herein are to the docket in *Sergeants Benevolent Association Health & Welfare Fund v. Actavis, plc*, No. 15-CV-6549 (S.D.N.Y.).

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## BACKGROUND

### I. Overview of Claims and Jurisdiction

This case, *Sergeants Benevolent Association Health & Welfare Fund v. Actavis*, No. 15-cv-6549 (S.D.N.Y.) (the "IP Action"), proceeds in parallel with the factually similar case, *In re Namenda Direct Purchaser Antitrust Litigation*, No. 15-cv-7488 (S.D.N.Y.) (the "DP Action").

Although this Court accepted these two cases on its docket as related cases pursuant to Local Rule 13, (see 15-cv-7488, entry of Oct. 6, 2015), and although this Court granted certain Defendants' motion for consolidated briefing on the motions to dismiss pursuant to its individual rules, (15-CV-6549, Dkt. No. 64), it never consolidated the cases under [Federal Rule of Civil Procedure 42\(a\)](#), nor joined the claims and parties under [Federal Rules of Civil Procedure 18](#) and [19](#), respectively.

As a result, the IP Action proceeds as an entirely [\*11] separate action composed solely of state law claims. The complaint in the IP Action alleges a total of 123 state law claims, under the law of 44 states, aggregated as four "counts": (1) monopolization (27 state law claims); (2) conspiracy to monopolize (27 state law claims); (3) violation of consumer protection and unfair and deceptive trade practices statutes (25 state law claims); and (4) unjust enrichment (44 state law claims).

Since not a single federal interest is implicated in the IP Action, the Court exercises jurisdiction over these 123 state law claims pursuant to the *Class Action Fairness Act*, [28 U.S.C. § 1332\(d\)](#) ("CAFA"). CAFA's prerequisites are met. The IPP's Consolidated Amended Complaint ("CAC") alleges that the aggregate amount in controversy exceeds

\$5,000,000.00. (CAC ¶ 31.) In addition, the IPP, a New York trust, is diverse from several of the Defendants, including Actavis, Merz, and the majority of the Generic Defendants. (CAC ¶ 15-29.)

## II. Factual Background

The factual nucleus from which the IP Action arises has been described exhaustively in several published opinions, including those of Judge Sweet and the Second Circuit in the earlier civil enforcement action by the New York Attorney [\*12] General, and those of this Court in the parallel DP Action.

The relevant opinions are; (i) [New York v. Actavis, PLC, No. 14-cv-7473, 2014 U.S. Dist. LEXIS 172918, 2014 WL 7015198 \(S.D.N.Y. Dec. 11, 2014\)](#) (*Namenda I*), in which the district court (Sweet, J.) preliminarily enjoined Actavis and Forest from withdrawing Namenda IR, the twice-a-day or "immediate release" formulation, from the market; (ii) [Schneiderman ex rel. New York v. Actavis PLC, 787 F.3d 638 \(2d Cir. 2015\)](#) (*Namenda II*), in which the Second Circuit upheld the preliminary injunction granted in *Namenda I*; and (iii) three opinions from the private, follow-on litigation before this Court.

The first opinion, on which the Court granted consolidated briefing, denied Actavis, Forest, and Merz's motion to dismiss the DP Action; denied all Defendants' motions to dismiss the IP Action without prejudice; and placed the 123 state law claims in the IP Action on the Court's suspense calendar. [Sergeants Benevolent Association Health & Welfare Fund v. Actavis, PLC, Nos. 15-cv-7488, 15-cv-6549, 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690 \(S.D.N.Y. Sept. 13, 2016\)](#) (*Namenda III*).

The second opinion of this Court granted in part and denied in part the DPPs' motion for collateral estoppel and partial summary judgment against Actavis and Forest, on the basis of facts established about the product hop in *Namenda* [\*13] *I* and *Namenda II*. [In re Namenda Direct Purchaser Antitrust Litig., No. 15-cv-7488, 2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244 \(S.D.N.Y. May 23, 2017\)](#) (*Namenda IV*).

The third opinion denied Actavis's and Forest's post-discovery motion for summary judgment and granted the DPPs' motion for class certification. [In re Namenda Direct Purchaser Antitrust Litig., 331 F. Supp. 3d 152 \(S.D.N.Y. 2018\)](#) (*Namenda V*).

In light of the detailed factual history discussed in these opinions, the Court provides only an abridged summary of the relevant facts here.

### A. The Parties

Defendant Forest Laboratories, LLC ("Forest") is a limited liability company incorporated in Delaware with offices in New York and New Jersey. [Namenda III, 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at \\*2](#). It is wholly owned by Defendant Actavis, plc ("Actavis").<sup>5</sup> *Id.*; (CAC ¶ 16.) The IPP also describes Actavis as Forest's successor-in-interest. (See CAC ¶ 92.)

In 2000, Forest entered into a patent licensing and cooperation agreement with Merz GmbH & Co. KGaA, Merz Pharma GmbH & Co. KGaA, and Merz Pharmaceuticals GmbH (collectively, "Merz")<sup>6</sup> to develop a memantine hydrochloride-based drug for the treatment of moderate-to-severe forms of Alzheimer's disease. [Namenda III, 2016](#)

<sup>5</sup> Allergan plc was formerly known as Actavis, plc. (See *In re Namenda Direct Purchaser Antitrust Litig.*, No 18-2421 (2d Cir.), Dkt. No. 1 at 2 (corporate disclosure statement).) This opinion uses "Actavis throughout to reflect the fact that the IPP has not moved for a substitution of parties in the IP Action.

<sup>6</sup> The DPPs subsequently dismissed all three Merz entities from the DP Action on April 20, 2017. (15-cv-7488, Dkt. No. 207.) They remain parties to the IP Action, however.

[U.S. Dist. LEXIS 128349, 2016 WL 4992690, at \\*2; Namenda IV, 2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244, at \\*2.](#)

The resulting drug was launched in 2004 as a twice-daily immediate release formula ("Namenda IR"), generating \$1.5 billion in annual sales [\*14] for Forest in 2012 and 2013. [Namenda II, 787 F.3d at 646-47.](#)

Defendants Barr Pharmaceuticals, Inc. ("Barr"); Teva Pharmaceuticals Industries, Ltd. and Teva Pharmaceuticals USA, Inc. (jointly, "Teva"); Cobalt Laboratories, Inc. ("Cobalt"); Upsher-Smith Laboratories, Inc. ("Upsher-Smith"); Anmeal Pharmaceuticals, LLC ("Amneal"); Wockhardt Limited and Wockhardt USA LLC (jointly, "Wockhardt"); Sun India Pharmaceuticals Industries, Ltd. ("Sun"); and Dr. Reddy's Laboratories Ltd. and/or Dr. Reddy's Laboratories, Inc. (jointly, "Dr. Reddy's") (collectively, the "Generic Defendants" and, together with Actavis, Forest, and Merz, the "Defendants") each developed generic formulations of Namenda IR and sought approval from the FDA to take these generic formulations to market. [Namenda III, 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at \\*2.](#)

Plaintiff Sergeants Benevolent Association Health & Welfare Fund (the "IPP," or, where appropriate, the "Named Plaintiff") is a New York trust that provides prescription drug benefits for active and retired New York City Police Department sergeants and their dependents through its participant plans. *Id.*; (CAC ¶ 15). As a third-party payor of pharmaceutical claims for members of its plans, the IPP alleges that it was an indirect purchaser of branded Namenda [\*15] IR during the relevant period. (CAC ¶ 15.) The IPP alleges that, beginning in April 14, 2010 and continuing through the present day (the "Class Period"), it indirectly purchased branded Namenda IR in 11 states<sup>7</sup> at prices higher than it would have otherwise paid absent Defendants' unlawful anticompetitive conduct. (*Id.* ¶¶ 15, 146)

The IPP also alleges that it purchased (i.e. paid for) branded Namenda XR indirectly during the Class Period, when it would otherwise have purchased low-cost, generic Namenda IR absent Defendants' unlawful competitive conduct. (*Id.* ¶ 202.)

## B. The Regulatory Scheme

The [Federal Food, Drug, and Cosmetic Act \("FDCA"\), 21 U.S.C. § 301 et seq.](#), governs the manufacture, sale, and marketing of prescription pharmaceuticals in the United States. [Namenda III, 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at \\*2.](#) The FDCA requires a pharmaceutical company to submit a New Drug Application ("NDA") to the FDA before it can bring a new drug to market. *Id.*

The [Drug Price Competition and Patent Term Restoration Act \(the "Hatch-Waxman Act"\), Pub. L. No. 98-417, 98 Stat. 1585](#), was enacted to serve the "dual purposes of incentivizing innovation," by rewarding brand-name drug manufacturers for bringing new therapies to market, and "lowering drug prices for consumers," by rewarding generic [\*16] drug manufacturers who attempt to compete with costly branded drugs. [2016 U.S. Dist. LEXIS 128349, \[WL\] at \\*3.](#)

Rewards under the Hatch-Waxman Act take the form of granting an exclusive share of the prescription pharmaceutical market through one of two legal regimes: patents and exclusivities. See *Frequently Asked Questions on Patents and Exclusivity*, FDA (last updated May 2, 2018), <https://www.fda.gov/drugs/developmentapprovalprocess/ucm079031.htm> ("FAQs"). Patents are property interests granted by the U.S. Patent and Trademark Office ("PTO"), while exclusivities are statutory protections granted by the Food and Drug Administration ("FDA"), See [Namenda IV, 2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244, at \\*3;](#) see also FAQs at 1.

**Patents.** Manufacturers may claim patents for new drug compounds, drug products, and methods of use. See [In re Actos End-Payor Antitrust Litig., 848 F.3d 89, 94 \(2d Cir. 2017\)](#) (*Actos II*). Patents vary in duration but typically last

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<sup>7</sup> The IPP does not, however, bring claims under the laws of all 11 states. (Compare CAC ¶ 15 with CAC ¶¶ 201, 207, 215, 226.)

for twenty years. See FAQs at 2. During the lifetime of the patent, brand manufacturers are provided a legal monopoly on their invention, which can enable favorable price-setting. *Id.* at 1.

Patent protection is so valuable to pharmaceutical companies that entering the period following patent expiration is known as going off the "patent cliff." [Namenda III, 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at \\*3](#). In 2012, patent cliffs collectively caused the entire U.S. pharmaceutical market to shrink [\*17] by 1%. Eric Sagonowsky, *Big Pharma faces \$26.5B in losses this year as next big patent cliff looms, analyst says*, FiercePharma, Apr. 21, 2017, <https://www.fiercepharma.com/pharma/big-pharma-faces-26-5b-patent-loss-threats-year-analyst-says>.

The Hatch-Waxman Act allows a brand-name drug manufacturer to extend any patent submitted as part of an NDA for an additional five years, to compensate for the time elapsed during the FDA's approval process. [35 U.S.C. § 156; Namenda III, 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at \\*3](#).

**Exclusivity.** Both the FFDCA and the Hatch-Waxman Act also provide for statutory periods of "marketing exclusivity" in connection with the approval of certain NDAs. [Otsuka Pharm. Co., Ltd. v. Price, 869 F.3d 987, 988 \(D.C. Cir. 2017\)](#); see also FAQs at 3. "When a drug earns a period of exclusivity, the Food and Drug Administration must withhold approval of certain competing drugs," including generics, "if various conditions are satisfied." [Otsuka Pharm., 869 F.3d at 988](#).

Not all NDAs will qualify for statutory exclusivities. For example, the FDA may grant exclusivities for, among other things, a new chemical entity (five years), [21 C.F.R. § 314.108](#); or an "orphan" drug intended to treat rare diseases (seven years), [21 C.F.R. § 316.31](#). See FAQs at 3. The FDA may also grant additional exclusivities later in the life of a drug, well after submission of the initial NDA. For instance, the FDA may [\*18] grant a six-month period of exclusivity for studying the drug's efficacy in children ("pediatric exclusivity"). [21 U.S.C. § 355a; Namenda II, 787 F.3d at 644](#).

**Interaction.** To a degree, exclusivity interacts with patent protection. See FAQs at 4. For example, when a brand manufacturer submits an NDA to the FDA, it must list any patents that claim drugs, drug products, or methods of use that are the subject of that NDA. See [In re Actos End Payor Antitrust Litig., No. 13-cv-9244, 2015 U.S. Dist. LEXIS 127748, 2015 WL 5610752, at \\*1 \(S.D.N.Y. 2015\)](#) (Actos I). The FDA lists all existing patents and exclusivities in the "Orange Book." *Id.*; FAQs at 5.

Patent protection also interacts with exclusivity when a generic manufacturer seeks FDA approval to market a generic version of a branded drug that is still "on patent." Specifically, the Hatch-Waxman Act provides for a 180-day period of "patent challenge" exclusivity for the first generic manufacturer to file a certification with the FDA that contests the validity of the brand manufacturer's patent. [Namenda III, 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at \\*3](#); see also FAQs at 3. This period of exclusivity is valid against other generic manufacturers, although multiple filers may share the exclusivity period if they file on the same day. See [FTC v. Actavis, Inc., 570 U.S. 136, 174-75, 133 S. Ct. 2223, 186 L. Ed. 2d 343 \(2013\)](#) (Roberts, J., dissenting) (citing [21 U.S.C. § 355\(j\)\(5\)\(B\)\(iv\)\(II\)\(bb\)](#); FDA, Guidance for Industry: 180-Day Exclusivity When Multiple [\*19] ANDAs Are Submitted on the Same Day 4 (July 2003)). Patent challenge exclusivity is highly valuable, "possibly worth several hundred million dollars." [Actavis, 570 U.S. at 144](#) (citing C. Scott. Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, [81 N.Y.U. L. Rev. 1553, 1579 \(2006\)](#)).

To win the 180-day period of patent challenge exclusivity, a generic manufacturer must file an Abbreviated New Drug Application ("ANDA") with the FDA, which relies on the NDA submitted by the brand manufacturer to show the drug is safe and effective. [Actavis, 570 U.S. at 142](#). As part of this process, a generic manufacturer must certify that the generic drug "has the same active ingredients as, and is biologically equivalent" to the brand drug. *Id.* (internal citations omitted). In addition, and critical to gaining the 180-day exclusivity period, the first-filer generic manufacturer must also certify that the brand name drug is patented, but that the patent is invalid or the generic will not infringe it, a so-called "Paragraph IV" certification. [Id. at 143](#).

The Hatch-Waxman Act allows a brand manufacturer to treat the filing of a Paragraph IV certification as an infringing action and to sue the generic filer for patent infringement. *Id.* The filing of a patent [\*20] infringement action triggers an automatic, 30-month stay on the FDA's approval of the generic manufacturer's AND A. *Id.* During this time, however, the FDA may tentatively approve the AND A, such that the generic drug is set for final approval and launch after the 30-month stay expires. [Namenda IV, 2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244, at \\*4](#).

At this point, a generic manufacturer defending a patent infringement action based on its Paragraph IV certification has several options. First, it may defend the patent infringement action by arguing that the underlying patent is invalid or that its generic drug does not otherwise infringe the patent. If successful, a judgment in the infringement action results not only in the invalidation of the underlying patent or a finding of non-infringement but also entitles the generic manufacturer to the coveted 180-day exclusivity period. See Shashank Upadhye, *Generic Pharmaceutical Patent and FDA Law* §§ 28:9.50, 29:5 (2018-19 ed.).

Second, a generic manufacturer may launch its generic product "at risk," once it has gained FDA approval and the 30-month stay has expired, but while the litigation is ongoing. *Id.* § 32.

Third, the brand manufacturer and generic manufacturer may enter into a settlement agreement to resolve the litigation, which allows the generic manufacturer to extract [\*21] certain concessions from the brand manufacturer ("reverse payments"). See [Hemphill, supra, at 1568](#); see also [Actavis, 570 U.S. at 140-41](#). Settlement agreements containing reverse payments may raise antitrust scrutiny if the payments flowing from the brand manufacturer to the generic manufacturer are "large and unjustified." [Actavis, 570 U.S. at 158](#). Brand manufacturers are particularly incentivized to settle with first-filer generics because, under the Hatch-Waxman Act, no later-filing generic is eligible for the 180-day period of patent challenge exclusivity, thereby minimizing such "Paragraph IV" challenges.

### C. Drug Substitution Laws and Product Hopping

Apart from the federal Hatch-Waxman Act, state law regimes also facilitate generic competition and the provision of cheaper prescription drugs to consumers by allowing, or in some cases requiring, pharmacists to fill a prescription for a branded drug with a "therapeutically equivalent" generic drug. [Namenda IV, 2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244, at \\*4](#). States define therapeutic equivalence differently, but most use the comparatively strict definition adopted by the FDA. [2017 U.S. Dist. LEXIS 83446, \[WL\] at \\*4-\\*5](#). This definition only allows a pharmacist to substitute a generic drug if the FDA designates the generic as "AB-rated" in the Orange Book. [Namenda III, 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at \\*3](#).

As this Court has previously observed, "The requirement [\*22] that substituted drugs meet therapeutic equivalence standards, although intended to protect patients, allows brand-name drug manufacturers to 'game the system' through a practice known as 'product hopping.'" [Namenda IV, 2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244, at \\*5](#).

In a product hop, a brand manufacturer re-patents a slightly different formulation of the drug shortly before any generic competitors are legally allowed to enter the market. [Namenda II, 787 F.3d at 643](#) & n.2 (citing Alan Devlin, *Exclusionary Strategies in the Hatch-Waxman Context*, [2007 Mich. St. L. Rev. 631, 658 \(2007\)](#)). At its core, product hopping is regulatory arbitrage—taking advantage of the comparatively forgiving "improvement" standard under the federal patent laws and the relatively strict "therapeutically equivalent" standard under state drug substitution laws. See [Devlin, supra, at 657 n.139](#). Examples of product hops have included embedding the drug's active ingredient in a different inactive substrate, [In re Asacol Antitrust Litig., 323 F.R.D. 451, 462 \(D. Mass. 2017\)](#) (*Asacol II*); introducing a tablet in place of a capsule, [Mylan Pharm. Inc. v. Warner Chilcott Pub. Ltd. Co., 838 F.3d 421, 429 \(3d Cir. 2016\)](#); or re-apportioning the "scoring" lines on a tablet that allow patients to break the pill into smaller dosages, *id. at 429-30*.

Once the re-formulated product is re-patented, but before generic versions of the old formulation can legally enter the market and gain a foothold through state drug substitution laws, a [\*23] brand manufacturer may try to persuade physicians to prescribe their patients the new formulation (a "soft switch"). [Namenda II, 787 F.3d at 648](#).

In the alternative, a brand manufacturer might withdraw the old formulation from the market altogether or severely restrict access, forcing physicians to adopt the new formulation in order to avoid interruptions to their patients' medication regimens ("hard switch"). *Id.*

**HN2[]** A product hop raises antitrust scrutiny when it "coerces consumers and impedes competition." *Id. at 652.*

#### D. The Namenda Settlement Agreements

After entering into the June 2000 patent licensing and cooperation agreement with Merz, in December 2002 Forest submitted an NDA to the FDA for 5 mg and 10 mg memantine hydrochloride tablets for the treatment of Alzheimer's disease. (CAC ¶ 63.) The drug was based on Patent No. 5,061,703 (the "'703 patent"), which was obtained in 1991 and was set to expire on April 11, 2010. (*Id.* ¶¶ 4, 64.)

In October 2003, the FDA approved Forest's NDA for Namenda IR tablets and listed the '703 patent in the Orange Book. (*Id.* ¶¶ 64-65.)

On October 16, 2007, at least fourteen generic manufacturers filed AND As with Paragraph IV certifications for AB-rated generic formulations of Namenda IR. (*Id.* ¶ 69.) Beginning in January 2008, Forest [\*24] and Merz filed patent infringement lawsuits against these generic manufacturers, including the Generic Defendants, in the U.S. District Court for the District of Delaware. (*Id.* ¶¶ 70-71.) This triggered 30-month stays on these first-to-file AND As, which the IPP alleges would have begun to expire in April 2010. (*Id.* ¶ 72.)

Forest and Merz then obtained a patent extension on the '703 patent under the Hatch-Waxman Act. In March 2009, the '703 patent was extended for five years based on the duration of the FDA's approval process for the NDA. (*Id.* ¶ 67.)<sup>8</sup> This extended the '703 patent's expiration date from April 11, 2010 to April 11, 2015. (*Id.*)

Between July 2009 and December 2009, while the 30-month ANDA stays were in effect, Forest and Merz entered into settlement agreements with the Generic Defendants. (*Id.* ¶ 75.) Pursuant to these settlement agreements, the Generic Defendants agreed to delay market entry until as late as July 11, 2015. (*Id.* ¶ 76.)

All of the Generic Defendants received tentative approval of their AND As from the FDA between January 2010 and April 2010, and all had received final approval of their ANDAs by October 2011. (*Id.* ¶ 82-83.)

In 2014, Forest was granted an additional six months of pediatric exclusivity [\*25] for Namenda IR based on studies of the drug's efficacy in children with autism. (*Id.* ¶ 68.) This tacked an additional six months of statutory market exclusivity for Namenda IR onto the end of the '703 patent protection period. (*Id.*)

#### E. The "Hard Switch"

On August 21, 2009, "less than a month after it had announced the first wave of settlements with generics challenging the Namenda IR patent," Forest submitted an NDA for a once-a-day, extended release formulation of memantine hydrochloride, Namenda XR. (*Id.* ¶ 98.) The IPP alleges that the NDA did not demonstrate that Namenda XR was more efficacious than Namenda IR. (*Id.*)

The FDA approved the NDA for Namenda XR on June 21, 2010, but Forest did not launch the drug until June 2013. (*Id.* ¶¶ 99, 102.)

After the launch of Namenda XR, Forest used aggressive marketing to begin encouraging patients and physicians to switch from Namenda IR to Namenda XR. (*Id.* ¶ 105.) The IPP alleges that, when that "soft switch" strategy failed, Forest began implementing a strategy in February 2014 that involved discontinuing and/or severely limiting

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<sup>8</sup> It is not clear from the face of the IPP Complaint how Forest was able to obtain a five-year patent extension, the maximum permitted, when the FDA approval process for the Namenda IRNDA allegedly took only one year.

the distribution of Namenda IR. (*Id.* ¶ 95, 127-28.) This "hard switch" strategy included: (i) seeking to have the Centers for [\*26] Medicare and Medicaid Services ("CMS") remove Namenda IR from its reference list; (ii) signing an exclusive distribution agreement with a mail-order only pharmacy; and (iii) requiring physicians to certify that it was medically necessary for patients to take Namenda IR rather than Namenda XR. (*Id.* ¶ 95.) Forest planned to discontinue retail sales of Namenda IR in January 2015. (*Id.*)

In September 2014, New York State filed a complaint against Actavis and Forest alleging violations of the federal Sherman Antitrust Act and New York's Donnelly Act on the basis of the hard switch, and seeking to preliminarily enjoin the defendants from withdrawing Namenda IR from the market. Namenda II, 787 F.3d at 649.

In December of 2014, the U.S. District Court for the Southern District of New York (Sweet, J.) entered an order preliminarily enjoining Actavis and Forest from withdrawing Namenda IR from retail shelves. Namenda I, 2014 U.S. Dist. LEXIS 172918, 2014 WL 7015198, at \*46. The Second Circuit upheld the injunction. Namenda II, 787 F.3d at 663.

The enforcement action was followed by several private, follow-on suits seeking treble damages under federal and state antitrust laws, which are described below.

### III. Procedural History

The IP Action was filed in August of 2015 as a putative class action on behalf of:

All persons [\*27] or entities in the United States and its territories who indirectly purchased, paid and/or provided reimbursement for some or all of the purchase price for branded Namenda IR 5 or 10 mg tablets, or Namenda XR capsules, for consumption by themselves, their families, or their members, employees, insureds, participants, or beneficiaries, other than for resale, at any time during the period from April 14, 2010 and continuing until the anticompetitive effects of Defendants' unlawful conduct ceases (the "Class Period").

(CAC ¶ 146.)

The DP Action was filed the following month.<sup>9</sup> Both the IP Action and the DP Action were placed on this Court's docket as related actions shortly thereafter. (See 15-cv-7488, entry of Oct. 6, 2015.)

Like the enforcement action, the private plaintiffs sought damages on the basis of the "hard switch," but they also alleged damages stemming from the settlement agreements entered into with generic manufacturers. (See, e.g., CAC ¶¶ 84-86.)

Early in the litigation, this Court granted the parties' request for consolidated briefing on the motions to dismiss both the DP and IP Actions. (Dkt. No. 64).<sup>10</sup> Thereafter, Actavis, Forest, and Merz submitted a single memorandum of law in support [\*28] of their motion to dismiss the DP and IP Actions. (Dkt. No. 85 or "Forest Br.") The Generic Defendants, who had not been named in the DP Action, submitted a separate memorandum of law in support of their motion to dismiss the IP Action. (Dkt. No. 81 or "Gen. Defs. Br.")

Roughly speaking, Actavis, Forest, and Merz's briefing challenged the sufficiency of the facts alleged in the DPPS' and IPP's Complaints as a whole, while the Generic Defendants' briefing challenged the IPP's ability to bring individual claims as a matter of state law. Each group of Defendants expressly adopted the arguments of the other group, to the extent applicable, in full.

<sup>9</sup> Plaintiff Rochester Drug Co-Operative, Inc., also filed a complaint on behalf of direct purchasers that did not name the Generic Defendants. (15-CV-10083, Dkt. No. 1.) On January 26, 2016, Plaintiffs JM Smith Corporation and Rochester Drug Co-Operative, Inc. stipulated to consolidating the cases. (15-cv-7488, Dkt No 65.)

<sup>10</sup> As discussed, Merz did not join the motion for consolidated briefing, (Dkt. No. 63 at 2 n. 1), but later joined Actavis and Forest's brief, (Dkt. No. 85).

In the IP Action, the IPP filed two separate memoranda of law in opposition to (i) Actavis, Forest, and Merz's motion and (ii) the Generic Defendants' motion. (Dkt. No. 87 or "IPP Resp. to Forest Br."; Dkt. No. 88 or "IPP Resp. to Gen. Defs. Br.".) Actavis, Forest, and Merz filed one reply, and the Generic Defendants filed another. (Dkt No. 90 or "Forest Reply"; Dkt. No. 89 or "Gen. Defs. Reply.")

On September 13, 2016, this Court issued an order (1) denying in part and granting in part Actavis, Forest, and Merz's motion to dismiss the DP Action; [\*29] (ii) denying without prejudice Actavis, Forest, and Merz's and the Generic Defendants' motions to dismiss the IP Action; and (iii) placing the 123 state law claims from the IP Action on the Court's suspense calendar pending resolution of the federal antitrust claims in the DP Action.<sup>11</sup> [Namenda III, 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at \\*16-\\*17.](#)

The DP Action proceeded through discovery, summary judgment, and class certification. See [Namenda IV, 2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244](#); [Namenda V, 331 F. Supp. 3d 152, 2018 WL 3970674](#). Defendants in the DP Action recently sought and were denied leave to appeal this Court's grant of class certification. (15-cv-7488, Dkt. No. 600.)

On September 10, 2018, after the parties to the DP Action expressed interest in mediation, this Court lifted its stay of the IP Action and referred the parties to Magistrate Judge Lehrburger for supervision of "such non-duplicative discovery as is necessary to get the parties to the IPP case up to speed[.]" (Dkt. No. 122 at 2.) The order of September 10, 2018 acknowledged that the 123 state law claims in the IP Action were the subject of a pending motion to dismiss and had yet to be addressed. (*Id.*)

Subsequently, Actavis, Forest, Merz, and the Generic Defendants filed renewed motions to dismiss the IP Action, along with supplemental briefing. (Dkt. No. 131-1 or "Gen. Defs. [\*30] Suppl. Br."; Dkt. No. 133 or "Forest Suppl. Br."; Dkt. No. 152 or "IPP Resp. to Forest Suppl. Br."; Dkt. No. 158 or "IPP Resp. to Gen. Defs. Suppl. Br."; Dkt. No. 159 or "Forest Suppl. Reply"; and Dkt. No. 160 or "Gen. Defs. Suppl. Reply.") Defendants again divided the briefing, with Actavis, Forest, and Merz focusing on the sufficiency of the factual allegations regarding the underlying anticompetitive conduct, and the Generic Defendants briefing the requirements of each state's laws in detail.

Presently before the Court are the motions of (1) Actavis, Forest, and Merz and (2) the Generic Defendants to dismiss all 123 state law claims in the IP Action.

## DISCUSSION

### IV. Standard of Review

**HN3** In deciding a motion to dismiss pursuant to [Rule 12\(b\)\(6\)](#), the Court must liberally construe all claims, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. See [Cargo Partner AG v. Albatrans, Inc., 352 F.3d 41, 44 \(2d Cir. 2003\)](#); see also [Roth v. Jennings, 489 F.3d 499, 510 \(2d Cir. 2007\)](#).

To survive a motion to dismiss, "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" [Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#) (quoting [Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#)). "A claim has facial

<sup>11</sup> This Court had previously ordered that "the Indirect Purchaser Plaintiff's claims are severed and placed on the Court's suspense calendar." [Namenda III, 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at \\*17](#) (emphasis added). The use of the word "sever," however, did not connote that the cases had been consolidated under [Rule 42\(a\)](#) or joined for purposes of [Rules 18 and 19](#).

plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable [\*31] inference that the defendant is liable for the misconduct alleged." [Iqbal, 556 U.S. at 678](#) (citing [Twombly, 550 U.S. at 556](#)).

Finally, a motion to dismiss must be supported by "information contained in the 'four corners' of the complaint." [Hayden v. Cty. of Nassau, 180 F.3d 42, 54 \(2d Cir. 1999\)](#). This principally includes facts alleged in the complaint and materials attached to or incorporated by reference into the complaint. [Kramer v. Time Warner Inc., 937 F.2d 767, 773 \(2d Cir. 1991\)](#). It also includes information of which the court takes judicial notice. *Id.*

## V. Count One: Monopolization Under the Laws of 27 States Against Actavis, Forest, and Merz

The IPP first brings 27 separate state law claims grouped under the heading "Count One: Monopolization Under State Law." (CAC at 46.) These 27 state laws are all state antitrust or fair competition laws. (CAC ¶ 201.) The IPP asserts these claims against Actavis, Forest, and Merz, but not against the Generic Defendants. (CAC ¶ 201.)

Count One alleges unlawful monopolization based on two separate, anticompetitive acts: (i) the "hard switch" from Namenda IR to Namenda XR and (ii) the "pay to delay" settlement agreements with generic competitors. (CAC ¶¶ 193-96.)

The IPP alleges that both of these acts were part of an "overall scheme," (CAC ¶ 195), perpetuated to "maintain and extend [Forest's] monopoly power in [\*32] the memantine hydrochloride market," (CAC ¶ 197). In turn, "Forest's unlawful anticompetitive scheme to prevent, delay, and/or minimize the success of the introduction into the United States marketplace of any generic versions of Namenda IR enabled Forest to continue charging supracompetitive prices for memantine hydrochloride without a substantial loss of sales." (*Id.*)

The bulk of the parties' briefing is directed to this Count and to Count Two, for conspiracy to monopolize.

Actavis, Forest, and Merz bring a full arsenal of arguments to dismiss Count One, *viz.:*

- Judge Sweet's preliminary injunction in the earlier enforcement action prevented any "hard switch" from Namenda IR to Namenda XR from occurring, and in any case the IPP will be unable to offer any evidence that its plan participants or any member of the Class switched to Namenda XR as a result of the withdrawal announcement, (Forest Br. at 15-34);
- The IPP has expressly disclaimed that it is relying on a theory of unlawful "reverse payments" under [Actavis, 570 U.S. at 158](#), to show anticompetitive conduct with respect to the settlement agreements, and, even if the IPP were to rely on such a theory, it cannot plausibly allege that any of the reverse [\*33] payments made pursuant to the agreements were improper, (Forest Br. at 34-60);
- The IPP's "injuries" caused by the settlement agreements are purely speculative, (Gen. Defs. Br. at 26);
- Because this Court previously dismissed the DPPs' claim for an "overarching scheme," and because the IPP has failed to plead any independently anticompetitive conduct with respect to either the hard switch or the settlement agreements, this Count must be dismissed, (Forest Br. at 60-62); and
- The antitrust laws of 26 states have limitations periods of five years or fewer, making it "likely" that all of the state law claims asserted under Count One are time-barred, (*id.* at 65 n.42).

Actavis, Forest, Merz, and the Generic Defendants also argue for the dismissal of particular state law claims that are part of Count One, *viz.:*

- The IPP lacks Article III standing to assert claim in states where it has not made purchases and thereby suffered injury-in-fact, which are all but nine states, (Forest Br. at 65-66);

- *Illinois Brick* bars the IPP's claims in five states<sup>12</sup> that have not enacted so-called "*Illinois Brick* repealer statutes," (Gen. Defs. Suppl. Br. at 10-11);
- The IPP has failed to satisfy statutory requirements in four [\*34] states that any plaintiff first notify the state's attorney general before filing a private damages suit, (Gen. Defs. Suppl. Br. at 11-13); and
- Claims for unilateral monopolization are actionable under the laws of three states, (Forest Br. at 82).

## A. The IPP's Underlying Factual Allegations State a Claim for Monopolization

### 1. The IPP Has Stated a Claim for Monopolization Based on the Hard Switch from Namenda 1R to Namenda XR

**HN4** "Well-established case law makes clear that product redesign is anticompetitive when it coerces consumers and impedes competition." *Namenda II*, 787 F.3d at 652. While withdrawing an old product and substituting a new product does not constitute anticompetitive conduct *per se*, "when a monopolist combines product withdrawal with some other conduct, the overall effect of which is to coerce consumers rather than persuade them on the merits, and to impede competition, its actions are anticompetitive[.]" *Id. at 654* (internal citations omitted).

As part of Count One, the IPP alleges that the IPP "unlawfully switched the conversion of the memantine hydrochloride market from Namenda IR to Namenda XR" through a variety of anticompetitive measures, including "(i) publicizing to doctors, caregivers [\*35] and the general public that the discontinuation of Namenda IR was imminent; (ii) significantly limiting or attempting to limit the distribution of Namenda IR; and (iii) requesting that CMS remove Namenda IR tablets from the 2015 Formulary Reference File," all while knowing that Namenda XR was neither safer nor more effective than Namenda IR. (CAC ¶ 195.)

In its original, consolidated briefing, Actavis, Forest, and Merz argued that both the DPPs and the IPP had failed to state claims for the hard switch because Judge Sweet's preliminary injunction in the earlier enforcement action, *Namenda I*, had prevented the withdrawal of Namenda IR and therefore any alleged exclusionary conduct from occurring. (Forest Br. at 15.) Defendants also argued that both the DPPs and the IPP had failed to allege injury in fact and to adequately plead antitrust injury resulting from the announcement that Forest was discontinuing Namenda IR. (*Id.* at 30.) Defendants have renewed these arguments in supplemental briefing. (Forest Suppl. Br. at 10.)

#### a) Actavis and Forest Are Collaterally Estopped From Arguing That the Anticompetitive Hard Switch Took Place

**HN5** "Collateral estoppel, or issue preclusion, prevents the relitigation [\*36] of an issue that was raised, litigated, and actually decided by a judgment in a prior proceeding." *Jim Beam Brands Co. v. Beamish & Crawford Ltd.*, 937 F.2d 729, 734 (2d Cir. 1991). In order to establish that an issue was determined in a former adjudication, a party asserting collateral estoppel must establish four things: (1) the issues in the prior proceeding and the current proceeding are identical; (2) the issue raised in the current action was in fact actually decided in the prior proceeding; (3) there was full and fair opportunity to litigate the issue in the prior proceeding; and (4) the issue previously litigated and decided was necessary to support a valid and final judgment on the merits. *In re PCH Assoc.*, 949 F.2d 585, 593 (2d Cir. 1991).

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<sup>12</sup> Generic Defendants also argue that *Illinois Brick* bars the IPP's claims under two additional states—Illinois and Oregon—under Count One. (Gen. Defs. Suppl. Br. at 10-11.) However, the IPP Complaint does not allege Illinois and Oregon claims under Count One; instead, it alleges them only under Count Two. (See CAC ¶ 201.) This Court therefore addresses the Illinois and Oregon arguments in the portion of the opinion that discusses Count Two.

After discovery in the parallel DP Action had closed, the DPPs sought partial summary judgment on the first count of their Complaint, which alleged that the Defendants' February 2014 announcement of the upcoming withdrawal of Namenda IR from the market constituted unlawful monopolization in violation of Section 2 of the Sherman Act. Namenda IV, 2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244, at \*9.

In *Namenda IV*, this Court ruled, as against Actavis and Forest, that they were collaterally estopped from "relitigating the questions of (1) whether [Forest] possessed monopoly power over the U.S. memantine market up until the entry of generic competition; [\*37] (2) whether its February 2014 announcement of the upcoming discontinuation of Namenda IR was coercive and anticompetitive; and (3) whether Forest had any non-pretextual procompetitive justification for its illegal conduct." 2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244, at \*9-\*16. However, this Court denied the DPPs' motion for collateral estoppel with respect to the issue of whether plaintiffs had suffered an antitrust injury, *i.e.*, been forced to switch from Namenda IR to Namenda XR as a result of Forest's withdrawal announcement. 2017 U.S. Dist. LEXIS 83446, [WL] at \*16.<sup>13</sup>

The IPP sought the same relief in connection with the IP Action, (Dkt. Nos. 112, 113), which the Court stayed, (Dkt. No. 120 at 1).

The stay has now been lifted, and the motion is ripe for decision.

The Court grants the motion. For the reasons discussed in Namenda IV, 2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244, at \*9-\*16, Actavis and Forest are collaterally estopped from relitigating the issues of "(1) whether [Forest] possessed monopoly power over the U.S. memantine market up until the entry of generic competition; (2) whether its February 2014 announcement of the upcoming discontinuation of Namenda IR was coercive and anticompetitive; and (3) whether Forest had any non-pretextual procompetitive justification for its illegal conduct." 2017 U.S. Dist. LEXIS 83446, [WL] at \*16. The same findings with respect [\*38] to *Namenda I* and *II* that created estoppel in that case apply equally here.

By the same token, Actavis and Forest are not estopped from making arguments related to the IPP's injury. Their injury argument is addressed in subpart c), *infra*.

**b) Even Though Merz Is Not Collaterally Estopped From Arguing That the Hard Switch Took Place, the IPP Nonetheless States a Claim That the Hard Switch Occurred**

Merz, the only other party named in Count One, is not collaterally estopped from arguing that the IPP fails to state a claim against it because the product hop did not occur. (See Dkt. No. 116 at 1.)<sup>14</sup> Merz was not a party to the action in *Namenda I* or *Namenda II*, and the IPP did not move for collateral estoppel with respect to Merz in this action. (See Dkt. No. 113.)

Nonetheless, for the same reasons discussed in *Namenda III*, I find that the IPP has stated a plausible claim that the product hop occurred.

<sup>13</sup> Later, in *Namenda V*, this Court ultimately found that the DPPs, which were drug wholesalers, could rely on classwide economic models at trial to show that they had suffered antitrust injury. Namenda V, 331 F. Supp. 3d at 177. In addition, although the DPPs had originally moved for collateral estoppel on Count One against Actavis, Forest, and Merz, (15-cv-7488, Dkt. No. 134), the parties subsequently stipulated to the dismissal of Merz from the action, (15-cv-7488, Dkt. No. 207). In an accident of timing, therefore, Merz was dismissed after the parties had submitted briefing on the collateral estoppel motion but before this Court had ruled on that motion.

<sup>14</sup> Merz would also not be collaterally estopped from arguing that, under the facts alleged in the IPP Complaint, it had absolutely nothing to do with the hard switch. However, likely because Merz chose to be represented by the same counsel as Actavis and Forest, and likely because these parties chose to submit a consolidated brief in support of their motions to dismiss both the DPP and IPP Complaints, Merz never raised this argument separate and apart from Actavis and Forest. (See Forest Br. at 15-33.) The Court therefore does not address it.

In *Namenda III*, I found it persuasive for purposes of the DPPs' federal claims that both the *Namenda I* and *Namenda II* courts had identified exclusionary conduct that occurred prior to the entry of the preliminary injunction. See [\*Namenda III, 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at \\*10-\\*11\*](#). As a result, I held that the DPPs had alleged an injury on the [\*39] basis that "they were forced to pay for certain patients' memantine treatment at brand-name prices because these patients switched to Namenda XR *prior* to the entry of the injunction." [\*Namenda III, 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at \\*12\*](#) (emphasis in original). Plaintiffs' injury, the Court found, was that they were forced to pay for Namenda XR "after generic entry—when absent Defendants' anticompetitive conduct, their patients' prescriptions would have been filled by a far cheaper generic." *Id.* (emphasis in original). In other words, the DPPs had adequately pled that Forest's announcement discontinuing Namenda IR, as well as the tactics that accompanied the announcement, was sufficiently coercive.

The very same reasoning applies to the IPP Complaint. The IPP alleges it was injured because it was deprived of the opportunity to buy lower-priced generic Namenda IR and forced to buy more expensive branded Namenda XR. (CAC ¶ 202.) Further, like the DPP Complaint, the IPP Complaint alleges that once patients switched their prescriptions as a result of the "hard switch" tactics, "reverse commuting" back to Namenda IR was highly unlikely. (*Id.* ¶ 126.) These allegations are substantively identical to those in the DPP Complaint, and they therefore [\*40] survive a motion to dismiss for the same reasons articulated by this Court in [\*Namenda III\*](#).

### **c) The IPP Sufficiently Pleads That It Was Injured as a Result of the Hard Switch**

According to Actavis, Forest, and Merz, the IPP has failed to allege a cognizable antitrust injury based on Forest's announcement that it was discontinuing the Namenda IR formulation, because the IPP will not be able to establish "antitrust injury," i.e., that these tactics actually caused consumers to switch from Namenda IR to Namenda XR. (Forest Suppl. Br. at 10.)

"Antitrust injury" is a component of antitrust standing under federal law. "Unlike the United States government, which is authorized to sue anyone violating the antitrust laws, a private antitrust plaintiff must show 'standing' to sue" in a federal antitrust case. Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law*, § 3.01[A] (4th ed. 2018 suppl.). Among other standing requirements, a plaintiff must show that it has suffered "antitrust injury," which is "defined as the kind of injury that the antitrust laws were intended to prevent and 'flows from that which makes defendants' acts unlawful.'" *Id.* (citing [\*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 \(1977\)\*](#)).

Previously, with respect to the DP Action, [\*41] this Court held that the DPPs would be required to show at the summary judgment stage that "patients switched to Namenda XR because of the announced withdrawal of Namenda IR . . . prior to the injunction." [\*Namenda III, 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at \\*12\*](#). However, that holding related to the *wholesaler plaintiffs'* claims *under federal law*, which unquestionably requires that a private plaintiff demonstrate antitrust standing before he can proceed with his claim.

Here, however, the IPP alleges no claims under federal law. So that argument fails as a matter of law. To the extent Actavis, Forest, and Merz raise the federal requirement of "antitrust injury" as grounds for dismissal of the 27 state law claims in Count One, this argument is irrelevant.

Actavis, Forest, and Merz have not briefed whether each of the 27 state laws under which the IPP brings monopolization claims each contains a similar "antitrust injury" or "antitrust standing" requirement. (See Forest Suppl. Br. at 10-11.) [\*McLaughlin v. Am. Tobacco Co., 522 F.3d 215 \(2d Cir. 2008\)\*](#), cited by Actavis, Forest, and Merz, is inapposite, not the least because it is a RICO case—with federal mail and wire fraud as the predicate acts—and not an indirect purchaser case based on state antitrust laws. *Id. at 222*. Therefore, I conclude that they have no [\*42] basis to argue that the IPP has not sufficiently alleged injury under any of the 27 state law monopolization theories.

In supplemental briefing, Actavis, Forest, and Merz argue for the first time that the IPP Complaint does not plausibly allege any antitrust injury because the plaintiffs' expert in the DP Action "disclaimed any need to assess why

patients switched to Namenda XR." (Forest Suppl. Br. at 10.) They highlight the fact that one of the DPPs' experts in that Action, Dr. Russell Lamb, calculated "aggregate overcharge damages" rather than "individualized analysis" for purposes of class certification. [Namenda V, 331 F. Supp. 3d 152, 2018 WL 3970674, at \\*10](#). In the DP Action, the Court found that this was sufficient to defeat Defendants' motion for summary judgment, because direct purchasers would have been indifferent to individual consumers' choices and instead would have paid attention to the market as a whole. [331 F. Supp. 3d 152, Id. at \\*30](#).

The methodology used by the DPPs' expert—namely, evidence on a motion for summary judgment in the DP Action—is of no relevance in deciding whether the IPP has pleaded (not proven) a state antitrust violation. This argument is a red herring and entirely unpersuasive on a motion addressed to the pleadings.

## **2. The IPP States [\*43] a Claim for Monopolization Based on the Settlement Agreements**

**HN6** As discussed, when a patent holder provides favorable terms to an alleged infringer as part of a settlement agreement, this is called a "reverse payment." [Actavis, 570 U.S. at 141](#). The Supreme Court has held that "a reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects." [Id. at 158](#). Reverse payments comprised of cash, nominally conferred as compensation for avoided litigation costs, are most suspect, but reverse payments may also provide value in the form of early entry licenses, a period of exclusivity, or cash for avoided litigation costs. [King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp., 791 F.3d 388, 403 \(3d Cir. 2015\)](#) ("We do not believe Actavis's holding can be limited to reverse payments of cash ."); accord [In re Loestrin 24 Fe Antitrust Litig, 814 F.3d 538, 552 \(1st Cir. 2016\)](#).

As mentioned above, Count One for monopolization under the laws of 27 states alleges that, in addition to engaging in an anticompetitive hard switch, Actavis, Forest, and Merz "entered into unlawful agreements" with generic manufacturers "to settle patent infringement suits as part of an overall anticompetitive scheme." (CAC ¶¶ 193.)

Actavis, Forest, and Merz have moved to dismiss Count One on the ground that the IPP has failed to state a claim that the [\*44] settlement agreements were, in and of themselves, unlawful. (Gen. Defs' Suppl. Br. at 3; Forest Suppl. Br. at 4.)

### **a) The IPP Brings a Reverse Payments Case Under Actavis**

Defendants first argue that the IPP actually disclaims reliance on a reverse payment theory under [Actavis, 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343](#). (Gen. Defs. Suppl. Br. at 3; Forest Suppl. Br. at 4.) They support this argument with several quotations from the IPP's brief in opposition to their original motions to dismiss. (Gen. Defs. Suppl. Br. at 4; Forest Suppl. Br. at 4.) These include the following statements made by the IPP, among others: "Forest desperately tries to convert the [IPP]'s theory of its case into a reverse payment settlement case, which it is not." (IPP Resp. to Forest Br. at 25.) "The [IPP] has not pled any reverse payment agreement claims." (*Id.*)

However, despite this language, the IPP argues, in this very same brief, "Even under an Actavis analysis, the [IPP]'s Complaint survives. See Directs' Brief, which the [IPP] adopts and incorporates by reference." (*Id.* at 27.) Over several pages, the IPP then fleshes out a claim under *Actavis*, including that the early entry licenses should trigger scrutiny because the negotiated entry dates fell after expiration [\*45] of the '703 patent and only three months before \$=P33 expiration of the pediatric exclusivity period, (*id.* at 27) and that the acceleration clauses in the settlement agreements, like most favored nation clauses, constitute reverse payments under *Actavis*, (*id.* at 29). In supplemental briefing, moreover, the IPP argued that the payments in the settlement agreements were unlawful because they exceeded expected litigation costs. (IPP Resp. to Forest Suppl. Br. at 10.)

So the pertinent question is: does the CAC allege facts that adequately plead a claim under *Actavis*, even if the IPP identified the proper legal theory only in the alternative?

**b) The IPP States a Claim for Unlawful Reverse Payments in the Form of Early Entry Licenses, Cash Payments, and Unspecified Benefits**

Defendants argue—as they did in their original motion to dismiss—that early entry licenses are *per se* pro-competitive and do not constitute reverse payments in violation of the rule laid out in *Actavis*. (Forest Suppl. Br. at 6.) In particular, Defendants point out that the early entry licenses permitted the Generic Defendants to enter three months before the pediatric exclusivity period expired. (Gen. Defs. Suppl. Br. at 5.)

Defendants also argue that [\*46] any monetary payments the Generic Defendants received as part of the settlement agreements constituted avoided litigation costs, as lawfully permitted by *Actavis*. (Forest Suppl. Br. at 6-7; Gen. Defs. Suppl. Br. at 5-7.)

Finally, they state that the IPP's allegations with respect to the reverse payments are bare and conclusory, and they therefore must be dismissed under [Twombly, 550 U.S. at 557](#). (Forest Suppl. Br. at 6; Gen. Defs. Suppl. Br. at 6-7.)

In *Namenda III*, this Court held that the DPPs had stated a claim against *Actavis*, Forest, and Merz based on the reverse settlement agreements with generic manufacturers. [2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at \\*15](#). As part of that decision, the Court said it could not determine as a matter of law that the settlement agreements were *not* anticompetitive simply because they allowed for entry prior to the end of exclusivity. *Id.* The Court distinguished *Actos 1*, [2015 U.S. Dist. LEXIS 127748, 2015 WL 5610752, at \\*13](#), which had found that certain early entry licenses did not constitute anticompetitive reverse payments, because the plaintiffs in that case had not alleged a two-step anticompetitive scheme involving a post-settlement product hop. *Id.*

This same reasoning is applicable to the instant motion. Defendants have not cited any new, controlling case law which [\*47] holds that, as a matter of law, early entry licenses are immune from antitrust scrutiny. And as discussed above, the opinions in [King Drug, 791 F.3d at 403](#), and [Loestrin 24 Fe, 814 F.3d at 552](#), suggest that no item of value that was transferred from plaintiff to defendant is immune from antitrust scrutiny as a matter of law. [HN7](#) Rather, all benefits conferred as part of a settlement agreement are subject to antitrust review under the Rule of Reason. See also 2 William C. Holmes, *Intellectual Property and Antitrust Law* § 38:3 (Sept. 2018 update) (recent decisions on reverse payments "appear to favor a burden-shifting analysis keyed into the size of the reverse payment, proof of demonstrated anticompetitive effects, and the presence or absence of plausible justifications for the payment, with the trier balancing anticompetitive effects against procompetitive justifications.").

Regarding the alleged cash payments for avoided litigation costs, the Court held in *Namenda III* that *Actavis* required courts to compare a given payment to estimated future litigation costs and to "consider whether a payment 'reflects traditional settlement considerations, such as avoided litigation costs or fair value for services' to determine if it was justified." [\*48] [2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at \\*14](#) (internal quotation omitted). "These intrinsically fact-based determinations," the Court found, "cannot be made on a pre-answer motion to dismiss." *Id.* The Court also rejected Defendants' argument that the FTC had created a universal safe harbor for litigation costs up to \$7 million. *Id.* at 29.

*Actavis*, Forest, and Merz now argue for the first time in supplemental briefing that "the FTC has subsequently extended the safe harbor to additional reverse payment consent orders." (Forest Suppl. Br. at 7). The Court has read these consent orders. They do exclude "compensation for saved future litigation expenses of up to \$7 million." See, e.g., Stip. Arder at 3-4, *FTC v. Allergan*, No. 17-cv-312 (N.D. Cal. Jan. 23, 2017), ECF No. 4. But they do not announce a Shift in FTC policy that would automatically immunize all payments under \$7 million in all lawsuits and contexts from allegations of anticompetitive conduct under *Actavis*.

Finally, the Court disagrees with the Defendants that the IPP has not met its burden under *Twombly* with respect to the reverse payments simply because the Complaint does not estimate the value of the payments or anticipated litigation costs. (Gen. Defs. Suppl. Br. at 6.) The [\*49] Complaint alleges that the Generic Defendants "very likely received something of value in exchange for the agreement to delay entry," (CAC ¶ 76) and no more is required at the motion to dismiss stage. [HN8](#) Courts do not "require that the plaintiffs provide precise figures and

calculations at the pleading stage" because "very precise and particularized estimates of fair value and anticipated litigation costs may require evidence in the exclusive possession of the defendants, as well as expert analysis." Loestrin, 814 F.3d at 552; see also In re Opana ER Antitrust Litigation, 162 F. Supp. 3d 704, 718 (N.D. Ill. 2016) ("precise valuation may require discovery").

**c) The IPP Sufficiently Alleges That It Was Injured as a Result of the Settlement Agreements.**

Finally, Defendants argue that the IPP fails to adequately plead that the settlement agreements caused it antitrust injury. (Gen. Defs. Br. at 26.) The IPP's injuries are too speculative, they argue, because "Plaintiff's sole theory of harm . . . is that consumers would have been able to purchase lower-price generic products earlier" had the litigation not settled. (*Id.*) Obviously, this would have lowered the amount the IPP would have to reimburse individual consumers who were beneficiaries under its plans.

The IPP alleges that, absent the unlawful [\*50] settlement agreements, one of three events would have occurred that would have allowed for earlier entry of generic Namenda: (i) the generics would have prevailed in the patent litigation against Forest and Merz; (ii) the Generic Defendants would have launched "at risk" prior to the resolution of the patent litigation; or (iii) Forest and Merz would have settled the litigation legally with an earlier generic entry date. (CAC ¶ 81.)

The IPP's theory is similar to that of the DPPs, and in *Namenda III, 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at \*15*.

Specifically, with respect to the first early entry scenario, this Court held that, while the DPPs had alleged no facts to suggest that Forest's and Merz' s patent was invalid or that the Generic Defendants would have prevailed in litigation, this could be left to the summary judgment stage. *Id.* ("To survive a motion for summary judgment, [the DPPs] Will have to substantiate these allegations with evidence suggesting that the settlement agreements did, in fact, delay generic entry and that the delay had the effect of allowing Forest to complete the hard switch."). There is no [\*51] reason this Court should now find otherwise with respect to the CAC in the IP Action.

With respect to the second possible early entry scenario, an "at risk" launch, the IPP has alleged that the FDA tentatively approved the ANDAs of several of the generic companies in early 2010, (CAC ¶ 82, 83), and that an unusually large number of generic manufacturers (14) submitted ANDAs with Paragraph IV certifications for Namenda IR, as compared to other branded drugs, (*id.* ¶ 69). Defendants argue that this is insufficient to show that an "at risk" launch was anything more than speculative, particularly given the expense of "at risk" launches and the fact that the Delaware court had issued claim construction opinions in the patent litigation that were unfavorable to the generic manufacturers. (Forest Br. at 41-42.) Again, however, this Court heard these very same arguments in *Namenda III* and found that they were more appropriately determined after discovery at the summary judgment stage. 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at \*15.

Finally, with respect to the third, "alternative settlement" theory, the IPP alleges that, in the absence of unlawful settlement agreements that caused the Generic Defendants to act against their self-interest [\*52] when settling, earlier entry would have been possible. (CAC ¶ 84.) Defendants argue that this impermissibly second guesses an otherwise pro-competitive settlement. (Forest Br. at 44 ("Plaintiffs [sic] cannot premise an antitrust theory on the claim that they [sic] could imagine a different agreement that right have been even more procompetitive.") (emphasis in original).) Once again, however, the Court rejected this argument in Namenda III, 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at \*15; and other courts have expressly recognized the viability of the "alternative settlement" theory in this type of litigation. In re Androgel Antitrust Litig. (No. II), No. 09-md-2084, 2018 U.S. Dist. LEXIS 99716, 2018 WL 2984873, at \*16 (N.D. Ga. June 14, 2018) (collecting cases).

This Court thus concludes that the IPP has stated a claim for monopolization on the basis of the settlement agreements.

### 3. The Court's Earlier Ruling Regarding the DPPs' Overarching Scheme Claim Does Not Support Dismissing Count One

Defendants next argue that the IPP fails to state a claim for an "anticompetitive scheme" under Count One. (Forest Suppl. Br. at 9.) Defendants argue that, because the IPP fails to state a claim for either an anticompetitive hard switch or for anticompetitive settlement agreements, it cannot use an "overarching scheme" claim to tie [\*53] this conduct together. But since this Court has already found that the IPP does state a claim on the basis of both the hard switch and the settlement agreements, this argument fails.

In addition, any ruling regarding the duplicative nature of the overarching scheme claim was confined to the DP Action. The DPPs had brought five claims, the first three of which alleged violations of [Section 2](#) of the Sherman Act. (15-cv-7488, Dkt. No. 29 ¶¶ 237-65.) In the DPP Complaint, Count I was based on the hard switch, and Count III was based on the settlement agreements. (*Id.*) Count II alleged an "overarching scheme" based on the hard switch and settlement agreements. (*Id.*) Counts I through III were all asserted against Actavis, Forest, and Merz. (*Id.*) In *Namenda III*, this Court held that the "overarching scheme" claim was duplicative of the claims related to the product hop and the settlement agreements. [2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at \\*16](#).

The IPP Complaint is structured differently. It contains four Counts, the first two of which allege antitrust offenses under the laws of 27 states. (CAC ¶¶ 191-210.) As discussed earlier in this opinion, Count One alleges monopolization against Actavis, Forest, and Merz based on both the hard switch and [\*54] the settlement agreements. (*Id.*) Count Two alleges a conspiracy to monopolize against all Defendants—Actavis, Forest, Merz, and the Generic Defendants—and bases those allegations on the settlement agreements but not on the hard switch. (*Id.*) Plainly, Counts One and Two are not duplicative because (i) they are asserted against different groups of defendants, and (ii) they are grounded in different conduct (conspiracy to monopolize being a separate theory from actual monopolization).

The Court therefore denies Actavis, Forest, and Merz's motion to dismiss Count One.

### 4. The Statute of Limitations Argument Is Inadequately Briefed With Respect to the IP Action

In their original brief in support of their motion to dismiss both the DP and IP Actions, Actavis, Forest, and Merz argued that the DPPs' claims were time-barred. (Forest Br. at 62-65.)

In *Namenda III*, this Court rejected Defendants' argument that the DPPs' claims based on the settlement agreements were time-barred because the DPP Complaint was filed more than five years after the last settlement agreement was executed. [2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at \\*16](#). Relying on [Berkey Photo Inc. v. Eastman Kodak Co., 603 F.2d 263, 295-96 \(2d Cir. 1979\)](#), it held that "a purchaser suing a monopolist for overcharges paid within the previous four years may [\*55] satisfy the conduct prerequisite to recovery by pointing to anticompetitive actions taken before the limitations periods"—but confined the damages period to four years before the filing of the DP Action based on the four-year statute of limitations in the Sherman Act. *Id.*

The original brief's discussion of the statute of limitations and the IPP Complaint was limited to two footnotes. The first footnote urged the Court to limit the IPP's damages "to four years prior to the filing of the Complaint—August 19, 2011, as opposed to the damages period asserted by IPPs [sic] as of April 14, 2010." (*Id.* at 62 n.41.)

This I cannot do. As Defendants themselves have acknowledged, the limitations period for each state's [antitrust law](#) is not uniformly four years. (See App'x 2.) Moreover, the parties have not briefed whether [Berkey Photo, 603 F.2d at 267-68](#), which considered the question of ongoing injury with respect to the Sherman Act, is applicable to antitrust claims brought under state law.

In their second footnote, Defendants argue: "[T]he antitrust laws of 26 states alleged by IPPs [sic], the consumer protection laws of 21 states alleged by IPPs [sic], and the unjust enrichment claims of 28 states alleged by the 1PP

have limitations periods [\*56] of five years or less (see Appendices 2-4), making it likely that these claims are also time-barred." (*Id.* at 65 n.42.)<sup>15</sup>

"Likely" is not a standard that results in dismissal. This Court cannot make a sweeping inference about statutes of limitation for state antitrust laws on the basic of federal cases interpreting the Sherman Act. Nor will it independently undertake a review each state's requirements, armed with only a number in the cell of a table and without the movants' having briefed the issues. If the issue is important enough to movants, they can call relevant cases under relevant laws to the court's attention. I will not do Defendants' work for them.

As a result, Actavis, Forest, and Merz's motion to dismiss—or, in the alternative, shorten—the Count One claims on statute of limitations grounds is denied without prejudice. However, as I will not immediately entertain a new motion, they will have to wait until discovery is over to make any renewed motion.

## B. The IPP States a Claim for Monopolization Under the Laws of Some States But Not Others

I now turn to Defendants' arguments regarding the individual state law claims alleged under Count One.

### 1. The IPP Has Article III Standing To Bring State Law Monopolization Claims on Behalf of Class Members Who Made Purchases in [\*57] Those States

Defendants argue that the IPP may bring class claims only under the laws of eleven states—Delaware, Florida, Georgia<sup>16</sup> Kansas, Nevada, New Jersey, New York, Pennsylvania<sup>17</sup>, South Carolina, and Virginia—because, as the Named Plaintiff, the IPP "lack[s] standing to assert claims under the laws of the states in which they [sic] do not reside or in which they [sic] suffered no injury." (Forest Br. at 65-66; Gen. Defs. Br. at 32-33.)

In supplemental briefing, however, Defendants concede that, pursuant to the Second Circuit's recent ruling in *Langan v. Johnson & Johnson Consumer Cos.*, 897 F.3d 88, 96 (2d Cir. 2018), this is a "question of predominance under [Rule 23\(b\)\(3\)](#), not a question of standing under Article III." (Gen. Defs. Suppl. Br. at 9 (quoting *Langan*, 897 F.3d at 96).)

In *Langan*, which came before the Second Circuit on review of a grant of class certification, the Second Circuit denied Defendants' motion to de-certify the class and dismiss the case because the named plaintiff had not suffered injury-in-fact in each state where she asserted claims:

[W]e write to make explicit what we previously assumed in *In re Foodservice Inc. Pricing Litigation*, 729 F.3d 108 (2d Cir. 2013): as long as the named plaintiffs have standing to sue the named defendants, any concern about whether it is proper for a class to include out-of-state, nonparty class members [\*58] with claims subject to different state laws is a question of predominance under [Rule 23\(b\)\(3\)](#), *id.* at 126-27, not a question of 'adjudicatory competence' under Article III[.]

[897 F.3d 88, 93 \(2d Cir. 2018\)](#). Since *Langan*, a number of district court opinions have followed its reasoning to deny motions to dismiss state law claims on Article III standing grounds because the named plaintiff did not make in-state purchases and thereby suffer injury-in-fact in those states. See, e.g., *Daniel v. Tootsie Roll Indus., LLC*, No. 17-cv-7541, 2018 U.S. Dist. LEXIS 129143, 2018 WL 3650015, at \*5 (S.D.N.Y. Aug. 1, 2018) (applying *Langan* to

<sup>15</sup> The Generic Defendants adopt this argument in Actavis, Forest, and Merz's brief with their own footnote: "For the reasons set forth in Forest's motion to dismiss, Plaintiff's claims are also barred by the statute of limitations." (Gen. Defs. Br. at 50 n.27.) My holding above applies equally to the Generic Defendants.

<sup>16</sup> The IPP Complaint does not allege any claim under Georgia law, under any of Counts One through Four. (CAC ¶¶ 191-231.)

<sup>17</sup> The IPP Complaint does not allege any claim under Pennsylvania law, under any of Counts One through Four. (CAC ¶¶ 191-231.)

hold that named plaintiffs had Article III standing to assert claims on behalf of "nonparty class members with claims subject to different state laws"); [Donnenfeld v. Petro, Inc., 333 F. Supp. 3d 208, 2018 WL 4356727, at \\*12 \(E.D.N.Y. 2018\)](#) (denying defendant's motion to dismiss state consumer protection claims in states in which the plaintiff did not reside); [Holve v. McCormick & Co., Inc., 334 F. Supp. 3d 535, 2018 WL 3861406, at \\*10 \(W.D.N.Y. 2018\)](#) (holding that named plaintiff had Article III standing to bring class claims under Maryland state law). Thus, the Court will not presently grant Defendants' motion to dismiss a broad swath of the IPP's state law claims for lack of Article III standing.

I write briefly to note that *Langan* gives rise to certain prudential concerns for [\*59] CAFA class actions. It seems clear enough that Sergeants Benevolent cannot state a claim under the laws of at least some states whose laws are pleaded in its Complaint. Put otherwise, if there were no CAFA and the IPP brought a monopolization claim under the law of, say, Utah, that action would be dismissed on motion because the IPP could not state a claim under the relevant law. No state court would allow it to continue as a plaintiff on the theory that the proper time to deal with this question was at class certification. An entity that has no claim fails to state a claim—not as a matter of Article III standing (the issue addressed in *Langan*) but under [Rule 12\(b\)\(6\)](#) or its state court equivalent. Yet a number of courts, purporting to follow *Langan*, have concluded that, because a class plaintiff who fails to state a claim under a particular state's law (*i.e.*, it cannot recover for the alleged violation of law for its own account) nonetheless has Article III standing, the issue of whether the plaintiff fails to state a claim should abide a decision on a motion for class certification.

This court does not read *Langan* any more broadly than it purports to reach. Nothing in *Langan*, as I read it, precludes [\*60] a defendant from moving to dismiss a CAFA plaintiff's claims under a particular statute pursuant to [Rule 12\(b\)\(6\)](#), on the grounds that the plaintiff fails to state a claim for its own account—a question entirely different from whether it has constitutional standing. CAFA—which confers no substantive rights on any litigant, but simply permits certain cases that do not otherwise belong in a federal court to be brought here—cannot be read to enable plaintiffs to state claims when the laws of the several states specifically provide to the contrary. It is imperative that too much not be read into *Langan* since neither CAFA nor state consumer protection laws require counsel to compete with other advocates for the positions of class counsel and lead plaintiff, both of which create healthy incentives to find the best class representative(s) possible.

For those courts that read *Langan* more broadly than I do, it is enough that a district court can conclude that a class plaintiff is not an appropriate class representative because he/it fails to state a claim at the class certification stage. But that comes at cost. A district court's inability to address these arguments at the motion to dismiss stage increases [\*61] a plaintiff's leverage with respect to settlement negotiations, without any additional effort on its part.

So while I accept that *Langan* forecloses any argument that a CAFA plaintiff's claims should be dismissed on motion for lack of Article III standing, I decline to read it as foreclosing consideration of a properly made [Rule 12\(b\)\(6\)](#) motion at the motion to dismiss stage—a subject that the Court of Appeals nowhere addressed.

## **2. The IPP Fails to State a Claim for Monopolization in Three States That Follow *Illinois Brick* (Florida, Massachusetts, and Utah)**

Defendants next argue that the IPP fails to state a claim under [Rule 12\(b\)\(6\)](#) under the antitrust laws of Florida, Massachusetts, Puerto Rico, Rhode Island, and Utah, because these states follow the rule of *Illinois Brick* and prohibit indirect purchaser actions. (Forest Br. at 66; Gen. Defs. Br. 35-36; Gen. Defs. Suppl. Br. at 10 n.4.)<sup>18</sup> They are correct about three of these states.

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<sup>18</sup> Defendants also argue that any states that have not expressly adopted or rejected *Illinois Brick* should be treated as barring indirect purchaser claims. (Gen. Defs. Br. at 36 n.16 (citing [In re Digital Music Antitrust Litig., 812 F. Supp. 2d 390, 413 \(S.D.N.Y. 2011\)](#).) However, Defendants have not indicated which states these would be.

### a) Florida

Count One of the IPP Complaint alleges a claim for monopolization under [\*Fla. Stat. §§ 501.201, et seq.\*](#) (CAC ¶ 201(d).) Actavis, Forest, and Merz argue that because the Florida Antitrust Act applies *Illinois Brick*, the IPP cannot recover as an indirect purchaser. [\*62] (Forest Suppl. Br. at 10 n.4.)

I first note that the IPP incorrectly cites to the [\*Florida Deceptive and Unfair Trade Practices Act \("FDUTPA"\)\*](#), [\*Fla. Stat. §§ 501.201, et seq.\*](#), rather than the [\*Florida Antitrust Act\*](#), *id. §§ 542.15, et seq.* I construe this as a typographical error but hold that Defendants are correct that [HN9](#)<sup>↑</sup> the Florida Antitrust Act does not permit indirect purchaser recovery. "Florida adheres to the 'direct purchaser' rule enunciated in *Illinois Brick*." [\*Mack v. Bristol-Myers Squibb Co., 673 So.2d 100, 102 \(Fla. Dist. Ct. App. 1996\)\*](#).

The Court therefore **DISMISSES** the IPP's Florida Antitrust Act claim under Count One.

### b) Massachusetts

Count One of the IPP Complaint alleges a claims for monopolization under Mass. Gen. Laws, ch. 93A. (CAC ¶ 201(i).) Defendants move to dismiss the Massachusetts law claim under Count One on the basis that Massachusetts follows *Illinois Brick*. (Gen. Defs. Suppl. Br. at 10 n.4 (citing [\*Ciardi v. F. Hoffmann-La Roche, Ltd., 436 Mass. 53, 762 N.E.2d 303, 308 \(Mass. 2002\)\*](#).)

Again, I note that the IPP has incorrectly cited to chapter 93A, Massachusetts' consumer protection statute, rather than chapter 93, its antitrust statute. I again treat this as a typographical error, particularly since the IPP's conspiracy to monopolize claim is brought under chapter 93. 1 [HN10](#)<sup>↑</sup> dismiss the claim anyway because [\*Ciardi\*](#) is squarely on point. Chapter 93A (consumer protection) allows [\*63] indirect purchaser claims; chapter 93 (antitrust) does not. "Because the Antitrust Act is to be construed in harmony with judicial interpretations of comparable Federal antitrust statutes, the rule of law established in *Illinois Brick Co. v. Illinois* . . . would apply with equal force to preclude claims brought under G.L. c. 93 by indirect purchasers in Massachusetts." [\*Ciardi, 762 N.E.2d at 308\*](#); see also [\*In re EpiPen \(Epinephrine Injection, USP\) Mktg., Sales Practices & Antitrust Litig., 336 F. Supp. 3d 1256, 2018 WL 3973153, at \\*32 n.20 \(D. Kan. 2018\)\*](#).

The Court therefore DISMISSES the IPP's Massachusetts law claim under Count One.

### c) Puerto Rico

Count One of the IPP Complaint alleges a claim for monopolization under the *Puerto Rico Antitrust Act ("PRAA")*, *10 P.R. Laws §§ 263, et seq.* (CAC ¶ 201(aa).) Defendants move to dismiss because, while Puerto Rico does not expressly prohibit suits by indirect purchasers, the PRAA is modeled after the Clayton Act, under which indirect purchasers lack standing pursuant to the Supreme Court's decision in *Illinois Brick*. (Forest Suppl. Br. at 10 n.4.) The IPP counters that the PRAA does not limit standing to direct purchasers. (IPP Resp. to Gen. Defs. Br. at 11-12 (citing *Rivera-Muniz v. Horizon Lines Inc.*, *737 F. Supp. 2d 57, 61 (D.P.R. 2010)*).)

Again, the correct citation for the PRAA is *10 L.P.R.A. §§ 257, et seq.*, as section 263 covers price discrimination, [\*64] specifically. The monopolization offense is found at *10 L.P.R.A. § 260*. I once again construe this as a typographical error.

The Court recognizes that many district courts in the continental United States have dismissed indirect purchaser claims under the PRAA for lack of standing, based on the idea that the PRAA is modeled on federal statutes that do not extend standing to indirect purchasers. See, e.g., [\*Opana ER, 162 F.Supp.3d at 723\*](#) (collecting cases); [\*In re Digital Music Antitrust Litig., 812 F. Supp. 2d 390, 413 \(S.D.N.Y. 2011\)\*](#).

Nonetheless, this Court finds that the U.S. District Court for the District of Puerto Rico has more faithfully interpreted the standing requirements of the PRAA, in light of how the Supreme Court of Puerto Rico reads that statute. *Rivera-Muniz*, 737 F. Supp. 2d at 61 (citing *Pressure Vessels P.R. v. Empire Gas P.R.*, 137 D.P.R. 497, 520, 1994 Juris P.R. 144 (P.R. 1994)).

**HN11** [+] In *Pressure Vessels*, the Supreme Court of Puerto Rico interpreted the private damages section of the PRAA to hold that private remedies were available to any plaintiff who met the following conditions: (1) the person was harmed in his business or property (2) by reason of (3) actions prohibited by law. 137 D.P.R. at 518. The Supreme Court of Puerto Rico reasoned that, in order to satisfy this second prong, a plaintiff need only allege that "as a consequence of the legal violation, he has been injured." *Id.* at 520. Based on this interpretation of the PRAA in *Pressure* [\*65] *Vessels*, the Court in *Rivera-Muniz* held, "Because Puerto Rico liberally construes its standing requirements in private antitrust cases, it is immaterial whether Plaintiffs are direct or indirect purchasers." *Rivera-Muniz*, 737 F. Supp. 2d at 61 (internal citation omitted).

Defendants' motion to dismiss this claim is, therefore, **DENIED**.

#### d) Rhode Island

Count One of the IPP Complaint alleges a claim for monopolization under [R.I. Gen. Laws §§ 6-36-1, et seq.](#) (CAC ¶ 201(t).) Defendants move to dismiss this claim on the grounds that Rhode Island's *Illinois Brick* repealer statute went into effect on July 15, 2013. (Forest Suppl. Br. at 10 n.4.) Several federal district courts have held that the statute does not have retroactive application. See, e.g., [In re Effexor Antitrust Litig.](#), 337 F. Supp. 3d 435, 2018 WL 4466050, at \*16 (D.N.J. 2018) (also analyzing general presumption against retroactive application in Rhode Island law); [In re Niaspan Antitrust Litig.](#), 42 F. Supp. 3d 735, 759 (E.D. Pa. 2014) (same).

The Court agrees with Defendants and with the weight of federal case law and finds that the IPP cannot bring claims under Rhode Island's **antitrust law** for conduct occurring before July 15, 2013. As a result, the Court **DISMISSES IN PART** the Rhode Island law claim under Count One, to the extent it seeks damages prior to that date. See [Niaspan](#), 42 F. Supp. 3d at 759 (restricting end payor plaintiffs [\*66] from "recover[ing] for any overcharges incurred before the . . . Rhode Island repealer statute took effect").

#### e) Utah

Count One of the IPP Complaint alleges a claim for monopolization under [Utah Code §§ 76-10-1301, et seq.](#) [sic].<sup>19</sup> (CAC ¶ 201(w).) Defendants move to dismiss this claim on *Illinois Brick* grounds, arguing, "Indirect purchasers may only bring claims under the [Utah Antitrust Act](#) if they are citizens or residents of Utah." (Gen. Defs. Br. at 35-36 n.15 (citing [Utah Code § 76-10-3109](#)))

Despite Defendants' characterization, this is not in fact an *Illinois Brick* argument but instead an argument about the ability of the Named Plaintiff to state a claim under the Utah Antitrust Act pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). The statute reads, in relevant part: "A person who is a citizen of this state or a resident of this state and who is injured or is threatened with injury in his business or property by a violation of the Utah Antitrust Act may bring an action for injunctive relief and damages, regardless of whether the person dealt directly or indirectly with the defendant." [Utah Code § 76-10-3109](#).

**HN12** [+] "The majority of courts that have been presented with this statute require at least one Utah citizen or resident be a named plaintiff." [Opana ER](#), 162 F. Supp. 3d 704, 2018 WL 6003893, at \*17 (collecting cases); see

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<sup>19</sup> Since this provision governs prostitution offenses, and since Count Two cites the Utah Antitrust Act at [Utah Code §§ 76-10-3101, et seq.](#), (CAC P 207(x)), the Court once again assumes this is a typographical error.

also [GEICO Corp. v. Autoliv, Inc., No. 16-13189, 345 F. Supp. 3d 799, 2018 U.S. Dist. LEXIS 180216, 2018 WL 5077767, at \\*27 \(E.D. Mich. Aug. 30, 2018\)](#) (dismissing Utah antitrust [\*67] claim with prejudice.)

Sergeants Benevolent, the sole Named Plaintiff in this case, has not alleged anywhere in the Complaint that it is a citizen or resident of Utah. Therefore, it fails to plead an element required to state a claim under the Utah Antitrust Act. The possibility that some beneficiary of the IPP may have retired to Utah is not enough, because none of the IPP's beneficiaries is a *named* plaintiff. Defendants' motion to dismiss the Utah monopolization claim under Count One pursuant to [Rule 12\(b\)\(6\)](#) is, therefore, **GRANTED**.

### **3. The IPP's Failure To Satisfy Pre-Suit Notification Requirements Does Not Warrant Dismissal of the Claims in Three States (Hawaii, Arizona, and Nevada)**

In supplemental briefing, Defendants argue for the first time that the IPP's state antitrust claims under the laws of Arizona, Hawaii, and Nevada fail because the IPP has not alleged that it has complied with state law notice requirements. (Forest Suppl. Br. at 12; Gen. Defs. Suppl. Br. at 12-13.)

#### **a) Hawaii<sup>20</sup>**

Count One of the IPP Complaint alleges an antitrust under [Haw. Rev. Stat §§ 480, et seq.](#) (CAC ¶ 201(e).) The Hawaii Antitrust Act reads, in relevant part: "A class action for claims for a violation of this chapter other than claims for unfair or [\*68] deceptive acts or practices may be filed, and may be prosecuted on behalf of indirect purchasers by a person other than the attorney general as follows: (1) A filed copy of the complaint and all relevant supporting and exculpatory materials in possession of the proposed class representative or its counsel shall be served on the attorney general not later than seven days after filing of the complaint." [Haw. Rev. Stat. § 480-13.3\(a\).](#)

Generic Defendants argue that notice of suit must be provided to the state's attorney general and that failure to do so requires dismissal. (Gen. Defs. Suppl. Br. at 12 (citing [Haw. Rev. Stat. § 480-13.3](#)).) The IPP responds that at least two courts have allowed plaintiffs to proceed under the Hawaii Antitrust Act, despite their failure to comply with pre-suit notice requirements. (IPP ReSp. to Gen. Defs. Suppl. Br. at 16 (citing [In re Aggrenox Antitrust Litig., 94 F. Supp. 3d 224, 253-54 \(D. Conn. 2015\)](#) (Aggrenox I); [In re Aftermarket Filters Antitrust Litig., No. 08-md-4883, 2009 U.S. Dist. LEXIS 104114, 2009 WL 3754041, at \\*6 \(N.D. Ill. Nov. 5, 2009\)](#))).

The Court finds the cases cited by the IPP to be persuasive on the question of whether failure to comply with the statutory requirement is fatal to a claim under the Hawaii Antitrust Act. In [Aftermarket Filters, 2009 U.S. Dist. LEXIS 104114, 2009 WL 3754041, at \\*6](#), the court held that the statutory scheme did not imply that dismissal was the proper remedy for failing to comply with [\*69] the notification requirement. Moreover, defendants could not use the notification requirement "as a shield to avoid answering for alleged anti-competitive behavior." *Id.* The court in [Aggrenox I, 94 F. Supp. 3d at 253-54](#), adopted this reasoning.

The case cited by Defendants, [In re Asacol Antitrust Litig., No. 15-cv-12370, 2016 U.S. Dist. LEXIS 94605, 2016 WL 4083333, at \\*14 n.14 \(D. Mass. July 20, 2016\)](#) (Asacol I), is not persuasive. There, the court admitted that "[c]ourts are divided on whether Hawaii's statute necessitates dismissal" but dismissed the claim without looking specifically to Hawaii law. *Id.*

However, even if I were to find that the Hawaii statute required dismissal of the IPP's claim in Hawaii state court, I would find that [Federal Rule of Civil Procedure 23](#) is comprehensive with respect to pre-filing requirements in federal court, as held by the United States Supreme Court in [Shady Grove Orthopedic Associates v. Allstate Insurance Co., 559 U.S. 393, 130 S. Ct. 1431, 176 L. Ed. 2d 311 \(2010\)](#). "The Second Circuit has not taken up the

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<sup>20</sup> Although this Court would ordinarily proceed through the state law claims in alphabetical order there exists much more fulsome case law regarding the pre-suit notice requirement under the Hawaii Antitrust Act than there does for any of the other states.

problem of the effect of *Shady Grove*'s split opinions." [\*In re Aggrenox Antitrust Litig., No. 14-md-2516, 2016 U.S. Dist. LEXIS 104647, 2016 WL 4204478, at \\*5 \(D. Conn. Aug. 9, 2016\)\*](#) (*Aggrenox I*). According to Justice Scalia's plurality opinion, "the only test of a Rule's validity under the [\*Rules Enabling Act\*](#) is 'whether it regulates procedure,'" which the Court "found that [\*Rule 23\*](#) did." [\*In re Trilegiant Corp., 11 F. Supp. 3d 82, 116 \(D. Conn. 2014\)\*](#). According to Justice Stevens' concurrence, if the state rule conflicts with [\*Rule 23\*](#), the state rule will [\*70] yield only if it is not "so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy." [\*Shady Grove, 559 U.S. at 419-20\*](#) (Stevens, J., concurring).

**HN13** [↑] I find that Hawaii's limitation on class actions is "a state law that restricts the types of claims eligible for class treatment beyond the limits established by [\*Rule 23\*](#)." [\*In re Restasis Antitrust Litig., No. 18-md-2819, 355 F. Supp. 3d 145, 2018 U.S. Dist. LEXIS 194161, 2018 WL 5928143, at \\*6 \(E.D.N.Y. Nov. 13, 2018\)\*](#). It thus conflicts with the federal rule. *Id.* Under the plurality approach, therefore, the Hawaii Antitrust Act's notice provision would yield to [\*Rule 23\*](#).

Moreover, a majority of federal courts have held that, pursuant to Justice Stevens' approach, the pre-suit notice requirement is not substantive. See, e.g., [\*Restasis, 2018 U.S. Dist. LEXIS 194161, 2018 WL 5928143, at \\*6. Aggrenox I, 94 F. Supp. 3d at 254\*](#), is particularly persuasive. There, the court reasoned that the plain language of the Hawaii statute itself "does not appear . . . to create a substantive right to recovery that only 'vests' after some action or inaction of the state attorney general. Rather, it creates a right to 'bring an action based on unfair methods of competition' in [\*section 480-2\*](#), without any reference to notice, and delineates procedural prerequisites for class actions under the chapter in [\*section 480-13.3\*](#)." *Id.* The court there also observed that defendants had [\*71] not drawn the court's attention to any arguments, e.g., from the legislative history, that would counsel a different reading. *Id.*

This Court agrees with the weight of federal case law, which holds the pre-suit notice provision in the Hawaii Antitrust Act would, first of all, not require dismissal of the suit in state court and that, even if it did, would not override [\*Rule 23\*](#) to bar a claim in federal district court.

The Court therefore **DENIES** Defendants' motion to dismiss the Hawaii law claim under Count One.

### b) Arizona

Count One of the IPP Complaint alleges an antitrust claim under [\*Ariz. Rev. Stat. §§ 44-1403, et seq.\*](#) (CAC ¶ 201 (a).) The [\*Arizona Antitrust Act\*](#) provides, in relevant part: "A person filing a complaint, counterclaim or answer for any violation of the provisions of this article shall simultaneously with the filing of the pleading in the superior court or, in the case of pendent state law claims in the federal court, serve a copy of the complaint, counterclaim or answer on the attorney general." [\*Ariz. Rev. Stat. § 44-1415\(A\)\*](#).

In supplemental briefing, Defendants argue that notice of suit must be provided to the state's attorney general when the complaint is filed, and that failure to comply with the notice provision is grounds for dismissal. (Gen. [\*72] Defs. Suppl. Br. at 12 (citing [\*Effexor, 337 F. Supp. 3d 435, 2018 WL 4466050, at \\* 10-\\*11; Asacol I, 2016 U.S. Dist. LEXIS 94605, 2016 WL 4083333, at \\*14-\\*15\*](#).) In response, the IPP cites [\*In re Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772, 817 \(N.D. Ill. 2017\)\*](#), where the district court allowed claims under Arizona's Antitrust Act to proceed, despite the plaintiffs' failure to comply with the statutory notice requirements. (IPP Resp. to Gen. Defs. Suppl. Br. at 16.)

This Court does not see a meaningful distinction between the pre-suit notification requirement under the Hawaii Antitrust Act and that under the Arizona Antitrust Act, even if other courts have found to the contrary. Moreover, in addition to requiring those filing complaints to notify the attorney general, the statute by its terms also obliges those *answering* complaints to notify the attorney general. It is hard to imagine that failure to comply with this requirement would necessitate dismissal.

The Court is not persuaded by the reasoning in [Effexor, 337 F. Supp. 3d 435, 2018 WL 4466050, at \\*10-\\*11](#), or in [Asacol I, 2016 U.S. Dist. LEXIS 94605, 2016 WL 4083333, at \\*14-\\*15](#), which found that there was no conflict between [Rule 23](#) and the Arizona pre-filing requirement. [HN14](#)<sup>14</sup> Instead, this Court agrees with the court in [Restasis, 2018 U.S. Dist. LEXIS 194161, 2018 WL 5928143, at \\*6](#), which found that the United States Supreme Court had held in *Shady Grove* that [Rule 23](#) is "not silent on the question of whether a particular claim is eligible for class treatment." [Restasis, 2018 U.S. Dist. LEXIS 194161, 2018 WL 5928143, at \\*6](#). [Rule 23](#) contains its own limitations on those claims eligible for class [\*73] treatment; "[t]herefore, a state law that restricts the types of claims eligible for class treatment beyond the limits established by [Rule 23](#) conflicts with the federal rule." *Id.* Like Hawaii's statute, therefore, this Court could only find that this requirement was grounds for dismissal if it also found the requirement to be substantive.

For the reasons already discussed, however, because this Court finds that, Arizona's pre-suit notice requirement is purely procedural, Defendants' motion to dismiss the Arizona antitrust claim under Count One is **DENIED**.

### c) Nevada

Count One of the IPP Complaint alleges an antitrust claim under [Nev. Rev. Stat. §§ 598A.060, et seq.](#) (CAC ¶ 201(n).) The Generic Defendants argue that notice of suit must be provided to the state's attorney general or the claim cannot proceed. (Gen. Defs. Suppl. Br. at 12 (citing [Nev. Rev. Stat. § 598A.210\(3\)](#).) The statute states, in relevant part: "Any person commencing an action for any violation of the provisions of this chapter shall, simultaneously with the filing of the complaint with the court, mail a copy of the complaint to the Attorney General." [Nev. Rev. Stat. § 598A.210\(3\)](#).

Defendants argue that failure to notify the attorney general requires dismissal. (Gen. Defs. Suppl. Br. at 12 (citing [Effexor, 337 F. Supp. 3d 435, 2018 WL 4466050, at \\*10-\\*11](#); [Asacol I, 2016 U.S. Dist. LEXIS 94605, 2016 WL 4083333, at \\*14-\\*15](#).) In response, the [\*74] IPP does not cite any cases that discuss Nevada law particularly, but instead argues generally that "pre-suit notice requirements are procedural and, therefore, superseded by federal law." (IPP Resp. to Gen. Defs. Suppl. Br. at 16 (citing [Mace v. Van Ru Credit Corp., 109 F.3d 338, 346 \(7th Cir. 1997\)](#).)

Only scant federal case law interprets the [Nevada Antitrust Act](#)'s statutory notice requirement in light of *Shady Grove*, and the Court is not aware of any Nevada cases that discuss whether the requirement is substantive or procedural in nature.

Again, however, the Court sees no meaningful difference between the text of Nevada's statute and that of Hawaii's. The Court remains unpersuaded by the reasoning of the two cases cited by Defendants, for the reasons discussed above.

As a result, Defendants' motion to dismiss the Nevada law claim under Count One is **DENIED**.

## 4. The IPP Fails To State a Claim for Monopolization Under the Law of Kansas

Defendants argue that the IPP may not maintain a claim for monopolization (as opposed to conspiracy to monopolize) under the laws of Kansas, New York, and Tennessee because those statutes do not permit recovery for unilateral anticompetitive conduct. (Forest Br. at 67.)<sup>21</sup> For example, commentators have observed that "[Section 50-132](#) [\*75] [of the [Kansas Restraint of Trade Act](#)] would not appear to extend to cases of unilateral

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<sup>21</sup> Although Actavis, Forest, and Merz purport to seek dismissal of the IPP's monopolization claims at CAC ¶¶ 207(e) 207(p) and 207(w), those paragraph numbers actually correspond to Count Two of the IPP Complaint—conspiracy to monopolize—which is not unilateral conduct by definition. As it has several times throughout this opinion the Court assumes that this is a typographical error, and it treats the pleadings as if Actavis, Forest, and Merz instead move to dismiss the equivalent state law claims under Count One of the IPP Complaint.

monopolization." 6 Julian von Kalinowski, Peter Sullivan, & Maureen McGuirl, *Antitrust Laws and Trade Regulation* § 116.03 (2d ed. 2018); see also [Commonwealth Electrical Inspection Servs. v. Town of Clarence, 6 A.D.3d 1185, 1186, 776 N.Y.S.2d 687 \(N.Y. App. Div. 2004\)](#) (New York's Donnelly Act does not create a cause of action for unilateral anticompetitive conduct); [In re Ditropan XL Antitrust Litig., 529 F. Supp. 2d 1098, 1109 \(N.D. Cal. 2007\)](#) (the [Tennessee Trade Practices Act](#) does not create a cause of action for unilateral monopolization).

But the IPP Complaint does not allege monopolization via unilateral action. It pleads "plead some sort of concerted action" in support of its non-conspiracy monopolization claims. (See Forest Br. at 67.) The most obvious example is the IPP's allegation, in support of Count One, that Forest and Merz "entered into unlawful agreements with the Generic [] Defendants." (CAC ¶ 193). That is by definition *not* unilateral action. The IPP Complaint also plausibly alleges that Forest's hard switch was executed with the participation of other parties; those parties may not have been named as defendants but they did not have to be. For example, Forest signed "an exclusive distribution contract in November, 2014 for Namenda IR with Foundation Care, a mail-order-only pharmacy." (CAC ¶ 95). Forest also "agreed to pay rebates to [\*76] health plans to make sure they put Namenda XR on the same tier as Namenda IR so that members would not have an incentive to choose Namenda IR and patients did not have to pay higher co-payments for Namenda XR." (CAC ¶ 110). There is nothing unilateral about any of this. Unilateral conduct might include, in the pharmaceutical context: launching a false advertising campaign against a competitor; filing a sham petition with the FDA; filing a sham patent with the PTO; or initiating sham litigation against a competitor. None of that is alleged here.

However, Actavis, Forest, and Merz also argue that, under the law of these three states, monopolization, absent conspiracy, is not a cognizable cause of action. Since Count Two alleges conspiracy to monopolize, in effect what Defendants argue is that Counts One and Two are necessarily duplicative insofar as they are raised under the law of these three states.

#### a) Kansas

Defendants cite [In re Relafen Antitrust Litigation, 221 F.R.D. 260, 283 \(D. Mass. 2004\)](#), for the proposition that Kansas "prohibits combinations and conspiracies only" and move to dismiss on that basis. (Forest Br. at 67.) The IPP argues that it has pled concerted action in the form of the settlement agreements as the foundation for its Kansas law claim [\*77] under Count One. (IPP Resp. to Gen. Defs. Br. at 14.)

The Kansas Restraint of Trade Act ("KRTA") provides, in relevant part, "No person, servant, agent or employee of any person doing business within the state of Kansas shall conspire or combine with any other persons, within or without the state for the purpose of monopolizing any line of business[.]" [Kan. Stat. § 50-132](#); see also [Good v. Dickinson, 128 Kan. 481, 278 P. 730, 732 \(Kan. 1929\)](#) (sale of business, although bilateral conduct, did not constitute trust or combination as required to allege monopolization). The Kansas Supreme Court has observed (albeit in dicta) that, when bringing a claim for monopolization, conspiracy is "legal requirement under Kansas **antitrust law**." [Bergstrom v. Noah, 266 Kan. 829, 974 P.2d 520, 528 \(Kan. 1999\)](#); but see [Bellinder v. Microsoft Corp.](#), Nos. 00-c-0855, 00-C-00092, 99-cv-17089, 2001 WL 1397995, at \*1 (Kan. Dist. Ct. Sept. 7, 2001) (certifying class action under [Kan. Stat. § 50-132](#) where plaintiffs alleged that Microsoft "abused its monopoly power" but did not allege conspiracy). [HN15](#)<sup>↑</sup> The weight of published, appellate case law in Kansas holds that the IPP may not proceed on a theory of monopolization unless accompanied by allegations of conspiracy.

Other federal district courts have agreed that monopolization, absent conspiracy, does not state a claim under the KRTA. [Relafen, 221 F.R.D. at 283; EpiPen, 336 F. Supp. 3d 1256, 2018 WL 3973153, at \\*33.](#)

Obviously, the IP's claim for conspiracy [\*78] to monopolize is in Count Two, not Count One, and this court will dismiss duplicative counts. Defendants' motion to dismiss the Kansas claim under Count One is, therefore, **GRANTED**.

#### b) New York

**HN16** [+] The Donnelly Act prohibits "[e]very contract, agreement, arrangement or combination" that establishes a monopoly or restrains competition. [N.Y. Gen. Bus. Law § 340\(1\)](#). As the New York Court of Appeals has held, the term "arrangement" "must be interpreted as contemplating a reciprocal relationship of commitment between two or more legal or economic entities similar to but not embraced within the more exacting terms, 'contract', 'combination' or 'conspiracy'." [State v. Mobil Oil Corp., 38 N.Y.2d 460, 344 N.E.2d 357, 359, 381 N.Y.S.2d 426 \(N.Y. 1976\)](#); see also [Glob. Reins. Corp. U.S. Branch v. Equitas Ltd., 18 N.Y.3d 722, 969 N.E.2d 187, 192, 946 N.Y.S.2d 71 \(N.Y. 2012\)](#) ("An antitrust claim under the Donnelly Act . . . must allege both concerted action by two or more entities and a consequent restraint of trade within an identified relevant product market.")

In other words, a plaintiff must allege concerted action to bring a claim under the Donnelly Act, which the IPP does here. (See *supra*.) However, unlike the Kansas statute, there is no requirement that a plaintiff use the word "conspiracy" in order to state a claim.

At least one other federal district court has refused to dismiss a Donnelly Act claim that alleged concerted [\*79] action but not conspiracy. [In re K-Dur Antitrust Litig., No. 01-cv-1652, 2008 U.S. Dist. LEXIS 121946, 2008 WL 2660782, at \\*3 n.15 \(D.N.J. Mar. 10, 2008\)](#).

Defendants' motion to dismiss the New York claim under Count One is, therefore, **DENIED**.

### c) Tennessee

**HN17** [+] Similar to the Donnelly Act, the Tennessee Trade Practices Act ("TTPA") declares unlawful "[a]ll arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or which tend to lessen, full and free competition," as well as those "designed, or which tend to" control prices. [Tenn. Code. § 47-25-101](#). The Supreme Court of Tennessee interprets the TTPA broadly. "Its broad and comprehensive provisions cover every conceivable case of an agreement or contract made to lessen or destroy competition and control prices." [Standard Oil Co. v. State, 117 Tenn. 618, 100 S.W. 705, 716 \(Tenn. 1907\)](#). See also [Freeman Indus., LLC v. Eastman Chem. Co., 172 S.W.3d 512, 522 \(Term. 2005\)](#) (observing that "the language of Tennessee's antitrust statutes have not changed significantly since *Standard Oil*" and finding that the TTPA prohibits "agreements" and "arrangements" that affect competition).

Defendants cite no relevant law in support of the proposition that the TTPA requires a plaintiff to allege conspiracy.

Accordingly, Defendants' motion to dismiss the Tennessee claim under Count One is, therefore, **DENIED**.

## C. In Conclusion, the IPP Has Stated [\*80] A Claim for Monopolization Under Count One With Respect to the Laws of 23 States

In sum, the Court finds that the IPP has adequately pled facts supporting its allegations of monopolization based upon both the hard switch and the settlement agreements.

The Court also finds that, as a matter of law, the IPP may pursue its Count One claims for monopolization under the laws of all states **except** Florida, Kansas, Massachusetts, and Utah. Those claims are hereby **DISMISSED**. The IPP's claim for monopolization under Rhode Island law is hereby **DISMISSED IN PART** to the extent it seeks damages for injuries occurring before July 15, 2013.

## VI. Count Two: Conspiracy To Monopolize Under the Laws of 27 States Against Actavis, Forest, Merz, and the Generic Defendants

Second, the IPP brings an additional 27 state law claims grouped under the heading "Count Two: Conspiracy to Monopolize Under State Law." (CAC at 52.) The claims under Count Two are, for the most part, identical to the 27 claims under Count One. (*Id.* ¶ 207.)

Count Two differs from Count One in three significant respects.

First, Count Two alleges conspiracy to monopolize rather than actual monopolization. "Defendants have intentionally and unlawfully conspired [\*81] in order to allow Forest monopolize [sic] the market for memantine hydrochloride in violation" of state laws. (*Id.*)

Second, the IPP asserts claims for conspiracy to monopolize under Count Two against Actavis, Forest, Merz, and the Generic Defendants, who are not named in Count One. (*Id.* at 52.)

Third, whereas Count One alleges injuries to indirect purchasers stemming from both the hard switch and the settlement agreements, Count Two alleges injuries to indirect purchasers stemming from the settlement agreements only. (*Id.* ¶ 205.)

Beyond that, there are extremely minor, and likely inadvertent, differences between the state law causes of action underlying Counts One and Two. For example, Count One alleges monopolization under the laws of Florida and New Hampshire but does not allege monopolization under the laws of Illinois or Oregon. (*Compare id.* ¶¶ 201, 207.) Count Two, by contrast, alleges conspiracy to monopolize under the laws of Illinois and Oregon but does not allege conspiracy to monopolize the laws of Florida and New Hampshire. (*Id.*) There are also several differences—again, probably typographical errors—in the citations to the state codes. (See, e.g., *id.* ¶¶ 201(i), 207(i).)

Defendants move [\*82] to dismiss Count Two in all or large part for many of the same reasons as they did for Count One, including:

- The IPP has expressly disclaimed reliance on *Actavis*, 570 U.S. at 158, and, in any event, cannot prove that the agreements contained unlawful "reverse payments", (Forest Br. at 34-60);
- Any injuries the IPP alleges it suffered due to the settlement agreements is purely speculative, (*id.* at 40-46);
- The claims are "likely" time-barred by the applicable state statutes of limitations, (*id.* at 65 n.42).
- The IPP lacks Article III standing to assert claims in states where it has not made purchases and thereby suffered injury in fact, which are all but nine states, (*id.* at 65-66);
- *Illinois Brick* bars the IPP's claims in six states, (Gen. Defs. Suppl. Br. at 10-11); and
- The IPP has failed to satisfy pre-suit notice requirements in four states, (Gen. Defs. Suppl. Br. at 11-13).

For the reasons discussed in the preceding sections of this opinions, none of these arguments has merit, with the exception of the arguments that (i) Massachusetts bars indirect purchasers from recovering under its antitrust act; (ii) Utah bars indirect purchasers from recovering under its antitrust act unless they are citizens or residents of Utah; and (iii) Rhode Island [\*83] barred indirect purchasers from recovering under its antitrust act until the amendments of July 15, 2013. Therefore, the Massachusetts and Utah claims under Count Two are hereby **DISMISSED**, and the Rhode Island claim under Count Two is hereby **DISMISSED IN PART**, to the extent it seeks damages for injuries occurring before July 15, 2013.

Defendants also raise a handful of arguments specific to Count Two, *viz.*:

- The IPP does not adequately allege a conspiracy because it pleads only parallel conduct without the necessary "plus factors" that would be indicative of agreement; (Gen. Defs. Br. at 20; Forest Br. at 60);
- The Illinois Antitrust Act grants a right to bring a class action to the Illinois attorney general only (Gen. Defs. Br. at 35 n.15); and
- Oregon adheres to the law of *Illinois Brick* and therefore precludes recovery for indirect purchasers, (Gen. Defs. Br. at 35).

As with Count One, the Court first analyzes the argument of general applicability, and then turns to the Illinois and Oregon arguments.

### A. The IPP States a Claim for Conspiracy To Monopolize

Defendants argue in their original briefing<sup>22</sup> that the IPP fails to allege a conspiracy, thereby necessitating dismissal of Count Two, [\*84] because it has not pled sufficient "plus factors" to support an inference of conspiracy. (Forest Br. at 60; Gen. Defs. Br. at 20.)

This is, of course, an argument with respect to the elements of an antitrust conspiracy under *federal* law. Neither party has briefed the elements of conspiracy—let alone what is adequate at the motion to dismiss stage—under each state's law. However, both parties have apparently used federal *antitrust law* as a guidepost, and this Court does the same. The Court reminds the IPP that it will be required to show at the class certification stage that common legal issues with respect to the conspiracy elements of each state's law predominate over any individual issues.

Under the guideposts laid out by federal law, the IPP has pled sufficient circumstantial evidence to support a conspiracy to monopolize.

"[C]ourts have not given much attention to conspiracy to monopolize as a distinct antitrust offense." 2-16 Earl W. Kintner et al., *Federal Antitrust Law* § 16.39 (2017). Nonetheless, "in deciding whether there is concerted action, courts routinely apply the same analysis under both *Sections 1* and *2*" of the Sherman Act. 2 von Kalinowski, Sullivan, & McGuirl, *supra*, § 26.02; see also Areeda & Hovenkamp, *supra*, § 41.01[A]. "In order to establish a conspiracy in violation [\*85] of § 1, whether horizontal, vertical, or both, proof of joint or concerted action is required; proof of unilateral action does not suffice." *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 183 (2d Cir. 2012). Put another way, "Since mere parallel behavior can be consistent with independent conduct, courts have held that a plaintiff must show the existence of additional circumstances, often referred to as 'plus' factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy." *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253 (2d Cir. 1987).

Defendants argue principally that parallel contingent launch provisions, on their own, are insufficient to establish a conspiracy. (Gen. Defs. Suppl. Br. at 8 (citing *In re Nexium (Esomeprazole) Antitrust Litig.*, 842 F.3d 34, 55 (1st Cir. 2016)). Indeed, some courts in this district have found that pleading only contingent launch provisions does not survive a motion to dismiss. See *Actos I*, 2015 U.S. Dist. LEXIS 127748, 2015 WL 5610752, at \*23. Moreover, it is true that when plaintiffs build their conspiracy cases on contingent launch clauses alone, they often fail at the summary judgment stage. See, e.g., *King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, Nos. 06-cv-1797, 06-cv-1833, 06-cv-2768, 2014 U.S. Dist. LEXIS 84818, 2014 WL 2813312, at \*14 (RD. Pa. June 23, 2014). Finally, the *Nexium* court found that, at trial, the absence of evidence other than contingent launch provisions entitled the defendants to judgment as a matter of [\*86] law on the conspiracy claim. *Nexium*, 842 F.3d at 55.

However, this Court disagrees that more is presently required because, "to present a plausible claim at the pleading stage, the plaintiff need not show that its allegations suggesting an agreement are more likely than not true or that they rule out the possibility of independent action, as would be required at later litigation stages such as a defense motion for summary judgment . . . or a trial." *Anderson News*, 680 F.3d at 184 (internal citations omitted).

First, the IPP has met its burden to show parallel conduct, as it has alleged that the Generic Defendants entered into settlement agreements around the same time with Forest and Merz that contained the same pertinent provisions. (See IPP Resp. to Forest Br. at 36-37; see also CAC ¶ 76.) For example, Plaintiff alleges that the Generic Defendants entered into the settlement agreements in July, September, October, and December of 2009. (CAC ¶ 75.) Plaintiff also alleges that each of these agreements contained acceleration clauses, which led to

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<sup>22</sup> By way of background, I note briefly that the Court did not previously have occasion to consider the conspiracy issue in the DP Action. The DP Action did not expressly assert conspiracy as a cause of action, (15-cv-7488, Did. No. 29 ¶¶ 237-65), and the DPPs later informed the Court that they had abandoned any "inter-generic conspiracy claim" raised under Count IV of their Complaint, *Namenda V*, 331 F. Supp. 3d 152, 2018 WL 3970674, at \*25.

agreement not to launch any competing generic formulations until July 11, 2015. (CAC ¶¶ 76, 79.) Even at the summary judgment stage, for example, the *Nexium* court found it significant for inferring [\*87] the existence of a conspiracy that each generic competitor "agreed to delay its market entry on the express condition that every other Generic Defendant do the same." *Nexium*, 842 F. Supp. 3d at 54. The Court will not ignore this potent allegation merely because other courts have found that, after discovery, additional support is required.

Second, the IPP adequately alleges "plus factors" that support an inference of conspiracy at the motion to dismiss stage. The IPP Complaint directly alleges that the settlements were "negotiated collectively" or in such a manner that each Generic Defendant was informed of the pertinent terms of the other agreements. (CAC ¶¶ 75, 77.) Such collective negotiations, if true, would certainly constitute circumstantial evidence of a conspiracy.

The IPP Complaint also adequately alleges behavior against interest, which, combined with allegations of parallel conduct, can be indicative of concerted rather than independent action. See, e.g., *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 935 (7th Cir. 2000); *Apex Oil*, 822 F.2d at 254. Forest, Merz, and the Generic Defendants entered into the settlement agreements between July and December of 2009, which allowed for generic entry no earlier than July 11, 2015. (CAC ¶ 19-29.) The FDA's automatic, 30-month stays allegedly [\*88] began to expire in April 2010. (CAC ¶ 72.) The FDA tentatively approved the generics' ANDAs in January and April of 2010. (CAC ¶ 82.) This translates to a delay of roughly five years in exchange for only three months' competition within the exclusivity period, which certainly states a claim against interest that is plausible on its face.

Finally, the presence of contingent launch clauses, which are analogous to "most favored nation" provisions, raises antitrust scrutiny, even if they may have certain procompetitive effects. See, e.g., *U.S. v. Apple, Inc.*, 952 F. Supp. 2d 638, 701 (S.D.N.Y. 2013).

The Court finds that the IPP states a claim for conspiracy to monopolize.

## B. Illinois

Count Two (but not Count One) of the IPP Complaint alleges claims under the *Illinois Antitrust Act ("IAA")*, 740 Ill. Comp. Stat. 10/3, et seq. (CAC ¶ 207(e).) Defendants move to dismiss this claim because the statute states, in relevant part, "no person shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act, with the sole exception of this State's Attorney General." 740 Ill. Comp. Stat. 10/7(2); (Forest Suppl. Br. at 10 n.4). See also *Gaebler v. N.M. Potash Corp.*, 285 Ill. App. 3d 542, 676 N.E.2d 228, 230, 221 Ill. Dec. 707 (Ill. App. Ct. 1996); *Bobrowicz v. City of Chicago*, 168 Ill. App. 3d 227, 522 N.E.2d 663, 669, 119 Ill. Dec. 1 (Ill. App. Ct. 1988).

The IPP responds that the restriction "does nothing more than dictate the manner in which the [\*89] procedural device of a class action can proceed" and does not apply in federal court pursuant to the Supreme Court's holding in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010). (IPP Resp. to Gen. Defs. Br. at 8-10.)

**HN18** Courts in this circuit have split as to whether the indirect purchaser class action bar in the IAA is procedural or substantive, under Justice Stevens' concurrence in *Shady Grove*. Compare *Dig. Music*, 812 F. Supp. 2d at 416, with *Aggrenox II*, 2016 U.S. Dist. LEXIS 104647, 2016 WL 4204478, at \*6. However, the Court agrees with those cases in this circuit that have treated the IAA as stating a procedural rule applicable in Illinois state courts, rather than a substantive rule applicable to federal courts sitting in diversity jurisdiction in New York.

First, the same paragraph of the statute begins by stating that "[n]o provision of this Act shall deny any person who is an indirect purchaser the right to sue for damages." 740 Ill. Comp. Stat. 10/7(2). The statute therefore does not limit the substantive rights of an injured party in an individual action. See *Aggrenox II*, 2016 U.S. Dist. LEXIS 104647, 2016 WL 4204478, at \*6 ("[A]ny indirect purchaser procedurally blocked from participation in a class action would still have the same remedy in an individual action.")

Moreover, were the IAA to prohibit class actions altogether, the statute would read no differently than the New York class actions bar at issue in *[\*90] Shady Grove*—a fact observed by at least one other court in this circuit. *Aggrenox II, 2016 U.S. Dist. LEXIS 104647, 2016 WL 4204478, at \*6* ("I cannot square Shady Grove's allowance of a *Rule 23* class action despite New York's class-action bar with the disallowance of a *Rule 23* class action in the case of Illinois's class-action bar simply on the basis that Illinois's bar is narrower.").

Defendants' motion to dismiss the Illinois claim for conspiracy to monopolize under Count Two is **DENIED**.

### C. Oregon

Defendants argue that "the laws of Oregon bar recovery for at least part of the period for which Plaintiff seeks damages." (Gen. Defs. Br. at 35 (citing *Niaspan, 42 F. Supp. 3d at 759*.) The IPP responds that "Rihis is a non-issue" given that the class period begins after the enactment of Oregon's *Illinois Brick* repealer. (IPP Resp. to Gen. Defs. Br. at 13.)

Oregon's *Illinois Brick* repealer statute became effective on January 1, 2010. See *Or. Rev. Stat. § 646.780*; Laws 2009, c.304, § 1, eff. Jan. 1, 2010. The IPP has proposed a Class Period beginning April 14, 2010. (CAC ¶ 146.) There is therefore no *Illinois Brick* problem for purposes of this case.

Defendants' motion to dismiss the Oregon claim for conspiracy to monopolize under Count Two is **DENIED**.

### D. In Conclusion, the IPP Has Stated a Claim for Conspiracy to Monopolize Under [\*91] Count Two With Respect to the Laws of 25 States

In sum, the Court finds that the IPP has adequately pled facts supporting its allegations of conspiracy to monopolize.

The Court also finds that, as a matter of law, the IPP may pursue its Count Two claims for conspiracy to monopolize under the laws of all states **except** Massachusetts and Utah. Those claims are hereby **DISMISSED**. Moreover, the IPP's claim for conspiracy to monopolize under Rhode Island law is hereby **DISMISSED IN PART** to the extent that it seeks to recover for injuries incurred prior to July 15, 2013.

## VII. Count Three: Consumer Protection and Unfair and Deceptive Trade Practices Under the Laws of 25 States Against Actavis, Forest, Merz, and the Generic Defendants

The IPP Complaint next alleges an additional 25 state law claims grouped under the heading "Count Three: Consumer Protection and Unfair and Deceptive Trade Practices." (CAC at 56.) The IPP asserts this cause of action against all Defendants: Actavis, Forest, Merz, and the Generic Defendants. (*Id.*)

This cause of action alleges that "Defendants engaged in unfair competition or unfair acts or unconcionable [sic] acts or practices in violation of" state consumer protection statutes. [\*92] (CAC ¶¶ 212.) Specifically, "There was a gross disparity between the price that [the IPP] and [Class] members paid for the brand product and the value received, given that a less expensive substitute generic product should have been available." (*Id.* ¶ 213.) Count Three also alleges that the IPP and the Class "were deprived of the opportunity to purchase a generic version of Namenda IR 5 or 10 mg tablets and forced to pay higher prices for Namenda XR." (*Id.* ¶ 214.) Together, these allegations form the factual nucleus on which the 25 state law consumer protection claims are based.

As they have done with respect to Counts One and Two of the IPP Complaint, Defendants first advance several broad-based arguments aimed at dismissing Count Three of the IPP Complaint as a whole or in large part, *viz.:*

- The claims are "likely" time-barred under the applicable statute of limitations, (Forest Br. at 65 n.42);
- The IPP lacks Article III standing to bring claims in states where it has not made purchases and thereby suffered injury-in-fact, (Gen. Defs. Br. at 31);

- The IPP must satisfy the pleading requirements of [Fed. R. Civ. P. 9\(b\)](#), since state consumer protection claims are grounded in fraud, (Gen. Defs. Br. at 38); and [\*93]
- In the alternative, IPP has failed to satisfy the [Fed. R. Civ. P. 8](#) pleading standard under *Twombly* and *Iqbal*, (*id.* at 37).

For the reasons already discussed, this Court denies the motion to dismiss the claims as "likely" time-barred. In addition, the Court has already held that it will not dismiss a broad swath of claims for lack of Article III standing, on the basis that the IPP did not suffer injury-in-fact in states where it did not make purchases. However, the Court must consider the other [Rule 9\(b\)](#) and [Rule 8](#) arguments.

Defendants next make several separate state-specific arguments, *viz.*:

- The IPP may not bring state consumer protection claims where the state follows *Illinois Brick*, (*id.*);
- The IPP has failed to satisfy the pre-filing requirements under certain states' statutes, (Gen. Defs. Br. at 40; Gen. Defs. Suppl. Br. at 13);
- Certain states require a showing of consumer deception, which the IPP does not and cannot allege, (Forest Br. at 67 n.47);
- Some states require that the claim be based on a consumer transaction or conduct that is consumer-oriented, which the IPP does not plead, (Forest Br. at 67-68 n.48);
- A subset of consumer protection statutes do not cover antitrust conduct, (Forest Br. at 68 n.49; Gen. [\*94] Defs. Br. at 40);
- Recovery is possible under certain consumer protection statutes only when the conduct complained of is primarily intrastate, (Forest Br. at 68 n.50; Gen. Defs. Br. at 40, 41-42);
- Certain state statutes confer a right of action only on consumers who are natural persons with regard to transactions made primarily for personal or household purposes, (Forest Br. at 68 n.51), or on consumers who are elderly or disabled, (Forest Br. at 68 n.52; Gen. Defs. Br. at 40); and
- Some states' consumer protection laws prohibit nationwide class actions or prohibit class actions altogether, (Forest Br. at 68 n.53; Gen. Defs. Br. at 39, 41-42).

Defendants raise one or several of these arguments as a defense to each state law claim under Count Three. The table in Appendix 3 of Actavis, Forest, and Merz's original brief provides a mostly accurate overview of which arguments correspond to which claims. (See Forest Br. App'x 3.)

As this Court has done with the other Counts of the IPP Complaint, it first addresses Defendants' arguments of general applicability and then addresses each state law claim.

#### **A. The IPP Adequately Pleads Its State Law Claims Under *Twombly* and *Iqbal***

Defendants argue that the IPP does not [\*95] properly plead its claim for violation of state consumer protection laws under Count Three because (i) it does not cite to specific provisions of the consumer protection statutes and (ii) it does not plead the elements of each state's law. (Gen. Defs. Br. at 37, 42.) Merely listing citations to the state codes, they argue, does not satisfy [Iqbal, 556 U.S. at 678 \(2009\)](#) or [Twombly, 550 U.S. at 570](#).

The Court disagrees.

**HN19** [Footnote] First, the IPP is not required to identify the particular sections of the code under which the claims are brought, as long as defendants are on notice of the theory plaintiffs are pursuing. See, e.g., [In re Propranolol Antitrust Litig., 249 F. Supp. 3d 712, 729 \(S.D.N.Y. 2017\)](#) (denying defendants' motion to dismiss even though indirect purchasers did not specify the state code sections under which the claims were brought).

Moreover, the factual allegations that support the IPP's claims are well-pleaded throughout the Complaint, and it is not necessary that the IPP reiterate each of them when listing its causes of action in the final section of the

Complaint. See *In re Domestic Drywall Antitrust Litig.* No. 13-cv-2437, 2016 U.S. Dist. LEXIS 90619, 2016 WL 3769680, at \*11 (E.D. Pa. July 13, 2016) ("To the extent Defendants' one-paragraph [Twombly] argument is an invitation for the Court to comb through all of Plaintiffs' consumer protection claims and determine whether the elements [\*96] have been adequately pleaded, the Court respectfully declines the invitation."); see also *In re Petrobras Sec. Litig.*, 152 F. Supp. 3d 186, 197 (S.D.N.Y. 2016) (in securities fraud case, complaint "as a whole" adequately pleaded specific statements made or authorized by specific defendants, actual reliance, and failure to comply with statutory requirements).

Finally, although state laws may vary to some degree in the elements that they require, the IPP has made an effort to limit its claims to state laws that share substantive foundational features—such as a right of action for "unfair," as opposed to "deceptive," trade practices. See, e.g., *Propranolol*, 249 F. Supp. 3d at 729 (finding that a high level of detail was "not necessary at the pleading stage because the 'elements of unjust enrichment are similar in every state.") (citing *In re Credit Default Swaps Antitrust Litig.*, No. 13-md-2476, 2014 U.S. Dist. LEXIS 123784, 2014 WL 4379112, at \*18 (S.D.N.Y. Sept. 4, 2014)).

## B. The IPP Is Not Required to Plead Its Complaint in Accordance With Federal Rule of Civil Procedure 9(b)

Defendants next argue that because "allegations of deceptive trade practices . . . amount to allegations of fraud," the IPP must satisfy the heightened pleading standard of Rule 9(b). (Gen. Defs. Br. at 38 (citing *NCC Sunday Inserts, Inc. v. World Color Press, Inc.*, 692 F. Supp. 327, 330 (S.D.N.Y. 1988); Gen. Defs. Reply at 24.)

The IPP responds that it "has carefully limited its consumer fraud claims to the 'unfair methods' [\*97] and 'unfair trade practices' prongs of the statutes." (IPP Resp. to Gen. Defs. Br. at 17.) (See also CAC ¶ 214 (alleging injury "as a direct and proximate result of Defendants' unfair competition, unfair or unconscionable acts and practices").) The IPP also responds that *NCC Sunday Inserts*, 692 F. Supp. at 330, was binding only with respect to the *Connecticut Unfair Trade Practices Act*, under which the IPP does not bring a claim. (*Id.* at 17.)

Courts regularly distinguish between state consumer protection claims that proceed under a theory of "deceptive practices" and those that proceed under a theory of "unfair practices." See, e.g., *In re Packaged Seafood Prods. Antitrust Litig.*, 242 F. Supp. 3d 1033, 1074 (S.D. Cal. 2017); *In re Auto. Parts Antitrust Litig. (Instrument Panel Clusters)*, No. 12-md-2311, 2014 U.S. Dist. LEXIS 90724, 2014 WL 2993753, at \*19 (E.D. Mich. July 3, 2014). This is consistent with the federal FTC Act, which allows recovery for "unfair" as well as "deceptive" acts or practices, 15 U.S.C. §§ 45(a)(1), 45(n), and on which "virtually every" state consumer protection law is based, *Toward Greater Equality in Business Transactions: A Proposal to Extend the Little FTC Acts to Small Businesses*, 96 Harv. L. Rev. 1621, 1622 (1983).

As for *NCC Sunday Inserts*, that decision—which addresses a statute not at issue in this case, the Connecticut Unfair Trade Practices Act—does not hold that the heightened pleading standards of Rule 9(b) apply to allegations [\*98] under state consumer protection laws. That case held only that, "To the extent that fraud is being alleged under the rubric 'deceptive trade practices,' Rule 9(b) governs the pleading procedures." *NCC Sunday Inserts*, 692 F. Supp. at 330.

The IPP does not allege anything under the rubric of "deceptive trade practices"—deliberately so. In the absence of any "developed argument or legal authority" for Defendants' argument that I must treat the CAC as alleging deception rather than unfair acts, the claims may proceed. *Dig. Music*, 812 F. Supp. 2d at 408 n.10.

Defendants' motion to dismiss all Count Three claims on these grounds is, therefore, **DENIED**.

## C. *Illinois Brick* Does Not Bar the IPP's Consumer Protection Claims

Defendants argue—but do not cite any persuasive authority—that consumer protection claims brought by indirect purchasers are barred in all states that follow *Illinois Brick*. (Gen. Defs. Br. at 31-34.) Instead, the cases they cite focus overwhelmingly on unjust enrichment claims brought by indirect purchasers. (*Id.*)

The Generic Defendants cite only one case in which a court dismissed a consumer protection act claim that was duplicative of a state antitrust claim; in that instance, however, the district court based its finding on a case from the Supreme Court of Illinois [\*99] that specifically barred plaintiffs from invoking the *Consumer Fraud Act* to recover for conduct not covered by the Illinois Antitrust Act. *In re Wellbutrin XL Antitrust Litig.*, 260 F.R.D. 143, 162 (E.D. Pa. 2009).

The Court **DENIES** without prejudice the Defendants' motion to dismiss the majority of claims under Count Three in one fell swoop. I will consider the *Illinois Brick* arguments to the extent that the Defendants have briefed them with respect to each state's law.

#### **D. The IPP States a Claim Under the Consumer Protection Laws of Some States But Not Others**

I now turn to the arguments aimed at individual state law claims.

At this particular stage, the Court notes that it has been tasked with determining the intricacies of 25 states' consumer protection laws, in many cases with the benefit of very little briefing. For certain claims, Defendants' arguments for dismissal consists of little more than a footnote in its brief, which in many cases is a citation to either a single federal district court opinion in a similar, nationwide class of indirect purchasers, or a particular statutory provision, with little or no explanation of how state courts have interpreted this particular provision.

As is its duty, the Court has taken these arguments seriously. Nonetheless, [\*100] the Court cautions that, to the extent this very limited briefing invites the Court to *sua sponte* "comb through all of Plaintiffs' consumer protection claims and determine whether the elements have been adequately pleaded, the Court respectfully declines the invitation." *Domestic Drywall*, 2016 U.S. Dist. LEXIS 90619, 2016 WL 3769680, at \* 11. In other words, this Court responds to the arguments that are affirmatively raised in Defendants' briefing but does not undertake an independent assessment of arguments that are not pointed out by the Defendants—who are represented by able counsel.

Because of Defendants challenge each state's law on multiple grounds, this opinion proceeds state by state.

##### **1. Alabama**

Generic Defendants move to dismiss the Alabama claim under Count Three because the IPP cites to Alabama's antitrust statute, *Ala. Code § 8-10-3*, rather than to its consumer protection statute, *Ala. Code § 8-10-2*. (Gen. Defs. Br. at 37 n.17.) As this Court has done throughout this opinion for the benefit of both the IPP and the Defendants, it takes the IPP at its word that this is a typographical error. (See IPP Resp. to Gen. Defs. Br. at 18 n.8.)

For the first time in supplemental briefing, Defendants argue that the IPP fails to satisfy the pre-filing notice requirement under Alabama's consumer [\*101] protection statute. (Gen. Defs. Suppl. Br. at 13 (citing *Ala. Code § 8-19-10(e)*.) That provision states, in relevant part: "At least 15 days prior to the filing of any action under this section, a written demand for relief . . . , shall be communicated to any prospective respondent by placing in the United States mail or otherwise." *Ala. Code § 8-19-10(e)*.

It also states: "The demand requirements of this subsection shall not apply if the prospective respondent does not maintain a place of business or does not keep assets within the state, but such respondent may otherwise employ the provisions of this section by making a written offer of relief and paying the rejected tender into court as soon as practicable after receiving notice of an action commenced under this section." *Id.*

Defendants have not argued that they maintain a place of business or keep assets within the state, and nothing in the CAC alleges that they so do. (See CAC ¶¶ 16-30.) Even if this Court were to determine that Defendants maintain a place of business or keep assets in the state, nothing in the statute suggests that notifying defendants is a prerequisite to suit or that an action that failed to comply with this provision would require dismissal in state court. [\*102] Indeed, the relatively flexible notice provisions for out-of-state defendants suggests otherwise. Moreover, the tenor of the provision as a whole suggests that it operates much like a [Rule 68](#) offer of judgment and is aimed at encouraging settlement.

[Effexor, 337 F. Supp. 3d 435, 2018 WL 4466050](#), cited by Defendants, did not analyze the language of the various notice provisions at issue or opine on their purpose. That case also did not examine whether, under the laws of each state, the proper remedy for non-compliance with the notice remedy would be dismissal. Beyond *Effexor*, Defendants cite no case for the proposition that defendant notification requirements under these statutes would require dismissing the claim here.

Defendants' motion to dismiss the Alabama law claim under Count Three is **DENIED**.

## 2. Arizona

The IPP has withdrawn this claim. (IPP Resp. to Gen. Defs. Br. at 17 n.7.)

## 3. California

Defendants first argue that the [California Unfair Competition Law \("CUCL"\)](#) requires a showing of consumer deception. (Forest Br. at 67 n.47.) The IPP responds that it has limited its state consumer protection claims to the "unfair methods" and "unfair trade practices" prongs of state statutes. (IPP. Resp. to Gen. Defs. Br. at 17).

Here, the IPP has [\*103] the better of the arguments. [HN20](#)↑ For purposes of CUCL, unfair practices include, among other things, "any unlawful, unfair or fraudulent business act or practice." [Cal. Bus. & Prof. Code § 17200](#). Moreover, California's Supreme Court has held "that because the prohibitions on 'unlawful,' 'unfair' or 'fraudulent' practices are written in the disjunctive, each of those 'prongs' gives rise to a separate and distinct theory of liability." 1-16 Cheryl Lee Johnson (ed.), *California Antitrust and Unfair Competition Law* § 16.04 (revised ed. 2018) (citing [Cel-Tech Commc'n, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527, 540 \(Cal. 1999\)](#); see also [Podolsky v. First Healthcare Corp., 50 Cal. App. 4th 632, 58 Cal. Rptr. 2d 89, 102 \(Cal. Ct. App. 1996\)](#) (nursing home's practice of requiring relatives of patients on Medicare/Medicaid to sign guarantees could fall under "unlawful" prong of the CUCL, even if not deceptive)). Therefore, the IPP is correct that it need not allege deceptive behavior to survive a motion to dismiss.

Defendants next argue that the IPP must plead primarily intrastate conduct in order to allege a claim under the CUCL. (Forest Br. at 68 n.50). The IPP responds that the Complaint alleges intrastate effects and that, as a matter of law, a nationwide antitrust class action satisfies "intrastate" pleading requirements. (IPP Resp. to Gen. Defs. Br. at 32.)

The Court agrees that the IPP has pleaded intrastate [\*104] effects in its Complaint, insofar as the IPP alleges both that it indirectly purchased Namenda in California, (CAC ¶ 15), and that hundreds of thousands of consumers nationwide, including, presumably, California residents, were affected, (*id.* ¶ 48).

The only case cited by Defendants is inapposite, as it discusses wholly extraterritorial application of the statute and says nothing about whether the conduct must occur "primarily" within the state. [Meridian Project Sys., Inc. v. Hardin Constr. Co., LLC, 404 F. Supp. 2d 1214, 1225 \(E.D. Cal. 2005\)](#). In other cases, California courts have allowed class members who were either California residents or for whom the relevant transaction had occurred in state to bring claims under the CUCL. [Norwest Mortg., Inc. v. Superior Court, 72 Cal. App. 4th 214, 222, 85 Cal. Rptr. 2d 18 \(Cal. 1998\)](#).

Ct. App. 1999) (class members who were either California residents or for whom the defendant had purchased insurance within California could bring claims).

Finally, Defendants argue that the IPP has not satisfied California's pre-filing notice requirement. (Gen. Defs. Br. at 41 (citing [Cal. Bus & Prof. Code § 17209](#)).) [HN21](#) That provision reads: "If a violation of this chapter is alleged or the application or construction of this chapter is in issue in any proceeding *in the Supreme Court of California, a state court of appeal, or the appellate division of a superior court*, each person filing any brief or [\*105] petition with the court in that proceeding shall serve, within three days of filing with the court, a copy of that brief or petition on the Attorney General. . . and on the district attorney of the county in which the lower court action or proceeding was originally filed." *Id.* (emphasis added). That provision, by its terms, applies only to appellate proceedings in state court. Since this is a diversity case in a federal district court, the statute does not apply.

As a result, the Court **DENIES** the Defendants' motion to dismiss the California claim under Count Three.

#### 4. District of Columbia

Defendants argue that the IPP fails to state a claim under the [D.C. Consumer Protection and Procedures Act \("DCCPPA"\)](#) because it is not a "consumer" within the meaning of that statute. (Forest Br. at 67-68 n.48 (citing [D.C. Code § 28-3905\(k\)](#).)

The relevant provision of the DCCPPA states: "A consumer may bring an action seeking relief from the use of a trade practice in violation of a law of the District." [D.C. Code § 28-3905\(k\)\(1\)\(A\)](#). "When used as a noun," a "consumer" means "a person who, other than for purposes of resale, does or would purchase, lease (as lessee), or receive consumer goods or services, including as a co-obligor or surety, or does [\*106] or would otherwise provide the economic demand for a trade practice." *Id.* [§ 28-3901\(a\)\(2\)\(A\)](#). A "trade practice" means "any act... [involving] ... a sale, lease or transfer, of consumer goods or services." *Id.* [§ 28-3901\(a\)\(6\)](#). When used as an adjective, "consumer" relates to things "receive[d] and normally use[d] for personal, household or family purposes." *Id.* [§ 28-3901 \(a\)\(2\)\(B\)\(i\)](#).

[HN22](#) Sergeant Benevolent, the only Named Plaintiff in this Action, does not fit the definition of "consumer" under the plain language of the statute. Additionally, the D.C. Court of Appeals has clarified that "the CPPA was designed to police trade practices arising only out of consumer-merchant relationships, and does not apply to commercial dealings outside the consumer sphere." [Ford v. Chartone, Inc., 908 A.2d 72, 81 \(D.C. 2006\)](#) (internal quotations omitted). "[T]he CPPA does not protect merchants in their commercial dealings with suppliers or other merchants." [Id. at 83](#). For example, D.C. courts have held that a taxi driver's claims for coerced purchases of gasoline and other supplies against his taxi-owners association do not state a claim under the DCCPPA. [Mazanderan v. Indep. Taxi Owners' Ass'n, Inc., 700 F. Supp. 588, 591 \(D.D.C. 1988\)](#). The relevant question is whether the plaintiffs activity is akin to that of a merchant. [Ford, 908 A. 3d at 83](#).

In addition, "Courts overseeing multidistrict litigation as well as state [\*107] courts in the District of Columbia have ... held that transactions along the distribution chain that do not involve the ultimate retail customer are not 'consumer transactions' that the [DCCPPA] seeks to reach. Rather, it is the ultimate retail transaction between the final distributor and the individual member of the consuming public that the [DCCPPA] covers." [In re Cast Iron Soil Pipe & Fittings Antitrust Litig., No. 14-m-2508, 2015 U.S. Dist. LEXIS 121620, 2015 WL 5166014, at \\*30 \(E.D. Term. 2015\)](#).

[HN23](#) Sergeant Benevolent is not an "individual member of the consuming public." *Id.* Moreover, it is immaterial that Sergeant Benevolent pays for pharmaceuticals prescribed to its members, who do use them for "personal, family, or household purposes." [D.C. Code § 28-3901\(a\)\(2\)\(B\)\(i\)](#). As other courts have held, "when an insurance plan makes a purchase, it does so, not for personal purposes, but for the plan's business purposes, i.e., to fulfill its side of a contractual relationship with its members, who pay premiums for its coverage." [Restasis, 2018 U.S. Dist. LEXIS 194161, 2018 WL 5928143, at \\*7](#) (collecting cases).

Because the IPP fails to state a claim under the DCCPPA under [Rule 12\(b\)\(6\)](#), the Court **GRANTS** Defendants' motion to dismiss.<sup>23</sup>

## 5. Florida

Defendants move to dismiss the claim under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") on the grounds [\*108] that the IPP does not sufficiently allege intrastate conduct. (Forest Br. at 68 n.50; Gen. Defs. Br. at 40-41 n.20.) Relatedly, Defendants argue that a plaintiff may not use the FDUTPA to bring claims on behalf of a nationwide class. (Gen. Defs. Br. at 39 n.18).

The cases cited by Defendants, however, say nothing about an intrastate conduct requirement and instead stand for the proposition that the FDUTPA covers only those individuals who live or make purchases in Florida. It is intrastate *injury*, not conduct, which implicates the FDUTPA.

For example, in [Oce Printing Sys. USA, Inc. v. Mailers Data Servs., Inc.](#), 760 So.2d 1037, 1040 (Fla. Dist. Ct. App. 2000), the court held that plaintiffs, a class of users, brokers, and servicers of Siemens/Oce ultra-high speed printers, possessed viable causes of action under FDUTPA only if they were also Florida consumers, and that they would not be entitled to recovery merely on the basis that Siemens/Oce had entered into certain anticompetitive agreements or otherwise engaged in unlawful conduct within the state of Florida. *Id.*

Likewise, the court in [Montgomery v. New Piper Aircraft](#), 209 F.R.D. 221, 228 (S.D. Fla. 2002), held that a nationwide class of aircraft owners could not recover under the FDUTPA merely because the defendant's unlawful conduct had taken place within the state. *Id.* Instead, only Florida consumers [\*109] could take advantage of the FDUTPA. *Id.*

Finally, [Coastal Physician Servs. of Broward Cty., Inc. v. Ortiz](#), 764 So.2d 7, 8 (Fla. Dist. Ct. App. 1999), held that the FDUTPA was "for the protection of in-state consumers for either in-state or out-of-state debt collectors." *Id.*

The IPP alleges that it "indirectly purchased, paid and/or provided reimbursement for Namenda in ... Florida." (CAC ¶ 15.) Moreover, although the IPP brings the IP Action on behalf of a nationwide Class, it does not purport to enable all members of the Class to recover under the FDUTPA. For these reasons, Defendants' motion to dismiss the Florida claim under Count Three is **DENIED**.

## 6. Hawaii

Defendants argue that the Hawaii Unfair and Deceptive Acts or Trade Practices statute ("HUDAP") only "allow[s] suits by consumers who are natural persons with regard to transactions made primarily for personal or household purposes." (Forest Br. at 68 n.51). The statute reads, in relevant part: "No person other than a consumer, the attorney general or the director of the office of consumer protection may bring an action based upon unfair or deceptive acts or practices declared unlawful by this section." [Haw. Rev. Stat. § 480-2\(d\)](#). The preceding section of the statute defines "consumer" as "a natural person who, primarily for personal, family, or household [\*110] purposes, purchases, attempts to purchase, or is solicited to purchase goods or services or who commits money, property, or services in a personal investment." [Haw. Rev. Stat. § 480-1](#).

Sergeants Benevolent Association Health & Welfare Fund is not a natural person. It is a trust, incorporated in New York, which reimburses either pharmacies or its members for purchases of Namenda. Additionally, Sergeants Benevolent also does not pay for Namenda "primarily for personal, family, or household purposes," regardless of

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<sup>23</sup> Defendants also argue that the DCCPPA require plaintiffs to allege deceptive conduct, (Forest Br. at 67 n.47), and is inapplicable to antitrust conduct, (Forest Br. at 68 n.49; Gen. Defs. Br at 40 n. 19) However because the Court dismisses the DCCPPA claim under Count Three for failure to state a claim based on a retail purchase for personal, family, or household purposes, it does not reach these arguments.

how its member insureds use Namenda. See [Restasis, 2018 U.S. Dist. LEXIS 194161, 2018 WL 5928143, at \\*7.](#) Therefore, it fails to state a claim under [Rule 12\(b\)\(6\)](#) with respect to the HUDAP.

Defendants' motion to dismiss the Hawaii law claim under Count Three is **GRANTED**.

## 7. Idaho

Defendants first argue that plaintiff has failed to plead deceptive conduct, as required by the [Idaho Consumer Protection Act](#) ("ICPA"). (Forest Br. at 67 n.47.) The IPP responds that the ICPA confers a right of action based on "unfair" conduct. (IPP Resp. to Gen. Defs. Br. at 17.) Defendants also argue that the ICPA makes unlawful only specific types of conduct, including misrepresentations, and does not include antitrust conduct. (Gen. Defs. Br. at 40 n.19 (citing Ida. Code [§ 48-603](#).) These arguments are treated [\*111] together.

**HN24** [+] Like many state consumer protection laws, most of the conducted enumerated in the ICPA focuses on deceptive, fraudulent, or misleading practices. [Idaho Code § 48-603](#). Nonetheless, there is no firm requirement that a plaintiff show deception since, for example, "engaging in any unconscionable method, act, or practice in the conduct of trade or commerce-is expressly contemplated by the Act. Ida. Code [§ 48-603\(18\)](#); *id.* [§ 48-603C](#). Other courts have found that plaintiffs may state a claim for anticompetitive conduct, even if that conduct is not deceptive, under this prong of the ICPA. [In re New Motor Vehicles Canadian Exp. Antitrust Litig., 350 F. Supp. 2d 160, 184 \(D. Me. 2004\)](#).

Moreover, the ICPA contains a harmonization provision with the federal FTC Act. [Idaho Code § 48-604\(1\)](#). And, the Supreme Court of Idaho has held that the ICPA must be "liberally construed to effect the legislative intent to deter deceptive or *unfair trade practices* and to provide relief for consumers exposed to proscribed practices." [In re W. Acceptance Corp., Inc., 117 Idaho 399, 788 P.2d 214, 216 \(Ida. 1990\)](#) (emphasis added) (internal quotation omitted). The Court therefore denies Defendants' motion to dismiss the ICPA claim.

Defendants next argue that the ICPA requires that the underlying conduct involve a consumer transaction or conduct that is consumer-oriented. (Forest Br. at 67-68 n.48 (citing [Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 737 F. Supp. 2d 380, 409 \(E.D. Pa. 2010\)](#)).) [\*112]

In [Sheet Metal Workers](#), the court referenced a state court decision, [State ex rel Wasden v. Daicel Chem. Indus., Ltd., 141 Idaho 102, 106 P.3d 428, 435 \(Ida. 2005\)](#), which examined the unconscionability provisions of the ICPA and found that they were "designed to prohibit unconscionable 'sales conduct' that is *directed at the consumer*." *Id.* (emphasis added). *Wasden*, however, hinged on two factors: whether the alleged price-fixing of sorbates, an antimicrobial food and animal feed additive, was "sales conduct" for purposes of the ICPA and whether the defendants had ever sold sorbates to consumers in Idaho. [Id. at 430, 435](#).

Here, by contrast, the Defendants are alleged to have marketed and sold Namenda to consumers at inflated, anticompetitive prices by, among other things, restricting consumer access to generic versions of Namenda and announcing the withdrawal of the Namenda IR formulation directly to consumers. Thus, construing the allegations in the light most favorable to the Plaintiff, I find that the IPP has adequately alleged "consumer conduct" within the meaning of the statute. See also [New Motor Vehicles, 350 F. Supp. 2d at 185](#) (upholding claim for antitrust conduct under ICPA).

Defendants' motion to dismiss is **DENIED**.

## 8. Illinois

Defendants first argue that plaintiffs must allege deception [\*113] in order to state a claim under the Illinois Consumer Fraud Act ("ICFA"). (Forest Br. at 67 n.47.) See also [Sullivan's Wholesale Drug Co., Inc. v. Faryl's Pharmacy, Inc., 214 Ill. App. 3d 1073, 573 N.E.2d 1370, 1376, 158 Ill. Dec. 185 \(111. App. Ct. 1991\)](#) (plaintiffs

"cause of action must stand or fall on whether defendants' conduct was deceptive") (citing *Laughlin v. Evanston Hosp.*, 133 Ill. 2d 374, 550 N.E.2d 986, 993, 140 Ill. Dec. 861 (Ill. 1990)). The IPP argues that it can plead its claim under the "unfairness" prong of the ICFA, which is separate from the "deception" prong. (IPP Resp. to Gen. Defs. Br. at 17.)

**HN25** At bottom, it is unclear whether *Laughlin*'s statement that the ICFA's "reach was to be limited to conduct that defrauds or deceives consumers or others" was intended to bar all future claims brought under its "unfairness" prong, or whether its holding was, instead, restricted to the price discrimination claims alleged in that particular case. *550 N.E.2d at 993*. Subsequent cases in Illinois imply that "unfairness" has survived *Laughlin*: "[a] plaintiff may allege that conduct is unfair under the [ICFA] without alleging that the conduct is deceptive." *Hill v. PS Illinois Tr.*, 368 Ill. App. 3d 310, 856 N.E.2d 560, 568, 305 Ill. Dec. 755 (Ill. Ct. App. 2006). "A deceptive practices claim must meet *Rule 9(b)*'s heightened pleading standard, while an unfair practices claim need not because it is not based on fraud." *Wheeler v. Assurant Specialty Prop.*, 125 F. Supp. 3d 834, 842 (N.D. Ill. 2015). I will follow the lead of those Illinois courts and decline to dismiss the IPP's claim as a matter of law on [\*114] these grounds.

Second, Defendants argue that the ICFA is inapplicable to antitrust conduct. (Forest Br. at 68 n.49 (citing *815 Ill. Comp. Stat. 505/2*; *Laughlin*, 550 N.E.2d at 993); Gen. Defs. Br. at 40 n.19.) The IPP responds that the ICFA "should be interpreted in the same manner and to the same extent as *Section 5 of the FTC Act*," which unquestionably includes conduct that violates the antitrust laws. (IPP Resp. to Gen. Defs. Br. at 26 (citing *815 Ill. Comp. Stat. 505/2*).

Again, this Court is not persuaded that *Laughlin* bars the current claims. *Laughlin* held that price discrimination, which was not actionable under the IAA, was similarly not actionable under the ICFA. *550 N.E.2d at 993* ("There is no indication that the legislature intended that the Consumer Fraud Act be an additional antitrust enforcement mechanism."); accord *Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 3d 786, 2018 WL 36311577, at \*8 (S.D. Ill. 2018) ("the Illinois Supreme Court has instructed that plaintiffs cannot use the [ICFA] to get around the fact that their theory does not fly under the [IAA]."). As a result, *Laughlin* stands for the proposition that the ICFA is not a safety net that serves to catch residual anticompetitive behavior, although it does not speak to whether the ICFA countenances claims that are also actionable under the IAA.

A subsequent [\*115] case, *Gaebler v. NM Potash Corp.*, 285 Ill. App. 3d 542, 676 N.E.2d 228, 230, 221 Ill. Dec. 707 (Ill. App. Ct. 1996), relied on *Laughlin* to bar claims for anticompetitive conduct that were brought pursuant to the ICFA only-presumably because plaintiffs had tried to skirt the IAA's prohibition on indirect purchaser class actions. *Id.* ("[C]lassic antitrust allegations dressed in Consumer Fraud Act clothing" did not state a claim). However, federal courts in Illinois and the Seventh Circuit have questioned whether *Gaebler*, which interprets *Laughlin* as preventing the ICFA from ever being a remedy for anticompetitive conduct, states the law too broadly. *Siegel v. Shell Oil Co.*, 480 F. Supp. 2d 1034, 1049 n.12 (N.D. Ill. 2007) (noting that no other Illinois appellate courts have interpreted *Laughlin* in this manner). And, consistent with both *Laughlin* and *Gaebler*, other federal courts have held that "[i]t remains possible . . . that an unfair practice might be covered by both the **antitrust law** and the Consumer Fraud Act." *Baton v. Live Nation Entm't Inc.*, 746 F.3d 827, 831 (7th Cir. 2014). The Court finds these recent cases, as well as the lack of subsequent appellate case law in Illinois, persuasive on the question of whether *Gaebler* bars recovery for anticompetitive conduct under the ICFA.

Third, Defendants argue that the ICFA bars class actions. (Gen. Defs. Br. at 39, n.18; Forest Br. at 68, n.53). However, they fail to cite to any [\*116] provision of the ICFA that does so. Instead, they cite to the IAA, which does not purport to apply to other statutes. 740 Ill. Comp. Stat. § 10/7(2) ("no person shall be authorized to maintain a class action . . . for indirect purchasers asserting claims under *this Act*") (emphasis added). In the absence of any arguments, case law, or citations to the consumer fraud statute, the Court finds that this argument does not provide sufficient grounds for dismissing the ICFA claim.

Finally, Defendants argue that the ICFA requires plaintiffs to allege a consumer transaction or conduct that is consumer-oriented. (Forest Br. at 67-68, n.48 (citing *Ill. Comp. Stat. 505/10a(a)*)) But that section reads, in relevant part, "Proof of a public injury, a pattern, or an effect on consumers and the public interest generally shall be required in order to state a cause of action under this Section against a party defendant who is a new vehicle dealer

or used vehicle dealer within the meaning of Chapter 5 of the Illinois Vehicle Code or who is the holder of a retail installment contract within the meaning of [Section 2.12](#) of the [Motor Vehicle Retail Installment Sales Act.](#)" [Ill. Comp. Stat 505/10a\(a\)](#) (emphasis added). By its terms, the statute is inapplicable to the case at bar. [\*117]

Defendants' motion to dismiss the Illinois claim under Count Three is **DENIED**.

## 9. Kansas

Defendants argue that the IPP has failed to allege consumer deception in satisfaction of the elements of the Kansas Consumer Protection Act ("KCPA"). (Forest Br. at 67 n.47.) The IPP responds generally that it brings its claims pursuant to the "unconscionable" prong of the state consumer protection laws. (IPP Resp. to Gen. Defs. Br. at 17.)

[HN26](#)[] The Court agrees with Defendants' interpretation of the statute. The KCPA is intended to "protect consumers from suppliers who commit deceptive and unconscionable practices." [Kan. Stat. § 50-623](#); see also *id.* §§ 50-626, 50-627. As with other state laws, the enumerated offenses under the statute focus overwhelmingly on deceptive or fraudulent acts. Unlike other states, however, Kansas courts have spoken more uniformly to the issue of whether the "unconscionability" prong of the statute also requires a showing of deception: "In order to render the contract between the parties unconscionable, there must be some element of deceptive bargaining conduct present as well as unequal bargaining power." *Cornelison v. Denison State Bank*, 315 P.3d 278 (Kan. Ct. App. 2014) (citing [Willman v. Ewen](#), 230 Kan. 262, 266, 634 P.2d 1061 (1981)); see also [State ex rel. Stovall v. Confikied.com, L.L.C.](#), 272 Kan. 1313, 1321, 38 P.3d 707, 713 (2002) (same). And, unlike courts in, for example, Illinois, courts in Kansas have not affirmatively [\*118] excused a plaintiff proceeding with a claim for unconscionability from satisfying the heightened pleading requirements for claims grounded in fraud. Compare [Wheeler](#), 125 F. Supp. 3d at 842, *supra*.

Because the IPP cites no cases in support of its arguments, and cites one in support of Defendants', the KCPA claim is **DISMISSED**.<sup>24</sup>

## 10. Maine

Defendants argue that the [Maine Unfair Trade Practices Act \("MUTPA"\)](#) provides a cause of action only for persons who purchase goods "primarily for personal, family, or household purposes." (Forest Br. at 68 n.51.) The statute provides a remedy to, in relevant part "[a]ny person who purchases or leases goods, services or property, real or personal, primarily for personal, family or household purposes and thereby suffers any loss of money or property, real or personal." [Me. Rev. Stat. tit. 5, § 213\(1\)](#).

For the reasons discussed above, the Court finds that Sergeants Benevolent, an insurer, has not purchased or paid for Namenda "primarily for personal, family, or household purposes." See [Restasis](#), 2018 U.S. Dist. LEXIS 194161, 2018 WL 5928143, at \*7. It has paid for the drug because it is an insurer and has a contractual duty to reimburse its members for their purchases. Therefore, it fails to state a claim under [Rule 12\(b\)\(6\)](#).

Defendants' motion to dismiss is **GRANTED**.<sup>25</sup>

<sup>24</sup> Defendants also argue that the KCPA bars class actions (Gen. Defs. Br. at 39 n.18; Forest Br. at 68 n.53); that the statute requires plaintiffs to allege a consumer transaction or conduct that is consumer-oriented (Forest Br. at 67-68 n.48); that the statute is inapplicable to antitrust conduct (Gen. Defs. Br. at 40; Forest Br. at 68 n.49); and that the statute only allows suits by consumers who are natural persons with regard to transactions made primarily for personal or household purposes (Forest Br. at 68 n.51). However, because the Court dismisses the KCPA claim on the grounds that it is inapplicable to antitrust conduct, it does not reach these arguments.

<sup>25</sup> Defendants also argue that the MUPTA requires a showing of consumer deception. (Forest Br. at 67 n.47.) However, because the Court dismisses the MUPTA claim on the grounds that Sergeants Benevolent has failed to state a claim based on purchases made "primarily for personal, family, or household purposes," it does not reach these arguments.

## 11. Massachusetts

In order [\*119] to bring a claim under Massachusetts' state consumer protection law, Defendants argue that the IPP must allege primarily intrastate conduct. (Forest Br. at 68 n.50; Gen. Defs. Br. at 41 n.20.) Defendants do not cite any case law for this proposition, although they do cite [Mass. Laws ch. 93A, § 1](#), which defines "trade" and "commerce" to include "trade or commerce directly or indirectly affecting the people of this commonwealth." *Id.* The IPP responds that the Complaint alleges intrastate effects and that, as a matter of law, a nationwide antitrust class action satisfies "intrastate" pleading requirements. (IPP Resp. to Gen. Defs. Br. at 32.)

On its own, the "affecting people of this commonwealth" language does not persuade the Court that this claim should be dismissed, particularly as the IPP has alleged sales of Namenda IR and Namenda XR affecting consumers and third party payors across the country, including in Massachusetts.

It is true that an earlier version of the Massachusetts statute contained an exemption for defendants "of whose gross revenue at least twenty per cent is derived from transactions in interstate commerce," as well as for defendants who met certain other criteria. See [\*120] [Dodd v. Commercial Union Ins. Co., 373 Mass. 72, 365 N.E.2d 802, 808 \(Mass. 1977\)](#). However, the statute no longer carves out such defendants. Rather, the current version of that provision now states, in relevant part, "For the purpose of this section, the burden of proving exemptions from the provisions of this chapter shall be upon the person claiming the exemptions." [Mass. Laws ch. 93A, § 3](#).

Next, Defendants argue that G.L. c. 93A does not allow for class actions or indirect purchaser actions. [Ciardi, 762 N.E.2d at 314, HN27](#) [↑] is squarely on point: it holds that both class actions and indirect purchaser actions are permitted under Massachusetts' consumer protection law. *Id.*

Finally, Defendants argue in their supplemental briefing that the IPP has not satisfied the pre-filing notice requirement under chapter 93A. (Gen. Defs. Suppl. Br. at 13 (citing [Mass. Gen. Laws ch. 93A, § 9\(3\)](#).) [HN28](#) [↑]) Like Alabama's consumer protection statute, the pre-suit notice provisions of chapter 93A do not apply if "the prospective respondent does not maintain a place of business or does not keep assets within the commonwealth." *Id.* Defendants do not argue, and nothing in the CAC alleges, that they maintain a place of business or keep assets in Massachusetts. (See CAC ¶¶ 16-30.) Moreover, nothing in [§ 9\(3\)](#) suggests that a Massachusetts court would dismiss an action [\*121] under Chapter 93A if a plaintiff failed to comply with this provision. Like the Alabama statute, the provision appears to operate like a [Rule 68](#) offer of judgment, capping damages for defendants who make settlement offers in good faith.

Defendants' motion to dismiss the Massachusetts law claim under Count Three is **DENIED**.

## 12. Michigan

Defendants first argue that the IPP is required to allege consumer deception to plead a claim under the [Michigan Consumer Protection Act \("MCPA"\)](#). (Forest Br. at 67 n.47.) The IPP argues that it can base its claim on "unfair" practices. (IPP Resp. to Gen. Defs. Br. at 17.)

[HN29](#) [↑] The IPP is correct. "The MCPA is broader than common law torts of fraud inasmuch as it prohibits 'not only 'deceptive' business practices but also those which are 'unfair' and 'unconscionable.'" [Game On Ventures, Inc. v. Gen. RV Ctr., Inc., 587 F. Supp. 2d 831, 839 \(E.D. Mich. 2008\)](#) (citing [Mayhall v. A.H. Pond Co., 129 Mich. App. 178, 341 N.W.2d 268, 270 \(Mich. Ct. App. 1983\)](#)). The Court finds that the IPP has adequately alleged conduct falling under [§ 445.903\(1\)\(z\)](#)—"Charging the consumer a price that is grossly in excess of the price at which similar property or services are sold." (Compare CAC ¶ 213). Therefore, Defendants' first argument fails.

Defendant next argues that the IPP fails to plead a consumer transaction or conduct that is consumer-oriented. (Forest Br. at 67-68, n.48 [\*122] (citing [Sheet Metal Workers, 737 F. Supp. 2d at 412](#).) [Sheet Metal Workers,](#)

however, dismissed the plaintiffs' MCPA claim in a sham patent litigation case because plaintiffs had not "alleged that [defendant] had an intent to deceive consumers and because their actions [did] not fall within any of the enumerated prohibited practices listed in [section 445.901](#) [sic]." *Id.* The facts of [Sheet Metal Workers](#) are readily distinguishable, particularly as the IPP has adequately alleged "unfair" conduct under an enumerated provision of the statute.

Third, Defendants argue that the MCPA is inapplicable to antitrust conduct because it only applies to "specific types of conduct," such as misrepresentations. (Gen. Defs. Br. at 40 n.19 (citing [Mich. Comp. Laws § 445.903](#)); Forest Br. at 68 n.49.) The IPP opposes this argument on the basis that the MCPA is "modeled after the FTC Act and extend[s] to prohibit unfair methods of competition including monopolistic conduct." (IPP Resp. to Gen. Defs. Br. at 26.)

[HN30](#)[] The IPP is correct. The MCPA does contain harmonization language: it enables injured persons to bring a class action caused by "a method, act, or practice in trade or commerce declared by a circuit court of appeals or the supreme court of the United States to be an unfair or deceptive [\*123] act or practice within the meaning of [section 5\(a\)\(1\)](#) of the Federal Trade Commission Act." [Mich. Compiled Laws § 445.911\(3\)\(c\)](#). Moreover, federal courts have sustained causes of action under the MCPA for antitrust conduct. [FTC v. Mylan Lab., Inc., 62 F. Supp. 2d 25, 48 \(D.D.C. 1999\)](#).

Defendants' motion to dismiss is **DENTED**.

### 13. Missouri

Defendants argue that the IPP fails to adequately plead a consumer transaction or conduct that is consumer-oriented under the [Missouri Merchandising Practices Act \("MMPA"\)](#). (Forest Br. at 67-68, n.48 (citing [Mo. Rev. Stat. § 407.020\(1\)](#)).

The Court is not convinced that the provision of the MMPA cited by Defendants contains such a requirement. "The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce . . . in or from the state of Missouri, is declared to be an unlawful practice." [Mo. Rev. Stat. § 407.020\(1\)](#). "Trade or commerce," in turn, is defined as "the advertising, offering for sale, sale, or distribution, or any combination thereof, of any services and any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value wherever situated." [\*124] *Id.* [§ 407.010\(7\)](#).

Because Defendants have cited no authority commensurate with the proposition that Missouri restricts recovery under the MMPA to consumer-oriented conduct not covered by the IPP Complaint, their motion to dismiss the Missouri claim under Count Three is **DENTED**.

### 14. Montana

Defendants argue that the [Montana Unfair Trade Practices and Consumer Protection Act \("MUTCPA"\)](#) only "allow[s] suits by consumers who are natural persons with regards [sic] to transactions made primarily for personal or household purposes." (Forest Br. at 68, n.51 (citing Mont. Stat. [§ 30-14-102](#))).

[HN31](#)[] The MUTCPA enables a "consumer" to bring an action for damages, Mont. Stat. [§ 30-14-133\(1\)](#), and defines "consumer" as "a person who purchases or leases goods, services, real property, or information primarily for personal, family, or household purposes," *id.* [§ 30-14-102\(1\)](#).

As I have held with respect to other state laws containing this requirement, I find that Sergeants Benevolent has failed to state a claim under the MUTPCPA because it did not purchase Namenda "primarily for personal, family, or household purposes." See [Restasis, 2018 U.S. Dist. LEXIS 194161, 2018 WL 5928143, at \\*7.](#)

Defendants' motion to dismiss is, therefore, **GRANTED**.<sup>26</sup>

## 15. Nebraska

Defendants argue that the IPP fails to adequately plead a consumer transaction [\*125] or conduct that is consumer-oriented under the [Nebraska Consumer Protection Act \("NCPA"\)](#). (Forest Br. at 67-68 n.48 (citing [Neb. Rev. Stat. § 59-1601](#)).) As with their claim under Missouri law, Defendants have cited no authority commensurate with the proposition that the NCPA restricts recovery to "consumer-oriented" conduct or that such conduct not covered by the IPP Complaint. [Section 59-1601](#) of the NCPA is broad, with no indications that recovery is restricted to certain types of conduct: "person" is defined to include trusts," *id.* [§ 59-1601\(1\)](#), and "trade and commerce" is defined to mean, in relevant part, "any commerce directly or indirectly affecting the people of the State of Nebraska," *id.* [§ 59-1601\(2\)](#).

As a result, Defendants' motion to dismiss the Nebraska claim under Count Three is **DENIED**.

## 16. Nevada

Defendants argue that the [Nevada Deceptive Trade Practices Act \("NDTPA"\)](#) requires the IPP to allege deceptive conduct. (Forest Br. at 67 n.47.) The IPP argues that it has limited its claims to the "unfair methods" and "unfair trade practices" prongs of the statute. (IPP Resp. to Gen. Defs. Br. at 17.)

[HN32](#)[] The NDTPA enumerates deceptive trade practices at [sections 598.015 through 598.025](#) of the statute. [Section 598.0923](#) of the statute makes it a violation to "knowingly . . . violate a state or federal statute [\*126] or regulation relating to the sale or lease of goods or services." [Nev. Rev. Stat. § 598.0923\(3\)](#). This Court adopts the reasoning in [Effexor, 337 F. Supp. 3d 435, 2018 WL 4466050, at \\*20](#), which found that a plaintiff could state a claim under this section of the NDTPA where the claims were "predicated on allegations of anticompetitive conduct, which are considered prohibited acts under [Nev. Rev. Stat. § 598A.060](#)." *Id.*

Defendants next argue that the Nevada Deceptive Trade Practices Act ("NDTPA") confers a right of action only to elderly or disabled persons. (Gen. Defs. Br. at 40 (citing [Nev. Rev. Stat. § 598.0977](#)); see also Forest Br. at 68 n. 52.) Because the IPP, "a New York trust, is not an elderly or disabled person located in Nevada," it cannot bring a claim. (Gen. Defs. Br. at 40.)

[HN33](#)[] I agree with the IPP that private relief in the statute is not so limited. As the IPP persuasively argues, [Nev. Rev. Stat. § 41.600](#) operates to provide a right of action to "any person who is a victim of consumer fraud." (IPP Resp. to Gen. Defs. Br. at 31 (citing [Nev. Rev. Stat. § 41.600](#); [Southern Serv. Corp. v. Excel Bldg. Servs., Inc., 617 F. Supp. 2d 1097, 1099 \(D. Nev. 2007\)](#))) The statute defines "consumer fraud" to encompass acts that violate the NDTPA. See [Nev. Rev. Stat. § 41.600\(2\)\(e\)](#) ("consumer fraud" means . . . a deceptive trade practice as defined in [NRS 598.0915 to 598.0925](#), inclusive"). In [Southern Serv. Corp., 617 F. Supp. 2d at 1100](#), moreover, the U.S. District Court for the District of Nevada found that "person," as used in [Nev. Rev. Stat. § 41.600](#), could include a corporate [\*127] competitor, which indicates that private relief under the statute is not restricted to elderly or disabled persons. The fact that the law makes special provision for the elderly and disabled does not mean that others are not covered elsewhere in the statute.

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<sup>26</sup> Defendants also argue that the MUTPCPA does not permit class actions. (Forest Br. at 68 n.53.) However, because the Court dismisses the MUTPCPA claim on the grounds that Sergeants Benevolent has failed to state a claim based on purchases made "primarily for personal, family, or household purposes," it does not reach these arguments.

Other federal district courts to examine this issue are in accord and have not restricted NDTPA claims to elderly or disabled plaintiffs. [DDAVP, 903 F. Supp. 2d at 227](#); [Domestic Drywall, 2016 U.S. Dist. LEXIS 90619, 2016 WL 3769680, at \\*10](#).

Defendants' motion to dismiss the Nevada law claim under Count Three is **DENIED**.

## 17. New Hampshire

Defendants argue that the [New Hampshire Consumer Protection Act \("NHCPA"\)](#) only applies when the underlying conduct is primarily intrastate. (Forest Br. at 68 n.50; Gen. Defs. Br. at 40-41 n.20). Defendants cite to the provision of the statute that deems unlawful "any unfair method of competition . . . in the conduct of any trade or commerce within this state." [N.H. Rev. Stat. § 358-A:2](#). The IPP alleges it has met this requirement, both with respect to its Complaint and as a matter of nationwide class action law. (IPP Resp. to Gen. Defs. Br. at 32.)

Without more, the Court is not persuaded that the "within this state" language in the statute requires dismissal of the claim. "[C]ouds interpreting New Hampshire's consumer protection [[\\*128](#)] law disagree as to whether a nationwide scheme in which the plaintiffs pay a higher price in the state is sufficient to satisfy the statute's requirement." [In re Ductile Iron Pipe Fittings \(DIPF\) Indirect Purchaser Antitrust Litig., No. 12-cv-169, 2013 U.S. Dist. LEXIS 142466, 2013 WL 5503308, at \\*22 \(D.N.J. Oct. 2, 2013\)](#) (collecting cases). However, based on the language of the statute, this Court agrees with those cases that have held that [HN34](#)[] sales of the offending goods into New Hampshire alleges sufficient intrastate conduct to satisfy the NHCPA. [DDAVP, 903 F. Supp. 2d at 231](#).

Defendants' motion to dismiss the New Hampshire claim is, therefore, **DENIED**.

## 18. New Mexico

Defendants first argue that the [New Mexico Unfair Practices Act \("NMUPA"\)](#) requires plaintiffs to allege deceptive conduct. (Forest Br. at 67, n.47). The IPP says that the NMUPA also covers unfair or unconscionable conduct. (IPP Resp. to Gen. Defs. Br. at 17.)

[HN35](#)[] The IPP has the better reading of the NMUPA. In addition to deceptive conduct, the NMUPA also makes unlawful "unconscionable trade practices," which include those that "result[] in a gross disparity between the value received by a person and the price paid." [N.M. Stat. § 57-12-2\(E\)\(2\)](#); (compare CAC P 213). Federal courts have permitted price-fixing claims, which typically do not require alleging [[\\*129](#)] deception, to proceed under this provision. [In re Lipitor Antitrust Litig., 336 F. Supp. 3d 395, 2018 WL 4006752, at \\*20 \(D.N.J. 2018\)](#); [Domestic Drywall, 2016 U.S. Dist. LEXIS 90619, 2016 WL 3769680, at \\*8](#). Although this is not a price-fixing case, the Court is persuaded by these cases that hold that a plaintiff need not allege consumer deception. In addition, and for the same reasons, the Court also rejects Defendants' argument that the NMUPA does not provide a remedy for antitrust conduct. (Forest Br. at 68, n.49; Gen. Defs. Br. at 40 n.19.)

Defendants next argue that the IPP fails to adequately plead a consumer transaction or conduct that is consumer-oriented under the NMUPA. (Forest Br. at 67-68 n.48 (citing [N.M. Stat. §§ 57-12-2 to -3](#))).

As with their claim under Missouri and Nebraska law, however, Defendants have cited no authority commensurate with the proposition that the NCPA restricts recovery to "consumer-oriented" conduct or that such conduct not covered by the IPP Complaint. [Section 57-12-3](#) of the NMUPA states: "Unfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce are unlawful." [Section 57-12-2](#), in turn, defines "trade or commerce" very broadly, including "the advertising, offering for sale or distribution of any services and any property and any other article, commodity or thing of value, including [[\\*130](#)] any trade or commerce directly or indirectly affecting the people of this state." [N.M. Stat. § 57-12-2\(C\)](#).

Defendants' motion to dismiss is **DENIED**.

## 19. New York

Defendants move to dismiss the IPP's claim under [section 349 of New York's General Business Law](#) ("NYGBL") for failure to plead deceptive conduct. (Forest Br. at 67 n.47.) The IPP argues that it is not required to plead deceptive conduct to recover under the statute and that allegations of "unfair" conduct suffice. (IPP Resp. to Gen. Defs. Br. at 17.)

**HN36** [F] The Court agrees with Defendants. [Section 349 of the NYGBL](#) does not contain an "unfair" or "unconscionable" practices prong, and therefore a plaintiff must plead consumer fraud or deception in order to bring a claim. In addition, while antitrust conduct is actionable under [section 349](#), plaintiffs still must allege deception to state a claim. See [Dig. Music, 812 F. Supp. 2d at 410](#) (analyzing New York cases); see also 7 von Kalinowski, Sullivan, & McGuirl, *supra*, § 132.07. Even cases cited by the IPP hold that any plaintiff who brings a claim under [section 349](#) must allege deceptive conduct in its Complaint. See, e.g., [In re Processed Egg Prods. Antitrust Litig., 851 F. Supp. 2d 867, 907 \(E.D. Pa. 2012\)](#) (dismissing claim for failure to allege deception as the basis for injury) (citing [Stutman v. Chem. Bank, 95 N.Y.2d 24, 731 N.E.2d 608, 611-12, 709 N.Y.S.2d 892 \(N. Y. 2000\)](#)).

As a result, Defendants' motion to dismiss the New York claim is **GRANTED**.<sup>27</sup>

## 20. North Carolina

Defendants ask this Court to dismiss the IPP's claim under the [North Carolina Unfair and Deceptive Trade Practices Act \("NCUDTPA"\)](#) [\*131] because it has failed to allege conduct that is primarily intrastate. (Forest Br. at 68 n.50; Gen. Defs. Br. at 41 n.20 (both citing [N.C. Gen. Stat. § 75-1.1](#).) However, nothing in the section of the statute cited by Defendants indicates that a claim may be brought pursuant to the NCUDTPA only if the conduct is "primarily intrastate." See [N.C. Gen. Stat. § 75-1.1](#).

Second, Defendants argue that the NCUDTPA only permits actions by natural persons with regard to transactions made primarily for personal or household purposes. (Forest Br. at 68 n.51 (citing N.C. Gen. Stat. 75.1-1).) Again, nothing in the cited section indicates that a claim would be restricted to natural persons or to transactions made primarily for personal or household purposes. In fact, "commerce" is expressly defined to "include[] all business activities, however denominated," and exempts only "professional services rendered by a member of a learned profession." [N.C. Gen. Stat. § 75-1.1\(b\)](#).

Defendants' motion to dismiss is **DENIED**.

## 21. Rhode Island

Defendants argue that the [Rhode Island Deceptive Trade Practices Act \("RIDTPA"\)](#) limits relief to "[a]ny person who purchases or leases goods or services primarily for personal, family, or household purposes." [R.I. Gen. Laws § 6-13.1-5.2\(a\)](#); (see also Forest [\*132] Br. at 68 n.51).

As discussed in previous sections, Sergeants Benevolent fails to state a claim under the RIDTPA because it did not purchase Namenda "primarily for personal, family, or household purposes." See [Restasis, 2018 U.S. Dist. LEXIS 194161, 2018 WL 5928143, at \\*7](#).

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<sup>27</sup> Defendants also argue that [NYGBL § 349](#) requires a plaintiff to allege a consumer transaction or conduct that is consumer-oriented, (Forest Br. at 67-68 n.48), and that the statute covers only conduct that is primarily intrastate, (Forest Br. at 68 n.50; Gen. Defs. Br. at 40-41 n.20). However, because the Court dismisses the [NYGBL § 349](#) claim for failure to plead deceptive or fraudulent conduct, it does not reach these arguments.

Defendants' motion to dismiss is, therefore, **GRANTED**.<sup>28</sup>

## 22. Tennessee

Defendants argue that the TCPA is inapplicable to antitrust conduct. (Forest Br. at 68 n.49; Gen. Defs. Br. at 40 n.19 (citing [Tenn. Code § 47-18-104\(b\)](#)).) There appears to be a split among Tennessee's intermediate courts with respect to this question. Some courts have held expressly that "the TCPA does not apply to anti-competitive conduct." [Bennett v. Visa U.S.A. Inc., 198 S.W.3d 747, 755 \(Term. Ct. App. 2006\)](#). Others have concluded that anticompetitive conduct is an "unfair" practice covered by the TCPA. [Blake v. Abbott Labs., No. 03A01-9509-cv-00307, 1996 Tenn. App. LEXIS 184, 1996 WL 134947, at \\*5-\\*7 \(Tenn. Ct. App. Mar. 27, 1996\)](#).

[HN37](#)[<sup>29</sup>] More recent decisions in Tennessee, including *Bennett*, have reasoned that, by not incorporating the "unfair methods of competition" language from the federal FTC Act into Tennessee's "little FTC" Act, the Tennessee legislature intended to prohibit recovery for anticompetitive conduct under the TCPA. [Bennett, 198 S.W.3d at 754-55](#); see also [Sherwood v. Microsoft Corp., No. M2000-1850-00A-R9-CV, 2003 Tenn. App. LEXIS 539, 2003 WL 21780975, at \\*31-\\*33 \(Ten. Ct. App. July 31, 2003\)](#); [Duke v. Browning-Ferris Indus. of Tenn., Inc., No. W2005-146-00A-R3-CV, 2006 Tenn. App. LEXIS 355, 2006 WL 1491547, at \\*8 \(Tenn. Ct. App. May 31, 2006\)](#). Instead, the legislature [\*133] intended that consumers injured by such conduct would have an exclusive remedy under the state antitrust statute, the Tennessee Trade Practices Act. [Sherwood, 2003 Tenn. App. LEXIS 539, 2003 WL 21780975, at \\*33](#). *Blake*, by comparison, did not analyze the legislative history of the TCPA or its incongruities with the federal FTC Act, instead relying on the statutory mandate that it be "liberally construed." [1996 Tenn. App. LEXIS 184, 1996 WL 134947, at \\*6-\\*7](#).

Like other federal courts to review this issue, I find that the more recent opinions of the Tennessee Court of Appeals, such as *Bennett* and *Sherwood*, both persuasive in their own right, as well as indicative of how the Tennessee Supreme Court would likely rule on this question. See [Relafen, 221 F.R.D. at 284](#); [In re Photochromic Lens Antitrust Litig., No. 10-md-2173, 2011 U.S. Dist. LEXIS 119257, 2011 WL 4914997, at \\*4 & n.14 \(Oct. 14, 2011\)](#).

Therefore, Defendants' motion to dismiss the Tennessee claim under Count Three is **GRANTED**.<sup>29</sup>

## 23. Utah

Defendants first argue that the [Utah Consumer Sales Practices Act](#) ("UCSPA") requires the IPP to plead deceptive conduct. (Forest Br. at 67 n.47.) The IPP argues that a plaintiff may state a claim under the UCSPA for "unfair" acts or practices that are not inherently deceptive. (IPP Resp. to Gen. Defs. Br. at 17.)

The Court agrees with the IPP. [HN38](#)[<sup>29</sup>] The UCSPA expressly allows a plaintiff to [\*134] plead "unconscionable" conduct as the basis of its claim, and that this does not require a showing of fraud or deception. See [Utah Code § 13-11-5](#); see also [New Motor Vehicles, 350 F. Supp. 2d at 205](#); [Gallegos v. LVNV Funding LLC, 169 F. Supp. 3d 1235, 1245 \(D. Utah 2016\)](#) (considering separately claims for deceptive and unconscionable acts).

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<sup>28</sup> Defendants also argue that the RIDTPA requires a showing of consumer deception, (Forest Br. at 67 n.47), and is inapplicable to antitrust conduct, (Forest Br. at 68 n.49). However, because the Court dismisses the RIDTPA claim on the grounds that Sergeants Benevolent has failed to state a claim based on purchases made "primarily for personal, family, or household purposes," it does not reach these arguments.

<sup>29</sup> Defendants also argue that the TCPA requires a showing of consumer deception (Forest Br. at 67 n.47) and that the statute does not permit class actions (Forest Br. at 68 n.53; Gen. Defs. Br. 39 n.18.) However, because the Court dismisses the TCPA claim as inapplicable to antitrust conduct, it does not reach these arguments.

Defendants next argue that the UCSPA is inapplicable to antitrust conduct because anticompetitive conduct is not enumerated within the statute's list of "deceptive practices." (Forest Br. at 68 n.49; Gen. Defs. Br. at 40 n.19 (citing [Utah Code § 13-11-4](#).) The IPP responds that the UCSPA contains a harmonization provision with the FTC Act, giving it a broad reach. (IPP Resp. to Gen. Defs. Br. at 26.)

First, the list of deceptive practices in the statute is not exclusive, by its own terms. [Utah Code § 13-11-4\(2\)](#). Second, Defendants cite to the "deceptive act or practice" provision of the UCSPA, whereas the IPP has stated that it brings all claims under Count Three pursuant to the "unfair" or "unconscionable" practices prongs of the relevant statutes. Here, the relevant provision is not [section 13-11-4](#) but instead [section 13-11-5](#). Finally, other federal district courts have found that allegations of anticompetitive conduct, when brought pursuant to the "unconscionability" provision of the UCSPA, can survive a motion to dismiss. [New Motor Vehicles, 350 F. Supp. 2d at 205](#); [Aftermarket Filters, 2009 WL 3754041, at \\*9](#). Therefore, the Court [\*135] declines to dismiss the UCSPA claim on this ground.

Defendants next move to dismiss the UCSPA claim because it applies only to natural persons making purchases for personal or household purposes. (Forest Br. at 68 n.51 (citing [Utah Code §§ 13-11-3\(2\)\(a\), 13-11-19](#).)

The Court disagrees that the UCSPA clearly restricts recovery in this manner. [Utah Code § 13-11-5](#) states, "An unconscionable act or practice by a supplier *in connection with a consumer transaction* violates this act, whether it occurs before, during, or after the transaction." *Id.* [§ 13-11-5](#) (emphasis added). [Utah Code § 13-11-19](#), which provides a private cause of action, permits a "consumer who suffers loss as a result of a violation of this chapter" to recover actual damages. *Id.* [§ 13-11-19\(2\)](#) (emphasis added). The statute defines "consumer transaction" in [Section 13-11-3\(2\)](#) but does not anywhere define "consumer." That subsection reads, in relevant part: "'Consumer transaction' means a sale . . . or other . . . transfer or disposition of goods . . . , to, or *apparently to*, a person for . . . primarily personal, family, or household purposes." [Utah Code § 13-11-3\(2\)\(a\)](#) (emphasis added). "Person," moreover, expressly includes a "corporation, . . . trust, partnership, association, . . . or any other legal entity." *Id.* [§ 13-11-3\(5\)](#) (emphasis added).

On its face, the definition [\*136] of "consumer transaction" appears to contemplate sales of goods to—among other entities—corporations and trusts for their "personal," "family," or "household" purposes. This, of course, is possible only through an entity's members, employees or customers, which is consistent with the IPP's allegations in its Complaint.

The Court is not aware of any case law that would prohibit recovery by the IPP for failure to state a claim on the basis of these statutory provisions. The Court is aware of only one case, from the District of Utah, that purports to interpret "consumer" for purposes of [subsection 13-11-19](#). [Icon Health & Fitness, Inc. v. ConsumerAffairs.com, No. 16-cv-168, 2018 U.S. Dist. LEXIS 37517, 2018 WL 1183372, at \\*5 \(D. Utah Mar. 6, 2018\)](#), motion to certify appeal denied, [2018 U.S. Dist. LEXIS 78328, 2018 WL 2122855 \(D. Utah May 8, 2018\)](#). The court in that case reasoned that the plaintiff, whose products were reviewed on Defendant's website, did not have a cause of action under the UCSPA because the plaintiff did "not allege or argue that it is a consumer harmed by Defendants' conduct." *Id.* The facts of the IP Action are clearly distinguishable, however, because Sergeants Benevolent alleges that, through its own reimbursements or payments for branded Namenda, it grossly overpaid for the product relative to its value. [\*137] (CAC ¶ 213.) In addition, at least one federal court has allowed a corporation, which that a competitor engaged in false consumer advertising in the course of consumer transactions, to recover under the UCSPA. See [Derma Pen, LLC v. 4EverYoung Ltd., No. 13-cv-00729, 2017 U.S. Dist. LEXIS 79464, 2017 WL 2258362, at \\*15 \(D. Utah May 22, 2017\)](#), aff'd, [736 F. App'x 741 \(10th Cir. 2018\)](#).

**HN39** [↑] In addition, unlike other consumer protection statutes reviewed by this Court, the UCSPA contemplates sales made both "to" and "apparently to" a person for personal, family, or household purposes. [Utah Code § 13-11-3\(2\)\(a\)](#). The Court is not aware of any Utah case that interprets this language, and the distinction is not clear from the legislative history. The "apparently to" language was inserted as part of S.B. 75, which expanded the definition of "consumer transaction" related to identity fraud. 2000 Utah Las Ch. 57 (West) (S.B. 75) ("Consumer transaction' . . . includ[es] the use or misuse of personal identifying information of any person in relation to a consumer

*transaction to, or apparently to, a person for primarily personal, family, or household purposes.").* Later, the identity fraud language was stripped from the definition, but the phrase "apparently to" was retained. 2004 Utah Laws Ch. 55 (H.B. 195). [\*138] Construing the allegations in the Complaint in the light most favorable to the IPP, however, the Court finds that sales of Namenda were made either to or "apparently to" consumers primarily for their personal, family, or household purposes. Therefore, the Complaint states a claim.

Finally, Defendants argue that class actions are not permissible under the UCSPA. (Forest Br. at 68 n.53; Gen, Defs. Br. at 39 n.18 (citing [Utah Code § 13-11-19\(2\)](#).)) The UCSPA states, in relevant part: "A consumer who suffers loss as a result of a violation of this chapter may recover, but not in a class action, actual damages[.]" [Utah Code § 13-11-19\(2\)](#).

**HN40**[] However, another paragraph of the same section permits a consumer to bring a class action for actual damages provided certain preconditions are satisfied. [Utah Code § 13-11-19\(4\)\(a\)](#); see also [Miller v. Basic Research, LLC, 285 F.R.D. 647, 654-55 \(D. Utah 2010\)](#). Specifically, class plaintiffs proceeding under the UCSPA must allege that the specific action was declared unlawful pursuant to an administrative rule, a court order, or (in limited cases) a consent judgment before the consumer transactions on which the action was based occurred. *Id.*

Courts that have examined the class action damages bar under the UCSPA have tended to defer the question of whether an action meets the statutory prerequisites [\*139] until later stages of the case. See, e.g., [In re General Motors LLC Ignition Switch Litig., 339 F. Supp. 3d 262, 2018 WL 4351892, at \\*46 n.63 \(S.D.N.Y. 2018\)](#) ("The Court defers to another day whether the provision" that limits damages under the UCSPA "applies here."); [In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liability Litig., MDL No. 2672, 349 F. Supp. 3d 881, 2018 U.S. Dist. LEXIS 171598, 2018 WL 4777134, at \\*28-\\*29 \(N.D. Cal. Oct. 3, 2018\)](#) ("The Court will not make these determinations at this stage.").

The Court agrees that this issue is more appropriately handled following discovery, when the parties can address (i) if the statutory prerequisites have been met with respect to the conduct and particular transactions alleged and, (ii) in the alternative, whether the need to make this individualized determination in Utah would defeat predominance.

Defendants' motion to dismiss the UCSPA claim is **DENIED**.

## 24. Vermont

Defendants move to dismiss the [Vermont Consumer Protection Act \("VCPA"\)](#) because it permits only claims brought by natural persons making purchases for personal or household purposes. (Forest Br. at 68 n.51 (citing [Vt. Stat. tit 9 § 2461\(b\)](#).)

This cited provision restricts recovery to a "consumer," [Vt. Stat. tit. 9 § 2461\(b\)](#). "Consumer," in turn, is defined as "any person who purchases, leases, contracts for, or otherwise agrees to pay consideration for goods or services *not for resale in the ordinary* [\*140] *course of his or her trade or business* but for his or her use or benefit or the use or benefit of a member of his or her household, or in connection with the operation of his or her household . . . , or a person who purchases, leases, contracts for, or otherwise agrees to pay consideration for goods or services *not for resale in the ordinary course of his or her trade or business* but for the use or benefit of his or her business or in connection with the operation of his or her business." [Vt. Stat. tit. 9, § 2451a\(a\)](#) (emphasis added).

**HN41**[] As discussed in preceding sections, Sergeants Benevolent cannot state a claim under this statute by alleging that it reimbursed for Namenda on behalf of its insured members. See [Restasis, 2018 U.S. Dist. LEXIS 194161, 2018 WL 5928143, at \\*7](#). The language of the statute clearly restricts the term "consumer" to end users of the product,

Therefore, Defendants' motion to dismiss the VCPA claim is **GRANTED**.

## 25. West Virginia

Defendants argue for the first time in their supplemental briefing that the IPP's claim under the [West Virginia Consumer Credit and Protection Act](#) ("WVCCPA") must be dismissed because the IPP has not satisfied the statutory pre-filing notice requirement. (Gen. Defs. Suppl. Br. at 13 (citing [W. Va. Code § 46A-6-106\(c\)](#).) That provision reads, in relevant part: [\*141] "No action, counterclaim, cross-claim or third-party claim may be brought pursuant to the provisions of this section until the person has informed the seller or lessor in writing and by certified mail, return receipt requested, of the alleged violation and provided the seller or lessor twenty days from receipt of the notice of violation but ten days in the case a cause of action has already been filed to make a cure offer." [W. Va. Code § 46A-6-106\(c\)](#).

[HN42](#) [↑] Unlike the similar pre-suit notice requirement under the Hawaii Antitrust Act, the state court remedy for noncompliance with the WVCCPA's pre-filing notice requirement appears to be dismissal of the claim. [Harrison v. Porsche Cars North Am., Inc., No. 15-0381, 2016 W. Va. LEXIS 245, 2016 WL 1455864, at \\*3 \(W. Va. Apr. 12, 2016\)](#) (unpublished opinion) (dismissing claim for failure to comply with pre-suit notice provisions).

Because the notification requirement is an express precondition to filing suit, federal district courts sitting in diversity have also granted defendants' motions to dismiss when the plaintiffs have not complied with this provision. [Waters v. Electrolux Home Prods., Inc., 154 F. Supp. 3d 340, 354 \(N.D. W. Va. 2015\)](#) (consumer class action); [Mullins v. Ethicon, Inc., No. 12-cv-2952, 2017 U.S. Dist. LEXIS 7940, 2017 WL 319804, at \\*3 \(S.D. W. Va. Jan. 20, 2017\)](#) (consumer class action); [McCoy v. Southern Energy Homes, Inc., No. 09-cv-1271, 2012 U.S. Dist. LEXIS 56594, 2012 WL 1409533, at \\*13 \(S.D. W. Va. Apr. 23, 2012\)](#); [Stanley v. Huntington Nat. Bank, No. 11-ev-54, 2012 U.S. Dist. LEXIS 9448, 2012 WL 254135, at \\*7 \(N.D. W. Va. Jan. 27, 2012\)](#) (individual action). Other courts have [\*142] dismissed the claim without prejudice. [Processed Egg Prods., 851 F. Supp. 2d at 911](#).

To this Court's knowledge, no federal district court has examined the cure offer requirement in light of the Supreme Court's holding in *Shady Grove*. Certainly, the pre-suit cure offer requirement is "a state law that restricts the types of claims eligible for class treatment beyond the limits established by [Rule 23](#)," because it requires certain prerequisites to filing suit that [Rule 23](#) does not. [Restasis, 2018 U.S. Dist. LEXIS 194161, 2018 WL 5928143, at \\*6](#). It therefore conflicts with the federal rule.

The question is therefore whether the cure offer requirement is "so bound up with the state-created right or remedy that it define the scope of that substantive right or remedy." *Id.* (citing [Shady Grove, 559 U.S. at 419-20](#) (Stevens, J., concurring)).

[HN43](#) [↑] This Court finds that it is. Under the statute, the cure offer, where accepted, tolls the applicable statute of limitations "for the period the effectuation of the cure offer is being performed." [W. Va. Code § 46A-6-106\(e\)](#). Moreover, where the accepted cure offer is performed, it constitutes a complete defense to the action. *Id.* [§ 46A-6-106\(h\)](#). And, if a defendant accepts and performs a cure offer, and a plaintiff brings suit anyway, the defendant is entitled to attorneys' fees and costs for defending the action. *Id.* In other words, the cure offer [\*143] creates substantive defenses and additional remedies under state law.

For this reason, the Court **GRANTS** Defendants' motion to dismiss the West Virginia claim under Count Three.<sup>30</sup>

#### E. In Conclusion, the IPP Has Stated a Claim for Violation of State Consumer Protection Laws Under Count Three Under the Laws of 14 States

In sum, the Court finds that the IPP Complaint adequately pleads facts supporting its allegations of unfair trade practices against all Defendants. The Court also finds that, as a matter of law, the IPP may pursue its Count Three

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<sup>30</sup> Defendants also argue that the WVCCPA requires plaintiffs to allege deceptive conduct, (Forest Br. at 67 n.47); requires plaintiffs to plead a consumer transaction or conduct that is consumer-oriented, (Forest Br. at 67-68 n.48); and is inapplicable to antitrust conduct, (Forest Br. at 68 n.49; Gen. Defs. Br. at 40 n.19). However, because the Court dismisses the WVCCPA claim for failure to serve a cure offer on the Defendants prior to initiating the lawsuit, it does not reach these arguments.

claims for consumer protection law violations under the laws of all states **except** Arizona (which claim was withdrawn by the IPP), the District of Columbia, Hawaii, Kansas, Maine, Montana, New York, Rhode Island, Tennessee, Vermont, and West Virginia. Those claims are hereby **DISMISSED**.

### **VIII. Count Four: Unjust Enrichment Under the Laws of 44 States Against Actavis, Forest, Merz, and the Generic Defendants**

Finally, the IPP Complaint alleges 44 state law claims grouped under the heading "Count Four: Unjust Enrichment." (CAC at 56.) The IPP asserts this cause of action against all Defendants: Forest, Actavis, Merz, and the Generic Defendants. (*Id.*)

This cause of action [**\*144**] alleges that "Defendants have benefited from the overcharges" on Namenda IR and XR; that these benefits were "made possible by the unlawful and inequitable acts alleged" in the Complaint; that "Defendants' financial benefits are traceable to Plaintiff and End-Payor Class members' overpayments"; and that "Plaintiff and End-Payor Class members have conferred an economic benefit upon the Defendants in the nature of profits resulting from unlawful overcharges." (CAC ¶¶ 219-21.) Together, these allegations form the factual nucleus on which the 44 state unjust enrichment claims are based.

At the outset, the IPP notes that, "No the extent required, this claim is pled in the alternative to other claims in this Complaint." (CAC ¶ 218.) The IPP maintains that "unjust enrichment is a separate cause of action" from both state antitrust and consumer protection laws, "which plaintiffs are allowed to plead in the alternative under [Federal Rule of Civil Procedure 8](#)—regardless of consistency and whether based on legal or [sic] equitable grounds." (IPP Resp. to Gen. Defs. Br. at 41). The IPP also alleges that it has no adequately remedy at law. (CAC ¶ 230.)

As they have done with respect to Counts One, Two, and Three of the IPP Complaint, [**\*145**] Defendants first make several broad-based arguments aimed at dismissing Count Four of the Complaint as a whole, including:

- The claims are "likely" time-barred under the applicable statute of limitations, (Forest Br. at 65 n.42);
- The IPP has failed to satisfy the [Fed. R. Civ. P. 8](#) pleading standard under *Twombly* and *Iqbal*, (Gen. Defs. Br. at 42);
- The IPP lacks Article III standing to bring claims in states where it has not made purchases and thereby suffered injury-in-fact, (Forest Br. at App'x 4);
- The IPP has not plausibly alleged that it conferred any benefit on the Generic Defendants, (Gen. Defs. Br. at 46);
- The IPP may not skirt the strictures of *Illinois Brick* by bringing indirect purchaser claims as equitable actions for unjust enrichment, (Gen. Defs. Br. at 34-36 nn.12, 14; Forest Br. App'x 4); and
- Equitable claims cannot be used as a backstop where the injuries suffered by plaintiffs are not cognizable under either the antitrust or consumer protection laws (Gen. Defs. Br. at 43).

This Court has already addressed the first three of these arguments. For the same reasons discussed in preceding sections, the Court therefore denies Defendants' motions to dismiss on those grounds.

The Court addresses [**\*146**] the remaining three arguments—related to conferral of a benefit, *Illinois Brick*, and equitable claims—in its discussion below.

As with Count Three, Defendants also make several separate, state-specific arguments aimed at dismissing the individual state law claims under Count Four, *viz.*:

- Certain states have no independent cause of action for unjust enrichment, (Gen. Defs. Br. at 44; Forest Br. at 70 n.55);
- Some states require the plaintiff to allege that the defendant received a direct benefit from it, (Gen. Defs. Br. at 44 15; Forest Br. at 77 n.57); and

- A subset of states require the plaintiff to allege privity with the defendant, (Gen. Defs. Br. at 47-48), or "something approaching privity," (Forest Br. at 70).

Defendants raise one or several of these arguments as a defense to each state law claim under Count Four. The table in Appendix 4 of Actavis, Forest, and Merz's original brief provides a mostly accurate overview of which arguments correspond to which claims. (See Forest Br. App'x 4.)

Again, as this Court has done with the other Counts of the IPP Complaint, it first addresses Defendants' arguments of general applicability and then proceeds through each state claim, determining [\*147] whether the relevant arguments raised warrant dismissal.

#### **A. Count Four Does Not State a Claim With Respect to the Generic Defendants Under the Laws of Any State**

Federal district courts generally recognize that "[t]he elements of unjust enrichment are similar in every state." *Lazarek v. Ambit Energy Holdings, LLC, No. 15-cv-6361, 2017 U.S. Dist. LEXIS 161135, 2017 WL 4344557, at \*6 (W.D.N.Y. Sept. 29, 2017)* (citing *Credit Default Swaps, 2014 U.S. Dist. LEXIS 123784, 2014 WL 4379112, at \*18*).

Both *Lazarek* and *Credit Default Swaps* base their reasoning in large part on a law review article, which compared the elements of unjust enrichment in each state and, finding them to be similar, proposed that these state laws could be applied to antitrust claims. Daniel R. Karon, *Undoing the Otherwise Perfect Crime—Applying Unjust Enrichment to Consumer Price-Fixing Claims*, [108 W. Va. L. Rev. 395, 409-10](#) & n.79 (2005).

**HN44** [1] That article summarized the elements of unjust enrichment as follows: "(1) [plaintiff] conferred a benefit upon the defendant, who had knowledge of the benefit; (2) [t]he defendant accepted and retained the conferred benefit; and (3) [u]nder the circumstances, it would be inequitable for the defendant to retain the benefit without paying for it." *Id. at 409*.

Notably, the IPP adopts this same formulation in its brief. (IPP Resp. to Gen. Defs. Br. at 38.)

The Generic Defendants [\*148] move to dismiss all of Count Four with respect to themselves — but not with respect to Actavis, Forest, and Merz—because "Plaintiff's Complaint does not plausibly allege that Plaintiff conferred even an indirect economic benefit . . . on the Generic Defendants." (Gen. Defs. Br. at 46; Gen. Defs. Suppl. Br. at 17-18.) The IPP responds that the Generic Defendants received a benefit "in the nature of profits resulting from unlawful overcharges." (IPP Resp. to Gen. Defs. Br. at 39.)

Even by the IPP's own logic, however, the unlawful overcharges did not unjustly enrich the Generic Defendants. If the benefit alleged is indeed "profits resulting from unlawful overcharges"—prof is which could have come only from sales of branded Namenda IR and Namenda XR—then the CAC alleges no facts consistent with the claim that any benefit flowed from the IPP or the Class to the Generic Defendants.

In other words, nowhere has the IPP alleged that it or other members of the Class paid increased prices for *generic* versions of Namenda IR. Rather, the gravamen of the IPP Complaint is that it and other Class members paid increased prices for *branded* Namenda IR while generic Namenda IR was kept off of the market. [\*149] All of these overcharge benefits flowed to Forest.<sup>31</sup>

Indeed, according to the CAC, the only benefits conferred upon the Generic Defendants came from Forest and Merz—not from the IPP or class members—and came in the form of: (i) cash payments for avoided litigation costs; (ii) early entry licenses; and (iii) an acceleration clause that guaranteed entry no later than other generic manufacturers. The IPP has wholly failed to allege a connection between these benefits, which again are the only benefits to Generic Defendants mentioned in the CAC, and the loss suffered by the IPP and other Class members.

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<sup>31</sup> Again, most likely due to their decision to retain the same counsel and to submit a brief jointly with Forest, Actavis and Merz have not challenged the unjust enrichment claims under Count Four on the basis that no benefit from the overcharges on Namenda flowed to them, so the Court will not raise and address this argument *sua sponte*.

(See CAC ¶ 221 ("Plaintiff and [IPP] Class members have conferred an economic benefit upon the Defendants in the nature of profits resulting from unlawful overcharges, *to the economic detriment of Plaintiff and the End-Payor Class members.*".).) <sup>32</sup>

The Court therefore DISMISSES all 44 state law claims under Count Four with respect to the Generic Defendants.

#### **B. The Unjust Enrichment Claims Under the Laws of Ten States Are Barred By *Illinois Brick* (Alaska, Colorado, Connecticut, Delaware, Montana, New Jersey, Oklahoma, South Carolina, [\*150] Virginia, and Washington)**

The remaining Defendants next move to dismiss the claims for unjust enrichment under the laws of 20 states because allowing the IPP to pursue such claims would constitute an impermissible "end run" around the *Illinois Brick* prohibition on indirect purchaser actions. (Gen. Defs. Br. at 34-36 nn.12, 14; Forest Br. App'x 4.)<sup>33</sup>

As an initial matter, these 20 states include Puerto Rico and Utah. As this Court has already determined when addressing the arguments brought against Count One, Puerto Rico and Utah allow indirect purchaser claims. Accordingly, the Court DENIES Defendants' motion to dismiss the Puerto Rico and Utah unjust enrichment claims.

**HN45** Whether the remaining 18 state claims can be dismissed based on *Illinois Brick* depends on whether the claims stand on their own or simply reflect an alternative election of equitable remedies by the IPP. Courts in this circuit have observed that "unjust enrichment takes at least two forms:" autonomous and parasitic. *In re Dig. Music Antitrust Litig.*, 812 F. Supp. 2d 390, 411 (S.D.N.Y. 2011). "Parasitic claims are where the unjust enrichment is based upon a predicate wrong, such as a tort, breach of contract or other wrongful conduct such as an antitrust violation." *Id.* (internal quotation omitted). [\*151] "Conversely, unjust enrichment may provide an independent ground for restitution, and this is known as autonomous restitution." *Id.* (internal quotation omitted).

Logically, "Autonomous claims in an area regulated by an independent body of law are more problematic than parasitic claims because the premise for such a claim must be that, even if the defendants' conduct is blameless under the substantive requirements of federal and state antitrust statutes and state consumer protection statutes, the plaintiffs nevertheless can still obtain restitution," *Id. at 411-12*. This becomes even trickier when the state legislature has expressed a policy preference restricting certain groups of plaintiffs from recovering.

**HN46** The majority of courts in this circuit have followed the rule that indirect purchasers may not allege autonomous unjust enrichment claims if that state follows *Illinois Brick*. "It is beyond peradventure that indirect purchasers may not employ unjust enrichment to skirt the limitation on recovery imposed by *Illinois Brick*." *Dig. Music*, 812 F. Supp. 2d at 412; accord *DDAVP*, 903 F. Supp. 2d at 232; *Yong Ki Hong v. KBS Am., Inc.*, 951 F. Supp. 2d 402, 425 (E.D.N.Y. 2013) ("Certainly, if such plaintiffs were permitted to repackage their antitrust claims as unjust enrichment actions, the entire thrust and purpose of the antitrust standing [\*152] doctrine would disintegrate,").

This Court agrees with the logic of those decisions, which is respectful of states' own policy determinations about who may recover for anticompetitive conduct. It therefore DISMISSES the following ten autonomous unjust

<sup>32</sup> The *Restatement (Third) of Restitution and Unjust Enrichment* states, "While the paradigm case of unjust enrichment is one in which the benefit on one side of the transaction corresponds to an observable loss on the other, the consecrated formula at the expense of another' can also mean in violation of the other's legally protected rights,' without the need to show that the claimant has suffered a loss." *Restatement (Third) of Restitution and Unjust Enrichment* § 1 (2011). The IPP presumably could have chosen to rely upon this theory to prosecute its claims of unjust enrichment. However, the IPP has also stated expressly in its Complaint and in briefing that it conferred a benefit on Generic Defendants in the form of overcharges, so the Court does not reach this question.

<sup>33</sup> Because Actavis, Forest, and Merz adopt the Generic Defendants' briefing in whole, this Court continues to refer to Generic Defendants' briefs, even though these defendants were dismissed from Count Four.

enrichment claims brought in states that follow the rule of *Illinois Brick*: Alaska, Colorado, Connecticut, Delaware, Montana, New Jersey, Oklahoma, South Carolina, Virginia, and Washington.

Defendants seek dismissal of claims in an additional eight states that follow *Illinois Brick* but for which the Complaint pleads a viable antitrust or consumer protection claim: Alabama, Idaho, Massachusetts, Minnesota, Missouri, New York, Rhode Island, and South Dakota, (Gen. Defs. Br. at 34-36,) By definition, these are parasitic claims rather than autonomous claims.

"As to parasitic claims premised on a violation of state law, these claims boil down to an election of remedies." *Digital Music, 812 F. Supp. 2d at 413*, This turns on a case-by-case examination of whether each state's antitrust or consumer protection statute has "override[n]" or "limit[ed] ... the scope of restitutive relief that would normally be available to a plaintiff at equity. *Id.*

No party has briefed the extent to [\*153] which each of these eight states' antitrust and consumer protection laws limits a plaintiff's ability to recover in equity. Absent such argument or briefing, this Court will not undertake an independent assessment of whether and to what extent these each of these statutes restricts equitable recovery.

Therefore, Defendants' motion to dismiss these eight parasitic unjust enrichment claims is **DENIED**, without prejudice to consideration of the issue at a later date on proper briefing.

### C. Autonomous Unjust Enrichment Claims in States That Do Not Follow *Illinois Brick* Survive (Arkansas and Wyoming)

Defendants also argue that, in an antitrust case, claims for unjust enrichment cannot lie where the injuries suffered by plaintiffs are not cognizable under either the antitrust or consumer protection laws. (Gen. Defs. Br. at 43.) This is true regardless of whether those states follow *Illinois Brick*. On these grounds, they move to dismiss any autonomous unjust enrichment claims remaining, which would be those under the laws of Arkansas and Wyoming.

The IPP responds that recovery under a theory of autonomous enrichment is not contingent on statutory claims. (IPP Resp. to Gen. Defs. Br. at 39-40.)

The [\*154] Court is aware of some cases that support Defendants' argument. For example, in *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, plc, 737 F. Supp. 2d 380, 426 (E.D. Pa. 2010)*, the court applied the respect-for-state-policies rationale undergirding *Digital Music* and held that it would dismiss all autonomous unjust enrichment claims "unless plaintiffs have presented convincing caselaw establishing that a state recognizes unjust enrichment as an autonomous cause of action." *Id. at 426*; accord *Niaspan, 42 F. Supp. 3d at 763*.

This Court finds, however, that such a determination inappropriately shifts the burden at the motion to dismiss stage to the nonmoving party—particularly in light of the fact that unjust enrichment claims can morph from parasitic to autonomous once a court determines that the predicate statutory claims do not survive. Rather than asking the plaintiff to shoulder the burden of these contingencies, the Court finds it is more appropriate [HN47](#) [↑] at this stage that the parties moving to dismiss bear the burden of arguing that the state does not recognize an autonomous cause of action for unjust enrichment, as Defendants do here with respect to California, Illinois, and Mississippi. (See Forest Br. App'x 4.)

In the alternative, the party [\*155] moving to dismiss may argue that the policy reasons barring recovery under the predicate statutes are strong enough to require dismissing any autonomous unjust enrichment claim in that state. For example, at least one district court has held that it would "decline to allow autonomous restitution where recovery under state antitrust and consumer protection statutes is specifically prohibited." *In re Flonase Antitrust Litig., 692 F. Supp. 2d 524, 542 n.13 (E.D. Pa. 2010)*. The Court agrees that such an approach accords respect to states' own substantive policy determinations.

Here, however, the Court has not had occasion to determine whether recovery is "strictly prohibited" under the antitrust and consumer protection laws of Arkansas and Wyoming. This is because (i) the IPP did not allege antitrust or consumer protection claims in those states, and (ii) Defendants did not independently raise reasons why the IPP would be prohibited from recovering under the antitrust laws of Arkansas and Wyoming, beyond the fact that the IPP simply did not allege those claims in the first place. Cf. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 599 F. Supp. 2d 1179, 1191 (N.D. Cal. 2009) (defendants briefed policy reasons why plaintiffs could not recover under the antitrust laws and, therefore, by extension, the unjust enrichment laws, of Arkansas, Virginia, Montana, [\*156] and Puerto Rico).

In sum, this Court agrees with the reasoning of *In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 618, 669 (E.D. Mich. 2000). That case reasoned that a federal policy requiring dismissal of all autonomous unjust enrichment claims in an antitrust case would both "fail[] to read Plaintiffs' complaint in the light most favorable to Plaintiffs and confuse[] Plaintiffs' right to recover an equitable remedy under a common law claim based upon principles of unjust enrichment with its right to recover a remedy at law for an alleged violation of a state's antitrust laws."

Therefore, the Court **DENIES** Defendants' motion to dismiss the claims under Arkansas and Wyoming law, without prejudice to consideration of the issue at a later date on proper briefing.

#### **D. The IPP States a Claim for Unjust Enrichment Under the Laws of Some States But Not Others**

The Court now turns to Defendants' state-specific arguments for dismissing the IPP's unjust enrichment claims under Count Four. (Gen. Defs. Br. at 44-50.)

##### **1. Alabama**

Defendants argue that the IPP cannot allege a claim for unjust enrichment in Alabama because to do so it must allege that it conferred a direct benefit on the Defendants. (Forest Br. at 70 n.57 [\*157] (citing *Danny Lynn Elec. & Plumbing, LLC v. Veolia ES Solid Waste Se., Inc.*, No. 09-cv-192, 2011 U.S. Dist. LEXIS 78557, 2011 WL 2893629, at \*6 (M.D. Ala. July 19, 2011); Gen. Defs. Br. at 45 n.24 (same).))

The IPP responds that unjust enrichment does not require a direct benefit because it does not require privity. (IPP Resp. to Gen. Defs. Br. at 43.) The IPP also cites several federal district court cases that denied motions to dismiss based on the "direct benefit" requirement, none of which discuss that requirement in the context of Alabama law. (*Id.*)

**HN48** [↑] "The essence of the theories of unjust enrichment or money had and received is that a plaintiff can prove facts showing that defendant *holds* money which, in equity and good conscience, belongs to plaintiff or *holds* money which was improperly paid to defendant because of mistake or fraud." *Hancock-Hazlett Gen. Constr. Co. v. Trane Co.*, 499 So. 2d 1385, 1387 (Ala. 1986) (emphasis in original). The IPP Complaint plainly alleges that Defendants "hold" money, in the form of overcharges on Namenda IR and Namenda XR that "belongs to" the IPP or to other members of the Class. **HN49** [↑] It is a foundational principle of **antitrust law** that overcharges are passed along the distribution chain to consumers.

The case cited by Defendants is distinguishable. In *Danny Lynn Electric & Plumbing*, 2011 U.S. Dist. LEXIS 78557, 2011 WL 2893629, at \*6, plaintiffs' payments of inflated fees to a company did not directly benefit individual employees of the company, [\*158] whose annual bonuses were tied to that company's profits. *Id.* It could not be said, in other words, that the individuals "held" money, through their bonuses, that belonged to the fee payers. *Id.*

Defendants' motion to dismiss this claim is **DENIED**.

##### **2. Arizona**

Defendants argue that the claim for unjust enrichment under Arizona law should be dismissed because the IPP does not allege that it "directly" benefitted the Defendants. (Gen. Defs. Br. at 45 n.24 (citing [\*In re Refrigerant Compressors Antitrust Litig. No. 09-MD-02042, 2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at \\*26 \(E.D. Mich. Apr. 9, 2013\)\*](#).)

**HN50** [+] Arizona law, however, does not appear to require that the plaintiff confer any benefit directly on the defendant. See [\*Murdock-Bryant Constr., Inc. v. Pearson, 146 Ariz. 48, 703 P.2d 1197, 1202-03 \(Ariz. 1985\)\*](#). In that case, the court found that the excavation and site preparation subcontractor had conferred a benefit on a joint venture partner, even though that partner had signed the JV agreement with the prime contractor after the excavation and site preparation subcontractor's work had already been performed. *Id.*

Other federal district courts have also rejected the so-called "direct benefit" argument to hold that indirect purchasers may state a claim for unjust enrichment under Arizona law. See [\*In re Lidoderm Antitrust Litig., 103 F. Supp. 3d 1155, 1175-76 \(N.D. Cal. 2015\)\*](#). Those courts reasoned, in part, that unjust enrichment in [\*159] Arizona is a "flexible, equitable remedy," and "[a] benefit may be any type of advantage, including that which saves the recipient from any loss or expense." *Id.* The *Lidoderm* court found, accordingly, that indirect purchasers still stated a claim even though they had dealt directly with intermediaries in the chain of distribution, rather than defendants. *Id.*; see also *Flonase*, 692 F. Supp. 2d at 543.

Defendants' motion to dismiss this claim is **DENIED**.

### 3. California

Defendants argue that California has no independent cause of action for unjust enrichment. (Gen. Defs. Br. at 44.)

**HN51** [+] While some California courts have held that there is no independent recovery in unjust enrichment, others have simply restyled a claim for unjust enrichment as a claim sounding in quasi-contract, and still other courts have treated these claims in the ordinary course, enumerating its elements. *55 Cal. Jur. 3d Restitution* § 2 (noting inconsistent treatment of unjust enrichment claims and collecting cases). For example, the Ninth Circuit recently held, in the same opinion, that "in California, there is not a standalone cause of action for 'unjust enrichment,' which is synonymous with 'restitution,'" but later held that "[w]hen a plaintiff alleges [\*160] unjust enrichment, a court may construe the cause of action as a quasi-contract claim seeking restitution." [\*Astiana v. Hain Celestial Grp., 783 F.3d 753, 762 \(9th Cir. 2015\)\*](#).

Because this Court apparently may construe the claim as one for quasi-contract, the Court **DENIES** Defendants' motion to dismiss.

### 4. District of Columbia

Defendants argue that the claim for unjust enrichment under the District of Columbia's law should be dismissed for the IPP's failure to allege that it conferred a direct benefit on the Defendants. (Gen. Defs. Br. at 45 n.24 (citing [\*Refrigerant Compressors, 2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at \\*26\*](#).)

The Court disagrees. [\*Refrigerant Compressors\*](#) relied on cases that did not analyze D.C. law. See also [\*Lidoderm, 103 F. Supp. 3d at 1176\*](#) (finding Defendants' citation to *Refrigerant Compressors* "not helpful"). Defendants have cited no other case law requiring D.C. law to be so construed, and the Court is aware of none. See *id.* ("I find that in absence of cases arising under District of Columbia law that support defendants' proposed narrow definition of direct benefit, the claims under District of Columbia law can proceed.").

Defendants' motion to dismiss this claim is **DENIED**.

## 5. Florida

Defendants also argue that the claim for unjust enrichment under Florida law should be dismissed because the IPP must allege that it conferred a direct benefit [\*161] on the Defendants. (Gen. Defs. Br. at 45, n.24 (citing *Century Senior Servs. v. Consumer Health Ben. Ass'n, Inc.*, 770 F. Supp. 2d 1261, 1267 (S.D. Fla. 2011).)

The Court agrees with the district court's thoughtful analysis in *In re Processed Egg Prods. Antitrust Litig.*, 851 F. Supp. 2d 867, 928-29 (E.D. Pa. 2012), which upheld a claim for unjust enrichment under Florida law against the same challenge. That case surveyed several Florida cases and determined that while some Florida courts had not allowed plaintiffs to rely on the doctrine of unjust enrichment absent a direct benefit, other courts had allowed these claims to proceed. *Id.* For example, on a motion to dismiss, an appellate court overturned a trial court's dismissal of a medical services provider's unjust enrichment claim, which was based on uncompensated treatment of defendant HMO's members. *Merkle v. Health Options, Inc.*, 940 So. 2d 1190, 1199 (Fla. Dist. Ct. App. 2006). [HN52](#)[] Florida courts have also confirmed that recovery under quasi-contract is available "even where the parties had no dealings at all with each other." *Commerce P'ship 8098 L.P. v. Equity Contracting Co., Inc.*, 695 So. 2d 383, 386 (Fla. Dist. Ct. App. 1997).

Therefore, at this stage, the Court **DENIES** Defendants' motion to dismiss.

## 6. Idaho

Defendants move to dismiss the claim for unjust enrichment under Idaho law because the IPP fails to allege privity (or "something approaching privity") and that the IPP conferred a direct benefit on Defendants. (Forest Br. at 70 nn.56-57; Gen. Defs. Br. at 45 n.24.) Defendants cite *Beco Constr. Co., Inc. v. Bannock Paving Co., Inc.*, 118 Idaho 463, 797 P.2d 863, 867 (Ida. 1990).

The Court [\*162] agrees and dismisses this claim as to all Defendants. First, the *Beco Construction* court rejected the plaintiff's contention that "the equitable principle of unjust enrichment does not require the plaintiff and the defendant to have any other relationship beyond the nexus that one party may not unjustly enrich itself at the expense of the other." *Id.*

Second, other Idaho courts have similarly restricted recovery in the absence of a direct relationship. See, e.g., *Stevenson v. Windermere Real Estate/Capital Grp., Inc.*, 152 Idaho 824, 275 P.3d 839, 842-44 (Ida. 2012) ("The Stevenson' argument, reduced to its essence, is that because they conferred a benefit upon Jefferson, and Jefferson conferred a benefit upon Windermere, they can cut out the middleman and directly recover from Windermere for unjust enrichment. . . . We are unwilling to expand the doctrine of unjust enrichment to the extent advocated by the Stevenson."); *Med. Recovery Servs., LLC v. Bonneville Billing & Collections, Inc.*, 157 Idaho 395, 336 P.3d 802, 806 (Ida. 2014) [summarizing cases].

Defendants' motion is **GRANTED**.

## 7. Illinois

Defendants argue that Illinois has no independent cause of action for unjust enrichment and that, in the alternative, the IPP has failed to allege privity with Defendants or conferral of a direct benefit on Defendants. (Gen. Defs. Br. at 44, 45 nn.22, 24.) Defendants also argue that the IPP has failed to allege [\*163] a duty owed to it by Defendants, which is required under Illinois law for recovery in unjust enrichment. (Gen. Defs. Br. at 48 n.26.)

First, Illinois appears to recognize an independent cause of action for unjust enrichment. [HN53](#)[] "To state a cause of action based on a theory of unjust enrichment, a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental

principles of justice, equity, and good conscience." [\*HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.\*, 131 Ill. 2d 145, 545 N.E.2d 672, 679, 137 Ill. Dec. 19 \(Ill. 1989\)](#). However, it is also true that, recently, intermediate appellate courts have called this into question. See [\*Cleary v. Philip Morris Inc.\*, 656 F.3d 511, 517 \(7th Cir. 2011\)](#) [noting apparent disagreement in Illinois law]. This Court follows the controlling view of the Illinois Supreme Court and declines to dismiss the IPP's unjust enrichment claim under Illinois law.

A plaintiff in Illinois is likewise not required to allege privity or allege a direct benefit. See [\*Freeman Indus., LLC v. Eastman Chem. Co.\*, 172 S.W.3d 512, 525 \(Tenn. 2005\)](#) [listing *HPI Health Care* as a case that "concluded that the benefit received by a defendant need not be direct to establish an unjust enrichment claim"].

Defendants cite [\*Cleary\*, 656 F.3d at 517](#), to support their contention that defendants must receive a benefit from plaintiff in a "direct way." [Gen. [\*164] Defs. Br. at 45.] However, *Cleary* was decided on the basis that the plaintiffs had not alleged any detriment that would make the defendants' retention of profits from cigarette sales unjust, since plaintiffs had not proven that they would have refrained from purchasing defendants' cigarettes even defendants had disclosed their true nature and risk. [\*656 F.3d at 519\*](#). Because the IPP has alleged a detriment here, in the form of overcharges, *Cleary* is inapposite.

Finally, Defendants cite [\*Martis v. Grinnell Mut. Reins. Co.\*, 388 Ill. App. 3d 1017, 905 N.E.2d 920, 928, 329 Ill. Dec. 82 \(Ill. App. Ct. 2009\)](#), for the proposition that the IPP must allege a duty owed to it by Defendants in order to state a claim for unjust enrichment. (Gen. Defs. Br. at 48 n.26.) Contrary to Defendants' argument, however, *Martis* dismissed plaintiff's claim because plaintiff's claim under the [\*Illinois Consumer Fraud Act\*](#) ("ICFA") had been dismissed; therefore, there was no underlying fraud count upon which the plaintiff could establish a duty in unjust enrichment. [\*905 N.E.2d at 928\*](#). Here, by contrast, the Court has found that the IPP has stated a claim under the ICFA.

Therefore, Defendants' motion to dismiss the IPP's claim for unjust enrichment under Illinois law is **DENIED**.

## 8. Kansas

Defendants argue that the IPP fails to state a claim for unjust enrichment under [\*165] Kansas law because it does not allege either (i) that the IPP and the Defendants are in privity or (ii) that the IPP conferred a direct benefit on Defendants. (Gen. Defs. Br. at 44, 45 nn.22, 24.)

[\*\*HN54\*\*](#) [↑] Kansas does not require privity. "Our past cases establish that recovery under quasi-contract or unjust enrichment is not prohibited simply because the subcontractor and the owner of the property are not in privity. This conclusion is consistent with the theory of quasi-contract and unjust enrichment, which does not depend on privity." [\*Haz-Mat Response, Inc. v. Certified Waste Servs. Ltd.\*, 259 Kan. 166, 910 P.2d 839, 847 \(Kan. 1996\)](#).

Other district courts have been similarly unable to find any authority for the proposition that plaintiffs in Kansas are required to allege a "direct benefit." See [\*Processed Egg Prods.\*, 851 F. Supp. 2d at 930 \(E.D. Pa. 2012\)](#); [\*Packaged Seafood Prods.\*, 242 F. Supp. 3d 1033, 1090 \(S.D. Cal. 2017\)](#); [\*Lidoderm\*, 103 F. Supp. 3d at 1177-78; \*Auto. Parts Antitrust Litig. \(Instrument Panel Clusters\)\*, 2014 U.S. Dist. LEXIS 90724, 2014 WL 2993753, at \\*30](#). In particular, this Court adopts the thoughtful analysis in [\*Processed Egg Prods.\*, 851 F. Supp. 2d at 929-30](#), which summarized several Kansas cases that permitted plaintiffs to maintain unjust enrichment claims absent "direct" benefits.

Accordingly, Defendants' motion to dismiss this claim is DENIED.

## 9. Maine

Defendants argue that to plead a claim for unjust enrichment under Maine law, the IPP must allege that it conferred a benefit directly on the Defendants. (Gen. Defs. Br. at 45 n.24.)

The Defendants again cite [\*Refrigerant Compressors\*, 2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at \\*25](#), which dismissed a similar [\*166] claim for unjust enrichment, albeit without any analysis of Maine's laws.

Beyond *Refrigerant Compressors*, the Court is aware of one trial-level case from Maine purporting to condition recovery on a direct benefit. [\*Rivers v. Amato\*, No. CIV. A. CV-00-131, 2001 Me. Super. LEXIS 296, 2001 WL 1736498, at \\*4 \(Me. Super. Ct. June 22, 2001\)](#). In that case, however, a prospective buyer claimed unjust enrichment against the owner of a piece of property, on the theory that the buyer's negotiations with a third-party developer had led to the owner's repudiating their original contract and entering into a higher-priced land sale contract with that developer. *Id.* The court there found that the prospective buyer had failed to allege that any cognizable benefit was conferred. *Id.*

At present, and in the absence of any additional briefing by Defendants on this issue, neither *Refrigerant Compressors* nor *Rivers* convinces the Court that Maine's unjust enrichment law requires a plaintiff to allege a direct benefit in order for its claim to survive a motion to dismiss. See also [\*TFT-LCD \(Flat Panel\)\*, 2011 U.S. Dist. LEXIS 110635, 2011 WL 4501223, at \\*11](#) (denying motion to dismiss claim under Maine's unjust enrichment law for failure to allege direct benefit).

Defendants' motion is **DENIED**.

## **10. Massachusetts**

Defendants argue that Massachusetts law similarly requires [\*167] that the IPP confer a direct benefit on Defendants in order to state a claim for unjust enrichment. (Gen. Defs. Br. at 45 n.24.) Defendants again cite *Refrigerant Compressors*, which does not contain any analysis of Massachusetts law and does not cite to any cases containing analysis of Massachusetts law. [\*2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at \\*25\*](#).

Moreover, Massachusetts law does not appear to include such a requirement. See, e.g., [\*Meshna v. Scrivanos\*, No. CIV.A. 2011 01849 BLS 1, 2011 Mass. Super. LEXIS 334, 2012 WL 414476, at \\*4 \(Mass. Super. Ct. Dec. 21, 2011\)](#) (plaintiff employees successfully pleaded unjust enrichment claim against restaurant owner on the basis that owner was unjustly enriched by tips that customers left for employees). See also [\*Packaged Seafood Prods.\*, 242 F. Supp. 3d 1033, 1091 \(S.D. Cal. 2017\)](#) (noting absence of direct benefit rule in Massachusetts cases).

Defendants' motion to dismiss is **DENIED**.

## **11. Michigan**

Defendants argue that Michigan law also requires the IPP to allege that it conferred a direct benefit on Defendants, again citing *Refrigerant Compressors*. (Gen. Defs. Br. at 45 n.24 (citing [\*2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at \\*25\*](#).) The IPP responds that other courts have sustained claims for unjust enrichment under Michigan law by indirect purchaser classes. (IPP Resp. to Gen. Defs. Br. at 43 (citing [\*In re Suboxone \(Buprenorphine Hydrochloride and Naloxone\) Antitrust Litig.\*, 64 F. Supp. 3d 665, 706 \(E.D. Pa. 2014\)](#)).

**HN55** This Court is persuaded that, under Michigan law—which strictly grounds a claim for [\*168] unjust enrichment in quasi-contract—the relationship between the IPP and the Defendants is too attenuated to support a claim of unjust enrichment. See [\*A & M Supply Co. v. Microsoft Corp. \("A & M II"\)\*, No. 274164, 2008 Mich. App. LEXIS 433, 2008 WL 540883, at \\*2 \(Mich. Ct. App. Feb. 28, 2008\)](#) (requiring direct benefit). In *A & M I*, the Court of Appeals vacated and remanded the trial court's certification of a class of "individuals who purchased, leased, or licensed a copy of Windows 95 or Windows 98 from an entity other than Microsoft." [\*A & M Supply Co. v. Microsoft Corp. \("A & M I"\)\*, 252 Mich. App. 580, 654 N.W.2d 572, 575 \(Mich. Ct. App. 2002\)](#). In a later proceeding, *A & M II*, the Court of Appeals dismissed the unjust enrichment claims by indirect purchasers against Microsoft because there was no "direct contact" between the parties, nor any showing that "Microsoft received any direct payment or other benefit from those purchasers," [\*2008 Mich. App. LEXIS 433, 2008 WL 540883, at \\*2\*](#).

Although there may be limited exceptions to the "direct benefit" requirement where the plaintiff and defendant are directly in contact, see [Kammer Asphalt Paving Co. v. E. China Twp. Sch.](#), 443 Mich. 176, 504 N.W.2d 635, 641 (Mich. 1993), the IPP has not alleged that either it or any Class members had direct contact with Actavis, Forest, or Merz. See also [Hollowell v. Career Decisions, Inc.](#), 100 Mich. App. 561, 298 N.W.2d 915, 920 (Mich. Ct. App. 1980) ("The process of imposing a 'contract-in-law' to prevent unjust [\*169] enrichment is an activity which courts should approach with some caution.").

Therefore, Defendant's motion to dismiss this claim is **GRANTED**.

## **12. Mississippi**

Defendants cite [Cole v. Chevron USA, Inc.](#), 554 F. Supp. 2d 655, 671 (S.D. Miss. 2007), for the proposition that unjust enrichment is not a separate cause of action in Mississippi.

[HN56](#) After reading *Cole* and the case on which it relies, [Coleman v. Conseco, Inc.](#), 238 F. Supp. 2d 804, 813 (S.D. Miss. 2002), the Court is not convinced that Mississippi courts have barred unjust enrichment as a separate cause of action. Although Mississippi courts discuss unjust enrichment as a "theory of recovery," this is not incompatible with its being considered a cause of action. See [Estate of Johnson v. Adkins](#), 513 So. 2d 922, 926 (Miss. 1987) ("The doctrine of unjust enrichment or recovery in quasi-contract applies to situations where there is no legal contract but where the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another[.]") (citing [Hans v. Hans](#), 482 So.2d 1117, 1122 (Miss. 1986)).

Other federal courts have agreed. "Contrary to *Coleman* and its federal progeny . . . there is a substantial body of Mississippi case law that treats unjust enrichment as a separate cause of action." [In re Light Cigarettes Mktg. Sales Practices Litig.](#), 751 F. Supp. 2d 183, 193 (D. Me. 2010).

Defendants' motion to dismiss this claim is **DENIED**.

## **13. New York**

Defendants argue that New York requires both privity [\*170] and conferral of a direct benefit in order to allege a claim for unjust enrichment. (Gen. Defs. Br. at 45 n.24; *id.* at 48; Forest Br. at 70 nn.56-57.) [HN57](#) The privity argument is a non-starter. "[A] plaintiff need not be in privity with the defendant to state a claim for unjust enrichment[.]" [Sperry v. Crompton Corp.](#), 8 N.Y.3d 204 215, 863 N.E.2d 1012, 1018, 831 N.Y.S.2d 760 (2007).

The New York Court of Appeals has announced a rule that the relationship between the parties may not be "too attenuated" in a claim for unjust enrichment. [Sperry v. Crompton Corp](#) 8 N.Y.3d 204, 216, 863 N.E.2d 1012, 1018, 831 N.Y.S.2d 760 (2007). In *Sperry*, for example, the Court of Appeals dismissed a claim by end purchasers of rubber products against manufacturers of processing chemicals that had allegedly been sold to the rubber product manufacturers at a markup. [Sperry v. Crompton Corp.](#), 8 N.Y.3d 204, 209, 863 N.E.2d 1012, 1013-14, 831 N.Y.S.2d 760 (2007).

Later, the New York Court of Appeals dismissed on the same grounds a claim for unjust enrichment brought by a real estate broker, which had conducted due diligence on certain properties, against a rival brokerage firm, which had purchased those due diligence reports from the developer and eventually won the commission to sell the properties in the original broker's stead. [Georgia Mahne & Co. v. Rieder](#), 19 N.Y.3d 511, 519, 973 N.E.2d 743, 748, 950 N.Y.S.2d 333 (2012). Over a dissent, the Court of Appeals held that "regardless of whether [the defendant rival firm] was a good-faith purchaser of the due diligence materials, the complaint [\*171] fails to present a sufficient connection between [plaintiff and defendant] to form the basis of an unjust enrichment claim." *Id.*

**HN58** [+] However, wrongdoing can create the requisite relationship between benefactor and beneficiary. The First Department has synthesized the rule as follows: "a plaintiff must plead some relationship between the parties that could have caused reliance or inducement and ... the relationship cannot be too attenuated." *Philips Int'l Invs., LLC v. Pektor*, 117 A.D.3d 1, 4, 982 N.Y.S.2d 98, 100-01 (2014); see also *Mandarin Trading Ltd v. Wildenstein*, 16 N.Y.3d 173, 944 N.E.2d 1104, 1111, 919 N.Y.S.2d 465 (N.Y. 2011).

In *Philips International Investments*, for example, the First Department denied a motion to dismiss an unjust enrichment claim against a group of limited partnerships that had swooped in to purchase viable properties in a real estate transaction—cutting plaintiff, who had done much of the development work, out of the deal—because they "knew of the alleged wrong being done to plaintiff and of their essential role in the allegedly wrongful scheme." *Philips Int'l Investments, LLC v. Pektor*, 117 A.D.3d 1, 8, 982 N.Y.S.2d 98, 103 (2014).

At this time, the Court cannot hold that the relationship between the IPP and the Defendants is too attenuated as matter of law, since the IPP has plausibly pled that Defendants derived an economic benefit from charging monopolistic and artificially inflated prices for Namenda, a direct and proximate [\*172] result of Defendants' unlawful practices. Cf. *Dur an v. Bautista*, 47 Misc. 3d 1207[A], 15 N.Y.S.3d 711, 2015 N.Y. Slip Op. 50507[U], 19, 2015 WL 1567020, at \*18 [N.Y. Sup. 2015] ("It is against equity and good conscience to permit [the defendant] to retain the proceeds ... if the Class is able to prove the alleged fraudulent scheme.")

Other district courts examining this requirement with respect to indirect purchaser class actions are in accord. See *Processed Egg Prods.*, 851 F. Supp. 2d at 930; *DDAVP*, 903 F.Supp.2d at 234; *Suboxone*, 64 F. Supp. 3d at 709-10.

The Court therefore **DENIES** Defendants' motion to dismiss the claim for unjust enrichment under New York law, without prejudice to renewal at a later date.

#### 14. North Carolina

Defendants cite *Effler v. Pyles*, 94 N.C. App. 349, 380 S.E.2d 149, 152 (N.C. Ct. App. 1989), for the proposition that a plaintiff must allege that it conferred a direct benefit on a defendant. (Forest Br. at 70 n.57; Gen, Defs. Br. at 45 n.24.) The *Effler* court affirmed the trial court's entry of summary judgment in favor of defendant because the record did "not satisfy plaintiff's burden of showing that she conferred a benefit *directly* on defendant." *Effler*, 380 S.E.2d at 152 (emphasis added).

**HN59** [+] The North Carolina Supreme Court has defined the elements of the claim more broadly, without reference to a "direct" benefit: "In order to establish a claim for unjust enrichment, a party must have conferred a benefit on the other party. The benefit must not have been conferred officially, [\*173] that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances. The benefit must not be gratuitous and it must be measurable." *Booe v. Shadrick*, 322 N.C. 567, 369 S.E.2d 554, 556 (N.C. 1988).

Moreover, "cases decided after *Effler* have held that an indirect benefit can support an unjust enrichment claim." *Lau v. Constable*, No. 16 CVS 4393, 2017 NCBC LEXIS 10, 2017 WL 536361, at \*5 (N.C. Super. Feb. 7, 2017) (collecting cases); see also *Bandy v. Gibson*, No. 16 CVS 456, 2017 NCBC LEXIS 66, 2017 WL 3207068, at \*5 (N.C. Super. July 26, 2017) (same).

Generally, federal district courts that have recognized this split in North Carolina authority have not dismissed unjust enrichment claims on pre-answer motions. *Lidoderm*, 103 F. Supp. 3d at 1178 (citing other federal cases). In particular, the court in *Processed Egg Prods.*, 851 F. Supp. 2d at 931-32, found that the more expansive language of *Booe*, from the North Carolina Supreme Court, was more persuasive than the language of *Effler*, from the intermediate appellate court. *Id.* This Court agrees that, given both the divide in authority and the clear language of *Booe*, a case from the North Carolina Supreme Court, it cannot dismiss the claim on these grounds.

Therefore, the Court **DENIES** Defendants' motion to dismiss the North Carolina claim for unjust enrichment.

## 15. North Dakota

Defendants argue that unjust enrichment under North Dakota law requires the plaintiff to have conferred a direct benefit on the defendant, [\*174] citing *Ritter, Laber & Assocs., Inc. v. Koch Oil, Inc.*, 2004 ND 117, 680 N.W.2d 634, 642 (N.D. 2004) and *Relafen*, 221 F.R.D. at 280. (Forest Br. at 70 n.57; Gen.Defs.Br. at 45 n.24.)

In *Ritter*, defendant and plaintiffs worked on the same construction project; the defendant argued that the plaintiffs, which had not chosen to contract with it directly at the outset of the project, could not later sue it for unjust enrichment. *680 N.W.2d at 642* (citing *Apache Corp. v. MDU Res. Grp, Inc.*, 1999 ND 247, 603 N.W.2d 891 (N.D. 1999)).

*Apache*, however, does not stand for the proposition that, in North Dakota, unjust enrichment claims universally require a direct benefit. Rather, that case holds that, when parties involved in a single project do not all contract with one another, "[t]he separate contracts convey clearly the limited kinds of liability and exposure each party has in mind.... Respect for that contract arrangement requires the courts to refuse restitution between the parties who did not contract with each other." *Apache*, 603 N.W.2d at 895 (citing Dan B. Dobbs, *Law of Remedies*, § 4.1(2), p. 372 (2d ed. 1993)). Accord *In re Auto. Parts (Fuel Senders) Antitrust Litig.*, 29 F. Supp. 3d 982, 1025 (E.D. Mich. 2014) (declining to dismiss indirect purchasers' unjust enrichment claim under North Dakota law on the basis of *Apache*); *In re Auto. Parts (Bearings) Antitrust Litig.*, 50 F. Supp. 3d 836, 864-65 (E.D. Mich. 2014).

**HN60**[] Moreover, North Dakota courts have upheld unjust enrichment claims even where no direct benefit was alleged. See, e.g., *Opp v. Matzke*, 1997 ND 32, 559 N.W.2d 837, 840 (N.D. 1997) (well driller had stated claim for unjust enrichment against landowner even [\*175] though she had not asked him to drill the well and did not reside on the property; since defendant "provide[d] her family a place to live on the property," she benefitted from the well).

Defendants' motion to dismiss the North Dakota claim is **DENIED**.

## 16. Rhode Island

Defendants argue that Rhode Island law requires the IPP to allege that it conferred a direct benefit on Defendants. (Gen. Defs. Br. at 45 n.24.) Defendants again cite *Refrigerant Compressors*, which dismissed the Rhode Island unjust enrichment claim without any analysis of Rhode Island law. *2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at \*25*.

**HN61**[] In Rhode Island, there are three elements of unjust enrichment. *R&B Elec. Co. v. Amco Const. Co.*, 471 A.2d 1351, 1355 (R.I. 1984). "First, a benefit must be conferred upon the defendant by the plaintiff. Second, there must be an appreciation by the defendant of such benefit. Finally, there must be an acceptance of such benefit under such circumstances that it would be inequitable for him to retain the benefit without paying the value thereof." *Id. at 1356*. None of these elements requires conferral of a direct benefit.

**HN62**[] Moreover, "[t]he most significant requirement for a recovery on quasi contract is that the enrichment to the defendant be unjust," *Id.* Because the Rhode Island courts have not stated clearly that [\*176] an action for unjust enrichment requires that the plaintiff have conferred a benefit on the defendant directly, and because Defendants have cited no case that so holds, the Court denies Defendants' motion to dismiss this claim on such grounds.

However, because the conduct underlying this claim is based on antitrust violations, and because Rhode Island did not recognize a cause of action for indirect purchasers under its antitrust statute until July 15, 2013, the Court **DISMISSES IN PART** this claim to the extent the IPP seeks to recover for injuries incurred before that date.

## 17. Tennessee

Defendants argue that a plaintiff in Tennessee must demonstrate either (i) that it "has exhausted all remedies against the person with whom the plaintiff enjoyed privity of contract" or (ii) that any attempt to exhaust these remedies would be futile, before it may recover in unjust enrichment. *Freeman Indus., LLC v. Eastman Chem. Co.*, [172 S.W.3d 512, 525-26 \(Tenn. 2005\)](#); (see also Gen. Defs. Br. at 46-47). Defendants further contend that the IPP's assertions at paragraphs 222-23 of its Complaint demonstrate that that the IPP intends to rely on a futility theory, but that, under Tennessee law, "a bare allegation of futility is not enough." (Gen. Defs. Br. at 46-47.)

*Freeman Indus.*, [172 S.W.3d at 526](#), held that, [\*177] at the summary judgment stage, an affidavit from plaintiffs counsel averring that he was "unaware of any viable claims" against the party with which the plaintiff had been in privity, without any further factual basis, was insufficient to show that he was entitled to recover in unjust enrichment. *Id.*

The IP Action, however, is at the motion to dismiss stage, where plaintiff has adequately alleged that any claim against the pharmacies or distributors would be futile. (CAC ¶¶ 222-23.) It is thus easily distinguishable from *Freeman Industries*, and the IPP must be given the opportunity to prove up its futility argument after discovery is complete.

Defendants' motion to dismiss the Tennessee claim is **DENIED**.

## 18. Utah

Defendants argue that, under Utah law, a plaintiff must allege that it conferred a benefit directly on a defendant. (Gen. Defs. Br. at 45 n.24 (citing *Concrete Prods. Co. v. Salt Lake Cty.*, [734 P.2d 910, 911-12 \(Utah 1987\)](#).)

In *Concrete Prods.*, [734 P.2d at 911](#), a concrete supplier delivered materials to a subcontractor hired for a public works project. *Id.* The supplier, which was never paid, unsuccessfully sued the subcontractor, and then turned around and attempted to sue the county government on the theory that the county had not required the general [\*178] contractor to post a bond. *Id.* The court found that the subcontractor could not recover in unjust enrichment against the county because there was no benefit to the county whatsoever—"instead, [the county] will incur the expenses of cleaning and maintaining curbs and gutters with no resale value or intrinsic economic worth." *Id. at 912*. Although the *Concrete Products* court distinguished an earlier case, *Breitling Bros. Constr. v. Utah Golden Spikers, Inc.*, [597 P.2d 869 \(Utah 1979\)](#), by stating that "[n]o direct benefit, such as that demonstrated by the plaintiff in *Breitling*, is present here," *Concrete Prods.*, [734 P.2d at 911-12](#) (emphasis added), the use of the word "direct" in that case's dicta does not convince the Court that a plaintiff must allege a direct benefit as part of its *prima facie* case.

**HN63** [↑] Other district courts have also found that Utah law does not require a direct benefit. *Processed Egg Prods.*, [851 F. Supp. 2d at 932-34](#); *Auto. Parts (Bearings)*, [50 F. Supp. 3d at 864-65](#); *Packaged Seafood Prods.*, [242 F. Supp. 3d at 1092-93](#).

Defendants' motion to dismiss the Utah unjust enrichment claim is, therefore, **DENIED**.

## 19. Washington

Defendants claim that Washington unjust enrichment law requires plaintiffs to allege a direct benefit. (Gen. Defs. Br. at 45 n.24 (citing *Keil v. Scholten*, [No. 48051-1-1, 2002 Wash. App. LEXIS 196, 2002 WL 988562, at \\*5 \(Wash. Ct. App. Feb. 4, 2002\)](#) (unpublished opinion).)

In *Keil*, a group that had formed a joint venture to purchase a commercial real estate property sued a real estate broker for unjust enrichment, seeking recovery [\*179] of two hundred thousand dollars he had earned as a commission from the sale proceeds. *2002 Wash. App. LEXIS 196, [WL] at \*4*. But for the broker's fraud and misrepresentations concerning the sale, the group argued, it never would have paid the four hundred thousand

dollars cash at closing from which the broker earned his fee. [2002 Wash. App. LEXIS 196, \[WL\] at \\*5](#). The court found that the group could not recover the broker's commission on a theory of unjust enrichment because, pursuant to the sale documents, it was the property owner's obligation to pay the brokerage fee, not the group's. *Id.*

Similarly, in *State v. Am. Tobacco Co.*, No. 96-2-15056-SEA, 1996 WL 931316, at \*8-9 (Superior Ct. Wash. Apr. 9, 1999), the court found that the State of Washington had not stated a claim for unjust enrichment against tobacco producers, because the benefit that the state alleged to have conferred, in the form of medical payments, was too attenuated. *Id.*

However, in *Chem. Bank v. Wash Pub. Power Supply Sys.*, 102 Wn.2d 874, 691 P.2d 524, 544 (Wash. 1984), the Supreme Court of Washington held that a group of bondholders, which had funded a nuclear power plant construction project that later went bankrupt, had provided a "benefit" to the projects' participants—municipal entities that had bargained for a share of the plants' power output—such that restitution was appropriate. *Id.* at 558. The court reasoned that "the Restatement's definition [[\\*180](#)] of benefit is quite broad;" that the bond revenues—although flowing through a third party—had been raised on the request of the participants; and that, "[f]inally, it was for the participants' benefit that the plants were being built in the first place." *Id.*

This Court is not aware of any federal district court cases discussing the "direct benefit" requirement under Washington unjust enrichment law in the antitrust context. However, this Court concludes that it must follow the reasoning of the Washington Supreme Court in *Chemical Bank*. The IPP has alleged that unlawful overcharges for branded Namenda IR and Namenda XR flowed ultimately to Defendants, even though there were intermediaries in the chain of distribution. This is analogous to the bondholder financing that flowed to the participants in *Chemical Bank*. Moreover, it was on Defendants' account that higher prices for Namenda were passed through to the consumer.

Therefore, the Court **DENIES** Defendants' motion to dismiss

## **20. West Virginia and Wisconsin**

Defendants argue that a plaintiff must allege conferral of a direct benefit on a defendant in order to bring a claim for unjust enrichment in West Virginia and Wisconsin. (Gen. Defs. [[\\*181](#)] Br. at 45 n.24 (citing [Refrigerant Compressors, 2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at 25-26](#)). *Refrigerant Compressors*, however, neither analyzes the law under either of these jurisdictions nor cites any case that does.

As a result, and in the absence of any additional briefing, Defendants' motion to dismiss these claims is **DENIED**.

## **21. Wyoming**

Lastly, Defendants argue that the IPP has failed to allege that it conferred a direct benefit on Defendants, as required under Wyoming law. (Forest Br. at 70 n.57 (citing [Boyce v. Freeman, 2002 WY 20, 39 P.3d 1062, 1065-66 \(Wyo. 2002\)](#).) In [Boyce, 39 P.3d at 1063](#), the plaintiff gave a pickup truck to an employee of the defendant because the employee told the plaintiff that the defendant would pay for the truck. *Id.* Plaintiff was never paid for the truck and brought an unjust enrichment claim against the defendant, alleging that the employee had used the truck on the job and, therefore, that the defendant-employer was unjustly enriched. *Id.* The Supreme Court of Wyoming found that because nothing in the record showed that the employer knew it was expected to pay for the truck, or that the employer induced the plaintiff to give the truck to its employee, "[w]e see no evidence leading us to conclude that... good conscience requires [the defendant] to pay[.]" [Id. at 1066](#). The opinion concluded, in part, that the employer [[\\*182](#)] had "received no *direct* benefit from this action." *Id.*

**HN64**  In *Boyce*, the Supreme Court of Wyoming also described the elements of unjust enrichment as follows: "(1) Valuable services were rendered, or materials furnished, (2) to the party to be charged, (3) which services or materials were accepted, used and enjoyed by the party, and, (4) under such circumstances which reasonably

notified the party to be charged that the plaintiff, in rendering such services or furnishing such materials, expected to be paid by the party to be charged. Without such payment, the party would be unjustly enriched." *Id. at 1065* (citing *Coones v. F.D.I.C.*, 894 P.2d 613, 617 (Wyo. 1995) (emphasis added).)

The Court finds that the *Boyce* opinion as a whole establishes that a plaintiff seeking to recover under a theory of unjust enrichment under Wyoming law must allege a direct benefit.

Other federal district courts sitting in diversity are in accord. See, e.g., *Aftermarket Filters*, 2009 U.S. Dist. LEXIS 104114, 2010 WL 1416259, at \*2-3.

Therefore, Defendants' motion to dismiss the Wyoming claim is **GRANTED**.

#### **E. In Conclusion, the IPP Has Stated a Claim for Unjust Enrichment Under Count Four With Respect to Actavis, Forest, and Merz Under the Laws of 31 States**

In sum, the Court finds that the IPP Complaint has adequately pled facts supporting a claim for [\*183] unjust enrichment against Actavis, Forest, and Merz only. The Court thus dismisses all claims under Count Four with respect to the Generic Defendants.

The Court also finds that, as a matter of law, the IPP may pursue its Count Four claims for unjust enrichment under the laws of all states **except** Alaska, Colorado, Connecticut, Delaware, Idaho, Michigan, Montana, New Jersey, Oklahoma, South Carolina, Virginia, Washington, and Wyoming. Those claims are hereby **DISMISSED**.

The Court also **DISMISSES IN PART** the IPP's claim under Rhode Island law, to the extent the IPP seeks recovery for injuries occurring prior to July 15, 2013.

#### **IX. Conclusion**

In conclusion, the Court holds as follows:

With respect to Count One for monopolization, the claims under the laws of Florida, Kansas, Massachusetts, and Utah are **DISMISSED** in their entirety. The claim under the law of Rhode Island is **DISMISSED IN PART**, to the extent that the IPP seeks to recover on the basis of injuries occurring before July 15, 2013.

With respect to Count Two for conspiracy to monopolize, the claims under the laws of Illinois, Massachusetts, and Utah are **DISMISSED** in their entirety. The claim under the law of Rhode Island is **DISMISSED IN PART**, to the extent that the IPP seeks to recover on the basis of injuries occurring before July 15, 2013.

With respect to Count Three for consumer protection and unfair and deceptive trade practices, the claims under the laws of Arizona, the District of Columbia, Hawaii, Kansas, Maine, Montana, New York, Rhode Island, Tennessee, Vermont, and West Virginia are **DISMISSED** in their entirety.

With respect to Count Four, unjust enrichment, all claims are **DISMISSED ONLY WITH RESPECT TO** the Generic Defendants. For the remaining Defendants, Actavis, Forest, and Merz, the claims under the laws of Alaska, Colorado, Connecticut, Delaware, Idaho, Michigan, Montana, New Jersey, Oklahoma, South Carolina, Virginia, Washington, and Wyoming are **DISMISSED** in their entirety. The claim under the law of Rhode Island is **DISMISSED IN PART**, to the extent that the IPP seeks to recover on the basis of injuries occurring before July 15, 2013.

The Clerk of Court is respectfully requested to remove Docket Number 133 from the Court's list of pending motions.

Pursuant to this Court's memorandum endorsement at Docket Number 165, the Clerk of Court is also respectfully requested to remove Docket Number 150 from the Court's [\*185] list of pending motions.

Dated: December 26, 2018

/s/ Colleen McMahon

Chief Judge

BY ECF TO ALL PARTIES

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## Cinetopia, LLC v. AMC Entm't Holdings, Inc.

United States District Court for the District of Kansas

December 27, 2018, Decided; December 27, 2018, Filed

Case No. 18-2222-CM-KGG

### **Reporter**

2018 U.S. Dist. LEXIS 216600 \*; 2018-2 Trade Cas. (CCH) P80,626; 2018 WL 6804776

CINETOPIA, LLC, Plaintiff, v. AMC ENTERTAINMENT HOLDINGS, INC. and AMERICAN MULTI-CINEMA, INC., Defendants.

## **Core Terms**

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theater, allegations, licensing, film, distributors, movie, geographic, antitrust, relevant market, clearances, markets, argues, competitors, estoppel, tortious interference, monopoly power, blanket, buying, movie theater, monopolization, exhibitor, vertical, promise, opened, zone, rule of reason, exclusionary

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**Judges:** CARLOS MURGUIA, United States District Judge.

**Opinion by:** CARLOS MURGUIA

## **Opinion**

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### **MEMORANDUM AND ORDER**

This case involves movie theaters, the films they show, and when the theaters are able to get access to those films. Plaintiff Cinetopia, LLC operates a movie theater in Overland Park, Kansas, in the Prairiefire development. Roughly three miles away, defendants AMC Entertainment Holding, Inc. and American Multi-Cinema, Inc. (collectively, [\*2] "AMC") operate an AMC theater called the AMC Town Center 20. According to Cinetopia, AMC is the largest movie theater circuit in the United States. Cinetopia claims that AMC has used its dominant market position to force movie distributors to grant AMC exclusive licenses to play movies, which stifles competition and unfairly harms theaters like Cinetopia. Cinetopia claims that AMC's practices violate federal antitrust laws. Cinetopia also brings state law claims for tortious interference and estoppel. AMC filed a motion to dismiss (doc. 27) all of Cinetopia's claims. For the following reasons, the court denies AMC's motion.

## **I. Factual Background**

The following facts are taken from Cinteopia's complaint and are viewed in the light most favorable to Cinetopia.

Cinetopia opened its Prairiefire movie theater ("Cinetopia Overland Park 18") in May 2014. Cinetopia Overland Park 18 is a unique, cutting-edge theater. For example, it operates a restaurant on the premises; offers restaurant and bar menus for some of its screens designed for the exhibition of blockbusters; has ten "Living Room Theaters" with full restaurant and bar service; includes a movie Parlor; and offers other luxury accommodations. [\*3] When Cinetopia Overland Park 18 opened, AMC was already operating AMC Town Center 20. AMC Town Center 20 does not offer a restaurant menu or in-theater waiter and staff service, and has received a number of negative online reviews.

Cinetopia alleges that in 2010, AMC implemented a National Clearance Position. Under that national policy, AMC told movie distributors (like Disney, Paramount, and Universal) that it wanted exclusive access to movies over any new theater in close proximity to an existing AMC theater. These "clearances" meant that AMC would refuse to play any film a distributor licensed to play for the competing theater. As one example of the execution of AMC's policy, in 2010, AMC sent a letter to the major film distributors indicating that it would "not play day-and-date" with a new movie theater in Georgia that was within three miles of two AMC theaters. Playing day-and-date means to simultaneously exhibit a particular movie. (See Doc. 28, at 9; Doc. 29, at 24.) In the same letter, AMC reminded the distributors that AMC had "played 100% of [their] wide commercial releases and look[ed] forward to continuing that arrangement going forward." (Doc. 17, at 17.) And when the [\*4] new theater opened in Georgia, AMC's CEO told the owner that AMC would use its "full weight and power" to "prevent them from building new theaters near AMC [t]heaters." (*Id.*)

The Cinetopia Overland Park 18 and AMC Town Center 20 are within the same "film licensing zone." A film licensing zone is a geographic area established or recognized by distributors in which prints of films are generally made available to play when released. Cinetopia uses the term "clearance" or "blanket clearance" throughout its complaint to mean an exclusivity agreement between a distributor and an exhibitor licensed to play a film (i.e., a distributor like Paramount and an exhibitor like AMC) that applies "to all films licensed in a competitive film licensing zone and is accompanied by a similarly blanket refusal to play day-and-date any film licensed to a competing theater." (*Id.* at 8.)

Before Cinetopia opened its theater at Prairiefire, AMC offered to "buy" the facility. Initially, AMC suggested some "very attractive prices." (*Id.* at 17.) But in the end, AMC's offer was for a purchase price of zero dollars. Cinetopia declined. AMC responded, "Okay, then I guess we will see what happens next summer when you try to open." (*Id.* at 18 [\*5].) Beginning when Cinetopia opened, AMC's actions resulted in Cinetopia being denied access to a number of desirable movies, including *Godzilla*, *Captain America: Winter Soldier*, *Guardians of the Galaxy*, *Teenage Mutant Ninja Turtles*, *The Amazing Spider-Man 2*, *The Hunger Games: Mockingjay Part 2*, *Divergent Series: The Insurgent*, *Jurassic World*, and *Pitch Perfect 2*, among many others. According to Cinetopia, "AMC's exclusionary demands, backed by AMC's circuit and monopoly power, were the reason distributors denied Cinetopia fair competitive access to high grossing, wide release, commercial films. These denials were not based on the distributors' fair and independent assessment of the quality and customer-drawing capacity of Cinetopia Overland Park, which was vastly superior to that of the competing AMC Theater." (*Id.* at 20.)

After Cinetopia opened, AMC again expressed interest in buying Cinetopia's facilities at attractive prices. But at the same time, AMC was trying to acquire another large national theater circuit, Carmike Cinemas. The size of the Carmike deal required AMC to report the deal to the United States Department of Justice ("DOJ"), who would review the deal for potential anticompetitive effects. Cinetopia claims that AMC renewed its (pretended) interest in buying Cinetopia Overland Park 18 so that Cinetopia would not bring legal action for anticompetitive conduct while the DOJ was reviewing the Carmike deal. According to Cinetopia, AMC delivered an indication of interest including a proposed purchase price in February 2016, but advised that the proposed deal would be delayed because of the Carmike acquisition. After the DOJ approved the Carmike [\*6] acquisition, AMC offered another price—

substantially lower than the previous offer. Eventually, AMC offered even worse terms and a condition that Cinetopia release all of its legal claims against AMC.

## **II. Standards of Review**

The court will grant a 12(b)(6) motion to dismiss only when the factual allegations fail to "state a claim to relief that is plausible on its face." [Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#). Although the factual allegations need not be detailed, the claims must set forth entitlement to relief "through more than labels, conclusions and a formulaic recitation of the elements of a cause of action." [In re Motor Fuel Temperature Sales Practices Litig., 534 F. Supp. 2d 1214, 1216 \(D. Kan. 2008\)](#). The allegations must contain facts sufficient to state a claim that is plausible, rather than merely conceivable. *Id.* "All well-pleaded facts, as distinguished from conclusory allegations, must be taken as true." [Swanson v. Bixler, 750 F.2d 810, 813 \(10th Cir. 1984\)](#); see also [Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#). The court construes any reasonable inferences from these facts in favor of the plaintiff. [Tal v. Hogan, 453 F.3d 1244, 1252 \(10th Cir. 2006\)](#).

Discovery in antitrust cases can be expensive. [Twombly, 550 U.S. at 558](#) (applying the plausibility standard to Sherman Act antitrust claims). But while this potential expense may require some specificity in pleading, antitrust cases do not require heightened fact pleading. *Id. at 570*. Rather, an antitrust complaint is subject to the [\*7] same standards identified above. *Id.*; see also [In re Urethane Antitrust Litig., 663 F. Supp. 2d 1067, 1074 \(D. Kan. 2009\)](#).

## **III. Analysis**

### **A. Count I — Circuit Dealing**

The court first addresses Cinetopia's claim for circuit dealing. Defendant argues that this claim fails because it is not a per se violation of the antitrust laws (so plaintiff must plead a relevant market, but hasn't done so) and, even if it is a per se violation, plaintiff has not provided adequate allegations to state a claim under either [United States v. Griffith, 334 U.S. 100, 68 S. Ct. 941, 92 L. Ed. 1236 \(1948\)](#), overruled on other grounds by [Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771-72, 104 S. Ct. 2731, 81 L. Ed. 2d 628 \(1984\)](#), or [United States v. Paramount Pictures, Inc., 334 U.S. 131, 68 S. Ct. 915, 92 L. Ed. 1260 \(1948\)](#).

*Griffith* and *Paramount* identify two forms of circuit dealing. The first involves the use of circuit buying power and is described in *Griffith* as follows:

A man with a monopoly of theatres in any one town commands the entrance for all films into that area. If he uses that strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade weapon against his competitors. It may be a feeble, ineffective weapon where he has only one closed or monopoly town. But as those towns increase in number throughout a region, his monopoly power in them may be used with crushing effect on competitors in other places.

[334 U.S. at 107](#). The second type of circuit dealing, identified in *Paramount* [\*8], is the elimination, by contracts or otherwise, of competitive bidding on a film-by-film and theater-by-theater basis. [334 U.S. at 154-55. Ayres v. AG Processing Inc., 345 F. Supp. 2d 1200, 1210 \(D. Kan. 2004\)](#). AMC asserts that it has a privilege to "interfere." [Digital Ally, Inc. v. Utility Assocs., Inc., No. 14-2262-CM, 2017 U.S. Dist. LEXIS 49893, 2017 WL 1197561, at \\*17 \(D. Kan. Mar. 30, 2017\)](#). This privilege is grounded in the Restatement (Second) Torts, which provides that competitors do not tortiously interfere when

Cinetopia alleges that AMC has engaged in both types of circuit dealing, and that such actions are per se unlawful. Specifically, Cinetopia alleges that AMC has monopoly power in many markets where AMC is the only theater operating. AMC is therefore able to use its position of power in those markets to receive beneficial treatment in

markets where it is not the only theater. And Cinetopia further alleges that AMC has negotiated "blanket clearances" for movie licenses, which eliminates competition on a film-by-film basis.

### **1. Per Se Violation**

AMC asks the court to determine that the type of circuit dealing alleged by Cinetopia is a vertical restraint of trade, which is analyzed under the "rule of reason" instead of the per se rule. See [\*Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284, 201 L. Ed. 2d 678 \(2018\)\*](#) (explaining that vertical restraints are "restraints 'imposed by agreement between firms at different levels of distribution'") (citation omitted). It is [\*9] typically only horizontal restraints, which are created by agreement between competitors, that qualify for per se treatment. *Id.* AMC argues that the Tenth Circuit has said that the per se rule should be limited in application. See, e.g., [\*Buccaneer Energy \(USA\) Inc. v. Gunnison Energy Corp., 846 F.3d 1297, 1306 \(10th Cir. 2017\)\*](#) ("The rule of reason is the default approach, and there is a presumption in favor of its application."). And the Supreme Court has in recent years addressed a number of once-unlawful vertical restraints and evaluated them under the rule of reason. See, e.g., [\*Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 59, 97 S. Ct. 2549, 53 L. Ed. 2d 568 \(1977\)\*](#) (reversing prior precedent that vertical non-price restraints were per se unlawful); [\*State Oil Co. v. Khan, 522 U.S. 3, 22, 118 S. Ct. 275, 139 L. Ed. 2d 199 \(1997\)\*](#) (holding that vertical maximum retail price maintenance agreements were not per se unlawful; reversing prior precedent); [\*Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899-908, 127 S. Ct. 2705, 168 L. Ed. 2d 623 \(2007\)\*](#) (same, with vertical minimum retail price maintenance agreements). Finally, AMC asks this court to consider *Paramount* and *Griffith* in their context—a time when the relationships between movie distributors and exhibitors were not the same as they are today. See [\*Redwood Theaters, Inc. v. Festival Enters., Inc., 200 Cal. App. 3d 687, 697, 248 Cal. Rptr. 189 \(1988\)\*](#).

The Supreme Court has not overturned the per se treatment of circuit dealing claims. And lower courts continue to apply the per se rule with respect to circuit dealing claims. See, e.g., [\*2301 M Cinema LLC v. Silver Cinemas Acquisition Co., No. 17-1990 \(EGS\), 342 F. Supp. 3d 126, 2018 U.S. Dist. LEXIS 167176, 2018 WL 4681007, at \\*3 \(D.C. Cir. Sept. 28, 2018\)\*](#); [\*Cobb Theatres III, LLC v. AMC Entm't Holdings, Inc., 101 F. Supp. 3d 1319, 1343 \(N.D. Ga. 2015\)\*](#); [\*Reading Int'l, Inc. v. Oaktree Cap. Mgmt. LLC, No. 03-CV-1895, 2007 U.S. Dist. LEXIS 504, 2007 WL 39301, at \\*7 \(S.D.N.Y. Jan. 8, 2007\)\*](#); [\*Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc., 198 Cal. App. 4th 1366, 131 Cal. Rptr. 3d 519, 527 \(Cal. Ct. App. 2011\)\*](#). This court will do the same. In any [\*10] event, for the reasons stated later in this opinion, the result would not change if the court were to apply the rule of reason.

### **2. Adequate Allegations**

AMC further argues that even if circuit dealing is treated as a per se antitrust violation, Cinetopia has failed to adequately allege a claim under either *Griffith* or *Paramount*. Specifically, AMC claims that Cinetopia does not adequately allege any external markets for purposes of a leveraging claim under *Griffith*. And AMC also claims that Cinetopia merely makes conclusory statements about "blanket clearances" and film-by-film licensing that fail to adequately support a claim under *Paramount*.

#### a) Allegations of External Markets

*Griffith* prohibits circuit dealing in the form of monopoly leveraging. This happens when an exhibitor "with a monopoly of theaters in any one town . . . uses that strategic position to acquire exclusive privileges in a city where [the exhibitor] has competitors." [\*Griffith, 334 U.S. at 107\*](#). To state a claim for this type of antitrust violation, the plaintiff must allege a second market that is being leveraged. See [\*Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216, 1222 \(10th Cir. 2009\)\*](#).

AMC complains that Cinetopia did not identify a specific non-competitive market in which AMC owns a theater. But Cinetopia alleges [\*11] a nationwide circuit—the largest in the United States. And Cinetopia alleges that AMC is the sole film provider in many markets. It further alleges that the majority of AMC's theaters lack a direct competitor within three miles. As in *Cobb Theatres III*, this is a sufficient allegation of the use of an entire circuit, including

theaters in closed markets, to obtain privileges in competitive markets. [101 F. Supp. 3d at 1343](#). The test here is plausibility; not certainty. Cinetopia's allegations of an external market are sufficient to satisfy *Twombly*.

b) Conclusory Statements of "Blanket Clearances"

*Paramount* says that a movie exhibitor may not pool its purchasing power by negotiating "agreements that cover two or more theaters in a particular circuit . . ." [334 U.S. at 154](#). This conduct "eliminate[s] the opportunity for a small competitor to obtain the choice of first runs," and "put[s] a premium on the size of the circuit." *Id.* According to AMC, Cinetopia must allege facts sufficient to show "(i) a licensing agreement for a film covering multiple AMC theaters, that (ii) had the effect of eliminating the opportunity for Cinetopia to obtain a license agreement at Cinetopia Overland Park 18." (Doc. 28, at 28.)

Cinetopia alleges [\*12] that blanket clearances were a core part of AMC's "national exclusionary campaign to prevent or limit competitive entry." (Doc. 17, at 15.) Cinetopia further alleges that AMC discussed its policy with each major distributor and "insisted on blanket clearances and refusals to play day-and-date to protect any theater in its national circuit from 'competitive encroachment.'" (*Id.* at 16.) According to Cinetopia, AMC's practices "destroyed competition on a film-by-film theater-by-theater basis." (Doc. 29, at 23.) Cinetopia claims that "AMC's exclusionary demands, backed by AMC's circuit and monopoly power, were the reason distributors denied Cinetopia fair competitive access to high grossing, wide release, commercial films. These denials were not based on the distributors' fair and independent assessment of the quality and customer-drawing capacity of Cinetopia Overland Park, which was vastly superior to that of the competing AMC Theater." (Doc. 17, at 20.) These allegations are adequate to plausibly state a claim under *Paramount*. To be certain, Cinetopia will have to offer more specific evidence of agreements covering multiple theaters to survive a motion for summary judgment. But the allegations [\*13] in Cinetopia's complaint are sufficient for this stage of the proceedings.

## B. Counts II — IV

In Count II of its complaint, Cinetopia alleges a claim for monopolization under [§ 2 of the Sherman Act](#). Count III is for attempted monopolization under the same law. And Count IV is for unreasonable restraint of trade in violation of [§ 1 of the Sherman Act](#). AMC argues that all three claims fail for the same overriding reason: Cinetopia has not alleged a relevant market.

[Section 2](#) of the Sherman Act establishes that it is illegal to "monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States . . ." [15 U.S.C. § 2](#). [Section 2](#) prohibits monopolistic anticompetitive conduct that harms competition. [Auraria Student Hous. at the Regency, LLC v Campus Vill. Apartments, LLC, 843 F.3d 1225, 1233 \(10th Cir. 2016\)](#). "The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself." [Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458, 113 S. Ct. 884, 122 L. Ed. 2d 247 \(1993\)](#). The elements of a [§ 2](#) claim are "(1) monopoly power in the relevant market; (2) willful acquisition or maintenance of this power through exclusionary conduct; and (3) harm to competition." [Lenox MacLaren Surg. Corp. v. Medtronic, Inc., 847 F.3d 1221, 1231 \(10th Cir. 2017\)](#). To prove a [§ 2](#) monopolization and attempt claim, plaintiffs must show [\*14] that "a defendant's conduct actually monopolizes or dangerously threatens to do so." *Id.* (quoting [Spectrum Sports, 506 U.S. at 459](#)). Additionally, all [§ 2](#) claims require proof of a relevant antitrust market. [Buccaneer, 846 F.3d at 1320](#) (citing [Auraria, 843 F.3d at 1232-33](#)).

[Section 1 of the Sherman Act](#) prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." [15 U.S.C. § 1](#). For a [§ 1](#) violation, a plaintiff must plead (1) a contract, combination, or conspiracy among two or more independent actors; (2) that unreasonably restrains trade; and (3) is in, or substantially affects, interstate commerce. *Id.*; [TV Commc'n's Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1027 \(10th Cir. 1992\)](#). To show that a restraint of trade under [§ 1](#) violates the rule of reason, a plaintiff must also identify a relevant market. [Ohio, 138 S. Ct. at 2284](#).

## **1. Allegations of Relevant Market**

"Because the relevant market provides the framework against which economic power can be measured, defining the product and geographic markets is a threshold requirement." *Auraria, 843 F.3d at 1244* (quoting *Campfield v. State Farm Mut. Auto. Ins. Co., 532 F.3d 1111, 1118 (10th Cir. 2008)*). The product market "is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." *Id. at 1244-45* (quoting *SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 966 (10th Cir. 1994)*). "The geographic market is the narrowest market which is wide enough so [\*15] that products from adjacent areas cannot compete on a substantial parity with those included in the market." *Id. at 1245* (quoting *Westman Comm'n Co. v. Hobart Intl, Inc., 796 F.2d 1216, 1222 (10th Cir. 1986)*). "Failure to allege a legally sufficient market is cause for dismissal of the claim." *Campfield, 532 F.3d at 1118*. But market definition is also a "deeply fact-intensive inquiry," making courts hesitant to dismiss for failure to plead a relevant market. *Concord Assocs., L.P. v. Entm't Props. Trust, 817 F.3d 46, 53 (2d Cir. 2016); Reazin v. Blue Cross & Blue Shield, Inc., 899 F.2d 951, 975 (10th Cir. 1990)*. Market definitions are sufficient if they "plausibly suggest the contours of the relevant geographic and product markets." *Cobb Theatres III, 101 F. Supp. 3d at 1336* (citation and quotation marks omitted).

### a) Are allegations of a relevant market required?

Cinetopia argues that it is not required to define a relevant market for Counts II—IV for two reasons. First, Cinetopia claims that it has offered direct evidence of monopoly power, which relieves it of the need to define a market. Second, Cinetopia claims that a market definition is not required because it has alleged the factual predicate for a "quick look" analysis. The court need not address either of these arguments further here because, as explained below, the court determines that Cinetopia has sufficiently alleged a relevant market.

### b) Geographic Market

Cinetopia alleges that the geographic market is "local because existing [\*16] industry structure limits access to competitive film licensing zones." (Doc. 17, at 10.) In this case, the geographic market is therefore the "Overland Park/Leawood film licensing zone in which Cinetopia Overland Park 18 and AMC Town Center 20 in Leawood are located . . ." (*Id.*)

AMC argues that Cinetopia's geographic market definition is too limited. According to AMC, a valid geographic market definition must "reflect[] the total market demand for plaintiffs' product" and "cannot circumscribe the market to a few buyers." *Campfield, 532 F.3d at 1118-19*.

The court determines that Cinetopia's alleged geographic market is sufficient because Cinetopia is alleging that AMC is a monopsonist—a buyer who is able to assert market power in the upstream input market. See *id. at 1118*. "When considering market power in a monopsony situation, 'the market is not the market of competing sellers [here, the movie theaters exhibiting the films] but of competing buyers. This market is comprised of buyers who are seen by sellers as being reasonably good substitutes.'" *Id.* (citation omitted). In a monopsonist case, the court looks upstream at how the distributors determine "reasonably good substitutes."

Cinetopia has alleged that AMC essentially [\*17] forced the upstream movie distributors to create "film licensing zones" to determine who will receive licenses within geographic areas. There may be other theaters within relatively close proximity to AMC and Cinetopia. And ultimately, the facts may show that a different geographic market is proper. But for now, Cinetopia has plausibly alleged that a proper geographic market is that which was created by AMC's own actions.

### c) Product Market

Cinetopia alleges that the relevant product market is the "market for licensing of first run, high grossing, wide release, commercial films," or the "film licensing market." (Doc. 17, at 9.) AMC argues that this does not make sense; the product at issue is not the license—it's the films themselves.

On this point, the court agrees with Cinetopia. As noted above, Cinetopia has essentially alleged a monopsony. The relevant market is therefore the upstream purchases (of licenses) instead of the downstream sales (of tickets to view the movies). Practically speaking, it is not the movies themselves that are being bought and sold here. It is the right—or the license—to exhibit the movies and view the movies. Cinetopia has adequately alleged a relevant product [\*18] market.

### C. State Law Claims

Finally, Cinetopia brings two state law claims: one for tortious interference, and one for estoppel. AMC asks the court to dismiss both claims.

#### **1. Tortious Interference with Actual and/or Prospective Business Relations**

To state a claim for tortious interference with a business relationship, Cinemark must allege:

- (1) the existence of a business relationship or expectancy with the probability of future economic benefit to the plaintiff; (2) knowledge of the relationship or expectancy by the defendant; (3) that, except for the conduct of the defendant, plaintiff was reasonably certain to have continued the relationship or realized the expectancy; (4) intentional misconduct by defendant; and (5) damages suffered by plaintiff as a direct or proximate cause of defendant's misconduct.
- (a) the relation concerns a matter involved in the competition between the actor and the other and
  - (b) the actor does not employ wrongful means and
  - (c) his action does not create or continue an unlawful restraint of trade and
  - (d) his purpose is at least in part to advance his interest in competing with the other.

*Restatement (Second) Torts § 768.* The Tenth Circuit has predicted that Kansas courts would adopt this principle. [\*19] [DP-Tek Inc. v. AT&T Glob. Info. Sols. Co., 100 F.3d 828, 831 \(10th Cir. 1996\)](#). AMC argues that under Kansas law, "wrongful means" requires Cinetopia to plead independently actionable conduct. Because Cinetopia's antitrust claims fail, AMC argues, its tortious interference claims must fail, as well. But this court has held that Cinetopia's antitrust claims may proceed. Because Cinetopia has plausibly alleged that AMC has employed wrongful means to obtain movie licenses, AMC cannot succeed on its competitive privilege defense at this time.

Alternatively, AMC asks the court to dismiss Cinetopia's tortious interference claim because Cinetopia has not adequately identified the specific groups of individuals with which it had a business expectancy. But Cinetopia has alleged that AMC interfered with Cinetopia's relationship with the Prairiefire development by "reducing [the development's] attendance and revenues, and limiting its growth and viability." (Doc. 17, at 3.) Cinetopia has also alleged that AMC interfered with its "relationships with distributors that include future economic benefits to Cinetopia from the continued fair competitive access to the licensing of movies." (*Id.* at 28.) Cinetopia specifically identifies these distributors as Disney, Paramount, Sony, Universal, [\*20] Warner Bros., Lionsgate, and Universal. And Cinetopia has alleged that AMC interfered with its theater patrons. It is unnecessary to identify individual ticket purchasers when setting forth allegations in the complaint. See [In re Syngenta AG MIR 162 Corn Litig., 131 F. Supp. 3d 1177, 1218 \(D. Kan. 2015\)](#). These allegations are sufficient to state a claim for tortious interference.

#### **2. Estoppel**

To succeed on a claim of promissory estoppel, a party must show: "(1) the promisor reasonably intended or expected the promisee to act in reliance on the promise; (2) the promisee acted reasonably in reliance on that promise; and (3) a refusal of the court to enforce the promise would sanction the perpetration of fraud or result in other injustice." [W & W Steel, LLC v. BSC Steel, Inc., 944 F. Supp. 2d 1066, 1078 \(D. Kan. 2013\)](#) (citing [Ayalla v. Southridge Presbyterian Church, 37 Kan. App. 2d 312, 152 P.3d 670, 677 \(Kan. Ct. App. 2007\)](#)). Estoppel does not

apply if "any essential element thereof is lacking or is not satisfactorily proved." *Ram Co. v. Estate of Kobbeman*, 236 Kan. 751, 696 P.2d 936, 944 (Kan. 1985) (citation omitted). And "[e]stoppel will not be deemed to arise from facts which are ambiguous and subject to more than one construction." *Gillespie v. Seymour*, 250 Kan. 123, 823 P.2d 782, 789 (Kan. 1991) (citation omitted).

AMC asks the court to dismiss Cinetopia's estoppel claim because the only promise it identifies is not enforceable as a matter of law. According to AMC, Cinetopia claims "AMC promised to purchase Cinetopia Overland Park 18 for fair consideration," [\*21] (doc. 17, at 29), which is merely a general proposal (without an offer and acceptance), and is not enough. It was a mere agreement to agree.

AMC does not identify all of Cinetopia's allegations relating to its claim for estoppel. In addition to the allegation identified above, Cinetopia also alleged that AMC promised to buy the theater for a specific price: "In February 2016, AMC delivered an indication of interest including a proposed purchase price, but AMC advised Cinetopia that the proposed deal would be delayed due to the DOJ's investigation of the AMC-Carmike deal." (Doc. 17, at 23.) And Cinetopia claims, "In order to forestall legal action by Cinetopia to block AMC's unlawful clearances and to prevent the DOJ from learning about this exclusionary conduct, AMC once again pretended to be interested in buying Cinetopia's facilities at attractive prices." (*Id.*) Finally, "AMC repeatedly assured Cinetopia in numerous private communications that it would buy Cinetopia's theaters at the original valuation, after the Carmike deal was finalized." (*Id.*) Cinetopia alleges that it relied on these assurances to its detriment. At this stage of the proceedings, these allegations are sufficient [\*22] to plausibly state a claim for estoppel.

#### **IV. Conclusion**

For the above reasons, the court denies AMC's motion to dismiss. While the evidence ultimately may not support all of Cinetopia's claims, Cinetopia has pleaded plausible causes of action for violations of federal **antitrust law** and state law at this time.

**IT IS THEREFORE ORDERED** that Defendants' Motion to Dismiss (Doc. 27) is denied.

Dated this 27th day of December, 2018, at Kansas City, Kansas.

**/s/ Carlos Murgua**

**CARLOS MURGUIA**

**United States District Judge**



## Clean Water Opportunities, Inc. v. Willamette Valley Co.

United States Court of Appeals for the Fifth Circuit

January 4, 2019, Filed

No. 18-30245

### **Reporter**

759 Fed. Appx. 244 \*; 2019 U.S. App. LEXIS 308 \*\*; 2019-1 Trade Cas. (CCH) P80,630; 2019 WL 113681

CLEAN WATER OPPORTUNITIES, INCORPORATED, doing business as Engineered Polyurethane Patching Systems, Plaintiff - Appellant v. THE WILLAMETTE VALLEY COMPANY, Defendant - Appellee

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

**Prior History:** [\*\*1] Appeal from the United States District Court for the Middle District of Louisiana. USDC No. 3:16-CV-227.

## **Core Terms**

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patch, pricing, discounts, manufacturers, variable, alleges, predatory-pricing, exclusionary, monopoly, products, antitrust, predatory, plywood, district court, monopolist, costs, competitive price, competitor, non-patch

## **LexisNexis® Headnotes**

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

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

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

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

An appellate court reviews a district court's grant of a motion to dismiss de novo, applying the same standard on review as that applied by the district court. In order to survive a motion to dismiss, a plaintiff's factual allegations must be enough to raise a right to relief above the speculative level. Although appellate courts are bound to accept plaintiff's factual allegations as true, this principle is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. A plaintiff is not entitled to relief when the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct.

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

Evidence > Burdens of Proof > Allocation

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

## **[HN2](#) [↓] Anticompetitive & Predatory Practices, Predatory Pricing**

Predatory pricing occurs when a defendant sacrifices present revenues for the purpose of driving a competitor out of the market with the hope of recouping the losses through subsequent higher prices. In order to successfully state a claim of predatory pricing under the [Sherman Act](#), a plaintiff must plausibly allege that: 1) the prices complained of are below an appropriate measure of the alleged monopolist's costs; and 2) that the alleged monopolist has a reasonable chance of recouping the losses through below-cost pricing. As to the first element, an ideal measure of the alleged monopolist's cost would be true marginal cost. However, because of difficulties in ascertaining true marginal cost, courts look to average variable cost in conducting the predatory-pricing inquiry. Average variable costs are costs that vary with the amount produced, including hourly labor, the cost of materials, transport, and electrical consumption at a plant. Accordingly, in order to state a claim for predatory pricing, a plaintiff must sufficiently plead that the alleged monopolist priced its goods below its average variable costs for producing those goods.

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

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

## **[HN3](#) [↓] Motions to Dismiss, Failure to State Claim**

For conclusory allegations, courts are not bound to accept them as true under [Fed. R. Civ. P. 12\(b\)\(6\)](#).

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

## **[HN4](#) [↓] Actual Monopolization, Monopoly Power**

The Supreme Court has recognized that the acquisition of a competitor alone may constitute a violation of federal antitrust laws, under certain circumstances.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

## **[HN5](#) [↓] Actual Monopolization, Claims**

In order to state a claim under [§ 2 of the Sherman Act](#) for the unlawful maintenance of a monopoly, a plaintiff must allege that the defendant: 1) possesses monopoly power in the relevant market; and 2) acquired or maintained that power willfully, as distinguished from the power having arisen and continued by growth produced by the development of a superior product, business acumen, or historic accident. Exclusionary conduct under § 2 is the creation or maintenance of monopoly by means other than the competition on the merits embodied in the Grinnell standard. The "key factor" courts look to in conducting this inquiry is "the proffered business justification for the act. If the conduct has no rational business purpose other than its adverse effects on competitors, an inference that it is exclusionary is supported.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

## **HN6** [down arrow] Actual Monopolization, Claims

While the rationality of a business decision is a significant factor in ascertaining whether conduct is exclusionary under [§ 2 of the Sherman Act](#), it is not a sine qua non.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

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

## **HN7** [down arrow] Attempts to Monopolize, Sherman Act

The Louisiana antitrust statute substantially mirrors the [Sherman Act](#).

**Counsel:** For CLEAN WATER OPPORTUNITIES, INCORPORATED, doing business as Engineered Polyurethane Patching Systems, Plaintiff - Appellant: Joseph R. Ward, Jr., Esq., Ward & Condrey, L.L.C., Covington, LA; Stacy R. Palowsky, Esq., Palowsky Law, L.L.C., Covington, LA.

For WILLAMETTE VALLEY COMPANY, Defendant - Appellee: Bradley Charles Myers, Esq., Katie Deranger Bell, Kean Miller, L.L.P., Baton Rouge, LA; Robert Nathan Hochman, John W. Teece, Sidley Austin, L.L.P., Chicago, IL; Amanda Starer Norton, Sidley Austin, L.L.P., Washington, DC.

**Judges:** Before STEWART, Chief Judge, KING and OWEN, Circuit Judges.

## Opinion

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[\*245] PER CURIAM:\*

Clean Water Opportunities, Incorporated, appeals the district court's order dismissing its various federal and state antitrust claims against The Willamette Valley Company. We AFFIRM.

### I.

We set forth the facts as alleged in the complaint and accept them as true, as we are required to do at the motion-to-dismiss stage. Clean Water Opportunities, Incorporated, doing business as Engineered Polyurethane Patching Systems ("EPPS"), manufactured patch, a polyurethane material used to fill knot holes [\*\*2] in plywood. EPPS offered patch to plywood manufacturers in the so-called Southern Market, which includes portions of Louisiana, Texas, Mississippi, Alabama, Florida, and Arkansas.

Manufacturers of patch sell the product to plywood manufacturers on a per-gallon basis. In their dealings with plywood manufacturers, patch manufacturers sell not only patch itself, but also the equipment used to apply patch and servicing for that equipment.

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\* Pursuant to **5TH Cir. R. 47.5**, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in **5TH Cir. R. 47.5.4**.

Although David Edwards, the owner and founder of EPPS, had previously competed with The Willamette Valley Company ("Willamette") in the patch market, EPPS itself entered into the market in or around 2013. At that time, Willamette was the sole seller of patch. Shortly after entering the market, EPPS entered into a production contract with MARTCO, a Louisiana-based plywood manufacturing company, to supply patch for one of MARTCO's two manufacturing lines. Subsequently, EPPS proposed an additional contract under which it would supply patch to both of MARTCO's manufacturing lines for five years at \$12.90 per gallon. This price was significantly lower than Willamette's price of \$17 per gallon.

Willamette managed to scuttle this transaction, however. Upon learning [\*\*3] of EPPS's proposal, Willamette offered MARTCO "a substantial discount" on all the non-patch products it sold to MARTCO, contingent upon MARTCO purchasing all its patch from Willamette. EPPS attempted to offer similar discounts to MARTCO, but MARTCO advised EPPS that EPPS was unable to offer anything that could match Willamette's discounts. MARTCO thereafter "terminate[d] its relationship with EPPS." During this time period, EPPS also sought business from two other plywood manufacturers, but discussions stalled prior to the creation of any formal agreement, also allegedly due to 2 Willamette's offer of a substantial discount on non-patch products to those manufacturers.

As a result of this lost business, it was no longer financially viable for EPPS to compete in the patch market. Approximately two months after losing MARTCO's business, EPPS entered into a contract with Willamette to sell all of its assets. The agreement included a noncompete clause. Willamette thereafter became the sole seller of patch in the Southern Market.

In April 2016, EPPS sued Willamette in federal court, alleging violations of the *Sherman Act*, the *Clayton Act*, and Louisiana's [\*246] antitrust analogue. EPPS alleged that [\*\*4] Willamette had engaged in predatory pricing in violation of the Sherman Act when it offered discounts on non-patch products to the would-be EPPS customers, because these discounts resulted in a price for patch that was effectively below Willamette's average variable costs for producing patch. It also alleged that Willamette illegally established a monopoly, in violation of state and federal law, and had purchased EPPS's assets to maintain its monopoly. Upon Willamette's motion to dismiss, the district court determined that EPPS had failed sufficiently to allege pricing below average variable cost and that its predatory-pricing claim therefore failed. The district court alternatively held that the predatory-pricing claim failed because EPPS had failed to allege that Willamette would have been able to recoup losses incurred as a result of its alleged pricing scheme after EPPS exited the market. The district court also concluded that EPPS's other claims depended on its predatory pricing claim, and therefore dismissed those claims as well. EPPS now appeals.

## II.

### A.

**HN1**[ We review a district court's grant of a motion to dismiss de novo, applying the same standard on review as that applied by the [\*\*5] district court. See *Gonzalez v. Kay, 577 F.3d 600, 603 (5th Cir. 2009)*. In order to survive a motion to dismiss, a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Although we are bound to accept plaintiff's factual allegations as true, this principle "is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. A plaintiff is not entitled to relief when "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." *Id. at 679*.

### B.

EPPS first alleges that Willamette engaged in predatory pricing in order to maintain its monopoly over the patch industry when it offered substantial discounts on its non-patch products to several would-be EPPS customers. **HN2**[ "Predatory pricing occurs when a defendant 'sacrifice[s] present revenues for the purpose of driving [a

competitor] out of the market with the hope of recouping the losses through subsequent higher prices." *Felder's Collision Parts, Inc. v. All Star Adver. Agency, Inc.*, 777 F.3d 756, 759 (5th Cir. 2015) (alterations in original) (quoting *Int'l Air Indus., Inc. v. Am. Excelsior Co.*, 517 F.2d 714, 723 (5th Cir. 1975)). In order to successfully state a claim of predatory pricing under the Sherman Act, a plaintiff must plausibly allege that "1) the prices complained of are below an [\*\*6] appropriate measure of the alleged monopolist's costs and 2) that the alleged monopolist has a reasonable chance of recouping the losses through below-cost pricing." *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 527 (5th Cir. 1999). As to the first element, an ideal measure of the alleged monopolist's cost would be true marginal cost. *Id. at 532*. However, because of difficulties in ascertaining true marginal cost, this court looks to average variable cost in conducting the predatory-pricing inquiry. *Id.* Average variable costs are costs that "vary with the amount produced," including "hourly labor, the cost of materials, transport, and electrical consumption at a plant." *Id.* Accordingly, in order to state a [\*247] claim for predatory pricing, a plaintiff must sufficiently plead that the alleged monopolist priced its goods below its average variable costs for producing those goods.

EPPS alleges that, although Willamette did not price patch itself below average variable cost, it effectively did so when it substantially discounted non-patch products to induce customers to purchase its patch. When these discounts are considered, EPPS argues, the price of patch sank below Willamette's average variable cost to produce it. Willamette does not appear to dispute that the effective [\*\*7] price of patch, with discounts on other products considered, constituted an appropriate measure of price for purposes of the predatory-pricing analysis, and we see no authority barring such an approach. We therefore consider Willamette's pricing holistically, rather than focusing exclusively on the price at which it sold patch.

EPPS's factual allegations fail to plausibly support its claim that Willamette effectively priced its patch below average variable cost. EPPS alleges that Willamette offered discounts to several plywood manufacturers that "were substantial and represented a benefit below Willamette's cost to produce patch." Absent further factual enhancement, these claims amount to no more than *HN3*[<sup>1</sup>] conclusory allegations, which we are not bound to accept as true *Federal Rule of Civil Procedure 12(b)(6)*. See *Iqbal*, 556 U.S. at 678.

The specific factual allegations EPPS does plead only serve to render its case implausible. First, EPPS alleges that it offered to sell patch at \$12.90 per gallon and that Willamette sold patch at \$17 per gallon. Second, it alleges that the competitive price for patch was \$10. Thus, the average variable cost for producing patch likely falls somewhere below the competitive price of \$10. Even setting average variable [\*\*8] cost directly at the competitive price of \$10, Willamette needed only to discount its other products to undercut EPPS's price of \$12.90. In doing so, Willamette only had to remain within the \$2.90 interval between EPPS's price and the competitive price in order to maintain above-cost pricing. And likely, it could have gone further, since its average variable costs were almost certainly lower than the competitive price. Accordingly, we have no reasonable basis to infer that Willamette effectively priced its patch below average variable cost. Because EPPS failed to plausibly allege one of the two essential elements of its predatory pricing claim against Willamette, dismissal of that claim was appropriate. We therefore need not consider the question of whether EPPS successfully alleged recoupment.

## C.

EPPS also alleges that Willamette violated *§ 2 of the Sherman Act* and *§§ 4* and *7 of the Clayton Act* when it purchased EPPS's assets and entered into a noncompete agreement with EPPS's founder. *HN4*[<sup>1</sup>] The Supreme Court has recognized that the acquisition of a competitor alone may constitute a violation of federal antitrust laws, under certain circumstances. See *United States v. Grinnell Corp.*, 384 U.S. 563, 576, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966) (listing acquisition by defendant of its competitors [\*\*9] as one of several "unlawful and exclusionary practices" used by defendant to achieve monopoly).

In its brief, EPPS does not argue that Willamette's acquisition of EPPS, standing alone, amounted to an antitrust violation. Instead, EPPS contends that because the district court erred in dismissing its predatory-pricing claim, it similarly erred in dismissing its unlawful-acquisition claim. The two claims allegedly must rise and fall together. Because we reject the latter [\*248] claim, we must likewise reject the former. Accordingly, we affirm the district court's grant of Willamette's motion to dismiss as to EPPS's unlawful-acquisition claim.

#### D.

The balance of EPPS's complaint consists of its allegation that Willamette illegally monopolized the patch market in violation of § 2 of the Sherman Act and an analogous Louisiana law. Unlike its unlawful-acquisition claim, EPPS argues that its § 2 claim stands independent of its predatory-pricing claim. For support, EPPS cites out-of-circuit precedent holding that "[b]ehavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist." United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005). The thrust of EPPS's § 2 theory is that although Willamette's pricing scheme [\*\*10] may not have itself violated federal law as a predatory-pricing scheme, it may nonetheless violate § 2 because it has been practiced by a monopolist and had the effect of maintaining that monopoly.

**HN5** [↑] In order to state a claim under § 2 for the unlawful maintenance of a monopoly, a plaintiff must allege that the defendant: "1) possesses monopoly power in the relevant market and 2) acquired or maintained that power willfully, as distinguished from the power having arisen and continued by growth produced by the development of a superior product, business acumen, or historic accident." Stearns Airport, 170 F.3d at 522 (citing Grinnell, 384 U.S. at 563). We assume arguendo that EPPS has successfully alleged facts demonstrating that the first element is present. The second element requires a showing of exclusionary conduct. "Exclusionary conduct under section 2 is the creation or maintenance of monopoly by means other than the competition on the merits embodied in the Grinnell standard." *Id.* The "key factor" we look to in conducting this inquiry is "the proffered business justification for the act. If the conduct has no rational business purpose other than its adverse effects on competitors, an inference that it is exclusionary is supported." *Id.*

The rationality [\*\*11] of Willamette's acts is readily apparent. The only exclusionary conduct EPPS alleges is Willamette's offering of substantial discounts to its customers. Willamette's justification for these actions "is obvious: it was trying to sell its product." *Id. at 524*. Here, Willamette was faced with the prospect of losing business to a competitor. In order to keep that business, it offered discounts on its other products. Although, as the predatory-pricing framework contemplates, certain discounts may be so substantial as to cross the line into economic irrationality, no such discounts are present here: as stated above, the discounts resulted in an effective selling price of patch that was, in all likelihood, either competitive or supracompetitive.

**HN6** [↑] While the rationality of a business decision is a significant factor in ascertaining whether conduct is exclusionary, it is not a sine qua non. See *id. at 524-26* (considering other factors in addition to business rationality, including the approval of the consumer and the potential existence of bribery or threats, in determining the validity of plaintiff's § 2 claim). EPPS does not, however, explain why this court should deem this economically rational conduct exclusionary. [\*\*12] As a result, the rationality of Willamette's actions is determinative. We therefore affirm as to the district court's denial of EPPS's § 2 claim.

#### E.

Finally, the Louisiana antitrust claim similarly rises and falls with the claims discussed above. The parties do not dispute [\*249] that EPPS's Louisiana antitrust claim hinges on the success of the federal claims, because **HNT** [↑] the Louisiana statute substantially mirrors the Sherman Act. This circuit's caselaw confirms that understanding. Felder's Collision Parts, 777 F.3d at 759. Because each of EPPS's federal-law claims fails, so too must its Louisiana claim.

### III.

We therefore conclude that dismissal pursuant to Rule 12(b)(6) was appropriate as to each of EPPS's claims against Willamette. Accordingly, the judgment of the district court is AFFIRMED.

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## Greenkraft, Inc. v. Gemayels

Superior Court of California, County of Orange

January 8, 2019, Decided

30-2018-00979579-CU-FR-CJC

**Reporter**

2019 Cal. Super. LEXIS 57491 \*

Greenkraft, INC. v. Gemayels

## Core Terms

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cause of action, unfair, parties, amended complaint, fraudulent, protective order, subpoenas, estoppel, alleges

**Counsel:** [\*1] Saleen K. Erakat, from Callahan & Blaine, APLC, present for Plaintiff(s).

Peter Sunukjian, from Briggs & Alexander, APC, present for Defendant(s).

**Judges:** Walter Schwarm.

**Opinion by:** Walter Schwarm

## Opinion

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### MINUTE ORDER

Tentative Ruling posted on the Internet .

Parties represent to the Court they have reviewed its tentative ruling posted online. Argument heard.

The Court adopts and MODIFIES its ruling as to Motion No. 1 as follows:

Motion No. 1:

Defendants' (George Patrick Gemayel and Gem Works LLC) Demurrer to Second Amended Complaint (filed on 10-2-18) is SUSTAINED as to the Fifth Cause of Action with leave to amend. The Demurrer is SUSTAINED as to the Seventh Causes of Action WITH leave to amend. The Demurrer is OVERRULED as to the Ninth Cause of Action.

The Fifth Cause of Action alleges a cause of action for Breach of Contract. Defendant contends that Commercial Code [section 2201](#) prevents Plaintiff from enforcing this contract. [Commercial Code section 2201](#) states, "(1) Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars (\$ 500) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and [\*2] signed by the party against whom enforcement is sought or by his or her authorized agent or broker [¶] (2) Between merchants if within a reasonable time a writing in confirmation and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of [subdivision \(1\)](#) against the party unless written notice of objection to its contents is given within 10 days after it is received." [Commercial Code section 2104, subdivision \(1\)](#), explains,

"Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill."

The Second Amended Complaint (SAC) concedes that the alleged contract was an oral contract. (SAC, ¶¶ 13 and 62.) It appears that Plaintiff does not dispute the alleged contract involved the sale of goods for more than \$ 500. (Plaintiff Greenkraft, Inc.'s Opposition to Defendants' Demurrer to Plaintiff's Second Amended Complaint (Opposition), filed on 12-21-18; [\*3] 3:15-5:3; SAC, ¶ 62.)

It does not appear that Plaintiff qualifies as a merchant within the meaning of [Commercial Code section 2204, subdivision \(1\)](#). Although the SAC alleges "... Plaintiff ordered 210 vehicles ... from Walter's Auto Sales ..." (SAC, ¶ 14), it does not allege that Plaintiff employed Walter's Auto Sales as an agent or broker. The SAC does not sufficiently plead that Plaintiff's business involves the sale of vehicles. The SAC describes Plaintiff's business as "... a manufacturer of alternative fuel automotive products." (SAC, ¶ 10.) There are no clear allegations in the SAC that establish Plaintiff and Defendant are "merchants" in connection with the purchase and sale of vehicles within the meaning of [Commercial Code section 2104, subdivision \(1\)](#). Thus, the SAC does not adequately plead that the alleged contract falls within [Commercial Code section 2201, subdivision \(2\)](#).

Paragraph 70 of the SAC indicates Plaintiff sent an invoice to Gem Works LLC for the first 70 vehicles, and that Gem Works LLC paid for these vehicles. (SAC, ¶¶ 63-64.) This allegation may sufficiently allege a writing within [Commercial Code section 2201, subdivision \(2\)](#), as to the first 70 vehicles. The SAC, however, does not appear to claim damages resulting from the sale of the first 70 vehicles. The SAC does not sufficiently plead that any portion of the contract after the sale [\*4] of the first 70 vehicles falls within [Commercial Code section 2201, subdivision \(2\)](#). Therefore, [Commercial Code section 2201, subdivision \(1\)](#), prevents the enforcement of the contract as to the remaining vehicles.

[Allied Grape Growers v. Bronco Wine Co. \(1988\) 203 Cal.App.3d 432, 443](#), states, "Furthermore, the great weight of authority from sister state jurisdictions holds that estoppel can be applied to overcome the Uniform Commercial Code's statue of frauds provision as long as a court is not enforcing a mere oral promise. There must be some form of detrimental reliance." (The SAC does not adequately allege detrimental reliance. The SAC pleads, "... as a result of that contract, Greenkraft ordered 210 vehicles from Mercedes Benz." (SAC, ¶ 62.) The SAC does not allege that Plaintiff paid for these 210 vehicles. The loss of profits from the Agreement does not appear sufficient to demonstrate detrimental reliance. (SAC, ¶ 21.)

Based on the above, Plaintiff has failed to allege sufficient facts to avoid the application of [Commercial Code section 2201, subdivision \(1\)](#), as to the Fifth Cause of Action. Thus, the court sustains Defendants' Demurrer as to the Fifth Cause of Action.

As to the Seventh Cause of Action, "[t]he UCL does not proscribe specific activities, but broadly prohibits 'any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading [\*5] advertising.' [Citation.]" ([Puentes v. Wells Fargo Home Mortg., Inc. \(2008\) 160 Cal. App. 4th 638, 643-644](#)).

[Saunders v. Superior Court \(1994\) 27 Cal.App.4th 832, 838-839](#), states, "Section 17200 defines unfair competition as 'any unlawful, unfair or fraudulent business act or practice ' The 'unlawful' practices

prohibited by section 17200 are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made. [Citation.] It is not necessary that the predicate law provide for private civil enforcement. [Citation.] As our Supreme Court put it, section 17200 'borrows' violations of other laws and treats them as unlawful practices independently actionable under section 17200 et seq. [Citation.] 'Unfair' simply means any practice whose harm to the victim outweighs its benefits. [Citation.] 'Fraudulent,' as used in the statute, does not refer to the common law tort of fraud but only requires a showing members of the public "are likely to be deceived." [Citation.]"

[Arce v. Kaiser Foundation Health Plan, Inc. \(Arce\) \(2010\) 181 Cal.App.4th 471, 489-490](#), explains, "If the trial court were to find that Applied Behavior Analysis therapy and speech therapy for autism spectrum disorders are covered services under the terms of the health care plan, then Kaiser's alleged practice of categorically denying coverage for such services to the putative class could constitute a breach of contract. A breach of contract in turn may [\*6] form the predicate for a UCL claim, "provided it also constitutes conduct that is 'unlawful, or unfair, or fraudulent.'" [Citations.] [Citation.] With respect to the unfairness prong of Business and Professions Code section 17200, appellate courts have recognized that 'a systematic breach of certain types of contracts (e.g., breaches of standard consumer or producer contracts involved in a class action) can constitute an unfair business practice under the UCL. [Citations.]' [Citations.]"

Consequently, it's not clear that Plaintiff's references to [Civil Code sections 1572, 1709, and 1710](#), each which outlines circumstances in which civil liability attaches to fraud, are sufficient to establish the "unlawful" prong.

"... 'When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes section 17200, the word "unfair" in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.' [Citation.]" ([Bardin v. DaimlerChrysler Corp. \(2006\) 136 Cal.App.4th 1255, 1266-1267](#)) Although Plaintiff briefly references the "unfair" prong, it offers no argument which supports its application.

Here, Plaintiff [\*7] alleges, "The fraudulent conduct of Defendants has deceived members of the public, including, but not limited to, Mercedes Benz .... (SAC, ¶78.) Plaintiff does not provide authority supporting that a single entity qualifies as a "members of the public within the meaning of Business and Professions Code section 17200. Absent authority which indicates the deception of a single entity is sufficient to support fraudulent conduct under Business and Professions Code section 17200, the court sustains the Defendants' Demurrer as to the Seventh Cause of Action.

As to the Ninth Cause of Action for Promissory Estoppel, [Flintco Pacific, Inc. v. TEC Management Consultants, Inc. \(2016\) 1 Cal.App.5th 727, 734](#), describes the elements necessary to establish promissory estoppel. Paragraphs 87-92 adequately of the SAC adequately plead a claim for promissory estoppel. Defendants' primary argument is that an alleged contract prevents a claim for promissory estoppel. (Defendants' Demurrer to Second Amended Complaint (Demurrer), filed on 10-2-18; 7:4-21.) [Adams v. Paul \(1995\) 11 Cal.4th 583, 593](#), provides, "Moreover, a party may plead in the alternative and may make inconsistent allegations. [Citations.]" Therefore, the court overrules Defendants' Demurrer as to the Ninth Cause of Action.

In summary, the court Defendants' (George Patrick Gemayel and Gem Works LLC) Demurrer to Second Amended Complaint is SUSTAINED as [\*8] to the Fifth Cause of Action with leave to amend. The Demurrer is SUSTAINED as to the Seventh Cause of Action with leave to amend. The Demurrer is OVERRULED as to the Ninth Cause of Action. Plaintiff is to file an amended complaint within 14 days of the date of service of the notice of this order.

Defendants are to give notice.

Motion No. 2:

Defendants (George Patrick Gemayel and Gem Works LLC) Motion for Protective Order (filed on 8-20-18) is continued to 3-12-19 at 1:30 p.m. in Department C19 for the reasons set forth below.

The Motion seeks a protective order as to eleven deposition subpoenas which collectively contain 345 requests for production. Plaintiff Greenkraft, Inc.'s Opposition to Defendant's Motion for Protective Order (Opposition), filed on 12-21-18, states, "With respect to the subpoenas, Greenkraft has agreed to withdraw certain requests, Defendants have agreed to withdraw objections to certain requests and the parties have jointly agreed to modify others... [T]he parties have significantly limited the outstanding disputes between them with respect to the subpoenas." (Opposition; 5:11-15.) Defendants' Reply to Plaintiff Greenkraft's Opposition to Defendants' Motion for

Protective [\*9] Order (Reply), filed on 10-3-18, states, "Nevertheless, the parties did agree to the modification of certain subpoenas in question here." (Reply; 2:13.) (See also, 12-21-18 Erakat Decl., ¶ 3.)

Although these briefs attempt to articulate the remaining disputes, they do so without providing context or identifying the remaining requests at issue. The court appreciates the parties' attempt to resolve these disputes without court intervention. To the extent the parties still require the court's assistance to resolve any remaining disputes, the court requires a Joint Statement that identifies each subpoena and Request for Production which remains in dispute and the subject of the dispute. The parties are to submit this joint statement no later than 1-31-19.

Defendants are to give notice.

**Motion for Protective Order continued to 03/12/2019 at 01:30 PM in Department C19.**

**Case Management Conference continued to 03/12/2019 at 01:30 PM in Department C19.**

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End of Document



## LegalForce RAPC Worldwide P.C. v. UpCounsel, Inc.

United States District Court for the Northern District of California

January 10, 2019, Decided; January 10, 2019, Filed

CASE NO. 18-cv-02573-YGR

### **Reporter**

2019 U.S. Dist. LEXIS 5061 \*; 2019 WL 160335

LEGALFORCE RAPC WORLDWIDE P.C., ET AL., Plaintiffs, vs. UPCOUNSEL, INC., Defendant.

## **Core Terms**

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motion to dismiss, law firm, Lawyers, plaintiffs', customers, unfair, consumers, allegations, largest, unfair competition, advertising, argues, LegalForce RAPC's Lanham Act, quotation, website, marks, predicate, false and misleading, misleading, prong, Top, potential client, competitor, technology, violations, puffery, ratings, cause of action, Lanham Act, fraudulent

**Counsel:** [\*1] For LegalForce RAPC Worldwide P.C., Plaintiff: Emil J Ali, Lake Oswego, OR; Jorge Aurelio Amador, Jorge A. Amador Law Firm, San Francisco, CA; Nicholas Carl Craft, LegalForce RAPC Worldwide, Tempe, AZ; Wensheng Ma, LegalForce RAPC Worldwide, P.C., Mountain View, CA; Raj Vasant Abhyanker, Raj Abhyanker, PC, Mountain View, CA.

For LegalForce, Inc., Plaintiff: Raj Vasant Abhyanker, Raj Abhyanker, PC, Mountain View, CA; Emil J Ali, Lake Oswego, OR; Jorge Aurelio Amador, Jorge A. Amador Law Firm, San Francisco, CA; Wensheng Ma, LegalForce RAPC Worldwide, P.C., Mountain View, CA.

For UpCounsel, Inc., Defendant: Simona Alessandra Agnolucci, LEAD ATTORNEY, Abraham Harry Fine, Nicholas David Marais, Keker, Van Nest & Peters LLP, San Francisco, CA; Jesselyn K Friley, Keker Van Nest and Peters, San Francisco, CA.

**Judges:** YVONNE GONZALEZ ROGERS, UNITED STATES DISTRICT COURT JUDGE.

**Opinion by:** YVONNE GONZALEZ ROGERS

## **Opinion**

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### **ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS FIRST AMENDED COMPLAINT**

Now before the Court is defendant UpCounsel, Inc.'s ("UpCounsel") motion to dismiss plaintiffs Legalforce RAPC Worldwide P.C.'s ("LegalForce RAPC") and LegalForce, Inc.'s ("Trademarkia") first amended complaint. (Dkt. No. 49 [\*2] ("MTD").) Having carefully considered the pleadings in this action, the papers submitted, and the oral argument held on November 6, 2018, and for the reasons set forth below, the Court **GRANTS IN PART AND DENIES IN PART** UpCounsel's motion.<sup>1</sup>

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<sup>1</sup> Given the sheer number of statements addressed in this Order, the Court summarizes that those which contain specific representations have survived the motion to dismiss, as have the allegations regarding UpCounsel's fee structure.

## I. BACKGROUND

UpCounsel is an online marketplace for legal services that enables users (primarily entrepreneurs and businesses) to find and hire attorneys via its website UpCounsel.com. (First Amended Complaint ("FAC") ¶ 16, Dkt. No. 45.) California attorney Raj Abhyanker started both plaintiff companies approximately four years before UpCounsel launched. (*Id.* ¶¶ 13-15.) Plaintiff LegalForce RAPC is a law firm wholly owned by Abhynaker, which practices corporate and intellectual property law. (*Id.* ¶ 7.) Plaintiff Trademarkia offers law firm automation and free trademark search services through its website Trademarkia.com. (*Id.* ¶ 8.) UpCounsel and plaintiffs compete to provide individuals and small businesses with affordable access to attorneys. (*Id.* ¶ 2.)

Plaintiffs allege that UpCounsel's false advertising and unfair competition have caused consumers to purchase UpCounsel's services instead of LegalForce RAPC's services. (*Id.* ¶ 114.) Among the challenged [\*3] conduct by UpCounsel is its (i) acting as an unregistered lawyer referral service, (ii) acting as a runner and capper to solicit potential clients, (iii) fee sharing with attorneys; (iv) aiding and abetting its attorneys to violate California Rule of Professional Conduct 1-400 and [37 C.F.R. section 11.703](#); and (v) use of certain advertisements and promotional statements which plaintiffs allege are false and/or misleading to reasonable consumers. Plaintiffs claim that UpCounsel's alleged misconduct has resulted in lost sales opportunities, lost asset value, lost market share, lost revenue, and rising costs per client acquisition for LegalForce RAPC. (*Id.* ¶¶ 114-16.)

On September 11, 2018, plaintiffs filed their FAC, asserting therein three claims for relief: (1) "False Advertising and Unfair Competition [under] the [Lanham Act, 15 U.S.C. § 1125\(a\)](#)"; (2) "California False & Misleading Advertising [under] [Cal. Bus. & Prof. Code § 17500 et seq.](#) ['(FAL')]"'; and (3) "California Unfair Competition in Violation of [Cal. Bus. & Prof. Code § 17200 et seq.](#) ['UCL']".<sup>2</sup> The instant motion followed.

## II. LEGAL STANDARD

Dismissal under [Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#) "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." [Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 \(9th Cir. 1990\)](#). [Rule 8\(a\)\(2\)](#), however, "requires only 'a short and plain statement of the claim showing that the pleader is entitled [\*4] to relief[.]'" [Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#) (quoting [Fed. R. Civ. P. 8\(a\)\(2\)](#)). Consequently, "a complaint attacked by a [Rule 12\(b\)\(6\)](#) motion to dismiss does not need detailed factual allegations[.]" *Id.* Nonetheless, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" *Id.* (internal quotation marks, citation, and alterations omitted).

In analyzing a motion to dismiss, a district court must accept as true all material allegations in the complaint and construe them in the light most favorable to the nonmoving party. [NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 \(9th Cir. 1986\)](#). "To survive a motion to dismiss, a complaint must contain sufficient factual material, accepted as true, to 'state a claim to relief that is plausible on its face.'" [Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#) (quoting [Twombly, 550 U.S. at 570](#)). "Factual allegations must be enough to raise a right to relief above the speculative level[.]" [Twombly, 550 U.S. at 555](#) (citation omitted). Courts "are not bound to accept as true a legal conclusion couched as a factual allegation[.]" [Iqbal, 556 U.S. at 678](#) (internal quotation marks omitted).

On a motion to dismiss, a court can consider documents attached to the complaint, documents incorporated by reference in a complaint, or documents subject to judicial notice. [\*5] [U.S. v. Ritchie, 342 F.3d 903, 908 \(9th Cir. 2003\)](#). The court is not required to accept as true allegations that contradict such documents. [Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998 \(9th Cir. 2010\)](#).

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<sup>2</sup> Specifically, LegalForce RAPC asserts all three claims, while Trademarkia asserts only a claim under the UCL.

### **III. FIRST CLAIM FOR RELIEF: FALSE ADVERTISING AND UNFAIR COMPETITION (LANHAM ACT, [15 U.S.C. § 1125\(a\)](#))**

The *Lanham Act* prohibits any person from using, "on or in connection with any goods or services, . . . any . . . false or misleading description of fact, or false or misleading representation of fact, which . . . misrepresents the nature, characteristics, [or] qualities . . . of his or her or another person's goods, services, or commercial activities[.]" [15 U.S.C. § 1125\(a\)\(1\)\(B\)](#).

LegalForce RAPC's Lanham Act claim is based generally on ten allegedly "false and misleading advertising [s]tatements . . . relat[ing] to descriptions or representations of fact that misrepresent the nature, characteristics, and quality of UpCounsel's services." (FAC ¶¶ 118-19.) UpCounsel argues that all of the challenged statements are non-actionable.

In its motion, UpCounsel generally sorts plaintiffs' false advertisement allegations into four groups.<sup>3</sup> As a result, UpCounsel's position with respect to each statement asserted in the FAC was difficult for the Court to discern. The Court instead understands UpCounsel's motion as attacking *eight* statements, or categories [\*6] of statements, which are addressed in turn. (See *infra* Sections III.A-H.)<sup>4</sup>

#### **A. "UpCounsel is the world's largest law firm."**

Plaintiffs allege six iterations of the statement that "UpCounsel is the world's largest virtual law firm." According to plaintiffs, all of them were "made with an intent to deceive consumers into thinking the statement 'UpCounsel is the world's largest virtual law firm' is trustworthy and legitimate." (FAC ¶ 25.) "Since UpCounsel is not a law firm," plaintiffs contend that "these statements are false and misleading to average consumers. . . . Clearly, UpCounsel sells itself as a law firm, acts like a law firm, and therefore is a law firm despite its self-serving statements to the contrary." (*Id.* ¶ 26.)

UpCounsel generally argues, without specifically addressing each iteration, that the statement that UpCounsel is "equivalent to the world's largest law firm" is non-actionable puffery. (MTD at 12.)<sup>5</sup> The Court addresses each of the six iterations in turn.

##### *1. Statements on the website of UpCounsel's business partner inDinero Inc.*

On the website of UpCounsel's business partner inDinero Inc., UpCounsel made the following statements: [\*7] "We are the world's largest virtual law firm for businesses of any size. We allow businesses to get high-quality, cost-

<sup>3</sup>Those groups include: "behind-the-scenes HTML source code or 'search engine optimization' ('SEO') efforts," "quotes suggesting that UpCounsel is 'equivalent to the world's largest virtual law firm' or that available lawyers are, for example, the 'best patent lawyers' in a particular city," "whether UpCounsel's fee structure is 'false and misleading,'" and "serious but spurious allegations that some lawyers advertised on UpCounsel's website are 'not even licensed to practice law' in a particular state, or in any state." (See MTD at 9-10.)

<sup>4</sup>Any statements not addressed herein are those that were not *clearly* the subject of UpCounsel's motion to dismiss.

<sup>5</sup>UpCounsel also argues as a general matter that "[p]laintiffs cannot rest their Lanham Act claims on UpCounsel's executives' statements, both as a matter of fact and as a matter of law." (MTD at 13.) It cites *L.A. Taxi Cooperative, Inc. v. Uber Technologies, Inc.*, 114 F. Supp. 3d 852 (N.D. Cal. 2015) in support thereof. However, that case is distinguishable because the challenged statements, which were made by Uber representatives to journalists and published in independent online articles, were "'inextricably intertwined' with the reporters' coverage of a *matter of public concern*, i.e. whether Uber is safe for riders[.]'" *Id.* at 864 (emphasis supplied). For this reason, the court in *L.A. Taxi* determined that the statements could not constitute commercial speech actionable under the Lanham Act. Unlike the statements in *L.A. Taxi*, the challenged statements here do not implicate matters of public concern. Thus, this argument fails, and the Court does not address it further.

effective legal services. While our lawyers serve as outside general counsel to many companies, we also assist with specialized legal work like IP, immigration, commercial contracts, litigation, and much more." (FAC ¶ 19; *id.* Exh. 35 at 1.)

First, as plaintiffs' counsel conceded at oral argument, the phrase "world's largest virtual law firm" constitutes non-actionable puffery. (See Transcript of Proceedings held on November 6, 2018 ("Hearing Tr. 2") at 13:23-14:3, Dkt. No. 71.) Second, LegalForce RAPC's reliance on these statements as a basis for its Lanham Act claim does not persuade, in light of the *context* in which the statements were made, which the Court may consider. Namely, on its website inDinero also states: "Every day, we have the pleasure of working with innovative *startups* that are making a true difference in the world around us. This Customer Spotlight, we'd like to introduce you to UpCounsel. They make it easy for you to *find talented and local attorneys* at an affordable rate." (FAC Exh. 35 at 1 (emphases supplied).) UpCounsel's motion is thus **GRANTED** [\*8] as to these statements.

## *2. Statements by UpCounsel's customers*

In an article entitled "6 Lexoo Competitors Connecting Lawyers and Clients with Online Legal Platforms," DataFox, a customer of UpCounsel, stated: "UpCounsel is the world's largest virtual law firm. With UpCounsel, businesses can access and manage a high-quality and on-demand legal workforce. Today, both big and small businesses use UpCounsel to supplement or replace their traditional service providers." (FAC ¶ 20; *id.* Exh. 36 at 2.)

LegalForce RAPC's reliance on these statements similarly does not persuade. In the article, UpCounsel is featured as one of six private companies "that could help the legal services *technology market* grow . . ." (FAC Exh. 36 at 1 (emphasis supplied).) UpCounsel's motion is thus **GRANTED** as to these statements.

## *3. Statements by UpCounsel's Co-founder and Chief Executive Officer in an interview*

On March 15, 2015, Mimesis Law, a strategic communications consultancy firm, published a video it produced of an interview with UpCounsel's Co-founder and CEO, Matthew Faustman, entitled "Competitor or Collaborator? What UpCounsel's Growth Means for BigLaw." (FAC ¶ 21.) In the interview, Faustman made the [\*9] following statement: "So, what we've created at UpCounsel is equivalent to the world's largest virtual law firm."<sup>6</sup>

The Court already dismissed the Lanham Act claim to the extent it is based on this statement, in the context of UpCounsel's previous motion to dismiss the initial complaint in this action. (See Transcript of Proceedings Held on August 28, 2018 ("Hearing Tr. 1") at 9:25-10:20, Dkt. No. 46; see also Dkt. No. 42 ("MTD Order") at 1.) To reiterate, LegalForce RAPC's reliance on this statement is disingenuous. While Faustman, indeed, remarks in the video that "what we've created at UpCounsel is equivalent to the world's largest law firm," he *immediately* goes on to say, "But, as I'm sure you know, and many of your viewers know, we aren't a law firm. We are a venture-backed technology company. We've started with technology and we end with technology, where we've created a [sic] intelligent technology platform that makes it easy to discover and work with a community of attorneys."<sup>7</sup> UpCounsel's motion is thus **GRANTED** as to these statements.

## *4. Statements [\*10] by Faustman at Persian Tech Conference*

On December 12, 2014, Faustman made the following statements: "[W]e have created what is essentially the world's largest virtual law firm . . . We're able to deliver high-quality, cost-effective, and faster solutions than what the traditional law firms are actually able to provide."<sup>8</sup>

<sup>6</sup> See <https://www.youtube.com/watch?v=FG1ZBCL181I&app=desktop&t=0m44s>; see also FAC ¶ 21.

<sup>7</sup> See <https://www.youtube.com/watch?v=FG1ZBCL181I&app=desktop&t=0m52s>.

LegalForce RAPC's reliance on these statements also does not persuade. Between the two sentences plaintiffs quote, Faustman states the following: "We essentially allow independent talented lawyers throughout the world through a mobile device or a laptop to *plug into the UpCounsel marketplace and accept work, and essentially work freely as independent contractors*. We then bundle this up and we go to our companies. We go to our clients, which are businesses between 5 and 1000 employees. . . ."<sup>9</sup> UpCounsel's motion is thus **GRANTED** as to these statements.

#### *5. Statements made up UpCounsel's Co-founders in online video titled "Inside UpCounsel's Mission to Modernize the Legal Industry"*

In a September 21, 2015 online [\*11] video, Faustman made the following statement: "This is a very high-trust kind of industry, and in order to make any movement people have to associate you with very high quality [that] is as good as using a law firm."<sup>10</sup> In addition, Mason Blake, Cofounder and Chief Technology Officer of UpCounsel, stated: "The beauty of UpCounsel is that it's essentially a virtualized law firm in a box . . . ."<sup>11</sup>

LegalForce RAPC's reliance on Faustman's statement is unpersuasive because the statement itself indicates that using UpCounsel is *as good as using a law firm*. As for Blake's statement, the preceding statement made by the moderator of the discussion is the following: "One of the things that gets me really excited about UpCounsel too is . . . your primary offering is that connection—is the back office for the lawyers and then being able to use your platform to communicate, you know a small business and the lawyer they're working with—but you can also assemble a team of lawyers who help you with different things."<sup>12</sup> Thus, the subsequent statement by Blake [\*12] which describes UpCounsel as a "virtualized law firm in a box" ties back to the notion that UpCounsel is a technology platform that makes it easy to discover and work with a community of attorneys. UpCounsel's motion is thus **GRANTED** as to these statements.

#### *6. Statements by Faustman in an interview with San Gabriel Valley Tribune*

In an article published on March 26, 2015 and updated on August 30, 2017, Faustman was quoted as describing UpCounsel as "equivalent to the largest virtual law firm in the world." (FAC ¶ 24; *id.* Exh. 40 at 2.)

LegalForce RAPC's reliance on this statement does not persuade because the quote by Faustman *immediately* following this one states: "We are a *venture-backed technology company* based out of San Francisco . . . . We have a *marketplace structure*, and we power that with a group of top-tier attorneys." (FAC Exh. 40 at 2 (emphases supplied).) UpCounsel's motion is thus **GRANTED** as to these statements.

#### *7. Conclusion*

In sum, the Court does not accept as true plaintiffs' allegations with respect to the aforementioned statements as they are contradicted by the documents attached to, and incorporated by [\*13] reference in, the FAC. Accordingly,

<sup>8</sup> See <https://www.youtube.com/watch?v=jaS7kuEv1Y4&t=0m35s> ;  
<https://www.youtube.com/watch?v=jaS7kuEv1Y4&t=1m22s> ; see also FAC ¶ 22.

<sup>9</sup> See <https://www.youtube.com/watch?v=jaS7kuEv1Y4&t=0m44s> (emphasis supplied).

<sup>10</sup> See <https://www.youtube.com/watch?v=eKe3y2aEG2I&app=desktop&t=8m19s> ; see also FAC ¶ 23(a).

<sup>11</sup> See <https://www.youtube.com/watch?v=eKe3y2aEG2I&app=desktop&t=2m23s> ; see also FAC ¶ 23(b).

<sup>12</sup> See <https://www.youtube.com/watch?v=eKe3y2aEG2I&app=desktop&t=2m02s> .

UpCounsel's motion to dismiss LegalForce RAPC's Lanham Act claim is **GRANTED WITHOUT LEAVE TO AMEND** to the extent the claim is based on the statement that "UpCounsel is the world's largest law firm."

#### B. "Top 5% of {Practice Area} Lawyers in {City}"

Plaintiffs allege that "UpCounsel has made tens of thousands of false and misleading statements in the format of 'Top 5% of {Practice Area} Lawyers in {City}' in tens of thousands of web pages on its website." (FAC ¶ 27; see generally, e.g., *id.* Exhs. 26-29.) Plaintiffs contend that "[b]y indicating '5%', UpCounsel implies that there exists an independent and publicly trusted ranking system in each and every city and the attorneys that UpCounsel lists on its city pages are chosen from the top 5% of such a list. In reality, no such list exists." (FAC ¶ 30.) Plaintiffs allege that this statement misled customers, as evidenced by a review of UpCounsel on Yelp from a customer who said the reason he selected UpCounsel was because he believed it was "a network for only the most top notch legal reps in the area" and "[t]he attorneys offered with them are at the top of their game and you will get what you pay for." [\*14] (FAC ¶ 32 (emphasis removed); *id.* Exh. 39 at 2.) Separately, a customer wrote on Quora that he was deceived when he saw an advertisement on a search engine because "[o]ffering 'Business Legal Services On-Demand by Top Attorneys,' UpCounsel also promised attorneys who could do the job for much less money." (FAC ¶ 32 (emphasis removed); *id.* Exh. 72 at 2.) The customer wrote: "Well, the bottom line in this review of UpCounsel: I wish I had never used UpCounsel and I'm warning all startups, business and companies out there to never make the same mistake!" (FAC ¶ 32 (emphasis removed); *id.* Exh. 72 at 2.)

UpCounsel argues that the examples and related exhibits plaintiffs provide are Google *search results*, not statements made by UpCounsel. (MTD at 12.) In any event, even if UpCounsel *had* made these statements, UpCounsel argues that they would still be "general assertions" and "mere puffery." (*Id.*)

As a preliminary matter, the Lanham Act claims based on the "Top 5% of Trademark Attorneys" already survived dismissal on the basis of puffery. (See MTD Order at 2; Hearing Tr. 1 at 16:14-17.) That the FAC adds similar statements pertaining to other types of attorneys, namely patent, intellectual property, copyright, [\*15] and startup attorneys, (see FAC ¶ 27), does not affect the Court's ruling as to this category of statements.<sup>13</sup>

As for UpCounsel's Google search result argument, the Court finds it unpersuasive at the motion to dismiss stage. Plaintiffs allege that the search results "republish" statements *originally made by UpCounsel*. (FAC ¶ 27.) The issue of who *actually* made the statements (*i.e.*, the search results) is a factual issue to be resolved at summary judgment.

<sup>13</sup> UpCounsel cites [Hackett v. Feeney, No. 2:09-cv-02075-RLH-LRL, 2011 U.S. Dist. LEXIS 101485, 2011 WL 4007531 \(D. Nev. Sept. 8, 2011\)](#) in support of its argument that, in order to be actionable under the Lanham Act, the statement must answer the "critical question '[Top 5%] as determined by whom[?]' (Reply at 11 (emphasis supplied).) However, that case is distinguishable. First, it involves a #1 claim, namely "Voted #1 Best Show in Vegas!" [2011 U.S. Dist. LEXIS 101485, WL at \\*4](#); see also *In re Century 21-RE/MAX Real Estate Advert. Claims Litig.*, 882 F. Supp. 915, 923 (C.D. Cal. 1994) ("The word[] . . . '#1' convey[s] no specific meaning and thus cannot be considered literally false."). Moreover, the full quote from *Hackett* cited by UpCounsel provides: "the[] words (voted, considered, rated, etc.) *in combination with* '#1 Best Show in Vegas' begs the question: By whom?" [Hackett, 2011 U.S. Dist. LEXIS 101485, 2011 WL 4007531, at \\*5](#) (emphasis supplied). Here, unlike in *Hackett*, none of the 5% statements say UpCounsel was voted/considered/rated as top 5%. Moreover, the "#1 Best Show in Vegas" statement at issue in *Hackett* is classic puffery because it made no reference to the *category* in which the show "The Rat Pack is Back" was number one. Here, on the other hand, the 5% statement specifies a *particular category* as to which the 5% statement applies, namely the specific *practice area*. It cannot be said that no reasonable consumer would rely on such an assertion.

UpCounsel also cites [Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134 \(9th Cir. 1997\)](#) in its reply brief, arguing that "[m]ost of" plaintiffs' "supposedly false claims" are "general assertions and vague claims of 'lower costs and superiority' . . . ." (Defendant UpCounsel Inc.'s Reply in Support of Motion to Dismiss Plaintiffs' First Amended Complaint ("Reply") at 11, Dkt. No. 59.) However, for the reasons discussed herein, the Court disagrees and finds that they are instead "quantifiable" and/or "make[] a claim as to the specific or absolute characteristics" of UpCounsel's services, provided by the attorneys who use its platform. [Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1053 \(9th Cir. 2008\)](#) (internal quotation marks omitted).

Accordingly, UpCounsel's motion to dismiss LegalForce RAPC's Lanham Act claim is **DENIED** to the extent the claim is based on statements in the format of "Top 5% of {Practice Area} Lawyers in {City}."

#### C. "The 10 Best {Practice Area} Lawyers in {State} NEAR ME"

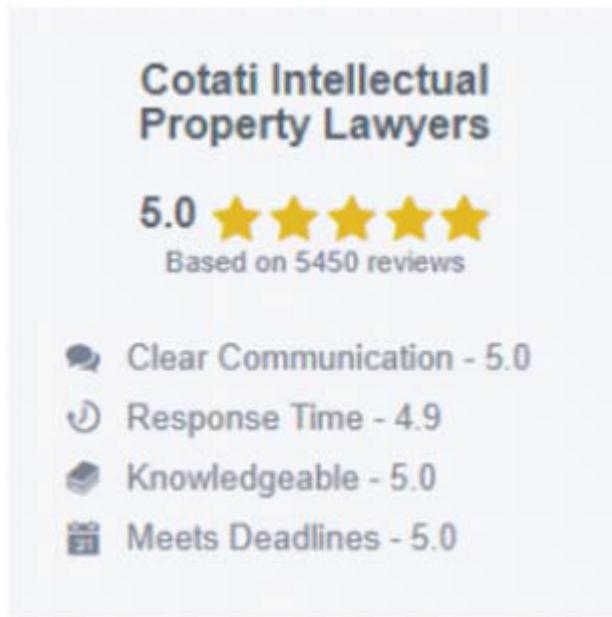
Plaintiffs allege that "UpCounsel has made over 1,000 false and misleading statements in the format of 'The 10 Best {Practice Area} Lawyers in {State} NEAR ME' in over 1,000 web pages on its website." (FAC ¶ 33; see also *id.* Exh. 52.) According to plaintiffs, "[t]hese statements are false because individuals listed in each resulting page [\*16] are not usually near the customer who did the search, and often not even in the same state." (*Id.* ¶ 35.)

While LegalForce does not address this category of statements directly, it appears to fall within the second of its four groups, namely the group encompassing "quotes suggesting that UpCounsel is 'equivalent to the world's largest virtual law firm' or that available lawyers are, for example, the 'best patent lawyers' in a particular city." (MTD at 9-10.) Against this backdrop, the argument that statements in the format of "The 10 Best {Practice Area} Lawyers in {State} NEAR ME" are Google search results fails for the reasons previously stated, as does the contention that the statement must answer the question "as determined by whom[?]" Moreover, statements in the format of "The 10 Best {Practice Area} Lawyers in {State} NEAR ME" are not puffery because UpCounsel is advertising a top-10 list of the best attorneys practicing in a *specific area of law in a geographically limited area*. See *Newcal*, 513 F.3d at 1053 (explaining that "[u]ltimately, the difference between a statement of fact and mere puffery rests in the specificity or generality of the claim"). A reasonable consumer reading these statements could conclude [\*17] that UpCounsel attorneys are objectively and measurably superior to other "{practice area} lawyers in {state}" near the consumer. (FAC ¶ 33.)

Accordingly, UpCounsel's motion to dismiss LegalForce RAPC's Lanham Act claim is **DENIED** to the extent the claim is based on statements in the format of "The 10 Best {Practice Area} Lawyers in {State} NEAR ME."

#### D. "{City} {Practice Area} Lawyers 5.0 \*\*\*\*\* Based on {X number of} reviews"

Plaintiffs allege that in a total of 51,700 landing pages, "there is a Page Summary Block which shows '{City} {Practice Area} Lawyers 5.0 \*\*\*\*\* Based on {X number of} reviews.'" (FAC ¶ 38.) For example:



(See *id.* Exh. 61 at 1.) According to plaintiffs, the statement "Cotati Intellectual Property Lawyers 5.0 \*\*\*\*\* Based on 5450 reviews" is a false statement, namely: "It is impossible for Cotati Intellectual Property Lawyers to have 5,450

reviews on UpCounsel. Cotati is a small town in Northern California with a population of 7,455. There are only 21 attorneys in the city of Cotati licensed to practice law in California, and none of these 21 attorneys are listed on UpCounsel." (*Id.* ¶ 39.) Thus, plaintiffs maintain that "UpCounsel manipulates [Google's search optimization] [\*18] technique to deceive Google crawlers and other search engines so that Google will display UpCounsel's fabricated and false ratings and reviews on the first page search result." (FAC ¶ 42.) As a result, UpCounsel "steers away potential clients from [p]laintiffs and hinders [p]laintiffs' ability to compete." (*Id.*)

UpCounsel argues that use of search-engine optimization techniques "as a means to its advertising ends" does not suffice to state a claim under the *Lanham Act* because UpCounsel's "software code" is not a statement that was seen or relied on by customers. (MTD at 10 (emphasis in original).) UpCounsel also maintains that its advertising statements regarding five-star reviews are non-actionable puffery.

Whether UpCounsel's software code is a statement that was seen and relied on by customers is a factual issue to be resolved at summary judgment. As for UpCounsel's argument that the statements themselves are non-actionable puffery, it does not persuade. The statements indicate a *specific area of law* in a *geographically limited area* and also a *specific number of reviews*. A reasonable consumer reading these statements could conclude that UpCounsel attorneys are objectively and measurably superior [\*19] to other "{city} {practice area} lawyers." (FAC ¶ 38.)

Accordingly, UpCounsel's motion to dismiss LegalForce RAPC's Lanham Act claim is **DENIED** to the extent the claim is based on the Page Summary Block on UpCounsel's landing pages which shows "{City} {Practice Area} Lawyers 5.0 \*\*\*\*\* Based on {X number of} reviews."

#### E. \*\*\*\*\* Rating: 5 - {X number of} reviews"

Plaintiffs allege that "when a customer searches 'intellectual property lawyer in cotati, ca,' UpCounsel makes another false and misleading statement," which appears beneath the separate false and misleading statement "Top 5% Intellectual Property Lawyers in Cotati, CA," namely "\*\*\*\*\* Rating: 5 - {X number of} reviews." (FAC ¶ 43.) For example:

[Top 5% of Intellectual Property Lawyers in Cotati, CA | UpCounsel](https://www.upcounsel.com/Intellectual-Property-California)  
 https://www.upcounsel.com › Intellectual Property › California •  
 ★★★★ Rating: 5 - 5.174 reviews  
 Compare Cotati Intellectual Property Attorneys & Lawyers for hire on UpCounsel and choose the best  
 IP attorney for your intellectual property needs in Cotati, ...

(*Id.* Exh. 33-G at 1.) According to plaintiffs, "[t]he display of the invariable 5-star rating followed by the number of reviews is achieved by manipulating Google search results through deceptive, unethical, and fraudulent search engine optimization techniques. . . . UpCounsel's deceptive aggregations of reviews mislead [consumers] into believing the reviews came from actual customers in those cities and states." (*Id.* ¶ 45.) In addition, "[t]o keep its pages at the top of search results," plaintiffs [\*20] allege that UpCounsel "underhandedly tricks Google by 'refreshing' its reviews through a posting regularly updated, fabricating reviews directly on each webpage on the UpCounsel website." (*Id.* ¶ 49.)

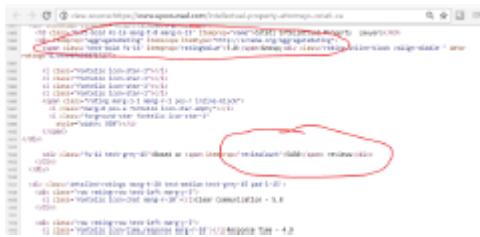
UpCounsel repeats its argument regarding HTML code and search-optimization techniques and generally asserts that statements that attorneys have five-star reviews are non-actionable puffery. (MTD at 12.)

The former argument fails for the reasons discussed in the previous section. As for UpCounsel's argument that the statements are puffery, it does not persuade. The statements are "quantifiable," namely they indicate a five-star rating based on a *specific number of reviews*, and are thus actionable. *Newcal. 513 F.3d at 1052*.

Accordingly, UpCounsel's motion to dismiss LegalForce RAPC's Lanham Act claim is **DENIED** to the extent the claim is based on statements in the format of "\*\*\*\*\* Rating: 5 - {X number of} reviews."

#### **F. Review and Web Page Source Code Deception**

Plaintiffs allege generally that UpCounsel's presentation layer code (*i.e.*, "software code that is executed on a client side device and which is responsible for displaying textual and graphical elements printed on a webpage to users throughout their monitors") reveals that [\*21] UpCounsel "intentionally and purposefully, and in bad faith, attempts to deceive Google search crawlers and the public that uses Google to search for legal services." (FAC ¶ 50.) For example, "UpCounsel's tag for its 5450 fabricated reviews for attorneys in Cotati is based on a fraudulent data field called 'reviewCount' which is printed on each page," and "UpCounsel's page source for each of its tens of thousands of reviews includes the following line of code: <divitemprop='aggregateRating' itemscope itemtype='http://schema.org/AggregateRating '>," the sole purpose of which is to "trick search engines into recognizing UpCounsel's aggregate ratings as trustworthy." (FAC ¶¶ 52, 53; *id.* Exh. 76 at 26.) "Specifically," plaintiffs allege, "this descriptor indicates that UpCounsel is attempting to fraudulently utilize the 'AggregateRating' class or library on the website www.schema.org to trick search engines into recognizing its ratings and reviews as honest and reputable, when in fact they are aggregated fraudulently to generate a fabricated city rating." (*Id.* ¶ 54.) The lines of code are depicted in the FAC as follows:



(*Id.* ¶ 52.) According to plaintiffs, "[w]hen adding this library of [\*22] code, UpCounsel intentionally violates (1) the technical and content guidelines of Google, which require legitimate reviews and (2) provisions of the Google Technical guidelines." (*Id.* ¶ 57.) The core of plaintiffs' allegations regarding review and web page source code deception is thus that "UpCounsel fraudulently and unethically employs techniques published on Schema.org to deceive Google and average consumers into thinking that when they search on Google, they are receiving trustworthy reviews of real attorneys in their city or 'near them' when in fact, the reviews are a manufactured hodgepodge of unrelated UpCounsel attorneys who often have no connection to the particular city or state." (*Id.* ¶ 59.) UpCounsel, in turn, has "greatly benefited from deceptive, unethical, and fraudulent search engine optimization techniques." (*Id.* ¶ 62.) Namely, plaintiffs claim that "UpCounsel's false and misleading advertising has propelled it to secure 10,000† customers" and that "[a] percentage of these clients would have become clients of RAPC." (*Id.* ¶ 64.)

UpCounsel argues that its "software code," or the pages of HTML "page source" that plaintiffs use in their brief, are not *statements* that were [\*23] seen and relied on by customers. (MTD at 10.) As for the corresponding search results, UpCounsel argues that plaintiffs cannot rest a false advertising claim—which requires a false statement made by the defendant—on search results that *plaintiffs* have elicited from a third party using words that *plaintiffs* have chosen. (*Id.* at 11.)

The Court agrees in part. Specifically, the Court finds that *standing on their own*, the software code and HMTL page source are not actionable statements. However, plaintiffs have tied the software code and HTML page source to specific actionable statements. (See Plaintiffs' Opposition to Defendant's Motion to Dismiss First Amended Complaint ("Opp.") at 16, Dkt. No. 55 ("UpCounsel . . . carefully tags the statements in the website coding so that Google includes the false and misleading statements in search results for consumers.").) Thus, the software code and HTML page source represent UpCounsel's purported *intent* when making the statements, namely to mislead

consumers. Accordingly, allegations pertaining to the same, while not sufficient to give rise to a separate Lanham Act claim, shall not be dismissed.<sup>14</sup>

Accordingly, UpCounsel's motion to dismiss LegalForce RAPC's [\*24] Lanham Act claim is **DENIED** to the extent the claim is based on UpCounsel's alleged review and web page source code deception.

#### G. Distant, Unlicensed Attorneys

Plaintiffs allege that "UpCounsel deceives customers by steering them to attorneys and non-attorneys who are not located anywhere close to their city, or authorized to practice in their respective state" or in any state. (FAC ¶ 65; see also *id.* ¶ 66.) For instance, plaintiffs "take issue . . . with UpCounsel listing . . . patent agents as lawyers." (Opp. at 26.)

UpCounsel concedes that the three examples that plaintiffs cite in the FAC (see FAC ¶¶ 66-68) are, as indicated in the corresponding exhibits, patent prosecutors. However, UpCounsel argues that it does not steer anyone to unlicensed attorneys and that plaintiffs identify nothing on UpCounsel's website that represents that these individuals are attorneys. In addition, UpCounsel reiterates its argument that Google search results are not statements. (See Reply at 13) ("That leaves Plaintiffs with just one allegation: that *Google* is somehow displaying these individuals under misleading headings.") (emphasis in original).) Without some false statement by UpCounsel, UpCounsel insists that [\*25] LegalForce RAPC has no Lanham Act claim.

Accepting as true plaintiffs' allegation that the search results "republish" statements *originally made by UpCounsel*, as the Court must in analyzing UpCounsel's motion to dismiss, UpCounsel cannot reasonably argue at this stage that it has not made false statements by way of the search results. Indeed, UpCounsel does not refute that the patent prosecutors are linked to search results advertising attorney services, and in different states. (See, e.g., FAC Exh. 57 at 1 ("Mark Levenda Attorney Profile on Upcounsel") (emphasis supplied); *id.* Exh. 37 at 1 (search result heading is "Bend Attorneys & Lawyers for Hire On-Demand" but description states "Mark Levenda is a patent attorney with over 12 years of experience. He is licensed to practice law in Arizona and is also a member of the Arizona patent bar") (emphasis supplied); see also, e.g., FAC Exhs. 32 at 3 & 56 at 1, 2 (patent agent appears as "Top 5%" immigration lawyer in Blackfoot Idaho and as an "Oregon Attorney[] & Lawyer[] for Hire On-Demand" through UpCounsel).)

Accordingly, UpCounsel's motion to dismiss LegalForce RAPC's Lanham Act claim is **DENIED** to the extent the claim is based on UpCounsel's [\*26] alleged "dece[p]tion" [of] customers by steering them to attorneys and non-attorneys who are not located anywhere close to their city, or authorized to practice in their respective state." (FAC ¶ 65.)

#### H. False and Misleading Fee Structure

Plaintiffs allege that "UpCounsel deceptively hides exactly how much in fees consultant users or employer users pay as part of its success fee, ranging from 15% to 24%." (FAC ¶ 76.) Specifically, "th[e] 15% mark up in its terms is materially inconsistent with its invoices, in which the mark up spikes to 24%." (*Id.* ¶ 78.) In addition to these alleged misrepresentations regarding the mark up, plaintiffs allege: "UpCounsel attempts to 'mask' this 'processing fee' from its Employer Users by including it as part of the hourly fee paid to each lawyer. Specifically, the initial hourly rate shown to each potential client after a proposal is provided by an attorney is silent as to whether it includes the processing fee." (*Id.* ¶ 79.)

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<sup>14</sup> As for UpCounsel's argument regarding the corresponding search results, the fact that plaintiffs formulated the searches which triggered the results is of no moment. UpCounsel does not dispute that the search results and information contained therein are accessible to the broader public. As previously stated, the issue of who actually made the statements (i.e., the search results), whether it be UpCounsel or a third party, is a factual issue to be resolved at summary judgment. (See *supra* p. 10.)

UpCounsel argues that plaintiffs are "either confused or intentionally obfuscating the truth." (MTD at 13.) Namely, "[t]here is no 'range' from 15% to 24%; those are different fees charged for entirely different services." (*Id.*) Regarding the [\*27] former, UpCounsel explains that Section 7.1 of its Terms of Service, (see FAC Exh. 11), has nothing to do with work performed by attorneys through UpCounsel's platform. Rather, it sets out the referral fee an employer is to pay UpCounsel if it decides to employ—on a full-time basis in the future—an attorney it met through the platform. (MTD at 13; See FAC Exh. 11 at ECF pp. 57-58.) The amount of that referral fee is "determined by the start date of that employment, and how close in time it is to when those parties first met through UpCounsel." (Reply at 12.) Regarding the latter, UpCounsel contends that it makes clear that its "processing fee"—not a referral fee—"amounts to 24% of your total invoice." (MTD at 13 (citing FAC ¶ 78 n.8).) "In other words, if an attorney performs an hour's work for an UpCounsel client and charges \$250, the client pays that attorney \$250 and, in addition, pays UpCounsel 24% (or \$60) in processing fees." (MTD at 13.) In any event, UpCounsel maintains that its fee structure does not constitute a statement, in interstate commerce or advertising, that is literally false.

The Court finds that the disagreement between the parties boils down to a factual dispute appropriate for resolution at summary [\*28] judgment, not on a motion to dismiss. Accordingly, UpCounsel's motion to dismiss LegalForce RAPC's Lanham Act claim is **DENIED** to the extent it is based on UpCounsel's allegedly false and misleading fee structure.

## I. Conclusion

LegalForce RAPC's Lanham Act claim is subject to dismissal only to the extent the claim is based on the statement that "UpCounsel is the world's largest law firm." Otherwise, the claim survives UpCounsel's motion to dismiss.

## IV. SECOND CLAIM FOR RELIEF: CALIFORNIA FALSE & MISLEADING ADVERTISING ([CAL. BUS.&PROF. CODE § 17500 ET SEQ.](#))

California's FAL prohibits the dissemination of any advertising "which is untrue or misleading." [Cal. Bus. & Prof. Code § 17500](#); see also [In re Sony Gaming Networks & Customer Data Sec. Breach Litig.](#), 996 F. Supp. 2d 942, 985-86 (S.D. Cal. 2014).

UpCounsel argues that LegalForce RAPC's FAL claim fails for the same reasons as its Lanham Act and UCL claims. First, UpCounsel contends that plaintiffs have not alleged a false or misleading statement sufficient to state a false advertising claim. Second, UpCounsel argues that LegalForce RAPC does not have standing under the FAL because it has not suffered an injury in fact or lost money or property as a result of a violation.<sup>15</sup>

As a preliminary matter, because the Court previously ruled in plaintiffs' favor on the issue of standing under [\*29] both the FAL and UCL, UpCounsel's motion based on lack of standing is **DENIED**. (See MTD Order at 2.)<sup>16</sup> Otherwise, because LegalForce RAPC's FAL claim is based in its entirety on conduct which forms the basis of its Lanham Act claim, this claim rises and falls with LegalForce RAPC's Lanham Act claim. See [Walker & Zanger, Inc. v. Paragon Indus., Inc.](#), 549 F. Supp. 2d 1168, 1182 (N.D. Cal. 2007) ("[C]laims of . . . false advertising under state statutory and common law are 'substantially congruent' to claims made under the Lanham Act.") (quoting [Cleary v. News Corp.](#), 30 F.3d 1255, 1263 (9th Cir. 1994)). Accordingly, UpCounsel's motion as to the FAL claim is **GRANTED IN PART AND DENIED IN PART** in accordance with the Court's aforementioned rulings regarding LegalForce RAPC's Lanham Act claim.

<sup>15</sup> UpCounsel's motion actually makes these arguments as to "plaintiffs," i.e., both LegalForce RAPC and Trademarkia. However, only LegalForce RAPC asserts a claim under the FAL. (See FAC at p. 42 (indicating that the FAL claim is asserted "[a]gainst UpCounsel by RAPC").) UpCounsel's standing argument in the context of the FAL claim therefore pertains to LegalForce RAPC only, and the Court thus proceeds with its discussion accordingly.

<sup>16</sup> See also discussion at *infra* pp. 19-20.

## V. THIRD CLAIM FOR RELIEF: CALIFORNIA UNFAIR COMPETITION ([CAL. BUS.&PROF. CODE § 17200 ET SEQ.](#))

The UCL proscribes business practices that are "unlawful, unfair[,] or fraudulent." [Cal. Bus. & Prof. Code § 17200](#); see also [In re Sony, 996 F. Supp. 2d at 985](#). Because the statute is written in the disjunctive, it applies separately to business practices that are (1) unlawful, (2) unfair, or (3) fraudulent. See [Pastoria v. Nationwide Ins., 112 Cal. App. 4th 1490, 1496, 6 Cal. Rptr. 3d 148 \(2003\)](#).

Plaintiffs assert claims under the unlawful and unfair prongs only. The Court discusses each prong in turn after addressing the threshold issue of Trademarkia's standing.

### A. Trademarkia's Standing

At the hearing on the instant motion, UpCounsel [\*30] addressed the issue of Trademarkia's standing to pursue its UCL claim against UpCounsel, arguing for the first time that plaintiffs' allegations in the FAC regarding "lost sales and increased costs," namely those contained in FAC ¶¶ 114-116, pertain to LegalForce RAPC only, and not Trademarkia. (See Hearing Tr. 2 at 11:2-25.) While UpCounsel is correct regarding these specific allegations, its argument that Trademarkia lacks standing to pursue its UCL claim against UpCounsel does not persuade. Because UpCounsel did not distinguish at the hearing between Article III standing and statutory standing, the Court addresses both.<sup>17</sup>

A plaintiff asserting a UCL claim must satisfy both the Article III and [UCL](#) standing requirements. [Birdsong v. Apple, Inc., 590 F.3d 955, 960 n.4 \(9th Cir. 2009\)](#). To have standing to assert a UCL claim, the plaintiff must show that "she hast lost 'money or property' sufficient to constitute an 'injury in fact' under Article III of the Constitution." [Rubio v. Capital One Bank, 613 F.3d 1195, 1203-04 \(9th Cir. 2010\)](#). Thus, the plaintiff asserting a UCL claim must have Article III standing in the form of economic injury. [Cardenas v. NBTY, Inc., 870 F. Supp. 2d 984, 991 \(E.D. Cal. 2012\)](#); see also [Birdsong, 590 F. 3d at 960 n.4](#) ("[T]he UCL incorporates Article III's injury in fact requirement . . . .") (citation omitted).

The UCL's loss of "money or property" requirement is broadly expansive as to what sort of economic [\*31] injury suffices. See [Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 323, 120 Cal. Rptr. 3d 741, 246 P.3d 877 \(2011\)](#). The California Supreme Court instructs that "[t]here are innumerable ways in which economic injury from unfair competition may be shown." *Id.*; see also [Law Offices of Mathew Higbee v. Expungement Assistance Servs., 214 Cal. App. 4th 544, 561, 153 Cal. Rptr. 3d 865 \(2013\)](#) ("[T]he notion of 'lost money' under the UCL is not limited."). Loss of business to a competitor as a result of unfair competition is a paradigmatic, and indeed the original, variety of loss contemplated by the UCL. See [Law Offices of Mathew Higbee, 214 Cal. App. 4th at 560-61](#) (explaining that while the UCL has developed into an important consumer-protection statute, its "original purpose . . . was to protect against wrongful conduct in commercial enterprises which resulted in business loss to another, ordinarily by the use of unfair means in drawing away customers from a competitor") (internal quotation marks omitted). A decrease in business value has also been deemed sufficient to show "an identifiable trifle of injury as necessary for standing under the UCL." [Id. at 561](#).

Here, plaintiffs make the following allegations of economic injury, *inter alia*, with respect to *both* Trademarkia and LegalForce RAPC:

- "UpCounsel . . . deceive[s] Google crawlers and other search engines so that Google will display UpCounsel's fabricated and false ratings and reviews on the first page search [\*32] result. As such, UpCounsel steers away potential clients from [p]laintiffs and hinders [p]laintiffs' ability to compete." (FAC ¶ 42.)

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<sup>17</sup> Moreover, because UpCounsel's standing point at oral argument was limited to Trademarkia's purported injuries, and because the Court previously ruled on the issue of plaintiffs' standing under the UCL, (see Dkt. No. 42 at 2), the Court limits its discussion herein accordingly. Thus, the Court does not address the causation or redressability requirements of Article III standing.

- "Plaintiffs' value of their business has been directly reduced and negotiations with potential acquirers have stalled." (*Id.* ¶ 115.)
- "UpCounsel prevented competition from [p]laintiffs by unfairly gaining potential clients through illegal solicitation and sharing legal fees with lawyers. But-for [*sic*] UpCounsel's unlawful and unfair competition, a good percentage of these potential clients would have otherwise gone to [p]laintiffs." (*Id.* ¶ 140.)
- "If UpCounsel did not engage in the alleged unlawful solicitation and unethical fee sharing, [it] would not have made false and misleading advertisements on Google and would not have unfairly competed with [p]laintiffs. Therefore, UpCounsel's conduct of unfair competition took away potential sales belonging to [p]laintiffs and proximately caused injury to [p]laintiffs." (*Id.* ¶ 141.)

The Court concludes that allegations of "plaintiffs'" *i.e.* LegalForce RAPC's and Trademarkia's, lost business and decrease in business value, in the overall context of the FAC and its allegations of wrongfully denied business opportunities, [\*33] suffice to plead standing under the UCL's expansive standing doctrine. Because these allegations also suffice for pleading injury in fact under Article III,<sup>18</sup> UpCounsel's argument regarding Trademarkia's lack of standing is without merit.

## B. Unlawful Prong

"The unlawful prong of the UCL prohibits anything that can properly be called a business practice and that at the same time is forbidden by law." [\*In re Adobe Sys., Inc. v. Privacy Litig.\*, 66 F. Supp. 3d 1197, 1225 \(N.D. Cal. 2014\)](#) (internal quotation marks omitted). "Generally, violation of almost any law may serve as a basis for a UCL claim." [\*Jordan v. Paul Fin., LLC\*, 745 F. Supp. 2d 1084, 1098 \(N.D. Cal. 2010\)](#) (internal quotation marks omitted). However, a UCL claim "must identify the particular section of the statute that was violated and must describe with reasonable particularity the facts supporting the violation." [\*In re Anthem, Inc. Data Breach Litig.\*, 162 F. Supp. 3d 953, 989 \(N.D. Cal. 2016\)](#) (internal quotation marks omitted). Plaintiffs asserts five predicates for their "unlawful" UCL claim: California Business and Professions Code sections (1) [6152\(a\)](#) and (2) [6155](#); (3) [37 C.F.R. section 11.504](#); and California Rules of Professional Conduct ("RPC") (4) 1-320 and (5) 1-400. (See FAC ¶ 138(a)-(d).)

UpCounsel contends that plaintiffs "may not 'plead around an absolute bar to relief by recasting the cause of action as one for unfair competition.'" (MTD at 5 (quoting [\*Cel-Tech Commc'n Inc v. L.A. Cellular Tel. Co.\*, 20 Cal. 4th 163, 182, 83 Cal. Rptr. 2d 548, 973 P.2d 527 \(1999\)](#)).) Specifically, UpCounsel [\*34] argues that plaintiffs' "unlawful" UCL claim fails because "its purported statutory hooks expressly forbid private rights of action . . ." (MTD at 5.) Plaintiffs, in opposition, respond that "[a] claim under the UCL cannot be brought [only] where the legislature has created an immunity or provided a 'safe harbor' for that action." (Opp. at 8 (quoting [\*Cel-Tech\*, 20 Cal. 4th at 182](#).) At oral argument, UpCounsel agreed with plaintiffs that, in some instances, a statute that does not provide a private cause of action can serve as a predicate for a UCL claim. (Hearing Tr. 2 at 10:1-2 ("I completely agree that if a statute is entirely silent[,] that can serve a statutory hook.").) However, UpCounsel maintained that where a private right of action to enforce a statute has been expressly foreclosed, that statute may not serve as a predicate for a UCL claim. Specifically, UpCounsel argued that [section 6156](#) forecloses a private cause of action under [section 6155](#) because the former specifically provides for enforcement actions by public entities or the state of California, but not actions by individuals or competitors. (See *id.* at 9:22-25.)

It is true that plaintiffs may not "plead around an absolute bar to relief" by recasting the cause of action as a claim [\*35] under the UCL. [\*Cel-Tech\*, 20 Cal. 4th at 182-83](#) (internal quotation marks omitted). At the same time, California courts have repeatedly stated that a plaintiff may bring a UCL claim even when the conduct alleged to constitute unfair competition violates a statute that does not provide a private right of action. See, e.g., [\*Troyk v. Farmers Grp., Inc.\*, 171 Cal. App. 4th 1305, 1335, 90 Cal. Rptr. 3d 589 \(2009\)](#); [\*McKell v. Wash. Mut., Inc.\*, 142 Cal.](#)

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<sup>18</sup> See [\*Kwikset\*, 51 Cal. 4th at 325](#) ("If a party has alleged or proven a personal, individualized loss of money or property in any nontrivial amount, he or she has also alleged or proven injury in fact.").

App. 4th 1457, 1475, 49 Cal. Rptr. 3d 227 (2006); Kasky v. Nike, Inc., 27 Cal. 4th 939, 950, 119 Cal. Rptr. 2d 296, 45 P.3d 243 (2002); Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal. 4th 553, 561-66, 71 Cal. Rptr. 2d 731, 950 P.2d 1086 (1998), superseded by statute on other grounds as stated in Arias v. Superior Court, 46 Cal. 4th 969, 95 Cal. Rptr. 3d 588, 209 P.3d 923 (2009). Courts have reconciled these two principles by holding that "[t]o forestall an action under the unfair competition law, another provision must actually 'bar' the action . . ." Cel-Tech, 20 Cal. 4th at 183. Thus, if a statute explicitly precludes private enforcement, or if a statute expressly provides immunity for the conduct alleged, a plaintiff may not plead around this bar by bringing a claim under the UCL. Compare Hartless v. Clorox, No. 06CV2705 JAH(CAB), 2007 U.S. Dist. LEXIS 81686, 2007 WL 3245260, at \*4 (S.D. Cal. Nov. 2, 2007) (holding that a UCL claim cannot be predicated on Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") due to Congress' express rejection of private actions to enforce FIFRA), with Fowler v. Wells Fargo Bank, N.A., No. 17-cv-02092-HSG, 2017 U.S. Dist. LEXIS 146732, 2017 WL 3977385, at \*3 (N.D. Cal. Sept. 11, 2017) (permitting 24 C.F.R. section 203.558 to serve as predicate for UCL claim because it "does not explicitly bar private enforcement"), and Stop Youth Addiction, 17 Cal. 4th at 566 (permitting provision of California Penal Code to serve as basis [\*36] for UCL claim because there was no "absolute[] bar[]" to relief).

With these principles in mind, the Court turns to the five predicates plaintiffs assert for their "unlawful" UCL claim, namely California Business and Professions Code sections (1) 6152 and (2) 6155, California Rules of Professional Conduct (3) 1-320 and (4) 1-400, and (5) 37 C.F.R. section 11.504.

#### 1. Cal. Bus. & Prof. Code §§ 6152 & 6155

The Court is not persuaded by UpCounsel's argument that section 6156 forecloses a private right of action under section 6155. In Stop Youth Addiction, the California Supreme Court considered a similar question, namely "whether the absence of a private right of action to enforce the predicate statute compromises a plaintiff's eligibility to maintain a UCL cause of action." 17 Cal. 4th at 563. With respect to Penal Code section 308, one of the two predicates asserted for the UCL claim in that case, the court noted: "Undeniably, section 308 provides for its own *direct enforcement only by public lawyers*. It does not follow, however, that a private UCL action that borrows violations . . . of section 308 to establish predicate 'unlawful' (§17200) business activity is barred." Id. at 566 (internal quotation marks and citation omitted) (second emphasis supplied). The court emphasized that the UCL states, "[u]nless otherwise expressly [\*37] provided, the remedies or penalties provided by this chapter [i.e., ch. 5, Enforcement, Bus. & Prof. Code, §§ 17200-17209] are cumulative to each other and to the remedies or penalties available under all other laws of this state." Stop Youth Addiction, 17 Cal. 4th 533 at 573 (internal quotation marks omitted) (alterations and emphasis in original). The court continued, "[t]he term 'expressly' means 'in an express manner; in direct or unmistakable terms; explicitly; definitely; directly.'" Id. (quoting City & Cty. of S.F. v. W. Air Lines, Inc., 204 Cal. App. 2d 105, 120, 22 Cal. Rptr. 216 (1962)). The court refused to hold that Penal Code section 308 impliedly precluded a private cause of action under the UCL, explaining that to do so, the court "would have to read the word 'implicitly' into [Business and Professions Code] section 17205 or read the word 'expressly' out of it." Id.

Turning to the case at bar, California Business and Professions Code section 6155 provides, in relevant part, that "[a]n individual, partnership, corporation, association, or any other entity shall not operate for the direct or indirect purpose, in whole or in part, of referring potential clients to attorneys," unless the service is registered with the State Bar of California. Section 6156 provides:

Any individual, partnership, association, corporation, or other entity, including, but not limited to, any person or entity having an ownership interest in a lawyer referral service, that engages, has engaged, or proposed to engage in violations of Section 6155, shall be liable for a civil penalty . . . , which shall be assessed and recovered in a civil action brought: (1) In the manner specified in subdivision (a) of Section 17206 . . . (2) By the State Bar of California.

Section 17206 in turn provides:

Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the [\*38] State of California by the Attorney General, by any district attorney, by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, by any city attorney of a city having a population in excess of 750,000, by any city attorney of any city and county, or with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor, in any court of competent jurisdiction.

Thus, [section 6156](#) provides for enforcement actions to recover civil penalties under [section 6155](#) only by public entities or the State Bar of California. As with the court in [Stop Youth Addiction](#), this Court concludes that "[i]t does not follow, however, that a private UCL action that borrows violations . . . of [section 6155](#) to establish predicate 'unlawful' . . . business activity is barred." [Stop Youth Addiction, 17 Cal. 4th at 566](#) (internal quotation marks and citation omitted). Nothing in [section 6156](#) creates a bar to plaintiffs' UCL claim based on [section 6155](#) analogous to an "absolute[] bar[]." [Stop Youth Addiction, 17 Cal 4th at 566](#). The Court agrees with the [Stop Youth Addiction](#) court that a statute does not necessarily bar a private right of action where the statutory scheme provides for penal (or, in this case, civil) penalties. Accordingly, UpCounsel's [\*39] motion to dismiss plaintiffs' UCL claim based on a violation of [section 6155](#) is DENIED.<sup>19</sup>

UpCounsel further attacks plaintiffs' attempt to premise their UCL claim on [section 6155](#), arguing that doing so is unprecedeted and contradicted by the FAC. According to UpCounsel, it neither operates to refer potential clients to attorneys nor takes any referral fee for doing so, but rather "allow[s] individuals to post descriptions of their legal needs; get free custom quotes from attorneys through the platform; choose whether to engage an attorney, and if so whom; pay the attorney his or her full rate, and pay a small processing fee to UpCounsel." (MTD at 7 (internal quotation marks omitted); see also Reply at 4 (UpCounsel is "more like a public bulletin board that individuals and companies can consult and consider before choosing a lawyer they like").) Plaintiffs respond that regardless of whether an identical case exists, UpCounsel is clearly operating "for the direct or indirect purpose, in whole or in part, of referring potential clients to attorneys." (Opp. at 12 (quoting [Cal. Bus. & Prof. Code § 6155\(a\)](#))).

As a preliminary matter, the fact that no similar case exists is irrelevant to the actual merits of plaintiffs' claim. Moreover, UpCounsel's argument [\*40] ignores the broad reach of the UCL's unlawful prong. See [CRST Van Expedited, Inc. v. Werner Enters., Inc., 479 F.3d 1099, 1106 \(9th Cir. 2007\)](#) ("The California Supreme Court has given the term 'unlawful' a straightforward and broad interpretation: The UCL covers a wide range of conduct. It embraces anything that can properly be called a business practice and that at the same time is forbidden by law[.]"); [Andreoli v. Youngevity Int'l, Inc., No. 16-cv-02922-BTM-JLB, 2018 U.S. Dist. LEXIS 49791, 2018 WL 1470264, at \\*11 \(S.D. Cal. Mar. 23, 2018\)](#) ("As to an unlawful business practice, the UCL's coverage is broad and sweeping . . . .") Next, UpCounsel's contention that the FAC contradicts plaintiffs' claim that UpCounsel violated [section 6155](#) is disingenuous. Indeed, UpCounsel quotes FAC ¶ 90 in support thereof, but that paragraph of the FAC describes UpCounsel's own attempts at disclaiming being a referral service on its website. As for UpCounsel's argument that it is not operating as a referral service, it ignores that plaintiffs' *allegations* suffice in this regard, namely:

Although UpCounsel.com has a disclaimer in fine print stating that it is not a "lawyer referral service", referring attorneys to potential clients is in essence all that UpCounsel does. According to the "How It Works" page of UpCounsel, customers looking for attorneys first post a job on UpCounsel.com, [\*41] then the website's proprietary algorithm "matches" customers with certain attorneys, and finally customers hire the attorneys

<sup>19</sup> Citing [section 6156](#), UpCounsel similarly moves to dismiss plaintiffs' UCL claim based on a violation of [section 6152](#) "because that code section specifically provides for enforcement actions by public entities . . . or the State Bar of California[.]" (MTD at 5-6 (emphasis removed).) However, [section 6156](#) references violations of [section 6155](#) only, and not violations of [section 6152](#). See [Cal. Bus. & Prof. Code § 6156\(a\)](#) ("Any individual, partnership, association, corporation, or other entity . . . that engages, has engaged, or proposes to engage in violations of [Section 6155](#), shall be liable for a civil penalty . . . .") (emphasis supplied). Thus, UpCounsel's motion to dismiss plaintiffs' UCL claim based on a violation of [section 6152](#) is DENIED.

instantly through UpCounsel. (See **Exhibit 70.**) . . . UpCounsel is thus a *de facto* "lawyer referral service" . . . (FAC ¶¶ 90, 91 (emphasis in original).)

## 2. Rules of Professional Conduct ("RPC") 1-320 & 1-400

The result with respect to the RPC differs. The RPC expressly provide: "These rules are not intended to create new civil causes of action." Cal. R. Prof. Conduct 1-100(A).

The Court acknowledges, as plaintiffs note, that the court in [\*People ex rel. Herrera v. Stender, 212 Cal. App. 4th 614, 152 Cal. Rptr. 3d 16 \(2012\)\*](#) rejected the argument that violations of the RPC do not support a cause of action under the UCL. See *id. at 632*; Opp. at 9. However, *Herrera* did not involve a private action and was instead brought by the California Attorney General. Plaintiffs also cite [\*Estakhrian v. Obenstine, 320 F.R.D. 63 \(C.D. Cal. 2017\)\*](#), but the court there neither analyzed nor decided whether RPC 1-320 could be the basis of an unlawful prong claim. Rather, that class certification decision stands only for the proposition that whether a person who shared legal fees with a non-lawyer was an issue common to the class. See *id. at 78*. Similarly, in [\*Hoy v. Clinnin, No. 17-cv-788-BTM-KSC, 2017 U.S. Dist. LEXIS 96872, 2017 WL 2686216 \(S.D. Cal. June 22, 2017\)\*](#), the issue before the court was whether to remand a malpractice claim arising under the [\*42] RPC to state court under the local controversy exception to the Class Action Fairness Act. See [\*2017 U.S. Dist. LEXIS 96872, \[WL\] at \\*1\*](#). The court granted the motion to remand, and its analysis of the UCL claim at issue was limited to repeating *Herrera*'s holding and a citation to *Estakhrian*.<sup>20</sup>

In sum, given the RPC's express bar on private enforcement, plaintiffs are precluded from enforcing RPC 1-320 and 1-400 privately by using them as predicates for their UCL claims. UpCounsel's motion to dismiss plaintiffs' UCL claim based on a violation of these rules is thus **GRANTED**.<sup>21</sup>

## 3. [37 C.F.R. § 11.504](#)

Finally, with respect to [37 C.F.R. section 11.504](#), UpCounsel argues only that "[a]ny UCL claim under [the United States Patent and Trademark Office Rules of Professional Conduct] is impliedly preempted by federal law," citing just one case in support thereof. (MTD at 6.) However, six days before oral argument on the instant motion was held, the California Supreme Court ordered that the cited case be depublished. See [\*Post Foods, LLC v. Superior Court, 25 Cal. App 5th 278, 235 Cal. Rptr. 3d 641 \(2018\)\*](#), as modified on denial of reh'g (Aug. 14, 2018), review denied and ordered not to be officially published (Oct. 31, 2018). Thus, it cannot be cited or relied on by UpCounsel. See [\*Cal. Rules of Court 8.1115\(a\)\*](#). Absent binding, or at the least citable, authority on the [\*43] issue, the Court is not inclined at this juncture to dismiss plaintiffs' UCL claim based on a violation of [37 C.F.R. section 11.504](#). UpCounsel's motion to dismiss the same on the sole basis of preemption is thus **DENIED**.

## C. Unfair Prong

"The 'unfair' prong of the UCL creates a cause of action for a business practice that is unfair even if not proscribed by some other law." [\*In re Adobe, 66 F. Supp. 3d at 1125\*](#). "The UCL does not define the term 'unfair.' . . . [And] the

<sup>20</sup> As for [\*Balukjan v. Virgin Am., Inc., No. 18-cv-00185-SI, 2018 U.S. Dist. LEXIS 40387, 2018 WL 1242179 \(N.D. Cal. Mar. 9, 2018\)\*](#), the court there stated in dicta that "[v]irtually any state, federal or local law can serve as the predicate for an action under [section 17200](#), . . . including . . . rules of professional conduct." [\*2018 U.S. Dist. LEXIS 40387, \[WL\] at \\*7\*](#). However, the court engaged in no analysis on that point. Instead, it relied on *Herrera*, which, as the Court previously indicated, did not involve a private action.

<sup>21</sup> In light of the Court's ruling, the Court does not address the parties' remaining arguments regarding the RPC.

proper definition of 'unfair' conduct 'is currently in flux' among California courts." *Id.* (internal quotation marks omitted) (alterations in original).

Although the precise test for the UCL's "unfair" prong has not been definitively established, plaintiffs endorse the Federal Trade Commission ("FTC") Act section 5 test employed in Camacho v. Automobile Club of Southern California, 142 Cal. App. 4th 1394, 48 Cal. Rptr. 3d 770 (2006). Under that test, three factors define unfairness: "(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided." Camacho, 142 Cal. App. 4th at 1403; see also FAC ¶ 139(b)-(d). UpCounsel contends that where, as here, the plaintiff is a competitor, "the word 'unfair' . . . means conduct that threatens an incipient violation of [\*44] an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (MTD at 8 (quoting Cel-Tech, 20 Cal. 4th at 187.) And, UpCounsel argues, plaintiffs cannot state an antitrust claim unless they "plead and prove a reduction of competition in the market in general and *not mere injury to their own positions* as competitors." (MTD at 8 (internal quotation marks omitted) (emphasis in original).) In that context, UpCounsel contends that plaintiffs have not, and cannot, allege harm to general market competition.

The parties do not dispute that this action is brought by a competitor, and not a consumer, nor can they. This point is significant because, in adopting its test for determining what is unfair under the UCL, the California Supreme Court in *Cel-Tech* stated:

This case involves an action by a competitor alleging anticompetitive practices. Our discussion and this test are *limited to that context*. Nothing we say relates to actions by consumers or by competitors alleging other kinds of violations of the unfair competition law such as "fraudulent" or "unlawful" business practices or "unfair, [\*45] deceptive, untrue or misleading advertising."

Cel-Tech, 20 Cal. 4th at 187 n.12 (emphasis supplied); cf. FAC ¶ 139(a)-(d) (alleging anticompetitive practices). In devising this "more precise" test, the court in *Cel-Tech* "turn[ed] for guidance to the jurisprudence arising under the 'parallel' . . . section 5 of the Federal Trade Commission Act (15 U.S.C. § 45(a)) (section 5)." *Id. at 185*. In Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc., 178 F. Supp. 2d 1099 (C.D. Cal. 2001), on which plaintiffs rely, the court determined that the *Cel-Tech* test applied, see id. at 1118 n.13, and similarly determined, citing Section 5, that certain "federal antitrust decisions provide sound and appropriate standards for evaluating [plaintiff's] § 17200 'unfair' business act claim." Id. at 1119. However, it did not indicate, as plaintiffs appear to argue, that Section 5 provides an alternative applicable test that *displaces* the *Cel-Tech* test. Plaintiffs also cite the recent decision by Judge Freeman in In re Nexus 6P Products Liability Litigation, 293 F. Supp. 3d 888 (N.D. Cal. 2018) because it "noted . . . one test for determining what is unfair under California's UCL is the FTC Act section 5 test . . ." (Opp. at 13.) However, *In re Nexus 6P* involved a *consumer class action*, and the court there addressed "the proper definition [of the term 'unfair'] in the *consumer context*." Id. at 930 (emphases supplied).

Notwithstanding the foregoing, the Court is not persuaded by UpCounsel's argument that plaintiffs *must* "state [\*46] an antitrust claim." (MTD at 8.) Namely, the *Cel-Tech* test provides that an "unfair" claim under the UCL may be proven only on the basis of "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." Cel-Tech, 20 Cal. 4th at 187 (emphasis supplied). Against this backdrop, plaintiffs have sufficiently alleged facts to establish that UpCounsel's actions "otherwise significantly threaten[] or harm[] competition." *Id.* For example, they allege:

[Attorney ethics rules] have not been revised in the age of the Internet. UpCounsel has brazenly ignored law, ethics, and common sense in defiance of healthy competition. . . . As a result of UpCounsel's malfeasance, [p]laintiffs, law firms, and legal technology companies across the United States are unable to fairly compete with UpCounsel.

(FAC ¶ 5.) Moreover, plaintiffs allege: "Plaintiffs are not able to compete fairly despite having an early start because they cannot fee share with non-attorneys. For this reason, based on UpCounsel's own admissions, UpCounsel has unfairly threatened [p]laintiffs' [\*47] business directly by unfairly competing." (*Id.* ¶ 111.) Plaintiffs also allege:

It is unfair to the competition in the practice of law if UpCounsel is able to offer legal services by violating state laws, federal regulations[,] and California ethics rules without being punished, while the vast majority of attorneys and legal technology companies, including [p]laintiffs, abide by the laws, federal regulations[,] and California ethics rules.

(FAC ¶ 139(a).)

Accordingly, UpCounsel's motion to dismiss plaintiffs' claim under the UCL's unlawful prong is **DENIED**.

## VI. CONCLUSION

For the foregoing reasons, UpCounsel's motion to dismiss is **GRANTED IN PART AND DENIED IN PART** as follows:

- The motion to dismiss LegalForce RAPC's Lanham Act claim is **GRANTED WITHOUT LEAVE TO AMEND** to the extent the claim is based on the statement that "UpCounsel is the world's largest law firm." To the extent the Lanham Act claim is based on any other statement asserted in the FAC, the motion is **DENIED**.
- The motion to dismiss LegalForce RAPC's FAL claim based on lack of standing is **DENIED**. The motion is otherwise **GRANTED IN PART AND DENIED IN PART** in accordance with the Court's rulings herein regarding LegalForce RAPC's [\*48] Lanham Act claim.
- The motion to dismiss plaintiffs' UCL claim is **GRANTED** to the extent the claim is based on a violation of Rules of Professional Conduct 1-320 and 1-400. To the extent it is based on other predicates, it is **DENIED**.
- The motion to dismiss plaintiffs' claim under the UCL's unlawful prong is **DENIED**. This Order terminates Docket Number 49.

**IT IS SO ORDERED.**

Dated: January 10, 2019

/s/ Yvonne Gonzalez Rogers

**YVONNE GONZALEZ ROGERS**

**UNITED STATES DISTRICT COURT JUDGE**

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## In re Am. Express Anti-Steering Rules Antitrust Litig.

United States District Court for the Eastern District of New York

January 14, 2019, Decided; January 14, 2019, Filed

11-MD-2221 (NGG) (RER); 08-CV-2315 (NGG) (RER); 08-CV-2316 (NGG) (RER); 08-CV-2317 (NGG) (RER); 08-CV-2380 (NGG) (RER); 08-CV-2406 (NGG) (RER); 11-CV-0337 (NGG) (RER); 11-CV-0338 (NGG) (RER)

### **Reporter**

361 F. Supp. 3d 324 \*; 2019 U.S. Dist. LEXIS 6876 \*\*; 2019-1 Trade Cas. (CCH) P80,642; 2019 WL 202664

IN RE: AMERICAN EXPRESS ANTI-STEERING RULES ANTITRUST LITIGATION. This Document Relates to: All Individual Merchant Plaintiff Actions 08-CV-2315 (NGG) (RER), 08-CV-2316 (NGG) (RER), 08-CV-2317 (NGG) (RER), 08-CV-2380 (NGG) (RER), 08-CV-2406 (NGG) (RER), 11-CV-0337 (NGG) (RER), 11-CV-0338 (NGG) (RER)

**Prior History:** [Rite-Aid Corp. v. Am. Express Travel Related Servs. Co., 2008 U.S. Dist. LEXIS 59545 \(E.D.N.Y., Aug. 4, 2008\)](#)

## **Core Terms**

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merchants, platform, cardholders, two-sided, relevant market, network, allegations, products, card, interchangeable, single-brand, submarket, summary judgment motion, stare decisis, antitrust, one-sided, summary judgment, transactions, courts, pizza, matter of law, credit-card, consumer, markets, pricing, cases, market power, customers, purposes, credit card

**Counsel:** [\[\\*\\*1\] For American Express Anti-Steering Rules Antitrust Litigation \(NO II\), In Re \(1:11-md-02221-NGG-RER\): Philip C. Korologos, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY.](#)

For Ascena Retail Group, Inc., ANN INC., Automobile Club of Southern California, AutoNation, Inc., Bally Total Fitness Corporation, BJ's Restaurants, Inc., Bridgestone Americas Inc., Brookstone Company, Inc., CALERES, CarMax, Inc., Centric Group, LLC, CoreLogic, Inc., Crestline Hotels & Resorts, LLC, Darden Restaurants, Inc., Enterprise Holdings, Inc., Ferguson Enterprises, Inc., Festival Fun Parks, LLC (d/b/a Palace Entertainment), Fitness International, LLC, Fresh Enterprises, LLC, Georgetown University, Host Hotels & Resorts, Inc., Ingram Micro, Inc., Innovative Dining Group, Jack in the Box Inc., Lucky Brand Dungarees, LLC, MorphoTrust USA LLC, Nestle Waters North America, Nespresso USA, Inc., The New York Times Company, Office Depot, Inc., OfficeMax Incorporated, Public Storage, The Regents of the University of California, Sears Holdings Management Corporation, Siemens Corporation, Sofa Mart, LLC, Denver Mattress Co., LLC, Big Sur Waterbeds, Inc., Staples, Inc., SYNNEF Corporation, Target Corporation, [\[\\*\\*2\] Tesoro Companies, Inc., Tiffany and Company, University of Michigan, Williams-Sonoma, Inc., The WP Company LLC, Movants \(1:11-md-02221-NGG-RER\): Daniel A. Sasse, Crowell & Moring LLP, Irvine, CA; Kelly T. Currie, Crowell & Moring, LLP, New York, NY; Richard J. Leveridge, Adams Holcomb LLP, Washington, DC.](#)

For Marriott International, Inc., Movant (1:11-md-02221-NGG-RER): Kelly T. Currie, Crowell & Moring, LLP, New York, NY; Richard J. Leveridge, Adams Holcomb LLP, Washington, DC.

For United Airlines, Inc., Ushio America, Inc., Movants (1:11-md-02221-NGG-RER): Daniel A. Sasse, Crowell & Moring LLP, Irvine, CA.

For Rite Aid Corporation, Rite Aid HDQTRS Corp, Plaintiffs (1:11-md-02221-NGG-RER): David P. Germaine, Vanek Vickers & Masini, P.C., Chicago, IL; Eric Bloom, Hanglevich Segal Pudlin & Schiller, Harrisburg, PA; James Almon, Kenny Nachwalter, P.A., Miami, FL; Maureen Smith Lawrence, PRO HAC VICE, Hanglevich

361 F. Supp. 3d 324, \*324 (2019 U.S. Dist. LEXIS 6876, \*\*2

Segal Pudlin & Schiller, Philadelphia, PA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL; Zachary R. Davis, Hangle Aronchick Segal & Pudlin, Philadelphia, PA.

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For Plymouth Oil Corporation, Plaintiff (1:11-md-02221-NGG-RER): Gary B. Friedman, LEAD ATTORNEY, Friedman Law Group LLP, New York, NY; Mark Reinhardt, LEAD ATTORNEY, Reinhardt Wendorf & Blanchfield, St. Paul, MN; Brian A. Ratner, Hausfeld LLP, Washington, DC; Eugene A. Spector, PRO HAC VICE, Spector, Roseman & Kodroff, Philadelphia, PA; Joseph Gentile, **[\*\*4]** Sarraf Gentile LLP, New York, NY; Rachel Kopp, PRO HAC VICE, Spector Roseman Kodroff & Willis PC, Philadelphia, PA; Ronen Sarraf, Sarraf Gentile LLP, New York, NY; William Caldes, PRO HAC VICE, Spector, Roseman Kodroff & Willis, P.C., Philadelphia, PA.

For Jasa, Inc., on behalf of themselves, Animal Land, Inc., Lopez-DeJonge, Inc., Italian Colors Restaurant, Cohen Rese Gallery, Inc., Bar Hama LLC, Plaintiffs (1:11-md-02221-NGG-RER): Christopher William Hellmich, PRO HAC VICE, Hellmich Law Offices, Costa Mesa, CA; Dean Martin Solomon, Levitt & Kaizer, New York, NY; Douglas A Millen, PRO HAC VICE, FREED KANNER LONDON & MILLEN LLC, Bannockburn, IL; Gary B. Friedman, Friedman Law Group LLP, New York, NY; Mark Reinhardt, Reinhardt Wendorf & Blanchfield, St. Paul, MN; Noah Shube, New York, NY; Read K. McCaffrey, The Law Offices of Marc Seldin Rosen, Baltimore, MD; Richard P. Rouco, Quinn Connor Weaver Davies & Rouco, Birmingham, AL.

For Jasa, Inc., and all similarly situated persons, Rookies, Inc., Plaintiffs (1:11-md-02221-NGG-RER): Christopher William Hellmich, PRO HAC VICE, Hellmich Law Offices, Costa Mesa, CA; Dean Martin Solomon, Levitt & Kaizer, New York, NY; Gary B. Friedman, Friedman **[\*\*5]** Law Group LLP, New York, NY; Mark Reinhardt, Reinhardt Wendorf & Blanchfield, St. Paul, MN; Noah Shube, New York, NY; Read K. McCaffrey, The Law Offices of Marc Seldin Rosen, Baltimore, MD; Richard P. Rouco, Quinn Connor Weaver Davies & Rouco, Birmingham, AL.

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For Bi-Lo, LLC, Plaintiff (1:11-md-02221-NGG-RER): David P. Germaine, Vanek Vickers & Masini, P.C., Chicago, IL; Eric Bloom, Hangle Aronchick Segal Pudlin & Schiller, Harrisburg, PA; James Almon, Kenny Nachwalter, P.A., Miami, FL; Linda P. Nussbaum, Nussbaum Law Group, PC, New York, NY; Maureen Smith Lawrence, PRO HAC VICE, Hangle Aronchick Segal Pudlin & Schiller, Philadelphia, PA; Paul E. Slater, Sperling Slater & Spitz,

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For National Supermarkets Association, Inc., on behalf of its membership, and all other similarly situated persons, Plaintiff (1:11-md-02221-NGG-RER): Gary B. Friedman, Friedman Law Group LLP, New York, NY; Noah Shube, New York, NY.

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Bill McCauley, Plaintiff (1:11-md-02221-NGG-RER), Pro se.

Read McCaffrey, Plaintiff (1:11-md-02221-NGG-RER), Pro se.

For Hillary Jaynes, Anthony Oliver, Bernadette Martin, Bryan Huey, James Eaton, Paul Kashishian, Gianna Valdes, Chad Tintrow, Matthew Moriarty, Shawn O'Keefe, Francisco Robleto, Jr., Michael Thomas Reid, Plaintiffs (1:11-md-02221-NGG-RER): Joseph J. Tabacco, Jr., LEAD ATTORNEY, Berman DeValerio, San Francisco, CA.

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For American Express Travel Related Services Company, Inc, American Express Company, Defendants (1:11-md-02221-NGG-RER): Peter T. Barbur, LEAD ATTORNEY, Cravath Swaine Moore LLP, NY, NY; Alanna Rutherford, Eric Brenner, Philip M. Bowman, Philip C. Korologos, Boies, Schiller & Flexner LLP, New York, NY; Athena N. Cheng, Elizabeth L. Grayer, Kevin J Orsini, Cravath, Swaine & Moore LLP, New York, NY; Damien Jerome Marshall, Boies, Schiller & Flexner, LLP(NYC), New York, NY; Daniel Ryan, Hinshaw & Culbertson LLP, Chicago, IL; David John Hanus, Hinshaw & Culbertson, LLP, Milwaukee, WI; Donald L. Flexner, PRO HAC VICE, Boies, Schiller & Flexner LLP, New York, NY; Evan R. Chesler, Cravath, Swaine & Moore, New York, NY; John Francis LaSalle, Boies Schiller & Flexner LLP, New York, NY; Matthew S. Tripolitsiotis, Boies Schiller & Flexner LLP, Armonk, NY; Robert M. Cooper, Boies, Schiller & Flexner LLP, Washington, DC; Tamara Rubb, PRO HAC VICE, Cravath, Swaine & Moore LLP, New York, NY; William T. Thomas, [\*\*11] Boies Schiller & Flexner, Fort Lauderdale, FL.

For Susan Burdette, Defendant (1:11-md-02221-NGG-RER): Kim Elaine Miller, LEAD ATTORNEY, Kahn Gauthier Swick, LLC, New York, NY; Melinda Ann Nicholson, LEAD ATTORNEY, Kahn Swick & Foti, LLC, Madisonville, LA.

For Government Plaintiffs in 10-cv-4496, Interested Party (1:11-md-02221-NGG-RER): Anne E. Schneider, Attorney General of Missouri, Jefferson City, MO; Mark Hamer, Department of Justice, Washington, DC.

For Target Corporation, Staples, Inc., The Bon-Ton Stores, Inc., Interested Parties (1:11-md-02221-NGG-RER): Alycia Nadine Broz, Michael J. Canter, Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY.

For Willkie Farr & Gallagher LLP, Interested Party (1:11-md-02221-NGG-RER): Robert J. Jossen, LEAD ATTORNEY, Dechert LLP, The Chrysler Building, New York, NY.

For Gary Friedman, Interested Party (1:11-md-02221-NGG-RER): Samuel Issacharoff, Samuel Issacharoff, Esq., New York, NY; Theresa Trzaskoma, Brune & Richard LLP, New York, NY.

For DFS Services LLC, Discover Home Loans, Inc., Discover Bank, Interested Parties (1:11-md-02221-NGG-RER): Jennifer M. Selendy, LEAD [\*\*12] ATTORNEY, Kirkland & Ellis, New York, NY.

For Squire Patton Boggs (US) LLP, Interested Party (1:11-md-02221-NGG-RER): Mitchell Rand Berger, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Thomas Michael Guiffre, LEAD ATTORNEY, Patton Boggs LLP, Washington, DC.

For Hausfeld, LLP, Interested Party (1:11-md-02221-NGG-RER): Michael D. Hausfeld, LEAD ATTORNEY, PRO HAC VICE, Hausfeld LLP, Washington, DC; Scott Allan Martin, LEAD ATTORNEY, Hausfeld LLP, New York, NY.

For Prof. Myriam Gilles, Interested Party (1:11-md-02221-NGG-RER): Noah Shube, New York, NY.

For Circuit City Liquidating Trust, the RSH Liquidating Trust, Holiday Companies, Gander Mountain Company, Commonwealth Hotels, Inc., Intervenors (1:11-md-02221-NGG-RER): K. Craig Wildfang, Robins Kaplan L.L.P., Minneapolis, MN; Ryan W. Marth, Robins Kaplan LLP, Minneapolis, MN; Thomas J. Undlin, Robins Kaplan, L.L.P., Minneapolis, MN.

For Keila Ravelo, Intervenor (1:11-md-02221-NGG-RER): Lawrence S. Lustberg, LEAD ATTORNEY, Gibbons, P.C., Newark, NJ; Jake F. Goodman, Gibbons P.C., Newark, NJ.

For 7-Eleven, Inc., Academy, Ltd., Affiliated Foods Midwest Cooperative, Aldo US Inc., American Eagle Outfitters, Inc., Barnes & Noble, [\*\*13] Inc., Barnes & Noble College Booksellers, LLC, Bealls, Inc., Best Buy Stores, L.P., Boscovs, Inc., Brookshire Grocery Company, Buc-ees Ltd., The Buckle, Inc., Dillards, Inc., Coborns Incorporated, DAstogino Supermarkets, Inc., Drury Hotels Company, LLC, Euromarket Designs, Inc., Meadowbrook, L.L.C., Express, LLC, HMSHost Corporation, Ikea North America Services, LLC, Lowes Companies, Inc., Martins Super Markets, Inc., National Grocers Association, Petsmart, Inc., Recreational Equipment, Inc., Republic Services, Inc., Urban Outfitters, Inc., Wal-Mart Stores, Inc., Whole Foods Market Group, Inc., Whole Foods Market Rocky Mountain/Southwest, L.P., Whole Foods Market California, Inc., Mrs. Goochs Natural Food Markets, Inc., Whole Food Company, Whole Foods Market Pacific Northwest, Inc., WFM-WO, Inc., WFM Northern Nevada, Inc., WFM Hawaii, Inc., WFM Southern Nevada, Inc., Objectors (1:11-md-02221-NGG-RER): Adam Owen Glist, David Alan Scupp, Gary J. Malone, Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY.

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For Macy's Inc., Kohl's Corporation, The TJX Companies, Inc., J.C. Penney Corporation, Inc., Office Depot, Inc., L Brands, Inc., Big Lots Stores, Inc., PNS Stores, Inc., C.S. [\*\*14] Ross Company, Closeout Distribution, Inc., Acena Retail Group, Inc., Abercrombie & Fitch Co., OfficeMax Incorporated, Saks Incorporated, Chico's FAS, Inc., Luxottica U.S. Holdings Corp., American Signature, Inc., National Retail Federation, Objectors (1:11-md-02221-NGG-RER): Alycia Nadine Broz, Michael J. Canter, Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY.

Kevin S. Scheunemann, Objector (1:11-md-02221-NGG-RER), Pro se, Kewaskum, WI.

For Home Depot U.S.A., Inc., Objector (1:11-md-02221-NGG-RER): Alison Berkowitz Prout, PRO HAC VICE, Bondurant Mixson & Elmore, LLP, Atlanta, GA; Frank M. Lowrey, PRO HAC VICE, Bondurant Mixson & Elmore, LLP, Atlanta, GA.

For The Buckeye Institute for Public Policy Solutions, Objector (1:11-md-02221-NGG-RER): Adam E. Schulman, LEAD ATTORNEY, PRO HAC VICE, Competitive Enterprise Institute, Center for Class Action Fairness, Washington, DC.

For Brenda Howell, Objector (1:11-md-02221-NGG-RER): Denise H. Gibbon, LEAD ATTORNEY, PRO HAC VICE, Attorney at Law, New York, NY.

For Blue Cross Blue Shield entities, WellPoint, Inc., Objectors (1:11-md-02221-NGG-RER): Adam P. Feinberg, [\*\*15] Anthony F. Shelley, LEAD ATTORNEY, Miller & Chevalier Chartered, Washington, DC.

For Unlimited Vacations and Cruises, Inc., Lasko Enterprises, Inc., Annamarie Falvo, Objectors (1:11-md-02221-NGG-RER): John Jacob Pentz, III, LEAD ATTORNEY, PRO HAC VICE, John J. Pentz, Esq., Sudbury, MA.

For Alaska Airlines, Inc., Southwest Airlines, Inc., Newegg, Inc., AirTran Airways, Inc., DSW Inc., Objectors (1:11-md-02221-NGG-RER): David P. Germaine, Vanek Vickers & Masini, P.C., Chicago, IL; Jason A. Zweig, Hagens Berman Sobol Shapiro LLP, New York, NY; Joseph Michael Vanek, Vanek, Vickers & Masini, P.C., Chicago, IL; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL.

For Restoration Hardware, Inc., Objector (1:11-md-02221-NGG-RER): Joe Vecchione Demarco, DeVore & DeMarco LLP, New York, NY.

For Lord & Taylor Acquisitions, Inc., Objector (1:11-md-02221-NGG-RER): Gregory Alan Clarick, LEAD ATTORNEY, Clarick Gueron Reisbaum LLP, New York, NY; Alycia Nadine Broz, Michael J. Canter, Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH.

For United States of America, United States of America, Objector (1:11-md-02221-NGG-RER): Gregg I. Malawer, Department of Justice, Antitrust Division, Washington, [\*\*16] DC.

For Amazon.com, Inc., Ashley Furniture Industries Inc., Costco Wholesale Corp., Footlocker, Inc., The Gap, Inc., Marathon Petroleum Company LP, Michaels Stores, Inc., National Association of Convenience Stores, Panda Restaurant Group, Inc., Panera, LLC, RaceTrac Petroleum, Inc., Retail Industry Leaders Association, Roundy's Supermarkets, Inc., Sears Holdings Corporation, Speedway LLC, Starbucks Corporation, Stein Mart, Inc., The Wet Seal, Inc., YUM! Brands, Inc., Mills Motor, Inc., Mills Auto Enterprises, Inc., Willmar Motors, L.L.C., Mills Auto Center, Inc., Fleet and Farm of Alexandria, Inc., Fleet Wholesale Supply of Fergus Falls, Inc., Fleet and Farm of Green Bay, Inc., Fleet and Farm of Menomonie, Inc., Mills Fleet Farm Inc., Fleet and Farm of Manitowoc, Inc., Fleet and Farm of Plymouth, Inc., Fleet and Farm Supply Co. of West Bend, Inc., Fleet and Farm of Waupaca, Inc., Mills E-Commerce Enterprises, Inc., Brainerd Lively Auto, L.L.C., Objectors (1:11-md-02221-NGG-RER): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY.

Assistech Special Needs, Objector (1:11-md-02221-NGG-RER), Pro se, Tucson, AZ.

Les Petits Bisous! LLC, Objector (1:11-md-02221-NGG-RER), Pro se, Havre [\*\*17] de Grace, MD.

Bailey H. Squier Associates, Objector (1:11-md-02221-NGG-RER), Pro se, Burleson, TX.

The Crow Hill Company, Inc., Objector (1:11-md-02221-NGG-RER), Pro se, Highland, NY.

Sales Growth Specialists, Objector (1:11-md-02221-NGG-RER), Pro se, Long Lake, MN.

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Sports Coverage, Inc., Objector (1:11-md-02221-NGG-RER), Pro se, Dallas, TX.

SIGMAPAC, Objector (1:11-md-02221-NGG-RER), Pro se.

The Fuel Foundation, Objector (1:11-md-02221-NGG-RER), Pro se.

Ports Petroleum Company Inc., doing business as Fuel Mart, Objector (1:11-md-02221-NGG-RER), Pro se, Wooster, OH.

Brooks Brothers Group, Inc., Objector (1:11-md-02221-NGG-RER), Pro se, New York, NY.

rue21, Inc., Objector (1:11-md-02221-NGG-RER), Pro se, Warrendale, PA.

The Estee Lauder Companies, Inc., Objector (1:11-md-02221-NGG-RER), Pro se, New York, NY.

New Vista, LLC, Objector (1:11-md-02221-NGG-RER), Pro se, North Little Rock, AR.

SIGMA, Objector (1:11-md-02221-NGG-RER), Pro se.

Diamond State Oil, LLC, Objector (1:11-md-02221-NGG-RER), Pro se, North Little Rock, AR.

Coulson Oil Company, Inc., Objector (1:11-md-02221-NGG-RER), Pro se, North Little Rock, AR.

New Neptune, LLC, Objector (1:11-md-02221-NGG-RER), Pro se, North Little Rock, AR.

Cumberland [\*\*18] Farms, Inc., Objector (1:11-md-02221-NGG-RER), Pro se, Framingham, MA.

Gulf Oil Limited Partnership, Objector (1:11-md-02221-NGG-RER), Pro se, Framingham, MA.

RR #1 TX, LLC, Objector (1:11-md-02221-NGG-RER), Pro se, North Little Rock, AR.

Port Cities Oil, LLC, Objector (1:11-md-02221-NGG-RER), Pro se, North Little Rock, AR.

Cracker Barrel Old Country Store, Inc., Objector (1:11-md-02221-NGG-RER), Pro se, Lebanon, TN.

Petroplus, LLC, Objector (1:11-md-02221-NGG-RER), Pro se, North Little Rock, AR.

New Mercury, LLC, Objector (1:11-md-02221-NGG-RER), Pro se, North Little Rock, AR.

Superstop Stores, LLC, Objector (1:11-md-02221-NGG-RER), Pro se, North Little Rock, AR.

O'Reilly Automotive, Inc., Objector (1:11-md-02221-NGG-RER), Pro se, Springfield, MO.

AutoZone, Inc., Objector (1:11-md-02221-NGG-RER), Pro se, Memphis, TN.

Spirit Airlines, Inc., Objector (1:11-md-02221-NGG-RER), Pro se, Miramar, FL.

BlueGalaxy Digital, Objector (1:11-md-02221-NGG-RER), Pro se, Beavercreek, OH.

The Comic King, Objector (1:11-md-02221-NGG-RER), Pro se, Melrose, MA.

Dairy Queen, Objector (1:11-md-02221-NGG-RER), Pro se, Kewaskum, WI.

Hot Topic, Inc., Objector (1:11-md-02221-NGG-RER), Pro se, City of Industry, CA.

Erich Neumann, [\*\*19] Objector (1:11-md-02221-NGG-RER), Pro se, Miami, FL.

Skeeter's Automotive Repair, Objector (1:11-md-02221-NGG-RER), Pro se, Santa Ana, CA.

Pacific Sunwear of California, Inc., Objector (1:11-md-02221-NGG-RER), Pro se, Anaheim, CA.

Prestigiousbullion/Coppercapowns, Objector (1:11-md-02221-NGG-RER), Pro se, Millsboro, DE.

Kathy Goodhart-Walker, Objector (1:11-md-02221-NGG-RER), Pro se, Benson, AZ.

Christopher & Banks Corporation, Objector (1:11-md-02221-NGG-RER), Pro se, Plymouth, MN.

FL Snyder and Son Inc., Objector (1:11-md-02221-NGG-RER), Pro se, Albany, OR.

The Children's Place Retail Stores, Inc., Objector (1:11-md-02221-NGG-RER), Pro se, Secaucus, NJ.

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Akamaru Japanese Restaurant, Objector (1:11-md-02221-NGG-RER), Pro se, Visalia, CA.

Family Express Corporation, Objector (1:11-md-02221-NGG-RER), Pro se, Valparaiso, IN.

Incredible Creations, Objector (1:11-md-02221-NGG-RER), Pro se, Buford, GA.

The Water Brewerey, Inc., Objector (1:11-md-02221-NGG-RER), Pro se, Costa Mesa, CA.

For The Water Brewerey, Inc., Objector (1:11-md-02221-NGG-RER): Scott A. Kron, LEAD ATTORNEY, PRO HAC VICE, Kron & Card LLP, Laguna Hills, CA.

Belk, Inc., Objector (1:11-md-02221-NGG-RER), Pro se, Charlotte, NC.

Andersson [\*\*20] Technologies LLC, Objector (1:11-md-02221-NGG-RER), Pro se, Phoenixville, PA.

NTT Corporation, Objector (1:11-md-02221-NGG-RER), Pro se, Los Angeles, CA.

Swarovski North America Limited, Objector (1:11-md-02221-NGG-RER), Pro se, Cranston, RI.

Shabakas, Objector (1:11-md-02221-NGG-RER), Pro se, Clinton, MS.

Tiffany and Company, Objector (1:11-md-02221-NGG-RER), Pro se, New York, NY.

I.L. "Lonnie" Morris, CPA & Company, Objector (1:11-md-02221-NGG-RER), Pro se, Plano, TX.

Siringo Optometry Associates, PLLC, Objector (1:11-md-02221-NGG-RER), Pro se, Denver, CO.

Arthur Howard, Ph.D., Objector (1:11-md-02221-NGG-RER), Pro se, Hemet, CA.

For Rite Aid Corporation, Rite Aid HDQTRS.Corp., Plaintiffs (1:08-cv-02315-NGG-RER): Steve D. Shadowen, LEAD ATTORNEY, PRO HAC VICE, Hilliard&Shadowen LLP, Austin, TX; Eric Bloom, Hangley Aronchick Segal&Pudlin, Harrisburg, PA; Jason L. Reimer, PRO HAC VICE, Hangley Aronchick Segal&Pudlin, Harrisburg, PA; Linda P. Nussbaum, Nussbaum Law Group, PC, New York, NY.

For Walgreen Co, Plaintiff (1:08-cv-02315-NGG-RER): James Almon, Kenny Nachwalter, P.A., Miami, FL.

For American Express Travel Related Services Company, Inc., American Express Company, Defendants (1:08-cv-02315-NGG-RER): [\*\*21] Evan R. Chesler, LEAD ATTORNEY, Cravath, Swaine&Moore, New York, NY; Philip M. Bowman, Philip C. Korologos, LEAD ATTORNEY, Eric Brenner, Boies, Schiller&Flexner LLP, New York, NY; Elizabeth L. Grayer, Kevin J Orsini, Cravath, Swaine&Moore LLP, New York, NY.

For CVS Pharmacy, Inc., Plaintiff (1:08-cv-02316-NGG-RER): Linda P. Nussbaum, LEAD ATTORNEY, Nussbaum Law Group, PC, New York, NY; Mitchell H. Macknin, LEAD ATTORNEY, Sperling&Slater, P.C., Chicago, IL; Paul E. Slater, LEAD ATTORNEY, Sperling Slater&Spitz, Chicago, IL; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer&Fox, LLP, New York, NY; David P. Germaine, PRO HAC VICE, Vanek Vickers&Masini, P.C., Chicago, IL; Joseph Michael Vanek, PRO HAC VICE, Vanek, Vickers&Masini, P.C., Chicago, IL.

For American Express Travel Related Services Company, Inc., American Express Company, Defendants (1:08-cv-02316-NGG-RER): Philip M. Bowman, Philip C. Korologos, LEAD ATTORNEY, Eric Brenner, Boies, Schiller&Flexner LLP, New York, NY.

For Walgreen Co., Plaintiff (1:08-cv-02317-NGG-RER): Douglas H. Patton, LEAD ATTORNEY, Kenny Nachwalter, P.A., Miami, FL; Kenny Nachwalter, LEAD ATTORNEY, Miami, FL; William Jay Blechman, LEAD ATTORNEY, PRO HAC VICE, [\*\*22] Kenny Nachwalter, P.A., Miami, FL; James Almon, Kenny Nachwalter, P.A., Miami, FL; Linda P. Nussbaum, Nussbaum Law Group, PC, New York, NY; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For American Express Travel Related Services Company, Inc., American Express Company, Defendants (1:08-cv-02317-NGG-RER): Philip M. Bowman, Philip C. Korologos, LEAD ATTORNEY, Eric Brenner, Boies, Schiller&Flexner LLP, New York, NY.

For Bi-Lo, LLC, Plaintiff (1:08-cv-02380-NGG-RER): Steve D. Shadowen, LEAD ATTORNEY, PRO HAC VICE, Hilliard&Shadowen LLP, Austin, TX; Eric Bloom, Hangley Aronchick Segal&Pudlin, Harrisburg, PA; Jason L.

Reimer, PRO HAC VICE, Hangley Aronchick Segal&Pudlin, Harrisburg, PA; Linda P. Nussbaum, Nussbaum Law Group, PC, New York, NY.

For American Express Travel Related Services Company, Inc., American Express Company, Defendants (1:08-cv-02380-NGG-RER): Philip M. Bowman, LEAD ATTORNEY, Eric Brenner, Boies, Schiller&Flexner LLP, New York, NY; Philip C. Korologos, LEAD ATTORNEY, Boies, Schiller&Flexner LLP, New York, NY.

For H.E. Butt Grocery Company, Plaintiff (1:08-cv-02406-NGG-RER): Douglas H. Patton, LEAD ATTORNEY, Kenny Nachwalter, P.A., Miami, FL; William [\*\*23] Jay Blechman, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL; Brian K. O'Bleness, Stinson Morrison Hecker LLP, Kansas City, MO; David E. Everson, PRO HAC VICE, Stinson Morrison Hecker LLP, Kansas City, MO; James Almon, Kenny Nachwalter, P.A., Miami, FL; Linda P. Nussbaum, Nussbaum Law Group, PC, New York, NY; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For American Express Travel Related Services Company, Inc., American Express Company, Defendants (1:08-cv-02406-NGG-RER): Philip M. Bowman, Philip C. Korologos, LEAD ATTORNEY, Eric Brenner, Boies, Schiller&Flexner LLP, New York, NY.

For The Kroger Co., Safeway Inc., Ahold U.S.A., Inc., Albertson's LLC, Hy-Vee, Inc., The Great Atlantic&Pacific Tea Company, Inc., Plaintiffs (2:11-cv-00337-NGG-RER): Douglas H. Patton, Kenny Nachwalter, P.A., Miami, FL; James Almon, Richard A. Arnold, William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL; Kenny Nachwalter, Miami, FL.

For American Express Travel Related Services Company, Inc., American Express Company, Defendants (2:11-cv-00337-NGG-RER): Donald L. Flexner, Eric Brenner, Boies, Schiller&Flexner LLP, New York, NY.

For Meijer, Inc., Publix [\*\*24] Super Markets, Inc., Raley's, Supervalu Inc., Plaintiffs (2:11-cv-00338-NGG-RER): David P. Germaine, PRO HAC VICE, Vanek Vickers&Masini, P.C., Chicago, IL; Joseph Michael Vanek, PRO HAC VICE, Vanek, Vickers&Masini, P.C., Chicago, IL; Linda P. Nussbaum, Nussbaum Law Group, PC, New York, NY; Mitchell H. Macknin, Sperling&Slater, P.C., Chicago, IL; Paul E. Slater, Sperling Slater&Spitz, Chicago, IL; Susan R. Schwaiger, Grant&Eisenhofer, PA, New York, NY.

For American Express Travel Related Services Company, Inc., American Express Company, Defendants (2:11-cv-00338-NGG-RER): Eric Brenner, Boies, Schiller&Flexner LLP, New York, NY.

**Judges:** NICHOLAS G. GARAUFIS, United States District Judge.

**Opinion by:** NICHOLAS G. GARAUFIS

## Opinion

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### [\*330] MEMORANDUM & ORDER

NICHOLAS G. GARAUFIS, United States District Judge.

In this set of consolidated antitrust actions (the "MP Actions"), the Merchant Plaintiffs (the "MPs")<sup>1</sup> challenge under [Sections 1](#) and [2](#) of the Sherman Antitrust Act, [15 U.S.C. §§ 1-2](#), the contracts that they have entered into with Defendants American Express Travel Related Services Company, Inc. and American Express Company (together, "Amex"). ([See](#) Am. Compl. (Dkt. 814).) Specifically, the MPs challenge Amex's anti-steering rules, referred to as the [\*\*25] Non-Discrimination Provisions ("NDPs"), which are contained in merchant agreements entered into

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<sup>1</sup>The MPs are Ahold U.S.A., Inc.; Albertson's LLC; BI—LO, LLC; CVS Pharmacy, Inc.; The Great Atlantic & Pacific Tea Company, Inc.; H.E. Butt Grocery Co.; Hy-Vee, Inc.; The Kroger Co.; Meijer, Inc.; Publix Super Markets, Inc.; Raley's Inc.; Rite Aid Corporation; Rite Aid HDQTRS Corp.; Safeway Inc.; Supervalu Inc.; and Walgreen Co.

between Amex and each MP. The MPs seek an order enjoining Amex from enforcing the NDPs, as well as treble damages for the injuries the MPs allege they have sustained [**\*331**] on account of the NDPs. (See id. ¶ 11.)

Pending before the court is Amex's motion seeking summary judgment as to the MPs' allegations of a one-sided market and the MPs' allegations of an Amex-only market. (See Notice of Mot. to Dismiss (Dkt. 835).) For the following reasons, Amex's motion is GRANTED.

## I. BACKGROUND

The facts of this case—the procedural history, the restraints on competition, the workings of the credit-card market in general and Amex's platform in particular, etc. have been discussed at great length in this court's previous opinions in this matter and in the related case brought by the federal government. See *In re Am. Exp. Anti-Steering Rules Antitrust Litig. (In re Amex)*, No. 11-MD-2221 (NGG), 2016 U.S. Dist. LEXIS 3332, 2016 WL 748089, at \*1-4 (E.D.N.Y. Jan. 7, 2016); *United States v. Am. Exp. Co. (U.S. v. Amex)*, 88 F. Supp. 3d 143, 149-67 (E.D.N.Y. 2015), rev'd, 838 F.3d 179 (2d Cir. 2016), aff'd sub nom. *Ohio v. Am. Exp. Co. (Ohio)*, 138 S. Ct. 2274, 201 L. Ed. 2d 678 (2018). The court repeats certain facts and aspects of the procedural history here as necessary to introduce and to decide the instant motion.

### A. Factual Overview

The MPs are retail merchants that have [**\*\*26**] each entered into an American Express Card Acceptance Agreement (the "Agreement") with Amex. (Am. Compl. ¶ 1.) In those Agreements, "and in virtually every other such Agreement that Amex has entered into with a merchant," Amex has included the NDPs, which prevent the merchant "from differentially pricing the use of payment cards, stating a preference for any form of payment, or allowing the retail customer to use different payment cards on differing terms or conditions established by the merchant." (Id.; see id. ¶¶ 2-3 (describing the NDPs).) The MPs claim that these restraints are anticompetitive "because they nullify the operation of the price mechanism, impede competition among credit card networks and suppress output." (Id. ¶ 4; see id. ¶¶ 4-6.) As a result, the MPs allege, "merchant fees and the net two-sided transaction price for Amex and other credit card networks are higher than the competitive level and higher than they otherwise would be in the absence of Amex's anticompetitive restraints [and] the number of credit card transactions is lower than it otherwise would be in the absence of the Amex restraints." (Id. ¶ 7.)

The MPs allege that the NDPs "have had an actual adverse [**\*\*27**] effect on competition as a whole . . . in that they have reduced output, quality and consumer choice and increased price and barriers to entry in each of the relevant markets and/or submarkets." (Id. ¶ 53.) The MPs seek to proceed to trial with respect to four formulations of the relevant market:

1. a one-sided, all-general purpose credit card ("GPCC") market;
2. a one-sided, Amex-only market;
3. a two-sided, all-GPCC market; and
4. a two-sided, Amex-only market.

(Id. ¶ 11, see id. ¶¶ 56-57, 64.) The MPs assert claims under each cause of action with respect to all four formulations of the relevant market and submarket. (See id. ¶¶ 68-85.)

### B. Procedural History

In 2008, certain of the MPs brought suit against Amex in this court. See *In re Amex*, 2016 U.S. Dist. LEXIS 3332, 2016 WL 748089, at \*2 & n.3. As stated above, the MPs allege that the anti-steering rules Amex imposes on merchants that participate in its network are an anticompetitive restraint on trade in violation of the Sherman Act. See *Rite Aid Corp. v. Am. Exp. Travel Related Servs. Co.*, 708 F. Supp. 2d 257, 261-62 (E.D.N.Y. 2010). After [**\*332**] answering each MP's complaint, Amex moved for judgment on the pleadings, arguing that all of the MPs'

claims were barred by the Sherman Act's four-year statute of limitations. On March 3, 2010, the court denied the motion. *Id.* at 264; see *In re Amex, 2016 U.S. Dist. LEXIS 3332, 2016 WL 748089, at \*2*.

Meanwhile, in October [\*\*28] 2010, the Department of Justice and the attorneys general of eighteen states filed suit against Amex, MasterCard, and Visa (the "Government Action").<sup>2</sup> The MP Actions and the Government Action proceeded to coordinated discovery. In late 2013, Amex moved for summary judgment in both the Government Action and the MP Actions, and moved to consolidate the actions for trial. The court denied Amex's motion for summary judgment in the Government Action in May 2014. See *United States v. Am. Exp. Co., 21 F. Supp. 3d 187 (E.D.N.Y. 2014)*. Separately, the court denied Amex's motion to consolidate the actions for the purpose of trial (Feb. 11, 2014, Order (Dkt. 335)), and stayed the MP Actions during the pendency of a motion for final settlement approval in consolidated class actions that comprise part of the MDL and in which the MPs are putative class members (see Apr. 9, 2014, Order). The court reserved judgment on Amex's motion for summary judgment in the MP Actions.

The Government Action proceeded to a bench trial during the summer of 2014. On February 19, 2015, the court found by a preponderance of the evidence that the specific NDPs challenged by the Government violate *Section 1* of the Sherman Act. After receiving additional briefing from the parties to the Government [\*\*29] Action, as well as other interested parties including the MPs, the court issued a permanent injunction on April 30, 2015. *United States v. Am. Exp. Co., No. 10-CV-4496 (NGG), 2015 U.S. Dist. LEXIS 56945, 2015 WL 1966352 (E.D.N.Y. Apr. 30, 2015)*, rev'd, *838 F.3d 179*, aff'd sub nom. *Ohio, 138 S. Ct. 2274, 201 L. Ed. 2d 678*. The court denied Amex's motion to stay the permanent injunction pending appeal. *United States v. Am. Exp. Co., No. 10-CV-4496 (NGG), 2015 WL 13735045 (E.D.N.Y. May 19, 2015)*. Amex then filed a notice of appeal and sought a stay pending appeal from the Second Circuit. Although a three-judge panel of the Second Circuit initially denied Amex's motion to stay (Order of USCA (Dkt. 687 in No. 10-CV-4496)), the Second Circuit ultimately entered a temporary stay of the permanent injunction and a temporary stay of the Government Action in this court (Order of USCA (Dkt. 697 in No. 10-CV-4496)).

On September 26, 2016, the Second Circuit reversed this court's judgment in the Government Action, holding that the court erred in excluding the market for cardholders from its definition of the relevant market. See *U.S. v. Amex, 838 F.3d at 197, 206-07*. Because the Second Circuit found that the Government could not, on the facts of the case, prove net harm to both cardholders and merchants, it directed this court to enter judgment in favor of Amex. *Id. at 207*. Certain state plaintiffs then sought [\*\*30] certiorari, which the Supreme Court granted.<sup>3</sup> *Ohio v. Am. Exp. Co., 138 S. Ct. 355, 199 L. Ed. 2d 261 (Mem)* (2017). On June 25, 2018, the Supreme Court affirmed the Second Circuit, [\*333] holding that this court should have included both sides of the Amex platform when defining the relevant market. *Ohio, 138 S. Ct. at 2285-86*.

Following the Supreme Court's affirmation of the dismissal of the Government Action, matters resumed in the MP Actions. The court granted the MPs leave to file an amended complaint—intended to address some of the deficiencies with the Government Action raised by the Court in *Ohio*—and set a briefing schedule on various anticipated motions for summary judgment by Amex. (July 10, 2018, Order (Dkt. 811).) The MPs filed the amended complaint on July 27, 2018. (Am. Compl.) Under the original briefing schedule set by the court, Amex was to serve its motions for summary judgment—one as to the allegations of one-sided and Amex-only markets, and one "additional" motion as to the allegation of a two-sided market that includes all GPCCs—on the Merchant Plaintiffs by no later than August 17, 2018. (See July 10, 2018, Order.) On August 6, 2018, Amex requested that it "be given leave to file a summary judgment motion directed to the Merchant Plaintiffs' allegations [\*\*31] regarding competitive harm in a two-sided market after the new discovery is complete." (Aug. 6, 2018, Letter (Dkt. 815) at 2.)

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<sup>2</sup> Visa and MasterCard entered into consent decrees with the Government on the same day that the Government Action was initiated; only Amex remained as a defendant. See *In re Amex, 2016 U.S. Dist. LEXIS 3332, 2016 WL 748089, at \*2 n.5*.

<sup>3</sup> In response to the grant of certiorari, this court stayed all further proceedings in the MP Actions. (Oct. 24, 2017, Order.) The court directed the parties, by no later than 14 days after entry of a decision in *Ohio*, to "confer and submit a joint letter proposing a schedule for additional motions, if any, and setting forth the parties' availability for trial." (*Id.*)

The court granted Amex's request and set the briefing schedule on the motion for summary judgment as to the Merchant Plaintiffs' claims on the two-sided, all-GPCC market to take place following the completion of additional fact discovery. (See Aug. 6, 2018, Min. Entry; Aug. 17, 2018, Order.)

On August 17, 2018, Amex served on the Merchant Plaintiffs a motion to dismiss or, in the alternative, for summary judgment. (Amex Mem. in Supp. of Mot. to Dismiss (Dkt. 828 at ECF p.6).) Amex did not answer the amended complaint. The MPs subsequently sought an order from this court compelling Amex to file its answer and defenses to the amended complaint. (Mot. to Compel (Dkt. 828 at ECF p.1).) On September 26, 2018, the court held that, because Amex did not "seek to dismiss any 'claims' in the amended complaint," its motion could not be considered a motion to dismiss, but rather one for summary judgment. *In re Am. Exp. Anti-Steering Rules Antitrust Litig. (In re Amex)*, *F. Supp. , 343 F. Supp. 3d 94, 2018 U.S. Dist. LEXIS 165924, 2018 WL 4623052, at \*4-5, \*7 (E.D.N.Y. Sept. 26, 2018)*. The court ordered Amex to answer the amended complaint, *2018 U.S. Dist. LEXIS 165924, [WL] at \*7*, which Amex did on October 10, 2018 (Answer (Dkt. 834)). The court also provisionally terminated the pending [\*\*32] briefing schedule on the motion for summary judgment, on the assumption that it would be more efficient to deal with Amex's anticipated summary-judgment motion in one fell swoop after the completion of additional fact discovery. See *In re Amex, F. Supp. 3d , 2018 U.S. Dist. LEXIS 165924, 2018 WL 4623052, at \*7*. On October 1, 2018, however, Amex informed the court that it had "decided that it [would] not file a motion for summary judgment directed to Plaintiffs' two-sided market allegations." (Oct. 1, 2018, Amex Letter (Dkt. 832).) Accordingly, Amex's motion seeking summary judgment as to the MPs' one-sided and Amex-only relevant market allegations was fully briefed on October 12, 2018. (Notice of Mot.; Amex Mem. in Supp. of Mot. for Summ. J. ("Mem.") (Dkt. 836); MPs Opp'n to Mot. for Summ. J. ("Opp'n") (Dkt. 841-1); Amex Reply in Supp. of Mot. for Summ. J. ("Reply") (Dkt. 843-1).)

## II. LEGAL STANDARD

A court must grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. "A 'material' fact is one capable of influencing the case's outcome under governing substantive law, and a 'genuine' dispute is one as to which the evidence [\*334] would permit a reasonable juror [\*\*33] to find for the party opposing the motion." *Figueroa v. Mazza*, *825 F.3d 89, 98 (2d Cir. 2016)* (citing *Anderson v. Liberty Lobby, Inc.*, *477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*). "The movant may discharge this burden by showing that the nonmoving party has 'fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co.*, *255 F. Supp. 3d 443, 451 (S.D.N.Y. 2015)* (alteration in original) (quoting *Celotex Corp. v. Catrett*, *477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*). "The mere existence of a scintilla of evidence' in support of the non-movant will be insufficient to defeat a summary judgment motion." *Transflo Terminal Servs., Inc. v. Brooklyn Res. Recovery, Inc.*, *248 F. Supp. 3d 397, 399 (E.D.N.Y. 2017)* (quoting *Anderson*, *477 U.S. at 252*).

"In determining whether an issue is genuine, '[t]he inferences to be drawn from the underlying affidavits, exhibits, interrogatory answers, and depositions must be viewed in the light most favorable to the party opposing the motion.' *SCW W. LLC v. Westport Ins. Corp.*, *856 F. Supp. 2d 514, 521 (E.D.N.Y. 2012)* (alteration in original) (quoting *Cronin v. Aetna Life Ins. Co.*, *46 F.3d 196, 202 (2d Cir. 1995)*). "[T]he judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Redd v. N.Y. Div. of Parole*, *678 F.3d 166, 173-74 (2d Cir. 2012)* (quoting *Anderson*, *477 U.S. at 249*). However, "[a] party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment," and "[m]ere conclusory allegations or denials . . . cannot by themselves create a genuine issue of material fact where [\*\*34] none would otherwise exist." *Hicks v. Baines*, *593 F.3d 159, 166 (2d Cir. 2010)* (citation and internal quotation marks omitted).

Finally, it bears noting that "[s]ummary judgment is not an all-or nothing proposition." *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, *824 F. Supp. 2d 524, 533 (S.D.N.Y. 2011)*. A party may move pursuant to *Rule 56(a)* for summary judgment as to an entire claim or defense, as well as "part of a claim or defense." *Id.* So, while the court

has previously held that the MPs' alternative formulations of the relevant market (and submarket) are not, by themselves, independent claims subject to a Rule 12(b)(6) motion to dismiss, see In re Amex, 88 F. Supp. 3d, 2018 U.S. Dist. LEXIS 165924, 2018 WL 4623052, at \*7, it is proper for the court to adjudicate the existence of a genuine issue for trial as to each relevant market on a motion for summary judgment.

### **III. DISCUSSION**

In order for the MPs' antitrust claims against Amex to succeed, they must define a relevant market in which the allegedly uncompetitive behavior exhibited by Amex restrained trade. U.S. v. Amex, 88 F. Supp. 3d at 170 ("In order to determine whether Amex's NDPs violate the Sherman Act, the court must first determine the contours of the relevant market and thereby define an appropriate context for the remainder of its analysis."); see Ohio, 138 S. Ct. at 2285 & n.7 (holding that market definition is required when analyzing a vertical restraint); In re Aluminum Warehousing Antitrust Litig., 95 F. Supp. 3d 419, 448 (S.D.N.Y. 2015); see also Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485, 506-07 (2d Cir. 2004) ("Under the rule of reason, the plaintiffs [\*\*35] bear an initial burden to demonstrate the defendants' challenged behavior had an actual adverse effect on competition as a whole in the [\*335] relevant market." (citation and internal quotation marks omitted)).

For antitrust purposes, a relevant market has two components: a "product market" and a "geographic market." See Concord Assocs. v. Entm't Props. Tr., 817 F.3d 46, 52 (2d Cir. 2016). Here, as in the Government Action, all "parties have agreed that the relevant geographic market is the Territorial United States," U.S. v. Amex, 88 F. Supp. 3d at 170, so only the relevant product market is at issue. "Under the federal antitrust laws, a product market is 'composed of products that have reasonable interchangeability' from the perspective of the relevant consumer with the product sold by the defendant firm." Id. (quoting United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)); see Concord Assocs., 817 F.3d at 52 ("A relevant product market consists of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." (citation and internal quotation marks omitted)). If a product is "interchangeable," consumers retain the ability to "switch to a substitute," thus "restrain[ing] a firm's ability to raise prices above the competitive level." City of New York v. Grp. Health Inc., 649 F.3d 151, 155 (2d Cir. 2011) (quoting Geneva Pharms., 386 F.3d at 496).

"[M]arket definition is a deeply fact-intensive inquiry." Chapman v. N.Y. State Div. for Youth, 546 F.3d 230, 238 (2d Cir. 2008) (quoting [\*\*36] Todd v. Exxon Corp., 275 F.3d 191, 199 (2d Cir. 2008)). Still, though, "a plaintiff whose proposed relevant market or allegation of market power is challenged by a motion for summary judgment must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial as to the market definition or the existence of market power." Emigra Grp. v. Fragomen, Del Rey, Bernsen & Loewy, 612 F. Supp. 2d 330, 347 (S.D.N.Y. 2009); Diseños Artísticos E Industriales, S.A. v. Work, 714 F. Supp. 46, 49 (E.D.N.Y. 1989) (stating that summary judgment should be granted where a plaintiff's definition of the relevant market "verges on legal insufficiency and is unsupported by any probative or credible evidence"); cf. City of New York v. Grp. Health Inc., No. 06-CV-13122 (RJS), 2010 U.S. Dist. LEXIS 60196, 2010 WL 2132246, \*5 (S.D.N.Y. May 11, 2010) (dismissing antitrust claim because the plaintiff's "market definition [was] inadequate as a matter of law"), aff'd, 649 F.3d 151.

Amex's motion for summary judgment requires the court to ask whether three of the MP's four proposed market definitions can succeed as a matter of law. While Amex has not moved for summary judgment as to the MPs' two-sided, all-GPCC market definition, the other three definitions—one-sided, Amex-only; one-sided, all-GPCC; and two-sided, Amex-only—remain subject to this motion. The court agrees with Amex that these three market definitions cannot succeed as a matter of law, so the court GRANTS Amex's motion for summary judgment. [\*\*37]

#### **A. One-Sided Market Allegations**

##### **1. One-Versus Two-Sided Markets**

Because Amex moves for summary judgment on the grounds that the MPs' one-sided market allegations are faulty as a matter of law, the court begins its analysis by defining "one-sided" and "two-sided" platforms and examining how the Supreme Court construed these terms in Ohio.

"[A] two-sided platform offers different products or services to two different groups who both depend on the platform to intermediate between them." Ohio, 138 S. Ct. at 2280; see also id. at 2298 (Breyer, J., dissenting) ("[T]here are four relevant features of [two-sided platforms] on the majority's account: they (1) offer [\*336] different products or services, (2) to different groups of customers, (3) whom the 'platform' connects, (4) in simultaneous transactions."). As the Court has stated, a credit-card network is an example of a two-sided platform because of the simultaneous transactions it facilitates between cardholders and merchants:

For cardholders, the network extends them credit, which allows them to make purchases without cash and to defer payment until later. . . . For merchants, the network allows them to avoid the cost of processing transactions and offers them quick, guaranteed payment. **[\*\*38]**

Id. at 2280 (majority op.); see U.S. v. Amex, 838 F.3d at 185-86.

While "it is not always necessary to consider both sides of a two-sided platform" when defining the relevant market for antitrust purposes, courts must consider both sides of the platform when it exhibits two features typical of two-sided platforms. See Ohio, 138 S. Ct. at 2286. First, the court must ask if the platform exhibits "what economists call 'indirect network effects.'" Id. at 2280 (citation omitted). As this court has previously recognized, "[i]ndirect network effects exist when the number of agents or the quantity of services bought on one side of a two-sided platform affects the value that an agent on the other side of the platform can realize." U.S. v. Amex, 88 F. Supp. 3d at 155; see Ohio, 138 S. Ct. at 2280 ("Indirect network effects exist where the value of the two-sided platform to one group of participants depends on how many members of a different group participate."). Second, the court must ask if the platform exhibits "interconnected pricing and demand." Ohio, 138 S. Ct. at 2286. That is, in certain cases, the platform must "[s]trik[e] the optimal balance of the prices charged on each side of the platform" so as to "maximize the value of [the platform's] services and to compete with their rivals." Id. at 2281.

In Ohio, the Supreme Court held that credit-card networks **[\*\*39]** are two-sided platforms.<sup>4</sup> Id. at 2285. The court found that credit-card networks exhibit indirect network effects: the value of a credit card to cardholders increases when more merchants accept the card, and the card is more valuable to merchants when more cardholders use it. Id. at 2281. On the flip side, a credit-card network that raises the price on either cardholders or merchants risks entering "a feedback loop of declining demand" due to the likelihood that members of the affected side will leave the platform, thus decreasing the value to the other side and increasing the risk that members of that side will in turn leave the platform. See id. at 2281, 2285. As for interconnected pricing and demand, the Court noted that credit-card networks "often charge cardholders a lower fee than merchants because cardholders are more price sensitive." Id. at 2281. But even if the network is losing money on the cardholder side—usually because the network offers rewards, such as airline miles, as an incentive for cardholders to use the card—the network is able to remain viable "because increasing the number of cardholders increases the value of accepting the card to merchants and, thus, increases the number of merchants who accept it." Id.; **[\*\*40]** see also id. at 2286 ("To optimize sales, the network must find the balance of pricing [\*337] that encourages the greatest number of matches between cardholders and merchants."). The network "can then charge those merchants a fee for every transaction (typically a percentage of the purchase price)." Id. at 2281.<sup>5</sup> Taken together, these features confirm that

<sup>4</sup>The Court also noted that credit-card networks are a particular kind of two-sided platform: a transaction platform, which "suppl[ies] only one product-transactions." Ohio, 138 S. Ct. at 2286 (internal quotation marks omitted). "In the credit-card market, these transactions are jointly consumed by a cardholder, who uses the payment card to make a transaction, and a merchant, who accepts the payment card as a method of payment." Id. (internal quotation marks omitted).

<sup>5</sup>In a subsequent portion of the Ohio opinion, the Court found that the evidence does not support the Government's contention that Amex's anti-steering provisions are the cause of any increases in merchant fees. 138 S. Ct. at 2288. Instead, the Court

"courts must include both sides of the platform—merchants and cardholders—when defining the credit-card market" *Id. at 2286*.

## 2. Stare Decisis

The doctrine of stare decisis compels a district court to abide by the legal decisions of higher courts in the same jurisdiction.<sup>6</sup> See, e.g., *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1279 (10th Cir. 2010) (setting forth "the general rule that a district court is bound by decisions made by its circuit court"); *Dodge v. County of Orange*, 282 F. Supp. 2d 41, 80 (S.D.N.Y. 2003) ("[V]ertical stare decisis provides little, if any, leeway for a district court judge to stray from Court of Appeals precedent."); Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 817, 818 (1994) ("[L]ongstanding doctrine dictates that a court is always bound to follow a precedent by a court 'superior' to it"); see also *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) ("[C]aselaw on point is the law."). While courts and commentators may disagree as to whether vertical stare decisis is a constitutional command, see [\\*\\*411 Winslow v. FERC](#), 587 F.3d 1133, 1135, 388 U.S. App. D.C. 375 (D.C. Cir. 2009) (quoting U.S. Const. art. III, § 1), or simply a "contingent" but "pragmatic" approach to decisionmaking, see *Trammell, supra note 7, at 582-83* (citing *Caminker, supra, at 867*), the endurance of vertical stare decisis reflects a general and sensible belief that legal outcomes should be predictable and consistent, see *Colonial Realty Corp. v. MacWilliams*, 381 F. Supp. 26, 28 (S.D.N.Y. 1974) (noting "the interests of the legal system in consistency and uniformity" as "the central values" underlying the doctrine of vertical stare decisis); 18 James W. Moore, *Moore's Federal Practice* § 134.01[1], at 134-9 (3d ed. 2018).

Although stare decisis is, as a formal matter, concerned with fidelity to precedent, it often functions as a type of preclusion doctrine—similar to res judicata, or "law of the case." See 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4478.5, at 814 (2d ed. 2002). Modern commentators have argued that there is little difference functionally between precedent and preclusion: both operate inflexibly to bind nonparties to prior decisions, and both can bind as to certain questions of law or fact. See Max Minzner, Saving Stare Decisis: Preclusion, Precedent, and Procedural Due Process, 2010 B.Y.U. L. Rev. 597, 608-11; *Trammell, supra note 7, at 585-86*; see [\\*\\*421](#) also 18A Wright, Miller & Cooper, Federal Practice and Procedure § 4449, at 335 & n.30 (3d ed. 2017) ("[I]n some special settings [a judgment] may achieve a particularly potent force that approaches preclusion under the name of stare decisis . . . ."). At the same [\[\\*338\]](#) time, the argument for applying stare decisis inflexibly—that is, for a court to declare itself constrained by a higher court's prior judgment—is more persuasive where the question is one that has already been the subject of litigation "between the same parties." See 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4425, at 701 (3d ed. 2016).

While it is not necessary at this juncture to define the full scope of the doctrine of stare decisis, it bears emphasizing that a decision can be given stare decisis effect even when the facts of the subsequent case are dissimilar. See *Haith ex rel. Accretive Health, Inc. v. Bronfman*, 928 F. Supp. 2d 964, 971 (N.D. Ill. 2013) ("The reach of Supreme Court decisions are not limited to the particular facts and circumstances presented in the case being decided; lower courts must apply the reasoning of those decisions even to cases that are factually dissimilar."). The arguments for applying stare decisis as a form of preclusion may be heightened the more similar the facts, see [\\*\\*431 Rodriguez v. City of Albuquerque, No. 07-CV-901, 2008 U.S. Dist. LEXIS 108660, 2008 WL 5978925, at \\*2 \(D.N.M. Dec. 22, 2008\)](#) (stating that vertical stare decisis "should effectively foreclose future litigation" as to cases that "all involve . . . the exact same set of facts"), but slight—or great—distinctions in factual circumstances between cases cannot save a party from being bound by a legal determination. It is thus incumbent upon a court construing a prior decision to give broad effect to the earlier case's legal principles and apply them as relevant. See *Walker v. Georgia*, 417 F.2d

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found that that the cause of increased merchant fees is "increased competition for cardholders and a corresponding marketwide adjustment in the relative price charged to merchants." *Id.*

<sup>6</sup>This form of stare decisis is commonly referred to as "vertical stare decisis," as distinguished from "horizontal stare decisis," which refers to a court's adherence to its own past decisions. See, e.g., Joseph W. Mead, Stare Decisis in the Inferior Courts of the United States, 12 Nev. L.J. 787, 788 (2012); Alan M. Trammell, Precedent and Preclusion, 93 Notre Dame L. Rev. 565, 581 (2017).

5, 8 (5th Cir. 1969) (Tuttle, J.) ("[U]nless the Supreme Court expressly limits its opinion to the facts before it, it is the principle which controls and not the specific facts upon which the principle was decided.").

### 3. Whether the MPs May Proceed Under a One-Sided Market Theory

Ohio's holding is clearly stated: "[C]redit-card networks are two-sided platforms." 138 S. Ct. at 2285. Despite this seemingly ironclad language, the MPs contend that the holding in Ohio is irrelevant to the instant action because market definition is a question of fact. (Opp'n at 3; see id. at 6.) Further, they submit that it would be inappropriate to apply the Ohio holding to this case given that these are different "cases based on different facts." (Id. at 3.) In response, Amex states that the Supreme Court's holding in Ohio \*\*441 binds this court to reject the MPs' one-sided market allegations because the Supreme Court set forth a "conclusion[] of law" contrary to the MPs' legal formulation, and because "the economic activity and the basic facts are the same" between the Government Action and the MP Actions. (Reply at 3-4 & n.6.) The court agrees with Amex.

It strains credulity for the MPs to claim that this case is essentially dissimilar from the Government Action. (See Opp'n at 3-4.) As in the Government Action, the plaintiffs claim that Amex is liable under the Sherman Act for restraining trade by including the NDPs in its merchant contracts. As in the Government Action, the plaintiffs' allegations are dependent on the economic realities of the credit-card market and the unique features of how Amex operates. And as in the Government Action, the plaintiffs seek to define the "relevant market" for Sherman Act purposes at least in part by reference to Amex's interactions with merchants alone, rather than by simultaneously scrutinizing Amex's interactions with merchants and cardholders.<sup>7</sup>

**[\*339]** The MPs argue that this case is distinguishable from the one that both the Supreme Court and the Second Circuit decided in Amex's \*\*45 favor because the MPs "have come forward with different relevant market facts." (Opp'n at 4.) As far as the court can tell, the MPs do not argue that there is actually anything different about the facts at issue in this action. Rather, the MPs want the chance to make arguments that they claim were not properly presented in the Government Action and that would, in their estimation, result in a different legal outcome from that reached in Ohio. These arguments include: that Amex is a "mature" market, thus calling into question whether it exhibits indirect network effects (Opp'n at 9-12); and that "there is abundant evidence that Amex does not 'balance' the prices on the two sides of its platform and that those prices are not 'relative' to each other or 'interconnected'" (id. at 12-15). The MPs are first incorrect that the Supreme Court must have explicitly considered an argument in order for its opinion to be binding as to that argument.<sup>8</sup> While the Ohio opinion does not mention the arguments made by the Government and its amici as to market maturity (see Opp'n at 12), the Court still held that "two-sided transaction platforms exhibit more pronounced indirect network effects" and thus that both sides \*\*46 of the platform must be included in the relevant-market analysis, Ohio, 138 S. Ct. at 2286-87.<sup>9</sup> Similarly, while the Ohio opinion may not

<sup>7</sup> Amex also points out that the MPs, in earlier filings in this action, admitted that "the basic facts and law in the Government [Action] and the MP Actions] are identical." (Reply at 3.)

<sup>8</sup> This court's construction of the Ohio holding does not violate the general rule that courts should not read Supreme Court opinions as "contain[ing] holdings on matters the Court did not discuss and which, presumably, the parties did not argue," Sweeney v. Westvaco Co., 926 F.2d 29, 40 (1st Cir. 1991) (Breyer, C.J.). (See also Opp'n at 12.) The relevant question in this instance is whether the Court discussed, and issued a holding on, whether Amex is a two-sided transaction platform and whether the "relevant market" for antitrust purposes contains both sides of the platform. Because the Court did so, see Ohio, 138 S. Ct. at 2286-87, the question of whether this holding incorporated the MPs' maturity theory is irrelevant.

<sup>9</sup> In support of their argument regarding market maturity, the MPs point to US Airways, Inc. v. Sabre Holdings Corp., No. 11-CV-2725 (LGS), 2017 U.S. Dist. LEXIS 40932, 2017 WL 1064709 (S.D.N.Y. Mar. 21, 2017), appeal filed, No. 17-983 (2d Cir. Apr. 6, 2017). (See Opp'n at 11.) In US Airways, the district court held that the Second Circuit's opinion in U.S. v. Amex did not foreclose the US Airways jury's finding of a one-sided market based on market maturity, in part because U.S. v. Amex "[did] not address or appear to consider market maturity." 2017 U.S. Dist. LEXIS 40932, 2017 WL 1064709, at \*10. But US Airways noted that the finding of a two-sided market in U.S. v. Amex occurred "in a different industry and with very different facts," id., suggesting that the Second Circuit's decision was binding on the facts of the Amex platform, which continue to be present in this case. While U.S. v. Amex and Ohio may not foreclose future antitrust plaintiffs from arguing that a supposedly two-sided market

critically engage with the claim that "Amex brings merchants and cardholders together and that credit card transactions occur simultaneously on both sides of the platform" (Opp'n at 14), it is clear that the Supreme Court based its holding on this assumption, even if it was "unchallenged" (*see id.*). See [Ohio, 138 S. Ct. at 2286](#) ("[T]wo-sided transaction platforms exhibit . . . interconnected pricing and demand. . . . In the credit-card market, these transactions are jointly consumed by a cardholder, who uses the payment card to make a transaction, and a merchant, who accepts the payment card as a method of payment." (internal quotation marks omitted)). The upshot of this analysis is that the MPs are wrong that [Ohio](#) "did not . . . [<sup>\*\*340</sup>]" hold that credit card platforms"—in particular, the Amex platform—"are two-sided markets as a matter of law." (Opp'n at 6.) While this rule is still subject to case-by-case application, cf. [US Airways, 2017 U.S. Dist. LEXIS 40932, 2017 WL 1064709, at \\*8](#) ("The relevant market for purposes of antitrust analysis may not be two-sided even though the defendant operates a two-sided platform."), this court may not deviate from the Court's clear [<sup>\*\*47</sup>] application of this rule to the facts of this case.

Nor are the MPs owed an opportunity to upset the Supreme Court's holdings on this matter. As Amex properly identifies, the relevant question is not whether the MPs are precluded as a matter of collateral estoppel and *res judicata* from making their arguments as to market maturity and the interconnectedness of the Amex platform; the question is whether [Ohio](#) held as a matter of law that the MPs' one-sided allegations cannot succeed.<sup>10</sup> (See Reply at 5-6 (citing [Taylor v. Sturgell, 553 U.S. 880, 128 S. Ct. 2161, 171 L. Ed. 2d 155 \(2008\)](#), and [Allen v. McCurry, 449 U.S. 90, 101 S. Ct. 411, 66 L. Ed. 2d 308 \(1980\)](#).) [Ohio](#) holds that Amex is a two-sided transaction platform that exhibits indirect network effects and interconnected pricing and demand, *see* [138 S. Ct. at 2286-87](#), a decision that is binding on this court as a matter of *stare decisis*. Cf. [US Airways, 2017 U.S. Dist. LEXIS 40932, 2017 WL 1064709, at \\*10](#). Any argument that the MPs, as nonparties to the Government Action, did not have a "full and fair opportunity to litigate the claims and issues settled in that suit," [Taylor, 553 U.S. at 892](#) (internal quotation marks omitted), is unavailing.<sup>11</sup>

The court also rejects the MPs' argument that [Ohio](#) does not bind this court on the grounds that market definition is typically thought of as a question of fact. (See Opp'n at 3.) The MPs are correct that, as a general rule, the question of market definition "is a highly factual one best allocated to the trier of fact." [Meredith Corp. v. SESAC LLC, 1 F. Supp. 3d 180, 219 \(S.D.N.Y. 2014\)](#) (quoting [Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 199 \(3d Cir. 1992\)](#)); *see* [Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899, 127 S. Ct. 2705, 168 L. Ed. 2d 623 \(2007\)](#) (discussing "[t]he case-by-case adjudication contemplated by the rule of reason"). Just because the definition of a relevant market necessarily involves considerations that must be adjudicated on a case-by-case basis does not, however, it does mean that courts are unable to conclude at the summary-judgment stage whether a relevant market can exist. See [Meredith Corp., 1 F. Supp. 3d at 219](#) (stating that, on a motion for summary judgment relating to the definition of a relevant market, the court must ask "whether there is sufficient evidence on which a trier of fact could adopt plaintiffs market definition"); cf. [Minzner, supra, at 609](#) ("The distinction between fact and law, while once true, is no longer so clear."). As stated above, the facts in the MP Actions are identical to those in the [<sup>\*\*341</sup>] Government Action. Because the Supreme Court has already answered the exact question presented to this [<sup>\*\*49</sup>] court with respect to the same defendant, the court may not find for the MPs on the basis of their one-sided market allegations.<sup>12</sup> See [Powers v. United States, 424 F.2d 593, 601-02, 191 Ct. Cl. 762 \(Ct. Cl.](#)

is actually one-sided due to the presence of market maturity, [US Airways](#) makes it clear that such an argument cannot survive on the facts of the MP Actions.

<sup>10</sup> Because vertical *stare decisis* is an absolute command, see Amy Coney Barrett, [Precedent and Jurisprudential Disagreement, 91 Tex. L. Rev. 1711, 1713 \(2013\)](#), this court is forbidden from revisiting a higher court's binding holding, no matter how little sense a bound party—or this court—may think the applicable rule of law makes.

<sup>11</sup> In [Taylor](#), the Supreme Court specifically recognized the possibility that a nonparty against whom a decision would not necessarily have a preclusive effect could still be barred as a matter of law from litigating "repetitive suits" through application of *stare decisis*. See [<sup>\*\*481</sup>] [553 U.S. at 893-95](#); *see also* [Rodriguez, 2008 U.S. Dist. LEXIS 108660, 2008 WL 5978925, at \\*2](#) (stating that litigation that involves "the exact same set of facts" as an earlier case would be "effectively foreclose[d]" as a matter of *stare decisis*).

1970) (stating that stare decisis applies "where the parties, the law, and the controlling facts remain the same, but the facts are separable in the two causes of action"); cf. McCabe v. Lifetime Entm't Servs., LLC, No. 17-CV-908 (ERK) (SJB), 2018 U.S. Dist. LEXIS 3212, 2018 WL 1521860, at \*16 (E.D.N.Y. Jan. 4, 2018) (finding that stare decisis precludes certification of a class to which the Second Circuit previously denied certification in a separate action), R&R adopted, Order (E.D.N.Y. Mar. 26, 2018), appeal filed, No. 18-1149 (2d Cir. Apr. 19, 2018); Rodriguez, 2008 U.S. Dist. LEXIS 108660, 2008 WL 5978925, at \*2 (stating that courts should apply stare decisis to foreclose relitigation of cases involving "the exact same set of facts").

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"[L]ike cases should be treated alike." 18 Moore, supra, § 134.01[1], at 134-9. Taking that command seriously, the court is compelled by the Supreme Court's decision in Ohio and the Second Circuit's decision in U.S. v. Amex to reject the MPs' one-sided market arguments as a matter of law. Accordingly, for the reasons set forth above, the court grants Amex's motion for summary judgment as to the MPs' one-sided market allegations. **[\*\*50]**

## B. Amex-Only Market Allegations

The second part of Amex's motion for summary judgment requires the court to ask whether this case may proceed to trial under the theory that Amex restrained competition within an Amex-only market.

As stated above, the MPs bear the burden of defining a relevant market within which Amex allegedly restrained trade. There is no dispute as to the geographical market at issue in this case. There is, however, a dispute as to the product market: While both sides agree that the MPs may define the product market by reference to all GPCCs, Amex argues that the MPs may not define a relevant submarket limited to Amex-only credit-card transactions. The court agrees with Amex and grants its motion for summary judgment as to an Amex-only market.

### 1. Doctrinal Overview

#### a. *Defining a Relevant Market*

"Defining a relevant product market is 'a process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take significant amounts of business away from each other.' Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll., 106 F. Supp. 2d 406, 411-12 (N.D.N.Y. 2000) (quoting Hayden Pub. Co. v. Cox Broad. Corp., 730 F.2d 64, 71 (2d Cir. 1984)). The "outer boundaries" of such a product market are determined by "the reasonable interchangeability [<sup>\*</sup>342] of [\*\*51] use or the cross-elasticity of demand between the product itself and substitutes for it." Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962); accord Chapman, 546 F.3d at 237. A product is reasonably interchangeable if it is "roughly equivalent to another for the use to which [the product] is put." Chapman, 546 F.3d at 238 (citation omitted). Reasonable interchangeability is indicated by the presence of "sufficient cross-elasticity of demand," which "exists if consumers would respond to a slight increase in the price of one product by switching to another product." Todd, 275 F.3d at 201-02; see also Intellective, Inc. v. Mass. Mut. Life Ins. Co., 190 F. Supp. 2d 600, 610 (S.D.N.Y. 2002) ("Interchangeability' looks to the use or function of the given product as compared to

<sup>12</sup> The cases that the MPs cite in support of their argument that the holding of Ohio cannot be given stare decisis effect are inapposite. (See Opp'n at 3.) In Complaint of Tug Helen B. Moran, Inc., 607 F.2d 1029 (2d Cir. 1979), the Second Circuit found that the apportionment of liability in one negligence case did not bind the district court's apportionment of liability in a subsequent case arising out of a different incident. The holding in Ohio is not a "determination[] of fact," and even if it were, the Second Circuit's consideration of stare decisis in Tug Helen B. Moran would not apply because this case is not one in which there are "different facts and a different record." See id. at 1031. And in United States v. Nolan, 136 F.3d 265 (2d Cir. 1998), the Second Circuit briefly mentioned stare decisis in dicta as a way of expressing the point that the same statute can be interpreted in a variety of ways depending on the factual situation. See id. at 269. That anodyne point is not relevant to the motion before the court.

other products. . . . 'Cross-elasticity' is related to interchangeability, and requires a consideration of the extent to which a change in the price of one product will alter demand for another product."). "[A]s a general rule, the process of defining the relevant market requires consideration of cross-elasticity of demand." [Hayden Pub., 730 F.2d at 71.](#)

"Reasonable interchangeability sketches the boundaries of a market, but there may also be cognizable submarkets which themselves constitute the appropriate market for antitrust analysis." [Geneva Pharms., 386 F.3d at 496](#) (citing [Brown Shoe, 370 U.S. at 325](#)). The Supreme Court has articulated a number of "practical indicia" that may allow "well-defined submarkets" [\*\*52] to "constitute product markets for antitrust purposes." [Brown Shoe, 370 U.S. at 325](#). These factors include "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."<sup>13</sup> [Brown Shoe, 370 U.S. at 325](#). As the Second Circuit has recognized, however, "[t]he term 'submarket' is somewhat of a misnomer, since the 'submarket' analysis simply clarifies whether two products are in fact 'reasonable' substitutes and are therefore part of the same market." [Geneva Pharms., 386 F.3d at 496](#). Therefore, an antitrust plaintiff seeking to define a relevant product submarket—like a plaintiff seeking to define a broader relevant market—must show that cross-elasticity of demand exists within the submarket. See [PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 615 F.3d 412, 418 \(5th Cir. 2010\)](#) ("[T]he requirements for pleading a submarket are no different from those for pleading a relevant broader market."); [Geneva Pharms., 386 F.3d at 496](#); [U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 995 \(11th Cir. 1993\)](#) ("[D]efining a 'submarket' is the equivalent of defining a relevant product market for antitrust purposes."); [PepsiCo, Inc. v. Coca-Cola Co., No. 98-CV-3282 \(LAP\), 1998 U.S. Dist. LEXIS 13440, 1998 WL 547088, at \\*5 \(S.D.N.Y. Aug. 27, 1998\)](#) ("Ultimately, a 'submarket' definition turns on the same inquiry as a 'market' definition—whether the products in a proposed submarket are reasonably interchangeable in [\*\*53] use or production with products in the broader market." (citation and internal quotation marks omitted)). But see [Geneva Pharms., 386 F.3d at 496](#) (analyzing the "competitive pressures" that create a submarket for generic warfarin sodium in spite of the "[f]unctional interchangeability" [\*343] between the brand name drug and its chemically identical generic equivalent).

#### *b. Single-Brand Markets*

It is an understatement to say that single-brand markets are disfavored. From nearly the inception of modern **antitrust law**, the Supreme Court has expressed skepticism of single-brand markets, stating that courts should not look at the power that certain manufacturers "have over their trademarked products" when asking whether monopolization exists, but rather that "[i]llegal [market] power must be appraised in terms of the competitive market for the product." [E. I. du Pont, 351 U.S. at 393](#) (emphasis added). Accordingly, time and time again, courts in this circuit have rejected attempts by antitrust plaintiffs to limit the relevant market to a single brand or product. [Mooney v. AXA Advisors, L.L.C., 19 F. Supp. 3d 486, 500 \(S.D.N.Y. 2014\)](#); see, e.g., [Planetarium Travel, Inc. v. Altour Int'l, Inc., 97 F. Supp. 3d 424, 429 \(S.D.N.Y. 2015\)](#) (rejecting plaintiff's attempt to limit product market to one airline-ticket-purchasing network); [Bookhouse of Stuyvesant Plaza, Inc. v. Amazon.com, Inc., 985 F. Supp. 2d 612, 620 \(S.D.N.Y. 2013\)](#) (rejecting construction of complaint that would allege harm to the U.S. market for e-books [\*\*54] that are readable on Amazon's Kindle devices and apps); [Global Discount Travel Servs., LLC v. Trans World Airlines, Inc., 960 F. Supp. 701, 705-06 \(S.D.N.Y. 1997\)](#) (Sotomayor, J.) (rejecting single-brand market allegations where customers were only "locked into" buying TWA tickets because of consumer preference); see also [Todd, 275 F.3d at 200](#) ("Cases in which dismissal on the pleadings is appropriate frequently involve . . . failed attempts to limit a product market to a single brand, franchise, institution, or comparable entity that competes with potential substitutes . . . ."). In order to overcome this heavy presumption, the plaintiff must point to "exceptional market conditions" that have created a market for a single brand that would otherwise be just "one brand in a market of competing brands." [Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 488 \(5th Cir. 1984\)](#); see [In re](#)

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<sup>13</sup> The Supreme Court's description of these factors as "practical indicia" indicates that this list is not intended to function as a "litmus test"—"submarkets can exist where only some of these factors are present." [Bon-Ton Stores, Inc. v. May Dep't Stores Co., 881 F. Supp. 860, 868 \(W.D.N.Y. 1994\)](#).

Fresh Del Monte Pineapples Antitrust Litig., No. 04-MD-1628 (RMB), 2009 U.S. Dist. LEXIS 97289, 2009 WL 3241401, at \*11 (S.D.N.Y. Sept. 30, 2009) (citing Domed Stadium Hotel, 732 F.2d at 488).

To illustrate the difficulties that plaintiffs seeking to define a single-brand market face, the court turns to the seminal case of Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430 (3d Cir. 1997). See Hack v. President & Fellows of Yale Coll., 237 F.3d 81, 85 (2d Cir. 2000) (citing Queen City Pizza, 124 F.3d at 438), abrogated on other grounds by Swierkiewicz v. Sorema N.A., 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002). In Queen City Pizza, the Third Circuit affirmed the dismissal of a claim that Domino's monopolized the market of "pizza supplies and ingredients for use in Domino's stores." 124 F.3d at 436. While the plaintiffs' franchise agreements with Domino's limited their ability to [\*\*55] purchase pizza supplies and ingredients that were not approved by Domino's, they could not argue that these other products were in any way distinguishable from the Domino's-approved products except in their designation by Domino's. It was unimportant whether the plaintiffs were able, under the terms of their contract with Domino's, to use non-Domino's-approved pizza supplies and ingredients; instead, the court asked whether "pizza makers in general might use such products"—that is, Domino's-approved and non-Domino's-approved products—"interchangeably." Id. at 438. Because the Domino's-approved and non-Domino's-approved products were interchangeable from the perspective of a [\*344] general pizza maker, a single-brand market was not appropriate. The overarching question regarding single-brand markets is thus not whether the plaintiffs have articulated certain factors that distinguish a certain product from similar products, but whether the product does not have reasonable interchangeability of use with rival products. See Global Discount Travel Servs., 960 F. Supp. at 705 ("A consumer might choose to purchase a certain product because the manufacturer has spent time and energy differentiating his or her creation from the panoply of products in the market, [\*\*56] but at base, Pepsi is one of many sodas, and NBC is just another television network.").

There is one situation in which courts generally agree that single-brand markets can succeed: an "aftermarket," which is "a type of derivative market consisting of consumable goods or replacement components that must be used for the proper functioning of some primary good," IIA Phillip Areeda et al., Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 564b, at 421 (4th ed. 2014). See Xerox Corp. v. Media Scis., Inc., 660 F. Supp. 2d 535, 543-45 (S.D.N.Y. 2009) (discussing Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992); Mathias v. Daily News, L.P., 152 F. Supp. 2d 465, 483 (S.D.N.Y. 2001)) (same). For example, in Eastman Kodak, the Supreme Court permitted an aftermarket composed of companies that service Kodak machines because, from the perspective of owners of Kodak equipment, "service and parts for Kodak equipment are not interchangeable with other manufacturers' service and parts." Eastman Kodak, 504 U.S. at 481-82. District courts in this circuit have recognized single-brand aftermarkets in similar circumstances. See Alt. Electrodes, LLC v. Empi, Inc., 597 F. Supp. 2d 322, 335 (E.D.N.Y. 2009); Xerox Corp. v. Media Scis. Int'l, Inc., 511 F. Supp. 2d 372, 385 (S.D.N.Y. 2007).

It is important to make clear that single-brand market definitions are not formally limited to the aftermarket context. See Mooney, 19 F. Supp. 3d at 501. Single-brand market allegations are usually rejected because they "are consistently pled in a manner that lacks plausibility or is otherwise untethered [\*\*57] to economic reality." Id. at 500-01. Accordingly, an antitrust plaintiff may succeed in defining a single-brand relevant market if it can establish that "a product's characteristics make it unique or circumstances prevent consumers from substituting alternatives for the same purposes." In re Payment Card Interchange Fee & Merch. Discount Antitrust Litig., 562 F. Supp. 2d 392, 403 (E.D.N.Y. 2008) (citing IIA Areeda et al., supra, ¶ 563d); see Mooney, 19 F. Supp. 3d at 500-01. In most cases, though, the product at issue—even if distinguishable from other products due to its brand or certain features—will have possible substitutes such that a single-brand market definition is inappropriate. See IIA Areeda et al., supra, ¶ 563d, at 413-14 (listing examples).

## 2. Application

The key question regarding the viability of MPs' Amex-only market allegations is whether the transactions<sup>14</sup> produced [\*345] by Amex are reasonably interchangeable with the transactions produced by other GPCCs, such as Visa, MasterCard, and Discover.<sup>15</sup> All parties agree that, from a cardholder's perspective, the transactions are interchangeable; that is, "if Amex raises its net two-sided price by increasing the price on the cardholder side (i.e., by reducing rewards), . . . [Amex] will lose cardholders and sales to MasterCard, Visa or Discover." (Opp'n at 20; see Amex Mem. at 10.) In Amex's view, that is the end of the inquiry: because [\*\*58] "competition between two-sided transaction platforms does not exist just on one side of the platform or the other," the admission that competition for transactions exists on the cardholder side of the platform precludes the court from defining an Amex-only market. (Amex Mem. at 10.) Not so, argue the MPs: they submit that they will be able to present evidence at trial that cross-elasticity of demand on the merchant side of the platform is "weak or non-existent"—in other words, that "Amex can raise its net two-sided price by increasing merchant fees while leaving rewards alone without losing sales to other credit cards"—thus making it inappropriate for the court to grant summary judgment as to the single-brand submarket allegations. (Opp'n at 20.)

The court does not think it prudent to state, as a matter of law, that cross-elasticity of demand on one side of a two-sided market forecloses the possibility that a single-brand market or submarket may be appropriate. It is true that one group of participants in the two-sided market before the court—the cardholders—treats Amex cards interchangeably [\*\*59] with other credit cards. But it is misguided to end the analysis there. If there is a disputed question of fact regarding whether the merchants treat Amex as interchangeable, there remains an open question as to whether the product at issue—the transactions—is actually interchangeable. This analysis is not, as Amex claims, an "attempt to segment the substitutability analysis." (Mem. at 10.) As the MPs point out, the Supreme Court has commanded that, in the case of a two-sided transaction market, courts "must look to 'both sides of the platform.'" (Opp'n at 22 (quoting [Ohio, 138 S. Ct. at 2286](#)); see id. at 21 (stating that there is "no rational basis" to look only at the cardholder side of the platform "where the anticompetitive restraint is directed only at the merchant side of the platform).)

But this is not the end of the inquiry. The "prevailing rule against single-brand markets" has multiple underpinnings which must be dealt with before the court may conclude that a single-brand market is appropriate. (See Mem. at 11.) Chief among these is the rule that a market of "otherwise identical products" cannot be rendered "non-interchangeable" simply by a plaintiff's assumption of contractual restraints. [Queen City Pizza, 124 F.3d at 438](#); accord [Smugglers Notch Homeowners' Ass'n v. Smugglers' Notch Mgmt. Co., 414 F. App'x 372, 377 \(2d Cir. 2011\)](#) (summary [\*\*60] order) (quoting [Queen City Pizza, 124 F.3d at 443](#)). Accordingly, where the defendant has "[e]conomic power" in a proposed market due exclusively to the "contractual arrangements" it has entered into with "a distinct class of consumers," an antitrust claim with respect to that market cannot lie. See [Hack, 237 F.3d at 85](#). An antitrust claim based on a contractual term voluntarily assumed by the plaintiff can only succeed if "the defendant's power to force plaintiffs" to accept [\*346] the allegedly anticompetitive provision "stems . . . from the market," not an agreement that the parties have entered into. [Smugglers Notch, 414 F. App'x at 376-77](#) (internal quotation marks omitted) (quoting [Queen City Pizza, 124 F.3d at 443](#)).

The MPs assert that Amex is unlawfully restraining trade through its imposition of anti-steering rules in the cardholder acceptance agreements that it enters into with merchants. (See Am. Compl. ¶ 1.) Amex argues that the MPs' claims as to an Amex-only market are barred because this market definition is "based on the contractual

<sup>14</sup> The product supplied by Amex is credit-card "transactions." [Ohio, 138 S. Ct. at 2286-87](#). A transaction occurs when Amex facilitates a cardholder's use of her card to buy a good at the same time that it facilitates a merchant's acceptance of the card to receive payment for the good. See id.; Benjamin Klein et al., [Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees](#), 73 Antitrust L.J. 571, 580 (2006) ("[P]ayment card transactions . . . are jointly consumed by a cardholder, who uses the payment card to make a transaction, and a merchant, who accepts the payment card as a method of payment.").

<sup>15</sup> The practical differences between Amex, which operates a "closed-loop" payment card system, and Visa and MasterCard, which operate "open-loop" systems, have been extensively discussed in the context of the Government Action. See [U.S. v. Amex, 838 F.3d at 188, 207-08](#); [U.S. v. Amex, 88 F. Supp. 3d at 157-58](#).

restraints at issue." (Mem. at 14.) In order to understand whether this defense is on-point, the court once again turns to Queen City Pizza. In Queen City Pizza, the franchisee plaintiffs alleged that Domino's was restraining trade in the market for Domino's-approved pizza [\*\*61] ingredients and supplies because franchisees could not use non-Domino's-approved products without violating the franchise agreement. 124 F.3d at 438. The court concluded that the only reason Domino's had power to restrain the plaintiffs from purchasing other—interchangeable—pizza ingredients and supplies was due to the contracts that the plaintiffs had voluntarily entered into, and that that was insufficient to make out a showing that Domino's had power in the market. See id. at 438-41.

The same seems true here: the MPs would be permitted to steer customers away from using Amex cards but for the inclusion of the NDPs in the contracts which the MPs voluntarily entered into with Amex; the only thing allegedly restraining competition for "Amex" transactions—and thereby distinguishing those transactions from transactions using any other credit card—are the NDPs. As Amex points out, the MPs have admitted to the fact that their single-brand market theory is based solely on the NDPs. (See Amex Rule 56.1 Statement of Material Facts (Dkt. 837) ¶ 36 ("[W]ith its Merchant Restraints in place, AmEx operates in a product market unto itself . . . ." (quoting Expert Report of Dr. Christopher A. Velturo ("Velturo I") (Dkt. 840-5) (under [\*\*62] seal) ¶ 104).) Indeed, in their brief in opposition to Amex's motion for summary judgment, the MPs seemingly do not dispute the contention that their "allegation for an Amex-only submarket is 'based on the contractual restraints at issue.'" (Opp'n at 22 (quoting Mem. at 14).) Instead, the MPs state that Queen City Pizza does not preclude their Amex-only market definition because here, unlike in Queen City Pizza, Amex has "pre-contract economic power that gives it the ability to compel merchants to accept its cards and agree to the anti-steering rules." (Id. at 24; see id. at 23.)

The MPs' Amex-only market allegations founder at this juncture, due to the fact that the MPs impermissibly seek to prove Amex's pre-contract market power by reference to "critical loss analysis." In general, a critical loss analysis "identifies the volume of business a supplier would have to lose (or correspondingly, the number of customers who would have to threaten to shift to another supplier) for a posited price increase to be rendered unprofitable." (Velturo I ¶ 106; see id. ¶¶ 109-13.) In this case, the MPs argue that a critical loss analysis would show that they are unable to respond to increases in Amex's merchant fees [\*\*63] by ceasing to accept Amex cards. (Opp'n at 23-24; see Velturo I ¶ 114.) This is so because a merchant that stops accepting Amex would suffer a greater "loss of profits on purchases by customers who no longer shop at the merchants because AmEx is no longer accepted" than it would gain profits from "a reduction in its payment acceptance costs on customers that it retains who now use a lower cost card rather than AmEx." (Velturo [\*347] I ¶ 107; see Opp'n at 24 ("[A] small loss of sales causes the merchant a greater loss than does the Amex anticompetitive overcharge.").) In other words, the supposed pre-contract power that Amex possesses that allegedly compels merchants to accept the terms of their cardholder agreement—including the NDPs—comes from the fact that Amex cardholders would rather take their business to an Amex-accepting merchant than use a different card to shop at a merchant that has ceased accepting Amex.

As Amex correctly identifies, this is cardholder insistence by another name.<sup>16</sup> (See Amex Reply at 8.) In the Government Action, this court relied on cardholder insistence—which refers to "the segment of Amex's cardholder base who insist on paying with their Amex cards and who would [\*\*64] shop elsewhere or spend less if unable to use their cards of choice"—for its finding that Amex possessed sufficient market power to cause an adverse effect on competition. See U.S. v. Amex, 88 F. Supp. 3d at 191. The Second Circuit reversed, stating that cardholder insistence could not form the basis of a finding of market power. U.S. v. Amex, 838 F.3d at 203-04. As the Second Circuit saw it, [c]ardholder insistence results not from market power, but instead from competitive benefits on the cardholder side of the platform and the concomitant competitive benefits to merchants who choose to accept Amex cards." Id. at 202. That statement compels the court's rejection of the MPs' Amex-only market allegations based on critical loss analysis.<sup>17</sup>

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<sup>16</sup> In their original opposition to Amex's motion for summary judgment as to an Amex-only submarket, the MPs treated the terms "critical loss analysis" and "insistence" as interchangeable. (See MPs Nov. 21, 2013, Mem. in Opp'n to Amex Mot. for Summ. J. (Dkt. 715) at 20, 22; see also Amex Reply at 9.)

<sup>17</sup> The MPs argue that the Second Circuit's discussion of cardholder insistence is irrelevant to the question of whether they can define an Amex-only relevant market because that court's opinion only discussed cardholder insistence in the context of market

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Because the MPs cannot define a single-brand market without reference to the contractual restraints at issue in this case, and because the MPs have not made a legally permissible allegation that Amex possessed pre-contract market power that compelled acceptance of the NDPS, the MPs' Amex-only market fails as a matter of law. Accordingly, the court grants Amex's motion for summary judgment as to the MPs' Amex-only market allegations.

#### IV. CONCLUSION

For the foregoing reasons, the court GRANTS Amex's motion for [\*\*65] partial summary judgment (Dkt. 835). Counsel for both sides are DIRECTED, by no later than January 25, 2019, to provide the court with a joint update regarding the anticipated length of trial in light of this memorandum and order. Both sides are also DIRECTED to confer and contact the court's Deputy at 718-613-2545 to schedule a status conference to discuss pretrial issues.

SO ORDERED.

Dated: Brooklyn, New York

January 14, 2019

/s/ Nicholas G. Garaufis

NICHOLAS G. GARAUFIS

United States District Judge

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power. (Opp'n at 19 & n.6.) The MPs read the Second Circuit's opinion too narrowly. As discussed above, the question of whether the MPs may proceed as to an Amex-only market turns on the question of whether Amex's power to force the MPs to agree to the NDPS stems from the market or from the contract. See *Smugglers Notch*, 414 F. App'x at 376-77. Accordingly, the Second Circuit's findings as to insistence in the context of market power are applicable here, where the definition of the relevant market requires analysis of market power.



## Shandong Lihong Tech. Ltd. Crop v. Masimo Corp.

Superior Court of California, County of Orange

January 14, 2019, Decided; January 14, 2019, Filed

CASE NO: 30-2018-01002779-CU-BT-CJC

### **Reporter**

2019 Cal. Super. LEXIS 18904 \*

Shandong Lihong Technology Limited Corp v. Masimo Corporation

## **Core Terms**

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unfair, cause of action, fair dealing, leave to amend, allegations, competitor, demurrer, alleged facts, first cause, good faith, unfair act, unfair business practice, covenant of good faith, member of the public, contracting parties, fraudulent practice, breach of contract, breach of covenant, notice of ruling, violation of law, anti trust law, public policy, conditions, consumers, deception, threatens, benefits, deceived, unfairly, harmed

## **Opinion**

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### **[\*1] MINUTE ORDER**

There are no appearances by any party.

The Court, having taken the above-entitled matters under submission on January 11, 2019, and having fully considered the arguments of all parties, both written and oral, now rules as follows:

### **NOTICE OF RULING**

Defendant Masimo Corporation's demurrer to Plaintiff Shandong Lihong Technology Limited Crop's First Amended Complaint ("FAC") is sustained with 15 days leave to amend.

#### Violation of *Business and Professions Code Section 17200* (First Cause of Action)

In the first cause of action, Plaintiff alleges violation of *Business and Professions Code section 17200* (the "UCL"). The UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Under the unlawful prong, a violation of law may be actionable as unfair competition under the UCL. (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 81, 163 Cal. Rptr. 3d 804.) "An unfair business practice occurs when that practice offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers... An unfair business practice also means the public policy which is a predicate to the action must be tethered to specific constitutional, statutory or regulatory provisions." (*Ibid.* [internal citations omitted].) A fraudulent [\*2] practice "require[s] only a showing that members of the public are likely to be deceived and can be shown even without allegations of actual deception, reasonable reliance and damage." (*Ibid.* [internal citations omitted].)

The UCL "was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive." (*Cel-Tech*

[Communications, Inc. v. Los Angeles Cellular Telephone Co. \(1999\) 20 Cal.4th 163, 181, 83 Cal. Rptr. 2d 548, 973 P.2d 527](#) [internal citations and quotations omitted.] While the UCL's scope is broad, it is not unlimited. In order to give businesses fair notice of what they can and cannot do, the California Supreme Court has cautioned that "[c]ourts may not simply impose their own notions of the day as to what is fair or unfair." (*Id. at p. 182.*) For this reason, the California Supreme Court developed a test when the plaintiff is commercial competitor whether the conduct or practice is "unfair." "When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes [section 17200](#), the word 'unfair' in that section means conduct that threatens an incipient violation of an [antitrust law](#), or violates the policy or spirit of one of those laws because its effects are comparable [\*3] to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Id. at p. 187.*) In articulating this test, the California Supreme Court was careful to emphasize that harm "to a competitor is not equivalent to [harm] to competition," and that "only the latter is the proper focus of antitrust laws." (*Id. at p. 186.*) "The UCL's purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." ([Kasky v. Nike, Inc. \(2002\) 27 Cal.4th 939, 949, 119 Cal. Rptr. 2d 296, 45 P.3d 243; Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra, 20 Cal.4th at p. 180.](#))

Here, the FAC does not allege an unlawful business act or practice. The FAC also does not allege a fraudulent practice because it does not allege facts to show that members of the public are likely to be deceived. (See [Lueras v. BAC Home Loans Servicing, LP, supra, 221 Cal.App.4th at p. 81.](#))

The FAC's allegations of Defendant's alleged use of Plaintiff's customers' names and addresses and plaintiff's market information, also does not constitute an unfair conduct or practice. Plaintiff's allegations, if true, allege unfair acts in a more generalized moral sense. However, they fail to allege an unfair act or practice as set forth in *Cel-Tech*. (See [Celebrity Chefs Tour, LLC v. Macy's Inc. \(S.D. Cal. 2014\) 16 F.Supp.3d 1141, 1156.](#)) Plaintiff's allegations merely indicate harm to its commercial interests, rather than harm to competition. Accordingly, the demurrer as to the [\*4] first cause of action is sustained with 15 days leave to amend.

#### Breach of Contract (Second Cause of Action)

The elements for a cause of action for breach of contract are "the existence of the contract, performance by the plaintiff or excuse for nonperformance, breach by the defendant and damages." ([First Commercial Mortgage Co. v. Reece \(2001\) 89 Cal.App.4th 731, 745, 108 Cal. Rptr. 2d 23.](#)) Plaintiff does not allege any facts to show how Defendant breached the distribution agreement. Accordingly, the demurrer as to the second cause of action is sustained with 15 days leave to amend.

#### Breach of Covenant of Good Faith and Fair Dealing (Third Cause of Action)

To state a claim for a breach of the implied covenant of good faith and fair dealing, Plaintiff must allege all of the following: (1) that plaintiff and defendant entered into a contract; (2) that plaintiff did all, or substantially all of the significant things that the contract required it to do, or that it was excused from having to do those things; (3) that all conditions required for defendant's performance had occurred; (4) that defendant unfairly interfered with plaintiff's right to receive the benefits of the contract; and (5) that plaintiff was harmed from defendant's conduct. (CACI no. 325.) "The covenant of good [\*5] faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." ([Guz v. Bechtel National, Ind. \(2000\) 24 Cal.4th 317, 349, 100 Cal. Rptr. 2d 352, 8 P.3d 1089.](#)) "With the exception of bad faith insurance cases, a breach of the covenant of good faith and fair dealing permits a recovery solely in contract." ([Spinks v. Equity Residential Briarwood Apartments \(2009\) 171 Cal.App.4th 1004, 1054, 90 Cal. Rptr. 3d 453](#) [internal citations omitted].)

Here, Plaintiff does not allege facts to show breach of the implied covenant of good faith and fair dealing. For instance, Plaintiff does not allege facts to show that all conditions required for Defendant's performance had occurred. Accordingly, the demurrer as to the third cause of action is sustained with 15 days leave to amend.

The Clerk shall give notice of the ruling.

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## Sentinel Global Prod. Sols., Inc. v. Hydrofarm, Inc.

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

January 17, 2019, Opinion Filed

A149017

### **Reporter**

2019 Cal. App. Unpub. LEXIS 417 \*; 2019 WL 244550

SENTINEL GLOBAL PRODUCT SOLUTIONS, INC., Plaintiff and Appellant, v. HYDROFARM, INC., Defendant and Respondent.

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

**Prior History:** [\*1] Sonoma County Super. Ct. No. SCV-254184.

### **Core Terms**

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translation, cause of action, declaration, products, prospective economic advantage, unfair, triable issue, disrupt, intentional interference, venture, enforceable contract, economic relations, trial court, contractual, summary judgment, material fact, manufacture, contractual relationship, unfair competition, italics omitted, certification, interfere, asserts, induce

**Judges:** Banke, J.; Humes, P. J., Margulies, J. concurred.

**Opinion by:** Banke, J.

### **Opinion**

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Plaintiff Sentinel Global Product Solutions, Inc. (Sentinel) sold the products of a Chinese company, Xiamen Superpro Technology Company, Ltd. (Superpro), to, among others, defendant Hydrofarm, Inc. (Hydrofarm). Sentinel claims it had an agreement with Superpro that it would be Superpro's exclusive distributor in the United States.

When Hydrofarm began purchasing products directly from Superpro, rather than Sentinel, Sentinel sued Hydrofarm for tortious interference with contract, tortious interference with prospective economic advantage, and unfair competition. The trial court granted Hydrofarm's motion for summary judgment. We affirm.

### **BACKGROUND**

In 2005, Gregory Moore, Keith Harrington and Russell Winnett agreed to form Sentinel to sell products used in hydroponic gardening.<sup>1</sup>

Harrington and Winnett subsequently met with two Chinese citizens, Xu Liqiang (Xu) and Lin Yaoliang (Lin), to discuss the manufacturing of a component to be used in hydroponic indoor gardening. Xu and Lin agreed to design and manufacture the component. Harrington suggested Xu and Lin form a manufacturing company, which [\*2] they did, creating Superpro.

In 2006, Harrington and Moore, as "legal representative[s]" of Interplas LLC and Redwood Imports LLC, respectively, signed a joint venture agreement with Xiamen Kunlun Technology Co., Ltd. (Xiamen), "co-invested by [Xu] and [Lin]." The agreement, entitled "Contrac[t] of a Chinese-Foreign Equity Joint Venture," provided that the parties would "set up a joint venture limited liability company in the PRC [(People's Republic of China)] (hereinafter referred to as the 'JVC'), named as Superpro Automation Technology Co. Ltd."

The agreement specified, "The establishment of the JVC shall start from the date on which the business license of the JVC is issued." It further provided, "This contract shall come into force with effect from the date of approval by the examination and approval of Huli District Foreign Investment Bureau." The agreement also stated, "The formation of this contract, its validity, interpretation, execution, amendment, termination and settlement of disputes shall be governed by the laws of the PRC." "All activities of the JVC shall be governed by the laws, decrees and relevant rules and regulations of the PRC and the JVC shall be subject to the [\*3] jurisdiction and protection of PRC laws." Xiamen was responsible for "[a]ssisting in handling applications for approval, registration and other matters for the establishment of the JVC in the PRC."

Thus, it was not disputed that "[t]he [a]llied JVA specified clearly that approval by the Chinese government was required before the venture would be valid and enforceable, and that Chinese law would govern the agreement."

Three years later, in 2009, Sentinel and Superpro executed a "Letter of Intent for the Joint Venture: Superpro Electronic (Xiamen) Co. Ltd." The letter provided "both parties agree to establish Superpro Electronic (Xiamen) Co., Ltd . . . subject to the terms and conditions as stipulated hereinafter." It also provided Sentinel "can sell products in their territory to North America, South America, Europe, UK, New Zealand, Australia and Africa," while "Superpro can sell products within their territory. Asia includes China, Japan, Vietnam, Philippines etc."

In 2011, Moore purchased Winnett's interest in Sentinel. The purchase agreement provided, among other things, that Winnett "agrees and covenants that for a period of five years . . . after the Effective Date, he shall not, [\*4] nor on behalf of any other person or entity, directly or indirectly . . . (ii) interfere with or disrupt, or attempt to interfere with or disrupt, the relationship, contractual or otherwise, between [Sentinel] and any customer, supplier, partner or employee of [Sentinel]." Apparently, Winnett commenced working, on a commission basis, for Superpro, and subsequently went to work for Growop Technology, Ltd. (Growop), a California corporation. He is the only named defendant in a fourth cause of action for breach of contract, which alleges Winnett breached the buyout agreement "by accepting employment with Growop."

In August 2012, Superpro began selling products directly to Hydrofarm and Worm's Way, another defendant who is not a party to this appeal. Hydrofarm and Worm's Way then stopped purchasing products from Sentinel.

The court granted summary judgment in favor of Hydrofarm and Worm's Way.<sup>2</sup>

## DISCUSSION

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<sup>1</sup> Moore is the "President and co-founder" of Sentinel. Harrington and Winnett are defendants in the underlying action. Harrington "quit as a partner of Sentinel" in 2009, while Winnett sold his interest in 2011. Superpro, the Chinese manufacturing company, was not named as a defendant.

<sup>2</sup> Although Sentinel's notice of appeal states it has appealed from the judgment, in its briefing Sentinel asks only that this court "vacate the Judgment issued in favor of Hydrofarm."

### **Standard of Review**

The standard of review on appeal from a summary judgment is de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860, 107 Cal. Rptr. 2d 841, 24 P.3d 493 (*Aguilar*); *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334, 100 Cal. Rptr. 2d 352, 8 P.3d 1089.) In general, summary judgment: "shall be granted if . . . there is no triable issue as to any material fact. . . . In determining if the papers show that there is no triable issue as to [\*5] any material fact, the court shall consider all of the evidence set forth in the papers . . . and all inferences reasonably deducible from the evidence . . . [unless] contradicted by other inferences or evidence that raise a triable issue as to any material fact." (*Code Civ. Proc.*, § 437c, subd. (c).)

The moving party bears the burden of showing, to a degree equal to the standard of proof at trial, that there is no issue of material fact on any cause of action; if the moving party succeeds, then the opposing party bears the burden of presenting competent evidence raising an issue of material fact. (*Aguilar, supra*, 25 Cal.4th at p. 845; see *Code Civ. Proc.*, § 437c, subd. (p)(2).) We "determine with respect to each cause of action whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff's case, or has demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial, such that the defendant is entitled to judgment as a matter of law." (*Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at p. 334.)

### **Cause of Action for Intentional Interference with Contract**

The elements of a cause of action for intentional interference with contractual relations are: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's [\*6] intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126, 270 Cal. Rptr. 1, 791 P.2d 587.)

"In its simplest terms, to be liable for inducing breach of contract, there must be a valid contract." (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 595, 52 Cal. Rptr. 2d 877 (*PMC*), disapproved on another ground by *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (*Korea Supply*).) "It is logical to force the plaintiff to plead and prove an enforceable contract when stating a cause of action for intentional interference with contract. If a party is not obligated to perform a contract and may refuse to do so at his election without penalty, then the other party to that agreement enjoys nothing more than an expectancy." (*PMC, at p. 599*.) *PMC* held that "a cause of action for intentional interference with contract requires an underlying enforceable contract. Where there is no existing, enforceable contract, only a claim for interference with prospective advantage may be pleaded. To [conclude] otherwise unnecessarily confuses the two torts and fails to recognize their inherent differences." (*Id. at p. 601*, italics omitted.)

"*PMC*'s recognition of the inherent differences between the two interference torts was based in large part on the discussion of [\*7] those differences in *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 45 Cal. Rptr. 2d 436, 902 P.2d 740 [(*Della Penna*)]. . . . *Della Penna* addressed 'the need to draw and enforce a sharpened distinction between claims for tortious disruption of an existing contract and claims that a prospective contractual or economic relationship has been interfered with by the defendant.' [Citation.] Emphasizing that the two torts are analytically different, *Della Penna* stated: [¶] 'The courts provide a damage remedy against third party conduct intended to disrupt an existing contract precisely because the exchange of promises resulting in such a formally cemented economic relationship is deemed worthy of protection from interference by a stranger to the agreement. Economic relationships short of contractual, however, should stand on a different legal footing as far as the potential for tort liability is reckoned. Because ours is a culture firmly wedded to the social rewards of commercial contests, the law usually takes care to draw lines of legal liability in a way that maximizes areas of competition free of legal penalties.'" (*Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners* (1997) 52 Cal.App.4th 867, 878, 60 Cal. Rptr. 2d 830 (*Bed, Bath & Beyond*), italics omitted.)

*Bed, Bath and Beyond* agreed with "PMC's analysis and conclusion that a cause of action for intentional interference [<sup>\*8</sup>] with contractual relations requires an underlying enforceable contract, and where the underlying contract is unenforceable, only a claim for interference with prospective economic advantage lies. We believe this rule is a proper extension of the California Supreme Court's admonition that courts should not blur the analytical line between the two interference torts and its recognition that the 'formally cemented economic relationship' created by an 'existing contract' is entitled to greater solicitude than a relationship falling short of that." (*Bed, Bath & Beyond, supra, 52 Cal.App.4th at p. 879*, italics omitted.)

#### **No Triable Issue of an Enforceable Contract**

As to the first element of a contractual interference claim, it is undisputed that neither the joint venture agreement nor the letter of intent were ever approved by the Chinese government, as required under Chinese law and the terms of the joint venture agreement.

Sentinel claims, however, that "[t]he mere fact that the [joint venture agreement] was not completed under Chinese law, or that the 2009 [letter of intent] was pending at the time of the 2011-12 interference by Hydrofarm did not preclude the trial court from finding a valid and enforceable contract." Relying on *Golden v. Anderson (1967) 256 Cal.App.2d 714, 719, 64 Cal. Rptr. 404* Sentinel [<sup>\*9</sup>] maintains "[c]ontracts which are voidable by reason of the statute of frauds, formal defects, lack of consideration, lack of mutuality, or even uncertainty of term, still afford a basis for a tort action when the defendant interferes with their performance."

*Golden*, however, was decided before cases drew "a clear distinction between tort liability for interference with a contract and tort liability for interference with prospective economic advantage." (*Bed, Bath & Beyond, supra, 52 Cal.App.4th at p. 880, fn. 9.*) Prior to the California Supreme Court's holding in *Della Penna*, the distinction between those two causes of action was "blurred in California case law." (*Bed, Bath & Beyond, at p. 880, fn. 9.*) As *Bed, Bath & Beyond* explained, "[t]he rule we adopt from PMC is not inconsistent with [Golden], as it does not preclude imposition of tort liability for interference with an unenforceable contract; it merely limits the scope of such liability to a claim for interference with prospective economic advantage." (*Ibid.*)

Accordingly, there is no merit to Sentinel's claim that it can maintain a cause of action for contractual inference in the absence of an enforceable contract.

#### **No Triable Issue of Actual Knowledge**

As to the second element of a contractual interference claim, Sentinel [<sup>\*10</sup>] failed to raise a triable issue that Hydrofarm "had actual knowledge that [Sentinel] had or claimed to have an exclusive North American distributorship with Superpro." Indeed, Sentinel concedes that even the letter of intent, which it claims was the "operative agreement," "does not specifically state that the sales and distribution rights are exclusive to Sentinel."

Sentinel asserts, however, that the "actual knowledge" requirement does not require that Hydrofarm "be aware of . . . the specific terms of the contract, including whether Sentinel had exclusive distribution rights." Sentinel is mistaken. Hydrofarm could not intentionally interfere with an alleged exclusive distributorship agreement if it did not know such an agreement existed. (See *Pacific Gas & Electric Co. v. Bear Stearns & Co., supra, 50 Cal.3d at p. 1126; Ramona Manor Convalescent Hospital v. Care Enterprises (1986) 177 Cal.App.3d 1120, 1130, 225 Cal. Rptr. 120* ["If the actor had no knowledge of the existence of the contract or his actions were not intended to induce a breach, he cannot be held liable. . . ." Italics omitted].)

Apparently acknowledging the lack of evidence that Hydrofarm had any actual knowledge of the purported exclusive distributor agreement, Sentinel additionally asserts that former co-owner Winnett's knowledge "of the contractual agreements and relations was legally imputed [<sup>\*11</sup>] to Hydrofarm." This is so, Sentinel claims, because Winnett was acting as *Hydrofarm's* agent in facilitating sales between Superpro (for whom Winnett was working) to *Hydrofarm*.

In an agency relationship, ""(1) An agent or apparent agent holds a power to alter the legal relations between the principal and third persons and between the principal and himself; (2) an agent is a fiduciary with respect to matters within the scope of the agency; and (3) a principal has the right to control the conduct of the agent with respect to matters entrusted to him.""  
[\*\(Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp. \(2007\) 148 Cal.App.4th 937, 964, 56 Cal. Rptr. 3d 177.\)\*](#)

Sentinel points to no evidence of any of these attributes as between Winnett and Hydrofarm. Specifically, there is no evidence Winnett was empowered to alter Hydrofarm's legal relations or that he was a fiduciary of Hydrofarm. On the contrary, as Sentinel asserts, and the evidence shows, Winnett was working for Superpro and "had a written agreement to be paid sales commissions by Superpro on sales to Hydrofarm." Furthermore, Winnett's knowledge, as a former co-owner of Sentinel, of any agreements between Sentinel and Superpro would include, as Sentinel concedes, that the "operative agreement" "does not specifically state that the sales [\*12] and distribution rights are exclusive to Sentinel."

Accordingly, Sentinel failed to meet its burden to raise a triable issue as to the requisite elements of a cause of action for intentional interference with contractual relations.

### **Cause of Action for Interference with Prospective Economic Advantage**

"Intentional interference with prospective economic advantage has five elements: (1) the existence, between the plaintiff and some third party, of an economic relationship that contains the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentionally wrongful acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm proximately caused by the defendant's action." ([\*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc. \(2017\) 2 Cal.5th 505, 512, 213 Cal. Rptr. 3d 568, 388 P.3d 800.\*](#))

"The tort of interference with prospective economic advantage protects the same interest in stable economic relationships as does the tort of interference with contract, though interference with prospective advantage does not require proof of a legally binding contract. [Citation.] The chief practical distinction between interference with contract and interference with prospective economic advantage is that a broader [\*13] range of privilege to interfere is recognized when the relationship or economic advantage interfered with is only prospective." ([\*Pacific Gas & Electric Co. v. Bear Stearns & Co., supra, 50 Cal.3d at p. 1126\*](#), fn. omitted.)

"[A] plaintiff seeking to recover for alleged interference with prospective economic relations has the burden of pleading and proving that the defendant's interference was wrongful 'by some measure beyond the fact of the interference itself.'" ([\*Della Penna, supra, 11 Cal.4th at pp. 392-393.\*](#)) "[A]fter *Della Penna* the elements of the tort of interference with prospective economic advantage remain the same, except that the third element also requires a plaintiff to plead intentional wrongful acts on the part of the defendant designed to disrupt the relationship." ([\*Korea Supply, supra, 29 Cal.4th at p. 1154\*](#), italics omitted.) "California has required plaintiffs to show that a defendant has engaged in an independently, or inherently, wrongful act." ([\*Id. at p. 1161.\*](#))

"[W]hile intentionally interfering with an existing contract is 'a wrong in and of itself' [citation], intentionally interfering with a plaintiff's prospective economic advantage is not. . . . An act is not independently wrongful merely because defendant acted with an improper motive. As we said in *Della Penna*, 'the law usually takes care to draw lines of legal liability in a way that [\*14] maximizes areas of competition free of legal penalties.' ([\*Della Penna, supra, 11 Cal.4th at p. 392.\*](#)) The tort of intentional interference with prospective economic advantage is not intended to punish individuals or commercial entities for their choice of commercial relationships or their pursuit of commercial objectives, unless their interference amounts to independently actionable conduct. [Citation.] We conclude, therefore, that an act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." ([\*Korea Supply, supra, 29 Cal.4th at pp. 1158-1159.\*](#))

Sentinel claims Hydrofarm's alleged independent wrongful conduct was "tacitly inducing Russ Winnett to materially breach the non-[interference] clause of his [buy-out] agreement with Sentinel." Hydrofarm did this, Sentinel asserts, by "encourag[ing] [Winnett's] efforts to secure Superpro as a supplier to Hydrofarm." But Sentinel does not identify any evidence that Hydrofarm knew of the non-interference clause in the buy-out agreement between Winnett and Sentinel. Nor does Sentinel identify any facts evidencing a "tacit" inducement to breach the Winnett/Sentinel agreement. Indeed, in its cause of action against Winnett [\*15] for breach of the non-interference clause, Sentinel alleges he did so by accepting employment with Growop, not by attempting to "secure Superpro as a supplier to Hydrofarm."

Thus, as the trial court concluded, Sentinel failed to produce evidence "showing that [Hydrofarm] engaged in any independently wrongful conduct beyond the alleged interference" and thus failed to raise a triable issue as to a material element of a cause of action for tortious interference with prospective economic advantage.

### **Cause of Action for Unfair Competition**

In its third cause of action for unfair competition under [Business and Professions Code section 17200](#), Sentinel alleged Hydrofarm "unfairly utilized information obtained through their role as distributors of [Sentinel's] products to sell almost identical products without the cost of research, design and development and creation of a factory equipped to manufacture the products." Sentinel specifically claims there is a triable issue as to "whether Hydrofarm unfairly took advantage of the industry and efforts of Sentinel by using and employing confidential information regarding the manufacture of the hydroponic products sold by Sentinel, copying the designs and appearance of the products, and then thereafter [\*16] directly competing with Sentinel after illicitly obtaining access to Superpro's engineers."

"Because [Business and Professions Code section 17200](#) is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent. "In other words, a practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' and vice versa.'"'" ([Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. \(1999\) 20 Cal.4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527](#) (Cel-Tech).)

"Although the unfair competition law's scope is sweeping, it is not unlimited. Courts may not simply impose their own notions of the day as to what is fair or unfair." ([Cel-Tech, supra, 20 Cal.4th at p. 182](#).) Cel-Tech noted, "A few Courts of Appeal have attempted a definition. (E.g., [People v. Casa Blanca Convalescent Homes, Inc. \(1984\) 159 Cal.App.3d 509, 530, 206 Cal. Rptr. 164](#). . . . '[A]n "unfair" business practice occurs when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.']; [State Farm Fire & Casualty Co. v. Superior Court \[\(1996\)\] 45 Cal.App.4th \[1093.\] 1104, 53 Cal. Rptr. 2d 229](#) ["the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim"].)" ([Cel-Tech, at p. 184.](#))

Cel-Tech concluded earlier attempts to define "unfairness" resulted in "definitions [that] are too amorphous and provide too little guidance to courts and businesses." ([Cel-Tech, supra, 20 Cal.4th at p. 185](#).) It explained: "any finding of unfairness to competitors under [[Business and Professions Code\] section 17200](#) [must] [\*17] be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition. We thus adopt the following test: When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes [[Business and Professions Code\] section 17200](#), the word 'unfair' in that section means conduct that threatens an incipient violation of an [antitrust law](#), or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." ([Cel-Tech, at pp. 186-187.](#))

As the trial court ruled, Sentinel's operative complaint "fail[ed] to allege a single unlawful act." While the complaint "alludes to possible trademark violations, or trade secret, or trade dress issues . . . it alleges no violation of any statute."

Apparently recognizing this, Sentinel asserts in its briefing on appeal only "unfairness" by Hydrofarm. Sentinel claims this alleged unfairness took the form of taking "advantage of the industry and efforts of Sentinel," "using and employing confidential information," "copying the designs and appearance of the products," and "directly competing with Sentinel."

Sentinel, however, failed to [\*18] meet its burden of presenting competent evidence raising an issue of material fact in this regard. ([Aguilar, supra, 25 Cal.4th at p. 845](#).) There is no evidence Hydrofarm was a manufacturer of the products at issue, rather than simply a buyer. Sentinel's brief does not identify what allegedly "confidential information" Hydrofarm used. The complaint alleges only that Hydrofarm "unfairly utilized information obtained through [its] role as distributor[] of [Sentinel's] products." And, even assuming Hydrofarm's purchase of products directly from Superpro made it a direct competitor of Sentinel, direct competition itself is not illegal or unfair. Indeed, the Unfair Competition Law seeks to protect "fair competition in commercial markets for goods and services." ([Kwikset Corp. v. Superior Court \(2011\) 51 Cal.4th 310, 320, 120 Cal. Rptr. 3d 741, 246 P.3d 877](#).) As Sentinel itself acknowledged, "[i]njury to a competitor is not equivalent to injury to competition. . . . [([Cel-Tech](#) II, *supra*, 20 Cal.4th at [p.] 186.{}])]

### **Evidentiary Objection to Declaration of Xu Liqiang**

Sentinel also claims the trial court erred in overruling its objection to the declaration of Xu, a founder of Superpro, because Hydrofarm "failed to submit a translator's declaration." Xu's declaration, which was properly sworn, was in English. However, the declaration [\*19] recited, among other things, that prior to signing the declaration, Xu had reviewed a Chinese translation.

We review a trial court's evidentiary ruling for abuse of discretion. ([People v. McCurdy \(2014\) 59 Cal.4th 1063, 1095, 176 Cal. Rptr. 3d 103, 331 P.3d 265](#).)

Sentinel claims [Evidence Code sections 750, 751, subdivision \(a\)](#) and [752, subdivision \(a\)](#) required that a translator's declaration be filed in conjunction with Xu's declaration. [Evidence Code section 750](#) provides: "A person who serves as an interpreter or translator in any action is subject to all the rules of law relating to witnesses." [Evidence Code section 751](#) provides, in part: "A translator shall take an oath that he or she will make a true translation in the English language of any writing he or she is to decipher or translate." ([Evid. Code, § 751, subd. \(c\).](#)) [Evidence Code section 753](#) provides, in turn, that: "When the written characters in a writing offered in evidence are incapable of being deciphered or understood directly, a translator who can decipher the characters or understand the language shall be sworn to decipher or translate the writing." ([Evid. Code, § 753, subd. \(a\).](#))

It is unclear whether these statutory provisions even apply to Xu's declaration, given that the document submitted to the court was in English and in no need of translation.

But even if Xu's English declaration was subject to the Evidence Code "oath" requirements, counsel for co-defendant Worm's Way submitted a declaration [\*20] that she retained TransPerfect Translations, Inc. to translate Xu's declaration from English to Chinese for his review. As an exhibit to her declaration, counsel attached a "certification" by an employee of TransPerfect Translations, Inc. certifying that the English to Chinese translation was "produced . . . according to our . . . certified quality management system, and has been validated and judged to be a true and accurate translation." This certification was "[s]worn to before" an Illinois notary public. Sentinel then filed "Amended Evidentiary Objections" to Xu's declaration, addressing the translation issues. Hydrofarm filed a declaration of the same TransPerfect Translations employee, made under California law, in which she reaffirmed that the translation was true and accurate.

Sentinel maintains, however, that the trial court "did not consider the Translator's Certification." This is so, it claims, because the court stated in its order granting summary judgment that "This ruling does not consider any of the new evidence submitted with the reply," and the certification was submitted with the reply. But that is not a fair reading of the trial court's order. Rather, read in the [\*21] context of all the parties' submissions, it is apparent the court was

not referring to the translator's certification, but to the "large volume of new evidence" proffered by the parties, "none of which is included in their original Separate Statement."

We, thus, conclude that on this record, the trial court did not abuse its discretion in overruling Sentinel's objection to Xu's declaration.

**DISPOSITION**

The judgment is affirmed. Costs on appeal to respondent.

Banke, J.

We concur:

Humes, P. J.

Margulies, J.

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## O1 Communs., Inc. v. MCI Communs. Servs.

United States District Court for the Eastern District of California

January 18, 2019, Decided; January 18, 2019, Filed

No. 2:18-cv-01950-JAM-DB

### **Reporter**

2019 U.S. Dist. LEXIS 9459 \*; 2019 WL 266253

O1 COMMUNICATIONS, INC., Plaintiff, v. MCI COMMUNICATIONS SERVICES, INC. and VERIZON SELECT SERVICES INC., Defendants.

### **Core Terms**

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Communications, rates, tariffed, alleges, Defendants', switched, charges, breach of contract claim, VoIP Symmetry Rule, carrier's, customers, access services, unfair, doctrine of primary jurisdiction, contractual, withholding, disputed, unfair competition, invoice, tariff

**Counsel:** [\*1] For O1 Communications, Inc., Plaintiff: Anita Taff-Rice, LEAD ATTORNEY, iCommLaw, Walnut Creek, CA.

For MCI Communications Services Inc., Verizon Select Services Inc., Defendants: Kevin D. Horvitz, LEAD ATTORNEY, PRO HAC VICE, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Meghan M. Baker, LEAD ATTORNEY, Downey Brand LLP (Sacramento), Sacramento, CA; Scott H. Angstreich, PHV, LEAD ATTORNEY, PRO HAC VICE, Kellogg Hansen Todd Figel & Frederick, P.L.L.C., Washington, DC.

**Judges:** JOHN A. MENDEZ, UNITED STATES DISTRICT JUDGE.

**Opinion by:** JOHN A. MENDEZ

### **Opinion**

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#### **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO STAY COUNT I AND TO DISMISS COUNTS II and III**

This matter involves a billing dispute between two telecommunications companies. O1 Communications, Inc. ("Plaintiff" or "O1") sued MCI Communications Services, Inc. and Verizon Select Services, Inc. (collectively, "Defendants" or "Verizon"), alleging Verizon improperly withheld, and continues to withhold, payments for switched access services that O1 provided to Verizon. First Amended Compl. ("FAC"), ECF No. 7. Verizon moves to stay O1's breach of contract claim, and to dismiss O1's claims for violations of the federal Communications [\*2] Act and California's unfair competition law. Mot., ECF No. 14-1.

For the reasons set forth below, the Court GRANTS IN PART and DENIES IN PART Defendants' motion.<sup>1</sup>

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<sup>1</sup> This motion was determined to be suitable for decision without oral argument. [E.D. Cal. L.R. 230\(g\)](#). The hearing was scheduled for January 8, 2019. The parties should also take notice that this is the only footnote in this Order. The Court finds

## I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

O1 is a competitive local exchange carrier ("CLEC") based in El Dorado Hills, California. FAC ¶ 6. O1 provides Verizon with switched access services, routing and connecting long-distance calls for Verizon customers. FAC ¶¶ 2, 6-8. Interexchange carriers, like Verizon, pay originating access charges to CLECs for connecting customers who initiate long-distance calls within a CLEC's local calling area and terminating access charges to CLECs for connecting customers who receive long-distance calls within a CLEC's local calling area. See FAC ¶¶ 2, 12. O1 also provides database queries that enable toll free calls to be directed to the correct destination. FAC ¶ 12.

The federal inter-carrier tariff compensation scheme permits CLECs to charge different amounts for switched access services in part based on the functionality of the services provided. FAC ¶ 13. O1 and Verizon disagreed on the functionality provided by O1, and thus could not agree on the appropriate compensation based on federal [\*3] and California state tariffs. FAC ¶ 2. To settle this dispute, in February 2015, O1 and Verizon entered into an agreement (the "Settlement Agreement") which, among other things, provides flat per-minute rates for the access charges to be billed by O1 as a substitute for the otherwise applicable, but disputed, tariffed rates. FAC ¶¶ 13-14, 18-20; Settlement Agreement, ECF No. 14-2, at 2-3. The Settlement Agreement is governed by New York law. Settlement Agreement ¶ 12.

Beginning with the January 1, 2015 invoice, O1 billed Verizon the rates agreed to by Verizon in the Settlement Agreement, and, until February 5, 2016, Verizon fully paid the invoices. FAC ¶¶ 22-23. Verizon subsequently ceased payments and disputed O1's invoices from January 2015 through May 2016, asserting O1 failed to provide full end-office switched access functionality and that much of the traffic transmitted by O1 consisted of fraudulent, "spoofed" calls. FAC ¶¶ 23, 27-28. O1 denied Verizon's allegations and the parties exchanged letters in 2016 and 2017 regarding the disputed payments. See Exhibits 2-4, ECF No. 7-1, at 3-10. Despite Verizon's failure to pay under the terms of the Settlement Agreement, O1 has, as required [\*4] by law, continued to provide Verizon and its customers with switched access services. FAC ¶¶ 30-34.

Moreover, O1 alleges "[u]pon information and belief, Verizon also may have colluded with AT&T in an effort to drive O1 from the market by cutting off O1's revenues." FAC ¶ 67. Specifically, O1 contends, "[u]pon information and belief, on or about March 2016, Verizon personnel communicated with AT&T Corp. personnel about AT&T Corp.'s allegations that most, if not all, of the toll free traffic transmitted by O1 to AT&T was 'spoofed' and that because of the alleged 'spoofing,' AT&T was withholding 100% of O1's invoiced amounts." FAC ¶ 25. O1 further alleges that Verizon began to withhold payments to O1 after, and as a consequence of, those communications with AT&T. FAC ¶ 27.

On July 14, 2018, O1 filed this suit to recover contractual payments allegedly owed by Verizon. Compl., ECF No. 1. In its First Amended Complaint, O1 brings causes of action for breach of contract, violation of the federal Communications Act (47 U.S.C. § 201), and violation of California's unfair competition law (Cal. Bus. & Prof. Code § 17200). FAC at 10-15.

Verizon moves to stay O1's breach of contract claim under the primary jurisdiction doctrine, and to dismiss O1's claims [\*5] for violations of the federal Communications Act and California's unfair competition law for failure to state a claim or, in the alternative, to also stay these claims. Mot., ECF No. 14-1. O1 opposes the motion. Opp'n, ECF No. 24.

## II. OPINION

### A. Breach of Contract Claim

Verizon argues this Court should stay O1's breach of contract claim, under the primary jurisdiction doctrine, pending the FCC's resolution of whether the VoIP Symmetry Rule applies to LECs that partner with over-the-top VoIP providers. Mot. at 6. As is relevant here, the FCC plans to determine whether an LEC partnered with an over-the-

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that 71 footnotes by Verizon and 10 footnotes by O1 is very distracting. The parties are strongly encouraged to avoid such excessive and unnecessary use of footnotes in the future.

top VoIP provider, which provides call routing over a broadband Internet connection, performs the functional equivalent of end-office switching and can thus charge the higher tariffed rates due for that service. Id. at 3-4, 6.

"The [primary jurisdiction] doctrine is a 'prudential' one, under which a court determines that an otherwise cognizable claim implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry rather than by the judicial branch." *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008). The Ninth Circuit has applied the primary jurisdiction doctrine [\*6] when there is a "(1) a need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration." *Clark*, 523 F.3d at 1115 (quoting *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002)).

Verizon contends O1 exclusively partners with over-the-top VoIP providers and so the FCC's interpretation of the VoIP Symmetry Rule, which would impact the appropriate tariffed rate, is directly raised in the contractual dispute with O1. Mot. at 3, 8. And while the interpretation of the VoIP Symmetry Rule is indeed pending before the FCC (see *AT&T Corp. v. FCC*, 841 F.3d 1047, 1049, 426 U.S. App. D.C. 383 (D.C. Cir. 2016) (vacating *In the Matter of Connect Am. Fund*, 30 F.C.C. Rcd. 1587 (2015))), Verizon's argument fails. The primary jurisdiction doctrine does not apply here because O1's breach of contract claim does not implicate the FCC's interpretation of the VoIP Symmetry Rule. Rather, the breach of contract claim can be properly adjudicated based on the plain language of the Settlement Agreement.

The Settlement Agreement provides, with respect to different services, that O1 "shall bill Verizon" "at a rate not to exceed" a certain dollar amount per minute of use. Settlement Agreement ¶¶ [\*7] 2(a)—(e). The contract makes no mention of O1's tariffed rates, and the contractual rates provided are owed to O1 irrespective of such tariffed rates. Id. Notwithstanding, Verizon argues the contractual language of "at a rate not to exceed" acts as a cap to O1's tariffed rates, drawing the VoIP Symmetry Rule into the contract. Reply, ECF No. 29, at 2. But reading into the contract an implicit reference to O1's tariffed rates would contradict the unambiguous, plain language of the Settlement Agreement. See *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324, 865 N.E.2d 1210, 834 N.Y.S.2d 44 (N.Y. 2007). The express language of the Settlement Agreement is clear, and the flat-rate payment provisions do not implicate O1's tariffed rates and are therefore not contingent on the FCC's interpretation of the VoIP Symmetry Rule.

In further support of its request to stay the proceedings, Verizon cites recent decisions from the District of Colorado (*Teliax, Inc. v. AT&T Corp.*, No. 15-cv-01472-RBJ, 2017 U.S. Dist. LEXIS 141470, 2017 WL 3839459 (D. Colo. Sept. 1, 2017)) and Northern District of Illinois (*Peerless Network, Inc. v. MCI Commc'n Servs., Inc.*, No. 14 C 7417, 2018 U.S. Dist. LEXIS 43044, 2018 WL 1378347 (N.D. Ill. Mar. 16, 2018)) which stayed similar payment disputes under the primary jurisdiction doctrine pending the FCC's resolution of the VoIP Symmetry Rule. Mot. at 6-7. Verizon also points to O1's own request to stay proceedings for the same reason in a case against AT&T. Mot. at 7 (citing [\*8] *O1 v. AT&T*, No. 3:16-cv-01452 (N.D. Cal. Sept. 17, 2018), ECF No. 129). But this argument is misplaced. Each of these three other cases specifically involved disputes about tariffed rates, which incorporate the VoIP Symmetry Rule, and not contractual agreements where payments are not contingent on tariffed rates.

Thus, this Court declines to stay O1's breach of contract claim.

#### B. Violation of Communications Act Section 201

Section 201 of the federal Communications Act provides that "[a]ll charges, practices, classifications, and regulations for and in connection with such communications service, shall be just and reasonable and any such charge, practice, classification, or regulation that is unjust and unreasonable is hereby declared unlawful." 47 U.S.C. § 201(b).

O1 alleges that Verizon's "self-help" of withholding contractual payments due to O1 and Verizon's "self-declared refund of previously made payments to O1" is unreasonable and violates Section 201 of the Communications Act. FAC ¶¶ 51-55. O1 relies on a Fifth Circuit decision affirming a judgment against a customer-carrier under Section

[201](#) for the customer-carrier's reduction of amounts paid to an LEC on undisputed invoice charges based on its estimate of previous "overpayments" on certain disputed charges. [\*CenturyTel of Chatham, LLC v. Sprint Commc'ns Co., L.P.\*, 861 F.3d 566, 577-578 \(5th Cir. 2017\)](#). This Court [\*9] does not find [\*CenturyTel\*](#) persuasive.

Verizon contends the FCC's recent interpretation of [Section 201](#) is instructive. Mot. at 10-11 (discussing Memorandum Opinion & Order, [\*All Am. Tel. Co. v. AT&T Corp.\*, 26 FCC Rcd. 723 \(2011\)](#) ("All American Order")). This Court agrees. In the [All American Order](#), the Commission noted that it has "repeatedly held that an allegation by a carrier that a customer has failed to pay charges specified in the carrier's tariff fails to state a claim for violation of any provision of the Act, including [sections 201\(b\)](#) and [203\(c\)](#)—even if the carrier's customer is another carrier. These holdings stem from the fact that the [Communications] Act generally governs a carrier's obligations to its customers, and not vice versa." [\*All American Order\*, 26 FCC Rcd., at 727](#). The Commission therefore held that, "although a customer-carrier's failure to pay another carrier's tariffed charges may give rise to a claim in court for breach of tariff/contract, it does not give rise to a claim . . . for breach of the Act itself." *Id.* And although the case at hand involves a claim brought under [Section 201](#) for failure to pay charges under a contract, rather than a tariff, that difference does not change the result.

O1 alleges that since March 2016 Verizon has entirely withheld payments due for switched access services provided by O1. FAC ¶ 35. [\*10] But a claim against Verizon, in its role as a *customer*, for withholding such payments is not actionable under [Section 201](#) of the Communications Act. O1's cause of action for violation of [Section 201](#) of the Communications Act is therefore dismissed with prejudice.

### C. Violation of California's Unfair Competition Law

California's unfair competition law ("UCL") broadly prohibits "any unlawful, unfair or fraudulent business act or practice." [\*Cal. Bus. & Prof. Code § 17200\*](#). The California Supreme Court, guided by federal [antitrust law](#), held a business act or practice is "unfair" when the conduct "threatens an incipient violation of an [antitrust law](#), or violates the policy or spirit of one of those laws because its effects are comparable to a violation of the law, or that otherwise significantly threatens or harms competition." [\*Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.\*, 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 \(Cal. 1999\)](#). Moreover, "any finding of unfairness to competitors under [section 17200](#) [must] be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." [\*Cel-Tech\*, 20 Cal. 4th, at 186-87](#).

O1 alleges Verizon is engaging in an unfair business practice by knowingly taking advantage of O1's legal obligation to continue providing switched access service to Verizon while Verizon refuses to pay for those services based on unsubstantiated [\*11] allegations, in collusion with AT&T and in effort to deprive O1 of cash flows. FAC ¶¶ 56-75; Opp'n at 13-15. O1 thus argues the predicate unfair conduct goes beyond a mere breach of contract—which alone cannot sustain a UCL claim—because Verizon has colluded with AT&T in withholding the payments to harm O1, a competitor. Opp'n at 14-15. O1 appears, in its opposition, to "tether" its UCL claim to a violation of [California Business and Professions Code Section 17048](#). *Id.*

As currently pleaded, O1's UCL cause of action must be dismissed. The Supreme Court's reasoning in [\*Twombly\*](#), which also involved allegedly collusive practices of telecommunications companies, is illustrative. [\*Bell Atl. Corp. v. Twombly\*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#). In [\*Twombly\*](#), citing the defendants' "parallel course of conduct," the plaintiffs alleged "upon information and belief" that the defendants had "entered into a contract, combination or conspiracy" in violation of [antitrust law](#). [\*Twombly\*, 550 U.S., at 551](#). The Supreme Court held that the plaintiffs had "not nudged their claims across the line from conceivable to plausible," and accordingly, "their complaint must be dismissed." [\*Id. at 547\*](#). The Supreme Court explained the defendants' "parallel conduct, even conduct consciously undertaken" was insufficient to state a claim for an antitrust violation because [\*12] such conduct was "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." [\*Id. at 554, 555\*](#).

Here, O1 alleges "upon information and belief" that, in deciding not to pay for the switched access services, Verizon communicated with AT&T about AT&T's rationale for refusing to pay O1, that Verizon adopted AT&T's rationale, and, thus, that Verizon "may" be "collu[ding]" with AT&T in an effort to drive O1 from the market by cutting off O1's

revenues." FAC ¶¶ 25, 27, 67, 69. But O1's allegation of collusion, upon which its UCL claim rests, is conclusory and insufficient to support the claim. Verizon's parallel conduct could simply be the rational reaction of a business actor to publicly-made allegations against a counterparty. Reply at 5 (citing [Twombly, 550 U.S., at 557](#)). Nevertheless, this Court grants Plaintiff leave to amend its complaint with respect to the UCL claim. See [Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 247 \(9th Cir. 1990\)](#) ("[A] district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.").

Separately, O1's request for relief for the UCL violation is not fatal [\*13] to its claim. In the FAC, O1 requested treble damages for the alleged UCL violation. FAC ¶ 80. But plaintiffs may only seek injunctive relief and restitution, not damages, under a UCL claim. [Cel-Tech, 20 Cal. 4th, at 179](#). Restitution is improper here because Verizon has not taken any money from O1 through an unfair business practice, rather Verizon has not paid money allegedly owed. See [Kraus v. Trinity Mgmt. Servs., Inc., 23 Cal. 4th 116, 126-127, 96 Cal. Rptr. 2d 485, 999 P.2d 718 \(Cal. 2000\)](#). And while O1 did not specifically request an injunction in the FAC, under the Federal Rules of Civil Procedure every final judgment, other than a default judgment, "should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." [Fed. R. Civ. P. 54\(c\)](#). Verizon was on notice of O1's claims, and would not be prejudiced by injunctive relief barring unfair business practices. See [Seven Words LLC v. Network Sols., 260 F.3d 1089, 1098 \(9th Cir. 2001\)](#).

Thus, the Court grants Verizon's motion to dismiss O1's UCL claim without prejudice.

### III. ORDER

For the reasons set forth above, the Court GRANTS IN PART and DENIES IN PART Defendants' motion (ECF No. 14-1) as follows:

1. DENIES Defendants' motion to stay Plaintiff's breach of contract claim (Count I);
2. GRANTS WITH PREJUDICE Defendants' motion to dismiss Plaintiff's cause of action for violation of [Section 201](#) of the Communications [\*14] Act (Count II); and
3. GRANTS WITHOUT PREJUDICE Defendants' motion to dismiss Plaintiff's UCL claim (Count III).

If Plaintiff elects to amend its complaint with respect to the UCL claim, Plaintiff shall file a Second Amended Complaint within twenty days of this Order. Defendants' responsive pleading is due twenty days thereafter.

IT IS SO ORDERED.

Dated: January 18, 2019

/s/ John A. Mendez

JOHN A. MENDEZ

UNITED STATES DISTRICT JUDGE



## Suarez v. iHeartMedia + Entm't, Inc.

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

January 22, 2019, Decided; January 22, 2019, Filed

Civil Action No. SA-18-CV-1237-XR

### **Reporter**

2019 U.S. Dist. LEXIS 10171 \*; 2019-1 Trade Cas. (CCH) P80,651; 2019 WL 286186

ANGEL SUAREZ, Plaintiff, v. IHEARTMEDIA + ENTERTAINMENT, INC., Defendant.

## **Core Terms**

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allegations, Pleadings, antitrust, songs, anti trust law

**Counsel:** [\*1] Angel Suarez, Plaintiff, Pro se, San Antonio, TX.

For iHeartMedia + Entertainment, Inc., Defendant: Richard William Espey, Espey & Associates, PC, San Antonio, TX.

**Judges:** XAVIER RODRIGUEZ, UNITED STATES DISTRICT JUDGE.

**Opinion by:** XAVIER RODRIGUEZ

## **Opinion**

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### **ORDER ON MOTION FOR JUDGMENT ON THE PLEADINGS**

On this date, the Court considered Defendant iHeartMedia's Motion for Judgment on the Pleadings. Docket no. 10. Plaintiff Angel Suarez, proceeding pro se, did not respond, but the Court will consider all applicable filings to determine whether dismissal is warranted. After careful consideration, the Court GRANTS Defendant's motion and dismisses Plaintiff's claims without prejudice.

## **BACKGROUND**

On November 2, 2018, Plaintiff filed his Original Petition in the 225th Judicial District Court of Bexar County, Texas. Docket no. 1-2. He alleges he is "suing for monopoly practices based on USA antitrust laws" and for not practicing "equal opportunity." *Id.* He alleges Defendant plays songs "from artists of their favorite record label and never play my songs on my album 'Latino Supremacist.'" *Id.* Plaintiff alleges that fans have requested his songs and that he has sent his songs to Defendant. *Id.* Because Defendant has not played his [\*2] music, he alleges he has lost profit opportunities and royalties and seeks \$7,000,000 in damages and an order that Defendant "play one of the Eastar record label songs." *Id.*

On November 28, Defendant removed to this Court. On December 21, Defendant filed its Motion for Judgment on the Pleadings. Docket no. 10. Defendant argues that Plaintiff's claim "based on USA antitrust laws," which must be construed as a claim under the Sherman Act or Clayton Act, fails under either statute. *Id.* Further, Defendant seeks dismissal with prejudice because Plaintiff could allege no viable antitrust claim even if allowed to re-plead. *Id.* at 5.

Plaintiff did not respond to this motion, but he filed on December 28 a document entitled "Proof Requested." Docket no. 11. This document functions as a table of contents for an attached CD that contains letters, calls, and emails that Plaintiff alleges are proof his songs have been requested and are "an initial proof but this is not the only thing we have in our power." *Id.* Defendant objected to the included evidence on January 11, 2019, and although Plaintiff's filing was not a response to Defendant's motion, Defendant included a reply in support of its motion anyway. [\*3] Docket no. 13.

## LEGAL STANDARD

Defendant moves for judgment on the pleadings pursuant to [Federal Rule of Civil Procedure 12\(c\)](#). "The standard for dismissal under [Rule 12\(c\)](#) is the same as that for dismissal for failure to state a claim under [Rule 12\(b\)\(6\)](#)." *Chauvin v. State Farm Fire & Cas. Co.*, 495 F.3d 232, 237 (5th Cir. 2007) (citing *Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir. 2004)); *Guidry v. Am. Pub. Life Ins. Co.*, 512 F.3d 177, 180 (5th Cir. 2007) (adopting the same standard after *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "To survive a [[Rule 12\(b\)\(6\)](#)] motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Twombly*, 550 U.S. at 570). A claim for relief must contain (1) "a short and plain statement of the grounds for the court's jurisdiction"; (2) "a short and plain statement of the claim showing that the pleader is entitled to the relief"; and (3) "a demand for the relief sought." [FED. R. CIV. P. 8\(a\)](#). In considering a motion to dismiss under [Rule 12\(b\)\(6\)](#), all factual allegations from the complaint should be taken as true, and the facts are to be construed favorably to the plaintiff. *Fernandez-Montez v. Allied Pilots Assoc.*, 987 F.2d 278, 284 (5th Cir. 1993). To survive a 12(b)(6) motion, a complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.* Judgment on the pleadings is only appropriate when "the material facts are not in [\*4] dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts." *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir. 2009).

## DISCUSSION

The Court liberally construes Plaintiff's allegations "under the USA antitrust laws" as stating a claim under the [Sherman Act](#) or the [Clayton Act](#). The Court is aware of no basis in the law, however, for Plaintiff's claim for "equal opportunity" in Defendant's allocation of radio airtime, no matter how liberally construed. Docket no. 1-2. To the extent that this phrase represents a cause of action independent of Plaintiff's antitrust claim, that cause of action is dismissed.

Further, Plaintiff fails to state a viable claim under any [antitrust law](#). First, [Section 1](#) of the Sherman Act, [15 U.S.C. § 1](#), requires a plaintiff to show that the defendants "(1) engaged in a conspiracy (2) that restrained trade (3) in a particular market." *MM Steel, L.P. v. JSW Steel (USA) Inc.*, 806 F.3d 835, 843 (5th Cir. 2015) (quoting *Spectators' Commc'n Network Inc. v. Colonial Country Club*, 253 F.3d 215, 220 (5th Cir. 2001)). Here, Plaintiff does not allege a restraint on trade or a particular market. To the extent his complaint can be read as alleging conspiracy, these allegations are conclusory and lack sufficient facts.

Second, a claim under [Section 2](#) of the Sherman Act, [15 U.S.C. § 2](#), requires a plaintiff to show "(1) that the defendant has engaged in predatory or anticompetitive [\*5] conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Retractable Techs., Inc. v. Becton Dickinson & Co.*, 842 F.3d 883, 891 (5th Cir. 2016) (quoting *Spectrum Sports, Inc. v. Mc+Quillan*, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)). Here, Plaintiff's allegations do not satisfy any element.

Third, the Clayton Act prohibits price discrimination, [15 U.S.C. § 13](#), and tying agreements (sales made on the agreement not to use the goods of a competitor), [15 U.S.C. § 14](#). No substantive provision of the Clayton Act is put

in issue by Plaintiff's allegations. Further, standing to pursue an antitrust suit requires the plaintiff to show "1) injury-in-fact, an injury to the plaintiff proximately caused by the defendants' conduct; 2) antitrust injury; and 3) proper plaintiff status, which assures that other parties are not better situated to bring suit." *Doctor's Hosp. of Jefferson, Inc. v. Southeast Medical Alliance*, 123 F.3d 301, 305 (5th Cir. 1997). The requirement for antitrust injury is necessary for a Sherman Act claim and is inferred from Section 4 of the Clayton Act. *Id.* (citing 15 U.S.C. § 15(a)). Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977). Plaintiff seeks millions of dollars [\*6] in damages but has not adequately alleged any injury, much less one that reflects the "anticompetitive effect" of Defendant's conduct. Thus, Plaintiff does not state any viable claim, antitrust or otherwise, and dismissal is warranted.

Finally, Defendant asks that the Court dismiss with prejudice, as Plaintiff's claims are frivolous and no additional facts could cure the pleading's deficiencies. It is true that on these facts Plaintiff states no claim, and that far more factual material is needed for any claim to survive a Rule 12 motion. But given Plaintiff's pro se status and the dearth of pleaded facts, the Court cannot reliably assess whether a viable claim is possible. Thus, Plaintiff's claims are dismissed without prejudice.

## CONCLUSION

For the foregoing reasons, Defendant's Motion for Judgment on the Pleadings (docket no. 10) is GRANTED. Plaintiff's claims are DISMISSED WITHOUT PREJUDICE. The Clerk is directed to close this case.

It is so ORDERED.

SIGNED this 22nd day of January, 2019.

/s/ Xavier Rodriguez

XAVIER RODRIGUEZ

UNITED STATES DISTRICT JUDGE

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## [Edoho-Eket v. Wayfair.com](#)

United States Court of Appeals for the Sixth Circuit

January 23, 2019, Filed

No. 17-6509

**Reporter**

2019 U.S. App. LEXIS 2332 \*; 2019 WL 2524366

UDEME EDOHO-EKET, Plaintiff-Appellant, v. WAYFAIR.COM; WAYFAIR, LLC, Defendants-Appellees.

**Notice:** NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. *SIXTH CIRCUIT RULE 28* LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE *RULE 28* BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

**Prior History:** [\*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE.

[Edoho-Eket v. Wayfair.com, 2017 U.S. Dist. LEXIS 194360 \(M.D. Tenn., Nov. 27, 2017\)](#)

## **Core Terms**

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magistrate judge, district court, report and recommendation, recommendation

## **LexisNexis® Headnotes**

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

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

### [HN1](#) [] Standards of Review, De Novo Review

The appellate court reviews de novo a district court's dismissal of a complaint pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#).

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

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

### [HN2](#) [] Motions to Dismiss, Failure to State Claim

In order to avoid dismissal, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Under this standard, the court may not accept conclusory legal assertions that do not include specific facts necessary to establish the cause of action.

Civil Procedure > Parties > Pro Se Litigants > Pleading Standards

### **HN3** [] **Pro Se Litigants, Pleading Standards**

Pleadings drafted by pro se litigants should be held to less stringent standards than those drafted by lawyers and should be liberally construed, but pro se litigants are not exempt from the requirements of the Federal Rules of Civil Procedure.

Business & Corporate Compliance > ... > Internet Business > Online Advertising > Spam Email

Civil Procedure > Preliminary Considerations > Justiciability > Standing

### **HN4** [] **Online Advertising, Spam Email**

A plaintiff lacks standing to bring a claim under the [CAN-SPAM Act](#), [15 U.S.C.S. § 7701](#), where she is not an internet access service provider. [15 U.S.C.S. § 7706\(g\)](#)

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

### **HN5** [] **Trade Practices & Unfair Competition, Federal Trade Commission Act**

Section 5 of the Federal Trade Commission Act does not provide a private right of action. [15 U.S.C.S. § 57b](#).

Civil Procedure > Judicial Officers > Magistrates > Waiver of Appeals

### **HN6** [] **Magistrates, Waiver of Appeals**

Parties may not raise new arguments or issues at the district court stage that were not presented to the magistrate judge.

Civil Rights Law > Protection of Rights > Section 1983 Actions > Elements

### **HN7** [] **Section 1983 Actions, Elements**

In order to state a viable constitutional claim under [42 U.S.C.S. § 1983](#), a plaintiff must allege that: (1) she was deprived of a right, privilege, or immunity secured by the Constitution or laws of the United States, and (2) the deprivation was caused by a person acting under color of state law.

**Counsel:** Udeme Edoho-Eket, Plaintiff - Appellant, Pro se, Nashville, TN.

For Wayfair.Com, Wayfair, Llc, Defendants - Appellees: Tara L. Swafford, Swafford Law Firm, Franklin, TN; Elizabeth Grace Hart, The Swafford Law Firm, Franklin, TN.

Judges: Before: KEITH, MOORE, and GIBBONS, Circuit Judges.

## Opinion

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### ORDER

Udeme Edoho-Eket, a pro se Tennessee resident, appeals the district court's judgment dismissing her complaint for failing to state a claim upon which relief can be granted. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. See *Fed. R. App. P.* 34(a).

In 2017, Edoho-Eket filed a complaint seeking monetary damages against Wayfair.com and Wayfair, LLC, alleging that the defendants discriminated against her and violated "BRIA 23 1 Free Markets and Antitrust Law," "FTC regulations to cease spam activities," and the "Federal Trade Commission Act . . . Section 5." She claimed that these violations occurred when the defendants blocked her from making new purchases from their websites and those of their partners after she returned items that she claimed were defective or broken. She alleged [\*2] that her right as a United States citizen to shop anywhere at her discretion had been violated because the defendants prevented her from making orders "at any retailer."

The defendants subsequently filed a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). After briefing, the magistrate judge recommended the dismissal of the complaint with prejudice, reasoning that: (1) "BRIA 23 1" was a publication from a private group and thus not a law providing any statutory grounds for relief; (2) Edoho-Eket did not provide a specific citation to any Federal Trade Commission ("FTC") regulation concerning spam activities; (3) the Federal Trade Commission Act ("FTCA"), Section 5, did not provide a private right of action; and (4) she failed to allege membership in a protected class, or that similarly situated individuals outside of her class were treated differently by the defendants. Over Edoho-Eket's objections, the district court adopted the magistrate judge's recommendation and dismissed the complaint.

On appeal, Edoho-Eket asserts that her claims should be considered under the Equal Protection Clause of the Fourteenth Amendment, "BRIA 23 1 Free Markets and Antitrust Law," the FTCA, the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act") [\*3], and Chapter 21 of Title 42 of the United States Code. She also argues that she did claim that she was a member of a protected class in her objections to the magistrate judge's report and recommendation and that she has conflicts of interest with Judge Waverly D. Crenshaw, Jr., and Magistrate Judge Joe Brown.

**HN1**[ We review de novo a district court's dismissal of a complaint pursuant to Rule 12(b)(6). See *Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478, 481 (6th Cir. 2009). **HN2**[ In order to avoid dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Under this standard, we may not "accept conclusory legal assertions that do not include specific facts necessary to establish the cause of action." *Lutz v. Chesapeake Appalachia, LLC*, 717 F.3d 459, 464 (6th Cir. 2013). **HN3**[ Pleadings drafted by pro se litigants should be held to less stringent standards than those drafted by lawyers and should be liberally construed, *Martin v. Overton*, 391 F.3d 710, 712 (6th Cir. 2004), but pro se litigants are not exempt from the requirements of the Federal Rules of Civil Procedure. *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989).

The district [\*4] court correctly determined that Edoho-Eket failed to state claims for violations of "BRIA 23 1" or any FTC law or regulation. First, "BRIA 23 1" appears to be a publication from a private group,<sup>1</sup> and therefore is not a law enacted by Congress providing statutory relief. Second, Edoho-Eket did not identify in the complaint a specific FTC regulation or law concerning spam that the defendants had violated. The defendants suggested that she might be referring to the CAN-SPAM Act, [15 U.S.C. § 7701](#), and Edoho-Eket embraces this suggestion on appeal, but [HN4](#)[<sup>↑</sup>] she lacks standing to bring such a claim because she is not an internet access service provider. See [15 U.S.C. § 7706\(g\)](#); [Facebook, Inc. v. Power Ventures, Inc.](#), 844 F.3d 1058, 1064 (9th Cir. 2016); [Omega World Travel, Inc. v. Mummagraphics, Inc.](#), 469 F.3d 348, 357 n.3 (4th Cir. 2006); [Hafke v. Rosedale Grp. LLC](#), No. 1:11-cv-220, 2011 U.S. Dist. LEXIS 116003, 11 WL 4758768, at \*4-5 (W.D. Mich. Oct. 7, 2011). Lastly, [HN5](#)[<sup>↑</sup>] [Section 5 of the FTCA](#) does not provide a private right of action. See [15 U.S.C. § 57b](#); [FTC v. Owens-Corning Fiberglas Corp.](#), 853 F.2d 458, 464 (6th Cir. 1988). Moreover, Edoho-Eket failed to object to the magistrate judge's recommendation that she lacked standing to assert these FTCA claims. See [United States v. Walters](#), 638 F.2d 947, 949-50 (6th Cir. 1981).

Although Edoho-Eket did not elaborate on her claim for "discrimination" in the complaint, the district court initially determined that service should issue because the complaint could be liberally construed to state discrimination claims under [42 U.S.C. §§ 1981](#) and [1982](#) involving a breach of contract [\*5] because the district court "infer[red] that the plaintiff believes that the defendants' discrimination was based on the plaintiff's ethnicity, race, national origin, or descent as known by or as perceived by the defendants from the plaintiff's name." Despite this initial review, the district court referred the complaint to a magistrate judge and stated that he could still recommend the dismissal of any claim under [28 U.S.C. § 1915\(e\)\(2\)](#). The magistrate judge recommended dismissal of the discrimination claim because Edoho-Eket did not allege that she belonged to a protected class. See [Christian v. Wal-Mart Stores, Inc.](#), 252 F.3d 862, 872 (6th Cir. 2001) (discussing the standard under [§ 1981](#)); [Mencer v. Princeton Square Apartments](#), 228 F.3d 631, 634-35 (6th Cir. 2000) (discussing the standard under [§ 1982](#)). The magistrate judge correctly noted that, in light of the defendants' motion to dismiss, the mere fact that Edoho-Eket had what appeared to be an African name was insufficient to infer that she was making an allegation of racial discrimination. In fact, she did not make her first reference to race until her objections to the magistrate judge's report and recommendation. See [Murr v. United States](#), 200 F.3d 895, 902 n.1 (6th Cir. 2000) (explaining that [HN6](#)[<sup>↑</sup>] parties may not raise new arguments or issues at the district court stage that were not presented to the magistrate judge). In adopting the magistrate judge's report [\*6] and recommendation, the district court also noted that the magistrate judge had already given Edoho-Eket an opportunity to amend the complaint to add the required allegations.

Edoho-Eket also did not raise an equal-protection claim until her objections to the magistrate judge's report and recommendation. Even if we were to construe her use of the word "discrimination" as raising such a claim, [HN7](#)[<sup>↑</sup>] in order to state a viable constitutional claim under [42 U.S.C. § 1983](#), a plaintiff must allege that: (1) she was deprived of a right, privilege, or immunity secured by the Constitution or laws of the United States, and (2) the deprivation was caused by a person acting under color of state law. [Flagg Bros. v. Brooks](#), 436 U.S. 149, 155, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978). Edoho-Eket did not allege in the complaint that the defendants were state actors, and her allegations concerning online retail transactions do not suggest any action fairly attributable to the state. See [Lugar v. Edmondson Oil Co.](#), 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982). Even if the defendants had received some kind of public funding, as she suggested in her objections to the magistrate judge's report and recommendation, such funding would not convert them into state actors. See [Rendell-Baker v. Kohn](#), 457 U.S. 830, 840, 102 S. Ct. 2764, 73 L. Ed. 2d 418 (1982).

Lastly, Edoho-Eket argues that Judge Crenshaw and Magistrate Judge Brown have conflicts of interest in her [\*7] case because she personally knows Judge Crenshaw and has seen Magistrate Judge Brown on television. However, Edoho-Eket did not follow the proper procedures to seek judicial disqualification in the district court, and

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<sup>1</sup> Constitutional Rights Foundation, *Free Markets and Antitrust Law*, [BILL OF RIGHTS](#) IN ACTION, Vol. 23, No. 1, <http://www.crf-usa.org/bill-of-rights-in-action/bria-23-1-free-markets-and-antitrust-law.html> (last visited Oct. 9, 2018).

these allegations, without anything more, do not give us reason to question the judges' impartiality. See [28 U.S.C. §§ 144, 455; Youn v. Track, Inc., 324 F.3d 409, 423 \(6th Cir. 2003\)](#).

For these reasons, we **AFFIRM** the district court's judgment.

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## Owens v. Cal. Dep't of Corr. & Rehab.

United States District Court for the Eastern District of California

January 23, 2019, Decided; January 23, 2019, Filed

Case No. 1:19-cv-00027-DAD-JLT

### **Reporter**

2019 U.S. Dist. LEXIS 11034 \*

JERRY LEE OWENS, Petitioner, v. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, Respondent.

### **Core Terms**

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Recommendation, frivolous, writ of mandamus, federal court, nonsensical, mandamus, federal district court, mandamus relief, district court, state official, state court, contends, courts

**Counsel:** [\*1] Jerry Owens, Petitioner, Pro se, Jamestown, CA.

**Judges:** Jennifer L. Thurston, UNITED STATES MAGISTRATE JUDGE.

**Opinion by:** Jennifer L. Thurston

### **Opinion**

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#### FINDINGS AND RECOMMENDATION TO DISMISS PETITION FOR WRIT OF MANDAMUS

On December 26, 2018, Petitioner filed a petition for writ of mandamus pursuant to [28 U.S.C. § 1361](#) in this Court. The petition is frivolous and nonsensical. Therefore, the Court will recommend it be DISMISSED WITH PREJUDICE.

### **DISCUSSION**

The [All Writs Act](#), codified at [28 U.S.C. § 1651\(a\)](#), provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The federal mandamus statute set forth at [28 U.S.C. § 1361](#) provides: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." [28 U.S.C. § 1361](#). Mandamus relief is only available to compel an officer of the United States to perform a duty if (1) the petitioner's claim is clear and certain; (2) the duty of the officer "is ministerial and so plainly prescribed as to be free from doubt," [Tagupa v. East-West Center, Inc., 642 F.2d 1127, 1129 \(9th Cir.1981\)](#) (quoting [Jarrett v. Resor, 426 F.2d 213, 216 \(9th Cir.1970\)](#)); and (3) no other adequate [\*2] remedy is available. [Piledrivers' Local Union No. 2375 v. Smith, 695 F.2d 390, 392 \(9th Cir.1982\)](#).

Petitioner's claims are entirely nonsensical. Petitioner claims that state "criminal case(s) ... are really civil claims in equity, without full disclosure to the people," and they are "fraudulently called criminal." (Doc. 1 at 14.) He contends the state criminal courts "are operating under trust law, assuming Defendant is a decedent," and that "[a]fter finding

the alleged Defendant guilty, the court clerks sell the judgment to the Federal Courts since the Defendant is a decedent, the Court officials consider themselves as a beneficiary." (Id.) Petitioner contends his state criminal judgment is, in actuality, a note which becomes a security, which is then pooled with other securities and sold as bonds. (Id. at 14.) Petitioner continues on with this argument, citing the Uniform Commercial Code, Internal Revenue Service actions, admiralty law, antitrust law, unfair trade practices, and so forth. (Id. at 15-16.) The arguments are clearly nonsensical, frivolous, and do not merit further analysis. Furthermore, mandamus relief is not available because Respondent is not an officer, employee or agency of the United States. Title 28 U.S.C. § 1651(a) does not vest a federal district court with the power to compel [\*3] performance of a state court, judicial officer, or another state official's duties under any circumstances. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) (11th Amendment prohibits federal district court from ordering state officials to conform their conduct to state law). Thus, a petition for mandamus to compel a state official to take or refrain from some action is frivolous as a matter of law. Demos v. United States Dist. Court, 925 F.2d 1160, 1161-62 (9th Cir. 1991); Robinson v. California Bd. of Prison Terms, 997 F. Supp. 1303, 1308 (C.D.Cal. 1998) (federal courts are without power to issue writs of mandamus to direct state agencies in the performance of their duties); Dunlap v. Corbin, 532 F.Supp. 183, 187 (D.Ariz.1981) (plaintiff sought order from federal court directing state court to provide speedy trial), *aff'd without opinion*, 673 F.2d 1337 (9th Cir. 1982).

## RECOMMENDATION

Accordingly, the Court RECOMMENDS that this action be DISMISSED WITH PREJUDICE as frivolous.

This Findings and Recommendation is submitted to the assigned District Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within thirty days after service of the Findings and Recommendation, Petitioner may file written objections with the Court. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendation." The Court will then review the Magistrate Judge's ruling pursuant to [\*4] 28 U.S.C. § 636(b)(1)(C). Petitioner is advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: January 23, 2019

/s/ Jennifer L. Thurston

UNITED STATES MAGISTRATE JUDGE



## **Physician Specialty Pharm. v. Therapeutics**

United States District Court for the District of Minnesota

January 23, 2019, Decided; January 24, 2019, Filed

No. 18-cv-1044 (MJD/TNL)

### **Reporter**

2019 U.S. Dist. LEXIS 53115 \*; 2019 WL 1239705

Physician Specialty Pharmacy, LLC, Plaintiff, v. Prime Therapeutics, LLC, Defendant.

**Subsequent History:** Adopted by, Dismissed by, in part [Physician Specialty Pharm., LLC v. Prime Therapeutics, LLC, 2019 U.S. Dist. LEXIS 52431 \(D. Minn., Mar. 28, 2019\)](#)

Motion granted by [Physician Specialty Pharm., LLC v. Prime Therapeutics, LLC, 2019 U.S. Dist. LEXIS 67092 \(D. Minn., Apr. 19, 2019\)](#)

Magistrate's recommendation at [Physician Specialty Pharm., LLC v. Prime Therapeutics, LLC, 2019 U.S. Dist. LEXIS 159853 \(D. Minn., Aug. 8, 2019\)](#)

Motion denied by, Costs and fees proceeding at [Physician Specialty Pharm., LLC v. Prime Therapeutics, LLC, 2019 U.S. Dist. LEXIS 221857 \(D. Minn., Dec. 19, 2019\)](#)

## **Core Terms**

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pharmacy, relevant market, specialty, monopolization, audit, mail-order, geographic, pled, batch, prescription, alleges, retail, monopoly power, markets, recommends, network, conspiracy, sufficient facts, alleged facts, health insurance, state law claim, large group, anticompetitive, rule-of-reason, parties, pleads, prices, fails, citizenship, antitrust

**Counsel:** [\*1] For Plaintiffs: Adrienne Dresevic & Robert J. Dindoffer, The Health Law Partners, P.C., Farmington Hills, MI and Elizabeth R. Odette & Kristen G. Marttila, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MNN.

For Defendants: Christine Lindblad, Meghan M.A. Hansen, Ellie J. Barragry, & Alex L. Rubenstein, Fox Rothschild LLP, Minneapolis, MN.

**Judges:** Tony N. Leung, United States Magistrate Judge.

**Opinion by:** Tony N. Leung

## **Opinion**

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### **REPORT AND RECOMMENDATION**

This matter is before the Court, United States Magistrate Judge Tony N. Leung, on Defendant's Motion to Dismiss Plaintiff's Amended Complaint (ECF No. 18) and Plaintiff's Motion in Limine Regarding June 30, 2016 Settlement Demand Letter. (ECF No. 35). These motions have been referred to the undersigned magistrate judge for a report

and recommendation to the Honorable Michael J. Davis, United States District Judge for the District of Minnesota, pursuant to [28 U.S.C. § 636\(b\)\(1\)](#) and [Local Rule 72.1](#). (ECF No. 25). Based on all the files, records, and proceedings herein, and for the reasons set forth below, this Court recommends that Defendant's motion be **GRANTED** and Plaintiff's Motion be **DENIED AS MOOT**.

## I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Physician Specialty Pharmacy, LLC ("PSP"), is a specialty pharmacy [\*2] located in and organized pursuant to the laws of Florida. Amend. Compl. ¶ 13. (ECF No. 6). Because PSP is located on the Florida-Alabama border, a substantial number of its customers come from Alabama. Prime Therapeutics ("Prime") is a pharmacy benefit manager located in Minnesota that is owned by nine health plans that are members of the Blue Cross Blue Shield Association. *Id.* at ¶ 14, 16. Prime manages the prescription drug benefits for Blue Cross and Blue Shield of Alabama, a health insurance provider that controls 93 percent of large-group health benefits in Alabama. *Id.* at ¶¶ 17, 144-45.

For several years, PSP filled prescriptions claims for Prime's beneficiaries. *Id.* at ¶ 26. When a Prime member used PSP to fill a prescription, PSP would use an electronic interface to submit a claim to Prime. *Id.* at ¶ 47. Prime would then tell PSP what amount Prime would reimburse PSP for the prescription and what amount the member would pay for the prescription. *Id.* Once Prime processed the prescription, it received payment from the member's health insurance plan. *Id.* at ¶ 48.

Beginning at the end of 2015 and continuing into 2016, Prime began to conduct a series of audits into PSP's business. [\*3] *Id.* at ¶ 27. The first batch of audits began on December 14, 2015 and covered claims submitted between November 30, 2014 and November 30, 2015. *Id.* at ¶ 77. The second batch of audits began in January 2016 and covered claims between December 12, 2015 and January 8, 2016. *Id.* The final batch of audits began in the first half of 2016 and covered all claims submitted between January 8, 2016 and May 27, 2016. *Id.* While Prime conducted these audits, it refused to pay PSP for any prescription that PSP dispensed to a Prime member. *Id.* at ¶ 78.

Prime issued its findings for the first two batches of audit results in April 2016. *Id.* at ¶ 81. It rejected over \$300,000 worth of claims that PSP submitted to Prime for reasons including incorrect entry of an origin code and using drug wholesalers that Prime had excluded, despite the fact that Prime never notified PSP of those exclusions. *Id.* at ¶¶ 83-85. Prime informed PSP that it would need to submit to an "administrative audit appeal process" if it wanted to receive payment for the rejected claims. *Id.* at ¶ 87.

Before PSP could appeal, however, and before Prime issued the results of its final batch of audits, Prime terminated PSP from its pharmacy [\*4] network for "poor audit performance." *Id.* at ¶ 88-89. PSP subsequently appealed both the first two audit batches and its termination from Prime's network. *Id.* at ¶¶ 93-94. A few months after PSP appealed, Prime issued its results for the third batch of audits. *Id.* at ¶ 95. It rejected more than \$500,000 worth of PSP's claims for technical and clerical errors. *Id.* at ¶ 98-99. Prime also rejected PSP's appeals of its first two batches of audit results, but gave PSP the opportunity for a final appeal, as required by state law. *Id.* at ¶ 101-02. Around the same time, Prime announced a partnership with Walgreens to provide specialty pharmacy and mail service businesses. *Id.* at ¶ 171.

PSP submitted its final appeal of the first batch of audit results and its first appeal of the third batch of audit results on September 3, 2016. *Id.* at ¶¶ 104-05. It also submitted a final appeal of the second batch of audit results on September 16, 2016. *Id.* ¶ 106. Prime denied PSP's first appeal of the third batch of audit results and asked for amended final appeals of the other two batches on November 23, 2016. *Id.* at ¶¶ 107-08. PSP filed a final appeal of the third batch of audit results and supplemental [\*5] information on the other two batches of audit results on December 23, 2016. *Id.* at ¶ 110. It also submitted additional information regarding the third batch of audit results on January 11, 2017. *Id.* at ¶ 112.

On April 3, 2017, Prime announced the creation of AllianceRx, a joint venture with Walgreens to provide specialty and mail-order pharmacy services. *Id.* at ¶¶ 159-60. A few weeks later, Prime issued its final audit results regarding PSP's claims. *Id.* at ¶ 117. Prime rejected over \$700,000 worth of claims. *Id.* at ¶ 118. Shortly thereafter, Prime also rejected PSP's appeal of its termination from Prime's network. *Id.* at ¶ 124. PSP subsequently requested a dispute resolution conference, at which an attorney for Prime indicated that she did not know of any PSP claims where the patient did not receive the medication that was billed or prescribed. *Id.* at ¶ 131. PSP alleges that Prime used the audits as a pretext to terminate PSP from its network for the benefit of AllianceRx.

PSP filed suit, alleging that Prime violated Minnesota and Florida state law and federal **antitrust law**. PSP alleged that Prime and Walgreens unlawfully restrained trade in the Alabama specialty/mail-order pharmacy [\*6] markets and the retail pharmacy market by vertically integrating over 90 percent of Alabama's prescription drug benefits and by excluding PSP from dispensing prescriptions to Prime members. *Id.* at ¶ 364-66. PSP also alleged that Prime and Walgreens combined, conspired, and agreed to monopolize the Alabama specialty/mail-order pharmacy market and the Alabama retail pharmacy market and that Prime attempted to monopolize or monopolized the same markets. *Id.* at ¶¶ 367-74.

Prime moved to dismiss the complaint. (ECF No. 18). Attached to a declaration in support of its motion was a settlement demand letter from PSP, dated June 30, 2016. (ECF No. 21-3). PSP subsequently moved to exclude that letter from evidence. (ECF No. 35). At the hearing, the Court ordered the parties to provide supplemental letter briefing on a number of issues. The parties submitted those letters on October 1 and 9, 2018, following which the Court took the matter under advisement.

## II. MOTION TO DISMISS

Prime has moved to dismiss the Amended Complaint under [Fed. R. Civ. P. 12\(b\)\(6\)](#) and [12\(b\)\(1\)](#). When determining a [Rule 12\(b\)\(1\)](#) motion, courts "must distinguish between a 'facial attack' and a 'factual attack' on jurisdiction." [Carlsen v. GameStop, Inc., 833 F.3d 903, 908 \(8th Cir. 2016\)](#) (quoting [Osborn v. United States, 918 F.2d 724, 729 n.6 \(8th Cir. 1990\)](#)). "In a facial attack, 'the court [\*7] restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under [Rule 12\(b\)\(6\)](#).'" *Id.* "In a factual attack, the court considers matters outside the pleadings, and the non-moving party does not have the benefit of [12\(b\)\(6\)](#) safeguards." *Id.*

In deciding a [Rule 12\(b\)\(6\)](#) motion, a court accepts as true all well-pleaded factual allegations and then determines "whether they plausibly give rise to an entitlement to relief." [Ashcroft v. Iqbal, 556 U.S. 662, 680, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#). In doing so, the court must draw reasonable inferences in the plaintiff's favor. [Zink v. Lombardi, 783 F.3d 1089, 1098 \(8th Cir. 2015\)](#) (citation omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." [Sletten & Brettin Orthodontics v. Cont'l Cas. Co., 782 F.3d 931, 934 \(8th Cir. 2015\)](#) (citation and internal quotations omitted). Facial plausibility of a claim exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." [Iqbal, 556 U.S. at 678](#) (citing [Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929](#)). Although a sufficient complaint need not be detailed, it must contain "[f]actual allegations . . . enough to raise a right to relief above the speculative level." [Twombly, 550 U.S. at 555](#) (citation omitted). Complaints are insufficient [\*8] if they contain "naked assertions devoid of further factual enhancement." [Iqbal, 556 U.S. at 678](#) (citing [Twombly, 550 U.S. at 557](#)) (internal quotation marks omitted).

### A. Federal Law Claims

PSP first contends that Prime and Walgreens violated [Section 1](#) of the Sherman Act, which provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." [15 U.S.C. § 1](#). "Despite its broad language,"

Section 1 applies only to "unreasonable" restraints of trade or commerce. *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 772 (8th Cir. 2004) ("Craftsmen I"). In order to evaluate whether PSP has pled facts showing the alleged contract, combination, or conspiracy is unreasonable, the Court must first identify what legal standard governs the challenged conduct. *Id. at 773*.

The default standard for evaluating whether conduct violates Section 1 of the Sherman Act is the "rule of reason." *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007). To successfully plead a case under the rule-of-reason standard, a plaintiff must allege facts showing that the challenged conduct has "detrimental effects" upon competition. *Fleigel v. Christian Hosp., NE-NW*, 4 F.3d 682, 688 (8th Cir. 1993). Traditionally, a plaintiff pleads such a case by first alleging sufficient facts to define a relevant market, which is composed of both a product and geographic market. [\*9] *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380, 388 (8th Cir. 2007) ("Craftsmen II"). The plaintiff then performs "an inquiry into market power and market structure designed to assess the [conduct's] actual effect." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984). This inquiry requires consideration of a number of factors, "including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *State Oil Co. v. Khan*, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997). This is a very "challenging" standard for a plaintiff to meet. *Craftsmen II*, 491 F.3d at 388.

In some cases, however, a truncated, "quick look" rule-of-reason standard applies. See *Calif. Dental Ass'n v. FTC*, 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999). The quick-look standard applies when a person "with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Id. at 770*. Typically, the quick rule standard applies when there are facts pled that show "genuine adverse effects on competition," such as a "naked restriction on price or output." *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986). In these cases, because the "anticompetitive effects can easily be ascertained," *Calif Dental Ass'n v. FTC*, 526 U.S. at 770, there is no need to conduct an "elaborate market analysis." *Ind. Fed'n of Dentists*, 476 U.S. at 461. Instead, upon a showing of anticompetitive effects, the burden turns immediately to the defendant to show some form of pro-competitive [\*10] justification for the conduct. *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 113, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984) ("NCAA").

Finally, some restraints are considered unreasonable "per se." *Leegin*, 551 U.S. at 886. The per se standard applies to restraints that "always or almost always tend to restrict competition and decrease output." *Id.* Such restraints include horizontal agreements between competitors to fix prices, divide markets, or boycott certain firms. *Id.*; *Johnson Bros. Liquor Co. v. Bacardi U.S.A., Inc.*, 830 F. Supp. 2d 697, 707 (D. Minn. 2011). Because these categories of restraints are "so strongly linked with anti-competitive activity and their economic impact so immediately obvious . . . the plaintiff meets its burden of proving the unreasonableness of the restraint merely by proving the existence and substance of the restraint itself." *Craftsmen II*, 491 F.3d at 387.

PSP contends that the per se standard should apply here, citing caselaw holding that the per se standard applies to conspiracies between firms to exclude another from the marketplace, so long as the conspirators possess "market power or exclusive access to an element essential to effective competition." *Johnson Bros.*, 830 F. Supp. 2d at 707; see also *Silver v. New York Stock Exchange*, 373 U.S. 341, 347-48, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963). But the per se standard applies to those types of conspiracies only when the conspirators directly compete with one another. See *Johnson Bros.*, 830 F. Supp. 2d at 700 (considering agreement between two producers of alcoholic beverages). This is not such [\*11] a case. PSP does not allege that Walgreens and Prime compete directly with one another. Instead, PSP alleges that Prime is a customer or purchaser of pharmacies like PSP and Walgreens. And when there is an agreement between a buyer and a seller to exclude another entity from the market, the per se rule is inapplicable. See *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 136-37, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998) (explaining that the freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage). Instead, such agreements are subject to a rule-of-reason analysis. *Lomer Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 590 (8th Cir. 1987). The Court will therefore apply that standard to PSP's Section 1 claim.

The next question is whether the traditional, more extensive rule-of-reason standard should apply or whether the conduct should be evaluated under the truncated, quick-look standard. Neither party appears to argue that the quick-look standard is appropriate. And the facts as pled do not establish the type of "naked restraint on price [or] output" that would mandate such an analysis. [NCAA, 468 U.S. at 110](#). PSP does not allege any facts to show that prices have been affected dramatically or that output has decreased. And other courts have declined to apply the quick-look standard to vertical restraints, including exclusive [\*12] dealing arrangements. See [Hannah's Boutique, Inc. v. Surdej, 112 F. Supp. 3d 758, 770](#) (E.D. Ill. 2015) (declining to apply quick-look standard to vertical price restraints); [Acton v. Merle Norman, No. cv-88-7462, 1995 WL 441852 \\*8, \(C.D. Cal. May 16, 1995\)](#) (noting that the Ninth Circuit has never approved of the quick look approach for such restraints). Accordingly, PSP has not alleged sufficient facts to show the challenged conduct has "obvious anticompetitive effects." [Law v. National Collegiate Athletic Ass'n, 134 F.3d 1010, 1020 \(10th Cir. 1998\)](#). Thus, this case is subject to traditional rule-of-reason analysis.

Because the traditional rule-of-reason standard applies, PSP must allege sufficient facts to define a relevant product and geographic market. [Double D Spotting Service, Inc. v. Supervalu, Inc., 136 F.3d 554, 560 \(8th Cir. 1998\)](#). The relevant product market must be broad enough to include only those products that are reasonably interchangeable. *Id.* The geographic market must encompass the "area in which consumers can practically seek alternative sources of the product." *Id.* Though "proper market definition can typically be determined only after a factual inquiry into the commercial realities faced by consumers," courts have not imposed "a *per se* prohibition against dismissal of antitrust claims for failure to plead a relevant market" under [Rule 12\(b\)\(6\)](#). *Id.* (quoting [Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 \(3d Cir. 1997\)](#)). In this case, PSP alleges two relevant markets: (1) the Alabama retail pharmacy [\*13] market and (2) the Alabama specialty and mail-order pharmacy market.

As pled, the geographic market for both relevant markets fails. PSP contends the geographic market encompasses the entire state of Alabama because Alabama controls access to the relevant markets by licensing and regulating pharmacies. But a properly pled geographic market must not only encompass the area in which the seller is able to operate lawfully. It must also be limited to the area where "the purchaser can practically turn for supplies." [Tampa Elec. Co. v Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 \(1961\)](#). As pled, PSP does not allege any facts that show that a purchaser of retail pharmacy or specialty/mailorder pharmacy services could practically turn to any other similar pharmacy in the state of Alabama to obtain those services.

There are two distinct types of purchasers of retail or mail-order/specialty pharmacy services. The first type is individual patients, who use retail, mail-order, and specialty pharmacy services to fill their prescriptions. The second type is pharmacy benefit managers, like Prime, who seek to create a network of pharmacies that their members can use to fill their prescriptions. As pled, PSP alleges that a patient who fills his or her prescription at [\*14] a retail or specialty pharmacy located on the western border of Alabama could reasonably turn to a similar pharmacy located on the other side of the state to fill that prescription.<sup>1</sup> PSP's proposed geographic market also suggests that a pharmacy benefit manager could put together a viable retail or specialty/mail-order pharmacy network for its members by forgoing any pharmacy located in the northern part of the state and instead setting up a network composed entirely of pharmacies in the southern part of the state. But PSP does not allege any facts to support this. In fact, regarding the retail pharmacy market, PSP itself admits in its brief that patients "rarely leave their locality to obtain prescription medications." (ECF No. 29, p. 24). Thus, by PSP's own reasoning, a patient who lives on the western border of Alabama is unlikely to travel to the Florida/Alabama border, where PSP is located, to obtain pharmacy services. PSP's alleged geographic market is therefore not plausible.

The Alabama specialty and mail-order pharmacy market also fails because PSP does not plead sufficient facts to show that those two services should be combined into a single product market. The outer boundaries [\*15] of a product market must be determined by examining whether consumers would shift from one service to another in response to a change in the cost of the original service. [HDC Med., Inc. v. Minntech Corp., 474 F.3d 543, 547 \(8th Cir. 2007\)](#). Because PSP alleges that specialty and mail-order pharmacies form the same market, they must also

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<sup>1</sup> A statewide geographic market might be plausible for mail-order pharmacies. But PSP does not allege a stand-alone Alabama mail-order market.

allege facts that show it is plausible for a patient seeking mail-order pharmacy services to obtain the same services from a specialty pharmacy and vice versa. See *id.* PSP does not do so. Though PSP alleges that mail-order pharmacies provide specialty pharmacy services, including drug compounding, PSP does not allege that specialty pharmacies provide mail-order services or that a person who obtains nonspecialty medications through a mail-order pharmacy could obtain those medications from a specialty pharmacy. Thus, as pled, PSP does not show how mail-order and specialty pharmacy services are interchangeable with one another.

The fact that Prime and Walgreens have developed a joint venture that encompasses both specialty and mail-order pharmacy services does not mean that those services are interchangeable for purposes of defining a plausible product market. It simply means that the joint venture offers two different [\*16] service lines, each of which is interchangeable with its own market. But a person who requires mail-order prescription drug services could not obtain those services from a specialty pharmacy storefront. Thus, as pled, PSP fails to allege facts showing a plausible product market for mail order and specialty pharmacy services.

Even if PSP pled viable markets, its Section 1 claim would still fail because PSP has failed to demonstrate anticompetitive harm to those markets. Viewing the facts in a light most favorable to PSP, the only harm that it identifies is its own exclusion from the market. But the loss of PSP by itself does not constitute the type of "significant anticompetitive effects" that Section 1 prohibits. See *Tanaka v. Univ. of Southern California*, 252 F.3d 1059, 1064 (9th Cir. 2001). Conduct does not cause significant harm to a market when it is alleged to have impacted only a single party, even if the purpose of the conduct is retaliation. *Id.* Instead, the plaintiff must show harm to competitive conditions in the defined markets. *Id.* In this case, PSP only pleads that it is the victim of a conspiracy intended to drive it out of the relevant markets. That, without more, is insufficient to establish a Section 1 claim. See *TheMLSonline.com, Inc. v. Regional Multiple Listing Service of Minnesota, Inc.*, 840 F. Supp. 2d 1174, 1181-82 (D. Minn. 2012). The conduct that PSP describes might be prohibited [\*17] by other laws, including "business tort laws." NYNEX, 525 U.S. at 137. But that does not mean it is unlawful under antitrust law.

In addition, the facts as pled by PSP do not support its claim that it was, or would have been, excluded from the relevant markets. PSP alleges that Prime controls over 90 percent of the relevant markets because it is the exclusive pharmacy benefit manager for Blue Cross and Blue Shield of Alabama, which controls 93 percent of large group health benefits in Alabama. In support of this allegation, PSP cites to a Kaiser Family Foundation ("KFF") study listing the market share for the three largest large group health plans in Alabama. PSP contends that because Prime has excluded PSP from Prime's network, Prime has virtually excluded PSP from the Alabama retail pharmacy and mail order/specialty markets.

For two reasons, the Court does not find PSP's allegations to be sufficient. First, the KFF report on which PSP relies is limited only to those persons with large group health insurance. According to that report, a person has large group health insurance only if he or she works for a firm with more than 100 employees. Kaiser Family Foundation, *Market Share and Enrollment of Largest [\*18] Three Insurers-Large Group Market* (2016).<sup>2</sup> The number of persons in Alabama in 2016 with large group health insurance is approximately 530,000. *Id.* But the United States Census found there were 4,779,736 people in Alabama in 2010 and now estimates there are 4,887,871 people there as of July 1, 2018. United States Census Bureau, QuickFacts Alabama (2018).<sup>3</sup> That means there are more than 4 million Alabama residents who receive health insurance from some other source, including coverage through the individual markets, Medicare, Medicaid, a small group plan, or even a large group health plan that uses a different pharmacy benefit manager. PSP does not allege any facts to show that Prime dominates the pharmacy benefit

<sup>2</sup> Available at <https://www.kff.org/other/state-indicator/market-share-and-enrollment-of-largest-three-insurers-large-groupmarket/?currentTimeframe=0&selectedRows=%7B%22states%22:%7B%22alabama%22:%7B%7D%7D%7D&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>.

<sup>3</sup> Available at <https://www.census.gov/quickfacts/al>. The Court may take judicial notice of publicly-available data about the population. *Friends of Lake View School District Inc. No. 25 of Phillips County v. Beebe*, 578 F.3d 753, 762 n. 12 (8th Cir. 2009); see also *Hollinger v. Home State Mut. Ins. Co.*, 654 F.3d 564, 571-72 (5th Cir. 2011) ("United States census data is an appropriate and frequent subject of judicial notice").

market for those individuals, nor that show the conduct complained of prohibited PSP from operating in those markets and serving those customers. As a result, PSP cannot show that it was excluded from the relevant markets. For all of these reasons, the Court recommends that PSP's [Section 1](#) claim be dismissed without prejudice.

PSP also alleges that Prime monopolized, or attempted to monopolize, the Alabama [\*19] market for retail and specialty and mail-order pharmacy services, in violation of [Section 2](#) of the Sherman Act. To bring a monopolization claim under [Section 2](#), a plaintiff must plead facts establishing that the defendant: (1) possessed monopoly power in the relevant market and (2) willfully acquired or maintained that power, "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." [United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 \(1966\)](#). Monopoly power is the power "to control prices or exclude competition." [United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 \(1956\)](#). To prevail on an attempted monopolization claim, a plaintiff must allege facts showing "(1) a specific intent by the defendant to control prices or destroy competition; (2) predatory or anticompetitive conduct undertaken by the defendant directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success." [General Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795, 803 \(8th Cir. 1987\)](#).

In a traditional [Section 2](#) monopolization case, a plaintiff establishes that the defendant possesses monopoly power by defining a relevant geographic and product market and then by pleading facts to show the defendant's share of that particular market. [Bathke v. Casey's Gen. Stores, Inc., 64 F.3d 340, 345 \(8th Cir. 1995\)](#). The same requirements apply to a plaintiff bringing an attempted monopolization case. [Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 \(1993\)](#). The analysis of the product [\*20] and geographic market in a [Section 2](#) claim is identical to the analysis required of those markets in a [Section 1](#) rule-of-reason claim. *Compare id. with Double D, 136 F.3d at 560*. In this case, PSP alleges the same geographic and product markets as it did for its [Section 1](#) claim. Thus, PSP's [Section 2](#) claim fails for the same reasons.

Even if PSP had pled sufficient facts to allege a plausible market, its claim would fail because PSP does not allege sufficient facts to show that Prime possesses monopoly power in either market. As with its [Section 1](#) claim, PSP's monopoly power allegations are based largely on the KFF study related to large group health plans. And as discussed before, the KFF study relates only to a small subset of Alabama insureds. It is insufficient to establish that PSP has monopoly power in the relevant markets.<sup>4</sup>

Furthermore, the Court cannot conclude on the basis of the KFF study that Prime possesses over 90 percent market share of the retail pharmacy or mail-order/specialty pharmacy markets. Until its joint venture with Walgreens, Prime did not participate in either market. The KFF study that PSP relies on relates only to the market shares of health insurance providers, rather than the market shares of retail pharmacies, mail-order [\*21] pharmacies, or specialty pharmacies. PSP appears to imply that because of the joint venture between Prime and Walgreens, Prime will obtain monopoly power in the relevant markets because Prime will require its customers to use only AllianceRx or other Walgreens pharmacies. But PSP does not plead any facts that show Walgreens' market share in the relevant markets, nor does PSP allege facts showing that it is plausible that Prime will require its members to use a Walgreens retail or AllianceRx. The Court therefore cannot conclude that PSP has pled sufficient facts to show that Prime has monopoly power in the relevant markets.

A plaintiff can also prove monopoly power through direct evidence of a monopoly, which is typically established through actual control over prices or the actual exclusion of competitors. [Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1016 \(6th Cir. 1999\)](#). If a plaintiff pleads sufficient facts to show that direct evidence of monopoly power exists, then the plaintiff is not required to plead a plausible geographic or product market, as is required in a traditional [Section 2](#) claim. *Id.*

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<sup>4</sup> For the same reasons, even if PSP had alleged facts showing, for purposes of its [Section 1](#) claim, that Prime and Walgreens were direct competitors, PSP would not be able to show that the *per se* standard should apply to that claim because it does not allege facts showing the two possessed market power. See [Johnson Bros., 830 F. Supp. 2d at 707](#) (requiring proof of market power or exclusive access to an element necessary for competition for *per se* rule to apply to refusal to deal claim).

PSP, however, does not allege sufficient facts to show direct evidence of monopoly power. PSP does not plead with particularity anywhere in its complaint that [\*22] prices will increase as a result of Prime's conduct. Nor can PSP show that it was excluded from operating as a pharmacy as a result of Prime's monopoly power. As discussed above, though Prime excluded PSP from Prime's network, PSP was free to continue operating in both of the relevant markets, serving patients who used other pharmacy benefit managers or had other sources of health insurance, such as Medicare or Medicaid. In fact, the facts as pled show that PSP continued to operate after Prime terminated PSP from its network until the Alabama Board of Pharmacy revoked PSP's license nearly five months later.<sup>5</sup>

In addition, like its [Section 1](#) claim, the fact that Prime excluded PSP from its own network is insufficient to establish the type of exclusionary conduct that is necessary to allege direct evidence of monopoly power. "Generally, [Section 2](#) of the Sherman Act does not restrict the right 'of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'" [Park Irmat Drug Corp. v. Express Scripts Holding Co.](#), 911 F.3d 505, 518 (8th Cir. 2018) (quoting [Verizon Commc'n v. Law Offices of Curtis V. Trinko, LLP](#), 540 U.S. 398, 408, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)). A limited exception to this principle exists only when the facts pled show that the defendant elected to forgo short-term benefits because "it [\*23] was more interested in reducing competition . . . over the long run by harming its smaller competitor." [Aspen Skiing Co. v. Aspen Highlands Skiing Corp.](#), 472 U.S. 585, 608, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985). That exception, however, "is at or near the outer boundary of [Section 2](#) liability." [Trinko](#), 540 U.S. at 409. And in this case, PSP pleads no facts to show that Prime, Walgreens, or AllianceRx lost out on shortterm profits or other benefits by its decision to terminate PSP from its network. Thus, PSP fails to show direct evidence of monopoly power. Its monopolization claim therefore fails.

PSP further alleges that Prime and Walgreens violated [Section 2](#) of the Sherman Act by conspiring to monopolize the Alabama retail pharmacy and Alabama mail order and specialty pharmacy markets. To bring a conspiracy to monopolize claim, the plaintiff must allege facts showing concerted action undertaken with the specific intent to obtain a monopoly and at least one overt act committed in furtherance of the conspiracy. [Alexander v. Nat'l Farmers Org.](#), 687 F.2d 1173, 1182-83 (8th Cir. 1982). Though a conspiracy claim brought under [Section 2](#) does not require proof of a relevant market in the same sense as required for actual and attempted monopolization cases, it does require some "minimal showing of product and geographic context . . . to ensure a claim is not based upon some abstract showing of unlawful intent." [\*24] *Id.* There is little-to-no legal authority setting forth the particular showing that PSP must make under *Alexander* to allege the appropriate product and geographic context. But for three reasons, the Court concludes that the showing must be substantially similar to what a plaintiff must plead to bring a monopolization claim.

First, other courts that have considered the standard articulated in *Alexander* have generally concluded that this decision is similar to those in other cases that required a relevant market to be pled. See [Auraria Student Housing at the Regency LLC v. Campus Village Apartments, LLC](#), 843 F.3d 1225, 1240 n. 5 (10th Cir. 2016) (concluding that nine circuits require a relevant market be defined or identified in some less rigorous fashion); [Fraser v. Major League Soccer, LLC](#), 284 F.3d 47, 67 n. 16 (1st Cir. 2002) (stating that a number of decisions, including *Alexander*, "say that a relevant market is necessary"). At a minimum, these decisions suggest that a plaintiff must allege facts showing some sort of relevant market in order to plead a conspiracy-to-monopolize claim. In fact, these decisions suggest that even under *Alexander*, that market definition is close to, if not identical with, the standard required for [Section 2](#) claims.

Second, the *Alexander* court also concluded that "an unlawful conspiracy under [Section 2](#) necessarily violates [Section 1](#) as an 'unreasonable' restraint of trade." [\*25] [687 F.2d at 1193](#). Subsequent decisions from the Eighth Circuit make clear that, absent application of the *per se* or quick-look standard, a plaintiff must define a relevant

<sup>5</sup>The Court will take judicial notice of the Alabama Board of Pharmacy's license verification for purposes of this motion to dismiss. [Stahl v. U.S. Dep't of Agriculture](#), 327 F.3d 697, 700 (8th Cir. 2003) ("The district court may take judicial notice of public records and thus may consider them on a motion to dismiss.")

product and geographic market to bring a [Section 1](#) claim. See, e.g. [Double D, 136 F.3d at 560](#). Thus, allowing a plaintiff to bring a conspiracy-to-monopolize claim under [Section 2](#) without pleading some form of product or geographic market would be inconsistent with Eighth Circuit precedent setting forth the necessary elements to bring a traditional rule-of-reason claim under [Section 1](#). This further supports the requirement that a plaintiff plead a relevant geographic and product market.

Third, and certainly not least, United States Supreme Court precedent decided since *Alexander* casts doubt on *Alexander's* conclusion that the relevant market need can be pled in a less rigorous fashion in a conspiracy-to-monopolize case. [Section 2](#) prohibits any person from monopolizing, attempting to monopolize, or combining or conspiring with any other person to monopolize "any part of the trade or commerce among the several States." [15 U.S.C. § 2](#). In *Spectrum Sports*, the Supreme Court considered whether a plaintiff needed to define a relevant market in order to plead an attempted monopolization claim. [506 U.S. at 457](#). The Supreme Court [\*26] concluded that [Section 2](#) required such a showing because the "any part" clause of that statute applied both to attempted monopolization cases and monopolization cases. *Id.* The Court explained that because it previously concluded that the "any part" clause required the pleading of a relevant geographic and product market in a monopolization case, it would require the same showing when pleading an attempted monopolization case. *Id.*

It "is evident from the text of [[Section 2](#)], the 'any part' language also applies to conspiracy-to-monopolize claims." [Auraria, 843 F.3d at 1236](#). It is therefore "equally apparent then, that the 'any part' language does not excuse a plaintiff in a conspiracy to monopolize case from identifying the relevant market." *Id.*<sup>6</sup> Thus, in light of *Spectrum Sports*, the "any part" clause requires a plaintiff to plead a geographic and product market when bringing a conspiracy-to-monopolize case. [Id. at 1237](#) (citing [Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 61, 31 S. Ct. 502, 55 L. Ed. 619 \(1911\)](#)).

Taking the above factors into consideration, the Court concludes that PSP must define a market in the substantially same way that is required to in order to bring a monopolization or attempted monopolization claim. And as set forth above, PSP does not plead sufficient facts to define a relevant market, [\*27] nor show that it has been excluded from that market. Accordingly, the Court recommends that PSP's conspiracy to monopolize claim be dismissed.

Finally, PSP alleges that the actions of Walgreens, Prime, and AllianceRx violate [Section 3](#) of the Clayton Act, [15 U.S.C. § 14](#). [Section 3](#) makes it unlawful for any person engaged in commerce to set or offer discounts from prices based on the condition, agreement, or understanding that the purchaser would not use the competing products of a seller. PSP contends that the prices negotiated between Prime, AllianceRx, or Walgreens were based on the agreement or understanding that PSP would be excluded from Prime's network.

For a plaintiff to successfully plead a [Section 3](#) claim, the plaintiff must allege facts that show that the contract or agreement forecloses competition "in a substantial share of the line of commerce involved." [Tampa Elec., 365 U.S. at 329](#). The primary factor in this determination is the definition of the relevant market. *Id.* The plaintiff must also show that "opportunities for other traders to enter into or remain in that market [are] significantly limited." [Southeast Missouri Hosp. v. C.R. Bard, Inc., 642 F.3d 608, 625 \(8th Cir. 2011\)](#).

PSP's [Section 3](#) claim fails for the same reasons as PSP's monopoly claim. As set forth above, PSP fails to plead facts establishing a relevant market [\*28] or showing that opportunities in the market were significantly limited following the establishment of the joint venture between Prime and Walgreens. At most, PSP is able to show only that opportunities to participate in the relevant markets for large group health plans might be limited. And even assuming that Prime will require its beneficiaries to use Walgreens or AllianceRx going forward, PSP does not allege facts that show it is foreclosed from offering services in the relevant markets to customers with different sources of health insurance. Thus, the Court recommends that PSP's [Section 3](#) claim be dismissed.

<sup>6</sup> The *Auraria* court also noted that it was the "minority position" to not require that a relevant market be defined in a conspiracy-to-monopolize case. [845 F.3d at 1241](#). The Court also noted that commentators had concluded that the "better reasoned decisions" required proof of a relevant market in such cases. [845 F.3d at 1239 n. 4](#).

## B. State Law Claims

PSP also pleads a number of state law claims. It contends that, even if the Court dismisses the federal law claims, the Court retains jurisdiction of these claims because the parties are diverse in citizenship and the amount in controversy is greater than \$75,000. See [28 U.S.C. § 1332\(a\)\(1\)](#). Prime contends that because it is an LLC and because one of its members is a citizen of Florida, diversity jurisdiction does not exist.

For diversity jurisdiction to exist, there must be "complete diversity of citizenship among the litigants." [OnePoint Solutions, LLC v. Borchert](#), 486 F.3d 342, 346 (8th Cir. 2007). An LLC's citizenship is the citizenship of each of its members. [\*29] *Id.* Thus, if the citizenship of any LLC member is the same as the citizenship of any of the opposing parties, complete diversity of citizenship does not exist for purposes of diversity jurisdiction. See *id.*

In this case, the parties agree that PSP is a citizen of Florida, but dispute whether any of Prime's members are Florida citizens. At the hearing, Prime argued that Navigy Holding, Inc., a corporation organized pursuant to the laws of Florida, was a member of Prime. PSP agreed that Navigy was a Florida citizen for purposes of diversity jurisdiction but stated that it did not know whether Navigy was a member of Prime. Following the hearing, Prime submitted for *in camera* review a copy of a joinder agreement showing that Navigy Holding, Inc. was a member of Prime. (ECF No. 52). Prime also made a redacted version of this agreement available to PSP. (ECF No. 50). The Court has reviewed both the redacted and unredacted joinder agreements and concludes that either is sufficient to establish that Navigy is a member of Prime. Accordingly, the Court concludes that diversity jurisdiction does not exist between the parties.

Because diversity jurisdiction does not exist, the Court's original jurisdiction [\*30] over this matter is based on the federal questions presented by PSP's Sherman and Clayton Act claims. The Court has supplemental jurisdiction over PSP's state law claims pursuant to [28 U.S.C. § 1337\(a\)](#). Because the Court has now dismissed the claims arising under original jurisdiction, the Court may decline to exercise supplemental jurisdiction over the state law claims. [28 U.S.C. § 1337\(c\)](#). In deciding whether to exercise supplemental jurisdiction after dismissing the only claims arising under its original jurisdiction, the Court must consider "the stage of the litigation; the difficulty of the state claim; the amount of judicial time and energy necessary for the claim's resolution; and the availability of a state forum." [Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp.](#), 5 F.Supp.2d 694, 711 (D. Minn. 1998), citing [Marshall v. Green Giant Co.](#), 942 F.2d 539, 549 (8th Cir. 1991).

The "normal practice" is to dismiss supplemental state law claims when the federal claims are dismissed prior to trial. [Kapaun v. Dziedzic](#), 674 F.2d 737, 739 (8th Cir. 1982). In this case, the remaining state claims turn solely on interpretations of state law relatively unrelated to the competition-related issues of PSP's antitrust claims. Litigation is also not that far along, as the pre-trial scheduling conference has not been held and the parties have not filed their Rule 26 report. Accordingly, the Court recommends that supplemental jurisdiction [\*31] not be exercised over PSP's state law claims.

## C. Leave to Amend

PSP asks that it receive leave to amend if the Court grants Prime's motion to dismiss. [Federal Rule of Civil Procedure 15\(a\)\(2\)](#) requires leave to amend be "freely give[n] when justice so requires." The purpose of the Federal Rules of Civil Procedure is to facilitate a proper decision on the merits of a claim, rather than on "mere technicalities." [Foman v. Davis](#), 371 U.S. 178, 181, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). The Court believes justice supports providing one more opportunity for PSP to plead facts establishing a viable antitrust claim. The Court therefore recommends that PSP be given leave to amend the complaint.

## III. MOTION IN LIMINE REGARDING SETTLEMENT DEMAND LETTER

In support of its motion to dismiss, Prime filed a June 30, 2016 letter that PSP's attorneys sent to Prime and Prime's counsel demanding the release of more than \$1,000,000 that PSP claimed Prime wrongly held. Prime filed this letter in support of certain arguments it made regarding PSP's state law claims. PSP now moves to exclude that letter from the record pursuant to [Federal Rule of Evidence 408](#).

Following dismissal of PSP's antitrust claims, the Court no longer has jurisdiction over PSP's state law claims. The Court therefore need not reach the substantive issues raised in PSP's motion. [\*32] See [Grinnell Mut. Reinsurance Co. v. Moon, 845 F. Supp. 2d 989, 994 \(D. Minn. 2012\)](#) (declining as moot motion for summary judgment regarding state law cause of action that the court declined to exercise supplemental jurisdiction over). The Court recommends that Plaintiff's Motion in Limine be denied as moot.

#### **IV. RECOMMENDATION**

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY RECOMMENDED** that:

1. Defendant's Motion to Dismiss Plaintiff's Amended Complaint (ECF No. 18) be **GRANTED** and the Amended Complaint be **DISMISSED WITHOUT PREJUDICE**.
2. Plaintiff be given 30 days from the date of the District Judge's ruling on this Report & Recommendation to file an amended complaint.
3. Plaintiff be given 45 days from the date of the District Judge's ruling on this Report & Recommendation to serve an amended complaint on Defendant.
4. Plaintiff's Motion in Limine Regarding the June 30, 2016, Settlement Demand Letter (ECF No. 35), be **DENIED AS MOOT**.

Date: January 23, 2019

/s/ *Tony N. Leung*

Tony N. Leung

United States Magistrate Judge

District of Minnesota

*Physician Specialty Pharmacy, LLC v. Prime Therapeutics, LLC*

No. 18-cv-1044 (MJD/TNL)

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## Ohio State ex rel. AG v. Life Care Ctrs. Am., Inc.

State of Ohio, Court of Common Pleas, Franklin County

January 24, 2019, Decided

Case No. 18 CV 3015

### **Reporter**

2019 Ohio Misc. LEXIS 229 \*

OHIO STATE EX REL ATTORNEY GENERAL, Plaintiff, v. LIFE CARE CENTERS AMERICA, INC., Defendant.

## **Core Terms**

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allegations, competitors, asserts, Valentine Act, statute of limitations, plain statement, geographic, antitrust, prices

## **LexisNexis® Headnotes**

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

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

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

In construing a claim for purposes of a [Civ.R. 12\(B\)\(6\)](#) motion, it is presumed that all factual allegations in the claim are true and it must appear beyond doubt that the party can prove no set of facts warranting recovery. As such, all reasonable inferences must be drawn in favor of the nonmoving party. Because Ohio is a notice pleading state, a party need only set forth "a short and plain statement of the claim showing that the party is entitled to relief." [Civ.R. 8\(A\)\(1\)](#). Further, a pleader is ordinarily not required to allege in the complaint every fact he or she intends to prove; such facts may not be available until after discovery. For this reason, the court dismisses claims only when a party can prove no set of facts entitling her to relief. Because it is so easy for the pleader to satisfy the standard of [Civ.R. 8\(A\)](#), few complaints are subject to dismissal.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

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

The Valentine Act, [R.C. § 1331.01 et seq.](#), is Ohio's antitrust statute which prevents agreements between competitors to exchange sensitive information and unreasonably restrain trade. Any civil or criminal action or proceeding for a violation of [R.C. § 1331.01](#) to [R.C. 1331.14](#) shall be forever barred unless commenced within four years after the cause of action accrued. [R.C. § 1331.12](#).

Antitrust & Trade Law > Sherman Act

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > State Regulation

### **HN3** [] Antitrust & Trade Law, Sherman Act

The Ohio Legislature patterned the Valentine Act, [R.C. § 1331.01 et seq.](#), after the federal antitrust statute, the Sherman Act. Accordingly, the Supreme Court of Ohio looks to federal case law when evaluating Valentine Act claims. In Zenith Radio Corp., the Supreme Court of United States held: In the context of a continuing conspiracy to violate the antitrust laws, this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.

Governments > Legislation > Statute of Limitations > Extensions & Revivals

### **HN4** [] Statute of Limitations, Extensions & Revivals

Under federal law, even when a plaintiff alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act.

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

Governments > Legislation > Statute of Limitations > Extensions & Revivals

### **HN5** [] Regulated Practices, Price Fixing & Restraints of Trade

**Antitrust law** provides that, in the case of a "continuing violation," say a price fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and that injures the plaintiff, e.g., each sale to the plaintiff, starts the statutory period running again, regardless of the plaintiffs knowledge of the alleged illegality at much earlier times.

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

### **HN6** [] Complaints, Requirements for Complaint

Ohio is a notice pleading state, where only a short and plain statement is necessary to adequately state a claim. [Civ.R. 8\(A\)\(1\)](#). Under [Civ.R. 12\(B\)\(6\)](#), a court need not look beyond the four corners of a complaint.

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

### **HN7** [] Relevant Market, Geographic Market Definition

The determination of the adequacy of a relevant market, like a geographic market, is typically a question of fact. The Supreme Court of the United States had held, a geographic market is sufficient if it sets out the geographic parameters of "effective competition." An area of effective competition is charted by careful selection of the market area in with the seller operates, and to which the purchaser can practically turn for supplies.

**Judges:** [\*1] Judge Daniel R. Hawkins.

**Opinion by:** Daniel R. Hawkins

## **Opinion**

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### **DECISION AND ENTRY DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

Hawkins, J.

This matter came before the Court on Defendant's motion to dismiss Plaintiff's complaint. Upon review of the motion, associated briefing, and pleadings, the Court finds the motion not well taken and DENIES the same.

#### **I. Background**

Defendant Lifecare Centers of America, Inc., provides assisted living services and skilled nursing services to elderly clients in Ohio and approximately 28 other states. Plaintiff's Complaint, ¶¶ 8-9, 35-36. Plaintiff, the State of Ohio, asserts Defendant Lifecare Centers of America, Inc., exchanged "competitively-sensitive nonpublic information with its competitors[.]" *Id.* at ¶ 7. Under its complaint, Plaintiff seeks a permanent injunction against Defendant, restraining it from "[c]ommunicating or agreeing to communicate sensitive information to any competitor" and pay damages for the harm it incurred against the elderly of Ohio pursuant to [R.C. §1331.03](#). Defendant now moves to dismiss Plaintiff's complaint.

#### **II. Motion-to-Dismiss Standard**

**HN1** In construing a claim for purposes of a [Civ. R. 12\(B\)\(6\)](#) motion, "it is presumed that all factual allegations in the [claim] [\*2] are true and it must appear beyond doubt that the [party] can prove no set of facts warranting recovery." [Tulloh v. Goodyear Atomic Corp.](#), 62 Ohio St.3d 541, 544, 584 N.E.2d 729 (1992). As such, "all reasonable inferences must be drawn in favor of the nonmoving party." [Byrd v. Faber](#), 57 Ohio St.3d 56, 60, 565 N.E.2d 584 (1991). Because Ohio is a notice pleading state, a party need only set forth "a short and plain statement of the claim showing that the party is entitled to relief." [Civ.R. 8\(A\)\(1\)](#). Further, "a pleader is ordinarily not required to allege in the complaint every fact he or she intends to prove; such facts may not be available until after discovery." [State ex rel. Hanson v. Guernsey Cty. Bd. Of Commsrs.](#), 65 Ohio St.3d 545, 549, 1992-Ohio 73, 605 N.E.2d 378 (1992). For this reason, the court dismisses claims only when a party can prove no set of facts entitling her to relief. [Volbers-Klarich v. Middletown Mgmt.](#), 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 12. "Because it is so easy for the pleader to satisfy the standard of [Civ.R.8\(A\)](#), few complaints are subject to dismissal." [Leictitman v. WLW Jacor Communications, Inc.](#), 92 Ohio App.3d 232, 234, 634 N.E.2d 697 (1st Dist. 1994).

#### **III. Discussion**

Defendant asserts Plaintiff has failed to state a claim for which relief may be granted because: (1) the complaint is barred by the statute of limitations under [R.C. §1331.12](#); (2) the complaint contains no allegations that Defendant exchanged information with its competitors; and (3) the complaint does not allege market harm as under the Valentine Act. The Court now addresses the same.

##### **A. Statute of Limitations**

Plaintiff brings its claims under [\*3] [HN2](#)<sup>↑</sup> the Valentine Act, Ohio's antitrust statute which prevents agreements between competitors to exchange sensitive information and unreasonably restrain trade. [R.C. §1331.01-1331.14](#). "Any civil or criminal action or proceeding for a violation of [sections 1331.01 to 1331.14 of the Revised Code](#) . . . shall be forever barred unless commenced within four years after the cause of action accrued." [R.C. §1331.12](#). Defendant asserts Plaintiff has failed to bring the underlying case within the four-year statute of limitations.

[HN3](#)<sup>↑</sup> The Ohio Legislature patterned the Valentine Act after the federal antitrust statute, the Sherman Act. See [Johnson v. Microsoft, 106 Ohio St. 3d 278, 281, 2005- Ohio 4985, 834 N.E.2d 791 \(2005\)](#). Accordingly, the Supreme Court of Ohio looks to federal case law when evaluating Valentine Act claims. *Id.* In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, the Supreme Court of United States held:

In the context of a continuing conspiracy to violate the antitrust laws, such as the conspiracy in the instant case, this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.

[401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 \(1971\)](#). Here, Plaintiff alleges the underlying matter was a continuing [\*4] conspiracy. Plaintiffs Memorandum Contra, p. 9. Yet, [HN4](#)<sup>↑</sup> under federal law, "[e]ven when a plaintiff alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act." [DXS, Inc. v. Siemens Med. Sys., 100 F.3d 462, 467 \(6th Cir.1996\)](#) (citing [Peck v. General Motors Corp., 894 F.2d 844, 849 \(6th Cir. 1990\)](#)).

In *Klehr v. A.O. Smith Corp.*, dairy farmers sought action against farm equipment corporations for falsely representing and inducing the farmers to purchase a silo, which resulted in loss to their farm. The Supreme Court stated, [HN5](#)<sup>↑</sup> "**Antitrust law** provides that, in the case of a 'continuing violation,' say a price fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, 'each overt act that is part of the violation and that injures the plaintiff,' e.g., each sale to the plaintiff, 'starts the statutory period running again, regardless of the plaintiffs knowledge of the alleged illegality at much earlier times.'" [Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 \(1997\)](#).

Plaintiff alleges Defendant conspired to and did work to raise or stabilize the prices of services. Plaintiff's Complaint, ¶¶ 7, 38-75. The Court finds each instance where the price was raised or stabilized to evade the decreasing of prices was a separate overt act because [\*5] each time the prices were raised, new and additional injuries occurred. [Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 \(1997\)](#). Plaintiff alleges Defendant conspired to raise and/or stabilize the prices of assisted living services and skilled nursing services up to and including October 2014. Plaintiff's Complaint, ¶ 43. The underlying matter was filed on April 10, 2018. Accordingly, the Court finds Plaintiff's claims are not barred by [R.C. §1331.12](#).

## **B. Failure to State a Claim**

The Defendant argues Plaintiff has not adequately plead its claim under the Valentine Act, and lacks allegations supporting [§ 1331.01 \(C\)\(1\)\(e\)](#), which states:

To make, enter into, execute, or carry out contracts, obligations, or agreements of any kind . . . by which they agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of an article, commodity, or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, purchasers, or consumers in the sale or transportation of such article or commodity, or by which they agree to pool, combine, or directly or indirectly unite any interests which [\*6] they have connected with the sale or transportation of such article or commodity, that its price might in any manner be affected[.]

Specifically, the Defendant argues Plaintiff's complaint lacks allegations of (1) an exchange of information and (2) actual stabilization or harm to the market.

### **i. Exchange of Information with Competitors**

The Defendant asserts the Complaint only alleges unilateral action and not an exchange of sensitive information. As previously stated, [HN6](#) Ohio is a notice pleading state, where only a short and plain statement is necessary to adequately state a claim. [Civ. R. 8\(A\)\(1\)](#). Under [Civ. R. 12\(B\)\(6\)](#), a court need not look beyond the four corners of a complaint. Within the Complaint, Plaintiff states, "Defendant's regular, frequent and systematic exchanges of competitively-sensitive nonpublic information with its competitors have injured the State and many of its most vulnerable citizens, and have violated Ohio's **antitrust law**." Plaintiff's Complaint, ¶ 7. Plaintiff's Complaint goes on to state many other similar allegations that Defendant exchanged sensitive information with competitors. *Id.* at ¶¶ 37-59. Based on the foregoing, the Court finds Plaintiff has plead a short, plain statement alleging [\*7] the exchange of competitively-sensitive nonpublic information with its competitors in support of its claim under the Valentine Act.

### **ii. Market Harm**

Defendant argues the Plaintiff's Complaint does not adequately state a claim because it fails to properly allege the area of the geography market or harm to that market. Both parties admit that [HN7](#) the determination of the adequacy of a relevant market, like a geographic market, is typically a question of fact. [Anapi Southwest, Inc. v. Coca-Cola Ents., 300 F. 3d 620, 628 \(5th Cir. 2002\)](#); [White & White, Inc. v. Am. Hosp. Supply Corp., 723 F.2d 495, 499 \(6th Cir. 1983\)](#). The Supreme Court of the United States had held, a geographic market is sufficient if it sets out the geographic parameters of "effective competition." [Brown Shoe Co. v. United States, 370 U.S. 294, 324, 82 S. Ct. 1502, 8 L. Ed. 2d 510 \(1961\)](#). An area of effective competition is "charted by careful selection of the market area in with the seller operates, and to which the purchaser can practically turn for supplies." [Food Lion, LLC v. Dean Foods Co., 739 F. 3d 262, 277 \(6th Cir. 2014\)](#).

Within the Complaint, Plaintiff states, "[t]he purchasers of Private Pay Services typically seek those services within 5-25 miles of their homes, depending upon population density in that area." Plaintiffs Complaint, ¶ 26. Additionally, Plaintiff asserts, "[t]he Ohio geographic markets affected by the conduct described in [the] Complaint generally fall within a 5-25 mile radius of each of the conspirators' [\*8] Ohio Communities[.]" *Id.* at ¶ 27. The Court finds these to be statements setting out the geographic parameters of effective competition. Defendant asserts the Court should not consider those allegations which include areas outside the 5-25 mile radius from Defendant's locations, as they are separate markets. The Court finds Plaintiff to be correct, but the allegations put forth regarding these additional markets do not diminish the claims of harm Plaintiff asserts within the alleged market. *Id.* at ¶¶ 38-53 (referring to Central Ohio competitors, a location in Milliard, etc.). Accordingly, the Court finds Plaintiff asserts short, plain statements of market harm.

## **IV. Conclusion**

Based on the foregoing, the Court finds Plaintiff's claims are not barred by the statute of limitations and Plaintiff does put forth short, plain statements supporting its claim showing that the party is entitled to relief under the Valentine Act. Accordingly, the Court DENIES Defendant's motion to dismiss for failure to state a claim upon which relief may be granted.

IT IS SO ORDERED.

It Is So Ordered.

/s/ Daniel R. Hawkins

/s/ Judge Daniel R. Hawkins

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## ***City of Rockford v. Mallinckrodt ARD, Inc.***

United States District Court for the Northern District of Illinois

January 25, 2019, Decided; January 25, 2019, Filed

Case No: 17 CV 50107

### **Reporter**

360 F. Supp. 3d 730 \*; 2019 U.S. Dist. LEXIS 12171 \*\*; 2019-1 Trade Cas. (CCH) P80,658; 2019 WL 330471

City of Rockford, et al., Plaintiffs, v. Mallinckrodt ARD, Inc., et al., Defendants.

**Subsequent History:** Reconsideration denied by, Motion denied by [\*City of Rockford v. Mallinckrodt ARD, Inc., 2019 U.S. Dist. LEXIS 103885, 2019 WL 2763181 \(N.D. Ill., May 3, 2019\)\*](#)

Related proceeding at [\*Mallinckrodt PLC v. City of Rockford \(In re Mallinckrodt PLC\), 2021 Bankr. LEXIS 1601 \(Bankr. D. Del., June 16, 2021\)\*](#)

**Prior History:** [\*City of Rockford v. Mallinckrodt Ard, Inc., 2018 U.S. Dist. LEXIS 41085 \(N.D. Ill., Feb. 2, 2018\)\*](#)

## **Core Terms**

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antitrust, defendants', plaintiffs', allegations, conspiracy, courts, containment, motion to dismiss, prices, misrepresentation, parties, unjust enrichment, purchaser, state-law, Acquisition, replead, antitrust claim, anti trust law, anticompetitive, conspired, recitals, price-fixing, prong, fair dealing, patients, promise, manufacturer, promissory estoppel, class action, monopolization

## **LexisNexis® Headnotes**

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

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

### ***HN1* [blue icon] Motions to Dismiss, Failure to State Claim**

When deciding a motion to dismiss, the court accepts all of the well-pleaded allegations of the complaint as true and draws all reasonable inferences in favor of the plaintiff. Under the Federal Rules, a complaint need only contain a short and plain statement of the claim showing that the pleader is entitled to relief. [\*Fed. R. Civ. P. 8\(a\)\(2\)\*](#). Detailed factual allegations are not required, but the plaintiff must allege facts that, when accepted as true state a claim to relief that is plausible on its face. In analyzing whether a complaint has met this standard, the reviewing court must draw on its judicial experience and common sense.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

360 F. Supp. 3d 730, \*730L 2019 U.S. Dist. LEXIS 12171, \*\*12171

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Torts > Business Torts > Fraud & Misrepresentation > Actual Fraud

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

## [HN2](#) [] **Claims, Fraud**

Claims for fraud, conspiracy to defraud and RICO conspiracy are subject to a heightened pleading standard that requires plaintiffs to plead their allegations with specificity. [Fed. R. Civ. Proc. 9\(b\)](#).

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Affirmative Defenses

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

## [HN3](#) [] **Defenses, Demurrs & Objections, Affirmative Defenses**

A plaintiff is not required to plead elements in his or her complaint that overcome affirmative defenses.

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

Constitutional Law > ... > Case or Controversy > Standing > Elements

## [HN4](#) [] **Standing, Injury in Fact**

Generally, U.S. Const. art. III standing is the threshold question in every federal case, determining the power of the court to entertain the suit. All that is required to demonstrate Article III standing is injury in fact plus redressability.

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

Constitutional Law > ... > Case or Controversy > Standing > Elements

## [HN5](#) [] **Standing, Sherman Act**

The United States Supreme Court has found two additional standing limitations born from the Sherman Act as part of a separate standing doctrine known as antitrust standing. Courts must engage in a proximate cause analysis to determine whether a plaintiff is a proper party to bring suit.

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

## [HN6](#) [] **Standing, Sherman Act**

Illinois Brick v. Illinois' indirect purchaser rule denies a plaintiff antitrust standing unless it fits into one of the recognized exceptions to Illinois Brick. One such exception is the co-conspirator exception, which allows indirect purchasers to sue middlemen-conspirators if the plaintiffs can establish a conspiracy and overcharges. Illinois Brick does not limit suits by consumers against a manufacturer who illegally contracted with its dealers to set the latter's resale price. The consumer plaintiff is a direct purchaser from the dealer who, by hypothesis, has conspired illegally with the manufacturer with respect to the very price paid by the consumer. There is no problem of duplication or

apportionment because the consumer is the only party who has paid any overcharge. Although the manufacturer did not sell directly to the consumer, he is a fellow conspirator with the direct-selling dealer and therefore jointly and severally liable with the dealer for the consumer's injury. The crucial question for courts assessing this exception is whether the alleged anticompetitive conduct stems from an agreement between the alleged co-conspirators.

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

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements

Antitrust & Trade Law > Sherman Act

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

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

### **HN7** [] Regulated Practices, Price Fixing & Restraints of Trade

A plaintiff alleging conspiracy to fix prices in violation of the Sherman Act must allege enough factual matter (taken as true) to suggest that an agreement was made—that is, enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. This standard is not the same as the heightened pleading standard of Fed. R. Civ. P. 9(b), and accordingly, plaintiffs can allege an antitrust conspiracy by pleading circumstantial evidence of an illegal agreement. The courts do not apply any heightened pleading standard, nor do the courts seek to broaden the scope of Rule 9. Circumstantial evidence is the lifeblood of antitrust law because direct evidence will rarely be available to prove the existence of a price-fixing conspiracy.

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

### **HN8** [] Private Actions, Sherman Act

The United States Court of Appeals for the Seventh Circuit explains that the crux of the Illinois Brick v. Illinois' co-conspirator exception is the joint-and-several liability of conspiring defendants: If the defendant was among those conspirators, then it is responsible for the entire overcharge of all defendants—and any direct purchaser from any conspirator can collect its own portion of damages (that is, the damages attributable to its direct purchases) from any conspirator.

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

### **HN9** [] Standing, Sherman Act

In determining whether an antitrust plaintiff is a proper party to bring suit, courts look at the following factors: (1) the causal connection between the violation and the harm; (2) the presence of improper motive; (3) the type of injury and whether it was one Congress sought to redress; (4) the directness of the injury; (5) the speculative nature of the damages; and (6) the risk of duplicate recovery or complex damage apportionment.

Antitrust & Trade Law > Sherman Act > Scope

### **HN10** [] Antitrust & Trade Law, Sherman Act

Section 1 of the Sherman Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. 15 U.S.C.S. § 1. Only those agreements that are unreasonable restraints on trade are actionable under § 1. To state § 1 claims, plaintiffs must plead facts plausibly suggesting: (1) a contract, combination, or conspiracy (meaning, an agreement); (2) a resulting unreasonable restraint of trade in a relevant market; and (3) an accompanying antitrust injury.

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

### HN11 [ ] Per Se Rule & Rule of Reason, Sherman Act

The unreasonable restraint of trade prong under 15 U.S.C.S. § 1 asks courts to assess the competitive effects of challenged behavior as its abandonment or a less restrictive substitute. Courts use one of three tests to determine the challenged behavior. Courts use a per se test for conduct such as horizontal price fixing, market allocation, group boycotts, or tying arrangements that are so inherently anticompetitive, they are considered illegal per se. In contrast, vertical arrangements such as exclusive distribution agreements are analyzed under the rule of reason test, which assigns the burden to plaintiffs to sufficiently allege that an agreement has an anticompetitive effect on a given market within a given geographic area. More often than not, courts use the rule of reason test and not the per se test. Courts sometimes employ a third test, known as the quick-look test, for conduct that is not plainly anticompetitive but where no elaborate industry analysis is required to demonstrate the anticompetitive character of an agreement.

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

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

### HN12 [ ] Per Se Rule & Rule of Reason, Sherman Act

At the motion to dismiss stage of proceeding, courts do not find it necessary to determine which mode of analysis under 15 U.S.C.S. § 1, the per se or the rule of reason, it will ultimately employ in evaluating a defendant's activities.

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

### HN13 [ ] Scope, Monopolization Offenses

The elimination of competition with no procompetitive justification is the type of conduct that the antitrust laws were designed to guard against.

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

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

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

### HN14 [ ] Scope, Monopolization Offenses

The third prong under 15 U.S.C.S. § 1 requires that an antitrust plaintiff must allege that the claimed injuries are of the type the antitrust laws were intended to prevent and reflect the anticompetitive effect of either the violation or

anticompetitive acts made possible by the violation. The purpose of the Sherman Act is to protect consumers from injury that results from diminished competition. Thus the plaintiff must allege, not only an injury to himself, but an injury to the market as well. A private plaintiff must show antitrust injury—which is to say, injury by reason of those things that make the practice unlawful, such as reduced output and higher prices.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Competitive Injuries

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

### **HN15** [down] **Price Discrimination, Competitive Injuries**

Paying higher prices as a result of coordinated output restrictions is a paradigmatic antitrust injury.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Competitive Injuries

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

### **HN16** [down] **Price Discrimination, Competitive Injuries**

The antitrust-injury doctrine was created to filter out complaints by competitors and others who may be hurt by productive efficiencies, higher output, and lower prices, all of which the antitrust laws are designed to encourage. To recover under the antitrust laws, the plaintiff must show that its injury flows from that which makes the conduct an antitrust problem: higher prices and lower output.

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

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

### **HN17** [down] **Scope, Monopolization Offenses**

A conspiracy to monopolize consists of (1) the existence of a combination or conspiracy, (2) overt acts in furtherance of the conspiracy, (3) an effect upon a substantial amount of interstate commerce, and (4) the existence of specific intent to monopolize. [15 U.S.C.S. § 2](#) claims may be plead under three different theories: (1) monopolization, (2) attempted monopolization, and (3) conspiracy to monopolize.

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

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

### **HN18** [down] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

With respect to the fourth prong under [15 U.S.C.S. § 2](#), in cases that involve exclusive dealing arrangements, courts typically infer a sufficient allegation of specific intent when overt acts are adequately pled. Explaining that anticompetitive conduct may be sufficient to prove the necessary intent to monopolize. Courts are wary to dismiss antitrust cases on intent solely on the pleadings because evidence of intent is often in the control of the defendants.

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

### [\*\*HN19\*\*](#) [L] Scope, Monopolization Offenses

In addressing the second prong [15 U.S.C.S. § 2](#), similar to [15 U.S.C.S. § 1](#), anticompetitive effects requirement, plaintiffs must allege that the overt acts constitute anticompetitive conduct. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct. Under [§ 2](#), intent to obtain a monopoly is unlawful only where an entity seeks to maintain or achieve monopoly power by anticompetitive means. The offense of monopolization is the acquisition of monopoly by improper methods or, more commonly the abuse of monopoly. The acts from which the court can infer anticompetitive conduct must be essentially predatory in nature. Exclusionary, predatory, or anticompetitive conduct for purposes of [§ 2](#) claims is broadly defined as conduct that is in itself an independent violation of the antitrust laws or that has no legitimate business justification other than to destroy or damage competition.

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

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

### [\*\*HN20\*\*](#) [L] Exclusive & Reciprocal Dealing, Exclusive Dealing

While analysis of the second prong [15 U.S.C.S. § 2](#), can in some cases differ greatly from claims under the second prong [15 U.S.C.S. § 1](#), for exclusive dealing claims brought under [§ 2](#), the analysis nearly the same as that for [§ 1](#) claims. This makes sense given that a plaintiff alleging an unreasonable restraint of trade would typically be required to allege that a defendant undertook overt acts to effectuate the restraint. [Section 2](#) claims that allege antitrust violations based on exclusive dealing arrangements are analyzed in much the same way as [§ 1](#) claims.

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

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

### [\*\*HN21\*\*](#) [L] Exclusive & Reciprocal Dealing, Exclusive Dealing

Like claims under [15 U.S.C.S. § 1](#), a plaintiff alleging a [15 U.S.C.S. § 2](#) claim must also allege an antitrust injury. The [§ 2](#) requirement of antitrust injury under a conspiracy-to-monopolize theory specifically.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

### [\*\*HN22\*\*](#) [L] Remedies, Injunctions

The § 16 of the Clayton Act provides in part that any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief against threatened loss or damage by a violation of the antitrust laws. [15 U.S.C.S. § 26](#).

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

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## [HN23](#) [blue icon] Purchasers, Indirect Purchasers

The indirect-purchaser doctrine does not foreclose equitable relief. [15 U.S.C.S. § 26](#).

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Constitutional Law > The Judiciary > Case or Controversy > Standing

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

## [HN24](#) [blue icon] Class Actions, Certification of Classes

Courts are split as to whether a court should rule on a plaintiff's U.S. Const. art. III standing to bring state-law claims on behalf of unnamed class members at a motion to dismiss stage, or as an alternative, defer that ruling until the class certification stage. The United States District Court for the Northern District of Illinois is persuaded that the standing issue focuses on whether the named plaintiff is properly before the court, not whether represented parties or absent class members are properly before the court, and applies that reasoning to a case when ruling on a motion to dismiss.

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

Constitutional Law > Supremacy Clause > Federal Preemption

## [HN25](#) [blue icon] Deceptive & Unfair Trade Practices, State Regulation

The Arkansas Deceptive Trade Practices Act (ADTPA) prohibits a variety of conduct, including deceptive and unconscionable trade practices. [Ark. Code Ann. § 4-88-107\(a\)](#). However, the ADTPA contains a safe harbor provision that does not apply the law to practices which are subject to and comply with any rule, order, or statute administered by the Federal Trade Commission. [Ark. Code Ann. § 4-88-101\(1\)](#).

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

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

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

## [HN26](#) [blue icon] Scope, Monopolization Offenses

In Arkansas, unconscionable trade practices include conduct violative of public policy or statute. This requires something more than merely alleging that the price of a product was unfairly high. Two important considerations are whether there is a gross inequality of bargaining power between the parties to the contract and whether the aggrieved party was made aware of and comprehended the provision in question. While price-fixing or monopolization are not listed in the Arkansas Deceptive Trade Practices Act (ADTPA), the statute does contain a catch-all provision that proscribes engaging in any other unconscionable, false, or deceptive act or practice in business, commerce, or trade. [Ark. Code Ann. § 4-88-107\(a\)\(10\)](#). Allegations of price fixing are not the kind of conduct prohibited under the statute because price-fixing, within the meaning of the ADTPA, does not affront the sense of justice, decency, or reasonableness. However, monopolization claims are actionable under the ADTPA. Courts have interpreted the catchall provision of the Arkansas Deceptive Trade Practices Act—which prohibits any

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unconscionable, false, or deceptive act or practice in business, commerce, or trade-broadly so as to encompass [15 U.S.C.S. § 2](#) monopolization claims.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statutory Remedies & Rights

## [\*\*HN27\*\*](#) [💡] **Private Actions, State Regulation**

There is a split of authority on the issue of whether the Illinois Antitrust Act's class action prohibition is part of Illinois' substantive rights or remedies. The United States District Court for the Northern District of Illinois agrees with the reasoning that casts doubt on whether the framework of substantive rights or remedies controls.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Civil Procedure > Special Proceedings > Class Actions

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Antitrust & Trade Law > Public Enforcement > State Civil Actions

## [\*\*HN28\*\*](#) [💡] **Purchasers, Indirect Purchasers**

The Illinois Antitrust Act does not alter the scope of any substantive right or remedy-and is thus not substantive for purposes of *Shady Grove v. Allstate* analysis-because any indirect purchaser procedurally blocked from participation in a class action would still have the same remedy in an individual action. The Illinois Antitrust Act's class action limitation hews more closely to a particular substantive right (indirect-purchaser antitrust claims) than the New York state-law limitation in *Shady Grove*, but if New York's state-law bar is not a procedural rule that alters the scope of a substantive right or remedy, then the narrower scope of Illinois's state-law bar does not make it one that does.

Civil Procedure > Special Proceedings > Class Actions

## [\*\*HN29\*\*](#) [💡] **Special Proceedings, Class Actions**

[\*Fed. R. Civ. P. 23\*](#) explicitly empowers a federal court to certify a class in every case that satisfies its criteria. Like the rest of the [\*Federal Rules of Civil Procedure, Rule 23\*](#) automatically applies in all civil actions and procedures in the United States district courts.

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

## [\*\*HN30\*\*](#) [💡] **Deceptive & Unfair Trade Practices, State Regulation**

In assessing Hawaii's antitrust statute notice provision, nothing in the Hawaii antitrust statutory scheme suggests that a defendant may use the statute as a shield to avoid answering for alleged anti-competitive behavior.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

### [\*\*HN31\*\*](#) [] Breach of Contract Actions, Elements of Contract Claims

To prevail on its breach of contract claim, a plaintiff must demonstrate: (1) the existence of a valid and enforceable contract; (2) substantial performance by the plaintiff; (3) a breach by defendants; and (4) resultant damages.

Business & Corporate Compliance > ... > Contract Conditions & Provisions > Contracts Law > Contract Conditions & Provisions

Contracts Law > Contract Interpretation

Business & Corporate Compliance > ... > Contract Formation > Offers > Definite Terms

### [\*\*HN32\*\*](#) [] Contracts, Contract Conditions & Provisions

Recitals to a contract provide explanations of those circumstances surrounding the execution of the contract. Recitals are preliminary in nature and are generally not binding on the parties or an effective part of their agreement unless referred to in the operative portion of their agreement. Courts in Illinois look for the terms contained within the recitals to appear in the operative portions of the contract before assigning those terms binding power upon the parties.

Business & Corporate Compliance > ... > Contract Conditions & Provisions > Contracts Law > Contract Conditions & Provisions

Contracts Law > Contract Interpretation

Business & Corporate Compliance > ... > Contract Formation > Offers > Definite Terms

### [\*\*HN33\*\*](#) [] Contracts, Contract Conditions & Provisions

Under Illinois law, recitals are not binding obligations unless referred to in the operative portion of the contract.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem

Contracts Law > Contract Interpretation > Intent

### [\*\*HN34\*\*](#) [] Contract Interpretation, Ambiguities & Contra Proferentem

Under Illinois law contractual terms that are too vague or indefinite are not enforceable. A term that is too vague or indefinite is one that a court cannot, under proper rules of construction and applicable principles of equity, ascertain what the parties have agreed to do.

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

Contracts Law > Contract Interpretation

### [\*\*HN35\*\*](#) [] Motions to Dismiss, Failure to State Claim

In the context of a motion to dismiss for failure to state a claim, the court must accept all of the well-pleaded allegations of a complaint as true; however, in a contract action, if the language of the contract is plainly inconsistent with the plaintiff's representations, the court may decline to afford the presumption of truth. Where the allegations of a pleading are inconsistent with the terms of a written contract attached as an exhibit, the terms of the latter, fairly construed, must prevail over the averments differing therefrom.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

#### **HN36** [+] Breach of Contract Actions, Elements of Contract Claims

To state a claim for breach of the implied covenant of good faith and fair dealing in Illinois, a plaintiff must plausibly allege (1) that the existence of an enforceable contract (2) breaching a specific duty imposed by the contract other than the covenant of good faith and fair dealing; (3) that defendant failed to exercise its contractual discretion reasonably and with proper motive; and (4) resultant damages.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

Contracts Law > Contract Interpretation > Intent

#### **HN37** [+] Breach of Contract Actions, Elements of Contract Claims

In Illinois, every contract implies good faith and fair dealing between the parties to it, and where an instrument is susceptible of two conflicting constructions, one which imputes bad faith to one of the parties and the other does not, the latter construction should be adopted. This good-faith principle is used only as a construction aid in determining the intent of the contracting parties. The obligation of good faith and fair dealing is used as an aid in construing a contract under Illinois law, but does not create an independent cause of action. Under Illinois law the covenant of good faith and fair dealing is not an independent source of duties for the parties to contract. The implied covenant is used to interpret a contract. Nor can it be used to contradict the express terms in a contract. Rather, a plaintiff can plead breach of the implied covenant as a theory for a breach of contract cause of action-and not as a separate, independent cause of action-in the situations where it is being used as a gap-filler where a contract is otherwise silent on how the parties are to perform certain terms of the contract. However, courts only allow this when the gap-filler is used to prevent a party from abusing discretion outlined for them in the contract.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

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

#### **HN38** [+] Breach of Contract Actions, Elements of Contract Claims

A party who does not properly exercise contractual discretion breaches the implied covenant of good faith and fair dealing that is in every contract. In order to plead a breach of the covenant of good faith and fair dealing, a plaintiff must plead existence of contractual discretion. Where the contract vests one of the parties with discretion in performing an obligation, and that party exercises that discretion in bad faith, unreasonable or in a manner

inconsistent with the reasonable expectations of the parties, it breaches the implied covenant of good faith and fair dealing.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

#### [HN39](#) [] Consideration, Promissory Estoppel

Promissory estoppel is a common-law principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and if the promisee did actually rely on the promise to his or her detriment. However, under Illinois law, promissory estoppel and unjust enrichment are unavailable where the parties have entered into an express contract. Like a plaintiff's claims for unjust enrichment, a plaintiff may only plead promissory estoppel in the alternative to a breach of contract claim, such that no express contract may be invoked in its count for promissory estoppel.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

#### [HN40](#) [] Consideration, Promissory Estoppel

To state a claim for the common-law doctrine of promissory estoppel, a plaintiff must prove that (1) defendant made an unambiguous promise to plaintiff, (2) plaintiff relied on such promise, (3) plaintiff's reliance was expected and foreseeable by defendants, and (4) plaintiff relied on the promise to its detriment.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

#### [HN41](#) [] Equitable Relief, Quantum Meruit

Unjust enrichment is a product of common law that enshrines the principle that no one ought to enrich himself unjustly at the expense of another. The doctrine enshrines both legal and equitable values, but at its core, properly alleged unjust enrichment claims involve situations in which the benefit the plaintiff is seeking to recover proceeded directly from him to the defendant.

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

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

#### [HN42](#) [] Complaints, Requirements for Complaint

Both Illinois and Tennessee permit a plaintiff to plead unjust enrichment as an alternative theory of liability. A plaintiff may plead as follows: (1) there is an express contract, and the defendant is liable for breach of it; and (2) if there is not an express contract, then the defendant is liable for unjustly enriching himself at my expense. This is counter to the wider-sweeping argument that a plaintiff may not plead both the existence of an enforceable contract and unjust enrichment in the same complaint.

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Civil Procedure > Preliminary Considerations > Equity > Adequate Remedy at Law

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

#### **HN43** [blue icon] **Equity, Adequate Remedy at Law**

In order to state an unjust enrichment claim under Illinois law, a plaintiff must allege a benefit mistakenly conferred, a benefit procured through wrongful conduct, and a benefit to which plaintiff has a better claim than the defendant for some other reason. In addition, Illinois law requires that relief under an unjust enrichment theory is obtainable only when there is no adequate remedy at law available to the plaintiff. Because it is an equitable remedy, unjust enrichment is only available when there is no adequate remedy at law.

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Contractual Remedies

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

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

#### **HN44** [blue icon] **Exhaustion of Remedies, Contractual Remedies**

Under Tennessee law, the elements of an unjust enrichment claim are 1) a benefit conferred upon the defendant by the plaintiff; 2) appreciation by the defendant of such benefit; and 3) acceptance of such benefit under such circumstances that it would be inequitable for him to retain the benefit without payment of the value thereof. Additionally, Tennessee law dictates that a plaintiff seeking relief for unjust enrichment must demonstrate that he exhausted all remedies against the person with whom the plaintiff enjoyed privity of contract. Under Tennessee law, the issue of exhaustion must be addressed in the complaint. This exhaustion of remedies requirement only applies to entities in privity with the plaintiff. As long as the plaintiff has satisfied that exhaustion obligation it can still recover against defendants with whom the plaintiff is not in privity.

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Contractual Remedies

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

#### **HN45** [blue icon] **Exhaustion of Remedies, Contractual Remedies**

An unjust enrichment claim may be dismissed where a plaintiff fails to allege that it has exhausted all remedies against the entities in which it has privity of contract and failed to plead that doing so would be futile.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

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

#### **HN46** [blue icon] **Claims, Fraud**

A RICO plaintiff alleging a violation of [18 U.S.C.S. § 1962\(c\)](#) must show conduct of an enterprise through a pattern of racketeering activity, and that she has been injured in her business or property by reason of the RICO violation. A claim of a pattern of racketeering activity requires at least two predicate acts of racketeering activity within a ten-year period. Racketeering activity is defined to include, among other things, any act indictable under specified

provisions of the United States Code, including [18 U.S.C.S. § 1341](#) (mail fraud) and [18 U.S.C.S. § 1343](#) (wire fraud).

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

#### [HN47](#) [ ] Claims, Fraud

The elements of mail fraud under [18 U.S.C.S. § 1341](#) are: (1) the defendant's participation in a scheme to defraud; (2) defendant's commission of the act with intent to defraud; and (3) use of the mails in furtherance of the fraudulent scheme. The elements of wire fraud under [18 U.S.C.S. § 1343](#) are similar: a scheme to defraud, a false representation, and use of interstate communications. To defraud is to make a false statement or material misrepresentation, or the concealment of a material fact. Plaintiffs alleging mail and wire fraud as predicate acts to their RICO claims must allege the identity of the person who made the misrepresentation, the time, place and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

#### [HN48](#) [ ] Claims, Fraud

When ruling on a [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion, the heightened pleading requirements of [Fed. R. Civ. P. 9\(b\)](#) apply to allegations of mail and wire fraud in a civil RICO complaint. Further, in cases with multiple defendants, [Rule 9\(b\)](#) requires a RICO plaintiff to plead sufficient facts to notify each defendant of his alleged participation in the scheme. The heightened pleading standard of [Rule 9\(b\)](#) serves an important purpose, to ensure that a plaintiff has some basis for his accusations of fraud before making those accusations and thus discourages people from including such accusations in complaints simply to gain leverage for settlement or for other ulterior purposes.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

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

#### [HN49](#) [ ] Claims, Fraud

Plaintiffs alleging mail fraud need not show that every particular communication that they point out contained misrepresentations, because even routine and innocent mailings can supply an element of the offense of mail fraud when they are used in the execution of the fraudulent scheme. But plaintiffs alleging little more than the existence of a price-fix scheme and defendants' intent to misrepresent prices is different than alleging the who, what, when, where and how of an actual misrepresentation.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

#### [HN50](#) [ ] Claims, Fraud

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Proximate cause is one of the requirements of a cause of action for a RICO violation.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

#### [HN51](#) [ ] Claims, Fraud

The proximate cause limitation of a properly-pled RICO violation requires some direct relation between the injury asserted and the injurious conduct alleged. The general tendency in this context is for courts not to go beyond the first step, because multiple steps, as the courts have detailed, separate the alleged fraud from the asserted injury. Courts have routinely dismissed [18 U.S.C.S. § 1962\(c\)](#) claims in drug cases where plaintiffs do not allege with specificity that defendants made misrepresentations directly to third-party payors.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

#### [HN52](#) [ ] Claims, Fraud

A [18 U.S.C.S. § 1962\(a\)](#) claim requires a showing that a defendant: (1) received income from a pattern of racketeering activity; (2) used or invested that income in the operation of an enterprise; and (3) caused the injury complained of by the use or investment of racketeering income in an enterprise.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

#### [HN53](#) [ ] Claims, Fraud

To state a claim under [18 U.S.C.S. § 1962\(d\)](#), a plaintiff must allege the existence of an agreement to participate in an endeavor which, if completed, would constitute a violation of RICO. This requires plaintiffs to allege that (1) the defendant agreed to facilitate the operation of an enterprise through a pattern of racketeering activity, in violation of subsections (a), (b), or (c) of RICO, and (2) the defendant agreed to effectuate at least two predicate acts that create a pattern of racketeering activity.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

#### [HN54](#) [ ] Heightened Pleading Requirements, Fraud Claims

Under Illinois law, the elements of common law fraud are: (1) a false statement of a material fact; (2) knowledge or belief of falsity by the party making it; (3) intention to induce the other party to act or refrain from acting; (4) action by the other party in justifiable reliance on the truth of the statement; and (5) damage to the other party resulting from such reliance. Similarly, Tennessee law requires: (1) an intentional misrepresentation of material fact, (2) knowledge of the representation's falsity, (3) an injury caused by reasonable reliance on the representation, and (4) the requirement that the misrepresentation involve a past or existing fact. [Fed. R. Civ. P. 9\(b\)](#) applies to fraud claims.

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Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

## **HN55** [ ] Heightened Pleading Requirements, Fraud Claims

The heightened pleading standard of *Fed. R. Civ. P. 9(b)* forces the plaintiff to conduct a careful pretrial investigation and thus operates as a screen against spurious fraud claims. A plaintiff is required to state the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

## **HN56** [ ] Actual Fraud, Elements

In the context of a fraud claim, high prices do not in and of themselves constitute false representations.

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

Torts > ... > Concerted Action > Civil Conspiracy > Elements

## **HN57** [ ] Complaints, Requirements for Complaint

Under Illinois law, to state a claim for civil conspiracy, the plaintiff must sufficiently allege that an underlying wrong existed. Similarly, under Tennessee law, a claim for civil conspiracy requires an underlying predicate tort allegedly committed pursuant to the conspiracy.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Scope of Declaratory Judgments

## **HN58** [ ] State Declaratory Judgments, Scope of Declaratory Judgments

The declaratory judgment remedy gives a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy. Claims for declaratory judgment are routinely dismissed where the claim substantially overlaps with a plaintiff's substantive claims. Where a substantive suit would resolve the issues raised by the declaratory judgment action, the declaratory judgment action serves no useful purpose because the controversy has ripened and the uncertainty and anticipation of litigation are alleviated.

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**Judges:** FREDERICK J. KAPALA, District Judge.

**Opinion by:** FREDERICK J. KAPALA

## Opinion

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### [\*742] MEMORANDUM OPINION AND ORDER

Plaintiffs, City of Rockford, Illinois, and Acument Global Technologies Inc., filed a second amended complaint (the "SAC") against two groups of defendants: (1) Mallinckrodt plc and Mallinckrodt ARD, Inc. [\*743] (including its acquisition of "Questcor Pharmaceuticals, Inc.") (collectively, "Mallinckrodt"); and (2) Express Scripts Holding Company and its four wholly-owned subsidiaries, Express Scripts, Inc. ("ESI"), Curascript, Inc., Accredo Health Group, Inc., and United Biosource Corp. ("UBC") (collectively, "Express Scripts"), pursuant to federal and state antitrust and consumer protection laws, the *Racketeer Influenced and Corrupt Organizations Act ("RICO")*, various state-law claims, and [\*\*3] [28 U.S.C. §§ 2201-2202](#) for declaratory judgment. Before this court are defendants' motions to dismiss. For the reasons that follow, defendants' motions to dismiss are granted in part and denied in part.

### I. BACKGROUND

The following facts are drawn from the allegations in the SAC. Because this case comes before the court pursuant to a motion to dismiss, the court accepts all non-conclusory allegations in the SAC as true.

#### A. Acthar and the Exclusive Dealing Arrangement

Acthar is an adrenocorticotrophic hormone ("ACTH") drug, which causes the body to produce cortisone and other steroid hormones. SAC ¶ 41. In 1952, the Food and Drug Administration approved Acthar's application to over fifty conditions. *Id.* ¶ 40. One of those conditions is infantile spasms, a serious condition but one with an annual patient population of less than 2,000 children. *Id.* ¶ 45. In 2001, Questcor Pharmaceuticals, Inc. acquired the rights to Acthar. In 2014, Mallinckrodt plc, another pharmaceutical company, acquired Questcor and, with it, Acthar. *Id.* ¶ 44. As a result of the acquisition Questcor's name was changed to Mallinckrodt ARD, Inc. *Id.* ¶ 22.<sup>1</sup>

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<sup>1</sup> At times the SAC refers to Mallinckrodt when it actually meant Questcor. For example, plaintiffs allege that Mallinckrodt acquired the Acthar monopoly from Aventis, SAC ¶ 9, when in actuality Questcor purchased Acthar. Because the SAC alleges that Mallinckrodt is responsible for Questcor's actions before 2014—a proposition which neither Mallinckrodt plc nor Mallinckrodt ARD, Inc. contest—the court will treat Questcor's actions as Mallinckrodt's actions for purposes of these motions to dismiss. The court's references to Mallinckrodt before 2014 refer to Questcor's conduct.

Before 2007, Acthar was distributed to any doctor, hospital, wholesaler, or specialty pharmacy **[\*\*4]** who requested the drug to treat seriously ill patients. Id. ¶ 47. On August 27, 2007, Mallinckrodt embarked on a "new strategy" that sought to limit Acthar's distribution by designating Express Scripts<sup>2</sup> as Mallinckrodt's sole distributor **[\*744]** of Acthar. Id. ¶¶ 48-49, 221.<sup>3</sup> Plaintiffs allege that the "new strategy" is in fact a vertical price-fixing conspiracy, in which Mallinckrodt used Express Scripts as its exclusive distributor of Acthar through a program called the "Acthar Support & Access Program" (the "ASAP") to raise prices, restrict distribution, and stifle competition. According to plaintiffs, the structure of the ASAP allows defendants to restrict the distribution of Acthar to just one distributor, Express Scripts, thereby eliminating other distributors from negotiating for lower prices for Acthar. Id. ¶¶ 48, 90, 231.

Express Scripts' role is to provide "integrated specialty services" to facilitate every other facet of the distribution chain, where each Express Scripts entity plays different roles at different levels of this process. Id. ¶ 58. UBC, a pharmaceutical support services company,<sup>4</sup> acts as the "hub" between these entities, coordinating Acthar's sale, distribution, **[\*\*5]** and reimbursement between Mallinckrodt, ESI, CuraScript, and Accredo. Id. ¶ 51. Specifically, after being contacted directly by patients or notified by Mallinckrodt that a patient wants to purchase Acthar, UBC confirms the medical necessity of the prescription through Accredo (a specialty pharmacy services company) and then arranges payment through ESI (the pharmacy benefit manager ("PBM")) for shipment of Acthar to patients through CuraScript (the wholesale pharmacy/distributor).<sup>5</sup> Id. ¶¶ 57-62, 67. This allows Mallinckrodt to simply ship Acthar directly to patients and receive payments directly from the patients' third-party payors, while Express Scripts handles the rest. Id. ¶ 50.

Plaintiffs further allege various anticompetitive acts that enabled defendants to use the ASAP to price-fix and maintain Mallinckrodt's monopoly. One example is the timing of Acthar's first large price increase. As soon as defendants implemented the ASAP, Mallinckrodt increased the price of Acthar from approximately \$1,980 to \$27,922.80—a 1,310% increase in the span of a month, and a 69,707% increase from 2001. Id. ¶¶ 89-90. Arguing that this price increase was made possible by an unlawful conspiracy between **[\*\*6]** defendants, plaintiffs allege that Express Scripts did not push back on this price increase despite acknowledging that Acthar was vastly overpriced, and still has not pushed back on even higher prices as of the filing of the SAC. Id. ¶¶ 94, 97-99. Express Scripts was in a unique position to negotiate the most competitive prices for specialty drugs in the United States as a result of its representation of the largest number of buyers in the pharmaceutical marketplace. Id. ¶¶ 56, 73, 96, 100-102, 239. Plaintiffs provide an example of a time where Express Scripts used its bargaining power to extract lower prices from a manufacturer, Daraprim, which had increased the price of another drug 5000% in one year. Id. ¶¶ 85-86. Specifically, in December 2015, Express Scripts partnered with a different manufacturer to offer

<sup>2</sup>Express Scripts argues that the various Express Scripts entities named in this action are distinct corporate entities, and accordingly, plaintiffs cannot "group plead" their allegations against all of the Express Scripts entities because "[a] complaint based on a theory of collective responsibility must be dismissed," even in cases of alleged conspiracy, where plaintiffs do not allege that each particular defendant joined the conspiracy and knew of its scope. *Bank of Am., N.A. v. Knight*, 725 F.3d 815, 818 (7th Cir. 2013). But the SAC contains various allegations about the roles of each Express Script entity such that each entity is put on notice as to which defendants engaged in which acts that allowed Express Scripts to effectuate the alleged antitrust violations. See *Guaranteed Rate, Inc. v. Conn*, 264 F. Supp. 3d 909, 931 (N.D. Ill. 2017) (differentiating the facts in that case from *Knight* where there were no allegations about which defendant did what, whereas the allegations in *Conn* laid out how each entity played a particular role in the conspiracy). It may come about in discovery that there are insufficient facts to support claims against the specific Express Scripts entities. But at this stage, the court accepts plaintiffs' allegations that the Express Scripts entities worked together, through various lines of business, to effectuate the Synacthen Acquisition, and does not find that plaintiffs' group pleading provides the Express Scripts defendants insufficient notice of the claims against them.

<sup>3</sup>In ¶ 48 of the SAC, plaintiffs allege that Mallinckrodt's announcement of the "new strategy" was "[e]ffective August 1, 2001," when it appears that plaintiffs meant August 1, 2007.

<sup>4</sup>Plaintiffs allege that Express Scripts Holding Company announced on November 27, 2017, that it sold UBC to a private equity firm.

<sup>5</sup>Express Scripts notes in their motion to dismiss that CuraScript, Inc. is actually a specialty pharmacy, whereas the pertinent entity is Priority Healthcare Distribution, Inc., doing business as CuraScript SD.

its purchasers a low-cost alternative to the drug as a response to Daraprim's manufacturer's pricing decision. *Id.* ¶¶ 87-88. But in the case of Acthar, Express Scripts "had [\*745] no interest in lowering the price for Acthar because it was making money off all aspects of its exclusive arrangement with the manufacturer. In other words, by helping Mallinckrodt maintain and enhance its [\*\*7] monopoly power in the ACTH market, Express Scripts along with Mallinckrodt realized greater profits at the expense of payors, like Plaintiffs." *Id.* ¶ 96. As a result, from the time Mallinckrodt acquired Acthar in 2001 to the commencement of this action, the cost of Acthar grew 109,046%. *Id.* ¶ 93.

## B. The Synacthen Acquisition

Plaintiffs also contend that the purported conspiracy allowed Mallinckrodt to keep Acthar's price high by eliminating potential competition to Acthar. By 2013, the only significant alternative to Acthar was Synacthen Depot ("Synacthen"), a synthetically derived ACTH medication manufactured by Novartis AG. *Id.* ¶ 106. Mallinckrodt was aware of Novartis as a competitive threat for years, including when defendants implemented the ASAP in 2007. *Id.* ¶¶ 127-129. Mallinckrodt unsuccessfully attempted to buy the rights to Synacthen in 2009. *Id.* ¶¶ 106, 132. In October of 2012, Mallinckrodt learned that at least one other company was attempting to buy the rights to Synacthen from Novartis to compete with Mallinckrodt in the ACTH drug market in the United States. *Id.* ¶ 141. Three firms proceeded through several rounds of negotiations with Novartis, submitted formal offers, [\*\*8] and drafted near-final agreements. *Id.* ¶ 136. Each firm planned to commercialize Synacthen in the United States, having taken affirmative steps to do so by independently conducting due diligence, and crafting business plans and regulatory approval strategies. *Id.* ¶ 137.

In 2013, Novartis agreed to sell the rights of Synacthen to Retrophin, Inc., for \$16 million. *Id.* ¶ 108. However, on June 11, 2013, the day Retrophin was to sign its contract with Novartis, Mallinckrodt "swept in at the eleventh hour" and agreed with Novartis to pay a minimum of \$135 million for the exclusive rights to Synacthen (the "Synacthen Acquisition"). *Id.* ¶¶ 108, 144-145, 147. Unlike the three alternative bidders, Mallinckrodt had only incomplete plans for Synacthen and conducted limited due diligence when it submitted its initial offer to Novartis. *Id.* ¶ 143. Upon purchasing the rights to Synacthen, Mallinckrodt chose not to bring it to market. *Id.* ¶¶ 108, 145. Mallinckrodt never sought FDA approval for Synacthen. *Id.* ¶ 145. Acthar was and continues to be the only viable product in the market for infantile spasms and certain other conditions. *Id.* ¶ 122. Because ACTH drugs require Food and Drug Administration [\*\*9] approval to be sold to consumers, there are significant barriers to entry for ACTH drugs. *Id.* ¶ 124.

In January 2014, Retrophin sued Mallinckrodt for antitrust violations in the United States District Court for the Central District of California. Retrophin alleged that there was no procompetitive aspect of Mallinckrodt's acquisition of Synacthen. *Id.* ¶ 146. The Federal Trade Commission sued Mallinckrodt on January 18, 2017, similarly alleging that Mallinckrodt exercised, and continued to exercise, monopoly power in the United States and did so unlawfully based on the Synacthen Acquisition. *Id.* ¶¶ 115-116. Mallinckrodt chose to settle the Retrophin lawsuit for \$15.5 million and the FTC lawsuit for \$100 million. *Id.* ¶¶ 91, 150, 155. Plaintiffs point to the Retrophin and FTC complaints against Mallinckrodt to support their claims that Mallinckrodt violated antitrust laws by eliminating the only viable competition to Acthar.<sup>6</sup>

## [\*746] C. The Instant Action

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<sup>6</sup>The consent order between the FTC and Mallinckrodt notes: "This Order shall not be used as evidence in any proceedings other than a proceeding by Plaintiffs or the Synacthen Sublicensee regarding enforcement or modification of this Order." Order for Permanent Injunction and Equitable Monetary Relief, *FTC v. Mallinckrodt ARD Inc.*, F.T.C. No. 1310172, at 8 (D.D.C. Jan 30, 2017). Accordingly, the court does not consider the Order for its analysis in this opinion, but does consider the FTC and Retrophin complaints.

Rockford provides its employees with a health plan that includes prescription insurance coverage for two Acthar patients. The health plan has a contract with ESI, which requires ESI to collect payments for the price of [\*\*10] Acthar. In a contract between Rockford and ESI (the "PBM Agreement" or the "contract") that the parties entered into on January 1, 2015, ESI agreed to provide Rockford certain services, including "cost containment," although "cost containment" is not defined in the agreement. Mallinckrodt charged Rockford for Acthar at a discounted rate of 13.5% off the "average wholesale price" as set forth in the PBM Agreement. Mallinckrodt set the average wholesale prices of Acthar used by Express Scripts for reimbursement. Accordingly, on April 1, 2015, Mallinckrodt had Acthar shipped directly to the children of two Rockford employees. ESI then charged Rockford \$100,457.64 for the 30-day supply of Acthar, pursuant to the terms of the PBM Agreement.

In contrast, Acument has a contract with CVS Caremark ("CVS") which covered the spouse of one of Acument's employees because the spouse suffers from a condition for which Acthar was prescribed as a treatment option. Plaintiffs allege that CVS stepped into the place of ESI in the Acthar distribution chain, but was still coordinated by UBC. CVS charged Acument \$894,617.75 for thirteen administrations of Acthar in a thirteen-month period between December [\*\*11] 2015 and December 2016. *Id.* ¶ 10.

The SAC alleges claims by Rockford against Express Scripts for unjust enrichment (Count I); Rockford against Mallinckrodt for unjust enrichment (Count II); Acument against Mallinckrodt for unjust enrichment (Count III); plaintiffs against all defendants for fraud (Count IV), conspiracy to defraud (Count V), maintenance of monopolization under [15 U.S.C. § 2](#) (Count VI), unreasonable restraint of trade under [15 U.S.C. § 1](#) (Count VII), violation of state antitrust and consumer protection laws (Count VIII), participation in racketeering activity under [18 U.S.C. § 1962\(c\)](#) (Count IX), use of investment funds from racketeering activity under [18 U.S.C. § 1962\(a\)](#) (Count X), and agreement to participate in racketeering activity under [18 U.S.C. § 1962\(d\)](#) (Count XI); and Rockford against Express Scripts for breach of contract based on the PBM Agreement (Count XII), promissory estoppel (Count XIII), declaratory judgment based on the PBM Agreement (Count XIV), and breach of the implied covenant of good faith and fair dealing (Count XV). Mallinckrodt and Express Scripts have separately moved to dismiss the SAC pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) for failure to state claims against them.<sup>7</sup>

## II. ANALYSIS

**HN1** When deciding a motion to dismiss, the court accepts all of the well-pleaded [\*\*12] allegations of the complaint as true and draws all reasonable inferences in favor of the plaintiff. [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Under the Federal Rules, a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled [\*747] to relief." [Fed. R. Civ. P. 8\(a\)\(2\)](#). "[D]etailed factual allegations" are not required, but the plaintiff must allege facts that, when "accepted as true . . . state a claim to relief that is plausible on its face." [Ashcroft v. Iqbal](#), 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). In analyzing whether a complaint has met this standard, the "reviewing court [must] draw on its judicial experience and common sense." *Id.* at 679. Further, plaintiffs' **HN2** claims for fraud, conspiracy to defraud<sup>8</sup> and RICO conspiracy are subject to a heightened pleading standard that requires plaintiffs to plead their allegations with specificity. See [Fed. R. Civ. Proc. 9\(b\)](#); [Fid. Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co.](#), 412 F.3d 745, 749 (7th Cir. 2005).

As an initial matter, defendants argue in their motions to dismiss that plaintiffs' claims are barred by applicable statutes of limitations to the extent that plaintiffs seek recovery for them and the class based on payments for

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<sup>7</sup> Plaintiffs also filed supplemental authority they believe support their positions; defendants filed briefs disputing that these cases militate in favor of plaintiffs. The court acknowledges these cases and has considered them in its analysis.

<sup>8</sup> For purposes of this opinion only, references to a "conspiracy" in the opinion's sections on plaintiffs' federal and state antitrust claims refer specifically to an "antitrust conspiracy," whereas references to a "conspiracy" in the other sections refers instead to common-law conspiracy, the principle difference being that the court applies [Rule 9\(b\)](#)'s heightened pleading standard to the latter but not the former.

Acthar that fall outside of each claim's respective limitations periods. [HN3](#)<sup>↑</sup> "A plaintiff is not required to plead elements in his or her complaint that overcome affirmative defenses, such as statute-of-limitations [\*\*13] defenses." [NewSpin Sports, LLC v. Arrow Elecs., Inc.](#), 910 F.3d 293, 2018 WL 6295272, at \*3 (7th Cir. 2018). Accordingly, defendants' statute of limitations argument may be raised in their answers and litigated later in these proceedings.

#### A. Federal Antitrust Claims (Counts VI and VII)

The gravamen of plaintiffs' antitrust claims is that defendants acted and conspired to raise Acthar prices exorbitantly high as part of a vertical price-fixing scheme and did so by implementing the ASAP, restricting distribution, not seeking low-cost alternatives to Acthar, and, in the case of the Synacthen Acquisition, eliminating viable competitors from entering the ACTH market in order to unlawfully preserve Mallinckrodt's monopoly for its and Express Scripts' pecuniary benefit. The antitrust conspiracy, as plaintiffs allege, injured plaintiffs by forcing them to pay higher costs for Acthar than they would have but for defendants' conduct. For the foregoing reasons, the court finds that Rockford has plausibly stated that defendants' conduct amounted to violations of [§§ 1](#) and [2](#) and that it was injured by this conduct, but that Acument does not plausibly allege that it has antitrust standing to sue.

#### 1. Plaintiffs' Article III Standing for Federal Antitrust Claims

[HN4](#)<sup>↑</sup> Generally, Article III standing is "the threshold question in every federal case, determining the power of the court to entertain [\*\*14] the suit." [Warth v. Seldin](#), 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). All that is required to demonstrate Article III standing is "injury in fact plus redressability." [Kochert v. Greater Lafayette Health Servs., Inc.](#), 463 F.3d 710, 714 (7th Cir. 2006). There is no dispute that plaintiffs have Article III standing to bring their federal antitrust claims. Thus, the court will proceed to discuss each plaintiffs' "antitrust standing" to bring this suit.

#### 2. Rockford's Antitrust Standing for Federal Claims

[HN5](#)<sup>↑</sup> The Supreme Court has found two additional standing limitations born from the [\[\\*748\]](#) Sherman Act as part of a separate standing doctrine known as "antitrust standing." See [Loeb Indus., Inc. v. Sumitomo Corp.](#), 306 F.3d 469, 480 (7th Cir. 2002) (describing the range of antitrust standing limitations that have emerged from federal law). First, in [Illinois Brick Co. v. Illinois](#), 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977), the Supreme Court held that only direct purchasers from alleged antitrust violators may bring federal antitrust actions. Second, in [Associated General Contractors of California, Inc. v. California State Council of Carpenters \("AGC"\)](#), 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983), the Supreme Court held that courts must engage in a "proximate cause" analysis to determine whether a plaintiff is a "proper party" to bring suit. Because these limitations "are analytically distinct," [Int'l Bhd. of Teamsters, Local 734 Health & Welfare Tr. Fund v. Philip Morris Inc.](#), 196 F.3d 818, 828 (7th Cir. 1999), the court assesses each in turn, see also [Loeb](#), 306 F.3d at 475 ("We find that [Illinois Brick](#) presents no obstacle [\*\*15] to any of the plaintiffs' claims but that the claims of the scrap copper dealers are precluded under [AGC](#).").

##### a. [Illinois Brick](#)

As alleged, Rockford directly purchased Acthar from Express Scripts, so the "indirect purchaser" limitation of [Illinois Brick](#) does not affect Rockford's antitrust standing to sue Express Scripts. [HN6](#)<sup>↑</sup> As for its claims against

Mallinckrodt as an indirect purchaser,<sup>9</sup> Illinois Brick's "indirect purchaser" rule denies Rockford antitrust standing unless it fits into one of the recognized exceptions to Illinois Brick. One such exception is the "co-conspirator" exception, which allows indirect purchasers to sue middlemen-conspirators if the plaintiffs can establish a conspiracy and overcharges:

Illinois Brick does not limit suits by consumers against a manufacturer who illegally contracted with its dealers to set the latter's resale price. The consumer plaintiff is a direct purchaser from the dealer who, by hypothesis, has conspired illegally with the manufacturer with respect to the very price paid by the consumer. There is no problem of duplication or apportionment because the consumer is the only party who has paid any overcharge. Although the manufacturer did not sell [\*\*16] directly to the consumer, he is a fellow conspirator with the direct-selling dealer and therefore jointly and severally liable with the dealer for the consumer's injury.

2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 264 (rev. ed. 1995) (footnotes omitted); see Paper Sys. Inc. v. Nippon Paper Indus. Co., 281 F.3d 629, 634 (7th Cir. 2002). The "crucial question" for courts assessing this exception is whether the alleged anticompetitive conduct stems from an agreement between the alleged co-conspirators. Tamburo v. Dworkin, 601 F.3d 693, 699 (7th Cir. 2010).

**HN7** A plaintiff alleging conspiracy to fix prices in violation of the Sherman Act must allege "enough factual matter (taken as true) to suggest that an agreement was made"—that is, "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." Twombly, 550 U.S. at 556. This standard is not the same as the "heightened" pleading standard of Rule 9(b), and accordingly, plaintiffs can allege an antitrust conspiracy by pleading circumstantial evidence of an illegal agreement. [\*749] See id. at 569 n.14 (affirming dismissal of antitrust conspiracy allegations and noting that "[i]n reaching this conclusion, we do not apply any 'heightened' pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9. . . . Here, our concern is not that the allegations in the complaint [\*\*17] were insufficiently 'particular[ized]'; rather, the complaint warranted dismissal because it failed in toto to render plaintiffs' entitlement to relief plausible" (citation omitted)). Indeed, "circumstantial evidence is the lifeblood of antitrust law" because direct evidence will rarely be available to prove the existence of a price-fixing conspiracy. In re Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133, 1147 (N.D. Cal. 2009) (quoting United States v. Falstaff Brewing Corp., 410 U.S. 526, 534 n.13, 93 S. Ct. 1096, 35 L. Ed. 2d 475 (1973)) ("Plaintiffs alleged that [the] agreements were used as the means to maintain and achieve the end result of the conspiracy by controlling the supply, and thereby permitting increases in the price for the products. While these allegations may not expressly state that the agreements themselves were illegal, they nonetheless may be considered with the pleadings as a whole in determining the existence of a 'plausible' conspiracy." (citations and footnote omitted)).

As the court accepts all allegations at the Rule 12 stage as true, the court finds that a reasonable inference could be drawn that defendants conspired to unlawfully boost the price of Acthar, restrict its output, and eliminate competition in violation of federal antitrust law when Mallinckrodt instituted its "new strategy." The goal of the exclusive dealing arrangement was [\*\*18] "to lock patients into receiving Acthar through one channel and prevent a competitive product from entering the market." SAC ¶ 222 (emphasis added). Express Scripts employed its market power to effectuate these goals, allowing Mallinckrodt to maintain its monopoly, thereby increasing both their profits, and prevent competitors from challenging that monopoly. Thus, Mallinckrodt's decision to purchase the rights to Synacthen "at the eleventh hour" only to "shelve" the product upon acquiring it was simply an intended goal of the ASAP, effectuated by both defendants. Id. ¶¶ 111-114, 145. Specifically, Express Scripts agreed not to push back on Mallinckrodt's decisions to inflate Acthar's price beyond the competitive level, in contrast to when Express Scripts took the opposite approach in 2015 with respect to Turing's drug, Daraprim. Id. ¶¶ 86-88. While defendants appear to isolate the exclusive dealing arrangement from the Synacthen Acquisition, taking the allegations in the SAC as true, plaintiffs allege that these anticompetitive acts were part of the same conspiracy. Id. ¶¶ 231, 250. The court anticipates that further discovery will shed light on Express Scripts' knowledge of and role [\*\*19] in the

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<sup>9</sup> The court leaves open the possibility after discovery that Rockford can prove that it stands in a direct purchasing relationship with Mallinckrodt, depending on what the evidence uncovers about the structure of the exclusive distribution arrangement—for example, if plaintiffs can prove that Express Scripts is really Mallinckrodt's agent.

Synacthen Acquisition, if any. But at this stage of litigation, the court draws all reasonable inferences from the complaint in favor of plaintiffs and taking the SAC as a whole finds that plaintiffs have sufficiently alleged a conspiracy.

Defendants cite [In re ATM Fee Antitrust Litigation](#) to argue that allegations of a vertical conspiracy pursuant to the "co-conspirator" exception must include the allegation that "the conspiracy must fix the price paid by the plaintiffs," and because plaintiffs failed to allege that defendants fixed the price paid by plaintiffs, [Illinois Brick](#) still applies. [686 F.3d 741, 750 \(9th Cir. 2012\)](#) (emphasis added); see also [Dickson v. Microsoft Corp.](#), [309 F.3d 193, 214-215 \(4th Cir. 2002\)](#) (noting in dicta that "the rationale for concluding that [Illinois Brick](#) does not apply to a price-fixing conspiracy is that no overcharge has been passed on to the consumer: When a dealer has illegally conspired with a manufacturer with respect to the price paid by a consumer, then the consumer is the only party [\*750] who has paid any overcharge"). In particular, Mallinckrodt argues that the SAC contains "no plausible allegations that the prices that Plaintiffs paid were set by an agreement between [defendants]" because "ESI charged Rockford for Acthar pursuant to [\*\*20] the terms of a [separate](#) agreement between Rockford and ESI," and "Acument contracted with CVS for the provision of specialty drugs like Acthar and made direct payments to CVS. Similarly, Express Scripts argues that plaintiffs "repeatedly plead[ ] facts illustrating that [Mallinckrodt unilaterally](#) sets the [average wholesale price] for Acthar." (emphasis in original).

**HN8** But [ATM Fee](#) expressly noted that the Seventh Circuit takes a different approach. See [ATM Fee](#), [686 F.3d at 755 n.7](#) (citing [Paper Systems](#), [281 F.3d at 631-32](#)) (noting that the Seventh and Third Circuits "restrict [Illinois Brick](#)'s influence by allowing an exception when the direct purchaser conspires with the seller, even though the price illegally set is an upstream cost that is passed-on to the plaintiffs"). In [Paper Systems](#), for example, the Seventh Circuit explained that the crux of the "co-conspirator" exception is the joint-and-several liability of conspiring defendants: "If [the defendant] was among those conspirators, then it is responsible for the [entire](#) overcharge of [all five \[defendant\] manufacturers](#)—and any direct purchaser from any conspirator can collect its own portion of damages (that is, the damages attributable to its direct purchases) from any conspirator." [281 F.3d at 632](#) (emphasis [\*\*21] in original); see also [In re Brand Name Prescription Drugs Antitrust Litig.](#), [186 F.3d 781, 787 \(7th Cir. 1997\)](#) ("[I]t was necessary for [plaintiffs] to present economic evidence that would show that the hypothesis of collusive action was more plausible than that of individual action. They did not, however, as the defendant manufacturers rather absurdly argue, have to exclude all possibility that the manufacturers' price discrimination was unilateral rather than collusive."); [Fontana Aviation, Inc. v. Cessna Aircraft Co.](#), [617 F.2d 478, 481 \(7th Cir. 1980\)](#) ("Standing separately some of the allegations may be of no antitrust concern, but if all of [the defendant's] alleged activities were combined and coordinated with the intent to destroy [the plaintiff], its target, as a competitor, the allegations, whatever their merit, should be judged as a whole and not separately."); [Kleen Prods. LLC v. Int'l Paper](#), [306 F.R.D. 585, 608 \(N.D. Ill. 2015\)](#) aff'd sub nom. [Kleen Prods. LLC v. Int'l Paper Co.](#), [831 F.3d 919, 930 \(7th Cir. 2016\)](#) (stating axiomatically that plaintiffs may also sue co-conspirators that are vertically connected to an upstream defendant in antitrust actions because co-conspirators are jointly and severally liable for alleged antitrust violations). Plaintiffs allege that defendants are jointly and severally liable for the alleged antitrust violations that plaintiffs (and the class) directly and wholly felt. [Paper Systems](#), [281 F.3d at 632-34](#) (noting that joint and several liability is a "vital instrument for [\*\*22] maximizing deterrence," so "[a]s long as [defendants'] direct customers hold the exclusive right to [100% of] damages for its own output, the holding and goals of [Illinois Brick](#) have been satisfied"). That plaintiffs contracted directly with Express Scripts on Acthar's price does not negate the inference that Express Scripts allegedly agreed with Mallinckrodt to price-fix.

Further, the three concerns highlighted by [Illinois Brick](#) are not of concern in the instant case. First, there is no risk of duplicative liability or potentially inconsistent judgments because plaintiffs and Express Scripts would not be suing for the same injury given plaintiffs' allegations that Express Scripts took part in the price-fixing that allegedly injured plaintiffs. Second, permitting plaintiffs to sue would not cause inefficient enforcement of the antitrust laws by diluting the ultimate [\*751] recovery and thus decreasing direct purchasers' incentive to sue. Though the court notes that there are no allegations that would lead Express Scripts to seek recovery for any such overcharge in subsequent lawsuits, it would still be able to recover the same amount on their hypothetical lost profits claim even if plaintiffs [\*\*23] recovered on their separate price-fixing claims. Third, [Illinois Brick](#) warned against requiring courts to ascertain the portion of an overcharge that was passed on. But here, plaintiffs do not allege that defendants'

agreement in fact included a "pass-on" payment. Rather, plaintiffs allege that defendants agreed on what share of the payment Express Scripts would receive, and then Express Scripts would simply deduct its agreed-upon share before forwarding the remainder to Mallinckrodt, see SAC ¶ 20; the court would simply look to the amount deducted by Express Scripts to ascertain the portion of the overcharge. While plaintiffs do not allege what that amount is, defendants do not explain why that amount would be difficult to ascertain.

In sum, plaintiffs allege circumstantial evidence to support their argument that defendants agreed to a vertical price-fixing scheme. Discovery may illuminate that Express Scripts did not in fact play a role in the Synacthen Acquisition, that defendants had no intention of effecting harm to the market through the exclusive dealing arrangement, and/or that Mallinckrodt conducted its allegedly unlawful conduct separate and apart from its business associations **[\*\*24]** with Express Scripts. Indeed, plaintiffs will be required later in litigation to provide evidence "that tends to exclude the possibility that the alleged conspirators acted independently." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1988). But at the Rule 12 stage, the court draws all reasonable inferences in favor of plaintiffs, and finds that Illinois Brick is not a bar to plaintiffs' claims.

#### b. AGC

**HNG**  Aside from Illinois Brick, another antitrust standing limitation imposed on parties bringing antitrust actions comes from AGC. In determining whether an antitrust plaintiff is a "proper party" to bring suit under AGC, courts look at the following factors: (1) the causal connection between the violation and the harm; (2) the presence of improper motive; (3) the type of injury and whether it was one Congress sought to redress; (4) the directness of the injury; (5) the speculative nature of the damages; and (6) the risk of duplicate recovery or complex damage apportionment. 459 U.S. at 537-45.

The court finds that Rockford alleges that it is a proper party to bring its federal antitrust claims and thus satisfies the AGC factors.<sup>10</sup> Rockford has plausibly alleged that, as a direct cause of defendants' purported conspiracy, it was injured by being forced to pay higher **[\*\*25]** prices for Acthar than it would have but for the agreements of the defendants and the Synacthen Acquisition which together prevented a low-cost alternative entering the market. See SAC ¶ 151. Further, as detailed below in the court's discussion of plaintiffs' § 2 claims, Rockford has plausibly alleged that defendants had the specific intent to create anticompetitive effects through the conspiracy, thus establishing an improper motive. And at this time, the court finds no concerns such as speculative damages, duplicative recovery, or apportionment issues that cast doubt on the **[\*752]** propriety of Rockford bringing its federal antitrust claims against either defendant. The injuries alleged in the SAC are precisely the types of injuries that Congress sought to redress in creating the Sherman Act—those being, "reduced output and higher prices," as well as the unlawful elimination of competition. U.S. Gypsum Co. v. Ind. Gas Co., Inc., 350 F.3d 623, 626-27 (7th Cir. 2003). Consequently, the court finds that Rockford has antitrust standing to bring its federal antitrust claims.

### 3. Acument's Antitrust Standing for Federal Claims

While the court finds that the SAC plausibly alleges an antitrust conspiracy between Mallinckrodt and Express Scripts, there is an additional wrinkle **[\*\*26]** concerning the "directness" of Acument's purchasing relationship to Express Scripts because plaintiffs allege that Acument paid CVS for Acthar and not ESI. Specifically, they allege that,

when Acument contracted with CVS Caremark for the provision of specialty drugs, like Acthar, to its employee beneficiaries, CVS Caremark simply charged the same prices based on the prices set by Mallinckrodt in agreement with Express Scripts, as the product continued to flow directly from Express Scripts to the patients of other PBMs, like CVS Caremark. . . . "[S]uch payments were transferred by CVS Caremark to Mallinckrodt

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<sup>10</sup> Defendants do not argue that plaintiffs fail to meet the AGC factors with respect to their federal antitrust claims.

pursuant to a likely understanding between the two that the total amount would be forwarded to Mallinckrodt, less a certain amount previously agreed to by Mallinckrodt and CVS Caremark."

SAC ¶¶ 70, 72, 196, 246 (emphasis added).

Plaintiffs do not sufficiently plead that CVS was a member of the conspiracy merely by alleging that CVS operated in the same fashion as Express Scripts, see id. ¶¶ 233-234, or that Mallinckrodt had a "likely understanding" with CVS, which mirrored the arrangement it had with Express Scripts, id. ¶ 196. Otherwise, the SAC contains scant mentions of CVS and [\*\*27] its role as part of the dealing arrangement alleged in all other respects to be exclusive.<sup>11</sup> As currently formulated, plaintiffs do not plausibly allege that Acument was a direct purchaser from a member of the alleged conspiracy, nor does Acument plausibly allege any other theory which [\*753] would furnish antitrust standing to it. As such, Acument cannot state a claim against either Mallinckrodt or Express Scripts.

AGC also presents a problem here, albeit less of a problem than Illinois Brick. It appears that the allegations in the SAC may satisfy the AGC factors as applied to Acument. But until we know the contours of CVS' role in supplying Acthar to Acument's employee's spouse, the court is not able to engage in a complete application of the AGC factors to Acument.

Thus, the court dismisses without prejudice Acument's federal antitrust claims against Mallinckrodt and Express Scripts. The court grants plaintiffs leave to replead to correct Counts VI and VII's deficiencies.<sup>12</sup>

The court now turns to the merits of Rockford's §§ 1 and 2 claims under the Sherman Act.<sup>13</sup>

#### 4. § 1 (Count VII)

HN10 [Section 1 of the Sherman Act] prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, [\*\*28] in restraint of trade or commerce." 15 U.S.C. § 1. Only those agreements that are unreasonable restraints on trade are actionable under § 1. See Omnicare, Inc. v. UnitedHealth Grp., Inc., 629 F.3d 697, 705 (7th

<sup>11</sup> Taking plaintiffs' allegations as true, the assertions that Acument paid CVS for Acthar appear to contradict the exclusivity of ESI as the only PBM as part of the alleged ASAP. Additionally, Acument's explanation of CVS' role in defendants' alleged scheme is cryptic. Acument alleges that it had a contract with CVS which provided prescription drug insurance coverage for its employee's spouse. SAC ¶ 71. But it is unclear whether CVS is acting as a prescription drug insurance carrier or something else. CVS is elsewhere described as an entity which performs a function similar to that of ESI. Id. ¶¶ 66, 70, 233. The SAC states that CVS is required to collect payments for the purchase of Acthar, but figures 1 and 2, which are presumably designed to clarify the text, shows that patient payments go directly from the patient to ESI. This situation is further muddled by plaintiffs' allegation that CVS deducts an agreed-upon share of money it receives before forwarding it to Mallinckrodt, while figures 1 and 2 of the SAC show money from the health plans, which may or may not refer to CVS, going to ESI. See id. ¶ 233. Notably, Acument's role is not shown on the figures at all. Rockford is self-insured, but it is unclear how in this scenario in which Acument's employee's spouse has prescription insurance coverage that Acument still pays 80% of the cost of the spouse's specialty pharmacy drugs, which comes to \$894,617.75, to obtain Acthar. Id. ¶¶ 10, 21. The dearth of information makes it difficult to understand the precise relationship of Acument, CVS, and the patient. Curiously, the SAC claims that payments for Acthar flow directly from Acument to CVS, id. ¶ 233, which is described as one of the "co-conspirators," id. ¶ 234, yet no details are provided anywhere else in the SAC as to how CVS participates in the alleged conspiracy.

<sup>12</sup> Defendants argue that the court should not exercise its discretion and allow plaintiffs to replead for a third time. The court notes that while another amended complaint will be plaintiffs' fourth total complaint filed in this action, a subsequent complaint would be the first incident to the court's ruling on a Rule 12(b) motion. As plaintiffs requested leave to amend in their oppositions to defendants' motions to dismiss, the court will allow plaintiffs to replead to correct the deficiencies detailed in this opinion if counsel can do so in accordance with the obligations imposed by Rule 11 of the Federal Rules of Civil Procedure.

<sup>13</sup> The remainder of this opinion's analysis of plaintiffs' federal antitrust claims deals only with Rockford because the court has found that Acument has not shown that it has antitrust standing to bring its federal antitrust claims. However, Acument may have viable claims should it choose to sufficiently replead antitrust standing to bring its federal antitrust claims. The court makes no finding at this stage as to whether Acument has adequately stated a claim.

Cir. 2011) (citing *State Oil Co. v. Khan*, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)). To state § 1 claims, plaintiffs must plead facts plausibly suggesting: (1) a contract, combination, or conspiracy (meaning, an agreement); (2) a resulting unreasonable restraint of trade in a relevant market; and (3) an accompanying "antitrust injury." See *Agnew v. NCAA*, 683 F.3d 328, 335 (7th Cir. 2012). As the court detailed in the section on antitrust standing, plaintiffs satisfied the first prong by alleging with sufficient factual support that defendants contracted among themselves and conspired to vertically fix Acthar's price and maintain Mallinckrodt's monopoly. See, e.g., SAC ¶¶ 5, 7-8, 48-49, 111-114, 145, 222. The court will turn to the remaining two prongs.

### a. Unreasonable Restraint of Trade

HN11[↑] The "unreasonable restraint of trade" prong asks courts to assess "the competitive effects of challenged behavior relative to such alternatives as its abandonment or a less restrictive substitute." *Id.* Courts use one of three tests to determine the challenged behavior. Courts use a "per se" test for conduct such as horizontal price fixing, market allocation, group boycotts, or tying arrangements that [\*\*29] are so inherently anticompetitive, they are considered illegal per se. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984). In contrast, vertical arrangements such as exclusive distribution agreements are analyzed under the "rule of reason" test, which assigns the burden to [\*754] plaintiffs to sufficiently allege that an agreement has an anticompetitive effect on a given market within a given geographic area. See *Methodist Health Servs. Corp. v. OSF Healthcare Sys.*, No. 1:13-cv-01054-SLD-JEH, 2016 U.S. Dist. LEXIS 136478, 2016 WL 5817176, at \*8 (C.D. Ill. Sept. 30, 2016) (citing *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 393 (7th Cir. 1984)). More often than not, courts use the "rule of reason" test and not the "per se" test. See *State Oil*, 522 U.S. at 10. Courts sometimes employ a third test, known as the "quick-look" test, for conduct that is not plainly anticompetitive but where "no elaborate industry analysis is required to demonstrate the anticompetitive character of . . . an agreement." *Natl Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978).

Rockford alleges two anticompetitive understandings—the exclusive dealing arrangement and the Synacthen Acquisition—that together form the basis of their § 1 claims. While courts generally assess exclusive dealing arrangements under the rule of reason analysis, it is less clear that the rule of reason analysis applies here where plaintiffs have alleged that the conspiracy included both the exclusive dealing arrangement [\*\*30] and the Synacthen Acquisition, which plaintiff argues deserves a "per se" analysis. However, the court agrees with plaintiffs that the court need not make this determination at this time. See *In re: EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig.*, 336 F. Supp. 3d 1256, 2018 WL 3973153, at \*19 n.8 (D. Kan. 2018) ("In ruling [on a motion to dismiss], the court just needs to determine whether the class plaintiffs have alleged a plausible conspiracy under the antitrust laws."); *CSR Ltd. v. Fed. Ins. Co.*, 40 F. Supp. 2d 559, 564 (D.N.J. 1998) (HN12[↑]) "At this early [motion to dismiss] stage of the proceeding, the court does not find it necessary to determine which mode of analysis [per se or rule of reason] it will ultimately employ in evaluating the defendants' activities."); 2 AREEDA & HOVENKAMP, ANTITRUST LAW 264 ¶ 305(e), at 69 ("Often, however, the decision about which rule is to be employed will await facts that are developed only in discovery."). After discovery, the court can better determine whether and how to take a more detailed look at the effects of defendants' conduct. See, e.g., *EpiPen*, 336 F. Supp. 3d 1256, 2018 WL 3973153, at \*16 (noting that if the court applied a rule of reason analysis to the exclusive dealing arrangement in that case, it would consider a "number of factors" from *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961), to determine whether a "substantial [\*31] foreclosure of the market" occurred, making the conduct unreasonable). Discovery will elucidate whether the purported conspiracy as a whole is patently anticompetitive "such as would always or almost always tend to restrict competition and decrease output." See *id. at 565* (citing *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)). At this stage, it is sufficient for plaintiffs to plausibly allege that defendants engaged in conduct that resulted in an unreasonable restraint of trade.

Rockford alleges that defendants conspired to keep prices high, restrict output, and prevent competition from entering the market. The "new strategy" reduced the number of wholesale distributors of Acthar from three to one,

thereby restricting patient's access to Acthar, and employed Express Scripts' market power not to push for lower-cost alternatives. SAC ¶¶ 48, 103. The ASAP thus allowed Mallinckrodt to maintain its dominant monopoly power in the ACTH drug market, maintain prices at artificially high levels, and exclude less expensive competitive products from the ACTH drug market. [\*755] The other focus of the SAC is the exclusion of competitive alternatives to the market and highlights the Synacthen Acquisition. Because Retrophin planned to bring Synacthen to market [\*\*32] as the first viable competitor to Acthar, keeping Synacthen from the United States market resulted in complaints filed by the FTC and Retrophin for depriving the market of a lower-cost alternative with no procompetitive justifications. *Id.* ¶ 151. [HN13](#)[<sup>14</sup>] The elimination of competition with no procompetitive justification is the type of conduct that the antitrust laws were designed to guard against. See [In re Dealer Mgmt. Sys. Antitrust Litig.](#), 313 F. Supp. 3d 931, 950 (N.D. Ill. 2018) (citing [Havco of Am., Ltd. v. Shell Oil Co.](#), 626 F.2d 549, 556 (7th Cir. 1980) (citation omitted)). Consequently, the court finds that Rockford's assertions of anticompetitive conduct are sufficient to adequately plead the "unreasonable restraint of trade" prong of Rockford's [§ 1](#) claim.

### b. Antitrust Injury

[HN14](#)[<sup>15</sup>] The third prong requires that an antitrust plaintiff must allege that the "claimed injuries are of the type the antitrust laws were intended to prevent and reflect the anticompetitive effect of either the violation of or anticompetitive acts made possible by the violation." [Kochert](#), 463 F.3d at 716; see also [Agnew](#), 683 F.3d at 334-35 ("The purpose of the Sherman Act is to protect consumers from injury that results from diminished competition. Thus the plaintiff must allege, not only an injury to himself, but an injury to the market as well." (citation omitted)); [Gypsum](#), 350 F.3d at 626-27 ("A private plaintiff must show antitrust injury—which [\*\*33] is to say, injury by reason of those things that make the practice unlawful, such as reduced output and higher prices."). Rockford alleges that defendants were able to charge higher prices for Acthar by restricting distribution of Acthar through the ASAP. SAC ¶ 8. [HN15](#)[<sup>16</sup>] "Paying higher prices as a result of coordinated output restrictions is a paradigmatic antitrust injury." [Wash. Cty. Health Care Auth., Inc. v. Baxter Int'l Inc.](#), 328 F. Supp. 3d 824, 845 (N.D. Ill. 2018). Further, Rockford alleges that Retrophin planned to bring Acthar to market and that defendants' decision to shelve Synacthen rather than bring it to market stifled competition. Had Novartis sold the rights to Synacthen to one of the other bidders that planned to bring Acthar to market, Rockford alleges that purchasers would have had a low-cost alternative to Acthar. See SAC ¶¶ 146-147. [HN16](#)[<sup>17</sup>] This is the type of injury that antitrust laws were intended to prevent. See [Gypsum](#), 350 F.3d at 627 ("The antitrust-injury doctrine was created to filter out complaints by competitors and others who may be hurt by productive efficiencies, higher output, and lower prices, all of which the antitrust laws are designed to encourage."); [Teamsters](#), 196 F.3d at 825 ("To recover under the antitrust laws, the plaintiff must show that its injury flows from that which makes the conduct an antitrust [\*\*34] problem: higher prices and lower output."). Thus, Rockford has satisfied the "antitrust injury" prong and, accordingly, the court finds that Rockford has stated a [§ 1](#) claim.

### 5. [§ 2](#) (Count VI)

Rockford alleges that defendants acted and conspired to monopolize the ACTH drug market in violation of [§ 2](#).<sup>14</sup> See [15 U.S.C. § 2](#). [HN17](#)[<sup>18</sup>] A conspiracy to monopolize consists of (1) the existence of a combination or conspiracy, (2) overt acts in [\*756] furtherance of the conspiracy, (3) an effect upon a substantial amount of interstate commerce, and (4) the existence of specific intent to monopolize. See [The Great Escape, Inc. v. Union City Body Co.](#), 791 F.2d 532, 540-41 (7th Cir. 1986).

The first prong of this test is sufficiently pled. Plaintiffs allege that Mallinckrodt initiated its "new strategy" to limit Acthar's distribution to one distributor, Express Scripts. *Id.* ¶¶ 48-49, 221, 231. Plaintiffs allege that Mallinckrodt was acting in concert with Express Scripts in an exclusive dealing arrangement well before the Synacthen Acquisition,

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<sup>14</sup> [Section 2](#) claims may be plead under three different theories: (1) monopolization, (2) attempted monopolization, and (3) conspiracy to monopolize. Plaintiffs proceed under the third theory only.

and thus, plaintiffs plausibly allege that defendants' conspiracy encompassed and facilitated the Acquisition. As to the third prong, the parties do not dispute that as pled the alleged conspiracy affects a substantial amount of interstate commerce. See SAC ¶ 19. [HN18](#) [¶] With respect to [\*\*35] the fourth prong, in cases such as this that involve exclusive dealing arrangements, courts typically infer a sufficient allegation of specific intent when overt acts are adequately pled. See [Spectrum Sports, Inc. v. McQuillan](#), 506 U.S. 447, 459, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993) (explaining that anticompetitive conduct "may be sufficient to prove the necessary intent to monopolize"). The court agrees with this inferential analysis, particularly because "[c]ourts are wary to dismiss antitrust cases on intent solely on the pleadings because evidence of intent is often in the control of the defendants." [Wagner v. Magellan Health Servs., Inc.](#), 121 F. Supp. 2d 673, 681 (N.D. Ill. 2000).

[HN19](#) [¶] In addressing the second prong, similar to § 1's "anticompetitive effects" requirement, plaintiffs must allege that the overt acts constitute "anticompetitive conduct." See [Verizon Commc'n Inc. v. Law Offices of Curtis V. Trinko, LLP](#), 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004) ("To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct." (emphasis in original)); [Endsley v. City of Chicago](#), 230 F.3d 276, 283 (7th Cir. 2000) ("Under § 2, intent to obtain a monopoly is unlawful only where an entity seeks to maintain or achieve monopoly power by anticompetitive means."); [Am. Acad. Suppliers, Inc. v. Beckley-Cardy, Inc.](#), 922 F.2d 1317, 1320 (7th Cir. 1991) ("The offense of monopolization is the acquisition of monopoly by improper methods or, more commonly . . . the abuse of monopoly." (emphasis in original)). The acts from [\*\*36] which the court can infer anticompetitive conduct must be essentially "predatory" in nature. See [Mercatus Grp., LLC v. Lake Forest Hosp.](#), 641 F.3d 834, 854 (7th Cir. 2011). Exclusionary, predatory, or anticompetitive conduct for purposes of § 2 claims is broadly defined as "conduct that is in itself an independent violation of the antitrust laws or that has no legitimate business justification other than to destroy or damage competition." [The Great Escape](#), 791 F.2d at 541; [DSM Desotech Inc. v. 3D Sys. Corp.](#), No. 08 CV 1531, 2009 U.S. Dist. LEXIS 5980, 2009 WL 174989, at \*9 (N.D. Ill. Jan. 26, 2009).

[HN20](#) [¶] While analysis of this prong can in some cases differ greatly from claims under § 1, for exclusive dealing claims brought under § 2, the analysis nearly the same as that for § 1 claims. This makes sense given that a plaintiff alleging an "unreasonable restraint of trade" would typically be required to allege that a defendant undertook "overt acts" to effectuate the restraint. [Methodist Health](#), 2016 U.S. Dist. LEXIS 136478, 2016 WL 5817176, at \*8 (noting that § 2 claims that allege antitrust violations based on exclusive dealing arrangements "are analyzed in much the same way as § 1 claims"). The court will await discovery to determine how to best characterize defendants' conduct. But at this [\*757] stage, the court finds that Rockford has plausibly alleged that defendants' conduct was anticompetitive under the Seventh Circuit's broad definition of exclusionary, predatory, or anticompetitive [\*\*37] conduct. As noted with respect to Rockford's § 1 claims, Rockford alleged that defendants conspired to price-fix and prevent competitors from entering the market, implemented through a joint-effort (the ASAP) that allowed Mallinckrodt to unlawfully acquire the rights to Synacthen. One can plausibly infer that the Synacthen Acquisition and Mallinckrodt's immediate "shelving" of Synacthen had no legitimate business justification and resulted in the maintenance and entrenchment of Mallinckrodt's monopoly.

[HN21](#) [¶] Further, like claims under § 1, a plaintiff alleging a § 2 claim must also allege an "antitrust injury." See [O.K. Sand & Gravel, Inc. v. Martin Marietta Techs., Inc.](#), 36 F.3d 565, 573 (7th Cir. 1994); see also [Magnetaq Techs. Corp. v. Intamin, Ltd.](#), 801 F.3d 1150, 1158, 1158 n.2 (9th Cir. 2015) (noting the § 2 requirement of antitrust injury under a conspiracy-to-monopolize theory specifically). As noted in the section concerning Rockford's § 1 claims, Rockford has satisfied that requirement. See [Wagner](#), 121 F. Supp. 2d at 681 (analyzing "antitrust injury" under § 1 and § 2 together). Thus, at this stage, all the § 2 prongs are sufficiently pled, and accordingly, Rockford has stated a § 2 claim.

Accordingly, the court denies defendants' motions to dismiss Counts VI and VII as to Rockford, finding that Rockford has antitrust standing to bring these claims and has met its burden at the [Rule 12](#) stage.<sup>15</sup> The court

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<sup>15</sup> [HN22](#) [¶] Plaintiffs also seek injunctive relief under [§ 16 of the Clayton Act](#), SAC ¶ 12, which provides in part that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or

grants defendants' **[\*\*38]** motions to dismiss Counts VI and VII as to Acument without prejudice, and grants plaintiffs leave to replead to correct the deficiencies noted by the court related to Acument's antitrust standing to bring its federal antitrust claims if it can do so consistent with its obligations under [Rule 11 of the Federal Rules of Civil Procedure](#).

## B. State-Law Antitrust and Consumer Protection Claims (Count VIII)

Plaintiffs bring various state-law antitrust and consumer protection claims against defendants. Defendants put forth three separate arguments as to why plaintiffs' state-law claims should be dismissed. Their first argument is that plaintiffs lack constitutional standing under Article III to **[\*758]** bring claims of unnamed class members. Second, defendants claim that plaintiffs are not the "proper parties" to bring suit under AGC.<sup>16</sup> Third, defendants maintain that certain limitations germane to specific states implicated by plaintiffs' claims act as additional barriers to plaintiffs bringing suit under those states. The court will assess these arguments in turn.

### 1. Article III Standing for Claims of Unnamed Class Members

Although defendants **[\*\*39]** do not dispute plaintiffs' Article III standing to pursue their federal claims, defendants challenge plaintiffs' Article III standing to bring state-law claims on behalf of the unnamed class members.<sup>17</sup> The issue before the court then is whether Article III standing is properly alleged for plaintiffs' state-law claims based in jurisdictions in which a named plaintiff is not alleged to have suffered injury and thus Rockford and Acument cannot be said to have personally experienced injury based on defendants' conduct. But first the court must decide whether it should rule on plaintiffs' Article III standing to represent these claims now or as an alternative defer that ruling until the class certification stage.

Courts across this country are split on this timing issue. See [McDonnell v. Nature's Way Prods., LLC, No. 16 C 5011, 2017 U.S. Dist. LEXIS 44875, 2017 WL 1149336, at \\*5 \(N.D. Ill. Mar. 28, 2017\)](#) (collecting cases and noting that "[c]ourts in this district . . . are divided as to whether these decisions require a plaintiff to establish standing at the pleading stage to pursue claims under state laws in which that plaintiff does not reside or cannot claim to have personally suffered an injury"); see also 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS [§ 2](#): 6 (5th ed. 2013)

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damage by a violation of the antitrust laws." [15 U.S.C. § 26](#). Aside from very brief and passing references in the SAC, [see id. ¶¶ 12, 254](#), and their prayers for relief, plaintiffs only raise the issue of injunctive relief pursuant to its federal antitrust claims in its briefing opposing the motion to dismiss. [HN23](#) [↑] Defendants do not dispute plaintiffs' claims for injunctive relief separate from their arguments opposing plaintiffs' [§§ 1](#) and [2](#) claims.

Plaintiffs are correct to point out that [Illinois Brick](#) does not foreclose plaintiffs' equitable relief claims. See [In re Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772, 813 \(N.D. Ill. 2017\)](#) (quoting [U.S. Gypsum Co. v. Ind. Gas Co., Inc., 350 F.3d 623, 627 \(7th Cir. 2003\)](#). ("[T]he [in]direct-purchaser doctrine does not foreclose equitable relief."); [Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 111 n.6, 107 S. Ct. 484, 93 L. Ed. 2d 427 \(1986\)](#) (explaining that Clayton Act claims under [§ 16](#) do not implicate [Illinois Brick](#) because "standing under [§ 16](#) raises no threat of multiple lawsuits or duplicative recoveries"). And while plaintiffs' allegations concerning injunctive relief under [§ 16 of the Clayton Act](#) must also allege antitrust standing in line with AGC, [see Teamsters, 196 F.3d at 823](#), because the court has determined that Rockford satisfied the AGC factors with respect to its [§§ 1](#) and [2](#) claims, the court finds that Rockford also has antitrust standing to sue defendants for injunctive relief under [§ 16](#). The court defers on ruling on Acument's antitrust standing under AGC until Acument repleads, if it chooses to do so.

<sup>16</sup> In [California v. ARC Am. Corp., 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86 \(1989\)](#), the Supreme Court held that state legislatures could pass laws "repealing" [Illinois Brick](#) (known as "[Illinois Brick](#) repealer statutes"), thus allowing for indirect plaintiffs to sue upstream antitrust defendants. Some of the states implicated in the SAC passed these statutes with the explicit intention of repealing [Illinois Brick](#) as applied to those respective states; other states passed antitrust or consumer protection statutes that effectively allow for such suits. Here, defendants put forth no argument that [Illinois Brick](#) works to prevent any indirect-purchaser suits in these states.

<sup>17</sup> The parties agree that Rockford and Acument have Article III standing to pursue state-law antitrust and consumer protection claims of Illinois and Tennessee, respectively.

(noting that the issue of whether a plaintiff [\*\*40] may represent a class of another state's residents that plaintiff was not herself injured within is not a pure question of standing, but rather, a hybrid of both standing and class representation). Plaintiffs point to the decisions of courts that hold that, "at the pleading stage and prior to analysis of the class allegations under [Rule 23](#)," where a named plaintiff is able to establish Article III standing and injury-in-fact in its own jurisdiction, this "suffices to establish the named plaintiffs' standing to assert the claims of class members in other states." [In re Broiler Chicken Antitrust Litigation, 290 F. Supp. 3d 772, 809-10 \(N.D. Ill. 2017\)](#) ("[N]amed plaintiffs who represent a class must allege and show that they have personally been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." (quoting [In re Plasma-Derivative Protein Therapies Antitrust Litig., No. MDL 2109, 09 C 7666, 2012 U.S. Dist. LEXIS 2501, 2012 WL 39766, at \\*6 \(N.D. Ill. Jan. 9, 2012\)\)\)\); see also \[Payton v. Cty. of Kane, 308 F.3d 673, 680 \\(7th Cir. 2002\\)\]\(#\) \(explaining that only "once a class is properly certified" should "standing requirements . . . be assessed with reference to the class as a whole" as opposed to "the individual named plaintiffs" \(emphasis added\)\); \[\\*759\] \[Supreme Auto Trans. LLC v. Arcelor Mittal, 238 F. Supp. 3d 1032, 1038 \\(N.D. Ill. 2017\\)\]\(#\) \("For now, whether named plaintiffs can bring claims under the laws of other states and whether plaintiffs are adequate class representatives do not pose Article \[\\*\\*41\] III barriers to subject-matter jurisdiction."\).](#)

One court in this district discussed [Halperin v. International Web Services, LLC, 123 F. Supp. 3d 999, 1009 \(N.D. Ill. 2015\)](#), and noted that the defendant's argument in [Halperin](#) (that the plaintiff lacked standing to raise claims under the nine state consumer protection laws other than Illinois') was "more accurately characterized as an attack not on Halperin's Article III standing *per se* . . . but rather on his ability under [Rule 23](#) to represent the multi-state class." [In re Herbal Supplements Mktg. & Sales Practices Litig., No. 15-cv-5070, 2017 U.S. Dist. LEXIS 76207, 2017 WL 2215025, at \\*6 \(N.D. Ill. May 19, 2017\)](#) (St. Eve, J.) (emphasis in original). The court finds the analysis contained within [Herbal Supplements](#) persuasive. What defendants here are really challenging is the adequacy of Rockford and Acument to represent the unnamed class members' state-law antitrust claims. Plaintiffs' "capacit[ies] to represent individuals from other states depends upon obtaining class certification, and the standing issue would not exist but for their assertion of state law claims on behalf of class members in those states. These standing issues therefore arise from [plaintiffs'] attempt to represent the multistate class, making class certification issues 'logically antecedent' to the standing concerns." [McDonnell, 2017 U.S. Dist. LEXIS 44875, 2017 WL 1149336, at \\*5.](#) [HN24](#) [↑] The court is persuaded that [\*\*42] plaintiffs' argument adheres best to the Supreme Court's holding that "the standing issue focuses on whether the [named] plaintiff is properly before the court, not whether represented parties or absent class members are properly before the court," and applies that reasoning to this case. [Lewis v. Casey, 518 U.S. 343, 395, 116 S. Ct. 2174, 135 L. Ed. 2d 606 \(1996\)](#); accord. [Morrison v. YTB Int'l, Inc., 649 F.3d 533, 535-36 \(7th Cir. 2011\)](#); [In re Fluidmaster, Inc., 149 F. Supp. 3d 940, 957-58 \(N.D. Ill. 2016\)](#) (Dow, J.). Thus, the court need not address Article III standing with respect to claims based on injuries incurred by unnamed class members until some later appropriate stage of the proceedings.

## 2. Rockford's Antitrust Standing for State-Law Claims

Defendants also argue that the proximate-cause limitation under AGC applies to plaintiffs' attempt to bring state-law claims for the unnamed class members.<sup>18</sup> Unlike Article III standing, for the state-law antitrust and consumer protection claims, the parties do not direct the court to any authority that suggests the court should defer ruling on this issue until the [Rule 23](#) stage. Thus, the court will determine this issue now.

Generally, in deciding whether to apply AGC to state-law antitrust claims, courts look to whether the relevant states' highest courts have ruled on the issue. [Broiler Chicken, 290 F. Supp. 3d at 814-15](#) (citing [ADT Sec. Servs., Inc. v. Lisle-Woodridge Fire Prot. Dist., 672 F.3d 492, 498 \(7th Cir. 2012\)](#)). However, federal courts have tied themselves in knots attempting to interpret [\*\*43] the decisions of state courts on this issue. See id.; [Dairy Farmers, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at \\*7](#); [In re Lithium Ion Batteries Antitrust Litig., No. 13-MD-2420 YGR, 2014](#)

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<sup>18</sup> The parties put forth no argument that AGC is irrelevant to state-law consumer protection claims. For purposes of this order only, the court considers all of the state laws invoked by the SAC as state laws that implicate plaintiffs' antitrust standing.

360 F. Supp. 3d 730, \*759 (2019 U.S. Dist. LEXIS 12171, \*\*43

U.S. Dist. LEXIS 141358, [\*760] 2014 WL 4955377, at \*9 (N.D. Cal. Oct. 2, 2014); see also Kelly S. Dwyer, With the Illinois Brick Wall Down, What's Left?: Determining Antitrust Standing Under State Law, 3 J. Bus. ENTREPRENEURSHIP & L. 255 (2010) (noting that the complexity of this issue has resulted in a "number of splintered opinions"). Many courts that embark upon the endeavor do so in relative cursory fashion, relying heavily on the parties' briefings. See, e.g., Arcelor, 238 F. Supp. 3d at 1038-39. Some courts eschew the task all-together, and instead assume arguendo that each state at issue has adopted the full AGC test and conclude that if plaintiffs' antitrust allegations pass muster under the full AGC test then it follows that they will comply with the "proper party" test of any state, including those that have less stringent requirements. See, e.g., Lithium, 2014 U.S. Dist. LEXIS 141358, 2014 WL 4955377, at \*11 & n.13 (listing cases that have taken the same approach). Here, the court has already determined that Rockford satisfies the full AGC test for their federal claims. Thus, for Rockford, the court need not embark on the "back-breaking labor involved in deciphering the state of antitrust standing in each of th[e] states," Flash Memory, 643 F. Supp. 2d at 1153, because [\*\*44] the court has already determined that plaintiffs satisfied the federal proximate-cause standard.<sup>19</sup> Courts especially take this approach where "[n]either party has provided the [c]ourt with the requisite, individualized analysis on a per state basis to enable the [c]ourt to render such a determination." Id. Defendants argue that Mallinckrodt "devoted over a page of argument to the issue, with supporting authorities." But nowhere in defendants' briefs is there a state-by-state analysis of how AGC interacts with the respective states' statutes; Mallinckrodt's only related argument to this point is a footnote summarily stating that "[a] number of [these] state courts have expressly adopted AGC or held that at least some of the AGC factors should be applied to state antitrust claims." Thus, because the court has already concluded that Rockford satisfies the AGC factors with respect to its federal claims, finding that it would be a "proper party" under AGC's proximate-cause analysis, the court presumes that Rockford would satisfy each states' "proper party" test.

### 3. Acument's Antitrust Standing for State-Law Claims

Conversely, the court finds that Acument would not [\*\*45] meet even the least stringent state's "proximate cause" test. To reiterate this opinion's section on the application of AGC to Acument's federal antitrust claims, the SAC lacks sufficient allegations to allow the court to determine how Acument's injuries in Tennessee are connected to defendants' conduct. Thus, the court grants defendants' motions to dismiss Count VIII as it pertains to Acument. The court grants plaintiffs leave to replead to correct the deficiencies associated with Acument's "proper party" status concerning its state-law claims.

### 4. Statutory Limitations<sup>20</sup>

In addition to the aforementioned standing arguments, defendants also bring a [\*761] litany of challenges to plaintiffs' state-law claims based on plaintiffs' failure to comply with or allege requirements particular to each state's antitrust laws. The twenty-four state statutes invoked in the SAC are those of Arizona, Arkansas, California, Florida, Hawaii, Illinois, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, and Wisconsin.

<sup>19</sup> Without any analysis or citation to authority by any of the parties, the court notes in passing its strong skepticism that any state that passed an "Illinois Brick repealer" statute to make indirect-purchaser standing easier would have made that indirect-purchaser's antitrust standing harder under a "proximate cause" analysis. Thus, the court assumes that the federal AGC standard represents the most stringent "proper party" standard that could apply to a state's "proximate cause" analysis for a plaintiff's antitrust standing. See Lithium, 2014 U.S. Dist. LEXIS 141358, 2014 WL 4955377, at \*11 & n.13.

<sup>20</sup> The court couches the language in this section as applying to both Rockford and Acument, but it is relevant to Acument only if it chooses to replead.

Defendants cite limitations specific to some of these states that [\*\*46] defendants contend defeat most of plaintiffs' state-law claims. The court will address these specific limitations in turn.<sup>21</sup>

**a. Arizona, California, Florida, Hawaii, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, and Wisconsin**

Defendants' briefing on this issue is cursory. Mallinckrodt simply argues that "[t]he antitrust laws of these states limit their reach to activities which occur within the state. Because Plaintiffs fail to allege conduct within those states that would violate the respective statutes, each claim should be dismissed." Similarly, for the consumer protection statutes, defendants argue that those statutes only concern "intrastate" activity. The court finds that plaintiffs have met their bare pleading requirements at this stage that unnamed class members purchased Acthar in these states. See SAC ¶¶ 260-266, 269-289, 293-336, 341-348, 353-356. Later stages in this litigation, including the [Rule 23](#) stage, will allow the court to more definitively determine whether any unnamed class members purchased Acthar in these states.<sup>22</sup>

However, as noted [\*\*47] in the previous section, the SAC does not sufficiently allege that Acument is a proper party to bring any antitrust or consumer protection claims (federal or state). Thus, with leave to replead, the court dismisses Count VIII to the extent Acument seeks to represent the claims of unnamed class members—including those in Tennessee.

**b. Arkansas**

**HN25** The [Arkansas Deceptive Trade Practices Act \(the "ADTPA"\)](#) prohibits a variety of conduct, including "[d]eceptive and unconscionable trade practices." [Ark. Code Ann. § 4-88-107\(a\)](#). However, the ADTPA contains a "safe harbor" provision that does not apply the law to practices "which are subject to and comply with any rule, order, or statute administered by the Federal Trade Commission." *Id.* [§ 4-88-101\(1\)](#). Defendants argue that because Mallinckrodt is subject to the consent order from the FTC complaint against it that it falls within the safe harbor provision. [\*762] Thus, before determining whether the ADTPA covers defendants' conduct, the court must first determine whether the existence of the FTC consent order removes defendants' liability under the ADTPA.

Defendants do not cite any authority supporting its argument that the consent order between the FTC and Mallinckrodt—which defendants ask this [\*\*48] court to ignore as evidence connected to a different argument pursuant to their motions to dismiss—falls within the statutory exemption of the ADTPA. In the court's view, the exemption appears inapplicable to the consent order here, as the safe harbor provision is meant to exempt "conduct that is permitted under laws administered" by the FTC, see [DePriest v. AstraZeneca Pharm., L.P., 2009 Ark. 547, 351 S.W.3d 168, 176 \(Ark. 2009\)](#), and defendants' alleged price-fixing and monopolization conduct was not permitted by the consent order, cf. [Godfrey v. Toyota Motor N. Am., Inc., No. 07-5132, 2008 U.S. Dist. LEXIS 51762, 2008 WL 2397497, at \\*3 \(W.D. Ark. June 11, 2008\)](#) ("Clearly, the FTC regulations require the use of EPA estimates in fuel economy advertisements. . . . It is, therefore, no great jump for this Court to find that plaintiffs'

<sup>21</sup> The parties' arguments concerning these requirements are styled as arguments about whether plaintiffs have plausibly "stated a claim" with respect to each states' antitrust laws. Cf. [Broiler Chicken, 290 F. Supp. 3d at 816](#) (discussing threshold issues concerning state antitrust laws on a motion to dismiss in terms of whether "Plaintiffs have failed to state claims"). But the court does not take the parties' arguments on these points to be on the "merits"; neither party engages the elements of any states' antitrust laws or whether the SAC contains allegations that sufficiently plead what is required for such elements. Rather, the court will address these arguments as pertaining to the threshold requirements for plaintiffs to bring claims under each specific state. See [Dairy Farmers, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at \\*33](#) ("[B]ecause Defendants do not allege that Indirect Plaintiffs failed to state a claim under the Arkansas, California, and Florida consumer-protection statutes (or at least Defendants failed to provide the relevant legal standards under those states' laws), the Court will not address such arguments.").

<sup>22</sup> For Kansas and Oregon, defendants offer no state-specific limitations.

claim under the ADTPA should be dismissed as the ADTPA has clearly exempted 'advertising or practices which are subject to and which comply with any rule, order, or statute administered by the Federal Trade Commission.'" (citations omitted) (emphasis added)). Thus, with no direction from the Supreme Court of Arkansas, the court will not apply the safe harbor provision to plaintiffs' claims, and will instead determine how the ADTPA relates to defendants' alleged conduct.

**HN26** [+] In Arkansas, unconscionable trade practices include "conduct violative of public policy or statute." [\*\*49] *Universal Coops., Inc. v. AAC Flying Serv., Inc.*, 710 F.3d 790, 795 (8th Cir. 2013). This requires something more than merely alleging that the price of a product was unfairly high. See *State v. R & A Inv. Co.*, 336 Ark. 289, 296, 985 S.W.2d 299 (1999) ("Two important considerations are whether there is a gross inequality of bargaining power between the parties to the contract and whether the aggrieved party was made aware of and comprehended the provision in question."). While price-fixing or monopolization are not listed in the Act, the statute does contain a catch-all provision that proscribes "[e]ngaging in any other unconscionable, false, or deceptive act or practice in business, commerce, or trade[.]" *Id.* § 4-88-107(a)(10). Another court in this district has found that "allegations of price fixing . . . are not the kind of conduct prohibited under the[ ] statute" because price-fixing, within the meaning of the ADTPA, does not "affront[ ] the sense of justice, decency, or reasonableness." *Dairy Farmers*, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at \*35 (quoting *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1030 (N.D. Cal. 2007)); cf. *Baptist Health v. Murphy*, 365 Ark. 115, 128, 226 S.W.3d 800 (2006) (affirming as unconscionable for ADTPA purposes a hospital's policy of denying practice rights to physicians who held ownership interests in another local hospital, where the defendant hospital had the "upper hand because of exclusive-provider contracts" and the "power to disrupt the relationships between patients, who are at [the hospital's] [\*\*50] mercy, with their physicians"). However, that same court found that monopolization claims are actionable under the ADTPA. *Dairy Farmers*, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at \*33 ("[C]ourts have interpreted the catchall provision of the Arkansas Deceptive Trade Practices Act—which prohibits any 'unconscionable, false, or deceptive act or practice in business, commerce, or trade'—broadly so as to encompass monopolization claims." (citation omitted)) (citing *Sheet Metal Workers* [\*763] *Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC*, 737 F. Supp. 2d 380, 404-05 (E.D. Pa. 2010)). Here, the court infers from the SAC that plaintiffs mean to incorporate its § 2 monopolization claims into their claims under Arkansas law. SAC ¶ 267. Accordingly, the court denies defendants' motions to dismiss plaintiffs' claims under the ADTPA.

### c. Illinois

Defendants argue that plaintiffs cannot bring their claims under the *Illinois Antitrust Act* because, while it allows for recovery by indirect purchasers, it provides that "no person shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act, with the sole exception of this State's Attorney General." 740 ILCS 10/7(2). Rockford contends that, under *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010), this is a procedural rule that does not apply to class action claims brought in federal court.

In *Shady Grove* [\*\*51], the Supreme Court held that a New York statute prohibiting class actions "in suits seeking penalties or statutory minimum damages" did not bar the class action in that case under New York law in federal court. See *id. at 408*. A plurality of the Court held that *Federal Rule of Civil Procedure 23* "neither change[s] plaintiffs' separate entitlements to relief nor abridge[s] defendants' rights; [but] alter[s] only how the claims are processed," and thus, the New York statute was a procedural, not substantive rule. *Id.* Importantly, Justice Stevens' concurrence would have allowed state procedural rules to control in federal court only when they are "part of a State's framework of substantive rights or remedies." *Shady Grove*, 559 U.S. at 419 (emphasis added); see *Broiler Chicken*, 290 F. Supp. 3d at 817 (noting that both the plurality and Justice Stevens' concurrence were "primarily focused on the fact that both *Rule 23* and the New York statute governed when a class action was permissible, and this was a procedural, not substantive conflict").

**HN27** [+] There is a split of authority on the issue of whether the Illinois Antitrust Act's class action prohibition is part of Illinois' "substantive rights or remedies." Some courts have answered in the affirmative. See, e.g., *In re*

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Opana ER Antitrust Litig., 162 F. Supp. 3d 704, 723 (N.D. Ill. 2016) (citing In re Wellbutrin XL Antitrust Litig., 756 F. Supp. 2d 670, 677 (E.D. Pa. 2010) ("The Illinois restrictions on indirect [\*\*52] purchaser actions are intertwined with Illinois substantive rights and remedies.")); In re Lipitor Antitrust Litig., 336 F. Supp. 3d 395, 2018 WL 4006752, at \*14 (D.N.J. 2018) ("[A] majority of courts have held that the Act is distinguishable from the New York law in Shady Grove and that it prohibits indirect purchaser class actions."); In re Digital Music Antitrust Litig., 812 F. Supp. 2d 390, 415-16 (S.D.N.Y. 2011). Others have not. See, e.g., Broiler Chicken, 290 F. Supp. 3d at 818 ("The availability of the class action procedure does not change the substantive rights or remedies available to [plaintiffs] under Illinois law."); In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig., 336 F. Supp. 3d 1256, 2018 WL 3973153, at \*31 (D. Kan. 2018)); In re Propranolol Antitrust Litig., 249 F. Supp. 3d 712, 728 (S.D.N.Y. 2017); In re Aggrenox Antitrust Litig., No. 14-MD-2516(SRU), 2016 U.S. Dist. LEXIS 104647, 2016 WL 4204478, at \*6 (D. Conn. Aug. 9, 2016)

While the court recognizes the split in authority on this issue, the court agrees with the reasoning of Aggrenox, which casts doubt on whether Justice Stevens' "framework of substantive rights or remedies" concurrence controls. The Court noted the doctrine from Marks v. United States, 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2d 260 [<sup>1</sup>\*764] (1977)—that "[w]hen no single rationale garners a majority, the holding of the Court is that position taken by those Members who concurred in the judgments on the narrowest grounds," but "only when one opinion is a logical subset of other, broader opinions . . . a common denominator of the Court's reasoning," 2016 U.S. Dist. LEXIS 104647, [WL] at \*5—and acknowledged [\*\*53] that some courts have used it to find that Justice Stevens' concurrence controlled, see, e.g., Wellbutrin, 756 F. Supp. 2d at 675; Aggrenox, 2016 U.S. Dist. LEXIS 104647, 2016 WL 4204478, at \*6. Nevertheless, the Court pointed out that these courts did not address whether Stevens' concurrence was actually the "common denominator" of the judgment such that the Marks doctrine applies:

The Stevens concurrence is "narrower" than the position of the other Justices who made up the Shady Grove majority only in the sense that it would reject state procedural rules in fewer cases. It is not logically narrower, however, because it is not a logical subset of the opinion of the other Justices in the majority. Those Justices do not implicitly approve of its rationale for sometimes allowing state procedural rules to control—on the contrary, they explicitly reject that rationale—and it therefore does not represent the common denominator of the Court's reasoning. The courts that have taken the Stevens concurrence to be controlling have generally not addressed that problem . . . [E]ven though Stevens joined the majority to hold that Rule 23 trumps New York's class-action bar, he agreed with the dissent that some state procedural rules—when sufficiently intertwined with the state's substantive rights [\*\*54] and remedies—can control in federal court. The Wellbutrin Court infers from that agreement that there were five votes for Stevens's approach. The problem is that no other Justice joined his concurrence, and even if we nevertheless infer agreement, the common denominator of a concurrence and a dissent does not support the judgment.

Aggrenox, 2016 U.S. Dist. LEXIS 104647, 2016 WL 4204478, at \*5-6. Thus, the Aggrenox Court concluded that "it may be that in a case where a state procedural rule is part of the state's framework of substantive rights, there simply is no controlling Supreme Court holding." 2016 U.S. Dist. LEXIS 104647, [WL] at \*6.

HN28 [↑] But even to the extent that Justice Stevens' concurrence could be construed as persuasive "Marks-doctrine dicta," the Court found that the Illinois Antitrust Act did not alter the scope of any substantive right or remedy—and is thus not substantive for purposes of Shady Grove—"because any indirect purchaser procedurally blocked from participation in a class action would still have the same remedy in an individual action." Id. The Court acknowledged that the Illinois Antitrust Act's class action limitation hewed more closely to a particular substantive right (indirect-purchaser antitrust claims) than the New York state-law limitation in Shady Grove, but [\*\*55] ultimately found that "if New York's state-law bar is not a procedural rule that alters the scope of a substantive right or remedy, then the narrower scope of Illinois's state-law bar does not make it one that does." HN29 [↑] Id.; see also In re TFT-LCD (Flat Panel) Antitrust Litig., No. M 07-1827 SI, 2011 U.S. Dist. LEXIS 165344, 2011 WL 13152270, at \*5 (N.D. Cal. Aug. 24, 2011) (citing Califano v. Yamasaki, 442 U.S. 682, 699-700, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)) (Rule 23 explicitly empowers a federal court to certify a class in every case that satisfies its criteria. Like the rest of the Federal Rules of Civil Procedure, Rule 23 automatically applies in all civil actions and

procedures in the United States district courts."). Thus, agreeing with the reasoning laid [**\*765**] out in [Aggrenox](#), defendants' motions to dismiss plaintiffs' class action antitrust claims based on the Illinois Antitrust Act are denied.

#### d. Arizona, Hawaii, Nevada, and Utah

With respect to plaintiffs' claims under Arizona, Hawaii, Utah, and Nevada, defendants argue as another basis for dismissal that plaintiffs' failure to plead compliance with the notice provisions of these states' antitrust statutes necessitates dismissal. Plaintiffs have represented to the court that they have made "post-filing efforts" to provide notice. Defendants offer no authority to suggest that late notice [**\*\*56**] would require dismissal. See [Broiler Chicken](#), 290 F. Supp. 3d at 817. One court assessing Hawaii's notice provision found that "Plaintiffs are correct that [HN30](#)↑ nothing in the statutory scheme suggests that defendants may use the statute as a shield to avoid answering for alleged anti-competitive behavior. Accordingly, defendants' motion to dismiss the claims under the Hawaii antitrust statute is denied." [In re Aftermarket Filters Antitrust Litig.](#), No. 08 C 4883, MDL Docket No. 1957, 2009 U.S. Dist. LEXIS 104114, 2009 WL 3754041, at \*6 (N.D. Ill. Nov. 5, 2009). The court agrees with this approach as to Hawaii as well as Arizona, Nevada, and Utah, and chooses to defer ruling on this issue until a later stage in these proceedings when the parties have had an opportunity to collect more facts to determine what these "post-filing efforts" have been and whether any failure by plaintiffs to adhere to these notice provisions prohibits their bringing of claims under these states' relevant statutes. Accordingly, the court denies defendants' motions to dismiss on this basis.

In sum, as to Rockford, the court denies defendants' motions to dismiss plaintiffs' state-law claims with respect to all twenty-four states named. As to Acument, the court grants defendants' motion to dismiss Count VIII without prejudice with leave to replead if [**\*\*57**] Acument can properly do so. The court notes in passing that Rockford, and perhaps Acument, will be required at some later point in these proceedings to demonstrate that they have Article III standing to bring these claims by showing that Acthar was in fact purchased in these states.<sup>23</sup>

### C. Breach of Contract (Count XII)

Rockford alleges that Express Scripts<sup>24</sup> failed to provide cost containment services as enumerated in the PBM Agreement and as understood by the parties when Express Scripts failed to push back against Mallinckrodt's increase of Acthar's price. SAC ¶ 243. Because of a choice-of-law provision in the PBM Agreement, Rockford's claim will be assessed under Illinois law. [HN31](#)↑ To prevail on its breach of contract claim, Rockford must demonstrate: "(1) the existence of a valid and enforceable contract; (2) substantial performance by the [plaintiff]; (3) a breach by defendants; and (4) resultant damages." [Dual-Temp of Ill., Inc. v. Hench Control, Inc.](#), 821 F.3d 866, 869 (7th Cir. 2016).

Express Scripts argues that the "cost containment" language, as "prefatory" language contained in the recitals section of the agreement, does not create a "binding obligation" capable of being breached. See [**\*766**] [McMahon v. Hines](#), 298 Ill. App. 3d 231, 237, 697 N.E.2d 1199, 232 Ill. Dec. 269 (1998); [First Bank & Tr. Co. of Ill. v. Vill. of Orland Hills](#), 338 Ill. App. 3d 35, 45, 787 N.E.2d 300, 272 Ill. Dec. 485 (2003). Rockford argues that, while the term "cost containment" is not mentioned in [**\*\*58**] the operative portion of the PBM Agreement, the "cost containment" term was part of the "PBM Services," which was mentioned throughout the operative part of the contract. Specifically, the portion of the PBM Agreement titled "**RECITALS**" states in part:

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<sup>23</sup> As noted earlier in this opinion, plaintiffs make only scant references to their requests for injunctive relief. Relatedly, the court does not construe the SAC to be making any claims for injunctive relief pursuant to any of the state-law antitrust and consumer protection statutes invoked in the SAC.

<sup>24</sup> Rockford uses the names Express Scripts and ESI interchangeably in Counts XII through XV. Recognizing that ESI is the only defendant signatory to the PBM Agreement, the court will use the name Express Scripts to include ESI.

ESI, either directly or through its subsidiaries, engages in pharmacy benefit management services, including, among other things, pharmacy network contracting; pharmacy claims processing; mail and specialty drug pharmacy; cost containment, clinical, safety, adherence, and other like programs; and formulary and rebate administration ("PBM Services").

(emphasis added).

**HN32** [↑] "Recitals to a contract provide explanations of those circumstances surrounding the execution of the contract." *Id.* Recitals are preliminary in nature and are generally not binding on the parties or "an effective part of their agreement unless referred to in the operative portion of their agreement." *Id.* Courts in Illinois look for the terms contained within the recitals to appear in the operative portions of the contract before assigning those terms binding power upon the parties. For example, in *McMahon*, the plaintiff filed an action for declaratory judgment seeking court [\*\*59] approval to install a driveway over an easement owned by the defendants. *298 Ill. App. 3d at 233-34*. The defendants objected, arguing that the plaintiff's proposed driveway would obliterate a curb that served as a boundary between the plaintiff's and defendants' properties for the length of the easement and which provided a means of water runoff. *Id.* The defendants claimed that the plaintiff was prohibited from removing the curb because the curb was part of their easement. *Id. at 237*. The appellate court rejected this argument, noting that in the instrument creating the defendants' easement the only mention of a curb was in the paragraphs containing recitals. *Id.* **HN33** [↑] The court ruled that under Illinois law, recitals "are not binding obligations unless referred to in the operative portion of the contract." *Id.* (emphasis added). Because there was no mention of the curb in the operative language of the easement document, the court found that "the parties did not intend to include the curb as part of the easement." *Id.*; see also *Wilson v. Wilson*, 217 Ill. App. 3d 844, 852, 577 N.E.2d 1323, 160 Ill. Dec. 752 (1991) (holding that recitals are operative when preambles or introductions to agreements include language indicating as much); *Am. Nat'l Bank & Tr. Co. of Chi. v. Chi. Title & Tr. Co.*, 134 Ill. App. 3d 772, 776-77, 481 N.E.2d 71, 89 Ill. Dec. 719 (1985) (holding that recitals became operative when the contract stated "[f]or and [\*\*60] in consideration of the premises set forth in the foregoing Recitals"). Because the term "curb" appeared nowhere in the operative clauses, and because there was no indication within the recitals that any particular terms of the recitals were to be part of the operative clauses, the appellate court affirmed the trial court.

Here, there is uncertainty as to how the "cost containment" language is referenced to in the operative portion of the contract. It is true, as Rockford contends, that "cost containment" is one of the "PBM Services" noted in the recitals and the term "PBM Services" is referred to throughout the operative portion of the contract. Conversely, it is worth noting that, with the conspicuous omission of "cost containment," the other undertakings listed in [\*767] the Recitals are specifically named in Section 2.4 of the Terms of Agreement.<sup>25</sup> "Cost containment" is never mentioned after the recitals. This may support the conclusion that any reference to "cost containment" was not intended by the parties to impose an actionable obligation on Express Scripts under the terms of the contract. In later proceedings, with the benefit of discovery and applicable rules of contract interpretation, the court [\*\*61] may be able to determine whether "cost containment" programs were merely an example of what "PBM Services" may generally include or whether, and to what extent, they constitute an enforceable obligation of Express Scripts.<sup>26</sup> But, drawing all reasonable inferences in favor of Rockford, the court concludes that "cost containment" is alluded to in the operative terms of the PBM Agreement and therefore the court will not dismiss Rockford's claim based upon Express Scripts' "prefatory language" argument.<sup>27</sup>

<sup>25</sup> Section 2.4(a) of the PBM Agreement reads:

Formulary Adherence and Clinical Programs. ESI may provide clinical, safety, adherence, and other like programs as appropriate. The Clinical Addendum described in Exhibit A-2 sets forth certain available adherence, clinical, safety and/or trend programs that require additional fees hereunder. ESI will not implement any program for which Sponsor may incur an additional fee without Sponsor's prior written approval and election of such program.

<sup>26</sup> Even *McMahon*, on which Express Scripts relies, was not decided on a motion to dismiss.

<sup>27</sup> Further, Section III(c) of Exhibit A-1 of the PBM Agreement notes that "Specialty Products will be excluded from any price guarantees set forth in the agreement," and Acthar is listed as a Specialty Product. Should Rockford choose to replead, the court

Turning to another issue, [HN34](#)<sup>↑</sup> under Illinois law contractual terms that are too vague or indefinite are not enforceable. A term that is too vague or indefinite is one that a court cannot, "under proper rules of construction and applicable principles [\[\\*\\*62\]](#) of equity . . . ascertain what the parties have agreed to do." [Dawson v. Gen. Motors Corp., 977 F.2d 369, 373 \(7th Cir. 1992\)](#) (quoting [Acad. Chi. Publishers v. Cheever, 144 Ill. 2d 24, 29, 578 N.E.2d 981, 161 Ill. Dec. 335 \(1991\)](#)); [see also Pennington v. Travelex Currency Servs., Inc., 114 F. Supp. 3d 697, 703 \(N.D. Ill. 2015\)](#) (finding that the promise of an "excellent" exchange rate was not enforceable); [Barbara's Sales, Inc. v. Intel Corp., 227 Ill. 2d 45, 73, 879 N.E.2d 910, 316 Ill. Dec. 522 \(2007\)](#) (holding that words of "puffery" such as a service that is "high-quality" or a price that a produce or service is the "best" are not actionable). Rockford does not explain the meaning of "cost containment." Instead, Rockford argues that Express Scripts already, in an unrelated case, admitted that "cost containment" is a definite term because in that case Express Scripts argued that the "goal" of its decision to end insurance coverage for certain medications was based on its effort to reduce costs. [See Precision Rx Compounding, LLC v. Express Scripts Holding Co., No. 4:16-CV-0069 \(CEJ\), 2016 U.S. Dist. LEXIS 112851, 2016 WL 4446801, at \\*1-2 \(E.D. Mo. Aug. 24, 2016\)](#). But Rockford's reference to this case in no way clarifies the meaning of "cost containment" in the context of the PBM Agreement, in large part because [Precision Rx](#) did not deal with any contract terms at all, let alone a contract term analogous to "cost containment."<sup>28</sup>

[\*768] The court also wishes to bring the parties' attention to a discrepancy between the allegations of the SAC and the language of the PBM Agreement. [\[\\*\\*63\]](#) The SAC states that Express Scripts breached the contract by failing to provide cost containment services. SAC ¶ 83. However, this is at odds with the plain language of the contract. The contract states only that Express Scripts engages in pharmacy benefit management services, including cost containment programs. [HN35](#)<sup>↑</sup> At this stage of the proceedings, the court must accept all of the well-pleaded allegations of the SAC as true; however, in a contract action, if the language of the contract is plainly inconsistent with the plaintiff's representations, the court may decline to afford the presumption of truth. "[W]here the allegations of a pleading are inconsistent with the terms of a written contract attached as an exhibit, the terms of the latter, fairly construed, must prevail over the averments differing therefrom." [Citicorp Vendor Fin., Inc. v. ISA Pharmacy, Inc., No. 03 C 6896, 2004 U.S. Dist. LEXIS 3275, 2004 WL 406985, at \\*1 \(N.D. Ill. Mar. 3, 2004\)](#) (quoting [Foshee v. Daoust Constr. Co., 185 F.2d 23, 25 \(7th Cir. 1950\)](#)). There remains a question as to how cost containment services, which are what the SAC maintains Express Scripts failed to provide, relate to cost containment programs, which the contract says is an activity of Express Scripts.

Therefore, the court dismisses Count XII without prejudice, and the court grants Rockford leave to replead if it can appropriately allege that [\[\\*\\*64\]](#) Express Scripts is in breach of their contract with Rockford by not engaging in cost containment programs. Further, should Rockford choose to replead this claim, it should specify what is meant by the contract term "cost containment . . . programs."

#### D. Breach of the Implied Covenant of Good Faith and Fair Dealing (Count XV)

The court turns to Rockford's claim based on an alleged breach of the implied covenant of good faith and fair dealing. [HN36](#)<sup>↑</sup> To state a claim for breach of the implied covenant of good faith and fair dealing in Illinois, a plaintiff must plausibly allege (1) that the existence of an enforceable contract (2) "breaching a specific duty

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expects Rockford to clarify that this Section does not operate to preclude its breach of contract claim in the event that Rockford can plausibly allege that "cost containment" is an actionable obligation contained within the PBM Agreement.

<sup>28</sup> Along these same lines, in order to conserve time and effort, the court wishes to draw the parties' attention to two other thorny issues in the breach of contract claim. The SAC charges that "ESI's failure to provide 'cost containment' repudiated its obligations under the ESI PBM Agreement." SAC ¶ 391 (emphasis added). Yet § 2.4(a) of the Agreement states only that "ESI may provide clinical, safety, adherence, and other like programs as appropriate." (emphasis added). Also, it is important to remember that the PBM Agreement applies to numerous other drugs besides Acthar. If Express Scripts engages in cost containment programs (whatever they may be) related to drugs other than Acthar, the question arises whether such involvement with other drugs would satisfy any "cost containment" obligation Express Scripts has under the PBM Agreement. At this point the court takes no position as to the parameters of Express Scripts' duties under the Agreement, but these are matters which should be addressed as soon as possible.

imposed by the contract other than the covenant of good faith and fair dealing"; (3) that defendant failed to exercise its contractual discretion reasonably and with proper motive; and (4) resultant damages. [AAA Gaming LLC v. Midwest Elecs. Gaming, LLC, No. 16 CV 4997, 2016 U.S. Dist. LEXIS 151742, 2016 WL 6476549, at \\*3 \(N.D. Ill. Nov. 2, 2016\)](#).

**HN37** [↑] However, in Illinois, "[e]very contract implies good faith and fair dealing between the parties to it, and where an instrument is susceptible of two conflicting constructions, one which imputes bad faith to one of the parties and the other does not, the latter construction should be adopted. This good-faith principle is used only as a [\*\*65] construction aid in determining the intent of the contracting parties." [Mid-W. Energy Consultants, Inc. v. Covenant Home, Inc., 352 Ill. App. 3d 160, 163, 815 N.E.2d 911, 287 Ill. Dec. 267 \(2004\)](#) (citation [\*769] omitted). "The obligation of good faith and fair dealing is used as an aid in construing a contract under Illinois law, but does not create an independent cause of action." [McArdle v. Peoria Sch. Dist. No. 150, 705 F.3d 751, 755 \(7th Cir. 2013\)](#); see also [In re VTech Data Breach Litig., No. 15 CV 10889, 2017 U.S. Dist. LEXIS 103298, 2017 WL 2880102, at \\*9 \(N.D. Ill. July 5, 2017\)](#) ("Under Illinois law the covenant of good faith and fair dealing is not an independent source of duties for the parties to contract. The implied covenant is used to interpret a contract." (citation omitted)). Nor can it be used to contradict the express terms in a contract. [Continental Bank, N.A. v. Everett, 964 F.2d 701, 705 \(7th Cir. 1992\)](#). Rather, a plaintiff can plead breach of the implied covenant as a theory for a breach of contract cause of action—and not as a separate, independent cause of action—in the situations where it is being used as a "gap-filler" where a contract is otherwise silent on how the parties are to perform certain terms of the contract. See [LSREF3 Sapphire Tr. 2014 v. Barkston Properties, LLC, No. 14 C 7968, 2016 U.S. Dist. LEXIS 7931, 2016 WL 302150, at \\*4 \(N.D. Ill. Jan. 25, 2016\)](#) (rejecting a motion to dismiss a breach of contract claim under the theory of breach of the implied covenant of good faith and fair dealing where one party had a reasonable expectation that the breaching party would perform in a particular way based on their understanding of a relevant contractual term and alleged that [\*\*66] the breaching party "took opportunistic advantage of [the injured party], dashed their reasonable expectations, and abused any discretion the contract may have afforded it"); [AAA Gaming, 2016 U.S. Dist. LEXIS 151742, 2016 WL 6476549, at \\*3](#) (allowing plaintiffs to amend their complaint to allege breach of the implied covenant of good faith and fair dealing in the same cause of action as the breach of contract claim). However, courts only allow this when the "gap-filler" is used to prevent a party from abusing discretion outlined for them in the contract. [Mid-W. Energy Consultants, Inc. v. Covenant Home, Inc., 352 Ill. App. 3d 160, 165, 815 N.E.2d 911, 287 Ill. Dec. 267 \(2004\)](#) ("Illinois courts have recognized that **HN38** [↑] a party who does not properly exercise contractual discretion breaches the implied covenant of good faith and fair dealing that is in every contract. . . . In order to plead a breach of the covenant of good faith and fair dealing, a plaintiff must plead existence of contractual discretion." (emphasis added)). "Where the contract vests one of the parties with discretion in performing an obligation, and that party exercises that discretion in bad faith, unreasonable or in a manner inconsistent with the reasonable expectations of the parties, it breaches the implied covenant of good faith and fair dealing." [LSREF3, 2016 U.S. Dist. LEXIS 7931, 2016 WL 302150, at \\*4.](#)

Here, Rockford's implied-covenant claim is [\*\*67] deficient for several reasons. First, Rockford pleads it as an independent cause of action, which it cannot do. More importantly, even if plaintiffs replead these allegations as an alternative theory in connection with its breach of contract claim, the allegations as currently formulated lack a reference to any particular section of the PBM Agreement that discusses Express Scripts' discretion to effectuate "cost containment."<sup>29</sup> Thus, the court grants Express [\*\*770] Scripts' motion to dismiss Count XV without prejudice, and grants Rockford leave to replead if it can sufficiently do so.

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<sup>29</sup> Section 2.4(a) of the PBM Agreement notes that Express Scripts "may provide clinical, safety, adherence, and other like programs as appropriate." The Recitals section of the PBM Agreement suggests that these are the kinds of things that Express Scripts does. If Rockford can plausibly allege that these (or different) sections of the PBM Agreement imparts discretion upon Express Scripts, and such discretion specifically includes "cost containment," Rockford may be able to state a claim under the implied covenant theory. Of course, an unenforceable provision in a contract cannot be made enforceable by the application of the implied covenant of good faith and fair dealing. As a result, Rockford still faces some of the obstacles noted in the previous breach of contract section related to the enforceability of the cost containment provisions of the PBM Agreement.

## E. Promissory Estoppel (Count XIII)

In Count XIII, Rockford brings a claim against Express Scripts for promissory estoppel. Specifically, Rockford seeks enforcement of Express Scripts' promise to continue with its obligations under the PBM Agreement. SAC ¶ 396. **HN39** [+] Promissory estoppel is a common-law "principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and if the promisee did actually rely on the promise to his or her detriment." *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 233 Ill. 2d 46, 51, 906 N.E.2d 520, 329 Ill. Dec. 322 (2009) (quoting Black's Law Dictionary 591 (8th ed. 2004)). However, [\*\*68] "[u]nder Illinois law, promissory estoppel and unjust enrichment are unavailable where the parties have entered into an express contract." *Prodromos v. Poulos*, 202 Ill. App. 3d 1024, 1032, 560 N.E.2d 942, 148 Ill. Dec. 345 (1991). Like plaintiffs' claims for unjust enrichment, Rockford may only plead promissory estoppel in the alternative to their breach of contract claim, such that no express contract may be invoked in its count for promissory estoppel. *Guinn v. Hoskins Chevrolet*, 361 Ill. App. 3d 575, 604, 836 N.E.2d 681, 296 Ill. Dec. 930 (2005); *The Sharow Grp. v. Zausa Dev. Corp.*, No. 04 C 6379, 2004 U.S. Dist. LEXIS 24497, 2004 WL 2806193, at \*3 (N.D. Ill. Dec. 3, 2004).

In the SAC's section on promissory estoppel, Rockford seeks relief under a promissory estoppel theory that is based on the "terms of the ESI PBM Agreement." SAC ¶ 395; see also id. ¶¶ 396-397, 399. This is fatal to Rockford's claim. However, Rockford may attempt to replead and plausibly allege alternatively that there is not an enforceable express contract and that Express Scripts is liable to Rockford under a cause of action for promissory estoppel. *Cohen v. Am. Sec. Ins. Co.*, 735 F.3d 601, 615 (7th Cir. 2013).

**HN40** [+] To state a claim for the common-law doctrine of promissory estoppel, a plaintiff must prove that "(1) defendant made an unambiguous promise to plaintiff, (2) plaintiff relied on such promise, (3) plaintiff's reliance was expected and foreseeable by defendants, and (4) plaintiff relied on the promise to its detriment." *Newton Tractor Sales*, 233 Ill. 2d at 51. Here, the main deficiency in Rockford's pleading is [\*\*69] with regard to the first prong. Rockford alleges that Express Scripts' conduct "constitutes a promise to perform under the terms" of the PBM Agreement. SAC ¶ 395. Rockford cites "cost containment" as one of these promises. Id. ¶ 397. But as discussed in the court's section on Rockford's breach of contract claim, the PBM Agreement's reference to "cost containment" is troublesome.

It is possible that Rockford may be able to point to an unambiguous promise made by Express Scripts within or outside the PBM Agreement that Rockford foreseeably relied on to its detriment. Thus, the court grants Express Scripts' motion to dismiss Count XIII without prejudice, and grants Rockford leave to replead if Rockford can properly do so.

## F. Unjust Enrichment (Counts I-III)

Rockford brings claims against both Express Scripts (Count I) and Mallinckrodt (Count II) and Acument brings a claim against Mallinckrodt (Count III) for unjust enrichment. Specifically, plaintiffs allege [\*771] that Mallinckrodt was unjustly enriched when plaintiffs paid "extremely high prices" for Acthar. See SAC ¶¶ 189, 198. Rockford also alleges that Express Scripts was unjustly enriched when it obtained "grossly inflated revenue" from its [\*\*70] scheme with Mallinckrodt. See id. ¶ 182.

**HN41** [+] Unjust enrichment is a product of common law that enshrines the principle that no one ought to enrich himself unjustly at the expense of another. *Vill. of Bloomingdale v. CDG Enters., Inc.*, 196 Ill. 2d 484, 500, 752 N.E.2d 1090, 256 Ill. Dec. 848 (2001); *Whitehaven Cnty. Baptist Church v. Holloway*, 973 S.W.2d 592, 596 (Tenn. 1998). The doctrine enshrines both legal and equitable values, but at its core, properly alleged unjust enrichment claims involve situations in which the benefit the plaintiff is seeking to recover proceeded directly from him to the defendant. See id.; *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill. 2d 145, 160-62, 545 N.E.2d 672, 137 Ill. Dec. 19 (1989).

**HN42** Both Illinois and Tennessee permit a plaintiff to plead unjust enrichment as an alternative theory of liability. [Cohen, 735 F.3d at 615](#) ("A plaintiff may plead as follows: (1) there is an express contract, and the defendant is liable for breach of it; and (2) if there is not an express contract, then the defendant is liable for unjustly enriching himself at my expense."); [Meadow v. NIBCO, Inc.](#), No. 3-15-1124, 2016 U.S. Dist. LEXIS 68903, 2016 WL 2986350, at \*7 (M.D. Tenn. May 24, 2016) (finding that a plaintiff "can plead alternative theories, including unjust enrichment"). This is counter to defendants' wider-sweeping argument that a plaintiff may not plead both the existence of an enforceable contract and unjust enrichment in the same complaint. As such, the court will assess plaintiffs' claims under Illinois and Tennessee law, respectively.

## 1. Rockford's [\*\*71] Claims Under Illinois Law (Counts I and II)

**HN43** In order to state an unjust enrichment claim under Illinois law, a plaintiff must allege "a benefit mistakenly conferred, a benefit procured through wrongful conduct, and a benefit to which plaintiff has a better claim than the defendant for some other reason." [In re Sears, Roebuck & Co. Tools Mktg. & Sales Practices Litig.](#), No. 05 C 2623, 2006 U.S. Dist. LEXIS 92169, 2006 WL 3754823, at \*4 (N.D. Ill. Dec. 18, 2006). In addition, Illinois law requires that relief under an unjust enrichment theory is obtainable only when there is no adequate remedy at law available to the plaintiff. [Cohen, 735 F.3d at 615](#) ("Because it is an equitable remedy, unjust enrichment is only available when there is no adequate remedy at law."); [Nesby v. Country Mut. Ins. Co.](#), 346 Ill. App. 3d 564, 567, 805 N.E.2d 241, 281 Ill. Dec. 873 (2004) ("Because it is an equitable remedy, unjust enrichment is only available when there is no adequate remedy at law."). The lack of legal remedy requirement extends beyond [Cohen](#) and [Nesby](#), both of which involved a legal remedy available through a contract. See [Cleary v. Philip Morris Inc.](#), 656 F.3d 511, 517 (7th Cir. 2011); [Season Comfort Corp. v. Ben A. Borenstein Co.](#), 281 Ill. App. 3d 648, 656, 655 N.E.2d 1065, 211 Ill. Dec. 682 (1995). Rockford has alleged a litany of conduct it claims entitles it to legal relief. See SAC ¶¶ 184, 192. Rockford cannot maintain an unjust enrichment claim when in that same claim it references legal remedies available to it. Rockford may plead in the alternative, but in doing so within that claim, it will have to plead that none of the many other [\*\*72] causes of action in the SAC in which it alleges it is entitled to damages is viable. The court grants defendants' motions to dismiss Counts I and II without prejudice and grants Rockford leave to replead if it can [\*772] sufficiently allege that it meets the elements of a properly stated unjust enrichment claim.

## 2. Acument's Claim Under Tennessee Law (Count III)

**HN44** Under Tennessee law, the elements of an unjust enrichment claim are "1) [a] benefit conferred upon the defendant by the plaintiff; 2) appreciation by the defendant of such benefit; and 3) acceptance of such benefit under such circumstances that it would be inequitable for him to retain the benefit without payment of the value thereof." [Freeman Indus., LLC v. Eastman Chem. Co.](#), 172 S.W.3d 512, 525 (Tenn. 2005) (alteration in original). Additionally, Tennessee law dictates that a plaintiff seeking relief for unjust enrichment must demonstrate that he "exhausted all remedies against the person with whom the plaintiff enjoyed privity of contract." [Spahr v. Leegin Creative Leather Prods., Inc.](#), No. 2:07-CV-187, 2008 U.S. Dist. LEXIS 90079, 2008 WL 3914461, at \*14 (E.D. Tenn. Aug. 20, 2008). Under Tennessee law, the issue of exhaustion must be addressed in the complaint. *Id.* This exhaustion of remedies requirement only applies to entities in privity with the plaintiff. As long as the plaintiff [\*\*73] has satisfied that exhaustion obligation it can still recover against defendants with whom the plaintiff is not in privity. *Id.*

With respect to the requirement that Acument must allege that it has exhausted all remedies against CVS (the entity with whom Acument may enjoy privity of contract), the court notes that the SAC does not describe any contract that Acument might have with CVS with anywhere near the amount of specificity that it details Rockford's agreement with Express Scripts. Although that level of specificity may not be required at this stage, an explanation of the contents of such a contract would certainly assist the court in assessing the issue of exhaustion. Assuming that Acument is in privity of contract with CVS, Acument does not allege that it has exhausted any remedies against CVS. This is fatal to Acument's claim. **HN45** The exhaustion requirement may be lifted if plaintiffs plausibly allege that such an effort would be "futile," but Acument has not done so. *Id.*; see [Bristol Pres., LLC v. IGC-Bristol](#),

[LLC, No. 2:16-CV-360-TAV-MCLC, 2017 U.S. Dist. LEXIS 97937, 2017 WL 2773663, at \\*5 \(E.D. Tenn. June 26, 2017\)](#) (dismissing unjust enrichment claim where plaintiff failed to allege that it had exhausted all remedies against the entities in which it had privity [\*\*74] of contract and failed to plead that doing so would be futile). Therefore, the court grants defendants' motions to dismiss Count III without prejudice, and grants Acument leave to replead to correct the deficiencies noted here if it can do so consistent with the proper pleading requirements.<sup>30</sup>

## G. RICO (Counts IX-XI)

The following sections address plaintiffs' claims under RICO. For the reasons stated below, the court grants defendants' motions to dismiss Counts IX, X, and XI without prejudice.

### 1. [§ 1962\(c\)](#) (Count IX)

In Count IX, plaintiffs allege that defendants violated [18 U.S.C. § 1962\(c\)](#). [HN46](#) [+] "A RICO plaintiff alleging a violation of [§ 1962\(c\)](#) must show conduct of an enterprise through a pattern of racketeering activity," [Lachmund v. ADM Inv'r Servs., Inc.](#), 191 F.3d 777, 783 (7th Cir. 1999), and that she has been injured in her "business or property by reason of" the [\*773] RICO violation, [Sabrina Roppo v. Travelers Commercial Ins. Co.](#), 869 F.3d 568, 590 (7th Cir. 2017).

A claim of a pattern of racketeering activity "requires at least two [predicate] acts of racketeering activity within a ten-year period. . . . '[R]acketeering activity' is defined to include, among other things, any act indictable under specified provisions of the United States Code, including [18 U.S.C. § 1341](#) (mail fraud) and [18 U.S.C. § 1343](#) (wire fraud)." [Corley v. Rosewood Care Ctr., Inc. of Peoria](#), 142 F.3d 1041, 1048 (7th Cir. 1998).

Here, plaintiffs allege predicate acts of mail fraud under [18 U.S.C. § 1341](#) and wire fraud under [18 U.S.C. § 1343](#).<sup>31</sup> [HN47](#) [+] The [\*\*75] elements of mail fraud under [§ 1341](#) are: "(1) the defendant's participation in a scheme to defraud; (2) defendant's commission of the act with intent to defraud; and (3) use of the mails in furtherance of the fraudulent scheme." [Williams v. Aztar Ind. Gaming Corp.](#), 351 F.3d 294, 298-99 (7th Cir. 2003). The elements of wire fraud under [§ 1343](#) are similar: "a scheme to defraud, a false representation, and use of interstate communications." [United States v. Pritchard](#), 773 F.2d 873, 876 (7th Cir. 1985). To "defraud" is to make a "false statement or material misrepresentation, or the concealment of a material fact." [Williams](#), 351 F.3d at 299. Plaintiffs alleging mail and wire fraud as predicate acts to their RICO claims must allege "the identity of the person who made the misrepresentation, the time, place and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff." [Vicom, Inc. v. Harbridge Merchant Servs., Inc.](#), 20 F.3d 771, 777 (7th Cir. 1994).

[HN48](#) [+] When ruling on a [Rule 12\(b\)\(6\)](#) motion, the heightened pleading requirements of [Federal Rule of Civil Procedure 9\(b\)](#) apply to allegations of mail and wire fraud in a civil RICO complaint. See [Sabrina](#), 869 F.3d at 587 n.56. Further, in cases with multiple defendants, "[Rule 9\(b\)](#) requires a RICO plaintiff to plead sufficient facts to notify each defendant of his alleged participation in the scheme." [Jazbec v. Hirsch](#), No. 08 CV 7275, 2009 U.S. Dist. LEXIS 96551, 2009 WL 3366970, at \*4 (N.D. Ill. Oct. 14, 2009). The heightened pleading standard of [Rule 9\(b\)](#) serves an important purpose, to "ensure[ ] that a plaintiff ha[s] some basis for his accusations [\*\*76] of fraud before making those accusations and thus discourages people from including such accusations in complaints simply to

<sup>30</sup> The court notes in passing that plaintiffs' arguments offer little in support of their unjust enrichment actions. Should plaintiffs choose to replead these claims, plaintiffs should offer more fully-developed arguments or else run the risk of the court finding that they have abandoned their claims.

<sup>31</sup> The SAC labels its wire fraud claims as under [18 U.S.C. § 1345](#). However, that section provides for the Attorney General to commence civil actions to enjoin alleged RICO violations. This is inapplicable to plaintiffs'

gain leverage for settlement or for other ulterior purposes." [Uni\\*Quality, Inc. v. Infotronx, Inc., 974 F.2d 918, 924 \(7th Cir. 1992\)](#).

The court agrees with defendants that plaintiffs' allegations concerning the predicate acts of mail or wire fraud are thin.<sup>32</sup> Plaintiffs allege that in 2007 defendants [\*774] established the ASAP to "streamline[] and cover-up the use of mail and wires to commit fraud . . . and illegally profit from the . . . sale of Acthar," but this does little to satisfy the demands of [Rule 9\(b\)](#). SAC ¶ 360(a). [HN49](#)<sup>↑</sup> It is true that plaintiffs need not show that every particular communication that they point out contained misrepresentations, because "even routine and innocent mailings can supply an element of the offense of mail fraud when they are used in the execution of the fraudulent scheme." [Ruderman v. Freed, No. 14 C 9079, 2015 U.S. Dist. LEXIS 120441, 2015 WL 5307583, at \\*3 \(N.D. Ill. Sept. 10, 2015\)](#). But here, plaintiffs allege little more than the existence of a price-fix scheme and defendants' intent to misrepresent prices, which is different than alleging the "who, what, when, where and how" of an actual misrepresentation. [DiLeo v. Ernst & Young, 901 F.2d 624, 627 \(7th Cir. 1990\)](#). Plaintiffs call attention to the Acthar Start Forms mailed to existing and prospective patients and payors, [\*\*77] see SAC ¶¶ 51, 362, 370, but do not specify what about those forms constitute a misrepresentation. Further, defendants' processing of prescriptions and payments related to Acthar does not evince fraud or deceit. [See id.](#) ¶ 366(d)-(f).

In the paragraph plaintiffs devote to delineating defendants' acts of mail fraud and wire fraud, plaintiffs allege that Express Scripts made fraudulent misrepresentations when it "explicitly advertised . . . that the ASAP Program would [provide] lower and affordable prices"; when Mallinckrodt and Express Scripts fraudulently stated "over the internet and through the mail that Rockford and the Class would receive affordable healthcare and contained costs of Acthar"; and when despite its "explicit promises" Express Scripts "refused to use its market strength and related bargaining power to convince Mallinckrodt to lower the price of Acthar." SAC ¶ 366(a)-(c). Plaintiffs are fatally deficient in specifying "the identity of the person who made the misrepresentation, the time, place and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff." [Vicom, 20 F.3d at 777](#).

Plaintiffs fall short in describing the manner in [\*\*78] which Express Scripts explicitly advertised that the ASAP would provide lower and affordable sales prices, SAC ¶ 366(a), or when, where, how, or to whom Express Scripts made explicit promises to use its market strength and bargaining power to influence Mallinckrodt, [id.](#) ¶ 366(c). Nor do plaintiffs adequately explain in what way defendants fraudulently stated over the internet and through the mail that Rockford would receive contained costs for Acthar. [Id.](#) ¶¶ 82-83, 366(b). The SAC does not clarify what specifically was done over the internet and through the mail. If the parties are referring to Rockford's PBM Agreement with Express Scripts, from a review of the court's discussion in the breach of contract section, they should be able to anticipate formidable obstacles in relying on the cost containment language in the PBM Agreement to support an allegation of misrepresentation.

For the reasons stated in this section, the court grants defendants' motions to dismiss plaintiffs' [§ 1962\(c\)](#) claims in Count IX without prejudice. In order to assist the parties should plaintiffs opt to replead a RICO violation, the court will also address the issue of RICO causation.

[HN50](#)<sup>↑</sup> Proximate cause is one of the requirements [\*\*79] of a cause of action for a RICO violation. See [Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 268, 112 S. Ct. 1311, \[\\*775\] 117 L. Ed. 2d 532 \(1992\)](#). Defendants argue, regarding the proximate-cause limitation, that courts in this district have "recognized that claims by third party

<sup>32</sup> In all of the counts of the SAC, plaintiffs incorporate every allegation of every preceding paragraph, and in Counts XIII and XIV, every allegation of every following paragraph. In the RICO context, this is an improper method of satisfying the heightened pleading requirement. See [Slaney v. The Int'l Amateur Athletic Fed'n, 244 F.3d 580, 599 n.10 \(7th Cir. 2001\)](#). But even beyond the RICO counts, the court does not assume any responsibility to wade through hundreds of paragraphs of pleadings comprising fifteen counts plus a request for injunctive to cull out paragraphs or fragments of paragraphs in an effort to assist plaintiffs in plausibly alleging their causes of action. This court has dismissed cases in certain circumstances on this basis, though the court declines to do so today. See [Stanard v. Nygren, 658 F.3d 792, 800 \(7th Cir. 2011\)](#) ("A federal court is not obligated to sift through a complaint to extract some merit when the attorney who drafted it has failed to do so himself.").

payors (TPPs) seeking to recoup 'losses' of prescription reimbursements pose proximate causation issues." The court agrees.

**HN51**[] The proximate cause limitation of a properly-pled RICO violation requires "some direct relation between the injury asserted and the injurious conduct alleged." *Hemi Grp., LLC v. City of New York, N.Y., 559 U.S. 1, 9, 130 S. Ct. 983, 175 L. Ed. 2d 943 (2010)* (plurality op.) (citing *Holmes, 503 U.S. at 271-72*). The "general tendency" in this context is for courts "not to go beyond the first step," *id. at 10* (quoting *AGC, 459 U.S. at 534*), because "[m]ultiple steps, as we have detailed, separate the alleged fraud from the asserted injury," *id. at 15*. Courts have routinely dismissed § 1962(c) claims in drug cases where plaintiffs do not allege with specificity that defendants made misrepresentations directly to third-party payors like plaintiffs here. See, e.g., *UFCW Local 1776 v. Eli Lilly & Co., 620 F.3d 121, 134 (2d Cir. 2010)* (finding failure to allege that TPPs themselves relied on misrepresentations crucial to a lack of proximate cause); *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig., No. 3:09-CV-20071-DRH, 2010 U.S. Dist. LEXIS 80758, 2010 WL 3119499, at \*7 (S.D. Ill. Aug. 5, 2010)* (dismissing a § 1962(c) claim where there [\*\*80] was no "mention [of] any alleged communication directed at or made to TPPs"). As stated above, it is unclear how either Mallinckrodt or Express Scripts communicated any "misrepresentations," let alone communications made directly, to either Rockford or Acument. Should plaintiffs choose to replead, in order to properly state a claim, plaintiffs must plausibly allege Mallinckrodt and/or Express Scripts communicated misrepresentations directly to plaintiffs.

## 2. § 1962(a) (Count X)

**HN52**[] As to Count X, "[a] section 1962(a) claim requires a showing that a defendant: (1) received income from a pattern of racketeering activity; (2) used or invested that income in the operation of an enterprise; and (3) caused the injury complained of by the use or investment of racketeering income in an enterprise." *Rao v. BP Prods. N. Am., Inc., 589 F.3d 389, 398-99 (7th Cir. 2009)*. While prongs two and three are adequately pled, SAC ¶¶ 375, 377-378, as noted with respect to plaintiffs' § 1962(c) claims, the court finds that plaintiffs have not adequately alleged "racketeering activity," and thus, plaintiffs' claims under § 1962(a) must also fail as a matter of law. *Id. at 398* (noting that plausibly alleging "racketeering activity" is a required element to state a claim under § 1962(a)). Consequently, the court grants defendants' motions to [\*\*81] dismiss plaintiffs' § 1962(a) claims in Count X without prejudice.

## 3. § 1962(d) (Count XI)

**HN53**[] To state a claim under § 1962(d), a plaintiff must allege the existence of an "agreement to participate in an endeavor which, if completed, would constitute a violation" of RICO. *United Food & Commercial Workers Unions and Emp's Midw. Health Benefits Fund v. Walgreen Co., 719 F.3d 849, 856 (7th Cir. 2013)*. This requires plaintiffs to allege that (1) the defendant agreed to facilitate the operation of an enterprise through a pattern of "racketeering activity," in violation of subsections (a), (b), or (c) of RICO, and (2) the defendant agreed to effectuate at least two predicate acts that create a pattern of racketeering activity. See *DeGuelle v. Camilli, 664 F.3d 192, 204 (7th Cir. 2011)*. Because the court has already determined that plaintiffs have failed to sufficiently plead these two requirements, plaintiffs' claims under § 1962(d) in Count [\*776] XI must also fail as a matter of law, and the court dismisses those claims without prejudice. *Id. at 400*. Thus, the court grants plaintiffs leave to replead to correct the deficiencies related to Counts IX, X, and XI if plaintiffs can appropriately do so.

## H. Fraud and Conspiracy to Defraud (Counts IV and V)

Plaintiffs allege that defendants have committed common law fraud by making "material misrepresentations" that the prices they allegedly advertised for Acthar "represented the actual value" of Acthar [\*\*82] when, in reality, those prices were "artificial" and "created and manipulated by the Defendants for the purpose of generating exorbitant

revenue, thus constituting false representations.<sup>33</sup> SAC ¶¶ 204-206. [HN54](#)<sup>↑</sup> Under Illinois law, the elements of common law fraud are: "(1) a false statement of a material fact; (2) knowledge or belief of falsity by the party making it; (3) intention to induce the other party to act or refrain from acting; (4) action by the other party in justifiable reliance on the truth of the statement; and (5) damage to the other party resulting from such reliance." [Newton v. Aitken, 260 Ill. App. 3d 717, 720, 633 N.E.2d 213, 198 Ill. Dec. 751 \(1994\)](#). Similarly, Tennessee law requires: "(1) an intentional misrepresentation of material fact, (2) knowledge of the representation's falsity, (3) an injury caused by reasonable reliance on the representation, and (4) the requirement that the misrepresentation involve a past or existing fact." [Gray v. Bank of Am., N.A., No. 3:12-CV-105, 2012 U.S. Dist. LEXIS 109536, 2012 WL 3230387, at \\*2 \(E.D. Tenn. Aug. 6, 2012\)](#). [Federal Rule of Civil Procedure 9\(b\)](#) applies to fraud claims. [See Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. v. Walgreen Co., 631 F.3d 436, 447 \(7th Cir. 2011\)](#).

[HN55](#)<sup>↑</sup> The heightened pleading standard of [Rule 9\(b\)](#) "forces the plaintiff to conduct a careful pretrial investigation and thus operates as a screen against spurious fraud claims." [Intercounty Nat'l, 412 F.3d at 749](#). Plaintiffs' allegations in the SAC lack the requisite particularity imposed by [\[\\*\\*83\]](#) the heightened pleading standard. Plaintiffs are required to state "the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff." [Camasta v. Jos. A. Bank Clothiers, Inc., 761 F.3d 732, 737 \(7th Cir. 2014\)](#).

Plaintiffs allege that defendants committed fraud in two different ways. First, plaintiffs allege that defendants misrepresented that the price for Acthar represented the real and fact-based prices for their drugs. SAC ¶ 204. Second, plaintiffs assert that defendants misrepresented the price for Acthar was a result of the efforts of Express Scripts—and, although it is not clear from the SAC, perhaps CVS—to provide cost containment. [Id.](#) ¶ 209.

As to the first manner of committing fraud, plaintiffs fail to sufficiently plead the factual information informing defendants of the "who, when, where, what, and how" components of a valid fraud claim. Instead, plaintiffs offer general allegations that because the "prices [for Acthar] were artificial prices," [id.](#) ¶ 206, "[d]efendants made material misrepresentations that those prices represented a calculation of real and fact-based prices for their drugs, and that they represented the [\[\\*\\*84\]](#) actual value [\[\\*777\]](#) of the product in the marketplace," [id.](#) ¶ 204.

In regard to the second means of committing fraud, plaintiffs allege that the "cost containment" misrepresentations appear in Rockford's and the class' contracts with Express Scripts and Acument's and the class' contracts with CVS. [Id.](#) ¶ 209. As noted in the court's analysis of plaintiffs' breach of contract claim, Rockford's contract with Express Scripts furnishes only equivocal support for the proposition that Express Scripts assumed an obligation to provide for cost containment in its sale of Acthar to Rockford.<sup>34</sup> [See id.](#) ¶¶ 209. Plaintiffs stress that they paid inflated prices for Acthar. [HN56](#)<sup>↑</sup> However, as Express Scripts points out, high prices do not in and of themselves constitute false representations. [Thompson's Gas & Elec. Serv., Inc. v. BP Am. Inc., 691 F. Supp. 2d 860, 870 \(N.D. Ill. 2010\)](#).<sup>35</sup>

<sup>33</sup> In ¶ 203 of the SAC, plaintiffs also allege that defendants' acts "violate the common law against negligent misrepresentation" in addition to fraud. "Negligent misrepresentation" is a separate cause of action from fraud in both Illinois and Tennessee. However, neither party addresses this claim in their briefs. Thus, the court concludes that neither plaintiff is pursuing a cause of action for negligent misrepresentation.

<sup>34</sup> As to Acument, the SAC suggests that Acument has "contracts" with CVS that provide for cost containment, SAC ¶ 209, that presumably support their contention that defendants made false representations that amount to fraud. Although it is unclear whether Acument is holding Express Scripts, Mallinckrodt, or perhaps a non-defendant, CVS, responsible for making the false representations. Plaintiffs have not provided any of these contracts and thus the court is unable to make any determination as to whether plaintiffs' allegations satisfy the heightened pleading requirements of [Rule 9\(b\)](#).

<sup>35</sup> Defendants also argue that plaintiffs have not adequately pled reliance. Plaintiffs allege that they and the class "justifiably relied upon false misrepresentations in purchasing and/or reimbursing Acthar at the amount charged by Express Scripts and CVS Caremark based on the price set by Mallinckrodt." SAC ¶ 208. But in this factual scenario that concerns only one manufacturer and one drug, the issue of the reasonableness of plaintiffs' reliance is problematic. Plaintiffs assert that they would not have paid or reimbursed the cost of Acthar if they were aware of the alleged misrepresentations. [Id.](#) ¶ 210. Are plaintiffs

Further, in Count V, plaintiffs allege that defendants conspired to defraud plaintiffs and the class by causing them to pay more for Acthar than they otherwise would have paid. [HN57](#) Under Illinois law, "to state a claim for civil conspiracy, the plaintiff must sufficiently allege that an underlying wrong existed." [\*Platinumel Commc'nns, LLC v. Zefcom, LLC, No. 08-CV-1062, 2008 U.S. Dist. LEXIS 104746, 2008 WL 5423606, at \\*8 \(N.D. Ill. Dec. 30, 2008\)\*](#). Similarly, under Tennessee law, a "claim for civil conspiracy requires an underlying predicate tort allegedly committed" [\\*\\*85](#) pursuant to the conspiracy." [\*Lane v. Becker, 334 S.W. 3d 756, 763 \(Tenn. Ct. App. 2010\)\*](#). Because plaintiffs have not met their pleading requirements under [Rule 9\(b\)](#) for alleging fraud, plaintiffs' conspiracy to defraud claims must be dismissed as well. The court grants defendants' motions to dismiss Counts IV and V without prejudice and grants plaintiffs leave to replead to correct the deficiencies related to these claims if plaintiffs can sufficiently do so.

## I. Declaratory Judgment (Count XIV)

[HN58](#) Finally, regarding Rockford's claim for declaratory judgment in Count XIV, the declaratory judgment remedy "gives a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy." 10A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2751, pp. 568-70 (1983). Further, courts in this district routinely dismiss claims for declaratory judgment where the claim "substantially overlaps with Plaintiff's substantive claims." [\*Cohn v. Guaranteed Rate \[\\*778\] Inc., 130 F. Supp. 3d 1198, 1205 \(N.D. Ill. 2015\)\*](#); see also [\*Amari v. Radio Spirits, Inc., 219 F. Supp. 2d 942, 944 \(N.D. Ill. 2002\)\*](#) ("Where the substantive suit would resolve the issues raised by the declaratory judgment action, the declaratory judgment action serves no useful purpose because the controversy has ripened and the uncertainty [\\*\\*86](#) and anticipation of litigation are alleviated."). Here, plaintiffs are seeking coercive remedies along with their suit for declaratory judgment, and all the claims will be adjudicated at the same time. In this situation, the court sees no benefit in addressing the claim for declaratory judgment in addition to the coinciding causes of action. Therefore, the court dismisses Count XIV with prejudice.

## III. CONCLUSION

For the above reasons, defendants' motions to dismiss are granted in part and denied in part. Count XIV is dismissed with prejudice. Counts I through V, IX through XIII, and XV are dismissed without prejudice. The court denies defendants' motions to dismiss Counts VI, VII, and VIII with respect to Rockford. Counts VI, VII, and VIII are dismissed without prejudice with respect to Acument. The court grants plaintiffs leave to replead within 45 days of the date of this order to correct the deficiencies as noted in this opinion.

Date: 1/25/2019

ENTER:

/s/ Frederick J. Kapala

FREDERICK J. KAPALA

District Judge

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saying that rather than pay exorbitant prices they would have left the Acthar patients without treatment? Regardless, at this juncture the court concludes that reliance is sufficiently pled.



## **Cox Auto., Inc. v. CDK Global, LLC (In re Dealer Mgmt. Sys. Antitrust Litig.)**

United States District Court for the Northern District of Illinois, Eastern Division

January 25, 2019, Decided; January 25, 2019, Filed

Case No. 18-cv-864; Case No. 18-cv-1058

### **Reporter**

360 F. Supp. 3d 788 \*; 2019 U.S. Dist. LEXIS 12147 \*\*; 2019 WL 331257

IN RE DEALER MANAGEMENT SYSTEMS ANTITRUST LITIGATION, MDL 2817. This document relates to: Cox Automotive, Inc, et al. v. CDK Global, LLC, Case No. 18-cv-1058 (N.D. Ill.).

**Prior History:** [Authenticom, Inc. v. CDK Global, LLC \(In re Dealer Mgmt. Sys. Antitrust Litig.\), 313 F. Supp. 3d 931, 2018 U.S. Dist. LEXIS 80937, 2018 WL 2193236 \(N.D. Ill., May 14, 2018\)](#)

## **Core Terms**

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dealers, integration, vendors, argues, third-party, antitrust, contracts, allegations, block, horizontal, providers, anticompetitive conduct, Sherman Act, purchasers, conspiracy claim, hostile, percent, competitors, fails, motion to dismiss, Cartwright Act, authorization, aftermarket, foreclosure, dealership, foreclosed, conspire, publicly, violates, switch

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For Cox Automotive, Inc., Autotrader.com, Inc., Dealer Dot Com, Inc., Dealertrack, Inc., HomeNet, Inc., Kelley Blue Book Co. Inc., vAuto, Inc., VinSolutions, Inc., Xtime, Inc., Plaintiffs (1:18-cv-00864): Derek Tam Ho, LEAD ATTORNEY, PRO HAC VICE, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Aaron Martin Panner, PRO HAC VICE, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Daniel V. Dorris, David L. Schwarz, Michael N. Nemelka, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Daniel Guarnera, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Jennifer L. Gregor, Kendall W Harrison, Mark W. Hancock, Godfrey & Kahn, S.C., Madison, WI; Joshua Hafenbrack, Kevin J. Miller, PRO HAC VICE, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Samuel Issacharoff, New York, NY.

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For CDK Global, LLC, Counter Claimant (1:18-cv-00864): Britt Marie Miller, Michael Anthony Scodro, Mayer Brown LLP, Chicago, IL; Jeffrey Allan Simmons, Foley & Lardner LLP, Madison, WI; John Nadolenco, Mayer, Brown & Platt, Los Angeles, CA; Joseph S Harper, Foley & Lardner, Madison, WI; MICHAEL MARTINEZ, MAYER BROWN LLP, NEW YORK, NY; Mark W. Ryan, Mayer Brown, Washington, DC; Matthew David Provance, Mayer Brown LLP, Chicago, IL; Michelle M. Umberger, Perkins Coie LLP, Madison, WI; William N. Reed, BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC - Jackson, Jackson, MS.

For Cox Automotive, Inc., Autotrader.com, Inc., Dealer Dot Com, Inc., Dealertrack, Inc., Kelley Blue Book Co. Inc., vAuto, Inc., VinSolutions, [\*15] Inc., Xtime, Inc., Plaintiffs (1:18-cv-01058): Aaron Martin Panner, Daniel V. Dorris, Daniel Guarnera, David L. Schwarz, Derek Tam Ho, Joshua Hafenbrack, Kevin J. Miller, Michael N. Nemelka, LEAD ATTORNEYS, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Jennifer L. Gregor, Kendall W Harrison, LEAD ATTORNEYS, Godfrey & Kahn, S.c., Madison, WI.

For CDK Global, LLC, Defendant (1:18-cv-01058): Britt Marie Miller, LEAD ATTORNEY, Mayer Brown LLP, Chicago, IL; Jeffrey Allan Simmons, Foley & Lardner LLP, Madison, WI.

**Judges:** Robert M. Dow, Jr., United States District Judge.

**Opinion by:** Robert M. Dow, Jr.

## Opinion

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### [\*792] MEMORANDUM OPINION AND ORDER

Before the Court is Defendant CDK Global, LLC's motion to dismiss [71] the complaint filed by Plaintiffs (1) Cox Automotive, Inc., (2) Autotrader.com, Inc., (3) Dealer Dot Com, Inc., (4) Dealertrack, Inc., (5) HomeNet, Inc., (6) Kelley Blue Book Co., Inc., (7) vAuto, Inc., (8) VinSolutions, Inc., and (9) Xtime, Inc. For the reasons set forth below, the motion [71] is granted in part and denied in part.

#### I. Background<sup>1</sup>

Plaintiff Cox Automotive, Inc. ("Cox Automotive"), along with its subsidiaries (collectively, [\*793] "Plaintiffs"), bring this action to remedy and enjoin purported [\*16] ongoing antitrust and state law violations by Defendant CDK Global, LLC ("CDK" or "Defendant"). [Compl., at ¶ 1.]<sup>2</sup> Plaintiffs are vendors that provide automotive software solutions, including well-known applications like AutoTrader, Dealer.com, and Kelley Blue Book. [*Id.* at ¶¶ 6-7.] The data that dealers generate in operating their businesses—such as sales, inventory, service, and customer information—is the lifeblood of these applications. [*Id.* at ¶ 8.] Dealers store this data on a database that is part of separate enterprise software known as a Dealer Management System ("DMS"). [*Id.* at ¶ 48.] Virtually every franchised new car dealership in the United States now uses a DMS. [*Id.* at 50.] While dealers generate much of their data outside of the DMS in separate software solutions, as a practical matter, a substantial portion of dealer data is stored on the DMS. [*Id.*]

#### A. The DMS Market

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<sup>1</sup> For the purposes of this motion to dismiss, the Court accepts as true all of Plaintiffs' well-pleaded factual allegations and draws all reasonable inferences in Plaintiffs' favor. *Killingsworth v. HSBC Bank Nev., N.A.*, 507 F.3d 614, 618 (7th Cir. 2007).

<sup>2</sup> Unless otherwise noted, all references to the complaint are to the complaint filed in Case No. 18-cv-1058. [Cox Automotive, Inc., et al. v. CDK Global, LLC, Case No. 18-cv-1058, Dkt. 1 (N.D. Ill.).]

Defendant CDK and third-party The Reynolds and Reynolds Company ("Reynolds") provide DMS software and services to automobile dealerships throughout the United States. [*Id.* at ¶ 41.] Defendant and Reynolds together control approximately 75 percent of the DMS market when [\*\*17] measured by number of dealers and approximately 90 percent when measured by number of vehicles sold. [*Id.* at ¶ 10.] Defendant alone controls approximately 45 percent of the DMS market. [*Id.*] Switching DMS providers presents significant logistical challenges and is highly disruptive to business operations. [*Id.* at ¶ 57.] It can take a dealership more than a year of preparation, staff training, and testing before a new DMS can be put into operation, all while the dealership is trying to sell and service cars. [*Id.*] The financial costs in terms of training and implementation are significant. [*Id.*] Defendant's own CEO publicly has recognized that dealers are hesitant to switch DMS providers because the process can take time and can be very difficult. [*Id.* at ¶ 58.]

## B. The Dealer Data Integration Market

The dealer data integration market consists of services that provide access to dealer data on the DMS, including Defendant's and Reynolds's own in-house data integration services. [*Id.* at ¶ 65.] Data integrators may also provide value-enhancing services, such as putting data from different DMSs in a uniform format, performing data hygiene, and allowing granular control by dealers over which [\*\*18] vendors receive which data. [*Id.*] Before a data integrator accesses dealer data on a DMS, they enter into contracts with dealers authorizing them to access the dealers' data. [*Id.* at ¶ 66.]

Vendors of software applications like Plaintiffs rely on data integrators to provide them with access to dealer data. [*Id.* at ¶¶ 62-65.] There once was a competitive market for data integration services. [*Id.* at ¶ 79.] Independent data integrators like Authenticom, Inc. ("Authenticom") competed with the offerings provided by Defendant and Reynolds. [*Id.*] Defendant welcomed that competition, stating: "We don't tell the dealer, if someone wants access to their data, they have to come to [CDK] to gain access to the data. It's ultimately the dealer's data." [*Id.* at ¶ 76.] **[\*794]** In competition with independent integrators, Defendant provides data integration services through its Third-Party Access ("3PA") program, and Reynolds does the same through its Reynolds Certified Interface ("RCI") program. [*Id.* at ¶¶ 80, 87.] Defendant itself owns two independent integrators—DMI and IntegraLink—that provide data integration services across DMS platforms, including at one time for Reynolds dealers. [*Id.* at ¶¶ 83, 86.] [\*\*19]

Defendant's top executives have repeatedly made public statements that dealers may grant data integrators rights to access their DMS. [*Id.* at ¶ 75.] For example, "Steve Anenen, CDK's longtime CEO, publicly stated that dealers have the right to grant third parties access to, and use of, their data. He told the industry publication Automotive News, 'We're not going to prohibit that or get in the way of that.'" [*Id.* (citation omitted).] He further stated, "I don't know how you can ever make the opinion that the data is yours to govern and to preclude others from having access to it, when in fact it's really the data belonging to the dealer. As long as they grant permission, how would you ever go against that wish?" [*Id.* (citation omitted).] The complaint identifies similar statements made by other CDK executives. [See, e.g., *id.* at ¶ 76.]

Consistent with those statements, prior to 2015, Defendant publicly touted its "open" system as one of the competitive advantages of its DMS. [*Id.* at ¶ 96.] Defendant issued press releases stressing that it "believes in the fair competitive environment and does not use its leverage through supply of the dealer management system to reduce competition through [\*\*20] the restriction of data access." [*Id.*] By contrast, in 2009, Reynolds began selectively blocking third-party access to its DMS, and increased its blocking efforts in 2013. [*Id.*] Despite its blocking efforts, Defendant continued to hostilely access Reynolds's DMS. Defendant was successful in marketing its "open" DMS as a competitive advantage over the Reynolds DMS. [*Id.* at ¶ 97.] As a result, Defendant very slowly gained market share from Reynolds. [*Id.*] Reynolds's DMS market share declined from about 40 percent to 30 percent, with most dealers leaving Reynolds for Defendant. [*Id.*]

## C. Alleged Conspiracy

In 2015, Defendant "closed" its system, coming as a complete surprise to Plaintiffs and others in the industry. [*Id.* at ¶ 98.] Before 2015, Plaintiffs used 3PA, DMI, IntegralLink, Superior Integrated Solutions, Inc. ("SIS"), and other commercial data integrators to access data for dealers using Defendant's DMS. [*Id.*] But after Defendant elected to close its system, Defendant made every effort to ensure that Plaintiff and other vendors could only integrate with dealer data through Defendant's 3PA program. [*Id.*] Plaintiffs contend that Defendant's change to a "closed" DMS was the result of [\*\*21] a horizontal agreement with Reynolds.

In early 2015, Defendant and Reynolds entered into three written agreements that are central to this lawsuit. One of these agreements is a "Data Exchange Agreement"—also referred to as a "wind-down" agreement—pursuant to which Defendant agreed to wind down its data integration business on the Reynolds DMS, with Reynolds promising not to block Defendant's access to the Reynolds system during the wind-down period. [*Id.* at ¶ 106.] During that period, Reynolds agreed that Defendant could continue to extract dealer data just as it had before, using login credentials provided by the dealer. [*Id.*] As for other independent integrators, Defendant and Reynolds agreed that they would not assist any other party in accessing the [\*795] other's DMS. [*Id.*] Defendant and Reynolds also agreed that they themselves would no longer access data on each other's DMS. [*Id.* at ¶ 107.] Defendant also agreed to coordinate the transition of Defendant's clients that needed access to data on Reynolds's DMS to Reynolds. [*Id.* at ¶ 108.]

The other two written agreements between Defendant and Reynolds "granted reciprocal access" to each other's data integration products—via the 3PA and [\*\*22] RCI programs, respectively. [*Id.* at ¶ 112.] Under the agreements, Defendant's proprietary products and services could integrate with data on Reynolds's DMSs via RCI, and vice versa. [*Id.*] Reynolds received five free years of 3PA integration from Defendant, while Defendant had to pay for the data integration services from Reynolds. [*Id.*] Moreover, by signing up for 3PA, Reynolds agreed that it would integrate with data on Defendant's DMSs exclusively through 3PA, and not obtain data for its products and services from anywhere else. [*Id.*] Defendant agreed to the same in its integration contract with Reynolds for the RCI program. [*Id.*]

In addition to the written agreements, senior CDK and Reynolds executives have admitted that they agreed to restrict access to dealer data and destroy data integrators like Authenticom, SIS, and others. [*Id.* at ¶ 113.] During a May 2015 phone conversation with Authenticom's founder and CEO Steve Cottrell, Reynolds's Vice President of Data Services Robert Schaefer said that Reynolds had "made agreements with the other major DMS providers"—there only is CDK—"to support each other's third-party access agreements and to block independent integrators such as [\*\*23] Authenticom." [*Id.*] Mr. Schaefer said that Authenticom should wind down its operations and leave the market. [*Id.*] On April 3, 2016, at an industry convention in Las Vegas, Defendant's former Vice President of Product Management Dan McCray stated that Defendant and Reynolds had agreed to "[l]ock [Authenticom] and the other third parties out," and that they were "working collaboratively to remove all hostile integrators from our DMS system." [*Id.* at ¶ 114.]

Defendant's public position has been that it closed its DMS as part of a cybersecurity initiative. [*Id.* at ¶ 150.] Plaintiffs acknowledge Defendant's claimed "security" justification but argue that it is pretextual. [*Id.* at ¶¶ 170-78.] According to Plaintiffs, a top-level CDK executive admitted in private conversation with a vendor that the rhetoric around "security" has "little credibility" and is primarily designed to force vendors to use Defendant for data integration. [*Id.* at ¶ 171.] Plaintiffs therefore claim that Defendant "closed" its DMS pursuant to its agreements with Reynolds in order to decrease competition in the data integration market, resulting in dramatically increased prices for data integration services. [*Id.* at [\*\*24] ¶ 150-56.] For example, Plaintiffs allege that in July of 2015, Defendant proposed massive price increases of up to 900 percent. [*Id.* at ¶ 152.] Plaintiffs allege that price increases for data integration services have no corresponding increase in functionality or quality of service. [*Id.* at ¶ 28.] Given that Defendant's open system resulted in lower priced and better-quality data integration services, dealers preferred its "open" DMS. [*Id.* at ¶¶ 119-21, 144.] Dealers have openly complained about Defendant's decision to switch to a "closed" DMS. [*Id.* at ¶¶ 119-21.]

#### D. Alleged Exclusive Dealing

Shortly after entering into the Data Exchange Agreement, Defendant began "renegotiating" its contracts with vendors for 3PA access (actually, cancelling existing contracts and forcing vendors like Plaintiffs [\*796] to sign new contracts). [*Id.* at ¶ 122.] Consistent with its decision to close its DMS, Defendant imposed exclusive dealing provisions that required vendors to use 3PA alone to integrate with data on Defendant's DMSs for all of their products and services. [*Id.*] CDK also took the new position that its existing contracts with dealers prohibited allowing data integrators to access its DMS. [*Id.* [\*25]] When Plaintiffs pushed back on these changes, Defendant said there would be "little flexibility" because Defendant was going to impose the same changes on every vendor. [*Id.* at ¶ 124.] After Defendant began publicly threatening to terminate Plaintiffs' access to data on CDK's DMS, Plaintiffs finally agreed to Defendant's new 3PA terms. [*Id.* at ¶¶ 125, 129.] Plaintiffs allege, however, that they agreed to Defendant's new 3PA terms in reliance (at least in part) on Defendant's representation that no other vendor would pay less than Plaintiffs for integration services in the 3PA program and that Plaintiffs would receive Most Favored Nation status. [*Id.* at ¶ 126-29.]

Defendant also forced many of its dealers to extend their contracts by years by threatening to terminate their DMS service in less than 60 days unless they entered into years-long contracts instead of the month-to-month contracts previously used by many of the dealers. [*Id.* at ¶ 59.] Plaintiffs allege that dealers had no choice but to sign the lengthy extensions given the impossibility of switching DMS providers in such a short amount of time. [*Id.*]

## II. Legal Standard

To survive a Federal Rule of Civil Procedure ("Rule") 12(b)(6) motion to dismiss for failure to state a claim [\*\*26] upon which relief can be granted, the complaint first must comply with Rule 8(a) by providing "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), such that the defendant is given "fair notice of what the \*\*\* claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)) (alteration in original). Second, the factual allegations in the complaint must be sufficient to raise the possibility of relief above the "speculative level." E.E.O.C. v. Concentra Health Servs., Inc., 496 F.3d 773, 776 (7th Cir. 2007) (quoting Twombly, 550 U.S. at 555). "A pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Twombly, 550 U.S. at 555). Dismissal for failure to state a claim under Rule 12(b)(6) is proper "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief." Twombly, 550 U.S. at 558. In reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court accepts as true all of Plaintiffs' well-pleaded factual allegations and draws all reasonable inferences in Plaintiffs' favor. Killingsworth v. HSBC Bank Nev., N.A., 507 F.3d 614, 618 (7th Cir. 2007).

## III. Analysis

### A. Horizontal Conspiracy (Count I)

Plaintiffs brings a Section 1 horizontal conspiracy claim against Defendant based on agreements made between Defendant and Reynolds that Plaintiffs contend were designed to eliminate competition in the provision [\*\*27] of dealer data integration services by "block[ing] all third-party access to their respective DMS[s]." [Compl., at ¶ 182.] Under established law, "joint efforts by a firm or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny [\*797] relationships the competitors need in the competitive struggle" are *per se* illegal. Toys "R" Us, Inc. v. F.T.C., 221 F.3d 928, 936 (7th Cir. 2000) (quoting Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 294, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)); see also Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959). In this case, Plaintiffs argue that Defendant conspired with Reynolds to (1) boycott and block independent data integrators such as Authenticom, and (2) divide the market for data integration services between each other. Defendant argues that Plaintiffs' horizontal conspiracy claim fails for a number of reasons.

First, Defendant argues that Plaintiffs are wrong about what the challenged agreements provide. Focusing on the written agreements between Defendant and Reynolds, Defendant argues that the "agreements effect only a wind-down of [Defendant's] hostile access to Reynold's DMS[.]" [72, at 13.] Although the 2015 written agreements between Defendant and Reynolds do not require that Defendant and Reynolds block third-party access on their own DMSs, as Judge St. Eve noted, the agreements [\[\\*28\]](#) do "effectively require that CDK stop hostile access of Reynolds DMSs (for a period, at least) and, more importantly, expressly prohibit [Defendant and Reynolds] from assisting in the hostile access of one another's DMSs." [In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. 3d at 951](#). "Such a partial ceasefire and mutual forbearance between two rivals would make sense if \* \* \* Defendants sought to 'support' one another's integration services to the exclusion of third-party integrators from the competition." *Id.* Furthermore, the alleged agreements between Defendant and Reynolds are not limited to the 2015 written agreements. Plaintiffs also allege that Defendant's executives admitted "that the companies agreed to block and thereby destroy third-party data integrators." [Compl., at ¶ 17.] "Defendants conspired to block integrators from accessing necessary data from the dealers—meaning, 'relationships' integrators 'need'—by (among other things) withholding authorization and disabling third-party credentials, so that Defendants, ultimately, could charge more for their integration services." [In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. 3d at 952](#). Such an agreement to block data integrators from the market plausibly is anticompetitive. *Id.*

Second, Defendant argues that Plaintiffs' [Section 1](#) horizontal conspiracy [\[\\*29\]](#) claim fails because Plaintiffs merely have alleged parallel conduct. "Tacit collusion, also known as conscious parallelism, does not violate [Section 1](#) of the Sherman Act. Collusion is illegal only when based on agreement." [In re Text Messaging Antitrust Litig., 782 F.3d 867, 879 \(7th Cir. 2015\)](#). Defendant therefore argues that Plaintiffs' [Section 1](#) claims fail because Plaintiffs fail to identify evidence that tends "to exclude the possibility" of independent conduct. [72, at 14 (quoting [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 \(1986\)](#) (internal quotation marks omitted)).] Although the Supreme Court has held "that a plaintiff must present evidence showing that defendants had a 'rational economic motive to conspire' and evidence 'that tends to exclude the possibility' of independent conduct to survive summary judgment[.]" [In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. 3d at 953](#) (quoting [Matsushita Elec. Indus. Co., 475 U.S. at 588](#)), courts have held that such a showing is not necessary at the pleading stage. *Id.* (collecting cases).

Regardless, Plaintiffs plausibly have alleged a motive to conspire. Plaintiffs allege [\[\\*798\]](#) that dealers preferred "open" DMSs and that several dealers complained when Defendant began blocking data integrators. [Compl., at ¶¶ 119-21.] It therefore is reasonable to infer that Defendant and Reynolds were motivated to conspire with each other so that they could close their systems to data integrators [\[\\*30\]](#) without fear that their customers would turn to another provider.<sup>3</sup> [In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. 3d at 953](#). Furthermore, accepting Defendant's argument that Plaintiffs only have alleged parallel conduct would require that the Court ignore well-pleaded allegations that Defendant's executives admitted to the conspiracy. Such admissions are direct evidence of an illegal conspiracy. [In re Text Messaging Antitrust Litig., 630 F.3d at 628](#) (recognizing "an admission by an employee of one of the conspirators" as direct evidence supporting a price-fixing case).

Third, Defendant argues that, to the extent Plaintiffs' horizontal conspiracy claim is based on a purported group boycott, Plaintiffs' claim is a "conceptually flawed" because Defendant does not "deal" with data integrators directly. Rather, data integrators are non-contracting third parties who bear no accountability to Defendant or Reynolds for undermining their systems' security and performance. Still, Plaintiffs allege that Defendant conspired with Reynolds to block data integrators from accessing necessary data from the dealers by withholding authorization to access

<sup>3</sup> Defendant argues that Plaintiffs concede a number of points demonstrating that Defendant and Reynolds engaged in nothing more than permissible parallel conduct. [72, at 14.] For example, Defendant argues that the fact that Reynolds's decision to close its DMS preceded Defendant's decision to do the same by several years demonstrates that there was no illicit agreement between Reynolds and Defendant. [*Id.*] However, nothing prevented Reynolds from deciding to open its DMS. Indeed, given that Plaintiffs allege that Reynolds lost business to Defendant as a result of its closed DMS, Reynolds had the incentive to do so. While Defendant is free to argue that the purported concessions demonstrate that Defendant and Reynolds merely engaged in parallel conduct, the Court cannot ignore the well-plead allegations establishing a horizontal agreement and must draw all reasonable inferences in Plaintiffs' favor on a motion to dismiss. [Killingsworth, 507 F.3d at 618](#).

their respective DMSs and by disabling third-party credentials, thereby inhibiting the relationship between the data integrators and the dealers. This is enough [\*\*31] to establish anticompetitive conduct under [Section 1. In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. at 952](#); see also [Toys "R" Us, Inc., 221 F.3d at 936](#) (recognizing that "joint efforts by a firm or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle" are *per se* illegal (quoting [Nw. Wholesale Stationers, Inc., 472 U.S. at 294](#))).

Fourth, Defendant argues that Plaintiffs' horizontal conspiracy claim essentially amounts to "refusal to deal" claim, and a refusal to deal almost never amounts to an antitrust violation. However, concerted refusals to deal have long been forbidden under [antitrust law. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212, 79 S. Ct. 705, 3 L. Ed. 2d 741 \(1959\)](#); see also [Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608 n.38, 105 S. Ct. 2847, 86 L. Ed. 2d 467 \(1985\)](#) ("In considering the competitive effect of [a firm's] refusal to deal or cooperate \*\*\*

\* it is not irrelevant to note that similar conduct carried out by the concerted action of three independent rivals with a similar share of the market would constitute a *per se* violation of [§ 1](#) of the Sherman Act."). As discussed above, Plaintiffs sufficiently have alleged concerted conduct, not just parallel conduct.

[\*799] Finally, Defendant argues that—to the extent Plaintiffs' horizontal conspiracy claim is based on a market-division theory—Plaintiffs fail to allege that Defendant and Reynolds entered into [\*\*32] an agreement to divide any market. Plaintiffs argue that they sufficiently have alleged such an agreement because their allegations establish that Defendant and Reynolds agreed that Defendant would be the sole provider of data integration services for dealers using Defendant's DMS and that Reynolds would be the sole provider of integration services for dealers using Reynolds's DMS. A market-division agreement is an agreement amongst competitors "to stay out of each other's territories." [Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 152 F.3d 588, 591 \(7th Cir. 1998\)](#). Market-division agreements are *per se* illegal, [United States v. Sealy, Inc., 388 U.S. 350, 358 n. 5, 87 S. Ct. 1847, 18 L. Ed. 2d 1238 \(1967\)](#) (citation omitted), meaning that they fall within the category of agreements that "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." [N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 \(1958\)](#). The Court sees no reason for the inclusion of an agreement to stop unauthorized access of a competitor's computer systems in that category. Indeed, Plaintiffs do not cite to—and the Court is not aware of—any cases treating the servicing and/or use of a competitor's product as a "territory" for the purposes of a market-division [\*\*33] agreement. The Court therefore grants Defendant's motion to dismiss Plaintiffs' horizontal conspiracy claim to the extent that it is based on a market-division theory but denies Defendant's motion to dismiss Plaintiffs' horizontal conspiracy claim in all other respects.<sup>4</sup>

## B. Exclusive Dealing (Count II)

Defendant also argues that Plaintiffs have not sufficiently alleged that Defendant engaged in exclusive dealing. "An exclusive dealing contract obliges a firm to obtain its inputs from a single source." [Paddock Publ'ns, Inc. v. Chicago Tribune Co., 103 F.3d 42, 46 \(7th Cir. 1996\)](#). "The objection to exclusive-dealing agreements is that they deny outlets to a competitor during the term of the agreement." [Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 393 \(7th Cir. 1984\)](#). Because of the procompetitive benefits of exclusive dealing (e.g., increasing allocative efficiency, preventing free-riding), courts analyze exclusive dealing claims under the rule of reason. [In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. 3d at 956-57](#). Plaintiffs argue that Defendant has engaged in exclusive

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<sup>4</sup> CDK also argues that Plaintiffs' market-division claim fails because Plaintiffs do not allege a market-division agreement "among competitors at the same market level[.]" [72, at 15-16 (quoting [Cal. ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1137 \(9th Cir. 2011\)](#).)] However, Defendant does not identify what is necessary to make such a showing. Here, Plaintiffs allege that Reynolds and CDK were both competitors in the data integration market. [See, e.g., Compl., at ¶ 2.] Plaintiffs further allege that Defendant and Reynolds each provide data integration services for their respective DMSs. Without an explanation by Defendants as to why these allegations are insufficient, the Court declines to address this undeveloped argument at this time.

dealing by preventing dealers and vendors (such as Plaintiffs) from working with independent data integrators (such as Authenticom).

To the extent that Plaintiffs seek to bring an exclusive dealing claim based on Defendant's contracts with dealers, Plaintiffs fail to state a claim. Plaintiffs do not [**\*800**] allege or even [**\*\*34**] argue that Defendant requires dealers to purchase and use its DMS exclusively, which is necessary to state a claim for exclusive dealing. [VBR Tours, LLC v. Nat'l R.R. Passenger Corp., 2015 U.S. Dist. LEXIS 130455, 2015 WL 5693735, at \\*12 \(N.D. Ill. Sept. 28, 2015\)](#) (dismissing exclusive dealing claim where there was "no exclusivity").

To the extent that Plaintiffs seek to bring an exclusive dealing claim based on Defendant's contract with vendors, however, Plaintiffs state a claim for exclusive dealing. Plaintiffs allege that "[a]s a condition of participating in CDK's 3PA data integration service, vendors must generally agree to use 3PA exclusively for all of the vendors' products and services." [Compl., at ¶ 20; see also *id.* at ¶¶ 122-23, 132-34.] Defendant argues that Plaintiffs' exclusive dealing claim fails because 3PA is a "managed interface" that is part of CDK's DMS, not a separate product." [160, at 15.] According to Defendant, there is no separate market for data integration services because the "peculiar characteristics" of 3PA "preclude any finding that it is a separate product." [*Id.*] However, Defendant fails fully to develop this argument. Although Defendant identifies two relevant factors for determining a product market (*i.e.*, "separate demand" and "the products peculiar characteristics and [**\*\*35**] uses"), Defendant does not even address other relevant factors such as "distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." [Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 \(1962\)](#). Of the two factors identified by Defendant, only one (*i.e.*, the products peculiar characteristics and uses) arguably support a finding of a separate product. The other relevant factors appear to weigh in favor of finding a separate market for data integration services.<sup>5</sup> For example, as Defendant repeatedly recognizes, it is not the dealers that purchase data integration services. There are distinct customers and distinct prices for data integration services. Furthermore, based on the fact-intensive nature of the product-market inquiry, the issue generally is not properly resolved on a motion to dismiss. [Ploss v. Kraft Foods Grp., Inc., 197 F.Supp.3d 1037, 1070 \(N.D. Ill. 2016\)](#) ("Courts should dismiss antitrust claims based on a market argument only when it is certain that the alleged relevant market clearly does not encompass all interchangeable substitute products"); accord [Avnet, Inc. v. Motio, Inc., 2015 U.S. Dist. LEXIS 120449, 2015 WL 5307515, at \\*4 \(N.D. Ill. Sept. 9, 2015\)](#) ("[b]ecause market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market") (quoting [Todd v. Exxon Corp., 275 F.3d 191, 199-200 \(2d Cir. 2001\)](#)) (alteration in original)).

Finally, [**\*\*36**] Defendant argues that even if Plaintiffs sufficiently allege an exclusive dealing claim—which the Court concludes Plaintiffs have done with respect to Defendant's contract with vendors—Plaintiffs fail to allege substantial foreclosure. [72, at 21.] "[E]xclusive dealing arrangements violate antitrust laws only when they foreclose competition in a substantial share of the line of commerce at issue[.]" [Republic Tobacco Co. v. N. Atl. \[\\*\\*801\] Trading Co., 381 F.3d 717, 737-38 \(7th Cir. 2004\)](#) (citing [Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 320-27, 81 S. Ct. 623, 5 L. Ed. 2d 580 \(1961\)](#)). Defendant argues that Plaintiffs have not alleged substantial foreclosure because (1) there are no allegations that Defendant's vendor contracts foreclosed Plaintiffs from a substantial share of any market, and (2) any argument that hostile integrators are excluded by the contracts "would fail because hostile integrators are still able to deal with DMS providers covering a sizeable portion of the market for car dealership DMS services." [72, at 21.] In its response brief, Plaintiffs appear to concede the former argument, focusing on allegations that the foreclosure caused by the agreements raised prices for data integration services and therefore reduced output below competitive levels. Specifically, Plaintiffs allege that Defendant's anticompetitive conduct dramatically raised [**\*\*37**] integration fees for software vendors, often doubling or even tripling the price. [Compl., at ¶¶ 149-155, 157, 161.]

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<sup>5</sup> In the *Authenticom* decision, Judge St. Eve described the data-integration market and the DMS market as separate markets based on similar allegations. [In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. 3d at 940](#). The Court sees no reason to change course based on Defendant's current arguments, especially given that Plaintiffs have alleged that Defendant itself treats its data-integration services as a separate product from its DMS. [See, e.g., Compl., at ¶ 67 ("In its 2015 10-K, CDK described its data integration services as 'a stand-alone product' separate from 'the core Dealer Management System.'" (citation omitted)).]

Defendant argues that Plaintiffs lack antitrust standing to challenge the foreclosure of independent integrators such as Authenticom, but Defendant does not cite to any authority for that proposition. Defendant therefore has waived this argument by failing fully to develop it.<sup>6</sup> *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991) ("We repeatedly have made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived[.]" (citations omitted)). In its reply, Defendant identifies specific factual allegations regarding the foreclosure of hostile integrators it contends are lacking in the complaint. [160, at 16 n.7.]

These belated arguments are not persuasive. With respect to Defendant's antitrust standing argument, as a purchaser of data integration services, Plaintiffs have antitrust standing to challenge anticompetitive conduct resulting in increased prices for such services. *Warner Mgmt. Consultants, Inc. v. Data Gen. Corp.*, 545 F. Supp. 956, 963 (N.D. Ill. 1982) ("It is well-settled that direct purchasers of a product the price of which has been inflated by anticompetitive conduct have standing to sue under the antitrust laws." (collecting cases)). [\*\*38] Here, Plaintiffs allege that they were forced to pay increased fees for data integration services. [Compl., at ¶¶ 149-155, 157.]

With respect to Defendant's argument regarding the sufficiency of Plaintiffs' allegations of foreclosure, Plaintiffs sufficiently have alleged that the exclusive-dealing contracts foreclose a substantial portion of the data-integration market, resulting in increased prices. CDK and Reynolds together control approximately 75 percent of the DMS market by number of dealers and approximately 90 percent when measured by number of vehicles sold. [Compl., at ¶ 10.] CDK alone controls approximately 45 percent of the DMS market. [*Id.*] Plaintiffs further allege that "with the two dominant DMS providers agreeing to block independent integrators, it would be impossible for competing data integrators to survive." [*Id.* at ¶ 104.] Indeed, vendors like Plaintiffs are forced to pay supracompetitive prices for data integration services because they need to be able to service [\*802] dealers who have CDK or Reynolds as their DMS providers. Vendors are likely only willing to pay such prices because Authenticom (the only other remaining data integrator) is foreclosed from competing for [\*\*39] that business. These allegations raise a reasonable inference that Authenticom is foreclosed from competing in a substantial portion of the data-integration market. *In re Dealer Mgmt. Sys. Antitrust Litig.*, 313 F. Supp. 3d at 957 (concluding that similar allegations were sufficient to establish that the "exclusive-dealing contracts [foreclosed] a substantial portion of the data-integration market"); see also *Pipe Fittings Direct Purchaser Antitrust Litig.*, 2013 U.S. Dist. LEXIS 29865, 2013 WL 812143, at \*19 (D.N.J. Mar. 5, 2013) ("The question of whether the alleged exclusive dealing arrangements foreclosed a substantial share of the line of commerce is a merits question not proper for the pleading stage."). Plaintiffs therefore sufficiently have alleged an exclusive dealing claim based on Defendant's contract with vendors.

### C. Unlawful Tying (Count III)

Defendant argues that Plaintiffs' *Section 1* tying claim fails because such a claim requires that the buyer of the tying product and the tied product be the same. "A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.'" *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 461-62, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992) (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)). "Such an arrangement violates § 1 of the Sherman Act if the seller has appreciable economic power in the tying product [\*\*40] market and if the arrangement affects a substantial volume of commerce in the tied market." *Batson v. Live Nation Entm't, Inc.*, 746 F.3d 827, 832 (7th Cir. 2014) (quoting *Eastman Kodak*, 504 U.S. at 462) (internal quotation marks omitted). "[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all." *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466

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<sup>6</sup> In its opening brief, Defendant merely asserts that "it is doubtful that [Plaintiffs] have standing" to challenge the exclusion of data integrators. [72, at 21.] Defendant does not, however, affirmatively argue the point. Instead, Defendant asserts that an exclusive dealing claim based on the foreclosure of hostile integrators would fail because hostile integrators still were able to deal with DMS providers covering a sizeable portion of the market for car dealership DMS services. [*Id.*] Still, Defendant does not provide any authority or factual support for that assertion.

360 F. Supp. 3d 788, \*8021 (2019 U.S. Dist. LEXIS 12147, \*\*40

U.S. 2, 12, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984), abrogated on other grounds by Illinois Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006).

Here, Defendant argues that Plaintiffs' tying claim fails because the dealers buy the tying product (*i.e.*, the DMS) but not the tied product (*i.e.*, integration services). Plaintiffs argue that because dealers pay a portion of the integration fees (which are passed on by the vendors) and make the purchasing decision for both the DMS and the integration service, dealers functionally are the purchasers of both the tied and tying products. In support of that argument, Plaintiffs cite to Dos Santos v. Columbus-Cuneo-Cabriini Med. Ctr., 684 F.2d 1346, 1354 (7th Cir. 1982). In that case, the Seventh Circuit noted that a patient might not be the real purchaser of anesthesiology services "[b]ecause the patient generally takes no part in the selection of a particular anesthesiologist" and "because the expense of anesthesia services to the patient is ordinarily at least partially [\*\*41] insured or otherwise payable by a third party[.]" *Id. at 1354*. However, the court in *Dos Santos* also noted that the patient does not make "any significant economic decision" in that regard. *Id.* (emphasis added).

Although Plaintiffs allege that a vendor must receive authorization from the dealer before a data integrator can access the dealer's data, this does not establish that vendors such as Plaintiffs do not make any [\*803] significant economic decision in selecting data integration services. Nor does the fact that some costs are passed on to dealers establish that the dealers are the actual purchasers of the data integration services. In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. 3d at 961. Plaintiffs reliance on Dos Santos, which was not even a tying case, therefore is misplaced. The Court recognizes that "formalistic distinctions rather than actual market realities are generally disfavored in antitrust law." Eastman Kodak, 504 U.S. at 466-67. Still, Plaintiffs' allegations do "not plausibly suggest that dealers, not vendors, make the economic choice about which integrator to use and suffer the consequences of those decisions." In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. 3d at 961 (dismissing tying claim) (citations omitted). Accordingly, the Court grants Defendant's motion to dismiss Plaintiffs' tying claim.<sup>7</sup>

#### D. Rule of Reason [\*\*42]

Defendant argues that, even assuming Plaintiffs sufficiently allege the kind of conduct that requires a rule of reason analysis under Section 1, its conduct rested on a clear and important business justification: the need to protect its system and the data on that system from cybersecurity threats.<sup>8</sup> [Compl., at ¶ 170.] However, whether challenged conduct has a procompetitive effect on balance so as to survive scrutiny under a rule-of-reason analysis presents a factual issue that cannot be resolved at this stage of the case. Cook Inc. v. Boston Sci. Corp., 2002 U.S. Dist. LEXIS 17331, 2002 WL 335314, at \*4 (N.D. Ill. Feb. 28, 2002) ("The rule of reason entails a complex inquiry into the surrounding circumstances that is not susceptible to resolution on a motion to dismiss[.]"); Watkins v. Smith, 2012 U.S. Dist. LEXIS 165762, 2012 WL 5868395, at \*7 (S.D.N.Y. Nov. 19, 2012) ("The rule-of-reason inquiry requires, at the motion to dismiss stage, that the plaintiff identify the relevant market affected by the challenged conduct and allege an actual adverse effect on competition in the identified market.").

Furthermore, Plaintiffs specifically allege that Defendant's security justification is pretextual. [Compl., at ¶¶ 170-78.] For example, Plaintiffs allege that "a top-level CDK executive admitted in private conversation with a vendor that the rhetoric around 'security' has 'little credibility' and [\*\*43] is primarily designed to force vendors to use CDK for data integration." [i.d. at ¶ 171.] Accepting all of Plaintiffs' well-pleaded factual allegations and drawing all reasonable

<sup>7</sup> When the Seventh Circuit reviewed the preliminary injunction entered in the *Authenticom* case, the Seventh Circuit indicated that it was "dubious in the extreme" that the alleged conduct of Defendant and Reynolds "amounts to tying, rather than simply participation at two levels of the market[]." Authenticom, Inc. v. CDK Glob. LLC, 874 F.3d 1019, 1026 (7th Cir. 2017). For the reasons discussed above, the Court reaches the same conclusion with respect to the allegations currently before the Court.

<sup>8</sup> As noted by Plaintiffs [126, at 20-21], Defendant does not appear to be arguing that Plaintiffs have failed to allege an actual adverse effect on competition in the identified market.

inferences in Plaintiffs' favor, Plaintiffs sufficiently have alleged that Defendant's proffered justification for the challenged conduct is pretextual.<sup>9</sup>

Finally, Plaintiffs have identified discovery materials supporting the argument that the objective of the challenged conduct "is to prevent and/or severely inhibit non-approved access to DMS forcing vendors into the 3PA or other CDK approved access programs and capture additional [\*804] revenue opportunities." [126-1 (Ex. 16 (CDK-0843493)), at 214 (emphasis added).] This evidence further supports Plaintiffs' arguments against dismissal. *Geinosky v. City of Chicago*, 675 F.3d 743, 745 n.1 (7th Cir. 2012) ("A party appealing a *Rule 12(b)(6)* dismissal may elaborate on his factual allegations so long as the new elaborations are consistent with the pleadings." (collecting cases)).

## B. Section 2 Claim (Count IV)

### 1. Brand Specific Aftermarkets

To prevail on its Section 2 claim, Plaintiffs must demonstrate that Defendant has monopoly power in the relevant market. Here, Plaintiffs allege that Defendant has monopolized a brand-specific "Dealer Data Integration aftermarket" limited [\*\*44] to its own DMS. [Compl., at ¶ 208.] "In rare circumstances, a single brand of a product or service can constitute a relevant market for antitrust purposes." *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 418 (5th Cir. 2010) (citation omitted). The seminal case setting forth the circumstances under which such a claim may be viable is *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, which held that a brand-specific aftermarket can constitute a relevant market for antitrust purposes when consumers effectively are "locked-in" that brand's market because of structural barriers and/or commercial realities (e.g., high transaction costs for switching brands). *504 U.S. at 461-62*. The Seventh Circuit has made clear, however, that firms with market power are not "forbidden to deal in complementary products[.]" *Schor v. Abbott Labs.*, 457 F.3d 608, 614 (7th Cir. 2006). Rather, what *Eastman Kodak* holds is that firms with market power cannot deal in complementary products in "ways that take advantage of customers' sunk costs." *Id.* Courts therefore have found "that an *Eastman Kodak* claim depends on the consumer's unawareness of the supplier's aftermarket power and its terms when it purchased the primary-market product." *In re Dealer Mgmt. Sys. Antitrust Litig.*, 313 F. Supp. 3d at 962-63 (collecting cases); see also *Schor*, 457 F.3d at 614 (recognizing same).

Turning to the facts of this case, Plaintiffs plausibly allege an *Eastman* [\*\*45] *Kodak* claim. Plaintiffs allege that dealers are "locked in" Defendant's DMS. [Compl., at ¶¶56-60, 207.] In support of that assertion, Plaintiffs allege that "switching costs are high" and "[s]witching DMS providers presents significant logistical challenges and is highly disruptive to business operations." [*Id.* at ¶ 57.] "It can take a dealership over a year of preparation, staff training, and testing before a new DMS can be put into operation, all while the dealership is trying to dell and service cars." [*Id.*] Indeed, Plaintiffs allege that Defendant's own CEO publicly has recognized that dealers are hesitant to switch DMSs because the process can take time and can be very difficult. [*Id.* at ¶ 58.]

Defendant argues that because of its contractual bars on third-party DMS access, dealers were aware of its aftermarket power and its terms when they purchased contract with Defendant. [72, at 24.] However, Plaintiffs repeatedly allege that Defendant publicly took the position that it permitted access by third-party integrators. [Compl., at ¶¶ 75-77.] For example, Plaintiffs allege that "CDK's top executives have repeatedly made public statements that dealers may grant data integrators rights [\*\*46] to access their DMS." [*Id.* at ¶ 75.] "Steve Anenen, CDK's longtime CEO, publicly stated that dealers have the right to grant third parties access to, and use of, their data. He told the industry publication Automotive News, 'We're not going to prohibit that or get in the way of that.'" [*Id.* (citation omitted).] He further stated, "I don't know how you [\*805] can ever make the opinion that the data is

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<sup>9</sup> The Supreme Court has recognized that whether a justification is a pretext can be evaluated under the rule of reason analysis. *Nw. Wholesale Stationers, Inc.*, 472 U.S. at 297.

yours to govern and to preclude others from having access to it, when in fact it's really the data belonging to the dealer. As long as they grant permission, how would you ever go against that wish?" [Id. (citation omitted).] The complaint identifies similar statements made by other CDK executives. [See, e.g., *id.* at ¶ 76.]

Defendant nonetheless argues that dealers could not be justified in relying on these representations given contrary language in their contracts with Defendant. [160, at 19.] In making this argument, Defendant cites to cases recognizing that "[a] party is not justified in relying on representations outside of or contrary to the written terms of a contract he or she signs when the signer is aware of the nature of the contract and had a full opportunity to read it." *Cromeens, Holloman, Sibert, Inc. v. AB Volvo*, 349 F.3d 376, 394 (7th Cir. 2003). However, [\*\*47] it is not apparent from the face of the complaint that Defendant's contracts with dealers contradict these representations. Although Defendant's contract with dealers permitted dealers to authorize its agents to access the DMS [Compl., at ¶¶ 20, 74, 82], it is not clear whether third-party data integrators were acting as the dealers' agents. Defendant argues in a footnote that Plaintiffs have not plausibly alleged that the data integrators are the agents of dealers [72, at 10 n.2], but Plaintiffs do not need to anticipate factual defenses that Defendant may raise regarding their claim. *Richards v. Mitcheff*, 696 F.3d 635, 637 (7th Cir. 2012) ("Complaints need not anticipate defenses and attempt to defeat them." (citing *Gomez v. Toledo*, 446 U.S. 635, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980))). Although discovery ultimately may demonstrate that data integrators were contractually prohibited from accessing Defendant's DMS, based on the well-pleaded obligations in the amended complaint it is plausible that dealers believed that they could authorize third-party integrators to access their DMSs, especially in light of public statements by CDK executives indicating that dealers had such authority. Accordingly, CDK plausibly has alleged an *Eastman Kodak* claim.<sup>10</sup>

Defendant further argues that Plaintiffs cannot complain [\*\*48] about the alleged foreclosure of competition in the dealer-data-integration aftermarket for Defendant's DMS because any hostile integration of its DMS is unlawful under the Computer Fraud and Abuse Act ("CFAA"). [72, at 25.] However, as Defendant notes, whether a data integrator violates the CFAA depends in part on whether the data integrator "accesses a computer without authorization or exceeds authorized access[.]" [72, at 25 (quoting *18 U.S.C. § 1030(a)(2)(C)*) (internal quotation marks omitted).] And, as discussed above, it is not at all clear from the complaint that data integrators lacked authorization to access Defendant's DMS. Given Plaintiffs' allegations regarding Defendant's repeated and unequivocal statements indicating that it permitted third-party integrator access, the allegations in the complaint support the contrary conclusion. Furthermore, whether data integrators violated the CFAA is a question of fact that cannot be determined based on the pleadings alone.<sup>11</sup> *In re Dealer Mgmt. Sys. Antitrust Litig.*, 313 F. Supp. 3d at 949 (rejecting similar argument with respect to purported violations of the CFAA and related state laws by Authenticom). Plaintiffs therefore sufficiently have alleged that Defendant has monopoly power in the relevant market—namely, a brand-specific [\*\*49] dealer data integration aftermarket limited to its own DMS.

## 2. Anticompetitive Conduct

To state a claim for monopolization under *Section 2*, a plaintiff must allege that defendant engaged in predatory or anticompetitive conduct. *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 854 (7th Cir. 2011) (holding that a claim for monopolization under *Section 2* requires that the defendant "willfully acquired or maintained that power by means other than the quality of its product, its business acumen, or historical accident"). Defendant argues that Plaintiffs' *Section 2* claim fails because it is premised on an alleged refusal to deal, which does not amount to predatory or anticompetitive conduct under the Supreme Court's decision in *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004).

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<sup>10</sup> The Court notes that the complaint indicates that Defendant later revoked any authorization. Still, according to the allegations in the complaint, dealers already using Defendant's DMS were effectively locked in their purchase. [Compl., at ¶¶ 56-60, 207.]

<sup>11</sup> Although Plaintiffs did not make this argument, the Court also notes that "a plaintiff's wrongdoing is not a defense to an antitrust suit." *In re Dealer Mgmt. Sys. Antitrust Litig.*, 313 F. Supp. 3d at 946.

Plaintiffs recognize that their Section 2 claim would fail if it were based on a refusal to deal,<sup>12</sup> but argue that their Section 2 claim is based on the predatory conduct that serves as the basis of their Section 1 claims. A defendant violates "Section 2" of the Sherman Act \*\*\* [if it] 'has acquired or maintained his strategic position, or sought to expand [its] monopoly, or expanded it by means of those restraints of trade which are cognizable under [Section] 1.'" *Fin. & Sec. Prods. Ass'n v. Diebold, Inc.*, 2005 U.S. Dist. LEXIS 45409, 2005 WL 1629813, at \*4 (N.D. Cal. July 8, 2005) (quoting *United States v. Griffith*, 334 U.S. 100, 106, 68 S. Ct. 941, 92 L. Ed. 1236 (1948)); see also *Gumwood HP Shopping Partners, L.P. v. Simon Prop. Grp., Inc.*, 2013 U.S. Dist. LEXIS 92133, 2013 WL 3214983, at \*7 (N.D. Ind. Mar. 13, 2013) ("Where defendant has engaged in unlawful restraint of trade that would independently violate [\*\*50] Section 1 of the Sherman Antitrust Act, it is well established that it also violates Section 2 if it acquires or maintains a monopoly by means of that restraint of trade." (citing *Griffith*, 334 U.S. at 106)). Although a unilateral refusal to deal alone does not establish an antitrust violation, that does not mean that other anticompetitive conduct is insulated because it involves a refusal to deal. *Glaberson v. Comcast Corp.*, 2006 U.S. Dist. LEXIS 62672, 2006 WL 2559479, at \*10 (E.D. Pa. Aug. 31, 2006) ("Trinko does not provide a basis for insulating claims based on well-established examples of anticompetitive conduct, such as horizontal market allocations, from judicial review.").<sup>13</sup> Because Plaintiffs plausibly have alleged a horizontal conspiracy claim [\*807] and an exclusive dealing claim,<sup>14</sup> Plaintiffs sufficiently have alleged anticompetitive conduct sufficient to state a claim under Section 2. Accordingly, the Court denies Defendant's motion to dismiss Plaintiffs' Section 2 monopolization claim.

#### D. Cartwright Act and California Unfair Competition Law (Counts V, VI, and VII)

Defendant argues that the dismissal of Plaintiffs' Sherman Act claims would be fatal to their antitrust-related claim under the Cartwright Act. "[B]ecause the Cartwright Act is patterned after the federal Sherman Act and both have their roots in the common law, [\*\*51] federal cases interpreting the Sherman Act are applicable in construing the Cartwright Act." *In re Copper Antitrust Litig.*, 436 F.3d 782, 802 (7th Cir. 2006) (internal quotation marks omitted) (quoting *Oakland-Alameda Cnty. Builders' Exch. v. F.P. Lathrop Constr. Co.*, 4 Cal. 3d 354, 93 Cal. Rptr. 602, 482 P.2d 226, 231 n. 3 (Cal. 1971)). Thus, Plaintiffs' Cartwright Act claim rises or falls with Plaintiffs' Sherman Act claims. Similarly, to the extent that Plaintiffs seek to bring a claim under the "unlawful" prong of the California Unfair Competition Law ("UCL"), Plaintiffs' claim depends on allegations of antitrust violations and therefore also rises or falls with Plaintiffs' Sherman Act claims. Because Plaintiffs sufficiently have alleged claims under the Sherman Act, Plaintiffs' claims under the Cartwright Act and the California UCL survive.<sup>15</sup> Accordingly, Defendant's motion to dismiss Plaintiffs' Cartwright Act and California UCL claims is denied.

<sup>12</sup> The parties' agreement on this issue is supported by case law, as there is "no antitrust duty to deal \*\*\* in selling services to [ ] competitors in the retail market." *In re Dealer Mgmt. Sys. Antitrust Litig.*, 313 F. Supp. 3d at 955 (citing *Pac. Bell Tel. Co. v. Linkline Commc'n, Inc.*, 555 U.S. 438, 450, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)); see also *Schor*, 457 F.3d at 610 ("[A]ntitrust law does not require monopolists to cooperate with rivals by selling them products that would help the rivals to compete. Cooperation is a *problem* in antitrust, not one of its obligations." (internal citation omitted)); *Authenticom, Inc. v. CDK Global, LLC*, 874 F.3d 1019, 1025 (7th Cir. 2017) ("Even monopolists are almost never required to assist their competitors[.]") (citation omitted)).

<sup>13</sup> Defendant notes that *Glaberson* and another case cited by Plaintiffs do not address Section 2 claims. However, Plaintiffs cite these cases for the proposition that *Trinko* is limited to refusal-to-deal claims and does not insulate a defendant who engages in other misconduct from liability.

<sup>14</sup> To the extent that Plaintiffs' Section 2 claim rests on allegations of a horizontal conspiracy, Defendant contends Plaintiffs are limited to bringing a Section 1 claim. But Defendant does not cite to any authority holding that violations of Section 1 are insufficient to establish anticompetitive conduct for the purposes of Section 2. As noted above, the case law supports the contrary position.

<sup>15</sup> Plaintiffs also argue that they have stated a claim under the "unfair prong" of the California UCL. [126, at 28.] Plaintiffs do not, however, identify what conduct it contends satisfies the "unfair prong" of the California UCL. Because Plaintiffs sufficiently have alleged violations of the Sherman Act, however, Plaintiffs' California UCL claim survives.

## E. California Unfair Practices Act

Defendant argues that Plaintiffs fail to state a claim under California's Unfair Practices Act ("CUPA"). California's Unfair Practices Act ("UPA") makes unlawful the "secret payment or allowance of rebates \* \* \* or unearned discounts \* \* \* or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions." [Cal. Bus. & Prof. Code § 17045](#). Defendant [\*\*52] argues that Plaintiffs have not sufficiently alleged (1) a secret discount, or (2) injury caused by the purported secret discount [72, at 30], which is necessary to state a claim for a violation of [Section 17045 of the CUPA](#).

The Court agrees that Plaintiffs have not sufficiently alleged injury caused by any purported discount given to Reynolds. Plaintiffs allege that the fee waiver given to Reynolds places Plaintiffs' applications "at a severe competitive disadvantage in the market place," which Plaintiffs contend is sufficient to establish injury under [Section 17045 of the CUPA](#). [126, at 30.] However, a plaintiff bringing a claim under [Section 17045 of the CUPA](#) must allege an actual injury in addition to a competitive disadvantage. [Am. Booksellers Ass'n, Inc. v. Barnes & Noble, Inc., 135 F. Supp. 2d 1031, 1043 \(N.D. Cal. 2001\)](#) (finding "a tendency to destroy competition" but granting summary judgment for failure to establish "actual injury"); cf. [Diesel I\\*8081 Elec. Sales & Serv., Inc. v. Marco Marine San Diego, Inc., 16 Cal. App. 4th 202, 213, 20 Cal. Rptr. 2d 62 \(1993\)](#) (plaintiff established actual injury by showing that "its gross sales and profits drastically declined"). Because Plaintiffs have not done so here, Plaintiffs CUPA claim fails.

Furthermore, Plaintiffs' allegation of a severe competitive disadvantage relates to the alleged conspiracy between Defendant and Reynolds. [Compl., at ¶ 28.] Thus, even if allegations of a competitive disadvantage were sufficient to [\*\*53] state a claim, Plaintiffs fail sufficiently to allege a competitive disadvantage caused by the purported secret discount. Accordingly, the Court grants Defendant's motion to dismiss Plaintiffs' CUPA claim.

## F. Fraudulent Inducement (Count VIII), Breach of Contract (Count IX), and Defamation (Count XI)

Defendant also moves to dismiss Plaintiffs' fraudulent inducement claim, breach of contract claim, and defamation claim. However, neither party addresses what law applies to these claims. Furthermore, neither party addresses the elements of these claims. Given that the parties have not fully developed their arguments, the Court declines to address the sufficiency of Plaintiffs' allegations with respect to these claims. [Doherty v. City of Chicago, 75 F.3d 318, 324 \(7th Cir. 1996\)](#) ("Given our adversary system of litigation, it is not the role of this court to research and construct the legal arguments open to parties, especially when they are represented by counsel.") (citation omitted)); [Waldock v. M.J. Select Glob., Ltd., 2005 U.S. Dist. LEXIS 38001, 2005 WL 3542527, at \\*14 \(N.D. Ill. Dec. 27, 2005\)](#) ("[W]ithout engaging in a choice-of-law analysis, they 'have failed to lay the proper ground work for the court to address their argument.'" (quoting [In re Air Crash Disaster, at Sioux City, Iowa, on July 19, 1989, 1991 U.S. Dist. LEXIS 17538, 1991 WL 268656, at \\*2 \(N.D. Ill. Dec. 4, 1991\)](#))). Accordingly, the Court denies Defendant's motion [\*\*54] to dismiss Plaintiffs' fraudulent inducement claim, breach of contract claim, and defamation claim. [Waldock v. M.J. Select Glob., Ltd., 2005 U.S. Dist. LEXIS 38001, 2005 WL 3542527, at \\*14 \(N.D. Ill. Dec. 27, 2005\)](#) (denying motion to dismiss claim because defendants failed to lay the proper ground work for the court to address their argument); [McDaniel v. Loyola Univ. Med. Ctr., 2014 U.S. Dist. LEXIS 120042, 2014 WL 4269126, at \\*6 \(N.D. Ill. Aug. 28, 2014\)](#) (denying motion to dismiss claims that were not supported by case law or legal authority).

## IV. Conclusion

For the reasons set forth above, Defendant's motion to dismiss [71] Plaintiffs' complaint is granted in part and denied in part.

Date: January 25, 2019

/s/ Robert M. Dow, Jr.

Robert M. Dow, Jr.

United States District Judge

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## In re Dealer Mgmt. Sys. Antitrust Litig., MDL 2817

United States District Court for the Northern District of Illinois, Eastern Division

January 25, 2019, Decided; January 25, 2019, Filed

Case No. 18-cv-864

### **Reporter**

362 F. Supp. 3d 510 \*; 2019 U.S. Dist. LEXIS 12157 \*\*

IN RE DEALER MANAGEMENT SYSTEMS ANTITRUST LITIGATION, MDL 2817. This document relates to: THE DEALERSHIP CLASS ACTION

**Prior History:** [Authenticom, Inc. v. CDK Global, LLC \(In re Dealer Mgmt. Sys. Antitrust Litig.\), 313 F. Supp. 3d 931, 2018 U.S. Dist. LEXIS 80937, 2018 WL 2193236 \(N.D. Ill., May 14, 2018\)](#)

## **Core Terms**

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Plaintiffs', dealers, arbitration, vendors, argues, antitrust, courts, antitrust claim, integration, damages, allegations, consumer protection, dealerships, purchasers, consumers, parties, harmonization, providers, software, motion to dismiss, class action, injunctive relief, anti trust law, Interface, indirect, denies, third-party, horizontal, contracts, anticompetitive conduct

## **LexisNexis® Headnotes**

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

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

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

To survive a [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion to dismiss for failure to state a claim upon which relief can be granted, the complaint first must comply with [Fed. R. Civ. P. 8\(a\)](#) by providing a short and plain statement of the claim showing that the pleader is entitled to relief, [Fed. R. Civ. P. 8\(a\)\(2\)](#), such that the defendant is given fair notice of what the claim is and the grounds upon which it rests. Second, the factual allegations in the complaint must be sufficient to raise the possibility of relief above the speculative level. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Dismissal for failure to state a claim under [Rule 12\(b\)\(6\)](#) is proper when the allegations in a complaint, however true, could not raise a claim of entitlement to relief. In reviewing a motion to dismiss pursuant to [Rule 12\(b\)\(6\)](#), the court accepts as true all of plaintiffs' well-pleaded factual allegations and draws all reasonable inferences in plaintiffs' favor.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope

**HN2** Arbitration, Arbitrability

Pursuant to the Federal Arbitration Act (FAA), [9 U.S.C.S. §1 et seq.](#), a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. [9 U.S.C.S. § 2](#). The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the FAA. [Section 2](#) of the FAA is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. Thus, when the parties have agreed to arbitrate some matters pursuant to an arbitration clause, the law's permissive policies in respect to arbitration counsel that any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

**HN3** Arbitration, Arbitrability

Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

**HN4** Federal Arbitration Act, Arbitration Agreements

A party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. However, the mere fact that parties are not signatories to an agreement does not defeat their right to compel arbitration. Still, arbitration agreements apply to nonsignatories only in rare circumstances.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

**HN5** Federal Arbitration Act, Arbitration Agreements

State law governs who is bound by agreements to arbitrate.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Contracts Law > ... > Affirmative Defenses > Estoppel > Equitable Estoppel

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## **HN6** Contract Conditions & Provisions, Arbitration Clauses

Under Illinois law, a party cannot enforce an arbitration agreement under an equitable estoppel theory without detrimental reliance.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Contracts Law > ... > Affirmative Defenses > Estoppel > Equitable Estoppel

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

## **HN7** Arbitration, Arbitrability

Under Ohio law, detrimental reliance is necessary to invoke the doctrine of equitable estoppel. The same contractual and estoppel principles apply to determining what parties are bound by an agreement to arbitrate.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Contracts Law > ... > Affirmative Defenses > Estoppel > Equitable Estoppel

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

## **HN8** Arbitration, Arbitrability

Traditional state-law principles such as assumption, agency, and estoppel apply to determining when a contract such as an agreement to arbitrate can be enforced against non-parties. Thus, the court looks to Ohio's traditional equitable estoppel principles to determine when an arbitration agreement can be enforced against a nonsignatory under Ohio law.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Waiver

## **HN9** Arbitration, Waiver

Despite the federal policy favoring arbitration, a contractual right to arbitration can be waived. A waiver of a contractual right to invoke arbitration can be implied or express. For waiver of the right to arbitrate to be inferred, the court must determine that, considering the totality of the circumstances, a party acted inconsistently with the right to arbitrate. Although a variety of factors may be considered, diligence or a lack thereof should weigh heavily in the court's determination of whether a party implicitly waived its right to arbitrate. The U.S. Court of Appeals for the Seventh Circuit therefore has directed courts to consider whether the party seeking arbitration did all it could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration. Other considerations include whether the allegedly defaulting party participated in litigation, substantially delayed its request for arbitration, or participated in discovery. Still, waiver is not lightly inferred; the strong federal policy favoring enforcement of arbitration agreements impresses upon a party asserting waiver a heavy burden.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Waiver

## [HN10](#) [blue document icon] Arbitration, Waiver

When a party chooses to proceed in a judicial forum, there is a rebuttable presumption that the party has waived its right to arbitrate.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Waiver

## [HN11](#) [blue document icon] Arbitration, Waiver

Although a showing of prejudice is not required in order to find waiver of the right to arbitrate, it is relevant.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

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

## [HN12](#) [blue document icon] Purchasers, Indirect Purchasers

A federal antitrust plaintiff may not seek damages based on alleged supracompetitive prices passed through by a purchaser earlier in the distribution chain. *Illinois Brick Co. v. Illinois* forbids a customer of the purchaser who paid a cartel price to sue the cartelists, even if his seller—the direct purchaser from the cartelists—passed on to him some or even all of the cartel's elevated price. This is because when defendants sell to a third party who could recover for any injury it suffers as a direct purchaser, there is no need for separate and duplicative suits for implicit overcharges claimed further downstream. Where a plaintiff's injury is derivative of a more direct injury to some other person, and that person would have a strong motivation to pursue its own antitrust claim against the defendant, standing is not likely to exist.

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

## [HN13](#) [blue document icon] Standing, Requirements

Antitrust standing examines the connection between the asserted wrongdoing and the claimed injury to limit the class of potential plaintiffs to those who are in the best position to vindicate the antitrust violation. Regardless of whether an antitrust plaintiff has constitutional standing, at the pleadings stage a district court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action. The U.S. Supreme Court announced six factors to consider in assessing whether an antitrust plaintiff is the proper party to proceed under the antitrust laws: (1) the causal connection between the violation and the harm; (2) the presence of improper motive; (3) the type of injury and whether it was one Congress sought to redress; (4) the directness of the injury; (5) the speculative nature of the damages; and (6) the risk of duplicate recovery or complex damage apportionment. For injunctive relief, the speculative nature of the damages and risk of duplicate recoveries factors drop out of the analysis, but the need to establish antitrust standing remains. The broad proposition is that a party cannot recover when others more directly injured are better able to state a claim.

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

## [HN14](#) [blue document icon] Standing, Requirements

The U.S. Supreme Court did not hold that *Associated General Contractors of California, Inc. v. California State Council of Carpenters* (AGC) categorically bars federal antitrust claims—even claims seeking injunctive relief—

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whenever more directly-affected purchasers seek the same injunctive relief that the more-remote plaintiff demands. The Court recognized that the fact that the alleged conspiracy operated in the separate but related futures market did not necessarily doom the indirect purchaser plaintiffs' claims. Furthermore, other courts in the Northern District of Illinois have concluded that when damages are not at issue, as long as the plaintiffs' alleged injury is not remote but is directly attributable to the conspiracy, the injury satisfies AGC.

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

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

#### **HN15** [blue icon] Standing, Requirements

When injunctive relief alone is at issue, some factors—namely the speculative nature of the damages and the risk of duplicate recoveries or complex damages apportionment—do not apply to the antitrust standing analysis. Courts should protect against multiple lawsuits for damages and duplicative recoveries by examining factors such as the potential for duplicative recovery, the complexity of apportioning damages, and the existence of other parties that have been more directly harmed, to determine whether a party is a proper plaintiff under § 4 of the Sherman Act. Because claims for injunctive relief do not present a risk of multiple lawsuits for damages and duplicative recoveries, those factors are not relevant to the antitrust standing analysis for claims seeking injunctive relief. The fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one.

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

#### **HN16** [blue icon] Cartels & Horizontal Restraints, Sherman Act

For purposes of horizontal conspiracy claims, evidence of retardation of innovation and subsequent decrease in the quality of products potentially available to consumers, if believed, could qualify as a harm to competition and consumers.

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

#### **HN17** [blue icon] Cartels & Horizontal Restraints, Sherman Act

Tacit collusion, also known as conscious parallelism, does not violate § 1 of the Sherman Act. Collusion is illegal only when based on agreement. Although a plaintiff must present evidence showing that defendants had a rational economic motive to conspire and evidence that tends to exclude the possibility of independent conduct to survive summary judgment, courts have held that such a showing is not necessary at the pleading stage.

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

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

#### **HN18** [blue icon] Exclusive & Reciprocal Dealing, Exclusive Dealing

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An exclusive dealing contract obliges a firm to obtain its inputs from a single source. The objection to exclusive-dealing agreements is that they deny outlets to a competitor during the term of the agreement. Because of the procompetitive benefits of exclusive dealing (e.g., increasing allocative efficiency, preventing free-riding), courts analyze exclusive dealing claims under the rule of reason.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

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

#### **HN19** [blue icon] **Price Fixing & Restraints of Trade, Horizontal Market Allocation**

Courts should dismiss antitrust claims based on a market argument only when it is certain that the alleged relevant market clearly does not encompass all interchangeable substitute products; because market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market.

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

#### **HN20** [blue icon] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

Exclusive dealing arrangements violate antitrust laws only when they foreclose competition in a substantial share of the line of commerce at issue.

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

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

#### **HN21** [blue icon] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

Whether challenged conduct has a procompetitive effect on balance so as to survive scrutiny under a rule-of-reason analysis is a factual issue for trial.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

#### **HN22** [blue icon] **Private Actions, State Regulation**

Courts applying Alaska, California, Florida, and South Carolina law have held that consumer protection claims based on the same factual allegations as a failed antitrust claim must likewise be dismissed.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

#### **HN23** [blue icon] **Private Actions, State Regulation**

South Carolina courts interpret the state's antitrust laws consistent with federal law.

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

#### [\*\*HN24\*\*](#) [blue icon] Standing, Requirements

The U.S. Court of Appeals for the Seventh Circuit has explained that Associated General Contractors of California, Inc. v. California State Council of Carpenters sets forth factors to consider whether a plaintiff satisfies the proximate cause (i.e., antitrust standing) requirement implicit in every antitrust case.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

#### [\*\*HN25\*\*](#) [blue icon] Standing, Requirements

While most states model their antitrust statutes and jurisprudence on federal law, they are under no obligation to do so. Still, many states have harmonization provisions—which can either be statutory or derived from common law—that provide that the state's antitrust laws are to be read in harmony with federal antitrust laws. Even though all but one state at issue has a harmonization provision, many states expressly have rejected Illinois Brick's bar on indirect purchaser claims by enacting repealer statutes' abrogating the Supreme Court's prohibition on indirect-purchaser actions as articulated in Illinois Brick.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

#### [\*\*HN26\*\*](#) [blue icon] Standing, Requirements

The presence of a statutory harmonization provision (either statutory or common law), absent any countervailing statutory law or case law from a state appellate court, is sufficient to permit a district court to apply federal antitrust-standing law—including Associated General Contractors of California, Inc. v. California State Council of Carpenters claims brought under that state's antitrust laws. Absent countervailing authority, it would be odd to read an exception into a state's harmonization provision. The fact that so many states took action in response to Illinois Brick shows that states are quite capable of rejecting federal antitrust law when they see fit to do so.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

#### [\*\*HN27\*\*](#) [blue icon] Standing, Requirements

The adoption of an Illinois Brick repealer statute does not preclude the application of Associated General Contractors of California, Inc. v. California State Council of Carpenters (AGC). The Illinois Brick and AGC analyses are analytically distinct. It is one thing to say that a state is willing to allow someone other than a direct purchaser to have the opportunity to shoulder the burden of showing proximate causation; it is quite another thing to say that the state has thrown both the direct-purchaser rule and proximate causation out the window. States with Illinois Brick-repealer statutes have not replaced one per se rule with another, so that all indirect-purchaser suits can proceed no matter how far removed the purchasers are from the production process and no matter how speculative the damages award would be. The court therefore cannot assume—absent some in-state authority to the contrary—

that states that have enacted Illinois Brick repealers also have abandoned AGC's antitrust standing requirement. The application of AGC to a plaintiff's claims ultimately is a question of state law.

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

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

### [HN28](#) [] Standing, Requirements

In deciding whether to apply Associated General Contractors of California, Inc. v. California State Council of Carpenters to state-law antitrust claims, the federal district court looks to whether the relevant state supreme court or state legislature has spoken to the issue. In the absence of guiding decisions by the state's highest court, federal courts consult and follow the decisions of intermediate state appellate courts unless there is a convincing reason to predict that the state's highest court would disagree.

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

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

### [HN29](#) [] Standing, Requirements

At least one court in the District of Columbia has applied Associated General Contractors of California, Inc. v. California State Council of Carpenters despite its Illinois Brick repealer statute. Absent any binding District of Columbia authority to the contrary, such decision and the deferential harmonization provision remain the best indicators of how the District of Columbia Court of Appeals (the highest court in the District of Columbia) would address the issue.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

### [HN30](#) [] Private Actions, State Regulation

Iowa courts have interpreted the state's harmonization provision, [\*Iowa Code Ann. § 553.2\*](#), narrowly. The purpose of Iowa's antitrust harmonization statute was to achieve uniform application of the state and federal laws prohibiting monopolistic practices, not to define who can sue under [antitrust law](#).

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

### [HN31](#) [] Standing, Requirements

Although the Iowa Supreme Court has rejected the application of Illinois Brick to Iowa competition law, the Iowa Supreme Court has continued to apply Associated General Contractors of California, Inc. v. California State Council of Carpenters.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

### **HN32** [blue icon] **Private Actions, State Regulation**

Courts have recognized that Maine's antitrust statute parallels federal law and therefore have analyzed state claims according to federal law.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

### **HN33** [blue icon] **Standing, Requirements**

The Supreme Court of Nebraska has applied Associated General Contractors of California, Inc. v. California State Council of Carpenters (AGC) despite the state's repealer statute, noting that Illinois Brick and AGC are analytically distinct.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

### **HN34** [blue icon] **Standing, Requirements**

The New Mexico Supreme Court has not addressed whether Associated General Contractors of California, Inc. v. California State Council of Carpenters (AGC) applies to claims under the New Mexico Antitrust Act, but a New Mexico appellate court has concluded that AGC applies.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

### **HN35** [blue icon] **Standing, Requirements**

In light of South Dakota's harmonization statute and absent any state-law authority to the contrary, the U.S. District Court for the Northern District of Illinois concludes that South Dakota would apply Associated General Contractors of California, Inc. v. California State Council of Carpenters to claims under South Dakota law.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

### **HN36** [blue icon] **Standing, Requirements**

Absent any authority to the contrary, the U.S. District Court for the Northern District of Illinois concludes that Associated General Contractors of California, Inc. v. California State Council of Carpenters applies to claims brought under Vermont law in light of Vermont's harmonization statute.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

#### [HN37](#) [blue icon] **Private Actions, State Regulation**

Wisconsin courts traditionally look to federal law to interpret substantive violations of the Wisconsin antitrust statutes.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

#### [HN38](#) [blue icon] **Standing, Requirements**

Even though Wisconsin does not have a harmonization statute, the fact that courts have long applied federal law to Wisconsin antitrust claims convinces the U.S. District Court for the Northern District of Illinois that the Wisconsin Supreme Court likely would apply Associated General Contractors of California, Inc. v. California State Council of Carpenters to antitrust claims brought under Wisconsin law.

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

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

#### [HN39](#) [blue icon] **Standing, Requirements**

Although claims brought under the laws of the states in which no named plaintiff purchased goods must be dismissed for lack of U.S. Const. art. III standing, the trend has been to treat the issue as one of statutory standing that can be deferred until class certification. This trend is consistent with recent U.S. Court of Appeals for the Seventh Circuit caselaw holding that the question of who is authorized to bring an action under a statute is one of statutory interpretation; it does not implicate Article III or jurisdiction.

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

#### [HN40](#) [blue icon] **Trade Practices & Unfair Competition, State Regulation**

The Delaware Consumer Fraud Act, [Del. Code Ann. tit. 6, § 2512](#), requires that the relevant conduct occur in part or wholly within the State. [§ 2512](#).

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

#### [HN41](#) [blue icon] **Trade Practices & Unfair Competition, State Regulation**

North Carolina's Unfair Trade Practices Act reaches only conduct causing a substantial in-state injury, not merely an incidental one. When plaintiffs do not allege that any wrongful conduct occurred in North Carolina, allegations that indirect purchasers paid inflated prices are not sufficient to establish a substantial, in-state injury.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

#### **HN42[] Trade Practices & Unfair Competition, State Regulation**

A civil plaintiff filing an action under Wisconsin's antitrust act must allege that (1) actionable conduct, such as the formation of a combination or conspiracy, occurred within the state, even if its effects are felt primarily outside Wisconsin; or (2) the conduct complained of substantially affects the people of Wisconsin and has impacts in the state, even if the illegal activity resulting in those impacts occurred predominantly or exclusively outside the state.

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

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

#### **HN43[] Trade Practices & Unfair Competition, State Regulation**

Massachusetts's consumer protection statute requires that the actions and transactions constituting the alleged unfair method of competition or the unfair or deceptive act or practice must have occurred primarily and substantially in Massachusetts. [Mass. Gen. Laws ch. 93A, § 11](#). However, the burden of proof shall be upon the person claiming that such transactions and actions did not occur primarily and substantially within the commonwealth. As this presents a factual question, a [§ 11](#) cause of action, attacked via a motion to dismiss, should survive a primarily and substantially challenge so long as the complaint alleges that the plaintiff is located, and claims an injury, in Massachusetts.

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

#### **HN44[] Trade Practices & Unfair Competition, State Regulation**

New Hampshire's consumer protection act applies only to the conduct of any trade or commerce within that state. [RSA 358-A:2](#).

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

#### **HN45[] Private Actions, State Regulation**

Alabama's antitrust statute regulates conduct occurring intrastate.

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

#### **HN46[] Trade Practices & Unfair Competition, State Regulation**

The law is well settled that the TTPA applies only to tangible goods, not intangible services. The U.S. District Court for the Northern District of Illinois declines to conclude that software does not constitute a tangible good under the TTPA.

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

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

#### **HN47** [blue icon] State Regulation, Claims

Indirect users can bring claims under the TPPA.

Civil Procedure > Appeals > Appellate Briefs

#### **HN48** [blue icon] Appeals, Appellate Briefs

Arguments raised for the first time in reply briefs are ordinarily waived, and rightly so given the lack of opportunity for the other party to respond to them.

Civil Procedure > Special Proceedings > Class Actions

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

#### **HN49** [blue icon] Special Proceedings, Class Actions

The U.S. Supreme Court has ruled that [Fed. R. Civ. P. 23](#)-not the New York class action bar-applies in federal court. Justice Scalia's plurality decision took the position that properly enacted federal rules of procedure always apply in federal court. Justice Stevens's concurring opinion took the position that properly enacted federal rules generally apply in federal court, unless the federal rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right. Although the U.S. Court of Appeals for the Seventh Circuit has not squarely addressed which opinion controls, it otherwise has indicated that Justice Scalia's plurality sets forth the controlling legal standard.

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

Civil Procedure > Special Proceedings > Class Actions

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

#### **HN50** [blue icon] State Regulation, Claims

Colorado's Consumer Protection Act (CCPA) bars class claims for money damages. [Colo. Rev. Stat. § 6-1-113\(2\)](#). However, whether the federal procedural rule allowing class actions (i.e., [Fed. R. Civ. P. 23](#)) trumps the state-law bar on class actions under the CCPA depends on the two-step analysis established by the U.S. Supreme Court in Shady Grove.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Civil Procedure > Special Proceedings > Class Actions > Notice of Class Action

#### **HN51** [blue icon] Federal & State Interrelationships, Erie Doctrine

If there is no conflict between [Fed. R. Civ. P. 23](#) and state notice requirements, then the state notice requirements would apply.

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

#### [HN52](#) [+] **State Regulation, Claims**

To state a claim under the Arkansas Deceptive Trade Practices Act, plaintiffs must allege a consumer-oriented act.

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

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

#### [HN53](#) [+] **State Regulation, Claims**

The Georgia Fair Business Practices Act (GFBPA) makes unlawful unfair or deceptive acts or practices in the conduct of consumer transactions and consumer acts or practices in trade or commerce but limits the definition of "consumer" to a natural person and "consumer transactions" to those that are primarily for personal, family, or household purposes. O.C.G.A. §§ 10-1-393(a), [10-1-392\(a\)\(6\)](#), [10-1-392\(a\)\(10\)](#). Although business entities may bring suit under the GFBPA, the allegedly deceptive actions and practices that are the subject of the suit must be those directed at natural persons.

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

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

#### [HN54](#) [+] **State Regulation, Claims**

The Arkansas Deceptive Trade Practices Act (ADTPA) prohibits unconscionable, false, or deceptive business practices without reference to unfair business practices. [Ark. Code Ann. § 4-88-107\(a\)\(10\)](#). The ADTPA further notes that the deceptive and unconscionable trade practices listed are in addition to and do not limit the types of unfair trade practices at common law or under other statutes of the state. [Ark. Code Ann. § 4-88-107\(b\)](#). Courts therefore have concluded that claims under the ADTPA are limited to instances of false representation, fraud, or the improper use of economic leverage in a trade transaction. An unconscionable act is an act that affronts the sense of justice, decency, or reasonableness.

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

#### [HN55](#) [+] **State Regulation, Claims**

A plaintiff may state a claim under the New Mexico consumer protection statute by pleading that defendant either acted in a way that (1) took advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or (2) resulted in a gross disparity between the value received by a person and the price paid. [N.M. Stat. § 57-12-2\(E\)](#) (2016). Nothing in the statute or in caselaw from New Mexico limits consumer protection claims to those involving grossly unequal bargaining power.

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

## HN56[] Complaints, Requirements for Complaint

Plaintiffs need only plead facts, not legal theories, in their complaints.

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For Hoover Automotive, LLC, individually and on behalf of all others similarly situated doing business as Hoover Dodge Chrysler Jeep of Summerville, Plaintiffs: Karen Halbert, Mike L. Roberts, LEAD ATTORNEYS, Roberts Law Firm, P.A., Little Rock, AR; Philip N Elbert, LEAD ATTORNEY, PRO HAC VICE, Charles F. Barrett, Neal & Harwell, PLC, Nashville, TN; Shawn M Raiter, Larson & King, LLP, St. Paul, [\*\*5] MN; Peggy J Wedgworth, Milberg LLP, New York, NY.

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For 440 Jericho Turnpike Sales LLC, on Behalf of Themselves, and on Behalf of All Others Similarly Situated, Patchogue 112 Motors LLC, on Behalf of Themselves, and on Behalf of All Others Similarly Situated, Plaintiff: Peggy J Wedgworth, LEAD ATTORNEY, Milberg LLP, New York, NY; James E. Cecchi, Carella Byrne Cecchi Olstein Brody & Agnesso, P.C., Roseland, NJ; Justin Nicholas Boley, Kenneth A. Wexler, Wexler Wallace LLP, Chicago, IL; Leonard A Bellavia, PRO HAC VICE, Bellavia Blatt & Crossett, P.C., Mineola, NY.

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For Bob Baker Volkswagen, Plaintiff: Brian Morrison, Karin E. Garvey, PRO HAC VICE, Christopher J McDonald, Gregory Asciolla, Labaton Sucharow LLP, New York, NY; Michael Thomas Layden, Richard J. Prendergast, Richard J. Prendergast, Ltd., Chicago, IL; Samuel Issacharoff, New York, NY.

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Motor Vehicle Software Corporation, Plaintiff, Pro se.

Motor Vehicle Software Corporation, Plaintiff, Pro se.

Authenticom [\*\*8] Inc., Plaintiff, Pro se.

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For Petri Imports, LLC, Marshall Chrysler Jeep Dodge, LLC, Cliff Harris Ford, Inc., H&H Continental Motors, Inc., Pitre, Inc., Continental Autos, Inc., Aca Motors, Inc., [\*\*9] NV Autos, Inc., Warrensburg Chrysler Dodge Jeep, LLC, Naperville Zoom Cars, Inc., Waconia Dodge, Inc., Jim Marsh American Corporation, Cherry Hill Jaguar, Continental Class Motors, Inc., Jericho Turnpike Sales. LLC, Gregoris Motors, Inc., Kenny Thomas Enterprises, Inc., HDA Motors, Inc., 5800 Countryside, LLC, Plaintiffs: Peggy J Wedgworth, Milberg LLP, New York, NY.

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For XCELERATED, LLC, XCELERATED DATA LLC, PENSA LLC, Respondents: James Robert Irving, LEAD ATTORNEY, Bingham Greenebaum Doll LLP, Louisville, KY.

For Dominion Enterprises, [\*\*11] Inc., Respondent: Deepti Bansal, Marc G Schildkraut, PRO HAC VICE, Cooley LLP, Washington, DC; Jeffrey Thomas Norberg, Neal & McDevitt, Northfield, IL.

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For CDK Global, LLC, Defendant: Andrew Stanley Marovitz, Britt Marie Miller, Matthew David Provance, Michael Anthony Scodro, Mayer Brown LLP, Chicago, IL; Jeffrey Allan Simmons, Foley & Lardner LLP, Madison, WI; John Nadolenco, Mayer, Brown & Platt, Los Angeles, CA; Joseph S Harper, Foley & Lardner, Madison, WI; MICHAEL MARTINEZ, MAYER BROWN LLP, NEW YORK, NY; Mark W. [\*\*12] Ryan, Mayer Brown, Washington, DC; Michelle M. Umberger, Perkins Coie LLP, Madison, WI; William N. Reed, BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC - Jackson, Jackson, MS.

**Judges:** Robert M. Dow, Jr., United States District Judge.

**Opinion by:** Robert M. Dow, Jr.

## Opinion

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### [\*519] MEMORANDUM OPINION AND ORDER

Before the Court are Defendant CDK Global, LLC's motion to compel arbitration and stay claims, or, in the alternative, to [\*520] dismiss the dealership consolidated class action complaint [262], and Plaintiffs' unopposed motions for leave to submit supplemental authority [366; 420]. Plaintiffs' unopposed motions for leave to submit supplemental authority [366; 420] are granted. The Court considers those submissions as well as Defendant's responses (in its reply and in its own supplemental brief) in ruling on the pending motion to dismiss. For the reasons set forth below, Defendant's motion to dismiss in favor of arbitration is denied, and its alternative motion to dismiss is granted in part and denied in part.

#### I. Background<sup>1</sup>

Defendants CDK Global, LLC ("CDK") and Reynolds and Reynolds Company ("Reynolds") provide Dealer Management System ("DMS") software and services to automobile dealerships throughout the United States, [\*13] including in Illinois. [198 (Compl.), at ¶¶ 51-52.] In addition to providing DMS services, CDK and Reynolds also provide data integration services ("DIS") indirectly to dealerships throughout the United States, including in Illinois. [*Id.*] Plaintiffs are automobile dealerships across the country who are purchasing and/or who have purchased DMS services from CDK or Reynolds. [*Id.* at ¶¶ 26-50.] Plaintiffs purport to bring this class action against Defendants CDK and Reynolds for alleged violations of the *Sherman Act* and state antitrust and consumer protection laws. [*Id.* at 5.] Plaintiffs allege that Defendants unlawfully colluded and conspired to restrain and/or eliminate competition by charging supracompetitive prices in the markets for: (1) DMS software services; and (2) DIS. [*Id.* at ¶ 1.]

#### A. The DMS Market

The DMS, sometimes described as the "central nervous system" for dealerships, is an enterprise software system designed specifically for automobile dealerships. [*Id.* at ¶ 3.] The DMS functions as the dealerships' central database and repository of all its operational information, including information regarding sales, financing, inventory management (both vehicles and parts), repair and service, [\*14] accounting, payroll, human resources, marketing, and car manufacturer certifications. [*Id.* at ¶¶ 3, 61.] The physical storage of the data is either onsite at the

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<sup>1</sup> For the purposes of this motion to dismiss, the Court accepts as true all of Plaintiffs' well-pleaded factual allegations and draws all reasonable inferences in Plaintiffs' favor. *Killingsworth v. HSBC Bank Nev., N.A.*, 507 F.3d 614, 618 (7th Cir. 2007).

dealerships, at private data centers operated by the DMS provider, or with cloud-based data storage companies. [Id. at ¶61.] The DMS includes a database and data storage component that allows dealerships to enter and store data in real time. [Id. at ¶ 3.]

Switching DMS providers is difficult, expensive, and disruptive to a dealership's business. [Id. at ¶ 4.] Changing DMS providers requires entirely new hardware and software. [Id.] It can cost as much as \$50,000 up front to change DMS providers. [Id.] It typically takes dealerships a year or more to prepare for changing DMS providers. [Id.] In November 2016, CDK's CEO acknowledged that "switching DMS providers can be very difficult. It [is] quite a process [to] change and takes time, which is part of the reason that many dealers are hesitant to switch." [Id. at ¶ 66.] Switching DMS providers is not only a costly and lengthy procedure, it is also extremely risky. [Id. at ¶ 67.] Dealers store vital data on their DMSs, and access to their data is crucial to the daily operation **[\*\*15]** of their business. [Id.] DMS providers control access to dealers' DMSs and can restrict or deny access to the DMSs, severely **[\*521]** crippling the dealers' businesses as retribution for changing DMS providers. [Id.]

CDK and Reynolds are in the business of providing DMS software and services to dealerships like Plaintiffs. [Id. at ¶ 2.] Together they control approximately 75 percent of the United States DMS market measured by the number of franchised automobile dealerships using their systems, with CDK controlling approximately 45 percent of the DMS market and Reynolds controlling approximately 30 percent of the DMS market. [Id.] The remaining 25 percent is divided among other smaller DMS providers that typically service smaller dealerships in niche submarkets. [Id. at ¶ 2 n.1.] CDK and Reynolds have even higher market shares when measured by revenue, with CDK having approximately \$2.2 billion in total annual revenue and Reynolds having approximately \$1.7 billion in total annual revenue. [Id.]

Both CDK and Reynolds have previously indicated that dealers own the data on their DMSs. For example, Steve Annen (CDK's former CEO) stated, "I don't know how you can ever make the opinion that the data **[\*\*16]** is yours to govern and to preclude others from having access to it, when in fact it's really the data belonging to the dealer. As long as they grant permission, how would you ever go against that wish?" [Id. at ¶ 74.] Howard Gardner (CDK's Vice President of Data Strategy) has stated that CDK "has always understood that dealerships own their data and enjoy having choices on how best to share and utilize that data with others." [Id.] Matt Parsons (CDK's Vice President of Sales and Marketing) has stated, "We're not going to limit the ability of a dealer to give an ID to someone else to, in essence, dial into their system. That is the dealer's right. We have no right to tell them they can't do that." [Id.] Similarly, Reynolds spokesman Tom Schwartz stated that "[t]he data belongs to the dealers. We all agree on that." [Id.]

## B. The DIS Market

CDK and Reynolds also provide DIS separate from their DMS offerings. [Id. at ¶ 5.] CDK's data integration service is known as Third Party Access ("3PA"), and Reynolds's data integration service is known as Reynolds Certified Interface ("RCI"). [Id. at ¶ 71.] Although 3PA and RCI only provide DIS for Defendants' respective DMSs, CDK also owns two independent **[\*\*17]** data integrators—Digital Motorworks ("DMI") and IntegraLink—that provide DIS with respect to data stored on others' DMSs (e.g., Reynolds) as well. [Id. at ¶ 76.] DIS are critical to the proper functioning of dealerships. [Id. at ¶ 5.] DIS enable dealers and third-party software application providers (also known as vendors) to extract, organize, and integrate the dealers' data on their DMSs into a usable format. [Id.]

To effectively run their dealerships, dealers engage vendors to provide necessary services such as inventory management, customer relationship management, warranty services, repair orders, and electronic vehicle registration and titling. [Id.] For example, a dealer might engage a vendor to electronically register new automobiles upon sale. [Id. at ¶ 73.] In providing services to dealers, vendors need to access and utilize DMS data. [Id.] A single dealership typically uses multiple vendors, with each vendor requiring access to the dealership's data stored on its DMS. [Id.] Vendors generally engage DIS providers that charge vendors for their services. [Id. at ¶ 5.] Although vendors have the dealers' authorization to access and utilize the data on their DMSs, vendors generally **[\*\*18]** cannot obtain access to the data in a usable format directly from dealers. [Id. at ¶ 75.] To access and utilize dealer data, vendors engage **[\*522]** data integrators to extract, format, and organize the data. [Id.] The data integrators

access the data stored on the DMS and convert it into a form suitable for the specific service provided by the vendor. [Id.]

Historically, the DIS market was active, with numerous DIS providers competing to provide affordable, secure, and reliable access to DMS data for dealerships and vendors. [Id. at ¶ 6.] In 2006, Reynolds began selectively and sporadically blocking data integrators from accessing dealer data on the Reynolds DMS by disabling data integrators' dealer-created login credentials. [Id. at ¶ 77.] CDK differentiated itself and the CDK DMS from Reynolds by publicly touting the openness of its DMS. [Id.] CDK repeatedly vowed (including in public statements by its CEO and top marketing officers) that it would not block independent data integrators from accessing dealer data on its DMS. [Id.] CDK marketed its "open" system directly to dealers and issued press releases stressing that it "believes in the fair competitive environment and does not use its **[\*\*19]** leverage through supply of the dealer management system to reduce competition through the restriction of data access." [Id. at ¶ 78.] CDK was successful in marketing its "open" DMS to dealers as a competitive advantage over the Reynolds DMS, and dealers purchased DMS services from CDK based in large part on CDK's public representations about the openness of its DMS. [Id.] As a result, CDK gained market share from Reynolds. [Id.] In 2013, Reynolds began vigorously blocking data integrators. [Id. at ¶ 79.] CDK, however, continued to allow open access to its DMSs and to compete with Reynolds. [Id.]

### C. Alleged Agreement

Despite CDK's success in wresting market share away from Reynolds, its biggest competitor in the DMS market, competition between Reynolds and CDK suddenly ceased in 2015. [Id. at ¶ 80.] Plaintiff alleges that this was the result of horizontal agreements between CDK and Reynolds to restrain competition in the DMS and DIS markets. Specifically, CDK and Reynolds agreed to cooperate in closing their respective DMSs. [Id. at ¶ 81.] In February 2015, CDK and Reynolds entered into three written agreements: (1) the Data Exchange Agreement or "Wind Down" Agreement; (2) the 3PA Agreement; **[\*\*20]** and (3) the RCI Agreement. [Id. at ¶ 82.]

The Data Exchange Agreement provides that CDK is to wind down its data integration business on Reynolds's DMS. [Id. at ¶ 83.] In other words, CDK would stop providing services to dealers relating to the third-party integration of data stored on Reynolds's DMS. [Id.] At the same time, Reynolds agreed not to block CDK's access to Reynolds's DMS during the wind-down period, which lasts until 2020. [Id.] During that wind-down period, Defendants agreed that CDK could continue to extract dealer data from Reynolds's DMS. [Id. at ¶ 84.] At the same time, under § 4.2 of the Data Exchange Agreement, CDK was to notify its vendor clients of its intent to wind down its data integration related to Reynolds's DMS. [Id.] Under § 4.4 of the Data Exchange Agreement, CDK was to assist and cooperate with Reynolds's efforts to communicate with CDK's vendor clients and transition them to RCI. [Id.] In connection with that effort, CDK agreed to provide Reynolds with full information about the vendors CDK served, including their names, DMS numbers, store numbers, branch numbers, user logins, specific data access provided by CDK, data interfaces, the frequency of the data provided, the deadlines for data delivery, and the format of the data. [Id. **[\*\*21]** at ¶ 85.] The Data Exchange Agreement also includes a "Prohibition on Knowledge Transfer and DMS Access" provision, whereby CDK and Reynolds each agreed not to provide DIS **[\*523]** with respect to data on the other's DMS. [Id. at ¶ 86.]

The two other written agreements made by Defendants in February 2015 were (1) the 3PA Agreement; and (2) the RCI Agreement. [Id. at ¶ 87.] These two agreements, collectively referred to as the "Data Integration Agreements," provided CDK and Reynolds reciprocal access to each other's DIS programs—the 3PA and RCI programs, respectively. [Id.] In the agreements, Reynolds received five free years of 3PA access. [Id. at ¶ 88.] Reynolds also agreed to access CDK's DMS exclusively through 3PA, and further agreed that it would not "otherwise access, retrieve, license, or otherwise transfer any data from or to a CDK system (including, without limitation, pursuant to any 'hostile interface') for itself or any other entity" or contract with any third parties to access the system. [Id.] The Data Integration Agreements also provided that CDK and Reynolds would deny data integrators access to each other's DMSs. [Id. at ¶ 89.]

Plaintiffs also allege that Defendants agreed to **[\*\*22]** force vendors to use Defendants (or their affiliates) to access their respective DMSs. [Id. at ¶ 171.] As evidence of this agreement, the complaint references an April 2016

conversation between Dan McCray (CDK's Vice President of Product Management) and Stephen Cottrell (CEO of Authenticom, a competing data integrator), in which Mr. McCray stated:

[W]e've entered into an agreement with Reynolds and Reynolds, okay? That agreement specifically says that we're going to support each other's third party interfaces, and we're working collaboratively to remove all hostile integrators from our DMS system.

[*Id.* at ¶ 101.] Similarly, in March 2015, Robert Schaefer (Reynolds's Vice President of OEM Relations, Data Services, and Security) told Mr. Cottrell: "We've made agreements with the other major DMS providers to support each other's third-party access agreements and to block independent integrators such as Authenticom." [*Id.* at ¶ 100.]

Defendants have claimed that their agreements with each other serve an important business justification: the need to protect their systems and the data on those systems from cybersecurity threats. However, Plaintiffs allege that Defendants' security justification [\*\*23] is pretextual. [*Id.* at ¶¶ 153-64.] Plaintiffs allege that "Automotive News reported that '[a] vendor executive who asked not to be named called the data-access cost a surcharge under the guise of data security.'" [*Id.* at ¶ 155.] Along the same lines, a CDK employee has made statements indicating that the security justification really was a "message" used by Defendants to justify increased fees, stating "[i]f we are going with security as our message, I feel we MUST incorporate language into our contract \* \* \* I feel a discussion around what these additional security items will be is warranted—once we have agreement on these security items it will help us update the managed data services agreement and further refine our message to the market." [*Id.* at ¶ 156.] Plaintiffs have identified similar statements indicating that the claimed security justification was pretextual. [*Id.* at ¶¶ 157-64.]

Plaintiffs allege that CDK and Reynolds have been able to impose massive price increases on vendors as a result of their agreements. [*Id.* at ¶ 134.] These increased fees are passed on to dealers. [*Id.*] Vendors have acknowledged that they pass increased data integration fees on to dealers. [*Id.* at ¶ [\*\*24] 135.] For example, a vendor informed a dealer that it was raising the fees it charged the dealer by \$500 a month as a result of CDK's higher integration fees. [*Id.* at ¶ 141.] Plaintiffs also allege that the agreements between [\*524] CDK and Reynolds have decreased the functionality of their DMSs. The dealers' ability to freely access their own data on their DMSs through third-parties was an important feature of their DMSs and their functionality. [*Id.* at ¶ 148.] Through their unlawful conduct, however, Defendants eliminated this feature, thereby restraining competition and increasing prices paid by the dealers for their DMSs. [*Id.* at ¶ 149.]

#### D. Alleged Exclusive Dealing

Plaintiffs also allege that CDK began canceling and renegotiating its 3PA vendor contracts to impose exclusive dealing provisions on vendors shortly after entering the Data Exchange Agreement. [*Id.* at ¶ 111.] These new 3PA contracts (also referred to as the "Managed Interface Agreements") required vendors to use 3PA if they wished to integrate CDK DMS data. [*Id.*] To ensure that vendors signed on to the new contracts, CDK sent an initial letter to dealers warning that access to its DMS by third-party integrators would cease. [\*\*25] [*Id.* at ¶ 112.] Subsequently, in September 2015, CDK sent dealers a letter indicating that it "intend[ed] to remove the majority of unauthorized third party [sic] access methods by Dec 31, 2016." [*Id.* at ¶ 112.] CDK employees were instructed that if any vendor failed to migrate to 3PA by December 31, 2016, the vendor's access to CDK's DMS would be disabled. [*Id.*] Plaintiffs allege that vendors agreed to the Managed Interface Agreements under threat of losing access to necessary data. [*Id.* at ¶ 113.]

The Managed Interface Agreements contained provisions explicitly prohibiting vendors from obtaining dealer data from anyone other than CDK. [*Id.* at ¶ 114.] The contracts were entered on a vendor-by-vendor basis, not an application-by-application basis, so if a vendor wanted to use CDK's integration services for one application, the vendor also had to use CDK's product for all of its other applications. [*Id.*] The contracts states: "Vendor agrees that it will, beginning on the date CDK certifies the use of the first Application with the CDK Interface System, access data on, and provide data to, CDK Systems exclusively through the Managed Interface System [a.k.a. 3PA] \* \* \*

[and] will not (i) [\*\*26] \* \* \* transfer any data from or to a CDK System \* \* \* or (ii) contract with \* \* \* any third party \* \* \* to \* \* \* transfer any data from or to a CDK System." [*Id.*]

The Managed Interface Agreement also includes what Plaintiffs characterize as a pricefixing agreement, which provides that a vendor "shall never indicate in any way to any CDK Vendor Client that any increase in any price charged by [v]endor to any CDK Vendor Client is in reaction to, or in any other way associated with, any modification in the price charged by CDK hereunder with respect to [v]endor's use of the CDK Interface System." [*Id.* at ¶ 119.] The contract also states that the vendor "shall not include any 'interface' fee, DMS access fee or any other similar fee related to the use of the CDK Interface System in any of its invoices to its customers [dealers] or otherwise include any direct or indirect indication to its customers (in its invoices or otherwise) of the fees charged by CDK hereunder." [*Id.*] In a March 3, 2016 internal email, one CDK employee stated, "CDK's position is that the vendor should include the integration in the price of their product as a cost of doing business and not something they line item with [\*\*27] the dealer. Line iteming of integration fees along with claims of high DMS fees by vendors (most of them exaggerated) only leads to questions from our dealers about what CDK actually charges for integration." [*Id.*]

## E. Reynolds Arbitration Agreement

Six named Plaintiffs (collectively the "Reynolds Dealers") signed agreements [\*525] that oblige them to resolve certain claims against Reynolds in Dayton, Ohio. Relevant to this order is a binding arbitration provision included in every Reynolds Dealers' contract. The provision states in relevant part:

Any disputes between us related directly or indirectly to an Order<sup>2</sup> will be settled by binding arbitration \* \* \* under the American Arbitration Association Rules \* \* \* It does not matter whether the controversy is based on contract, tort, strict liability, or other legal theory. \* \* \* The arbitration will be held in Dayton, Ohio.

[255-9, at 12.] Both CDK and Reynolds moved to dismiss Plaintiffs' claims in favor of arbitration pursuant to this arbitration agreement or, in the alternative, dismiss Plaintiffs' claims for failure to state a claim. Defendant Reynolds subsequently withdrew its motion. Before the Court is the motion to dismiss filed by Defendant [\*\*28] CDK.<sup>3</sup>

## II. Legal Standard

**HN1** To survive a Federal Rule of Civil Procedure ("Rule") 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, the complaint first must comply with Rule 8(a) by providing "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), such that the defendant is given "fair notice of what the \* \* \* claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)) (alteration in original). Second, the factual allegations in the complaint must be sufficient to raise the possibility of relief above the "speculative level." E.E.O.C. v. Concentra Health Servs., Inc., 496 F.3d 773, 776 (7th Cir. 2007) (quoting Twombly, 550 U.S. at 555). "A pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Twombly, 550 U.S. at 555). Dismissal for failure to state a claim under Rule 12(b)(6) is proper "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief." Twombly, 550 U.S. at 558. In reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court accepts as true all of Plaintiffs' well-pleaded factual allegations and draws all reasonable inferences in Plaintiffs' favor. Killingsworth v. HSBC Bank Nev., N.A., 507 F.3d 614, 618 (7th Cir. 2007).

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<sup>2</sup> "Order" is defined as "the Master Agreement and/or an Exhibit that has been accepted by [Reynolds]." [255-10, at 3.]

<sup>3</sup> Because Reynolds withdrew its motion, all references to Defendant below are to Defendant CDK.

### III. Analysis

#### A. Arbitration

Although there is no agreement between Plaintiffs and Defendant to arbitrate Plaintiffs' claims, Defendant argues that the Reynolds [\*\*29] Dealers' agreement to arbitrate with Reynolds covers the claims at issue in this case and extends to the claims brought against CDK under the doctrine of equitable estoppel. Plaintiffs argue that (1) its claims are outside the scope the arbitration agreement, (2) CDK has not shown that it is entitled to invoke the doctrine of equitable estoppel, and (3) CDK has waived any right to seek arbitration of Plaintiffs' claims.

Before turning to the merits of these arguments, some discussion of the federal policy favoring arbitration is warranted. [HN2](#)[<sup>↑</sup>] Pursuant to the [Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.](#) [\*526] ("FAA"), "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction \* \* \* shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." [9 U.S.C. § 2](#). "The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [FAA]." [Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.](#), 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983); see also [Int'l Ins. Agency Servs., LLC v. Revios Reinsurance U.S., Inc.](#), 2007 U.S. Dist. LEXIS 22229, 2007 WL 951943, at \*2 (N.D. Ill. Mar. 27, 2007) ("Arbitrability is governed by federal law." (citation omitted)). [Section 2 of the FAA](#) is "a congressional declaration of a liberal federal policy favoring [\*\*30] arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." [Moses H. Cone](#), 460 U.S. at 24. Thus, "[w]hen the parties have agreed to arbitrate some matters pursuant to an arbitration clause, the law's permissive policies in respect to arbitration counsel that any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration." [Local 73, Serv. Emples. Int'l Union v. UChicago Argonne, LLC](#), 2011 U.S. Dist. LEXIS 13967, 2011 WL 635862, at \*3 (N.D. Ill. Feb. 11, 2011) (quoting [Granite Rock Co. v. Int'l Bhd. Of Teamsters](#), 561 U.S. 287, 298, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010)). "[A]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." [Int'l Bhd. of Elec. Workers, Local 21 v. Illinois Bell Tel. Co.](#), 491 F.3d 685, 687-88 (7th Cir. 2007) (internal quotation marks and citation omitted). With these principles in mind, the Court turns to the merits of the parties' arguments regarding the Reynolds Dealers' arbitration agreement with Reynolds.

##### i. Arbitrability

CDK moves for dismissal of the Reynolds Dealers' claims against it in favor of arbitration. As a threshold issue, the Court must address whether the issue of arbitrability properly is before this Court. Reynolds argued that the issue of arbitrability itself was subject to arbitration pursuant its agreements with the Reynolds Dealers. [255, at 21-23.] In their omnibus response [\*\*31] to Defendants' motions to dismiss, Plaintiffs argue that agreements to arbitrate the issue of arbitrability only are binding on signatories. [358, at 34.] CDK therefore would not be entitled to invoke Reynolds's agreement to arbitrate arbitrability of Plaintiffs' substantive claims. [Kramer v. Toyota Motor Corp.](#), 705 F.3d 1122, 1127 (9th Cir. 2013) ("Given the absence of clear and unmistakable evidence that Plaintiffs agreed to arbitrate arbitrability with nonsignatories, the district court had the authority to decide whether the instant dispute is arbitrable." (citation omitted)); [Nat'l Oilwell Varco, L.P. v. Sadagopan](#), 2018 U.S. Dist. LEXIS 1080, 2018 WL 276364, at \*2 (S.D. Tex. Jan. 3, 2018) ("The cases that do address using equitable estoppel to allow a nonsignatory to an arbitration agreement to enforce that agreement against a signatory treat this gateway issue as for the court to determine, except in circumstances not present here."); see also [AT&T Technologies, Inc. v. Communications Workers of America](#), 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986) [HN3](#)[<sup>↑</sup>] ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." (collecting cases)). CDK does not respond to this argument or otherwise argue that

it is entitled to the benefit of Reynolds's agreement to arbitrate arbitrability.<sup>4</sup> [\*527] Accordingly, the Court proceeds on the assumption that the Court has authority [\*\*\*32] to address the threshold issue of the arbitrability of Plaintiffs' claims against CDK.

## *ii. Equitable Estoppel*

**HN4**[] CDK argues that because the Reynolds Dealers' claims relate to their contracts with Reynolds, in which the Reynolds Dealers agreed to arbitrate certain claims against Reynolds, the Reynolds Dealers also must arbitrate their related claims against CDK. "[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960). Arbitration "is a matter of consent, not coercion." *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 479, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989). However, the "mere fact" that parties are not "signatories to [an] agreement does not defeat their right to compel arbitration." *Hoffman v. Deloitte & Touche, LLP*, 143 F. Supp. 2d 995, 1004 (N.D. Ill. 2001). Still, "[a]rbitration agreements apply to nonsignatories only in rare circumstances." *I Sports v. IMG Worldwide, Inc.*, 157 Ohio App. 3d 593, 2004- Ohio 3631, 813 N.E.2d 4, 8 (Ohio Ct. App. 2004). Here, CDK contends that the Reynolds Dealers are bound to arbitrate their claims against CDK under the doctrine of equitable estoppel.

**HN5**[] State law governs who is bound by agreements to arbitrate. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630, 129 S. Ct. 1896, 173 L. Ed. 2d 832 (2009). The parties dispute whether Ohio law or Illinois law applies to CDK's estoppel argument. CDK contends that Ohio law applies because Reynolds's contract with the Reynolds Dealers is governed by Ohio law. Plaintiffs contend that Illinois law applies because equitable [\*\*\*33] estoppel is a tort doctrine and Illinois law applies under the most significant relationship test to tort claims brought in Illinois courts. The Court need not decide which state's law applies, however, as the outcome is the same under both Illinois and Ohio law. *Coexist Found., Inc. v. Fehrenbacher*, 2016 U.S. Dist. LEXIS 101705, 2016 WL 4091623, at \*4 (N.D. Ill. Aug. 2, 2016) ("The Court need not decide which state's law applies as the outcome is the same under both."), aff'd, 865 F.3d 901 (7th Cir. 2017).

**HN6**[] Under Illinois law, a party cannot enforce an arbitration agreement under an equitable estoppel theory without detrimental reliance. *Warciak v. Subway Restaurants, Inc.*, 880 F.3d 870, 872 (7th Cir.), cert. denied, 138 S. Ct. 2692, 201 L. Ed. 2d 1076 (2018) (applying Illinois law); see also *Ervin v. Nokia, Inc.*, 349 Ill. App. 3d 508, 517, 812 N.E.2d 534, 285 Ill. Dec. 714 (2004). Here, CDK does not even argue that it can establish detrimental reliance. Accordingly, CDK cannot invoke equitable estoppel under Illinois law.

**HN7**[] Similarly, under Ohio law, detrimental reliance is necessary to invoke the doctrine of equitable estoppel. *Ohio State Bd. of Pharmacy v. Frantz*, 51 Ohio St. 3d 143, 555 N.E.2d 630, 633 (Ohio 1990) ("The party claiming the estoppel must have relied on conduct of an adversary in such a manner as to change his position for the worse and that reliance must have been reasonable."); *Glidden Co. v. Lumbermens Mut. Cas. Co.*, 112 Ohio St. 3d 470, 2006- Ohio 6553, 861 N.E.2d 109, 119 (Ohio 2006) ("Equitable estoppel does not apply when there is no actual or constructive fraud and no detrimental reliance[.]"). [\*528] The same contractual and estoppel principles apply to determining what parties are bound by an [\*\*\*34] agreement to arbitrate. *Warciak v. Subway Restaurants, Inc.*, 880 F.3d 870, 872 (7th Cir.), cert. denied, 138 S. Ct. 2692, 201 L. Ed. 2d 1076 (2018);<sup>5</sup> *Judge v. Unigroup, Inc.*, 2017

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<sup>4</sup> Although CDK adopts the arguments advanced by Reynolds in support of the application of the arbitration agreement, Reynolds did not need to address whether the threshold issue of arbitrability applies to nonsignatories, as Reynolds was a signatory. And CDK's own briefs do not address the issue.

<sup>5</sup> CDK argues that *Warciak* is distinguishable because it involved the application of Illinois law. **HN8**[] However, in *Warciak*, the Seventh Circuit cited to the Supreme Court's decision in *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 129 S. Ct. 1896, 173 L. Ed. 2d 832 (2009), for the proposition that traditional state-law principles such as assumption, agency, and estoppel apply to determining when a contract such as an agreement to arbitrate can be enforced against nonparties. *Warciak*, 880 F.3d at 872.

U.S. Dist. LEXIS 145576, 2017 WL 3971457, at \*5 (M.D. Fla. Sept. 8, 2017) (holding that Ohio law requires detrimental reliance to compel arbitration with a nonsignatory of an arbitration agreement).

CDK has not cited to any authority indicating that the Ohio courts would apply a different equitable estoppel standard in the context of enforcing arbitration agreements against nonsignatories.<sup>6</sup> The only Ohio case cited by CDK is *I Sports v. IMG Worldwide, Inc.*, which recognizes that other courts have enforced arbitration agreements against nonsignatories when (1) a signatory must rely on the terms of the written agreement to assert claims against a non-signatory, or (2) the signatory alleges substantially interdependent and concerted misconduct by the non-signatory and one or more signatories. 157 Ohio App. 3d 593, 2004- Ohio 3631, 813 N.E.2d 4, 9 (Ohio App. Ct. 2004). However, the court in *I Sports* concluded that the nonsignatory did not satisfy either standard. The Court therefore did not affirmatively conclude that either showing was sufficient to invoke equitable estoppel under Ohio law.<sup>7</sup> Even if a nonsignatory has to show that the signatory relied on the written terms of the contract or that the signatory alleges substantially interdependent misconduct [\*\*35] in order to enforce an arbitration agreement, that does not mean that detrimental reliance also is not required. As the Seventh Circuit has explained, even in the arbitration context, "the court must apply traditional state promissory estoppel principles to decide whether a non-party should be bound by the terms of another's contract." Warcia, 880 F.3d at 872. Because detrimental reliance is required to invoke equitable estoppel under Ohio law, and because CDK does not even argue that it can show detrimental reliance, CDK cannot invoke equitable estoppel under Ohio law to force the Reynolds Dealers to arbitrate their claims against CDK.

### [\*529] iii. Waiver

The Reynolds Dealers also argue that CDK waived any right to seek arbitration of their claims by failing diligently to assert its claimed right to arbitrate. HN9 [↑] "Despite the federal policy favoring arbitration, a contractual right to arbitration can be waived." Kawasaki Heavy Indus. v. Bombardier Rec. Prods., 660 F.3d 988, 994 (7th Cir. 2011) (citing St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co., Inc., 969 F.2d 585, 587 (7th Cir. 1992)). A waiver of a contractual right to invoke arbitration can be implied or express. Cabinetree of Wisconsin v. Kraftmaid Cabinetry, 50 F.3d 388, 390 (7th Cir. 1995). "For waiver of the right to arbitrate to be inferred, [the Court] must determine that, considering the totality of the circumstances, a party acted inconsistently with the [\*\*36] right to arbitrate." Kawasaki Heavy Indus., 660 F.3d at 994.

"Although a variety of factors may be considered, diligence or a lack thereof should weigh heavily in the court's determination of whether a party implicitly waived its right to arbitrate." Halim v. Great Gatsby's Auction Gallery, Inc., 516 F.3d 557, 562 (7th Cir. 2008) (citation omitted). The Seventh Circuit therefore has directed courts to consider whether "the party seeking arbitration \* \* \* [did] all it could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration[.]" Smith v. GC Servs. Ltd. P'ship, 907 F.3d 495, 499 (7th Cir. 2018) (quoting Cabinetree of Wisconsin, 50 F.3d at 391 (internal quotation marks omitted)). Other considerations "include whether the allegedly defaulting party participated in litigation,

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Thus, pursuant to Arthur Andersen and Warcia, the Court looks to Ohio's traditional equitable estoppel principles to determine when an arbitration agreement can be enforced against a nonsignatory under Ohio law.

<sup>6</sup> CDK notes that Plaintiffs fail to address the cases they cited to in their opening brief in which courts held that allegations of a conspiracy or joint venture between signatory and non-signatory defendants, including in the antitrust context, were sufficient to equitably estop the signatory plaintiff to arbitrate claims against the non-signatory defendant. [266, at 25 n.5.] However, none of those cases purported to apply Ohio law. Furthermore, all of those cases were decided before the Supreme Court made clear that state law governs who is bound by agreements to arbitrate. Arthur Andersen LLP, 556 U.S. at 630.

<sup>7</sup> The only Ohio case cited by the court in *I Sports* was *Gerig v. Kahn*, which held that a signatory to a contract may enforce an arbitration provision against a nonsignatory seeking a declaration of the signatories' rights and obligations under the contract. 95 Ohio St. 3d 478, 2002- Ohio 2581, 769 N.E.2d 381, 385-86 (Ohio 2002). However, the Ohio Supreme Court later limited *Gerig* to situations "when a nonparty is 'seeking a declaration of the signatories' rights and obligations under the contract." Henderson v. Lawyers Title Ins. Corp., 108 Ohio St. 3d 265, 2006- Ohio 906, 843 N.E.2d 152, 161 (Ohio 2006).

substantially delayed its request for arbitration, or participated in discovery." [Halim, 516 F.3d at 562](#). Still, "waiver is not lightly inferred; the strong federal policy favoring enforcement of arbitration agreements impresses upon a party asserting waiver a heavy burden." *Williams v. Katten, Muchin & Zavis*, 837 F. Supp. 1430, 1442 (N.D. Ill. 1993) (quoting [St. Mary's Med. Ctr. of Evansville, Inc., 969 F.2d at 590](#)); see also [Dickinson v. Heinold Secs., Inc., 661 F.2d 638, 641 \(7th Cir. 1981\)](#) ("a 'waiver of arbitration is not lightly to be inferred'" (quoting [Midwest Window Sys., Inc. v. Amcor Indus., Inc., 630 F.2d 535, 536 \(7th Cir. 1980\)](#)).

In this case, all relevant factors weigh in favor of finding that CDK waived any right to arbitrate the Reynolds Dealers' claims against it. To begin, CDK did not assert its intent to arbitrate at the "earliest feasible" [\*\*37] time. CDK argues that it moved to compel arbitration at the earliest possible opportunity—when it filed its opening motion to dismiss. However, CDK earlier could have asserted its intent to arbitrate, just as Reynolds has done throughout this lawsuit. The first dealership class action, *Teterboro Automall, Inc. v. CDK Global, LLC*, Case No. 2:17-cv-08714 (D.N.J.), was filed on October 19, 2017. Although Reynolds asserted its intent to arbitrate when it and CDK moved for transfer and consolidation of the cases against them, CDK did not make any similar reservation. [HN10](#) [↑] "[W]hen a party chooses to proceed in a judicial forum, there is a rebuttable presumption that the party has waived its right to arbitrate." [Kawasaki, 660 F.3d at 996](#). Along the same lines, CDK participated in discovery without making clear that its participation in discovery was not a waiver of its now-claimed right to arbitrate.<sup>8</sup> Cf. [Kawasaki Heavy Indus., 660 F.3d at 998](#) (finding no waiver where the defendant "mentioned its desire to arbitrate at every turn"). While it may not be necessary for a defendant expressly to reserve its right to arbitrate whenever it participates in discovery, in light of CDK's failure to assert its intent to arbitrate until July 2018, CDK acted inconsistent [\*\*38] with the intent to arbitrate.

[HN11](#) [↑] Furthermore, although a showing of prejudice is not required in order to find waiver, it is relevant. [Kawasaki, 660 F.3d at 995](#). Here, CDK argues that the Reynolds dealers would not be prejudiced as a result of CDK's delay in asserting its intent to arbitrate, but it is difficult to see how litigating a complex class action and participating in extensive discovery in court only to have litigation come to a halt would not be prejudicial to Plaintiffs. CDK argues that the Reynolds Dealers were not prejudiced because discovery from the dealers is relevant to many claims and issues raised in other MDL cases. [378, at 11 (citing [Dickinson v. Heinold Sec., 661 F.2d 638, 642 \(7th Cir. 1981\)](#).)] However, CDK—not the Plaintiffs—are parties to the other MDL cases. Thus, although it may have been necessary for CDK to participate in discovery regardless of whether it arbitrated its claims against the Reynolds Dealers, the Reynolds Dealers would not have had to participate in discovery (at least as a party). Given CDK's substantial delay in invoking its intent to arbitrate, forcing the Reynolds Dealers to arbitrate now would be highly prejudicial. Accordingly, even if CDK could invoke the doctrine of equitable estoppel to force the Reynolds dealers [\*\*39] to arbitrate their claims, CDK waived its right to do so.

## B. Antitrust Standing

### i. Damages

[HN12](#) [↑] Defendant argues that Plaintiffs' federal antitrust claims for damages (Counts I, III, and V) should be dismissed under [Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 \(1977\)](#), which holds that a federal antitrust plaintiff may not seek damages based on alleged supracompetitive prices passed through by a purchaser earlier in the distribution chain. As the Seventh Circuit recently summarized, *Illinois Brick* "forbids a customer of the purchaser who paid a cartel price to sue the cartelists, even if his seller—the direct purchaser from

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<sup>8</sup>To be sure, the Court is not saying that Defendant's participation in discovery alone is the basis for finding waiver. Defendant could have participated in discovery while reserving its right to arbitrate. Given the simplicity of Defendant's arbitration argument (i.e., Plaintiffs must arbitrate all claims relating to their contract with Reynolds), however, it does not appear as though Defendant's delay was necessary for Defendant to be able to determine which of Plaintiffs' claims are or are not arbitrable. Thus, Defendant's participation in discovery without any reservation of its right to arbitrate until July 2018 was inconsistent with the intent to arbitrate.

the cartelists—passed on to him some or even all of the cartel's elevated price." [\*Motorola Mobility LLC v. AU Optronics Corp.\*, 775 F.3d 816, 821 \(7th Cir. 2015\)](#). This is because when defendants "sell to a third party who \*\*\* could recover for any injury" it suffers as a direct purchaser, there is no need for separate and duplicative suits for "implicit overcharges" claimed further downstream. [\*Loeb Indus., Inc. v. Sumitomo Corp.\*, 306 F.3d 469, 482 \(7th Cir. 2002\)](#). "[W]here a plaintiff's injury is derivative of a more direct injury to some other person, and that person would have a strong motivation to pursue its own antitrust claim against the defendant, standing is not likely to exist." [\*In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.\*, 2013 U.S. Dist. LEXIS 119962, 2013 WL 4506000, at \\*9 \(N.D. Ill. Aug. 23, 2013\)](#) ("DFA I") (citing [\*Illinois Brick Co. v. Illinois\*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 \(1977\)](#)).

According to Defendant, because Plaintiffs are indirect purchasers [\*\*40] of data integration services, Plaintiffs are not proper [\*531] federal antitrust Plaintiffs under *Illinois Brick*. Plaintiffs implicitly recognize that their Sherman Act claims would be barred by *Illinois Brick* to the extent that their purported antitrust injuries are derivative of more direct injuries to participants or direct consumers in the DIS market. Plaintiffs argue, however, that Defendant erroneously conflates their status as indirect purchasers in the DIS market with their status as direct purchasers in the DMS market.

The Court agrees that Plaintiffs' horizontal conspiracy claim (Count I) is—at least to some extent—based on alleged anticompetitive conduct in the DMS market, as Plaintiffs allege that its DMS lost functionality and is worth less as a result of CDK's agreements with Reynolds. Defendant argues that this alleged diminution in value and functionality is just the flip side of the purported inability to access data integration in the DIS market.<sup>9</sup> However, Plaintiffs allege misconduct in the DMS market resulting in harm in the DMS market. Specifically, Plaintiffs allege that CDK and Reynolds, competitors in the DMS market, agreed not to compete with each other in certain respects [\*41] (i.e., permitting third-party DMS access) resulting in DMSs with less value and inferior functionality. Plaintiffs therefore allege anticompetitive conduct in the DMS market.

To the extent that Plaintiffs seek to recover alleged supracompetitive prices passed through vendors, however, the Court agrees that Plaintiffs' claims are barred by *Illinois Brick*. Although Plaintiffs argue that their exclusive dealing claim based on vendor contracts relates to alleged anticompetitive conduct in the DMS market, Plaintiffs' exclusive dealing claim is based on their status as indirect purchasers in the DIS market. Indeed, in arguing that it sufficiently has alleged substantial foreclosure, as necessary to state a claim for exclusive dealing under federal law, Plaintiffs argue that they sufficiently have alleged substantial foreclosure in the DIS market. Similarly, Plaintiffs' [Section 2](#) claims are based on alleged monopolistic conduct by Defendant in the DIS market—not the DMS market. As noted by the Seventh Circuit, in relation to the DMS market, "neither Reynolds nor CDK is a monopolist." [\*Authenticom, Inc. v. CDK Glob., LLC\*, 874 F.3d 1019, 1025 \(7th Cir. 2017\)](#). Thus, Plaintiffs' exclusive dealing claim based on vendor contracts and Plaintiffs' [Section 2](#) monopoly claim are barred by [\*42] *Illinois Brick*. The Court grants Defendant's motion to dismiss Count II and Count V. Furthermore, to the extent that Plaintiffs seek to bring a horizontal conspiracy claim based on agreements to restrain competition in the DIS market, Plaintiffs' horizontal conspiracy claim fails under *Illinois Brick* and Plaintiffs may not proceed under that theory.

## *ii. Injunctive Relief*

Defendant also argues that Plaintiffs lack antitrust standing to bring claims for injunctive relief under the Sherman Act and therefore moves to dismiss Counts II and IV. [HN13](#) Antitrust standing "examines the connection between the asserted wrongdoing and the claimed injury to limit the class of potential plaintiffs to those who are in the best position to vindicate the antitrust infraction." [\*Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.\*, 998 F.2d 391, 395 \(7th Cir. 1993\)](#) [\*532] (citations omitted). In [\*Associated General Contractors of California, Inc. v. California State Council of Carpenters\*, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 \(1983\)](#) ("AGC"), the

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<sup>9</sup> Defendant also argues that the Plaintiffs' argument that the alleged conspiracy deprived the DMS market of a "primary point of differentiation" between CDK and Reynolds fails because the 2015 Agreements do not prohibit either party from allowing hostile integration at any time. [266, at 29.] As discussed below, however, the Court would have to ignore the Plaintiffs' well-pleaded allegations to accept that argument.

Supreme Court held that regardless of whether an antitrust plaintiff has "constitutional standing," at the pleadings stage a district court "must make a further determination whether the plaintiff is a proper party to bring a private antitrust action." *Id. at 535* & n.31. The Court announced six factors to consider in assessing whether an antitrust plaintiff is the proper party to proceed under the antitrust [\*\*43] laws: "(1) the causal connection between the violation and the harm; (2) the presence of improper motive; (3) the type of injury and whether it was one Congress sought to redress; (4) the directness of the injury; (5) the speculative nature of the damages; and (6) the risk of duplicate recovery or complex damage apportionment." *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 484 (7th Cir. 2002) (citing *AGC*, 459 U.S. at 537-45). For injunctive relief, the "speculative nature of the damages" and "risk of duplicate recoveries" factors drop out of the analysis, *DFA I*, 2013 U.S. Dist. LEXIS 119962, 2013 WL 4506000, at \*9, but the need to establish antitrust standing remains. See *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110-11, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986) (requiring party seeking injunctive relief to show antitrust standing). "The 'broad proposition' emanating from AGC is that 'a party cannot recover when others more directly injured are better able to state a claim.'" *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at \*6 (N.D. Ill. June 29, 2015) ("DFA II") (quoting *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 489 (7th Cir. 2002)). Defendant argues that Plaintiffs' federal antitrust claims seeking injunctive relief fail under AGC because there are more directly-affected purchasers that can—and in this case are—seeking the same injunctive relief.

Plaintiffs argue that Defendant's AGC argument fails with respect to Defendants' conspiracy directed towards the DMS market because Plaintiffs—as direct purchasers of Defendant's DMS—are the most "directly-affected" [\*\*44] purchasers." Defendant does not dispute that—to the extent that Plaintiffs' claims are based on anticompetitive conduct in the DMS market—Plaintiffs' claims are not barred by AGC. As discussed above, however, Defendant contends that Plaintiffs' federal antitrust claims actually are based on alleged anticompetitive conduct in the DIS market, not the DMS market. Because Plaintiffs' federal horizontal conspiracy claims are based—at least to some extent—on alleged anticompetitive conduct in the DMS market, as discussed above, the Court denies Defendant's motion to dismiss such claims pursuant to *AGC*.

However, Plaintiffs' exclusive dealing claim for injunctive relief (Count IV) is based on alleged anticompetitive conduct in the DIS market. Plaintiffs nonetheless argue that when plaintiffs "do not seek damages for their Sherman Act claim, it is inconsequential that there are more 'immediate victims' of the scheme." [358, at 56 (quoting *In re Broiler Chicken Antitrust Litig.*, 290 F. Supp. 3d 772, 814 (N.D. Ill. 2017) (internal quotation marks omitted)).] Still, under AGC, the Court must consider the directness of the injury. Defendant contends that AGC bars federal antitrust claims—even claims seeking injunctive relief—when more directly-affected purchasers seek the [\*\*45] same injunctive relief that the more-remote plaintiff demands. In making that argument, Defendant relies on *DFA I*, which held that downstream participants in the retail market failed to satisfy the directedness prong of AGC. *2013 U.S. Dist. LEXIS 119962, 2013 WL 4506000*. In that case, [\*533] the plaintiffs alleged that defendants conspired to buy all of the available long positions in three months' worth of Class III milk futures contracts on the Chicago Mercantile Exchange in an effort to gain control of those markets and sell their positions at an unreasonably high price. *2013 U.S. Dist. LEXIS 119962, [WL] at \*1*. Plaintiffs alleged that they were injured by defendants' actions when they purchased finished products at artificially inflated prices. *Id.* But plaintiffs were "downstream participants in a retail market \*\*\* separate from the allegedly restrained market" and "the allegedly price-fixed products \*\*\* [were] not even components of the products that [the plaintiffs] purchased." *2013 U.S. Dist. LEXIS 119962, [WL] at \*12-13*. This Court therefore concluded that plaintiffs failed to satisfy the directness factor of the antitrust standing analysis. *Id.* The Court noted that the plaintiffs' injury was "not alleged to be a necessary step in furthering the ends of the conspiracy involving the two relevant markets." *2013 U.S. Dist. LEXIS 119962, [WL] at \*11*. In [\*\*46] fact, the causal link between the alleged anticompetitive conduct and the antitrust injury was attenuated; "there [were] numerous links in the chain of distribution before a finished dairy product reache[d] a retailer, including transactions between the retailer and its distributors or wholesalers, between distributors or wholesalers and manufacturers of cheese products, and between manufacturers and milk producers." *2013 U.S. Dist. LEXIS 119962, [WL] at \*14*.

The Court did not hold, however, that AGC categorically bars federal antitrust claims—even claims seeking injunctive relief—whenever more directly-affected purchasers seek the same injunctive relief that the more-remote

plaintiff demands.<sup>10</sup> The Court recognized that "the fact that the alleged conspiracy operated in the separate but related futures market [did] not necessarily doom the indirect purchaser plaintiffs' claims." *Id.* [HN14](#)

Furthermore, other courts in this district have concluded that "[w]hen damages are not at issue, as long as the plaintiffs' alleged injury is not 'remote' \*\*\* but is directly attributable to the conspiracy, the injury satisfies AGC." [In re Broiler Chicken Antitrust Litig.](#), 290 F. Supp. 3d 772, 814 (N.D. Ill. 2017).

Here, Plaintiffs claimed injury is not so remote as to bar their claims for injunctive relief. The [\[\\*\\*47\]](#) first four AGC factors (the factors relevant to Plaintiffs' injunctive relief claims)—including the directness factor—weigh in favor of finding that Plaintiffs have antitrust standing to pursue their federal antitrust claims for injunctive relief. Plaintiffs purchase the services of vendors who are consumers in the DIS [\[\\*534\]](#) market and who rely on DIS to provide their applications to dealers. Furthermore, the DIS market is closely related to and dependent on the DMS market in which Plaintiffs are consumers. Plaintiffs' injury therefore was a necessary step in furthering the ends of the conspiracy in the relevant markets. Furthermore, Plaintiffs allege that vendors have passed on overcharges directly to dealers. Thus, unlike [DFA I](#), the causal link between the alleged anticompetitive conduct and the antitrust injury is not attenuated. Defendant does not argue that the presence of an improper motive is lacking. Nor does Defendant argue that Plaintiffs' claimed injuries are not the type of injuries Congress sought to redress in the Sherman Act. Although Defendant does dispute that Plaintiffs satisfy the directness factor—relying extensively on *DFA I*—the Court finds *DFA I* distinguishable for [\[\\*\\*48\]](#) the reasons discussed above. Accordingly, the Court denies Defendant's motion to dismiss Plaintiffs' federal antitrust claims for injunctive relief (Counts II and IV) under AGC.

### C. Failure to State a Claim Under Federal Law

#### i. Horizontal Conspiracy Claims (Counts I-II)

Plaintiffs bring [Section 1](#) horizontal conspiracy claims against Defendant based on agreements made between CDK and Reynolds that—according to Plaintiffs—amount to agreements to restrain competition in the DMS and DIS markets. With respect to the DMS market, Plaintiffs allege that Defendant and Reynolds are "horizontal competitors" that both possess "dominant positions" in the DMS market. [198, at ¶¶ 170, 177.] Plaintiffs further allege that Defendant and Reynolds agreed to restrain competition in that market by agreeing to "reduce the functionality of CDK's DMS (including dealerships' ability to freely access their DMS data through authorized persons)." [*Id.* at ¶ 171; see also ¶¶ 148-49 (Dealerships' ability to access their data on DMS through third parties "was an important feature of the DMS and its functionality," and Defendants unlawfully "eliminated this feature of the DMS and its functionality.").] With respect to the DIS [\[\\*\\*49\]](#) market, Plaintiffs allege that Defendants agreed that CDK would stop hostilely accessing Reynolds's DMS. Defendants also agreed that they would not assist in the hostile access of one another's DMSs. Still, Defendant argues that Plaintiffs' allegations of a horizontal conspiracy are insufficient to state a claim for a number of reasons.

<sup>10</sup> Because the Court was applying the AGC factors to claims for damages and for injunctive relief, the Court addressed all relevant AGC factors. [HN15](#) However, as recognized by the Court, "[w]hen injunctive relief alone is at issue, some factors—namely the speculative nature of the damages and the risk of duplicate recoveries or complex damages apportionment—do not apply to the antitrust standing analysis." [DFA I, 2013 U.S. Dist. LEXIS 119962, 2013 WL 4506000, at \\*9](#) (citation omitted). This is consistent with [Cargill, Inc. v. Monfort of Colorado, Inc.](#), 479 U.S. 104, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986), in which the Supreme Court recognized that courts should protect against multiple lawsuits for damages and duplicative recoveries by examining factors such as "the potential for duplicative recovery, the complexity of apportioning damages, and the existence of other parties that have been more directly harmed, to determine whether a party is a proper plaintiff under § 4." *Id.* at 111 n.6. Because claims for injunctive relief do not present a risk of multiple lawsuits for damages and duplicative recoveries, the Supreme Court indicated that those factors are not relevant to the antitrust standing analysis for claims seeking injunctive relief. *Id.* "[T]he fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one." *Id.* (quoting [Hawaii v. Standard Oil Co. of Cal.](#), 405 U.S. 251, 261, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972)) (internal quotation marks omitted)).

First, Defendant argues that Plaintiffs are wrong about what the challenged agreements provide. Focusing on the language of the written agreements between Defendant and Reynolds, Defendant argues that the "agreements merely wind-down CDK's hostile access to Reynolds's DMS." [266, at 33.] According to Defendant, "[t]hey do not divide any market, restrain any competition, or say anything about CDK's or Reynolds's third-party access policies (which either company could change tomorrow)." *Id.*; see also [Authenticom, 874 F.3d at 1025](#) ("nothing in the 2015 agreements forbade CDK itself from allowing access to its own data integration system").

To be sure, the 2015 written agreements between Defendant and Reynolds do not expressly require that Defendant and Reynolds block third-party access on their own DMSs. Yet, as noted by Judge St. Eve in the *Authenticom* case, the agreements do "effectively **[\*\*50]** require that CDK stop hostile access of Reynolds DMSs (for a period, at least) and, more importantly, expressly prohibit [Defendant and Reynolds] from assisting in the hostile access of one another's DMSs." [In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. 3d at 951](#). As **[\*535]** Judge St. Eve also noted, "[s]uch a partial ceasefire and mutual forbearance between two rivals would make sense if \* \* \* Defendants sought to 'support' one another's integration services to the exclusion of third-party integrators from the competition." [In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. 3d 931, 951 \(N.D. Ill. 2018\)](#). The anticompetitive effects of this "partial ceasefire" and "mutual forbearance between two rivals" were not limited to the DIS market. The alleged horizontal agreement is between two competitors in the DMS market. CDK and Reynolds—"horizontal competitors" and possessors of "dominant positions" in the DMS market—agreed to restrain competition in that market by agreeing to "reduce the functionality of CDK's DMS (including dealerships' ability to freely access their DMS data through authorized persons)." [198 (Compl.), ¶¶ 170-71.] **HN16** Evidence of "retardation of innovation and subsequent decrease in the quality of [products] potentially available to consumers, if believed, could qualify as a harm to competition and consumers." **[\*\*51]** [Aventis Envtl. Sci. USA LP v. Scotts Co., 383 F. Supp. 2d 488, 504 \(S.D.N.Y. 2005\)](#). Plaintiffs allege such a decrease in the quality of the products they purchased from Defendant here.

Furthermore, the alleged agreements between Defendant and Reynolds are not necessarily limited to the 2015 written agreements. Plaintiffs claim that Defendant's executives admitted to an agreement between Defendant and Reynolds to block third-party access of their respective DMSs. For example, in April 2016, CDK's Vice President of Product Management, Dan McCray, told Authenticom's CEO Stephen Cottrell:

[W]e've entered into an agreement with Reynolds and Reynolds, okay? That agreement specifically says that we're going to support each other's third party interfaces, and we're working collaboratively to remove all hostile integrators from our DMS system.

[198 (Compl.), at ¶ 101.] CDK's argument that Plaintiffs only have alleged an agreement to winddown CDK's hostile access to Reynolds's DMS therefore fails, as it ignores Plaintiffs' well-pleaded allegations of a horizontal agreement beyond the written agreements between Defendant and Reynolds.

In the *Authenticom* matter, Defendant argued that the court should disregard these allegations because the best evidence of CDK's and Reynolds's **[\*\*52]** agreement is their written contracts. Judge St. Eve found that argument unconvincing, concluding that the argument "backfire[d]" because it "suggests that [CDK and Reynolds] (or at least their executives) thought that the 2015 Agreements aimed to 'block' third-party integrators." [176, at 29.] CDK argues that conclusion was erroneous because using allegations of oral statements to inform the meaning of a written contract would upset the established contractual canon that oral evidence may not supplement a fully integrated, written agreement. [266, at 37 n.13 (citing 11 Williston on Contracts § 33:1 (4th ed. 2018)).]

However, to the extent the statements made by Defendant's and Reynolds's executives refer to the 2015 written agreements, the Court agrees that they indicate that the *aim* of those agreements was to block third-party integrators. The Court would not expect that CDK and Reynolds would identify that intent in the text of the contract, but that does not mean the parties' statements regarding their intent is being used to interpret the parties' obligations under the contract. Indeed, although the Seventh Circuit recognized that the 2015 written agreements "do not explicitly state **[\*\*53]** that defendants will work together to eliminate third-party data integrators, the agreements have that effect **[\*536]** \* \* \* After the agreements, there is little room in the market for third-party integrators." [Authenticom, Inc., 2017 U.S. Dist. LEXIS 109409, 2017 WL 3017048 at \\*6](#). Regardless, as Judge St. Eve also noted, in order to accept Defendant's argument, the Court would have to infer that Defendant's and

Reynolds's executives were referring to the written agreements—as opposed to an extracontractual agreement—requiring that the Court make an inference in Defendant's favor, which the Court cannot do at the motion to dismiss stage. Furthermore, to the extent that the statements made by CDK's and Reynolds's executives are not reflected in the agreement, it reasonable can be inferred that there was an extracontractual agreement between CDK and Reynolds. Again, the Court would not expect CDK and Reynolds to memorialize all aspects of the alleged anticompetitive agreement in their written agreements. The Court must make this reasonable inference at the motion to dismiss stage.

Second, Defendant argues that Plaintiffs' [Section 1](#) horizontal conspiracy claim fails because Plaintiffs merely have alleged parallel conduct. [HN17](#) [↑] "Tacit collusion, also known as conscious parallelism, [\*\*54] does not violate [section 1](#) of the Sherman Act. Collusion is illegal only when based on agreement." [In re Text Messaging Antitrust Litig., 782 F.3d 867, 879 \(7th Cir. 2015\)](#). Defendant therefore argues that Plaintiffs' [Section 1](#) claims fail because Plaintiffs fail to identify "evidence that 'tends to exclude the possibility' of independent conduct." [260, at 14 (quoting [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 \(1986\)](#).)] Although the Supreme Court has held "that a plaintiff must present evidence showing that defendants had a 'rational economic motive to conspire' and evidence 'that tends to exclude the possibility' of independent conduct to survive summary judgment[,"] [In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. 3d at 953](#) (quoting [Matsushita Elec. Indus. Co., 475 U.S. at 588](#)), courts have held that such a showing is not necessary at the pleading stage. *Id.* (collecting cases).

Regardless, Plaintiffs plausibly have alleged a motive to conspire. Plaintiffs allege that dealers preferred CDK's "open" DMS and that Reynolds therefore lost market share in the DMS market when it closed its DMS. [198 (Compl.), at ¶¶ 7, 77-78.] It therefore is reasonable to infer that Defendant and Reynolds were motivated to conspire with each other so that they could close their systems to data integrators without fear that their customers would turn to another provider.<sup>11</sup> [In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. 3d at 953](#). Furthermore, accepting Defendant's argument that Plaintiffs only [\*\*537] have [\*\*55] alleged parallel conduct would require that the Court ignore well-pleaded allegations that Defendant's executives admitted to the conspiracy. Such admissions are direct evidence of an illegal conspiracy. [In re Text Messaging Antitrust Litig., 630 F.3d 622, 628 \(7th Cir. 2010\)](#) (recognizing "an admission by an employee of one of the conspirators" as direct evidence supporting a price-fixing case). Accordingly, the Court denies Defendant's motion to dismiss Plaintiffs' horizontal conspiracy claims (Counts I-II).

## *ii. Exclusive Dealing (Counts III-IV)*

Defendant also argues that Plaintiffs have not sufficiently alleged that Defendant engaged in exclusive dealing. [HN18](#) [↑] "An exclusive dealing contract obliges a firm to obtain its inputs from a single source." [Paddock Publ'ns, Inc. v. Chicago Tribune Co., 103 F.3d 42, 46 \(7th Cir. 1996\)](#). "The objection to exclusive-dealing agreements is that they deny outlets to a competitor during the term of the agreement." [Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 393 \(7th Cir. 1984\)](#). Because of the procompetitive benefits of exclusive dealing (e.g., increasing allocative efficiency, preventing free-riding), courts analyze exclusive dealing claims under the rule of reason. [In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. 3d at 956-57](#).

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<sup>11</sup> Defendant argues that such a motive is not plausible because it would not risk treble-damages liability in exchange for Reynolds's mere agreement to continue doing what it already had done for years. [266, at 34.] Defendant also argues that Plaintiffs concede a number of points demonstrating that Defendant and Reynolds engaged in nothing more than permissible parallel conduct. [*Id.*] For example, Defendant argues that the fact that Reynolds's decision to close its DMS preceded Defendant's decision to do the same by several years demonstrates that there was no illicit agreement between CDK and Reynolds. [*Id.*] However, nothing prevented Reynolds from deciding to open its DMS. Indeed, given that Plaintiffs allege that Reynolds lost business to Defendant as a result of its closed DMS, Reynolds had the incentive to do so. While Defendant is free later to argue that the purported concessions demonstrate that Defendant and Reynolds merely engaged in parallel conduct, the Court cannot ignore the well-pled allegations of a horizontal agreement and must draw all reasonable inferences in Plaintiffs' favor on a motion to dismiss. [Killingsworth, 507 F.3d at 618](#).

Plaintiffs argue that Defendant has engaged in exclusive dealing by preventing vendors from working with independent data integrators (such as Authenticom). Plaintiffs allege that "Defendants [\*\*56] have utilized their control of the DMS market to impose exclusive dealing provisions on Vendors. These exclusive dealing provisions necessitate that any Vendor doing business with CDK or Reynolds cannot contract with any other independent DIS provider, and these exclusive dealing provisions are purportedly infinite in duration." [198 (Compl.), at ¶ 13.]

Defendant argues that Plaintiffs' exclusive dealing claim fails because 3PA is a "'managed interface' that is *part of* CDK's DMS," not a separate product. [266, at 38.] However, Defendant fails fully to develop this argument. For example, Defendant does not even discuss the relevant consideration for determining a product market, such as separate demand, the products peculiar characteristics and uses, "distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." [Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 \(1962\)](#). These factors appear to weigh in favor of finding a separate market for data integration services.<sup>12</sup> For example, it is not the dealers that purchase data integration services. [HN19](#) There are therefore distinct customers and distinct prices for data integration services. Furthermore, based on the fact-intensive nature of the product-market inquiry, the [\*\*57] issue generally is not properly resolved on a motion to dismiss. [Ploss v. Kraft Foods Grp., Inc., 197 F.Supp.3d 1037, 1070 \(N.D. Ill. 2016\)](#) ("Courts should dismiss antitrust claims based on a market argument only when it is certain that the alleged relevant market clearly does not encompass all interchangeable substitute products"); accord [Avnet, Inc. v. Motio, Inc., 2015 U.S. Dist. LEXIS 120449, 2015 WL 5307515, at \\*4 \(N.D. Ill. Sept. 9, 2015\)](#) ("[b]ecause market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market" (quoting [Todd v. Exxon Corp., 275 F.3d 191, 199-200 \(\\*538\) \(2d Cir. 2001\)](#)) (alteration in original)).

Finally, Defendant argues that even if Plaintiffs sufficiently allege exclusive dealing, Plaintiffs fail to allege substantial foreclosure. [266, at 38-39.] [HN20](#) "[E]xclusive dealing arrangements violate antitrust laws only when they foreclose competition in a substantial share of the line of commerce at issue[.]" [Republic Tobacco Co. v. N. Atl. Trading Co., 381 F.3d 717, 737-38 \(7th Cir. 2004\)](#) (citing [Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 320-27, 81 S. Ct. 623, 5 L. Ed. 2d 580 \(1961\)](#)). Defendant argues that Plaintiffs have not alleged substantial foreclosure because (1) there are no allegations that Defendant's vendor contracts foreclosed Plaintiffs from a substantial share of any market, and (2) any argument that hostile integrators are excluded by the contracts "would fail because hostile integrators are still able to deal with DMS providers covering a sizeable portion of the market [\*\*58] for car dealership DMS services." [266, at 38-39.] In its response brief, Plaintiffs appear to concede the former argument, focusing on allegations that the foreclosure caused by the agreements raised prices for data integration services, which Plaintiffs allege were passed onto Plaintiffs. [198 (Compl.), at ¶¶ 149-155, 157, 161.] Defendant argues that Plaintiffs lack antitrust standing to challenge the foreclosure of independent integrators such as Authenticom. As discussed above, to the extent that Plaintiffs seek damages, that is true and the Court grants Defendant's motion to dismiss Plaintiffs exclusive dealing claim for damages (Count III) on that basis.

Still, Plaintiffs have standing to pursue their exclusive dealing claim for injunctive relief, and Plaintiffs have alleged facts sufficient to establish substantial foreclosure. Specifically, Plaintiffs allege that CDK and Reynolds together control approximately 75 percent of the DMS market, with CDK alone controlling approximately 45 percent. [198 (Compl.), at ¶ 2.] With the two dominant DMS providers agreeing to block independent data integrators, CDK and Reynolds have been able to charge supracompetitive prices for data integration [\*\*59] services. [198 (Compl.), at ¶¶ 144, 185.] Vendors are forced to pay supracompetitive prices for data integration services because they need to be able to service dealers who have CDK or Reynolds as their DMS providers. Vendors are likely only willing to pay such prices because competitors like Authenticom are foreclosed from competing for that business. These allegations are sufficient to establish foreclosure at the pleading stage. [In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. 3d at 957](#) (concluding that similar allegations were sufficient to establish at the motion to dismiss stage that the "exclusive-dealing contracts [foreclosed] a substantial portion of the data-integration market"); see also [In](#)

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<sup>12</sup> In the *Authenticom* decision, Judge St. Eve described the data-integration market and the DMS market as separate markets based on similar allegations. [In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. 3d at 940](#). The Court sees no reason to change course based on the cursory argument raised by Defendant now.

362 F. Supp. 3d 510, \*538 (2019 U.S. Dist. LEXIS 12157, \*\*59

*re Ductile Iron Pipe Fitting Direct Purchaser Antitrust Litig.*, 2013 U.S. Dist. LEXIS 29865, 2013 WL 812143, at \*19 (D.N.J. Mar. 5, 2013) ("The question of whether the alleged exclusive dealing arrangements foreclosed a substantial share of the line of commerce is a merits question not proper for the pleading stage."). Accordingly, Defendant's motion to dismiss Plaintiffs' exclusive dealing claim for injunctive relief (Count IV) is denied.

### iii. Rule of Reason

Defendant argues that, even assuming that Plaintiffs sufficiently allege the kind of conduct that requires a rule-of-reason analysis under [Section 1](#), its conduct rested on a clear and important business justification: the need to protect [\\*\\*60](#) its system and the data on that system from cybersecurity threats. [198 (Compl.), at ¶ 154.] [HN21](#) However, whether challenged conduct has a procompetitive effect on balance [\\*539](#) so as to survive scrutiny under a rule-of-reason analysis is a factual issue for trial. *Cook Inc. v. Boston Sci. Corp.*, 2002 U.S. Dist. LEXIS 17331, 2002 WL 335314, at \*4 (N.D. Ill. Feb. 28, 2002) ("The rule of reason entails a complex inquiry into the surrounding circumstances that is not susceptible to resolution on a motion to dismiss[.]"); *Watkins v. Smith*, 2012 U.S. Dist. LEXIS 165762, 2012 WL 5868395, at \*7 (S.D.N.Y. Nov. 19, 2012) ("The rule-of-reason inquiry requires, at the motion to dismiss stage, that the plaintiff identify the relevant market affected by the challenged conduct and allege an actual adverse effect on competition in the identified market."). Furthermore, Plaintiffs specifically allege that Defendant's security justification is pretextual. [198 (Compl.), at ¶¶ 153-64.] Accepting all of Plaintiffs' well-pleaded factual allegations and drawing all reasonable inferences in Plaintiffs' favor, Plaintiffs sufficiently have alleged that Defendant's proffered justification for the challenged conduct is pretextual. According, whether Defendant's conduct is justified under a rule-of-reason analysis cannot be determined at the motion to dismiss stage.

## D. State Claims Dependent on Federal Antitrust Claims [\\*\\*61](#)

Because Plaintiffs' state antitrust claims parallel their federal antitrust claims [266, at 44 n.19 (collecting sources)], Defendant argues that Plaintiffs' state antitrust claims (Counts VI-XXXI) fail in lockstep with the federal claims asserted in Counts I through V. Defendant also argues that at least four of the consumer protection claims fail for the same reason. [HN22](#) Courts applying Alaska, California, Florida, and South Carolina law have held that consumer protection claims based on the same factual allegations as a failed antitrust claim must likewise be dismissed. *Alaska Gasline Port Auth. v. ExxonMobil Corp.*, 2006 U.S. Dist. LEXIS 41245, 2006 WL 1718195, at \*3 n.24 (D. Alaska June 19, 2006) (Alaska); *In re Wellpoint, Inc., Out-of-Network UCR Rates Litig.*, 903 F. Supp. 2d 880, 927-28 (C.D. Cal. 2012) (California); *In re Broiler Chicken Antitrust Litig.*, 290 F. Supp. 3d 772, 819 (N.D. Ill. 2017) (Florida); *In re Aggrenox Antitrust Litig.*, 2016 U.S. Dist. LEXIS 104647, 2016 WL 4204478, at \*9 (D. Conn. Aug. 9, 2016) (South Carolina). Because Plaintiffs' federal antitrust claims survive (at least to some extent), the Court denies Defendant's motion to dismiss Plaintiffs' state antitrust claims and consumer protection claims under Alaska, California, Florida, and South Carolina law for failure to allege a federal antitrust violation.

## E. Application of *Illinois Brick* to South Carolina Claim

Defendant argues that Plaintiffs' antitrust claims under South Carolina law also should be dismissed under *Illinois Brick*.<sup>13</sup> [HN23](#) South Carolina courts interpret the state's antitrust laws consistent with federal law. [\\*\\*62](#) *In re Microsoft Corp. Antitrust Litig.*, 401 F. Supp. 2d 461, 463 (D. Md. 2005) ("South Carolina has long adhered to a policy of following federal precedents in matters relating to state trade regulation enforcement.") (quoting [Drs.](#)

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<sup>13</sup> Defendant also argues that Plaintiffs' claim under Illinois law should be dismissed because the *Illinois Antitrust Act* provides that only the Illinois Attorney General may bring a class action asserting indirect purchaser claims. See 740 Ill. Comp. Stat. 10/7(2). Because Illinois otherwise allows indirect purchaser claims, see *id.*, the Court views the limit on class actions to be a kind of class action bar, which the Court addresses below.

*Steuer & Latham, P.A. v. Nat'l Med. Enters.*, 672 F. Supp. 1489, 1521 (D.S.C. 1987), aff'd, 846 F.2d 70 (4th Cir. 1988); *S.C. Cotton Growers' Co-op. Ass'n v. English*, 135 S.C. 19, 133 S.E. 542, 543 (S.C. 1926) (looking to federal case law to construe South Carolina's antitrust statute). Because South Carolina has not enacted an *Illinois Brick* repealer statute, the Court grants Defendant's motion for dismissal of Plaintiffs' South Carolina antitrust claim (Count XXV).<sup>14</sup>

## F. AGC and Related State-Law Causation Requirements

### i. Applicability of AGC

Plaintiffs argue that AGC does not apply to state-law claims of indirect purchasers who participate in the market that was restrained. However, neither the Supreme Court nor the Seventh Circuit has limited the application of AGC to certain kinds of antitrust claims. [HN24](#)[] To the contrary, the Seventh Circuit has explained that AGC sets forth factors to consider whether a plaintiff satisfies the proximate cause (i.e., antitrust standing) requirement implicit in every antitrust case. [Supreme Auto Transp., LLC v. Arcelor Mittal USA, Inc.](#), 902 F.3d 735, 743 (7th Cir. 2018) ("Proximate causation is an essential element that plaintiffs must prove in order to succeed on any of their claims."). To be sure, this is not to say that AGC bars such claims. Whether AGC applies and whether [\\*\\*63](#) AGC bars Plaintiffs' state law claims are different.

Although the Court concludes that AGC's antitrust standing requirement applies in all federal antitrust cases, that does not answer whether AGC applies to Plaintiffs' claims under state law. [HN25](#)[] "While most states model their antitrust statutes and jurisprudence on federal law, they are under no obligation to do so." [Supreme Auto Transp., LLC v. Arcelor Mittal USA, Inc.](#), 902 F.3d 735, 743 (7th Cir. 2018) (citing [California v. ARC Am. Corp.](#), 490 U.S. 93, 102, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)). Still, many states have harmonization provisions—which can either be statutory or derived from common law—that provide that the state's antitrust laws are to be read in harmony with federal antitrust laws. Even though all but one state at issue has a harmonization provision, many states expressly have rejected *Illinois Brick*'s bar on indirect purchaser claims by enacting "repeater statutes" abrogating the Supreme Court's prohibition on indirect-purchaser actions as articulated in *Illinois Brick*. [DFA II, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at \\*6](#). The key question is how, if at all, these repeater statutes impact the Court's application of AGC under each state's law.

Plaintiffs argue generally that the adoption of an *Illinois Brick* repealer forecloses the application of AGC because AGC borrowed the reasoning of *Illinois Brick*. [HN26](#)[] Although some courts have adopted [\\*\\*64](#) that position, see, e.g., [Broiler Chicken](#), 290 F. Supp.3d at 815-16, this Court rejected that position in [DFA II, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at \\*6](#). In that case, this Court held "that the presence of a statutory harmonization provision (either statutory or common law), *absent any countervailing statutory law or case law from a state appellate court*, is sufficient to permit a district court to apply federal antitrust-standing law—including AGC—to claims brought under that state's antitrust laws." [2015 U.S. Dist. LEXIS 84152, \[WL\] at \\*4](#). In reaching that conclusion, the Court noted that, absent countervailing authority, it would be odd to read an exception into a state's harmonization provision. *Id.* The Court also noted that "[t]he fact that so many states took action in response to *Illinois Brick* shows that states are quite capable of rejecting federal *antitrust law* when they see fit to do so." [2015 U.S. Dist. LEXIS 84152, \[WL\] at 6](#). This position is supported by recent Seventh Circuit case law.

In *Supreme Auto Transport, LLC v. Arcelor Mittal USA, Inc.*, the Seventh Circuit recognized that the adoption of an *Illinois Brick* repealer statute did not preclude [\\*\\*541](#) the application of AGC. [902 F.3d 735, 744 \(7th Cir. 2018\)](#). [HN27](#)[] In reaching that conclusion, the Seventh Circuit explained how the *Illinois Brick* and AGC analyses are analytically distinct, stating that "[i]t is one thing to say [\\*\\*65](#) that a state is willing to allow someone other than a direct purchaser to have the opportunity to shoulder the burden of showing proximate causation; it is quite another

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<sup>14</sup> Indeed, Plaintiffs do not even respond to Defendant's *Illinois Brick* argument under South Carolina law, implicitly conceding its merit of the argument.

thing to say that the state has thrown both the direct-purchaser rule *and* proximate causation out the window." *Id.* States with *Illinois Brick*-repealer statutes have not "replaced one *per se* rule with another," so that all indirect-purchaser suits can proceed "no matter how far removed the purchasers are from the production process and no matter how speculative the damages award would be." *Id. at 743-44*. The Court therefore cannot assume—absent some in-state authority to the contrary—that states that have enacted *Illinois Brick* repealers also have abandoned AGC's antitrust standing requirement. Still, because the application of AGC to Plaintiffs' claims ultimately is a question of state law, the Court must examine whether any of the states under which Plaintiffs have brought antitrust claims would apply a different standard.

The Court therefore must now "undertake the back-breaking labor involved in deciphering the state of antitrust standing in each" relevant state to determine whether to apply AGC to Plaintiffs' claims. *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d at 1153. This [\*\*66] Court has already conducted that analysis with respect to claims brought under California, Kansas, Michigan, New York, and North Carolina law,<sup>15</sup> concluding that AGC applies. *DFA II*, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at \*11. The Court now turns to analyzing whether AGC applies to Plaintiffs' claims under the laws of other states not already addressed.<sup>16</sup>

## 1. District of Columbia

Harmonization Provision: "It is the intent of the Council of the District of Columbia that in construing this chapter, a court of competent jurisdiction may use as a guide interpretations given by federal courts to comparable antitrust statutes." *D.C. Code Ann. § 28-4515*.

[\*542] *Illinois Brick* Repealer Statute: "Any indirect purchaser in the chain of manufacture, production, or distribution of goods or services, upon proof of payment of all or any part of any overcharge for such goods or services, shall be deemed to be injured[.]" *D.C. Code Ann. § 28-4509(a)*.

Analysis: **HN29** At least one court in the District of Columbia has applied AGC despite its *Illinois Brick* repealer statute. *Peterson v. Visa U.S.A. Inc.*, 2005 D.C. Super. LEXIS 17, 2005 WL 1403761, at \*5 (D.C. Super. Ct. Apr. 22, 2005). Absent any binding District of Columbia authority to the contrary, the *Peterson* decision and the deferential harmonization provision remain the best indicators of how the District [\*\*67] of Columbia Court of Appeals (the highest court in the District of Columbia) would address the issue, and both lean in favor of applying AGC to Plaintiffs' antitrust claim under District of Columbia law.

<sup>15</sup> Plaintiffs argue that the Court's analysis regarding North Carolina law in *DFA II* is incorrect, citing to a North Carolina appellate court decision that declined to apply AGC where the product at issue was a component of the product purchased by indirect purchasers. [358, at 97 n.79 (citing *Teague v. Bayer AG*, 195 N.C. App. 18, 671 S.E.2d 550 (N.C. Ct. App. 2009)).] However, in *DFA II*, the Court acknowledged *Teague*, but found a lower-court decision—*Crouch v. Crompton Corp.*, 2004 NCBC LEXIS 6, 2004 WL 2414027 (N.C. Super. Oct. 28, 2004)—to be more well-reasoned and a better reflection of that the North Carolina Supreme Court would do when given the opportunity to address the issue. *DFA II*, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at \*15. In *Crouch*, the court applied "a modified version of the AGC test to determine antitrust standing that retains the proximate-cause inquiry inherent in AGC while still respecting *Illinois Brick*'s ban on indirect-purchaser actions." *Id.* (summarizing *Crouch*, 2004 NCBC LEXIS 6, 2004 WL 2414027). The parties do not address whether Plaintiffs' claim under North Carolina satisfied the modified AGC test applied in *Crouch*. Given that the Court finds that Plaintiffs satisfy the more stringent federal AGC standard, as discussed below, Plaintiffs also would satisfy the modified AGC test applied in *Crouch*.

<sup>16</sup> **HN28** In deciding whether to apply AGC to state-law antitrust claims, the Court looks to whether the relevant state supreme court or state legislature has spoken to the issue. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938); *Jean v. Dugan*, 20 F.3d 255, 260 (7th Cir. 1994). "In the absence of guiding decisions by the state's highest court, [federal courts] consult and follow the decisions of intermediate [state] appellate courts unless there is a convincing reason to predict [that] the state's highest court would disagree." *ADT Sec. Servs., Inc. v. Lisle-Woodridge Fire Prot. Dist.*, 672 F.3d 492, 498 (7th Cir. 2012).

## 2. Iowa

Harmonization Provision: "This chapter shall be construed to complement and be harmonized with the applied laws of the United States which have the same or similar purpose as this chapter. This construction shall not be made in such a way as to constitute a delegation of state authority to the federal government, but shall be made to achieve uniform application of the state and federal laws prohibiting restraints of economic activity and monopolistic practices." *Iowa Code Ann. § 553.2.*<sup>17</sup>

Illinois Brick Repealer Statute: None. However, the Iowa Supreme Court has rejected the application of *Illinois Brick* to Iowa competition law. *Comes v. Microsoft Corp., 646 N.W.2d 440, 446 (Iowa 2002)*.

**HN31** [↑] Analysis: Although the Iowa Supreme Court has rejected the application of *Illinois Brick* to Iowa competition law, the Iowa Supreme Court has continued to apply *AGC. Southard v. Visa U.S.A. Inc., 734 N.W.2d 192, 198 (Iowa 2007)* ("We think the AGC test is more reflective of the legal context within which the Iowa legislature enacted Iowa's competition law. Therefore, we apply the AGC factors to determine whether the plaintiffs may recover [\*\*68] under Iowa law."). Given that there is no indication that Iowa law has changed since that decision, AGC applies to Plaintiffs' antitrust claim under Iowa law.

## 3. Maine

**HN32** [↑] Harmonization Provision: None. However, courts have recognized that Maine's antitrust statute parallels federal law and therefore have analyzed state claims according to federal law. *Tri-State Rubbish, Inc. v. Waste Mgmt., Inc., 998 F.2d 1073, 1081 (1st Cir. 1993)* ("The Maine antitrust statutes parallel the Sherman Act[.]" (citing *Me. Rev. Stat. Ann. tit. 10, §§ 1101 et seq.*)).

Illinois Brick Repealer Statute: "Any person, including the State or any political subdivision of the State, injured directly or indirectly in its business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by section 1101, 1102 or 1102-A, may sue for the injury in a civil action." *Me. Rev. Stat. tit. 10, § 1104(1).*

[\*543] Analysis: One Maine trial court has applied AGC despite Maine's *Illinois Brick* repealer statute, but ignored the directness factor in its analysis. *Knowles v. Visa U.S.A., 2004 Me. Super. LEXIS 227, 2004 WL 2475284, at \*6 (Me. Super. Oct. 20, 2004)* ("In light of Maine's *Illinois Brick* repealer, the next factor-directness or remoteness of the asserted injury-should be disregarded entirely in any inquiry as to standing under Maine's antitrust laws."). In that case, however, the court appears to have assumed that the directness inquiries automatically weighs [\*\*69] against finding antitrust standing whenever there are more directly injured parties. *Id.* This Court does not read the directness factor so narrowly. Nor does the Court see any basis for concluding that the Maine Supreme Judicial Court would apply AGC so narrowly. Accordingly, the Court will consider all AGC factors in analyzing Plaintiffs' claim under Maine law.

## 4. Nebraska

Harmonization Provision: "When any provision of sections 59-801 to 59-831 and sections 84-211 to 84-214 or any provision of Chapter 59 is the same as or similar to the language of a federal antitrust law, the courts of this state

<sup>17</sup> **HN30** [↑] The Court notes that Iowa courts have interpreted the state's harmonization provision narrowly. *Comes v. Microsoft Corp., 646 N.W.2d 440, 446 (Iowa 2002)* (noting that the purpose of Iowa's antitrust harmonization statute was to "achieve uniform application of the state and federal laws prohibiting monopolistic practices," not to define who can sue under antitrust law). Given that the Iowa Supreme Court has applied AGC, however, this narrow interpretation has no impact on the Court's analysis.

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in construing such sections or chapter shall follow the construction given to the federal law by the federal courts." [Neb. Rev. Stat. Ann. § 59-829](#).

**Illinois Brick Repealer Statute:** "Any person who is injured in his or her business or property by any other person or persons by a violation of [sections 59-801 to 59-831](#), whether such injured person dealt directly or indirectly with the defendant, may bring a civil action in the district court in the county in which the defendant or defendants reside or are found, without respect to the amount in controversy, and shall recover actual damages or liquidated damages in an amount which bears a reasonable relation to the actual damages which have been [\*\*70] sustained and which damages are not susceptible of measurement by ordinary pecuniary standards and the costs of suit, including a reasonable attorney's fee." [Neb. Rev. Stat. Ann. § 59-821](#).

**HN33** Analysis: The Supreme Court of Nebraska has applied AGC despite the state's repealer statute, noting that *Illinois Brick* and AGC are analytically distinct. [Kanne v. Visa U.S.A. Inc., 272 Neb. 489, 723 N.W.2d 293, 300 \(Neb. 2006\)](#); see also *Tackit v. Visa U.S.A., Inc.*, 2004 WL 2475281, at \*1 (Neb. Dist. Ct. Oct. 19, 2004) (applying AGC to claim under [Nebraska Unlawful Restraint of Trade Act](#)). Accordingly, the Court will apply [AGC](#) to Plaintiffs' claims under Nebraska law.

## 5. New Mexico

**Harmonization Provision:** "Unless otherwise provided in the Antitrust Act, the Antitrust Act shall be construed in harmony with judicial interpretations of the federal antitrust laws. This construction shall be made to achieve uniform application of the state and federal laws prohibiting restraints of trade and monopolistic practices." [N.M. Stat. Ann. § 57-1-15](#).

**Illinois Brick Repealer Statute:** "[A]ny person threatened with injury or injured in his business or property, directly or indirectly, by a violation of [Section 57-1-1](#) or [57-1-2](#) NMSA 1978 may bring an action for appropriate injunctive relief, up to threefold the damages sustained and costs and reasonable attorneys' fees." [N.M. Stat. Ann. § 57-1-3\(A\)](#).

Analysis: **HN34** The New Mexico Supreme Court has not addressed whether AGC [\*\*71] applies to claims under the [New Mexico Antitrust Act \("NMAA"\)](#), but a New Mexico appellate court has concluded that AGC applies. [Nass-Romero v. Visa U.S.A. Inc., 2012- NMCA 058, 279 P.3d 772, 776 \(N.M. Ct. App. 2012\)](#) (applying AGC to claim brought under the NMAA); see also [New Mexico J\\*5441 Oncology v. Presbyterian Healthcare Servs., 169 F. Supp. 3d 1204, 1206 \(D.N.M. 2016\)](#) (assuming without discussion that AGC applied to claim under NMAA). Accordingly, the Court will apply [AGC](#) to Plaintiffs' claims under New Mexico law.

## 6. South Dakota

**Harmonization Provision:** "It is the intent of the Legislature that in construing this chapter, the courts may use as a guide interpretations given by the federal or state courts to comparable antitrust statutes." [S.D. Codified Laws § 37-1-22](#).

**Illinois Brick Repealer Statute:** "No provision of this chapter may deny any person who is injured directly or indirectly in his business or property by a violation of this chapter the right to sue for and obtain any relief afforded under [§ 37-1-14.3](#). In any subsequent action arising from the same conduct, the court may take any steps necessary to avoid duplicative recovery against a defendant." [S.D. Codified Laws § 37-1-33](#).

Analysis: The parties do not cite—and the Court has not found—any South Dakota case addressing whether AGC applies to claims brought under the South Dakota Deceptive Trade Practices and Consumer Protection Statute. Federal courts to have addressed [\*\*72] the issue have been split. Compare [In re Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133, 1151-53 \(N.D. Cal. 2009\)](#) (declining to apply AGC), with [In re Aftermarket Auto. Lighting Prods. Antitrust Litig., 2009 U.S. Dist. LEXIS 133088, 2009 WL 9502003, at \\*6 \(C.D. Cal. July 6, 2009\)](#) (concluding

that South Dakota would apply AGC). [HN35](#)<sup>↑</sup> In light of South Dakota's harmonization statute and absent any state-law authority to the contrary, the Court concludes that South Dakota would apply [AGC](#) to claims under South Dakota law.

## 7. Vermont

Harmonization Provision: "It is the intent of the General Assembly that in construing this section and subsection 2451a(h) of this title, the courts of this State shall be guided by the construction of federal **antitrust law** and the Sherman Act, as amended, as interpreted by the courts of the United States." [Vt. Stat. Ann. tit. 9, § 2453a\(c\)](#).

Illinois Brick Repealer Statute: "In any action for damages or injury sustained as a result of any violation of State antitrust laws, pursuant to [section 2453](#) of this title, the fact that the State, any public agency, political subdivision, or any other person has not dealt directly with a defendant shall not bar or otherwise limit recovery. The Court shall take all necessary steps to avoid duplicate liability, including the transfer or consolidation of all related actions." [Vt. Stat. Ann. tit. 9, § 2465](#).

Analysis: The Vermont Supreme Court has not addressed whether AGC applies to antitrust claims brought under [\*73] Vermont law. The only Vermont appellate court to have addressed the issue concluded that the Vermont Supreme Court would apply AGC. [HN36](#)<sup>↑</sup> Absent any authority to the contrary, the Court again concludes that [AGC](#) applies to claims brought under Vermont law in light of Vermont's harmonization statute.

## 8. Wisconsin

[HN37](#)<sup>↑</sup> Harmonization Provision: None. However, caselaw indicates that courts are to look to federal courts for guidance in interpreting Wisconsin **antitrust law**. See, e.g., [Ashley Furniture Indus., Inc. v. Packaging Corp. of Am., 275 F. Supp. 3d 957, 968-69 \(W.D. Wis. 2017\)](#) (noting that "Wisconsin courts traditionally look to federal law to interpret substantive violations of the Wisconsin antitrust statutes").

[\*545] Illinois Brick Repealer Statute: "Except as provided under par. (b), any person injured, directly or indirectly, by reason of anything prohibited by this chapter may sue therefor and shall recover threefold the damages sustained by the person and the cost of the suit, including reasonable attorney fees." [Wis. Stat. Ann. § 133.18 \(1\)\(a\)](#).

Analysis: The Wisconsin Supreme Court has not addressed whether AGC applies under Wisconsin **antitrust law**, nor has any appellate court in Wisconsin. However, one trial court has concluded that Wisconsin's higher courts would apply AGC. Other federal courts have relied on this decision [\*74] to conclude that AGC applies under Wisconsin law. See, e.g., [In re G-Fees Antitrust Litig., 584 F. Supp. 2d 26, 42 \(D.D.C. 2008\)](#). But other federal courts have reached the opposite conclusion. See, e.g., [Los Gatos Mercantile, Inc. v. E.I. Dupont De Nemours & Co., 2015 U.S. Dist. LEXIS 106292, 2015 WL 4755335, at \\*19 \(N.D. Cal. Aug. 11, 2015\)](#). [HN38](#)<sup>↑</sup> Even though Wisconsin does not have a harmonization statute, the fact that courts have long applied federal law to Wisconsin antitrust claims convinces the Court that the Wisconsin Supreme Court likely would apply [AGC](#) to antitrust claims brought under Wisconsin law.

## 9. Other States

Plaintiffs also bring claims under states that have harmonization provisions and *Illinois Brick*-repealer statutes, but in which no in-state court has addressed the applicability of AGC. Specifically, Plaintiffs bring claims under the laws of Alabama, Arizona, Hawaii, Mississippi, New Hampshire, Oregon, Rhode Island, Tennessee, Utah, and West Virginia. As discussed above, "the presence of a statutory harmonization provision (either statutory or common law), absent any countervailing statutory law or case law from a state appellate court, is sufficient to permit a district

court to apply federal antitrust-standing law—including AGC—to claims brought under that state's antitrust laws." [DFA II, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at \\*6.](#)

## ii. Application

Now that the Court has addressed in which states AGC applies, the Court [\*\*75] must determine whether Plaintiffs' claims fail under AGC. As discussed above, under [AGC](#), the Court must consider: "(1) the causal connection between the violation and the harm; (2) the presence of improper motive; (3) the type of injury and whether it was one Congress sought to redress; (4) the directness of the injury; (5) the speculative nature of the damages; and (6) the risk of duplicate recovery or complex damage apportionment." [Loeb, 306 F.3d at 484](#) (citing [AGC, 459 U.S. at 537-45](#)).

The Court already has addressed the first four factors above. With respect the speculative nature of the damages, Plaintiffs sufficiently have alleged that costs have been passed on to dealers. Indeed, Plaintiffs have cited to examples of vendors specifically connecting fee increases to Defendant's allegedly anticompetitive conduct. [See, e.g., 198 (Compl.), at ¶ 141.] Because the causal link between the alleged misconduct and Plaintiffs' claimed harm is short, these allegations are sufficient to state a claim at the pleading stage. [In re TFT-LCD \(Flat Panel\) Antitrust Litig., 586 F. Supp. 2d 1109, 1124 \(N.D. Cal. 2008\)](#) ("The Court finds that, as a pleading matter, plaintiffs have sufficiently alleged that overcharges are passed on to consumers, and that such overcharges can be traced through the relatively short distribution chain."). [\*\*76]

That leaves the risk of duplicative recovery. With respect to the DIS market, the Court recognizes that there are other parties that have been more directly [\*\*546] harmed by the alleged misconduct by Defendant. Still, it cannot be true that state antitrust claims are categorically barred whenever other parties have been more directly harmed. Such an application of AGC would in effect "'repeal' the *Illinois Brick* 'repealers,' as it is difficult to image an indirect purchaser ever having antitrust standing under [such a] formulation." [In re Optical Disk Drive Antitrust Litig., 2011 U.S. Dist. LEXIS 101763, 2011 WL 3894376, at \\*11 \(N.D. Cal. Aug. 3, 2011\)](#). Again, given that the causal link between the alleged misconduct and Plaintiffs' claimed harm is short, the Court finds it likely that damages can reasonably be apportioned among Plaintiffs and others more directly harmed. Discovery ultimately may reveal that such apportionment cannot be done with reasonable accuracy. However, there is no indication based on the information before the Court that is the case here. Accordingly, taking all of the AGC factors into account, the Court concludes that Plaintiff sufficiently has alleged proximate causation.

This conclusion is consistent with the Seventh Circuit's decision in [Supreme Auto Transp., LLC v. Arcelor Mittal USA, Inc., 902 F.3d 735, 744 \(7th Cir. 2018\)](#). In that case, indirect purchasers of end-user [\*\*77] consumer products containing steel (including clothes washers, automobiles, barbecue grills, air conditioners, and snow blowers), filed an amended complaint asserting state-law claims based on an alleged antitrust conspiracy among steel manufacturers to increase steel prices. See [2011 U.S. Dist. LEXIS 101763, \[WL\] at \\*3](#). Although the Seventh Circuit ultimately found that the plaintiffs' claims were barred for failure to allege sufficient facts to establish antitrust standing (i.e., proximate causation), the Court indicated that antitrust standing would be satisfied if the plaintiffs alleged sufficient facts to establish that their claimed injuries still were "fairly traceable to the defendant steel manufacturers." [2011 U.S. Dist. LEXIS 101763, \[WL\] at \\*6](#). The Seventh Circuit reasoned:

There are many suits that satisfy ordinary principles of proximate causation but nevertheless would be barred under federal law by *Illinois Brick*'s direct-purchaser requirement. This very case provides an example: many if not all *Illinois-Brick* repealer states would have allowed Supreme Auto's original complaint to go forward. That first complaint alleged injury based on the purchase of steel rods and similar items from distributors who, in turn, had purchased those same items from [\*\*78] the defendants. The original complaint involves an indirect purchase (and so would be barred by *Illinois Brick* at the federal level) where the alleged injury is still fairly traceable to the defendant steel manufacturers.

The amended complaint is a different story. It alleges that plaintiffs purchased steel only insofar as it was one among many components of other more complex products, all of which have gone through numerous manufacturing alterations and lines of distribution. In many of these products, steel is not even a primary or necessary ingredient. We cannot imagine—and plaintiffs have not told us—how one might tackle the task of

tracing the effect of an alleged overcharge on steel through the complex supply and production chains that gave rise to the consumer products at issue here. The district court thus appropriately ruled that the claims asserted here were too remote to support a claim under the different state laws plaintiffs invoked.

2011 U.S. Dist. LEXIS 101763, [WL] at \*6-7. Defendant attempts to distinguish *Supreme Auto* by noting that the original complaint—which the Seventh Circuit indicated sufficiently alleged proximate cause—involved the "traditional indirect-purchaser" [\*547] relationship in which the indirect [\*\*79] purchaser buys the same item produced by the defendant through a distributor. [378, at 25.] Still, in *Supreme Auto*, the Seventh Circuit relied on the fact that the defendant's product "was not even a primary or necessary ingredient" in the purchased product and that defendant's product had "gone through numerous manufacturing alterations and lines of distribution." Although DIS is not a component part of the vendor services purchased by Plaintiffs, it certainly is a necessary ingredient to such services. Furthermore, there is only one link in the chain (*i.e.*, vendors) between dealers and data integrators. The Court recognizes that the allegations of proximate cause in this case fall somewhere in between the allegations in the original and amended complaints in *Supreme Auto*. Nevertheless, the allegations here are enough to establish at the motion to dismiss stage that Plaintiffs' claimed harms are fairly traceable to the alleged misconduct by Defendant.<sup>18</sup> Accordingly, Plaintiffs have alleged sufficient facts to establish proximate causation at the motion to dismiss stage.

### *iii. Application of Other State-Law Standing and Remoteness Doctrines*

Defendant argues that—to the extent that Plaintiffs' [\*\*80] claims are not subject to AGC—they nonetheless remain subject to general state-law causation requirements. [266, at 50-51 n. 26 (collecting authorities).] Because Defendant does not argue that any of these standards are more stringent than AGC, which Plaintiffs have satisfied at the motion to dismiss stage, the Court denies Defendant's motion to dismiss any of Plaintiffs' state-law claims based on the other state-law causation and remoteness standards cited by Defendant.

## **G. Failure to State a Claim Under State Law (Counts VI-L)**

### *i. No Operations or Purchases*

Defendant argues that Plaintiffs cannot bring claims under the laws of states that are unrelated to any named Plaintiffs' place of business or commercial operations. The named Plaintiffs are twenty-five car dealerships doing business in eleven states: Illinois, Kansas, Massachusetts, Minnesota, Mississippi, Missouri, New Jersey, New Mexico, New York, Nevada, and South Carolina. Plaintiffs nonetheless seek to advance claims under the laws of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Iowa, Maine, Michigan, Nebraska, New Hampshire, North Carolina, North Dakota, [\*\*81] Oregon, Rhode Island, South Dakota, [\*548] Tennessee, Utah, Vermont, West Virginia, and Wisconsin.

<sup>18</sup> Defendant also cites to cases across the country finding that AGC or similar causation standards barred consumer litigation against Visa and Mastercard, who allegedly required merchants using their credit cards to accept their debit cards as well. In those cases, however, the plaintiffs did not allege that they overpaid for goods or services either directly or indirectly from Defendant. Rather, the plaintiffs claimed that merchants increased the prices of all goods sold (goods not related in any way to defendants) to account for the increased fees charges for debit services. They did not allege that they overpaid for purchases of debit processing services, either directly or indirectly. See, e.g., Kanne v. Visa U.S.A. Inc., 272 Neb. 489, 723 N.W.2d 293, 299 (Neb. 2006) ("Appellants do not and cannot allege that they overpaid for purchases of debit processing services from merchants."); Nass-Romero v. Visa U.S.A. Inc., 2012- NMCA 058, 279 P.3d 772, 778 (N.M. Ct. App. 2012) ("Plaintiff is neither a consumer nor a competitor in the market allegedly being restrained by Defendants and does not appear in that chain of distribution; thus, she cannot be identified as a consumer of the service provided by Visa and MasterCard. Plaintiff, instead, is a consumer of goods sold by merchants who happen to be part of the affected market."). Here, on the other hand, Plaintiffs are indirect purchasers of DIS.

**HN39** [↑] Although courts (including this Court) have held that claims "brought under the laws of the states in which no named [plaintiff] purchased goods" must be dismissed for lack of Article III standing, see, e.g., [DFA I, 2013 U.S. Dist. LEXIS 119962, 2013 WL 4506000, at \\*7-8](#) (citing *In re Potash Antitrust Litig.*, 667 F. Supp. 2d 907, 922 (N.D. Ill. 2009)); *In re Plasma-Derivative Protein Therapies Antitrust Litig.*, 2012 U.S. Dist. LEXIS 2501, 2012 WL 39766, at \*6. (N.D. Ill. Jan. 9, 2012), the trend has been to treat the issue as one of statutory standing that can be deferred until class certification. See [Langan v. Johnson & Johnson Consumer Companies, Inc.](#), 897 F.3d 88, 96 (2d Cir. 2018) ("We fail to see how the fact that the defendant's wrongful conduct impacted customers in two states rendered the injuries of the Massachusetts consumers somehow more indefinite than the identical injuries of the Connecticut consumers." (footnote omitted)); [Muir v. Nature's Bounty \(De\), Inc.](#), 2018 U.S. Dist. LEXIS 128738, 2018 WL 3647115, at \*7 (N.D. Ill. Aug. 1, 2018) (noting that the "weight of recent authority points" against analyzing standing to bring class actions by legal theory); [In re Loestrin 24 Fe Antitrust Litig.](#), 261 F. Supp. 3d 307, 359 (D.R.I. 2017) (recognizing trend); see also [Morrison v. YTB Int'l, Inc.](#), 649 F.3d 533, 536 (7th Cir. 2011) ("That a plaintiff's claim under his preferred legal theory fails has nothing to do with subject-matter jurisdiction[.]" (citing [Bell v. Hood](#), 327 U.S. 678, 66 S. Ct. 773, 90 L. Ed. 939 (1946))). This trend is consistent with recent Seventh Circuit caselaw holding that "the question of who is authorized [\*\*82] to bring an action under a statute is one of statutory interpretation; it does not implicate Article III or jurisdiction." [Woodman's Food Market, Inc. v. Clorox Co.](#), 833 F.3d 743, 750 (7th Cir. 2016). Accordingly, at this stage, the Court denies Defendant's motion to dismiss Plaintiffs' state-law claims in states where no named Plaintiff operates for lack of Article III standing.

## ii. Territorial Conduct/Effect

Defendant argues that Plaintiffs' claims under Delaware, Massachusetts, North Carolina, Wisconsin, and New Hampshire law (Counts XXII, XXXI, XXXVI, XXXIX, and XLIII) should be dismissed for failure to allege any significant in-state conduct or injury. As noted by Defendant, those states all require some territorial conduct and/or affect to bring a claim under those statutes. **HN40** [↑] To begin, the [Delaware Consumer Fraud Act](#), 6 Del. § 2512, requires that the relevant conduct "occur 'in part or wholly within this State.'" [Wal-Mart Stores, Inc. v. AIG Life Ins. Co.](#), 901 A.2d 106, 117 (Del. 2006) (quoting [6 Del. § 2512](#)). Although Plaintiffs allege that Defendant and certain Plaintiffs are incorporated in Delaware [198 (Compl.), Compl. ¶¶ 27, 41, 51], that does not establish that any relevant conduct occurred in Delaware.<sup>19</sup> The only allegation that even arguably addresses conduct in Delaware does so in a conclusory manner. [*Id.* at ¶ 584 ("Defendants' [\*\*83] conduct substantially affected commerce and consumers in Delaware throughout the Class Period. In addition, Defendants have fraudulently concealed their actions from Plaintiffs and members of the Delaware Class.").]<sup>20</sup> Because Plaintiffs have not [\*549] sufficiently alleged conduct occurring in Delaware, the Court grants Defendant's motion to dismiss Plaintiffs' claim under the Delaware Consumer Fraud Act (Count XXXVI).

**HN41** [↑] Similarly, [North Carolina's Unfair Trade Practices Act](#) reaches only conduct causing a "'substantial' in-state injury," not "merely an 'incidental'" one. [In re Refrigerant Compressors Antitrust Litig.](#), 2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at \*18-19 (E.D. Mich. Apr. 9, 2013) (citing *The 'In' Porters, S.A. v. Hanes Printables, Inc.*, 663 F. Supp. 494, 502 (M.D.N.C. 1987)); [Merck & Co., Inc. v. Lyon](#), 941 F. Supp. 1443, 1463 (M.D.N.C. 1996)). When plaintiffs do not allege that any wrongful conduct occurred in North Carolina, allegations that indirect purchasers payed inflated prices are not sufficient to establish a substantial, in-state injury. Because Plaintiffs have alleged no more here, the Court grants Defendant's motion to dismiss Plaintiffs' claim under North Carolina's Unfair Trade Practices Act (Count XXII).

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<sup>19</sup> Plaintiffs do not argue that being incorporated in Delaware is sufficient to establish conduct occurring in Delaware for the purposes of the Delaware Consumer Fraud Act. Nor do Plaintiffs cite to any cases indicating that such a showing is sufficient.

<sup>20</sup> In support of its claim under Delaware law, Plaintiffs also cite to an allegation that Defendant "violated the [Delaware Consumer Fraud Act](#), 6 Del. Code § 2511, et seq.", through their unfair and/or deceptive practices." [198 (Compl.), at ¶ 578.] However, that allegation does not identify any conduct occurring in Delaware.

**HN42** [+] The Wisconsin Supreme Court also has made clear that "[a] civil plaintiff filing an action under Wisconsin's antitrust act must allege that (1) actionable conduct, such as the formation of a combination or conspiracy, occurred within [\*\*84] this state, even if its effects are felt primarily outside Wisconsin; or (2) the conduct complained of 'substantially affects' the people of Wisconsin and has impacts in this state, even if the illegal activity resulting in those impacts occurred predominantly or exclusively outside this state." [\*Olstad v. Microsoft Corp., 2005 WI 121, 284 Wis. 2d 224, 700 N.W.2d 139, 158 \(Wis. 2005\)\*](#) (quoting [\*State v. Allied Chem. & Dye Corp., 9 Wis. 2d 290, 101 N.W.2d 133, 134 \(1960\)\*](#)). Plaintiffs argue that the Wisconsin Supreme Court has rejected the view that Wisconsin's antitrust statute applies only to intrastate conduct. [356, at 106-07 (citation omitted).] Still, Plaintiffs fail entirely to explain how their allegations are sufficient to satisfy either standard set forth in *Olstad*. Accordingly, the Court grants Defendant's motion to dismiss Plaintiffs' Wisconsin antitrust claim (Count XXXI).

**HN43** [+] Massachusetts's consumer protection statute requires that the "actions and transactions constituting the alleged unfair method of competition or the unfair or deceptive act or practice" must have "occurred primarily and substantially" in Massachusetts. [\*Mass. Gen. Laws Ch. 93A, § 11\*](#). However, "the burden of proof shall be upon the person claiming that such transactions and actions did not occur primarily and substantially within the commonwealth." *Id.* "As this presents a factual question, 'a section [\*\*85] eleven cause of action, attacked via a motion to dismiss, should survive a 'primarily and substantially' challenge so long as the complaint alleges that the plaintiff is located, and claims an injury, in Massachusetts.'" [\*SCVNNGR, Inc. v. eCharge Licensing, LLC, 2014 U.S. Dist. LEXIS 135408, 2014 WL 4804738, at \\*6 \(D. Mass. Sept. 25, 2014\)\*](#) (quoting [\*Back Bay Farm, LLC v. Collucio, 230 F.Supp.2d 176, 188 \(D. Mass. 2002\)\*](#)). Because Plaintiffs make such allegations here [198 (Compl.), at ¶¶ 27, 605-617], the Court denies Defendant's motion to dismiss Plaintiffs' Massachusetts consumer protection claim (Count XXXIX) for failure to allege that the challenged conduct occurred primarily and substantially in Massachusetts.

**HN44** [+] Finally, New Hampshire's consumer protection act applies only to "the conduct of any trade or commerce within" that state. [\*N.H. Rev. Stat. Ann. § 358-A:2\*](#). "[C]ourts interpreting New Hampshire's consumer protection law disagree as to whether a nationwide scheme in which plaintiffs play a higher price in the state is sufficient to satisfy the statute's requirements." [\*In re Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 761 \(E.D. Pa. 2014\)\*](#) (quoting [\*550] [\*In re Ductile Iron Pipe Fittings \("DIPF"\) Indirect Purchaser Antitrust Litig., 2013 U.S. Dist. LEXIS 142466, 2013 WL 5503308, at \\*22 \(D.N.J. Oct. 2, 2013\)\*](#) (internal quotation marks omitted)). Although both parties cite to cases supporting their respective positions on whether Plaintiffs' allegations of conduct of trade or commerce within New Hampshire are sufficient to state a claim, neither party addresses the split in authority or why the Court [\*\*86] should follow the cases supporting their respective positions. Accordingly, a definitive ruling on this issue would be premature. The Court thus denies Defendant's motion to dismiss Plaintiffs' New Hampshire consumer protection claim (Count XLIII) on that basis.

### iii. Intrastate Conduct

Defendant argues that Plaintiffs' claims under Alabama and Tennessee law fail because those claims are limited to purely (or at least predominantly) intrastate conduct. **HN45** [+] Alabama's antitrust statute regulates conduct occurring intrastate. [\*Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 737 F. Supp. 2d 380, 429 \(E.D. Pa. 2010\)\*](#) (concluding that "antitrust violations as claimed by the plaintiffs [did] not violate Alabama's antitrust statute because they involve[d] interstate, and not purely intrastate, conduct"); see also [\*Abbott Lab. v. Durrett, 746 So. 2d 316, 339 \(Ala. 1999\)\*](#) (Alabama antitrust laws "regulate monopolistic activities that occur 'within this state'—within the geographic boundaries of [the] state."). Plaintiffs appear to concede that their Alabama antitrust claim fails for this reason, failing entirely to address Defendant's argument. Accordingly, the Court grants Defendant's motion to dismiss Plaintiffs' Alabama antitrust claim (Count VI) for failure to allege intrastate conduct.

The Court also grants Defendant's [\*\*87] motion to dismiss Plaintiffs' antitrust claim under the [\*Tennessee Trade Practices Act \(the "TTPA"\)\*](#) (Count XXVII). "[V]arious courts have interpreted the scarce Tennessee authority [on the intrastate standard requirement] to espouse different tests for whether Tennessee's antitrust statute applies." [\*Sherwood v. Microsoft Corp., 2003 Tenn. App. LEXIS 539, 2003 WL 21780975, at \\*15 \(Tenn. Ct. App. July 31,\*](#)

2003). Some courts have held that plaintiffs must allege that the challenged conduct occurred "predominately intrastate" in order to state a claim under Tennessee law. See, e.g., Lynch Display Corp. v. Nat'l Souvenir Ctr., Inc., 640 S.W.2d 837, 840 (Tenn. Ct. App. 1982) ("The Tennessee **antitrust law** applies to transactions which are predominantly intrastate in character."). However, other courts have held that plaintiffs must allege that the challenged conduct had a "substantial effect" in Tennessee in order to state a claim under Tennessee law. See, e.g., Sherwood v. Microsoft Corp., 2003 Tenn. App. LEXIS 539, 2003 WL 21780975, at \*1 (Tenn. Ct. App. July 31, 2003) ("[T]he Tennessee Trade Practices Act applies to activity that has substantial effects on commerce within the state[.]"). The Court need not decide which standard applies, as Plaintiffs have not even alleged sufficient facts to satisfy even the less stringent standard (*i.e.*, that challenged conduct had a substantial effect in Tennessee). Indeed, Plaintiffs have not identified any Tennessee-specific allegations supporting its claim. **[\*\*88]** Accordingly, Defendant's motion to dismiss Plaintiffs' Tennessee antitrust case (Count XXVII) for failure to allege sufficient intrastate conduct is granted.

#### iv. Intangible Services

Defendant also argues that Plaintiffs' claim under TTPA (Count XXVII) fails because that statute does not apply to services. HN46 "The law is well settled that the TTPA applies only to tangible goods, not intangible services." Bennett v. Visa U.S.A. Inc., 198 S.W.3d 747, 751 (Tenn. Ct. I<sup>\*551</sup> App. 2006). Plaintiffs argue that the software constitutes a tangible good under the TTPA. In support of that argument, Plaintiffs cite to Sherwood v. Microsoft Corp., in which the Tennessee Court of Appeals allowed a TTPA claim based on the purchase of computer software to proceed. 2003 Tenn. App. LEXIS 539, 2003 WL 21780975, at \*1 (Tenn. Ct. App. July 31, 2003). Although Sherwood did not specifically address whether software constitutes a tangible good, the court gave no indication that it had any doubts about the applicability of the TTPA to the purchase of software. Furthermore, in other contexts, courts have concluded that software is a tangible good. See, e.g., Simulados Software, Ltd. v. Photon Infotech Private, Ltd., 40 F. Supp. 3d 1191, 1199 (N.D. Cal. 2014) ("Generally, courts have found that mass-produced, standardized, or generally available software, even with modifications and ancillary services included in the agreement, is a good that is covered by the UCC."); **[\*\*89]** Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 675-76 (3d Cir. 1991) ("The topic has stimulated academic commentary with the majority espousing the view that software fits within the definition of a 'good' in the U.C.C."). Given these authorities, the Court declines to conclude that software does not constitute a tangible good under the TTPA.<sup>21</sup>

Defendant also argues that even if software constitutes a tangible good under the TTPA, Plaintiffs cannot bring a TTPA claim based on the purchase of software because they do not actually use the data integration software. However, Defendant does use DMS software. Furthermore, it is not clear that a party directly must use software to bring a claim under the TTPA. Defendant has not cited to any authority in support of that argument. HN47 In fact, the cases cited by the parties indicate the indirect users can bring claims under the TTPA. See, Sherwood, 2003 Tenn. App. LEXIS 539, 2003 WL 21780975, at \*29-30. Accordingly, Defendant's motion to dismiss Plaintiffs' TTPA claim for failure to allege a tangible good is denied.

#### v. Alleged Antitrust Conduct Not Covered

Defendant argues that Plaintiffs' claims under Arkansas's and West Virginia's consumer protection statutes (Counts XXX and XXXIII) fail because those consumer protection statutes do not apply to traditional antitrust conduct. **[\*\*90]** With respect to Plaintiffs' consumer protection claim under Arkansas law, Defendant's motion is denied. The only authority in support of this argument cited in Defendant's opening brief was In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 516 F. Supp. 2d 1072 (N.D. Cal. 2007), which actually concluded that indirect purchaser suits alleging antitrust violations could also state claims under the Arkansas Deceptive Trade

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<sup>21</sup> Despite the lack of Tennessee authority on point, the Court would have appreciated a fulsome explanation as to why software should or should not be considered a tangible good under the TTPA. Although the Court would have entertained any such argument on a motion for summary judgment, the Court already is dismissing Plaintiffs TTPA claim for failure to allege sufficient intrastate conduct. The issue therefore is moot.

Practices Act ("ADTPA"). In its reply brief, Defendant also notes that the ADTPA does not explicitly prohibit "unfair competition" at all. [378, at 28 (citing [Ark. Code Ann. § 4-88-107](#).)] Defendant also asserts that "Arkansas law recognizes the remoteness doctrine' as applied to claims under the ADTPA, favoring suits by those directly injured over more-indirect victims." [*Id.* (quoting [DFA II, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at \\*17](#).)] Because Defendant first raised these arguments in its reply brief and because Defendant fails fully to develop these arguments, the Court will not consider them at this time. [Peterson v. Vill. of Downers Grove, 103 F. Supp. 3d 918, 925 \(\\*552\) \(N.D. Ill. 2015\) HN48](#) [↑] ("Arguments raised for the first time in reply briefs are ordinarily waived, and rightly so given the lack of opportunity for the other party to respond to them." (citing [Carroll v. Lynch, 698 F.3d 561, 564 n. 2 \(7th Cir. 2012\)](#)); [Argyropoulos v. City of Alton, 539 F.3d 724, 738 \(7th Cir. 2008\)](#) (finding "perfunctory and undeveloped" argument waived)). Defendant therefore has not established that antitrust conduct is not covered by the ADTPA. [\*\*91] Accordingly, the Court denies Defendant's motion to dismiss Plaintiffs' ADTPA claim (Count XXXIII) on that basis.

Defendant's motion to dismiss Plaintiffs' West Virginia consumer protection claim (Count XXX) on the basis that antitrust violations are not covered under the West Virginia statute also is denied. There does not appear to be any in-state authority regarding the application of West Virginia's consumer protection statute in the antitrust context. As the parties note, out-of-state authorities are split regarding whether anticompetitive conduct can be challenged under the statute. Compare [In re Dynamic Random Access Memory \(DRAM\) Antitrust Litig., 516 F. Supp. 2d 1072, 1118 \(N.D. Cal. 2007\)](#), with [In re Packaged Seafood Prods. Antitrust Litig., 242 F. Supp. 3d 1033, 1087 \(S.D. Cal. 2017\)](#).

In *In re Packaged Seafood*, the court recognized authority concluding that West Virginia's consumer protection statute does not cover anticompetitive conduct such as price fixing, but nonetheless disregarded those decisions, noting that "none of [those] courts had the benefit of the West Virginia Legislature's 2015 amendment to the WVCCPA intending that 'in construing this article, the courts be guided by the policies of the Federal Trade Commission and interpretations given by the Federal Trade Commission and the federal courts to [Section 5\(a\)\(1\) of the Federal Trade Commission Act](#).'" [242 F. Supp. 3d at 1087](#) (quoting [\*\*92] [W. Va. Code § 46A-6-101](#)). Defendant does not argue that the challenged conduct does not constitute "unfair or deceptive acts or practices" under [Section 5\(a\)\(1\) of the Federal Trade Commission Act](#). Rather, Defendant argues that case was decided erroneously because "that amendment should not be read to so drastically expand the scope of the statute, especially where the dealers identify no West Virginia authority saying it does." [378, at 27-28.] But Defendant does not explain how the court's application of the 2015 amendment to the WVCCPA in *In re Seafood* drastically expanded the scope of the statute. Nor does Defendant explain how the courts application of the 2015 amendment to the WVCCPA in *In re Seafood* was incorrect. Given the plain language of the 2015 amendment to the WVCCPA, the Court agrees with the reasoning of *In re Seafood* and concludes that the WVCCPA prohibits anticompetitive conduct.<sup>22</sup> Accordingly, the Court denies Defendant's motion to dismiss Plaintiffs' WVCCPA claim (Count XXX) on the basis that antitrust violations are not covered.

#### vi. Class Actions Not Authorized

Defendant similarly argues that Plaintiffs are precluded from pursuing a [\*553] class action under the consumer protection statutes [\*\*93] of Alaska, Arkansas, Georgia, Illinois, and South Carolina because of class action bars. Although it is true that Alaska, Arkansas, Georgia, and South Carolina bar the kind of class action claims that Plaintiffs seek to bring here, see [Alaska Stat. § 45.50.531\(b\)](#); [Ark. Code Ann. § 4-88-113\(f\)\(1\)\(B\)](#); [Ga. Code Ann. §](#)

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<sup>22</sup> Defendant's memorandum in support of its motion to dismiss does cite to one district court case from California for the proposition that West Virginia's consumer protection statute does not cover antitrust violations. [266, at 57 (citing See [In re Dynamic Random Access Memory \(DRAM\) Antitrust Litig., 516 F. Supp. 2d 1072, 1118 \(N.D. Cal. 2007\)](#).)] However, that case was decided before the 2015 amendment to the WVCCPA. For that reason and for the reasons discussed above, the Court finds the reasoning in *In re Packed Seafood* to be more persuasive.

10-1-399(b); 740 Ill. Comp. Stat. Ann. 10/7(2); S.C. Code Ann. § 39-5-140(a), Plaintiffs brought their claims in federal court—not state court.

In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, the Supreme Court had to address whether a New York class action bar conflicted with Rule 23 and, if so, whether the federal rule or the state rule applied. 559 U.S. 393, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010). HN49 [↑] The Supreme Court held that Rule 23—not the New York class action bar—applied in federal court. *Id.* Justice Scalia's plurality decision took the position that properly enacted federal rules of procedure always apply in federal court. Id. at 410. Justice Stevens's concurring opinion took the position that properly enacted federal rules generally apply in federal court, unless the federal rule "would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right." Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 423, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010).

Some courts have treated Justice Stevens's opinion as the controlling opinion, as it provides [\*\*94] the narrowest grounds for the Supreme Court's decision. See, e.g., James River Ins. Co. v. Rapid Funding, LLC, 658 F.3d 1207, 1217 (10th Cir. 2011). Although the Seventh Circuit has not squarely addressed which opinion controls, it otherwise has indicated that Justice Scalia's plurality sets forth the controlling legal standard. See Sawyer v. Atlas Heating & Sheet Metal Works, Inc., 642 F.3d 560, 564 (7th Cir. 2011) (*Shady Grove* "holds that Rule 23 applies to all federal civil suits, even if that prevents achieving some other objective that a court thinks valuable"); State Farm Life Ins. Co. v. Jonas, 775 F.3d 867, 869 (7th Cir. 2014) ("[F]ederal procedures govern in federal litigation[.]" (citing Shady Grove, 559 U.S. 393, 130 S. Ct. 1431, 176 L. Ed. 2d 311)). Even if Justice Stevens's plurality opinion applied, Defendant has not identified any authority for concluding that the class action bars at issue are so intertwined with a state-created right or remedy as to justify finding that it trumps Rule 23 under Justice Stevens's analysis.<sup>23</sup> Accordingly, the Court denies Defendant's motion to dismiss Plaintiffs' class claims under Alaska, Arkansas, Georgia, and South Carolina based on the relevant class action bars in those states.

#### vii. No Damages Claim

Defendant argues that Plaintiffs' claims under California's Unfair Competition Law (Counts VIII and XXXIV) and Colorado Consumer Protection Act (XXXV) fail because those causes of action are equitable in nature and do not allow for the recovery [\*\*95] of damages. With respect to Plaintiffs' claims under California Unfair Competition Law ("UCL"), it is true—as Plaintiffs concede—that damages cannot be recovered under California's UCL. In re Tobacco II Cases, 46 Cal. 4th 298, 93 Cal. Rptr. 3d 559, 207 P.3d 20, 29 (Cal. 2009). Plaintiffs argue, however, that they can proceed on their UCL claims to obtain injunctive relief and/or restitution. Defendant [\*554] does not dispute that assertion, which is supported by case law. *Id. at 29* ("[P]laintiffs are generally limited to injunctive relief and restitution."); see also Vasic v. PatentHealth, L.L.C., 171 F. Supp.3d 1034, 1041 (S.D. Cal. 2016) ("An order for restitution is one compelling a UCL defendant to return the money obtained through the unfair business practice."). Furthermore, Count VIII also is brought under "the Cartwright Act, Cal. Bus. & Prof. Code § 16700 et seq., [which] was modeled after the Sherman Act." Cnty. of Tuolumne v. Sonora Cnty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001). Defendant does not contest that damages are not recoverable under the Cartwright Act. Cal. Bus. & Prof. Code § 16750 ("Any person who is injured \* \* \* may sue \* \* \* and recover three times the damages sustained[.]"). Accordingly, the Court denies Defendant's motion to dismiss Plaintiffs' claims under California's Unfair Competition Law (Counts VIII and XXXIV) based on the lack of availability of damages.

HN50 [↑] Colorado's Consumer Protection Act bars class claims for money damages. Colo. Rev. Stat. § 6-1-113(2) (noting defendants are liable for damages [\*\*96] "[e]xcept in a class action"); In re MyFord Touch Consumer Litig., 2016 U.S. Dist. LEXIS 179487, 2016 WL 7734558, at \*26 (N.D. Cal. Sept. 14, 2016) ("Colorado law prohibits class actions for monetary damages based on the Consumer Protection Act."). Defendant cites to one case from the Northern District of California—Davidson v. Apple, Inc., 2018 U.S. Dist. LEXIS 137707, 2018 WL 2325426, at \*11

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<sup>23</sup> Because the Court would reach the same conclusion under the standards set forth in the plurality and in the concurrence, the Court need not address which standard applies.

[\(N.D. Cal. May 8, 2018\)](#)—in which the court held that it would be inappropriate to "overlook the statute's plain language" in the absence of any Colorado authority "actually holding that the CCPA bar is inapplicable or explaining why the CCPA bar can be ignored." *Id.* However, as noted by the court in *Davidson*, whether the federal procedural rule allowing class actions (i.e., [Rule 23](#)) trumps the state-law bar on class actions under the CCPA depends on the two-step analysis established by the Supreme Court in *Shady Grove*. Neither party here has engaged in such an analysis. To the extent that Defendant relies on the court's analysis in *Davidson*, that decision lacks persuasive force. To begin, the court in *Davidson* indicated that it was not inclined to overlook the statute's plain language absent any Colorado decision actually holding that the CCPA bar is inapplicable or explaining why the CCPA bar can be ignored. But Colorado courts would have no reason to engage in a *Shady Grove* analysis. Furthermore, the *Davidson* court [\*\*97] noted some uncertainty regarding the proper application of *Shady Grove*. [Davidson, 2018 U.S. Dist. LEXIS 137707, 2018 WL 2325426, at \\*11](#) (discussing cases reaching different conclusions regarding the proper application of *Shady Grove* to the CCPA's class action bar). Without the benefit of thorough briefing on this issue, the Court declines to rule at this time on whether Plaintiffs' CCPA claim for damages is barred under *Shady Grove*.

#### viii. Notice Requirements Unsatisfied

Defendant argues that Plaintiffs' Hawaii antitrust claim and Georgia, New Jersey, and West Virginia<sup>24</sup> consumer protection claims (Counts X, XXXVIII, XLIV, and XLIX) fail because those statutes carry notice requirements—as to either the defendants or the state attorney general—that Plaintiffs here do not allege that they satisfy. [Ga. Code Ann. § 10-1-399\(b\); Haw. Rev. Stat. § 480-13.3\(a\)\(1\); N.J. Stat. Ann. § 56:8-20; W. Va. Code § 46A-6-106\(c\)](#). The parties dispute whether the notice requirements apply in federal court, but the parties fail to engage in a full analysis of the relevant legal standards.

[\*555] To begin, neither party sufficiently addresses whether there is a conflict between [Rule 23](#) (or any other federal rule) and these state notice requirements.<sup>25</sup> [HN51](#) If there is no conflict, then the state notice requirements would apply. [Hahn v. Walsh, 762 F.3d 617, 631 \(7th Cir. 2014\)](#) ("If there is no conflict, then our inquiry ends because there is no need to displace [\*\*98] any rule."). Courts have reached different conclusions on that issue. Compare [In re Lipitor Antitrust Litig., 336 F.Supp.3d 395, 415 \(D.N.J. 2018\)](#) ("[T]he Court finds that [Rule 23](#) is not 'sufficiently broad' to cover the state statutory notice provisions."); [In re Asacol Antitrust Litig., 2016 U.S. Dist. LEXIS 94605, 2016 WL 4083333, at \\*15 \(D. Mass. July 20, 2016\)](#) (same), with [In re Restasis \(Cyclosporine Ophthalmic Emulsion\) Antitrust Litig., 355 F. Supp. 3d 145, 2018 U.S. Dist. LEXIS 194161, 2018 WL 5928143, at \\*6 \(E.D.N.Y. Nov. 13, 2018\)](#) (holding that [Rule 23](#) and state notice provisions conflict and applying the *Shady Grove* analysis).

The parties also fail sufficiently to engage in any analysis under *Shady Grove*. For example, the parties do not address which opinion in *Shady Grove* is controlling. Plaintiffs appear to take the position advanced in Justice Scalia's plurality—namely, that federal procedural rules always apply. But Plaintiffs provide no argument as to why that opinion should control. To the extent that Justice Stevens's opinion controls, the parties do not address whether and to what extent each state's notice requirement "is so intertwined with a state right or remedy that it functions to define the scope of the state-created right." [Shady Grove, 559 U.S. at 423](#). Without the benefit of briefing on these complex questions, the Court declines to rule on the applicability of state-law notice requirements in federal lawsuits.

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<sup>24</sup> Defendant has withdrawn its argument that notice is required to bring a claim under Alaska's consumer protection statute. [378, at 28 n.11.]

<sup>25</sup> Defendant does cite to one case which held that the state notice requirements applied because there was no conflict with [Rule 23](#), but only did so in its reply brief. [378, at 28 (citing [In re Asacol Antitrust Litig., 2016 U.S. Dist. LEXIS 94605, 2016 WL 4083333, at \\*14-15 \(D. Mass. July 20, 2016\)](#).)] Plaintiffs do not address the issue at all, but cannot be faulted for not doing so, as Defendant did not raise the issue in its opening brief.

#### ix. Insufficient Tie to Consumers

Defendant argues that Plaintiffs' consumer protection claims under Arkansas and Georgia law [\*\*99] fail because Plaintiffs fail to allege a sufficient connection to consumers or consumer-related conduct. [HN52](#)[] To state a claim under the Arkansas Deceptive Trade Practices Act ("ADTPA"), plaintiffs must allege a "consumer-oriented act." [Apprentice Info. Sys., Inc. v. DataScout, LLC, 2018 Ark. 149, 544 S.W.3d 536, 539 \(Ark. 2018\)](#) (quotations omitted). In support of its argument for dismissal, Defendant cites to *Apprentice*, a decision by the Arkansas Supreme Court, which held that there was no such consumer-oriented act where the parties "were competitors in the market of selling counties' public data" and where the plaintiff "sued over its thwarted business model, not a specific harm to consumers." [Id. at 539-40](#). Defendant argues that Plaintiffs similarly have not alleged a specific harm to consumers. However, unlike [Apprentice](#), Plaintiffs are not competitors with Defendant. Furthermore, Defendant's argument assumes that Plaintiffs are not "consumers" under the ADTPA. Without any argument or authority addressing whether Plaintiffs are "consumers" under the ADTPA, the Court cannot determine whether Plaintiffs sufficiently have alleged a consumer-oriented act. Accordingly, the Court denies Defendant's motion to dismiss Plaintiffs' claim under the ADTPA (Count XXXIII) for failure to allege sufficient [\*\*100] consumer ties without prejudice to raising the argument in the future.

[\*556] With respect to Plaintiffs' claim under the [Georgia Fair Business Practices Act \("GFBPA"\)](#), however, the Court agrees that Plaintiffs have not alleged that they are consumers as the term is used under that statute. [HN53](#)[] The GFBPA makes unlawful "[u]nfair or deceptive acts or practices in the conduct of consumer transactions and consumer acts or practices in trade or commerce" but limits the definition of "consumer" to "a natural person" and "consumer transactions" to those that are "primarily for personal, family, or household purposes." Ga. Code Ann. §§ 10-1-393(a), [10-1-392\(a\)\(6\)](#), [\(10\)](#). Although business entities may bring suit under the GFPPA, "the allegedly deceptive actions and practices that are the subject of the suit must be those directed at natural persons." [Forth v. Walgreen Co., 2018 U.S. Dist. LEXIS 39212, 2018 WL 1235015, at \\*10 \(N.D. Ill. Mar. 9, 2018\)](#). Plaintiffs fail entirely to explain how the deceptive actions and practices alleged here are directed at natural persons. Accordingly, the Court grants Defendant's motion to dismiss Plaintiffs GFBPA claim (Count XXXVIII) for failure to allege sufficient consumer ties.

#### x. No "Unfairness" Claim

Defendant argues that Plaintiffs' claim under the Arkansas consumer protection statute (Count XXXIII) [\*\*101] fails because the dealers have not alleged the type of extreme conduct covered by that statute. [HN54](#)[] As this Court has previously noted, the Arkansas Deceptive Trade Practices Act ("ADTPA") prohibits "'unconscionable, false, or deceptive' business practices without reference to 'unfair' business practices." See [DFA II, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at \\*35](#) (citing [Ark. Code Ann. § 4-88-107\(a\)\(10\)](#)). The ADTPA further notes that "[t]he deceptive and unconscionable trade practices listed in this section are in addition to and do not limit the types of unfair trade practices at common law or *under other statutes* of this state." [Ark. Code Ann. § 4-88-107\(b\)](#) (emphasis added). Courts—including this Court—therefore have concluded that claims under the ADTPA are limited to "instances of false representation, fraud, or the improper use of economic leverage in a trade transaction." [Universal Coops., Inc. v. AAC Flying Serv., Inc., 710 F.3d 790, 795-96 \(8th Cir. 2013\)](#); see also [DFA II, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at \\*35](#). "An 'unconscionable' act is an act that 'affront[s] the sense of justice, decency, or reasonableness.'" [Universal Coops., 710 F.3d at 795](#) (citation omitted).

Defendant argues that Plaintiffs' claim under the ADTPA should be dismissed because Plaintiffs fail to allege the kind of fraudulent and/or unconscionable acts necessary to bring a claim under the ADTPA. Plaintiffs do not contend that they have made such allegations, but they argue nonetheless [\*\*102] that in their ADTPA claim should be allowed in light of the intention for the ADTPA to be construed liberally. [358, at 110 (citations omitted).] Although Plaintiffs note that courts are split regarding whether antitrust claims can be brought under the ADTPA [358, at 110 n.95 (citing [In re Lidoderm Antitrust Litig., 103 F. Supp. 3d 1155, 1166-67 \(N.D. Cal. 2015\)](#))]], Plaintiffs make no efforts to explain why the Court's previous application of Arkansas law was incorrect. Accordingly,

Defendant's motion to dismiss Plaintiffs ADTPA claim (Count XXXIII) for failure to allege fraudulent and/or unconscionable acts is granted.

#### *xi. Grossly Unequal Bargaining Power Not Alleged*

Defendant argues that Plaintiffs' claim under New Mexico's consumer protection statute (Count XLV) requires that Plaintiffs plead "grossly unequal bargaining power," which Defendant contends Plaintiffs fail sufficiently to allege. [HN55](#) [↑] Although one court has held that allegations of grossly unequal bargaining power are [\*557] necessary to state a claim under New Mexico's consumer protection statute, [\*In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1029-30 \(N.D. Cal. 2007\)\*](#), other courts have reached the opposite conclusion. [\*Ashton Woods Holdings LLC v. USG Corp. \(In re Domestic Drywall Antitrust Litig.\), 2016 U.S. Dist. LEXIS 90619, 2016 WL 3769680, at \\*10 \(E.D. Pa. July 13, 2016\)\*](#) ("[T]he New Mexico statute does not require a plaintiff to plead grossly unequal bargaining power."). The Court finds the reasoning of the latter category cases to [\*\*103] be more persuasive. A plaintiff may state a claim under the New Mexico Act by pleading that defendant either acted in a way that "(1) [took] advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or (2) result[ed] in a gross disparity between the value received by a person and the price paid." [\*N.M. Stat. § 57-12-2\(E\)\*](#) (2016). Nothing in the statute or in caselaw from New Mexico limits consumer protection claims to those involving grossly unequal bargaining power. Accordingly, the Court denies Defendant's motion to dismiss Plaintiffs' claim under New Mexico's consumer protection statute (Count XLV) for failure to allege grossly unequal bargaining power.

#### *xii. Failure To Allege Specific Violation*

Defendant argues that Plaintiffs' claim under the [\*Nevada Deceptive Trade Practices Act\*](#) (Count XLII) should be dismissed because Plaintiffs fail to identify the specific aspects of the statute that they contend CDK violated. In support of that argument, Defendant cites to a case from the District of Nevada in which the court granted a motion to dismiss a Nevada Deceptive Practices Act claim with leave to amend where the plaintiffs failed to identify "which kinds of violations [\*\*104] are alleged." [\*In re Zappos.com, Inc., 2013 U.S. Dist. LEXIS 128155, 2013 WL 4830497, at \\*6 \(D. Nev. Sept. 9, 2013\)\*](#). However, it is not clear from that opinion whether the plaintiffs in that case failed to cite to the specific statutory provision or failed substantively to identify the challenged conduct. Defendant appears to read *Zappos* as taking the latter position, as Defendant does not argue that Plaintiffs' factual allegations are insufficient. [HN56](#) [↑] To the extent that *Zappos* stands for the proposition that plaintiffs must cite the specific statutory authority on which it relies to state a claim, the Court finds *Zappos* unpersuasive in light of Seventh Circuit case law making clear that "[p]laintiffs need only plead facts, not legal theories, in their complaints." [\*Reeves ex rel. Reeves v. Jewel Food Stores, Inc., 759 F.3d 698, 701 \(7th Cir. 2014\)\*](#) (citing [\*Hatmaker v. Mem'l Med. Ctr., 619 F.3d 741, 742 \(7th Cir. 2010\)\*](#)). Indeed, the court in *Zappos* did not cite to any authority indicating that such allegations are necessary. Accordingly, the Court denies Defendant's motion to dismiss Plaintiffs' claim under the Nevada Deceptive Trade Practices Act (Count XLII) for failure to identify the specific statutory provision upon which Plaintiffs' claim relies.

### **IV. Conclusion**

Plaintiffs' unopposed motions for leave to submit supplemental authority [366; 420] are granted. In regard to Defendant's other motion [262], Defendant's motion to compel [\*\*105] arbitration is denied, and its alternative motion to dismiss is granted in part and denied in part.

Date: January 25, 2019

/s/ Robert M. Dow, Jr.

Robert M. Dow, Jr.

United States District Judge

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## United States v. Sanchez

United States Court of Appeals for the Ninth Circuit

January 16, 2019\*\*, Argued and Submitted, San Francisco, California; January 25, 2019, Filed

No. 17-10519, No. 17-10528, No. 18-10113

**Reporter**

760 Fed. Appx. 533 \*; 2019 U.S. App. LEXIS 2567 \*\*; 2019-1 Trade Cas. (CCH) P80,656; 2019 WL 325151

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAVIER SANCHEZ, Defendant-Appellant.UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GREGORY CASORSO, Defendant-Appellant.UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL MARR, Defendant-Appellant.

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

**Subsequent History:** Rehearing denied by, En banc [United States v. Sanchez, 2019 U.S. App. LEXIS 9865 \(9th Cir. Cal., Apr. 3, 2019\)](#)

US Supreme Court certiorari denied by [Sanchez v. United States, 2020 U.S. LEXIS 439 \(U.S., Jan. 13, 2020\)](#)

**Prior History:** **[\*\*1]** Appeal from the United States District Court for the Northern District of California. D.C. No. 4:14-cr-00580-PJH-2, D.C. No. 4:14-cr-00580-PJH-3, D.C. No. 4:14-cr-00580-PJH-1. Phyllis J. Hamilton, Chief Judge, Presiding.

[United States v. Sanchez, 2018 U.S. Dist. LEXIS 6128 \(N.D. Cal., Jan. 12, 2018\)](#)

**Disposition:** AFFIRMED.

## **Core Terms**

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rigging, bid, indictment, antitrust, competitors, entities, proposed instruction, instruct a jury, district court, per se rule, irreconcilable, intervening, overbroad, evidentiary presumption, per se violation, plain error, Price-fixing, instructions, bid-rigging, convictions, decisions, commerce, conspire, purposes, restrain, rights

## **LexisNexis® Headnotes**

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Governments > Courts > Judicial Precedent

[HN1](#) Courts, Judicial Precedent

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\*\* The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

A three-judge panel of an appellate court is bound by prior circuit law unless the reasoning or theory of the prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority.

Antitrust & Trade Law > Sherman Act

Criminal Law & Procedure > Trials > Defendant's Rights

## **HN2** [down arrow] Antitrust & Trade Law, Sherman Act

In Manufacturers' decision, the United States Court of Appeals for the Ninth Circuit held that applying the per se rule in a criminal antitrust case did not violate the defendant's constitutional rights.

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Theory of Defense

## **HN3** [down arrow] Particular Instructions, Theory of Defense

A defendant is entitled to have the judge instruct the jury on his or her theory of defense, provided that it is supported by the law and has some foundation in the evidence.

Criminal Law & Procedure > ... > Indictments > Amendments & Variances > Constructive Amendments

## **HN4** [down arrow] Amendments & Variances, Constructive Amendments

There is no constructive amendment when the indictment simply contains superfluously specific language describing alleged conduct irrelevant to the defendant's culpability under the applicable statute, and, in such cases, convictions can be sustained if the proof upon which they are based corresponds to the offense that was clearly described in the indictment.

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For GREGORY CASORSO, Defendant - Appellant (17-10528): Dennis P. Riordan, Riordan & Horgan, San Francisco, CA.

For UNITED STATES OF AMERICA, Plaintiff - Appellee (18-10113): Micah L. Rubbo, Albert Bilog Sambat, Esquire, Trial Attorney, U.S. DEPARTMENT OF JUSTICE, Antitrust Division, San Francisco, CA; Adam D. Chandler, James Joseph Fredricks, Jonathan Lasken, Kristen Ceara [\*\*2] Limarzi, Attorney, Robert Nicholson, U.S. Department of Justice, Washington, DC.

For MICHAEL MARR, Defendant - Appellant (18-10113): Dennis P. Riordan, Riordan & Horgan, San Francisco, CA.

**Judges:** Before: CLIFTON and FRIEDLAND, Circuit Judges, and ADELMAN, \*\*\* District Judge.

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\*\*\* The Honorable Lynn S. Adelman, United States District Judge for the Eastern District of Wisconsin, sitting by designation.

## Opinion

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### [\*535] MEMORANDUM\*

Defendants Michael Marr, Javier Sanchez, and Gregory Casorso appeal their jury convictions for conspiring to suppress and restrain competition by rigging bids in property foreclosure sales in violation of [Section 1](#) of the Sherman Antitrust Act, [15 U.S.C. § 1](#), which prohibits "contract[s], combination[s] . . . , or conspirac[ies]" that unreasonably "restrain[] trade or commerce."

1. We are bound by [United States v. Manufacturers' Ass'n of Relocatable Bldg. Industry, 462 F.2d 49 \(9th Cir. 1972\)](#). See [Miller v. Gammie, 335 F.3d 889, 893 \(9th Cir. 2003\)](#) (en banc) (holding that [HN1](#) [↑] a three-judge panel of this court is bound by prior circuit law unless "the reasoning or theory of [the] prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority"). [HN2](#) [↑] In *Manufacturers'*, we held that applying the per se rule in a criminal antitrust case did not violate the defendant's constitutional rights. [Manufacturers' Ass'n, 462 F.2d at 52](#). Defendants' argument that *Manufacturers'* is clearly irreconcilable with intervening Supreme Court antitrust decisions is unpersuasive, because the Supreme Court [\*\*3] has continued to recognize categories of per se violations. See [Ohio v. American Express Co., 138 S. Ct. 2274, 2283, 201 L. Ed. 2d 678 \(2018\)](#) ("A small group of restraints are unreasonable per se."); [F.T.C. v. Actavis, Inc., 570 U.S. 136, 161, 133 S. Ct. 2223, 186 L. Ed. 2d 343 \(2013\)](#) (noting that "it is per se unlawful to fix prices under [antitrust law](#)"); [Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 \(2006\)](#) ("Price-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements, fall into the *category of arrangements* that are *per se* unlawful." (emphasis added)). Defendants' argument that *Manufacturers'* is clearly irreconcilable with intervening Supreme Court decisions relating to mandatory evidentiary presumptions in criminal law is irrelevant, because *Manufacturers'* held that the per se rule is not an evidentiary presumption at all. [Manufacturers' Ass'n, 462 F.2d at 52](#). The district court therefore did not err in instructing the jury under the per se rule.

[\*536] 2. Defendants' proposed jury instruction, which would have instructed the jury that two entities are not competitors for purposes of [Section 1](#), and therefore cannot conspire, if they are engaged in a joint venture, lacked support in the law or in the facts of this case. See [United States v. Thomas, 612 F.3d 1107, 1120 \(9th Cir. 2010\)](#) ([HN3](#) [↑]) "A defendant is entitled to have the judge instruct the jury on [his or her] theory of defense, provided that it is supported by the law and has some foundation in the evidence." [\*\*4] (quoting [United States v. Mason, 902 F.2d 1434, 1438 \(9th Cir. 1990\)](#)). That Defendants cooperated with other persons and entities for purposes of rigging bids does not mean they were not competitors. See [Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 191, 130 S. Ct. 2201, 176 L. Ed. 2d 947 \(2010\)](#) (explaining that even "members of a legally single entity" have been held to have "violated [§ 1](#) when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity"). Thus, the district court did not err in rejecting the proposed instruction. See [Thomas, 612 F.3d at 1120-21](#) (explaining that this court reviews de novo the question whether a proposed instruction was supported by law, and "for abuse of discretion whether there is a factual foundation for a proposed instruction").

3. Defendants did not preserve their argument that the district court's instruction defining bid rigging was overbroad. See [Fed. R. Crim. P. 30](#) ("A party who objects to any portion of the [jury] instructions . . . must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate."). We thus review for plain error. See [Fed R. Crim. P. 52\(b\); Puckett v. United States, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 \(2009\)](#) (outlining four prongs to plain error review). Here, even assuming the portion of the instruction that Defendants claim was overbroad should not have been included, it did not affect Defendants' [\*\*5] substantial rights because the bid-rigging conduct Defendants were accused of clearly fell within the core of the instruction, not the allegedly overbroad part.

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\* This disposition is not appropriate for publication and is not precedent except as provided by [Ninth Circuit Rule 36-3](#).

4. To the extent Defendants have argued that the district court's instructions amounted to a constructive amendment of their indictment, that argument fails. The indictment clearly stated that Defendants were accused of bid rigging. That the indictment also quoted *Standard Oil* in generally describing the *Sherman Act* violation—*i.e.*, rigging bids *in unreasonable restraint of trade and commerce*—does not alter the fact that the bid-rigging charge was a charge of a per se antitrust violation. See [United States v. Ward, 747 F.3d 1184, 1191 \(9th Cir. 2014\)](#) (explaining that [HN4](#)<sup>↑</sup> there is no constructive amendment "when the indictment simply contains superfluously specific language describing alleged conduct irrelevant to the defendant's culpability under the applicable statute," and that "[i]n such cases, convictions can be sustained if the proof upon which they are based corresponds to the offense that was clearly described in the indictment"); see also [United States v. Joyce, 895 F.3d 673, 679 \(9th Cir. 2018\)](#) (holding that bid rigging was a per se violation and that "the district court did not err by refusing to permit [the defendant] to introduce [\*\*6] evidence of the alleged ameliorative effects of his conduct," in an appeal by another co-conspirator involved in the same scheme as Defendants here).

**AFFIRMED.**

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## Dreamstime.com, LLC v. Google, LLC

United States District Court for the Northern District of California

January 28, 2019, Decided; January 28, 2019, Filed

No. C 18-01910 WHA

### **Reporter**

2019 U.S. Dist. LEXIS 13408 \*; 2019-1 Trade Cas. (CCH) P80,664; 2019 WL 341579

DREAMSTIME.COM, LLC, a Florida LLC, Plaintiff, v. GOOGLE, LLC, a Delaware LLC; and DOES 1-10, Defendants.

**Subsequent History:** Motion granted by, in part, Motion denied by, in part, Claim dismissed by [Dreamstime.com, LLC v. Google, LLC, 2019 U.S. Dist. LEXIS 94573, 2019 WL 2372280 \(N.D. Cal., June 5, 2019\)](#)

Summary judgment granted by [Dreamstime.com, LLC v. Google, LLC, 470 F. Supp. 3d 1082, 2020 U.S. Dist. LEXIS 117312, 2020 WL 3630390 \(N.D. Cal., July 3, 2020\)](#)

Affirmed by [Dreamstime.com, LLC v. Google LLC, 2022 U.S. App. LEXIS 33550, 2022 WL 17420930 \(9th Cir. Cal., Dec. 6, 2022\)](#)

## **Core Terms**

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advertising, stock, online, images, amended complaint, monopoly, photography, rivals, website, customers, consumers, ranking, search engine, alleges, photographs, campaigns, relevant market, motion to dismiss, antitrust, competitors, monopolize, unfairness, policies, traffic, users, anticompetitive conduct, good faith, leveraging, asserting, breached

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**Judges:** WILLIAM ALSUP, UNITED STATES DISTRICT JUDGE.

**Opinion by:** WILLIAM ALSUP

## **Opinion**

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### **ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS**

#### **INTRODUCTION**

In this antitrust action, plaintiff accuses defendant of using its monopoly power to discriminate against plaintiff. Defendant now moves to dismiss all claims. For the reasons stated below, the motion to dismiss is **GRANTED IN PART AND DENIED IN PART.**

## STATEMENT

### 1. THE PARTIES.

Defendant Google, LLC owns and operates the world's largest internet search engine using a number of proprietary algorithms that Google claims will help consumers find pages with relevant information. When you type a word search into the Google search [\*2] bar, Google's product responds by producing lines of results drawn from all over the internet. Google shows approximately ten lines of results per page and provides as many pages as needed to show the hits. As potential hits can run into the thousands, a website's ranking on Google's line of results has a direct, measurable impact on the amount of web traffic to that website. In a nearby tab to the Google search bar, Google also operates a search engine for images ("Google Images"). An essential driver of web traffic to Google, Google Images has become the biggest repository of images in the world (Dkt. No. 50 at ¶¶ 2, 4, 18-20, 26).

Google has partnered with two photography businesses, Shutterstock as of July 2016 and Getty Images as of February 2018, who together represent 70% of the stock photography market. Google's partnership agreement with Shutterstock in particular provides Google license to integrate Shutterstock's library of hundreds of millions of online images into its search advertising network. Google then uses those images together with advertisements running through Google's advertising platforms, further driving web traffic through Google while also providing Shutterstock [\*3] with free advertising for their images. Nowhere does the amended complaint allege that these agreements *prohibit* Shutterstock and Getty Images from also dealing with Google's rivals, Yahoo! and/or Bing — stating solely that "Yahoo! and Bing are unable to obtain the same access to licensed stock photos for their competing ad networks." That inability may simply be due to the absence of any deal (as yet) between Shutterstock and Getty Images on the one hand, and Yahoo! and Bing on the other (*id.* at ¶¶ 32-34, 50, 104).

Plaintiff Dreamstime is a heavyweight in image repositories in the stock photography industry. A supplier of high-quality digital images since 2000, Dreamstime has a repository of millions of high-quality stock images. As of March 2018, Dreamstime had 20 million registered members (and counted clients in the Fortune 100 companies), more than 400 thousand contributing photographers, and over 75 million photos, illustrations, clip art images, and vectors (*id.* at ¶ 28).

### 2. SPONSORED ADS.

Google does not charge its search engine users money. Rather, companies pay Google to have advertisements for their websites prominently displayed in Google's search results. These are sponsored [\*4] ads. The complaint estimates that this advertising program (called AdWords by Google) accounts for over 80% of Google's revenue. Google's share of the United States online search advertising market is approximately 80%. To use AdWords, advertisers must agree to several adhesive agreements (*id.* at ¶¶ 23, 66-68).

The AdWords program uses an auction system to determine which advertisements are shown and how much each advertisement costs. Advertisers bid for relevant search term keywords such as "stock photo" or "digital image" and AdWords then allegedly assigns each advertisement a "quality score" based on multiple factors such as: the quality of the advertiser's website, the click-through rate (the percentage of users who not only viewed the ad but also clicked on it), and relevance to the search keywords. Each time a Google user enters search terms that include relevant keywords, the AdWords program determines which of the competing advertisements to display (*id.* at ¶¶ 67, 71-73).

In 2004, Dreamstime entered into the AdWords Agreement with Google, paying Google to display its advertisements on Google, and engaging in several different marketing campaigns to promote its advertisements [\*5] with the best combination of quality score, bid amount, and resulting customer acquisitions. Dreamstime paid Google daily to determine which of its advertisements are the most effective and to increase its circulation accordingly. Dreamstime subsequently saw a predictable and steady number of customers resulting from these campaigns (*id.* at ¶¶ 74-77).

### **3. DREAMSTIME PLUMMETS ON GOOGLE SEARCH.**

Dreamstime relies heavily on online search engines and search engine advertising to build its name recognition and generate new customers. Indeed, roughly two-thirds of Dreamstime's customers come to Dreamstime's website by way of a search-engine result. Consistent with Dreamstime's AdWords spending, from approximately 2005 to 2015, Dreamstime consistently ranked in the top three in Google's line of search results for searches related to stock photography, never appearing lower than the first page. Dreamstime's website traffic during that time also reflected that many people who searched "online stock photography" on Google used and purchased stock photographs from Dreamstime (*id.* at ¶¶ 29, 38-40).

In 2015, however, Dreamstime's search ranking on Google plummeted (this order pauses here to note that [\*6] Google's agreement with Shutterstock was announced in July 2016). For example, Dreamstime's rank on Google for the generic search term "stock photos" in June 2017 sank from what had been either the second or third *overall result* down to the fourth *page*. Such a drop in Google search results can be catastrophic for businesses; falling from page one to page two alone reduces website traffic by 95%, according to the amended complaint. In April 2016, Dreamstime's fall in Google's search ranking had taken a quantifiable toll, as the number of new Dreamstime customers who signed up and made a purchase within one month fell by 30% from that point the prior year (*id.* at ¶¶ 40-44).

### **4. DREAMSTIME'S ATTEMPTED SOLUTIONS.**

In an effort to steer away from the impending iceberg, Dreamstime followed every guideline and suggestion provided by Google's documentation to boost Dreamstime's rankings on Google search. Specifically, Dreamstime switched to https and http2, disavowed links, improved website quality, diversity, and quantity of content, invested in dedicated hardware for a caching system, and dramatically increased the crawl rate and number of pages on the site. When those efforts did not restore [\*7] Dreamstime's ranking, Dreamstime also invested numerous development hours to rebuild its entire site to be mobile-friendly, diverted resources from other projects in its business plan and doubled its hosting costs, engaged with and followed the advice of external agencies, hired its own in-house Search Engine Optimization expert, spent millions of dollars on website hosting to increase the content on its website by adding more images, and launched a second website — Megapixl.com — to get more exposure. Dreamstime also spent millions of dollars on new Google AdWords campaigns (increasing its budget by 50%) both for itself and for Megapixl.com. Still, Dreamstime's Google rank continued to decline through the end of 2017 and Megapixl.com did not gain traction (*id.* at ¶¶ 63-64, 77-78, 105).

To date, no one, including "guru" search engine optimization companies, have identified any issues with Dreamstime's site that would explain how Dreamstime came to be marginalized in Google's search rankings. To its knowledge, Dreamstime improved every metric critical to search ranking: Dreamstime's user engagement improved over the relevant period, Dreamstime's bounce rate (a metric that indicates the [\*8] percentage of people who land on a web page and then leave without clicking anywhere else on the website) has declined, and the average amount of time users spend on Dreamstime's website has stayed constant. Yet, Dreamstime's growth has slowed by approximately 50% since its peak (*id.* at ¶¶ 60, 64, 105).

This drop in rankings, moreover, continues to be unique to Google's search engine: a recent search demonstrated Dreamstime's search ranking for "stock images" was fifth on Bing's search engine, fourth on Yahoo!'s search engine, and third on Baidu's search engine. On Google's search engine, by contrast, Dreamstime found itself ninety-first, behind websites such as an obscure site with only 30,000 free images (compared with Dreamstime's

more than two million free images), yet another site with only 140 images total, and a blog article that had not been updated since 2014 entitled "Stock Photos That Don't Suck." Yet, when comparing Dreamstime to Google's partner Shutterstock by measure of accuracy, Dreamstime returned completely accurate, if not more accurate results than companies like Shutterstock. Dreamstime continues to maintain it has no internal answers for these vast discrepancies [\*9] in search results (*id.* at ¶¶ 41, 44, 55-58).

## 5. SUBVERSION BY GOOGLE IN DREAMSTIME'S ADVERTISING CAMPAIGNS.

Dreamstime contends that throughout this time, Dreamstime's advertising campaigns were actively subverted. Specifically, Google canceled Dreamstime's most successful advertising campaigns without notice or explanation and willy-nilly suspended Dreamstime's account based on accusations of policy violations. Google also prevented Dreamstime from running its advertisements altogether (but simultaneously allowed the exact same advertisements to be placed by Dreamstime's competitors). Most subversively, Google caused Dreamstime's daily spending limits to be exceeded systemically and on a regular basis by over-delivering on the advertisement campaigns (using more of the allocated advertising budget in a shorter period of time) (*id.* at ¶¶ 8, 79-80, 86, 90-91, 172).

Moreover, Google selectively applied its policies to Dreamstime's detriment. For example, Google removed Dreamstime's mobile application because it featured lingerie photographs but allowed Google partner Shutterstock's mobile application to remain active despite featuring explicitly nude photographs. In another example of selective [\*10] policy enforcement, Google removed Dreamstime's lowest cost per acquisition advertisements but allowed Dreamstime's high cost per acquisition display advertisements of *the same type* to remain active (translating to more income for Google) (*id.* at ¶¶ 53, 81, 86, 93).

The amended complaint is silent as to whether or not Dreamstime continued to win its AdWords campaigns for search terms. Dreamstime eventually determined that the spending on AdWords did not help Dreamstime's search ranking, and so, "Dreamstime recently resolved to significantly lower its advertising spending" (*id.* at ¶ 65 n.26).

## 6. THIS ACTION.

Dreamstime filed this lawsuit in March 2018 asserting four claims for relief: (1) violation of [Section 2 of the Sherman Act, 15 U.S.C. § 2](#); (2) breach of contract; (3) breach of the implied covenant of good faith and fair dealing; and (4) violations of [Section 17200 of the California Business and Professions Code](#) (Dkt. No. 1). Google moved to dismiss all claims (Dkt. No. 25). At oral argument (following full briefing), the undersigned judge provided Dreamstime an opportunity to amend the complaint before issuing an order on Google's motion to dismiss. Dreamstime elected to amend (Dkt. No. 44).

In September 2018, Dreamstime timely filed the amended complaint, asserting [\*11] the same four claims for relief (Dkt. No. 50). Google again moved to dismiss (Dkt. No. 53), and following full briefing (Dkt. Nos. 60, 61), another hearing was held in December 2018. Orders subsequently issued seeking clarification from both Dreamstime and Google (Dkt. Nos. 66, 70). Having received clarifications from both sides, this order follows (Dkt. Nos. 68, 69, 71).

## ANALYSIS

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." [Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#) (quotations omitted). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." [Id. at 678](#). Plausibility requires pleading facts, as opposed to conclusory allegations or the "formulaic recitation of the elements of a cause of action," [Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#), and must rise above the mere conceivability or possibility of unlawful conduct that entitles the pleader to relief. [Iqbal, 556 U.S. at 678-79](#). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops

short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 556 U.S. at 678 (citation [\*12] and quotation omitted). Nor is it enough that the complaint is "factually neutral"; rather, it must be "factually suggestive." *Twombly*, 550 U.S. at 557 n.5.

## 1. MONOPOLY MAINTENANCE UNDER SECTION 2 OF THE SHERMAN ACT.

Section 2 of the Sherman Act prohibits monopolization, attempted monopolization, and conspiracies to monopolize. More specifically, Section 2 provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." 15 U.S.C. §2.

The original complaint appeared to allege an unlawful monopoly leveraging theory based on the market for online stock photography and its dependence on the online search advertising market which Google purportedly monopolized. But both in Dreamstime's briefing and when directly asked during the first oral argument in September 2018, Dreamstime explicitly disavowed any such leveraging theory stating: "we are not alleging a two-market monopoly leveraging theory." Instead, Dreamstime insisted "it's a simple, straightforward monopoly maintenance case in which Google, with a market share of 70 percent plus, has maintained that [\*13] monopoly power and abused it . . ." (Dkt. No. 49 at 37, 38).

But even the maintenance theory had not been adequately alleged. The Court thus gave Dreamstime another chance to revise the unwieldy complaint to set forth its antitrust theory, observing that the best shot for Dreamstime appeared to be a leveraging claim. Dreamstime accepted the opportunity to amend, but the amended complaint made clear: "Dreamstime is advancing a traditional monopoly maintenance antitrust claim" (Dkt. No. 50 at ¶ 111). Later, Dreamstime affirmatively disavowed any leveraging theory: "plaintiff Dreamstime is not asserting a separate Section 2 of the Sherman Act two-market 'monopoly leveraging' claim" (Dkt. No. 68 at 1). It is plain that plaintiff foresees asserting a leveraging theory, attempting instead (for whatever reason) to pigeonhole this claim under the guise of unlawful monopoly maintenance.

The amended complaint alleges a relevant product market of online search advertising (Dkt. No. 50 at ¶ 119). Dreamstime's monopoly maintenance theory centers on an intertwined relationship between stock photographs and the online search advertising market. That is, stock photographs "are a critical component of search-based [\*14] display ads (ads that include pictures related to keyword searches). The use of stock photos in search-based display ads allows online search advertisers to create high-quality, engaging display ads that pop up when users enter certain keywords" (*id.* at ¶ 2b). Google purportedly therefore maintains its monopoly in the online search advertising market by taking "control over online stock photo supply . . . to sell in its advertising network, giving it a crucial competitive advantage over its competitors, such as Yahoo! and Bing" (*id.* at ¶ 4). Moreover, "[n]ow that Google has access to all of Shutterstock and Getty Images' stock photos, it has instantly become one of the largest distributors of stock photos to customers looking to use those photos in online ads" which "provide it with a key advantage over its online search advertising competitors, by allowing it to integrate hundreds of millions of licensed images into its search advertising network" (*id.* at ¶¶ 32, 34). Critically, Google then targets Dreamstime and other stock photography companies "by removing an important supplier of stock photos for search advertisers" (*id.* at ¶ 7).

As Google's rivals in the online search advertising [\*15] market have their own image services that have failed to gain traction, Google's monopoly in online search advertising is further secured:

Competition in online search advertising is harmed by Google's promotion of Google Images over Dreamstime and others. Google's competitors, such as Bing and Yahoo!, offer competing search and image services. However, they have been unable to achieve the volume of traffic and associated historical data capable of allowing their image-based services to compete with Google Images. Google's elimination of Dreamstime and other stock photography websites enhances and entrenches Google Images' dominance and secures its competitive advantages over Bing and Yahoo!.

(*id.* at ¶ 102). As alleged in the amended complaint, therefore, Google's mechanism for restricting competition in the online search advertising market is to exclude Dreamstime and other stock photography companies from engaging in both Google's search function and sponsored ads:

Google intends to restrict competition among itself, Yahoo! and Bing, and to extend its dominance over chief rivals. Its vehicle for doing so is the exclusion of Dreamstime and several other non-partner stock photography [\*16] websites . . . As these tactics injure competition in Google's market, they simultaneously cause material injuries to Dreamstime and other stock photo suppliers in the form of decreased or eliminated visibility in Google's search and ad results, overcharges for AdWords, lost revenue, lost customers, potential search engine optimization ("SEO") penalties, and loss of goodwill.

(*id.* at ¶ 10). In other words, the importance of stock photographs to Google means vanquishing smaller rivals in the stock photography industry:

Google has undertaken its . . . exclusionary conduct with the . . . purpose of maintaining and abusing its monopoly in the online search advertising market (by increasing Google Images' dominance and increasing its own stock photo offerings within its ad network) and to vanquish . . . smaller rivals in the online stock photography industry . . . Google's conduct discourages, prevents and/or precludes consumers from finding, accessing and/or buying services from Dreamstime and other online stock photo repositories directly, which in the long-run would erode Google's standing as the first place to go via its Google Images feature to search for . . . stock photos on the Internet. [\*17]

(*id.* at ¶¶ 125, 126). In sum, Dreamstime has most recently clarified the theory as follows:

[P]laintiff Dreamstime is alleging that defendant Google is a monopolist and has engaged in an overall scheme consisting of various predatory and exclusionary acts to maintain its monopoly position in the online search advertising relevant market. This conduct is directed at harming Dreamstime as a consumer/participant of services in the online search advertising market. This conduct simultaneously harms competition and consumers, and enhances Google's monopoly in the online search advertising market . . . As Dreamstime has alleged, its exclusion harms competition and consumers and enhances Google's monopoly in the online search advertising market notwithstanding that Dreamstime does not directly compete with Google in that market. While not a direct competitor in the online search advertising market, Dreamstime does compete for the same web traffic and offers similar functions to Google (in particular, Google Images) with respect to image-related searches, and its exclusion is a means by which Google increases its image-related search dominance and therefore its foothold in the online search [\*18] advertising market.

(Dkt. No. 68 at 1-2).

Dreamstime's theory, however, fails because it does not plausibly allege harm to competition in the relevant market. As the Supreme Court has made clear: "the possession of monopoly power will not be found unlawful unless it is accompanied by an element of *anticompetitive conduct*." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004) (emphasis added). Our court of appeals defines anticompetitive conduct as "behavior that tends to impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way." *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008) (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)).

Dreamstime alleges the following eight predatory acts committed by Google, which, taken as a whole, purportedly combine to impose anticompetitive conduct: (1) rigging the AdWords auction bidding process to control the purchase of Google's AdWords advertising services; (2) downgrading and distorting Dreamstime's online search ranking (raising Dreamstime's costs of competing and threatening to drive it out of business); (3) favoring contractual partners (Shutterstock and Getty Images) with opportunities not available to other smaller stock photography suppliers; (4) selectively enforcing its rules and terms governing its online [\*19] AdWords advertising program to disadvantage Dreamstime, thereby further undermining its ability to supply stock photos to its customers and Google's rivals; (5) elevating inconsequential websites ahead of Dreamstime and other online stock

photography repositories; (6) suspending Dreamstime's mobile application purportedly for policy violations (that the application did not violate), and later de-indexing Dreamstime's mobile application for the most common searches for stock photos within the Google Play Store; (7) allowing users to bypass Dreamstime's licensed images and obtain them directly on Google Images without paying for them; and (8) engaging in unlawful activity to capture and use privacy protected data of its consumers and advertisers (Dkt. No. 50 at ¶ 133).

But the pattern of conduct that appears to be predatory here, is not in and of itself injurious to competition in the relevant market. The theory advanced by plaintiff is that Dreamstime is a victim of a series of predatory acts — but the only harm to competition alleged is that it hurt Dreamstime and Dreamstime's ability to act as a consumer in that market. In the auction process, it would be to the advantage of Google [\*20] to have more bidders. Facialy, it does not make sense that Google would want to benefit from losing a customer.

What would make sense, is that Dreamstime is a potential competitor to Google in the online search advertising market with respect to images. Dreamstime could have its own search engine for images and sell sponsored ads and thus compete with Google as a rival. But Dreamstime has expressly disavowed that theory (Dkt. No. 68 at 1).\*

Taking the synergistic effect of the alleged predatory acts together as an overall scheme, this maintenance theory still does not succeed as a [Section 2](#) monopolization claim as "there can be no synergistic result" if none of the acts alleged is an antitrust violation. [\*Cal. Computer Prods. v. Int'l Bus. Machs., Corp.\*, 613 F.2d 727, 746 \(9th Cir. 1979\)](#). Although "a finding of some slight wrongdoing in certain areas need not by itself add up to a violation," Dreamstime still needs to meet every element of the antitrust claim. [\*City of Anaheim v. S. Cal. Edison Co.\*, 955 F.2d 1373, 1376 \(9th Cir. 1992\)](#). A showing of anticompetitive conduct is missing.

Much of the amended complaint focuses on the mistreatment of Dreamstime as a customer of Google in the online search advertising market. But such mistreatment, even by a monopolist, does not necessarily reduce competition in the relevant market. It is true that [\*21] "reduction of competition does not invoke the Sherman Act until it harms consumer welfare." [\*Rebel Oil Co., Inc. v. Atlantic Richfield Co.\*, 51 F.3d 1421, 1433 \(9th Cir. 1995\)](#) (citations omitted). But showing harm to one customer does not on its own demonstrate anticompetitive conduct. As one leading treatise states: "[t]he real intent of a consumer welfare test is to identify practices that both exclude rivals from the market and harm consumers." The treatise further illustrates:

Suppose that Microsoft, which has a monopoly in its Windows operating system, should develop a new version that was particularly buggy and prone to crashes. Clearly, consumers as a group would be harmed because they have a few good alternatives to Windows. But developing a bad version of Windows is not a monopolistic practice *because no one is excluded*. Microsoft's mistake . . . might simply impose harm on consumers until Microsoft fixed the problems and restored the status quo, *but the one thing that the practice would clearly not do is exclude rivals from the market. As a result, the practice is not 'monopolistic,' even though it causes consumer harm.*

Phillip E. Areeda & Herbert Hovenkamp, [\*Antitrust Law\*](#) ¶ 651 (4th ed. 2015) (emphasis added). Although this example differs from the predatory [\*22] acts alleged in the amended complaint in that Google is purportedly acting nefariously here, the fatal flaw in both theories remains the same: by destroying Dreamstime, no rival and no competition has been excluded from the online search advertising market, and therefore, no anticompetitive conduct has been adequately alleged.

To circumvent this problem, Dreamstime engages in some sleight of hand. Dreamstime asserts itself in the amended complaint not only as a customer whose welfare has been harmed, but also as a competitor to Google for

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\*This theory is suggested by language in the amended complaint (see, e.g., Dkt. No. 50 at ¶¶ 36, 126). At oral argument in December 2018, the district judge asked Dreamstime whether or not this was its theory. Dreamstime dodged the question at the time (Dkt. No. 65 at 4) ("Well, we think we should have been a stronger competitor in the image market, not taking Google head on in the search market"), but later affirmatively disavowed the theory: "plaintiff Dreamstime is not alleging it is a future potential or actual direct competitor to defendant Google (or Yahoo! or Bing) in the online search advertising market" (Dkt. No. 68 at 1).

web traffic and stock photographs. The relevant market alleged, however, is sponsored ads, not stock photographs. Dreamstime has repeatedly made clear, it is not, nor does it intend to be, a rival to Google in the relevant market: the online search advertising market (see Dkt. No. 68). Although Google may have reduced competition on the merits in the online stock photography market or "the online search advertising market for photography for images" (as the district judge asked Dreamstime at the December 2018 hearing), Dreamstime disavowed any such relevant market, insisting that the relevant market is "online search advertising, and we are in that [\*23] market as a participant because we are a contractual customer of Google" (Dkt. No. 65 at 23).

Scrutinizing the predatory actions alleged that are broader than mere harm to Dreamstime results in the same conclusion and do not "exclude[] some potential," or "limit[] some actual, competition." *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 343 (D. Mass. 1953) (Judge Charles Wyzanski), aff'd per curiam, 347 U.S. 521, 74 S. Ct. 699, 98 L. Ed. 910 (1954). In fact, some alleged conduct are more likely to have the opposite impact. The rigging of the AdWords bidding process and the general selective enforcement of Google's rules, for example, are more likely to steer customers towards existing rivals or to foster competition by encouraging others to enter the market.

Turning to the sole remaining alleged predatory act, Google's capturing of data, Dreamstime has not demonstrated that this data is captured through a means other than Google's "ability, economies of scale, research, natural advantages, and adaptation to inevitable economic laws." *Ibid.* Although the data collection likely gives Google an advantage in the online search advertising market over its rivals, a monopolist utilizing its competitive advantage does not equate to anticompetitive conduct. *Trinko*, 540 U.S. at 415-16. Other than couching the data collection practice [\*24] as "unlawful," Dreamstime has not specified how or in what way Google's data collection practice is anticompetitive.

Despite not listed as part of the eight predatory acts alleged in the amended complaint, this order pauses to explore the following possibility grounded in the facts alleged in the amended complaint: if, as Dreamstime states, it is true that the pipeline of stock photographs is the mechanism by which Google maintains its monopoly in the online search advertising market, then agreements between Google and stock photography companies streamlining that pipeline further allow Google to maintain its strength in the relevant market. This strength is further aided by Google's vast trove of data, including data shared between Shutterstock/Getty Images and Google as part of their agreements (Dkt. No. 50 at 103-104). This conduct, moreover, causes antitrust injury by increasing spending in the AdWords bidding campaigns for stock photography sites such as Dreamstime.

Even this conduct, however, would not be anticompetitive. Returning to the Supreme Court's opinion in *Trinko*: "Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve [\*25] their customers." *Trinko*, 540 U.S. at 407. A company providing a platform for businesses to sell advertisements must be expected to *efficiently* produce the best possible product to its customers. Thus, if in the online search advertising market, this means making stock photographs readily available to businesses seeking to advertise, a company will likely attempt to enter into agreements to make those stock photographs as available as possible. The use of data and the securing of these agreements here are efficient business transactions that do not "attempt[] to exclude rivals on some basis other than efficiency." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985) (citations omitted) (emphasis added). The Sherman Act, moreover, "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919).

Of course, Google could not enter into an agreement that violates *Section 1 of the Sherman Act* (agreements in unreasonable restraint of trade). But a *Section 1* violation is not alleged here. Under *Section 2*, nothing Dreamstime has alleged demonstrates that Google has maintained its monopoly by engaging in conduct to "chill[] vigorous competition" in the [\*26] relevant market. *American Needle, Inc. v. National Football League*, 560 U.S. 183, 190, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010). Google may position itself to leap ahead of its rivals in the relevant market on the merits. It is telling that not a single fact in this 76-page first amended complaint (with 19 exhibits attached) specifies how Google's rivals or potential rivals are denied online search advertising market share due to

the agreements between Google and Shutterstock/Getty Images. Dreamstime has not met its burden to show that the reason Google's rivals are unable to obtain the same access to licensed photos as Google is because of Google's anticompetitive action. Again, for all the amended complaint alleges, Shutterstock and Getty Images are perfectly free to enter into licensing arrangements with Yahoo! and Bing.

Nor do the antitrust laws require Google to enter into those same agreements with every stock photography company in the world. Or, as the Supreme Court stated: "The Sherman Act is indeed the Magna Carta of free enterprise, but it does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition." *Trinko, 540 U.S. at 415-16* (emphasis in original) (quotations and citations omitted). Dreamstime's amended complaint [\*27] misses a critical element in failing to allege a plausible monopoly maintenance claim — namely, injury to competition in the online search advertising market. The antitrust claim is dismissed without leave to amend.

## **2. BREACH OF CONTRACT.**

To allege a breach of written contract, a plaintiff must plead: (1) the existence of a contract; (2) plaintiff's performance or excuse of performance; (3) defendant's breach; and (4) damages. See *Oasis West Realty, LLC v. Goldman, 51 Cal. 4th 811, 821, 124 Cal. Rptr. 3d 256, 250 P.3d 1115 (2011)*. Dreamstime alleges Google breached two contracts: (1) the AdWords Agreement and (2) the Google Play Agreement.

Under the AdWords Agreement, Dreamstime alleges that Google breached its contract by providing Dreamstime advertising campaigns that did not work and did not meet Dreamstime's expectations, applied its policies and procedures unevenly towards Dreamstime, cancelled some of Dreamstime's ad campaigns for violating stated policies that the ad campaigns did not violate, and overcharged and overdelivered the ad campaigns (Dkt. No. 50 at ¶ 169). As to the Google Play Agreement, Dreamstime alleges that Google breached the agreement both by removing Dreamstime's mobile Buyer App from the Google Play app store unfairly and by de-indexing Dreamstime's Buyer [\*28] App for common search terms (*id.* at ¶ 171).

Dreamstime's requirement at this stage is solely to identify with specificity the contractual obligations allegedly breached by Google sufficient to put Google on notice of the claims and plausibly allege a right to relief. See *Kaar v. Wells Fargo Bank, N.A, 2016 U.S. Dist. LEXIS 71475, 2016 WL 3068396 (N.D. Cal. 2016)* (Judge William Alsup). Dreamstime does so. In the amended complaint, Dreamstime alleges that the AdWords Agreement incorporated by reference the AdWords program policies, various FAQ answers, and support pages describing Google's policies. Taking the amended complaint as true, these policies provide in part that overdelivery is a breach of contract, that Google "intended the policies and descriptions of the services Google was to provide to apply equally to all who executed it," and that the policies include a specific list of prohibited conduct that would subject an advertisement to rejection or removal (such as "ads that mislead or trick the user into interacting with them[,]" and that "an account may be suspended if you have several violations or a serious violation") (Dkt. No. 50 at ¶¶ 164-167). As to the policies incorporated by reference into the Google Play Agreement, the amended complaint provides the specific [\*29] policy section (Section 8.3) that Dreamstime is alleging Google breached.

Thus, the listings made by Dreamstime in the amended complaint are "enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. The amended complaint accordingly puts Google on notice as to what provisions of the AdWords and Google Play Agreements have been breached.

Google contends provisions in the agreements undercut Dreamstime's theories for recovery, rendering the theories implausible. It is true that both the AdWords Agreement and Google Play Agreement contain "catch-all" provisions that may undercut the viability of the alleged claims (Dkt. No. 50 at Exh. F Section 1, 8, 12; Exh. O). But Google cites no authority requiring resolution at this stage. At this juncture, Google has been adequately notified of the provisions and facts at issue. The breach of contract claim may move forward.

### 3. BREACH OF IMPLIED GOOD FAITH AND FAIR DEALING.

"[I]n every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." [Locke v. Warner Bros., Inc., 57 Cal. App. 4th 354, 363, 66 Cal. Rptr. 2d 921 \(1997\)](#) (citations and quotations omitted). The undersigned has previously held that "absent [\*30] those limited cases where a breach of a consensual contract term is not claimed or alleged, the only justification for asserting a separate cause of action for breach of the implied covenant is to obtain a tort recovery." See, e.g., [Total Recall Techs. v. Luckey, 2016 U.S. Dist. LEXIS 5659, 2016 WL 199796, at \\*6 \(N.D. Cal. Jan. 16, 2016\)](#) (citations omitted).

As alleged in the amended complaint, however, this action plausibly may be one of the aforementioned limited cases. Enough has been shown to support the notion that Google took affirmative steps to frustrate the purpose of the agreements. See [Cobb v. Ironwood Country Club, 233 Cal. App. 4th 960, 966, 183 Cal. Rptr. 3d 282 \(2015\)](#). For example, Google pretended to work to resolve purported "policy issues" with Dreamstime's ads while actually subverting and frustrating the ability of Dreamstime to realize the benefits of its contract. Google also is alleged to apply a double standard to Dreamstime's low cost and high cost advertising campaigns and a double standard in Google's treatment of Dreamstime compared to Dreamstime's competitors.

Further, the alleged conduct may go beyond the reach of a breach of contract claim. After all, a possibility exists that in scrutinizing the AdWords and Google Play Agreements, the "catch-all" provisions included therein would undercut any potential claim for breach of contract (Dkt. No. [\*31] 50 at Exh. F Section 1, 8, 12; Exh. O). Dreamstime's cause of action of the breach of implied good faith and fair dealing therefore may move forward.

### 4. VIOLATION OF [SECTION 17200](#).

[Section 17200 of the California Business and Professions Code](#) provides a remedy for unlawful, unfair, and fraudulent activity. The amended complaint alleges claims under all three prongs. The claim under the unlawful prong is derivative of the breach of contract and breach of the implied covenant of good faith and fair dealing and therefore may move forward.

Turning to the unfairness prong, California courts have applied unfairness under two different tests: *Cel-Tech* and *South Bay*. Our court of appeals has applied both tests. See, e.g., [Hodsdon v. Mars, Inc., 891 F.3d 857, 865-67 \(9th Cir. 2018\)](#). *Cel-Tech* held that to be unfair under the unfairness prong, the alleged conduct must be "tethered to some legislatively declared policy" or have some effect on competition. [Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 186-87, 83 Cal. Rptr. 2d 548, 973 P.2d 527 \(1999\)](#). Under *South Bay*, a challenged business practice qualifies as unfair when the practice is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." [South Bay Chevrolet v. General Motors Acceptance Corporation, 72 Cal. App. 4th 861, 886-87, 85 Cal. Rptr. 2d 301 \(1999\)](#) (citation omitted).

Here, applying both tests, the unfairness prong is satisfied. Dreamstime plausibly alleges that Google, for example, pretended to work in good faith to resolve purported "policy issues" with [\*32] Dreamstime's ads while actually intending at all times to remove them arbitrarily. Such action, taken as true, both plausibly breaches the contract through the breach of the implied covenant of good faith and fair dealing thereby tethering the alleged conduct to a legislatively declared policy and is a sufficiently alleged unscrupulous behavior substantially injurious to Dreamstime. Allegations under the unfairness prong may therefore move forward.

Turning to the fraud prong, Dreamstime alleges that Google mislead Dreamstime with various false assertions as to its ad campaigns. Indeed, the complaint documents numerous times Google falsely told Dreamstime the ad campaigns were working as they were supposed to (Dkt. No. 50 at ¶¶ 78, 90).

To determine if the elements of fraud have been pleaded to state a cause of action, the court looks to state law. In California, the elements of a cause of action for fraud are: "(a) misrepresentation (false representation,

concealment, or *nondisclosure*); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." [\*Kearns v. Ford Motor Co.\*, 567 F.3d 1120, 1126 \(9th Cir. 2009\)](#) (citing [\*Engalla v. Permanente Med. Group\*, 15 Cal.4th 951, 974, 64 Cal. Rptr. 2d 843, 938 P.2d 903 \(1997\)](#)) (emphasis in original). [\*Rule 9\(b\)\*](#)'s heightened pleading [\*33] standards apply here. See [\*Kearns\*, 567 F.3d at 1125](#). Under [\*Rule 9\(b\)\*](#), a pleading is sufficient if it identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations. [\*Moore v. Kayport Package Exp., Inc.\*, 885 F.2d 531, 540 \(9th Cir. 1989\)](#). The false statements alleged in the amended complaint that Dreamstime relied on to pour more money into its AdWords campaign, at the very least, sufficiently put Google on notice of the circumstances constituting fraud. The claim for fraud has therefore been pled with sufficient particularity and may move forward.

## CONCLUSION

For the above-stated reasons, Google's motion to dismiss is **GRANTED IN PART AND DENIED IN PART**. The motion to dismiss is granted as to the antitrust claim without leave to amend. The motion to dismiss is denied as to the breach of contract claim, the breach of the implied covenant of good faith and fair dealing claim, and the [Section 17200](#) claims.

The answer is due within 10 calendar days. Both sides should be taking discovery and preparing themselves for summary judgment and/or trial. Reasonable discovery relevant to the allowed claims shall be permitted even if it is also relevant to the [Section 2](#) claim. Further leave to amend will be allowed only if further investigation or discovery reveals facts [\*34] not previously known that would change the analysis.

## IT IS SO ORDERED.

Dated: January 28, 2019.

/s/ William Alsup

WILLIAM ALSUP

UNITED STATES DISTRICT JUDGE

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

United States District Court for the Eastern District of New York

January 28, 2019, Decided; January 28, 2019, Filed

05-MD-1720 (MKB) (JO)

### **Reporter**

330 F.R.D. 11 \*; 2019 U.S. Dist. LEXIS 13481 \*\*; 2019-1 Trade Cas. (CCH) P80,657; 2019 WL 359981

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION. This document refers to: ALL ACTIONS

**Prior History:** [In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 398 F. Supp. 2d 1356, 2005 U.S. Dist. LEXIS 25950 \(J.P.M.L., Oct. 19, 2005\)](#)

## **Core Terms**

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settlement, Notice, class member, settlement agreement, class plaintiff, preliminary approval, final approval, Superseding, class action, merchants, damages, parties, class certification, interchange, factors, risks, Plaintiffs', injunctive relief, predominance, Branded, courts, proposed settlement, antitrust, weigh, Cards, terms, negotiations, mediators, certification, cases

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For Plaintiffs in civil action Tabu Salon & Spa, Inc. v. Visa U.S.A., Inc. 05-cv-5072 JG-JO, Plaintiff: H. Laddie Montague, Michael J. Kane, LEAD ATTORNEYS, Berger & Montague, P.C., Philadelphia, PA; Merrill G. Davidoff, Beger & Montague, P.C., Philadelphia, PA; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Lakeshore Interiors v. Visa U.S.A., Inc. 05-cv-5081JG JO, Plaintiff: Carmen B. Copher, Charles N. Nauen, Darla Jo Boggs, Karen Hanson Riebel, [\*8] Rachel J. Christiansen, Richard A. Lockridge, William A. Gengler, LEAD ATTORNEYS, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; W. Joseph Bruckner, LEAD ATTORNEY, PRO HAC VICE, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Parkway Corp. v. Visa U.S.A., Inc. 05-cv-5077 JG-JO, Plaintiff: Hadley P Roeltgen, Robert J. LaRocca, LEAD ATTORNEYS, Kohn Swift & Graf, Philadelphia, PA; Jason L. Solotaroff, LEAD ATTORNEY, Giskan Solotaroff Anderson & Stewart LLP, New York, NY; Joshua D. Snyder, PRO HAC VICE, Boni Zack & Snyder LLC, Bala Cynwyd, PA; Kate Reznick, Michael J. Boni, Boni & Zack, LLC, Bala Cynwyd, PA; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action NuCity Publications, Inc. v. Visa U.S.A., Inc. 05-cv-5075 JG-JO, Plaintiff: Dennis Stewart, Hulett Harper Stewart LLP, San Diego, CA; Donald L. Perelman, Fine, Kaplan and Black, R.P.C., Philadelphia, PA; Joseph Goldberg, Freedman Boyd Daniels Hollander [\*9] Goldberg & Cline, P.A., Albuquerque, NM; Leslie Hurst, Lerach Coughlin, et al., San Diego, CA; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Lee et al v. Visa U.S.A. Inc. et al 05-cv-3800 JG-JO, Plaintiff: Jerald M. Stein, LEAD ATTORNEY, Law Office of Jerald M. Stein, New York, NY; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Resnick Amsterdam & Leshner P.C. v. Visa U.S.A., Inc. et al 05-cv-3924 JG-JO, Plaintiff: Ann D. White, Ann D. White Law Office, Jenkintown, PA; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Meijer, Inc. et al v. Visa U.S.A. Inc. et al 05-cv-4131-JG-JO, Plaintiff: Linda P. Nussbaum, LEAD ATTORNEY, Nussbaum Law Group, PC, New York, NY; David P. Germaine, Joseph Michael Vanek, PRO HAC VICE, Vanek Vickers & Masini, P.C., Chicago, IL; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL; Richard J. Kilsheimer, [\*10] Kaplan Fox & Kilsheimer LLP, New York, NY; Robert N. Kaplan, Kaplan, Kilsheimer & Fox, LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Lepkowski v. Mastercard International Incorporated et al 05-cv-4974 JG-JO, Plaintiff: Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; Tracey L. Kitzman, Friedman Law Group, LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Kroger Co. v. Visa U.S.A., Inc. 05-cv-5078 JG-JO, Plaintiff: William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL; Barry L. Refsin, Hangley Aronchick Segal & Pudlin, Philadelphia,

PA; Eric Bloom, Hangle Aronchick Segal & Pudlin, Harrisburg, PA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY.

For Plaintiffs in civil action Fitlife Health Systems of Arcadia, Inc. v. Mastercard International Incorporated et al 05-cv-5153 JG-JO, Plaintiff: Francis J. Balint, Bonnett Fairbourn Friedman & Balint, P.C., Phoenix, AZ; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY. **[\*\*11]** William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Harris Stationers, Inc., et al. v. Visa International Service Association, et al. 05-cv-5868 JG-JO, Plaintiff: Joseph R. Saveri, LEAD ATTORNEY, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA; Daniel M. Bradley, Richardson, Patrick, Westbrook & Brickman, LLC, Charleston, SC; Daniel O. Myers, Richardson, Patrick, Westbrook & Brickman, LLC, Mount Pleasant, SC; Kimberly Keevers Palmer, Richardson, Patrick, Westbrook & Brickman, LLC, Charleston, SC; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY. William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Performance Labs, Inc. v. American Express Travel Related Services Co., Inc., et al. 05-cv-5869 JG-JO, Plaintiff: Jonathan J. Lerner, Starr, Gern, Davison & Rubin, P.C., Roseland, NJ; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY. William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Discount Optics, Inc., et al. v. Visa U.S.A., Inc., et al. 05-cv-5870 JG-JO, Plaintiff: Jason S. Hartley, LEAD ATTORNEY, **[\*\*12]** PRO HAC VICE, Hartley LLP, San Diego, CA; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY. William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action LDC, Inc. v. Visa U.S.A., Inc., et al 05-cv-5871 JG-JO, Plaintiff: Dennis Stewart, Hulett Harper Stewart LLP, San Diego, CA; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Leeber Cohen, M.D. v. Visa U.S.A., Inc., et al. 05-cv-5878 JG-JO, Plaintiff: Bernard Persky, Robins Kaplan LLP, New York, NY; Douglas Thompson, Finkelstein Thompson LLP, Washington, DC; Gregory Scott Asciola, Labaton Sucharow, New York, NY; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Connecticut Food Association, Inc., et al. v. Visa U.S.A., Inc., et al. 05-cv-5880 JG-JO, Plaintiff: Joe R. Whatley, Jr., LEAD ATTORNEY, Whatley Drake & Kallas LLC, New York, NY; Charles S. Hellman, Dubner, Hartley & O'Connor LLC, New York, NY; J. Douglas Richards, Pomerantz Haudek Block Grossman **[\*\*13]** & Gross LLP, New York, NY; Michael M. Buchman, Motley Rice LLC, New York, NY; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; Richard P. Rouco, Quinn Connor Weaver Davies & Rouco, Birmingham, AL; Ryan G. Kriger, Milberg Weiss Bershad & Schulman LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Lombardo Bros., Inc. v. Visa U.S.A., Inc. 05-5882 JG-JO, Plaintiffs in civil action Abdallah Bishara, etc. v. Visa U.S.A., Inc. 05-cv-5883 JG-JO, Plaintiffs: Dianne M. Nast, NastLaw LLC, Philadelphia, PA; Erin Burns, NastLaw LLC, Philadelphia, PA; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action The Kroger Co., et al. v. MasterCard Inc., et al., 06-cv-0039 JG-JO, Plaintiff: William Jay Blechman, LEAD ATTORNEY, PRO HAC VICE, Barry L. Refsin; Eric Bloom, Hangle Aronchick Segal & Pudlin, Harrisburg, PA; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY.

For Plaintiffs in civil action Rite Aid Corporation et al. v. Visa U.S.A., Inc. et al. 05-cv-5352 JGJO, Plaintiff: Ashely M. Chan, **[\*\*14]** Barry L. Refsin, Hangle Aronchick Segal & Pudlin, Philadelphia, PA; Eric Bloom, Hangle Aronchick Segal & Pudlin, Harrisburg, PA; Kenneth G. Walsh, Kirby McInerney LLP, New York, NY; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

Plaintiffs in civil action Fringe, Inc. v. Visa, U.S.A., Inc et al 05-cv-4194 JG-JO, Plaintiff: Jayne A. Goldstein, PRO HAC VICE, Shepherd Finkelman Miller & Shah LLP, Fort Lauderdale, FL; Lee Albert, Mager & Goldstein LLP,

Philadelphia, PA; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Bi-Lo, LLC. et al v. Visa U.S.A., Inc. et al 06-cv-2532 JG-JO, Plaintiff: Ashely M. Chan, Barry L. Refsin, Hangle Aronchick Segal & Pudlin, Philadelphia, PA; Eric Bloom, Hangle Aronchick Segal & Pudlin, Harrisburg, PA; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action Bi-Lo, LLC. et al v. Mastercard Incorporated et al 06-cv-2534 JG-JO, Plaintiff: Ashely [\*\*15] M. Chan, Barry L. Refsin, Hangle Aronchick Segal & Pudlin, Philadelphia, PA; Barry L. Refsin; Eric Bloom, Hangle Aronchick Segal & Pudlin, Harrisburg, PA; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY. William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action 06-cv-5583, Esdacy, INC. v. Visa USA, INC. et al, Plaintiff: Angus Macaulay Lawton, Jonathan Craig Smith, LEAD ATTORNEYS, Joyce Law Firm, Charleston, SC; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For QVC, Inc., Plaintiff: L. Webb Campbell, II, Sherrard & Roe PLC, Nashville, TN; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL; Phillip F. Cramer, Sherrard & Roe PLC, Nashville, TN; Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Payless ShoeSource, Payless Shoe Source, Inc., Plaintiff: J. Douglas Richards, LEAD ATTORNEY, Pomerantz Haudek Block Grossman & Gross LLP, New York, NY; Michael M. Buchman, Motley Rice LLC, New York, NY; Geoffrey Holmes Kozen, Robins Kaplan LLP, Minneapolis, [\*\*16] MN; Michelle Catherine Zolnoski, Motley Rice LLC, New York, NY UNITED STATES; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For GMRI, Inc., Plaintiff: K. Craig Wildfang, LEAD ATTORNEY, Robins Kaplan L.L.P., Minneapolis, MN; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Capital Audio Electronics, Inc., Plaintiff: Christopher J McDonald, Jay L. Himes, LEAD ATTORNEYS, Labaton Sucharow LLP, New York, NY; Morissa Robin Falk, LEAD ATTORNEY, Labaton Sucharow, New York, NY; Bruce H. Levinson, Law Offices of Bruce Levinson, New York, NY; Geoffrey Holmes Kozen, Robins Kaplan LLP, Minneapolis, MN; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL; William V. Reiss, Robins Kaplan LLP, New York, NY.

For NATSO, Inc., Plaintiff: Adam Owen Glist, Constantine Cannon LLP, New York, NY; David Balto, Law Offices of David Balto, Washington, DC; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

For Plaintiffs in civil action BKS. v. Visa U.S.A., Inc. et al 09-cv-2264-JG-JO, Plaintiff: Carroll H. Ingram, LEAD ATTORNEY, INGRAM & ASSOCIATES, Hattiesburg, MS; [\*\*17] Jennifer Ingram Wilkinson, PRO HAC VICE, Ingram Wilkinson, PLLC, Hattiesburg, MS; John Corlew, PRO HAC VICE, Corlew, Munford & Smith, PLLC, Jackson, MS; John F Hawkins, PRO HAC VICE, Hawkins Gibson, PLLC, Jackson, MS.

For Plaintiffs in civil action Gulfside Casino Partnership. v. Visa U.S.A., Inc. et al 09-cv-03225 JG-JO, Plaintiff: Jennifer Ingram Wilkinson, Ingram Wilkinson, PLLC.

For Keith Superstores, BKS, INC., BKS of LA, Inc. d/b/a KEITH SUPERSTORES, and KEITHCO PETROLEUM, INC., Keithco Petroleum, Inc.. BKS, INC., BKS of LA, Inc. d/b/a KEITH SUPERSTORES, and KEITHCO PETROLEUM, INC., Plaintiffs: John F Hawkins, PRO HAC VICE, Hawkins Gibson, PLLC, Jackson, MS.

For National Community Pharmacists Association, National Cooperative Grocers Association, Plaintiffs: Daniel Hume, Kirby McInerney LLP, New York, NY; David E. Kovel, Kirby McInerney LLP, New York, NY; Eric Citron, Goldstein & Russell P.C., Bethesda, MD; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY; Meghan Joan Summers, Kirby McInerney LLP, New York, NY; Thomas Goldstein, Goldstein & Russell, P.C., Bethesda, MD.

For Coborn's Incorporated, D'Agostino Supermarkets, Plaintiffs: Adam Owen Glist, Constantine Cannon LLP, [\*\*18] New York, NY; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY.

For Affiliated Foods Midwest, Plaintiff: Adam Owen Glist, Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY.

For Robersons Fine Jewelry, Inc., Plaintiff: Jerrold S. Parker, Parker & Waichman, LLC, Great Neck, NY.

For Gielen Enterprises, Inc., Rice Palace, Inc.; Tobacco Plus, Inc.; Plaintiff: Arun Srinivas Subramanian, LEAD ATTORNEY, Susman Godfrey LLP, New York, NY.

For Plaintiffs in Delta Airlines Inc et al v. Visa Inc et al, 1:13-cv-04766-JG-JO, Plaintiff: Richard E. Norman, Crowley Norman LLP, Houston, TX.

For Cox Communications, Inc., Cox Enterprises, Inc., Cox Media Group LLC, G6 Hospitality LLC, Live Nation Entertainment Inc, Manheim Inc, Motel 6 Operating LP, Plaintiffs: Brian R Strange, Keith L Butler, LEAD ATTORNEYS, PRO HAC VICE, Strange and Carpenter, Los Angeles, CA.

For Manheim Inc, Plaintiff: Brian R Strange, LEAD ATTORNEY, PRO HAC VICE, Strange and Carpenter, Los Angeles, CA.

For Kum & Go, L.C., Sheetz, Inc., Susser Holdings Corporation, The Pantry, Inc., Plaintiffs: Donald R. Hall, Jr., Frederic S. Fox, LEAD ATTORNEYS, Kaplan Fox & Kilsheimer LLP, New York, NY; Donald Matt Mattson Keil, LEAD [\*\*19] ATTORNEY, PRO HAC VICE, Keil & Goodson PA, Texarkana, AR; George L McWilliams, LEAD ATTORNEY, Texarkana, TX; John C Goodson, LEAD ATTORNEY, Keil & Goodson PA, Texarkana, AR; Matthew Powers McCahill, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer, LLP, New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer & Fox, LLP, New York, NY.

For Plaintiffs in Target Corporation, et al. v. Visa Inc., et al., 13-cv-03477, Plaintiff: Amanda McMurray Roe, PRO HAC VICE, Vorys, Sater, Seymour and Pease LLP, Cleveland, OH; James A. Wilson, Kimberly Weber Herlihy, Vorys, Sater, Seymour and Pease, LLP (Columbus), Columbus, OH.

Plaintiffs in Civil Action Target Corporation, et al. v. Visa Inc. et al., 13-cv-4442, Plaintiff, Pro se.

For DSW, Inc., Plaintiff: Jason A. Zweig, Hagens Berman Sobol Shapiro LLP, New York, NY.

Jetblue Airways Corporation, Plaintiff, Pro se.

Plaintiffs in Civil Action 7-Eleven Inc., et al. v. Visa Inc. et al, 1:13-cv-05746-JG-JO, Plaintiff, Pro se.

For Sunoco, Inc. (R&M), Plaintiff: Arthur Christopher Young, LEAD ATTORNEY, Jessica S. Russell, Pepper Hamilton LLP, Philadelphia, PA; Edwin M. Buffmire, LEAD ATTORNEY, PRO HAC VICE, Jackson Walker LLP, Dallas, TX; Robert [\*\*20] Hickok, LEAD ATTORNEY, PRO HAC VICE, Pepper Hamilton, LLP, Philadelphia, PA; Stephanie L. Jonaitis, LEAD ATTORNEY, Pepper Hamilton LLP, Princeton, NJ.

Minnesota Twins LLC, Plaintiff, Pro se.

For CHS Inc., Leons Transmission Service, Inc, Traditions, Ltd, Plaintiffs: H. Laddie Montague, LEAD ATTORNEY, Berger & Montague, P.C., Philadelphia, PA; K. Craig Wildfang, LEAD ATTORNEY, Robins Kaplan L.L.P., Minneapolis, MN; Geoffrey Holmes Kozen, Robins Kaplan LLP, Minneapolis, MN.

Leons Transmission Service, Inc, Plaintiff, Pro se.

For Google Inc., Google Payment Corporation, Plaintiffs: David T Moran, LEAD ATTORNEY, PRO HAC VICE, Jackson Walker, Dallas, TX.

For Bass Pro Group, LLC, American Sportsman Holdings Co., Bass Pro Outdoor World, LLC, Bass Pro Shops White River Conference & Education Center, LLC, BPIP, LLC, BPS Direct, LLC, Big Cedar, LLC, Fryingpan River Ranch, LLC, Islamorada Fish Company Kansas, LLC, Islamorada Fish Company Texas, LLC, Islamorada Fish Company, LLC, Sportman's Distribution Co. of GA, LLC, Sportsman's Specialty Group, LLC, TMBC Corp. of Canada, Tracker Marine Financial Services, LLC, Tracker Marine Retail, LLC, Tracker Marine, LLC, Travis Boats & Motors Baton Rouge, LLC, [\*\*21] Charming Charlie LLC, City of Scottsdale, Starving Students, Inc., Crocs Retail, LLC, Crocs, Inc., East Coast Waffles, Inc., Ethan Allen Global, Inc., Ethan Allen Interiors, Inc., Ethan Allen Miami, LLC, Ethan Allen Operations, Inc., Ethan Allen Realty, LLC, Plaintiffs: Richard E. Norman, LEAD ATTORNEY, PRO HAC VICE, Crowley Norman LLP, Houston, TX.

For Ethan Allen Retail, Inc., Ethan Allen.com, Inc., Fury, Inc., Grand America Hotel Company, Crab Addison, Inc., BHHT Entertainment, Inc., BHHT Private Club - Plano TX, Board of Trustees of the University of Arkansas acting for University of Arkansas, Fayetteville, Bite, Inc., Jibbitz, LLC, Lake Avenue Associates, Inc., Love's Travel Stops & Country Stores, Inc., Lucky Brand Dungarees Stores, Inc., Little America Hotel Company, Little America Hotels and Resorts Inc., Lizzy Mae, Inc., Ethan Allen (Canada) Inc., Manor House, Inc., Joe's Crab Shack - Abingdon MD, Inc., Joe's Crab Shack - Alabama Private Club, Inc., Joe's Crab Shack - Anne Arundel MC, Inc., Joe's Crab Shack - Hunt Valley MD, Inc., Joe's Crab Shack - Kansas, Inc., Joe's Crab Shack - Maryland, Inc., Joe's Crab Shack - Texas Inc., Joe's Crab Shack -Redondo Beach, Inc., JCS Monmouth [\*\*22] Mall - NJ, LLC, Mid South Waffles, Inc., Midwest Waffles, Inc., Ignite Restaurant Group, Inc., Ignite Restaurants - New Jersey, Inc., Scandinavian Airlines System Denmark-, Norway-Sweden, Scandinavian Airlines of North America Inc., Sinclair Oil Corporation, Snowbasin Resort Company, Stuart Weitzman Holdings, LLC, Stuart Weitzman IP, LLC, Sun Valley Company, Sportsman's Specialty Group, LLC, Stuart Weitzman Retail Stores, LLC, Stuart Weitzman, LLC, New West Jeanswear Holding LLC, formerly known as Jones Holding Inc., Nine West Development LLC, formerly known as Nine West Development Corporation, Nine West Holdings, Ocean Minded, Inc., One Jeanswear Group, Inc., Ozark Waffles, LLC, Jones Distribution Corporation, Jones Investment Co., Inc., Jones Management Service Company, TMBC, LLC, Tiffany and Company, doing business as Tiffany & Co., Twin Liquors, LP, Waffle House, Inc., Westgate Hotel Company, William-Sonoma Inc., Ross Dress for Less, Inc., 1-800 Contacts, Inc., doing business as Glasses.com, doing business as South Valley Optical, GES Inc., dba Food Giant, Henry Oil Company of Tennessee, Savings Carolina Division, Plaintiffs: Richard E. Norman, LEAD ATTORNEY, PRO HAC VICE, Crowley [\*\*23] Norman LLP, Houston, TX.

For Electronic Payment Systems, LLC, Plaintiff: Scotty P. Krob, LEAD ATTORNEY, PRO HAC VICE, Krob Law Office, LLC, Greenwood Village, CO.

For Bravo Foods, CFL Pizza, CGS Sales, Captain Development Co, Cary Oil, Cusick Corporation, Delta Sonic Carwash Systems, Epping Forest Yacht Club, GT Petroleum, Gate Fuel Service, Gate Petroleum Company, High Plains Pizza, North American Financial Group, Ponte Vedra Corporation, Ponte Vedra Lodge, River Club, The, Stinker Stores, Plaintiffs: Brent O. Hatch, Shaunda L. McNeill, LEAD ATTORNEYS, HATCH JAMES & DODGE, SALT LAKE CITY, UT.

For Casey's Marketing Company, Casey's Retail Company, Casey's Services Company, Plaintiffs: Brent O. Hatch, Shaunda L. McNeill, LEAD ATTORNEYS, HATCH JAMES & DODGE, SALT LAKE CITY, UT; James Michael Evangelista, Evangelista Worley LLC, Atlanta, GA.

For CTC LLC Diamond Jim's, CTC LLP Crossroads Travel Center, Captain Development Co, Carolina Pizza Co, Crossroads Cafe, DC's Eastgate, DHCC LLC, DJ Casinos, Daland Corporation, Great Lakes Convenience, HN LLC, Hi-Noon Petroleum, MRC Hi-Noon, MTG Managment, Mackinaw Food Services, Michigan Pizza Service, Northfield Restaurant, Peru Pizza, Pester Marketing, [\*\*24] TTM Montana LLC, TriConn, Triple S Oil, doing business as, Mr. Gas, Virginia Pizza, WGN, Champlain Oil, Coco Mart, doing business as, Jiffy Mart, Columbia Basin Pizza Hut, Emerald City Pizza, J.D. Streett & Company, Kath Fuel Oil Service, Las Vegas Pizza, Pizza Hut of Southeast Kansas, Slidell Oil, Space Age Fuel, Spokane Valley Pizza, TB of America, By-Lo Oil, CNH Food, Canton Pizza, Capital Pizza Huts, Capital Pizza Huts of Vermont, Capital Pizza of New Hampshire, Columbian Pizza, Craig Food Stores, Dash In Food Stores, Delmarva Oil, Downs Energy, Elyria Pizza, Fastrip Oil, Flyers Energy, G.E. Junghans Discount Liquor, Geuga Pizza, Golden Dollar, HJB Convenience, Heart of Texas Pizza, Herdrich Petroleum, J&J Golf, JAG Convenience, JNH Food, Jaco Hill Company, Jamieson Hill Company, Kocomo Pizza, Lacombe Chevron Travel Center, Lawrence Oil, Leonard E Belcher Inc, Liberty Pizza, M2R, Mission Trail Oil, Mountain View Pizza, NJ Capital Furnishings, North Coast Pizza, Oklahoma Magic, Painesville Pizza, Pete's of Erie, Plaid Pantries, Pliska Golf, Pliska Investments, Popingo's Convenience Stores, Potomac Energy Holdings, RKS Ventures, Redding Oil, Reid Companies, Reid Petroleum, Reid [\*\*25] Stores, Robinson Oil, Plaintiffs: Brent O. Hatch, Shaunda L. McNeill, LEAD ATTORNEYS, HATCH JAMES & DODGE, SALT LAKE CITY, UT.

For SMO, Salem Pizza, Schmitt Sales, Seaside Pizza, Shop Quik Stores, Sky of Jenks, Slidell Oil, Southern Maryland Oil, Space Age Fuel, Speedie Mart, Speedy Q Markets, Spencer Companies, Tri Star Marketing, Trico Pizza, Valley Petroleum, WK Capital Enterprises, Wallis Oil Company, Wallis Petroleum, Wayne Pizza, Wayne

Pizza of Ohio, Wills Group, The, Plaintiffs: Brent O. Hatch, Shaunda L. McNeill, LEAD ATTORNEYS, HATCH JAMES & DODGE, SALT LAKE CITY, UT.

For Jetro Cash & Carry, Plaintiff: Daniel Hume, David E. Kovel, Meghan Joan Summers, Kirby McInerney LLP, New York, NY; Eric Citron, Goldstein & Russell P.C., Bethesda, MD.

For National Association of Truck Stop Operators, National Grocers Association, Plaintiffs: Daniel Hume, David E. Kovel, Meghan Joan Summers, Kirby McInerney LLP, New York, NY; Eric Citron, Thomas Goldstein, Goldstein & Russell P.C., Bethesda, MD.

For Calloway Oil Company, E-Z Stop Foodmarts, Inc., Plaintiffs: James Michael Evangelista, Evangelista Worley LLC, Atlanta, GA.

For Aloha Petroleum, LTD, Plaintiff: Edwin M. Buffmire, LEAD ATTORNEY, PRO [\*\*26] HAC VICE, Jackson Walker LLP, Dallas, TX; Robert Hickok, LEAD ATTORNEY, PRO HAC VICE, Jessica S. Russell, Pepper Hamilton, LLP, Philadelphia, PA.

For CMP Consulting Serv., Inc., Generic Depot 3, Inc. d/b/a Prescription Depot, PureOne, LLC d/b/a Salon Pure, Plaintiffs: Daniel Lawrence Berger, Deborah A. Elman, LEAD ATTORNEYS, Grant & Eisenhofer P.A., New York, NY; Robert G. Eisler, Grant & Eisenhofer P.A., Wilmington, DE.

For DDMB 2, LLC d/b/a Emporium Logan Square, DDMB, Inc. d/b/a Emporium Arcade Bar, Plaintiffs: Daniel Lawrence Berger, Deborah A. Elman, LEAD ATTORNEYS, Grant & Eisenhofer P.A., New York, NY; Robert G. Eisler, Grant & Eisenhofer P.A., Wilmington, DE; Steven A. Kanner, FREED KANNER LONDON & MILLEN LLC, Bannockburn, IL.

For Runcentral, LLC, Plaintiff: Daniel Lawrence Berger, Deborah A. Elman, LEAD ATTORNEYS, Grant & Eisenhofer P.A., New York, NY; Kevin B. Love, Hanzman Criden Love, P.A., Miami, FL; Robert G. Eisler, Grant & Eisenhofer P.A., Wilmington, DE.

Breaux Mart Supermarkets, Inc., Plaintiff, Pro se.

Champagne's Quality Foods, Inc., Plaintiff, Pro se.

Claiborne Fresh Market, LLC, Plaintiff, Pro se.

Coleman Oil Company, LLC, Plaintiff, Pro se.

Franks Supermaket #3, Plaintiff, [\*\*27] Pro se.

Franks Supermarket #2, Inc., Plaintiff, Pro se.

Franks Supermarket #3, Inc., doing business as, Franks Supermaket #5, Plaintiff, Pro se.

Franks Supermarket #4, Inc., Plaintiff, Pro se.

Harrison Fresh Market, LLC, Plaintiff, Pro se.

Kenilworth Supermarket, Inc., Plaintiff, Pro se.

Longview Enterprises, Inc., Plaintiff, Pro se.

M L Robert II, LLC, Plaintiff, Pro se.

M Robert Enterprises, Inc., Plaintiff, Pro se.

Mackenthun's Supermarkets, Inc., Plaintiff, Pro se.

Marketfare Annunciation, LLC, Plaintiff, Pro se.

Marketfare Canal, LLC, Plaintiff, Pro se.

Marketfare N Broad, LLC, Plaintiff, Pro se.

Marketfare St. Claude, LLC, Plaintiff, Pro se.

Matherne's LLC, Plaintiff, Pro se.

Matherne's Supermarket at Riverlands, LLC, Plaintiff, Pro se.

Potash Bros., Inc., Plaintiff, Pro se.

Potash-Hancock, Inc., Plaintiff, Pro se.

Sandburg Supermart, Inc., Plaintiff, Pro se.

Sopranos Supermarkets, LLC, Plaintiff, Pro se.

Supermarket Operations, Inc., Plaintiff, Pro se.

Techau's, Inc., Plaintiff, Pro se.

For Equitable Relief Class, Plaintiff: Hugh Sandler, Nussbaum Law Group, P.C., New York, NY; Michael J. Freed, Freed Kanner London & Millen LLC, Bannockburn, IL.

For Grove Liquors LLC, Palero Food Corp. and Cagueyes **[\*\*28]** Food Corp., Strouk Group LLC, Plaintiffs: Armen Zohrabian, LEAD ATTORNEY, Robbins Geller Rudman and Dowd LLP, San Francisco, CA; John William Devine, LEAD ATTORNEY, Robert J Kuntz, Jr., LEAD ATTORNEY, Lawrence Dean Goodman, Devine Goodman Rasco Watts-FitzGerald, LLP, Coral Gables, FL; Lonnie Anthony Browne, Thomas E. Egler, LEAD ATTORNEYS, Robbins Geller Rudman and Dowd LLP, San Diego, CA.

For Herc Rentals Inc., Royal Caribbean Cruises LTD., Hertz Corporation, Plaintiffs: Robert D.W. Landon, III, LEAD ATTORNEY, KENNY NACHWALTER, P.A., Miami, FL; Joshua Barton Gray, Kenny Nachwalter, P.A., Washington, DC.

For Hertz Corporation, Herc Rentals Inc., Royal Caribbean Cruises LTD., Plaintiffs: Robert D.W. Landon, III, LEAD ATTORNEY, KENNY NACHWALTER, P.A., Miami, FL.

For Broadway Grill, Inc., Plaintiff: Anne Marie Murphy, Joseph W. Cotchett, Mark Cotton Molumphy, LEAD ATTORNEY, Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Alexander E. Barnett, Cotchett, Pitre & McCarthy, LLP, New York, NY.

Kohlberg Kravis & Roberts Co., Plaintiff, Pro se.

For Luby's Fuddruckers Restaurants, LLC, Plaintiff: David Edwards Wynne, Scott G. Burdine, LEAD ATTORNEYS, Burdine Wynne LLP, Houston, TX; Kenneth R. Wynne, **[\*\*29]** LEAD ATTORNEY, PRO HAC VICE, Burdine Wynne LLP, Houston, TX.

Luby's Inc., Plaintiff, Pro se.

For Expedia, Inc., Natm Buying Corporation, Tractor Supply Company, Plaintiffs: Joseph Michael Vanek, Vanek, Vickers & Masini, P.C., Chicago, IL.

Oneota Community Food Co-op, Intervenor Plaintiff, Pro se.

For Defendants in civil action Jetro Holding, Inc. et al v. Visa U.S.A., Inc. et al 05-cv-4520 JG-JO, Defendants in civil actionNational Association of Convenience Stores et al v. Visa U.S.A., Inc. et al 05-cv-4521 JG-JO, Defendants: Mark E. Tully, LEAD ATTORNEY, Goodwin Procter, LLP, Boston, MA; Peter Edward Greene, LEAD ATTORNEY, Peter S. Julian, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; William Harry Rooney, LEAD ATTORNEY, Willkie Farr & Gallagher LLP, New York, NY; Andrew J. McDonald, Pullman & Comley, LLC, Stamford, CT; Brian A. Herman, Morgan, Lewis & Bockuis, LLP, New York, NY; David Sapir Lesser, Wilmer Cutler Pickering Hale & Dorr, LLP, New York, NY; Douglas Melamed, Washington, Dc, WA; Eric H. Grush, Sidley Austin LLP, Chicago, IL; Erica Fenby, LEAD ATTORNEY, Kara Kennedy, Alston & Bird LLP, Atlanta, GA. Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garrison, LLP, **[\*\*30]** New York, NY; James T. Shearin, Pullman & Comley, LLC, Bridgeport, CT; James M. Sulentic, John P. Passarelli, Kutak Rock LLP, Omaha, NE; Jonathan B. Orleans, Pullman & Comley LLC, Bridgeport, CT; Joseph W. Clark, Jones Day, Washington, DC; Kenneth A. Gallo, PRO HAC VICE, Paul, Weiss, Rifkind, Wharton & Garrison, LLP, Washington, DC; Lisl J. Dunlop, Shearman & Sterling, New York, NY; Mark P. Ladner, Morrison & Foerster, New York, NY; Michael Edward Johnson, Alston & Bird LLP, New York, NY; Michael B. Miller, Morrison & Foerster LLP, New York, NY; Robert Donald Carroll, Goodwin Procter LLP, Boston, MA; Robert C. Mason, Arnold & Porter Kaye Scholer LLP, New York, NY; Teresa T. Bonder, Alston &

Bird, LLP, Atlanta, GA; Valerie C. Williams, ALSTON & BIRD LLP, Atlanta, GA; William Kolasky, Washington, DC, WA.

For Defendants in civil action Supervalu Inc. v. Visa U.S.A. Inc. et al 05-cv-4650 JG-JO, Defendants in civil action Publix Supermarkets, Inc. v. Visa U.S.A. Inc. et al 05-cv-4677-JG-JO, Defendants in civil action Seaway Gas & Petroleum, Inc. v. Visa U.S.A., Inc. et al 05-cv-4728 JG-JO, Defendants in civil action Raley's v. Visa U.S.A. Inc. et al 05-cv-4799- JG-JO, Defendants in civil [\*\*31] action East Goshen Pharmacy, Inc. v. Visa U.S.A., Inc 05-cv-5073-JG-JO, Defendants: Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York, NY; Kenneth A. Gallo, PRO HAC VICE, Paul, Weiss, Rifkind, Wharton & Garrison, LLP, Washington, DC; Robert C. Mason, Arnold & Porter Kaye Scholer LLP, New York, NY.

For Defendants in civil action National Grocers Association et al v. Visa U.S.A., Inc. et al 05-cv- 5207 JG -JO, Defendants in civil action American Booksellers Association v. Visa U.S.A., Inc. et al 05-cv-5319 JG -JO, Defendants: Mark E. Tully, LEAD ATTORNEY, Robert Donald Carroll, Goodwin Procter, LLP, Boston, MA; Peter Edward Greene, LEAD ATTORNEY, Peter S. Julian, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; William Harry Rooney, LEAD ATTORNEY, Willkie Farr & Gallagher LLP, New York, NY; Andrew J. McDonald, Pullman & Comley, LLC, Stamford, CT; Brian A. Herman, Morgan, Lewis & Bockius, LLP, New York, NY; David Sapir Lesser, Wilmer Cutler Pickering Hale & Dorr, LLP, New York, NY; Douglas Melamed, William Kolasky, Washington, DC, WA; Eric H. Grush, Sidley Austin [\*\*32] LLP, Chicago, IL; Erica Fenby, PRO HAC VICE, Kara Kennedy, Alston & Bird LLP, Atlanta, GA; Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York, NY; James T. Shearin, Jonathan B. Orleans, Pullman & Comley, LLC, Bridgeport, CT; James M. Sulentic, John P. Passarelli, Kutak Rock LLP, Omaha, NE; Joseph W. Clark, Jones Day, Washington, DC; Kenneth A. Gallo, PRO HAC VICE, Paul, Weiss, Rifkind, Wharton & Garrison, LLP, Washington, DC; Mark P. Ladner, Morrison & Foerster, New York, NY; Michael Edward Johnson, Alston & Bird LLP, New York, NY; Michael B. Miller, Morrison & Foerster LLP, New York, NY; Robert C. Mason, Arnold & Porter Kaye Scholer LLP, New York, NY; Teresa T. Bonder, Valerie C. Williams, ALSTON & BIRD LLP, Atlanta, GA.

For Defendants in civil action Rookies, Inc. v. Visa U.S.A., Inc. 05-cv-5069-JG-JO, Defendants in civil action Jasperson v. Visa U.S.A., Inc. 05-cv-5070-JG-JO, Defendants in civil action Animal Land, Inc. v. Visa U.S.A., Inc. 05-cv-5074-JG-JO, Defendants in civil action Bonte Wafflerie, LLC v. Visa U.S.A., Inc. 05-cv-5083 JG-JO, Defendants in civil action Broken Ground, Inc. v. Visa U.S.A., Inc. 05-cv-5082 JG-JO, Defendants in civil action [\*\*33] Baltimore Avenue Foods, LLC v. Visa U.S.A., Inc. 05-cv-5080 JG-JO, Defendants in civil action Fairmont Orthopedics & Sports Medicine, PA v. Visa U.S.A., Inc. 05-cv-5076-JG-JO, Defendants in civil action Tabu Salon & Spa, Inc. v. Visa U.S.A., Inc. 05-cv-5072 -JG-JO, Defendants in civil action Lakeshore Interiors v. Visa U.S.A., Inc. 05-cv-5081 JGJO, Defendants in civil action Parkway Corp. v. Visa U.S.A., Inc. 05-cv-5077-JG-JO, Defendants in civil action NuCity Publications, Inc. v. Visa U.S.A., Inc. 05-cv-5070-JG-JO, Defendants in civil action Hyman v. VISA International Service Association, Inc. 05-cv-5866 JG -JO, Defendants in civil action Lee et al v. Visa U.S.A. Inc. et al 05-cv-03800, Defendants: Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York, NY; Robert C. Mason, Arnold & Porter Kaye Scholer LLP, New York, NY.

For Defendants in civil action Resnick Amsterdam & Leshner P.C. v. Visa U.S.A. Inc. et al, 05-cv-3924 JG-JO, Defendants in civil action Hy-Vee, Inc. v. Visa U.S.A., Inc. et al 05-cv-03925 JG-JO, Defendants in civil case Fitlife Health Systems of Arcadia, [\*\*34] Inc. v. Mastercard International Incorporated et a 05-cv-5153 JG-JO, Defendants: Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York, NY; Kenneth A. Gallo, PRO HAC VICE, Paul, Weiss, Rifkind, Wharton & Garrison, LLP, Washington, DC.

For Defendants in civil action Meijer, Inc. et al v. Visa U.S.A. Inc. et al 05-cv-4131 JG-JO, Defendants in civil action Kroger Co. v. Visa U.S.A., Inc. 05-cv-5078 JG-JO, Defendants: Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York, NY; Robert C. Mason, Arnold & Porter Kaye Scholer LLP, New York, NY.

For Defendants in civil action Lepkowski v. Mastercard International Incorporated et al 05-cv-4974-JG-JO, Defendant: Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY;

Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York, NY; Jonathan Mitchell Jacobson, Wilson Sonsini Goodrich & Rosati, PC, New York, NY; Paul W. Bartel, II, Davis, Polk and Wardwell, New York, NY.

For [\*\*35] Defendants in civil action Photos Etc. Corp. v. Visa U.S.A., Inc. 05-cv-5071-JG-JO, Defendant: Mark E. Tully, LEAD ATTORNEY, Goodwin Procter, LLP, Boston, MA; Peter Edward Greene, LEAD ATTORNEY, Peter S. Julian, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Andrew J. McDonald, Pullman & Comley, LLC, Stamford, CT; David Sapir Lesser, Wilmer Cutler Pickering Hale & Dorr, LLP, New York, NY; Douglas Melamed, Washington, DC, WA; Eric H. Grush, Sidley Austin LLP, Chicago, IL; Erica Fenby, PRO HAC VICE, Kara Kennedy, Teresa T. Bonder, Valerie C. Williams, Alston & Bird LLP, Atlanta, GA; Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York, NY; James M. Sulentic, John P. Passarelli, Kutak Rock LLP, Omaha, NE; Jonathan B. Orleans, Pullman & Comley LLC, Bridgeport, CT; Joseph W. Clark, Jones Day, Washington, DC; Lis J. Dunlop, Shearman & Sterling, New York, NY; Michael Edward Johnson, Alston & Bird LLP, New York, NY; Michael B. Miller, Morrison & Foerster LLP, New York, NY; Robert Donald Carroll, Goodwin Procter LLP, Boston, MA; William Kolasky, Washington, DC, WA.

For Defendants in civil action Rite Aid Corporation et al. v. Visa U.S.A., Inc. et al. 05-cv-5352 [\*\*36] JG-JO, Defendant: Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Robert C. Mason, Arnold & Porter Kaye Scholer LLP, New York, NY.

For Defendants in civil action The Kroger Co., et al. v. MasterCard Inc., et al., 06-cv-0039 JG-JO, Defendants in civil action Performace Labs, Inc. v. American Express Travel Related Services Co., Inc., et al 05-cv-5869 JG-JO, Defendants in civil action Discount Optics, Inc., et al. v. Visa U.S.A., Inc., et al. 05-cv-5870 JG-JO, Defendants in civil action LDC, Inc. v. Visa U.S.A., Inc. et al. 05-cv-5871 JG-JO, Defendants in civil action G.E.S. Bakery, Inc. v. Visa U.S.A., Inc., et al. 05-cv-5879 JG-JO, Defendants in civil action Leeber Cohen, M.D. v. Visa U.S.A., Inc., et al. 05-cv-5878 JG-JO, Defendants in civil action Twisted Spoke v. Visa U.S.A., Inc., et al. 05-cv-5881 JG-JO, Defendants in civil action Lombardo Bros., Inc. v. Visa U.S.A., Inc. 05-cv-5882 JG-JO, Defendants in civil action Abdallah Bishara, etc. v. Visa U.S.A., Inc. 05-cv-5883 JG-JO, Defendants in civil action JGSA, Inc. v. Visa U.S.A., Inc., et al 05-cv-5885, Defendants in civil action Fringe, Inc. v. Visa, U.S.A., Inc. et al 05-cv-4194 JG-JO, [\*\*37] Defendants: Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York, NY.

For Defendants in civil action Harris Stationers, Inc., et al. v. Visa International Service Association, et al. 05-cv-5868 JG-JO, Defendant: Joshua N. Holian, LEAD ATTORNEY, Latham & Watkins, San Francisco, CA; Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Eric H. Grush, Sidley Austin LLP, Chicago, IL; Erica Fenby, PRO HAC VICE, Kara Kennedy, Teresa T. Bonder, Valerie C. Williams, Alston & Bird LLP, Atlanta, GA; Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York, NY; Joseph W. Clark, Jones Day, Washington, DC; Michael Edward Johnson, Alston & Bird LLP, New York, NY; Michael B. Miller, Morrison & Foerster LLP, New York, NY; Richard P. Jeffries, Kutak Rock LLP, Omaha, NE.

For Defendants in civil action Dr. Roy Hyman, et al. v. Visa International Service Association, Inc., et al. 05-cv-5866, Defendant: Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Gary R. Carney, Jr., Paul, Weiss, Rifkind, [\*\*38] Wharton & Garrison, LLP, New York, NY; Joseph W. Clark, Jones Day, Washington, DC; Michael B. Miller, Morrison & Foerster LLP, New York, NY.

For Defendants in civil action Connecticut Food Association, Inc., et al. v. Visa U.S.A., Inc., et al 05-cv-5880 JG-JO, Defendant: Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Eric H. Grush, Sidley Austin LLP, Chicago, IL; Gary R. Carney, Jr., Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York, NY; Michael B. Miller, Morrison & Foerster LLP, New York, NY.

For Defendants in civil action 518 Restaurant Corp. v. American Express Travel Related Services Co., et al. 05-cv-5884 JG-JO, Defendant: Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY.

For HSBC Bank USA, N.A., Defendant: David Sapir Lesser, Wilmer Cutler Pickering Hale & Dorr, LLP, New York, NY; Perry Lange, Wilmer Cutler Pickering Hale and Dorr, Washington, DC.

For Capital One Bank, Defendant: Abby Faith Rudzin, Andrew J. Frackman, LEAD ATTORNEYS, O'Melveny & Myers LLP, New York, NY; John Zavitsanos, LEAD ATTORNEY, PRO HAC VICE, Ahmad Zavitsanos et al, Houston, TX; Jordan Lyn Warshauer, LEAD ATTORNEY, PRO [\*39] HAC VICE, Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing P.C., Houston, TX.

For Capital One F S B, Defendant: Abby Faith Rudzin, Andrew J. Frackman, LEAD ATTORNEYS, O'Melveny & Myers LLP, New York, NY.

For Capital One Financial Corp, Defendant: Abby Faith Rudzin, Andrew J. Frackman, LEAD ATTORNEYS, O'Melveny & Myers LLP, New York, NY; Jamie Alan Aycock, LEAD ATTORNEY, AZA, Houston, TX; John Zavitsanos, LEAD ATTORNEY, PRO HAC VICE, Ahmad Zavitsanos et al, Houston, TX.

For Wells Fargo & Company, Defendant: Charles Bedford Hampton, LEAD ATTORNEY, PRO HAC VICE, McGuireWoods LLP, Houston, TX; Peter Abraham Nelson, LEAD ATTORNEY, Patterson Belknap Webb & Tyler LLP, New York City, NY; Robert P. LoBue, LEAD ATTORNEY, Terra Hittson, Patterson, Belknap, Webb & Tyler LLP, New York, NY; Benjamin R. Rossen, Patterson Belknap Webb & Tyler, New York, NY.

For National City Bank of Kentucky, National City Corporation, Defendants: Frederick N. Egler, LEAD ATTORNEY, PRO HAC VICE, Reed Smith, Pittsburgh, PA.

For Mastercard Incorporated, Mastercard International Incorporated, Defendants: Donna M. Ioffredo, LEAD ATTORNEY, PRO HAC VICE, Craig Benson, Heather C. Milligan, Jarred A. Klorfein, Lina Dagnew, Paul Eric [\*40] Chaffin, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Gary R. Carney, LEAD ATTORNEY, Paul Weiss Rifkind Wharton & Garrison, LLPNY, New York, NY; Kenneth A. Gallo, LEAD ATTORNEY, PRO HAC VICE, Paul, Weiss, Rifkind, Wharton & Garrison, LLP, Washington, DC; Tynan Butchard, LEAD ATTORNEY, PRO HAC VICE, Baker Botts LLP, Houston, TX; Alex Michael Hyman, Robert Joseph O'Loughlin, III, Sarah Ripa, Zachary Dietert, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY; Bruce Alan Birenboim, Paul, Weiss, Rifkind, Wharton & Garrison, New York, NY; Gary R. Carney, Jr., Kelly Dodge Garcia, Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York, NY; Michelle Katherine Parikh, Paul Weiss Rifkind Wharton & Garrison LLP, Washington, DC; Matthew Duff Turner, Armstrong Teasdale LLP-JCMO.

For HSBC Finance Corporation, HSBC North America Holdings, Inc, Defendants: David Sapir Lesser, Wilmer Cutler Pickering Hale & Dorr, LLP, New York, NY; Perry Lange, Wilmer Cutler Pickering Hale and Dorr, Washington, DC.

For Citibank N A, Citicorp, Citigroup Inc, Defendants: Benjamin R. Nagin, LEAD ATTORNEY, Ada Asante Davis, Eamon Paul Joyce, Samuel Sung-Ook Choi, Thomas Andrew Paskowitz, Sidley Austin [\*41] LLP, New York, NY; David Graham, Sidley Austin Brown & Wood LLP, Chicago, IL.

For Chase Bank USA, N.A., Defendant: Noelle M Reed, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, Houston, TX; Peter Edward Greene, LEAD ATTORNEY, Boris Bershteyn, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Kamali P Willett, Skadden Arps Slate Meagher & Flom, New York, NY; Linda Wong Cenedella, Skadden Arps, New York, NY.

For JP Morgan Chase & Co., Defendant: Noelle M Reed, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, Houston, TX; Peter Edward Greene, LEAD ATTORNEY, Boris Bershteyn, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Kamali P Willett, Skadden Arps Slate Meagher & Flom, New York, NY.

For Fifth Third Bancorp, Defendant: Eliot Fielding Turner, LEAD ATTORNEY, PRO HAC VICE, Norton Rose Fulbright US LLP, Houston, TX; Benjamin G. Stewart, Keating Muething & Klekamp, PLL, Cincinnati, OH; Brenna L. Penrose, Keating Muething & Klekamp PLL, Cincinnati, OH; Charles M. Miller, Joseph M. Callow, Trenton B. Douthett, Keating Muething & Klekamp PLL, Cincinnati, OH; Drew M. Hicks, Richard L. Creighton, Keating Muething & Klekamp, Cincinnati, OH.

For Bank Of America, N.A., [\*42] Defendant: Adam James Hunt, LEAD ATTORNEY, Michael B. Miller, Morrison & Foerster LLP, New York, NY; Jeffrey K. Rosenberg, Mark P. Ladner, Robert James Baehr, LEAD ATTORNEYS, Morrison & Foerster, New York, NY.

For Visa International Service Association, Defendant: Blair Eden Kaminsky, LEAD ATTORNEY, Demian Alexander Ordway, Michael Shuster, Richard J. Holwell, Holwell Shuster & Goldberg LLP, New York, NY; Jayme Alyse Jonat, Robert J. Morrow, LEAD ATTORNEYS, Holwell Shuster Goldberg LLP, New York, NY; Lee L. Kaplan, LEAD ATTORNEY, PRO HAC VICE, Smyser Kaplan & Veselka, LLP, Houston, NY; Mark R. Merley, LEAD ATTORNEY, PRO HAC VICE, Karen Otto, Ron Ghatan, Arnold & Porter LLP, Washington, DC; Robert John Vizas, LEAD ATTORNEY, Arnold and Porter LLP, San Francisco, CA; Sharon D. Mayo, LEAD ATTORNEY, PRO HAC VICE, Arnold & Porter Kaye Scholer LLP, San Francisco, CA; Zachary Adam Kerner, LEAD ATTORNEY, Holwell Shuster & Goldberg, New York, NY; Laura J. Butte, Arnold & Porter Kaye Scholer, Washington, DC; Robert S. Jones, Rosemary Szanyi, Arnold & Porter Kaye Scholer LLP, Washington, DC; Robert C. Mason, Arnold & Porter Kaye Scholer LLP, New York, NY.

For Visa U.S.A. Inc., Defendant: Blair Eden [\*\*43] Kaminsky, LEAD ATTORNEY, Demian Alexander Ordway, Michael Shuster, Richard J. Holwell, Holwell Shuster & Goldberg LLP, New York, NY; Jayme Alyse Jonat, Robert J. Morrow, LEAD ATTORNEYS, Holwell Shuster Goldberg LLP, New York, NY; Lee L. Kaplan, LEAD ATTORNEY, PRO HAC VICE, Smyser Kaplan & Veselka, LLP, Houston, NY; Mark R. Merley, LEAD ATTORNEY, PRO HAC VICE, Karen Otto, Ron Ghatan, Arnold & Porter LLP, Washington, DC; Robert C. Mason, LEAD ATTORNEY, Arnold & Porter Kaye Scholer LLP, New York, NY; Robert John Vizas, LEAD ATTORNEY, Arnold and Porter LLP, San Francisco, CA; Sharon D. Mayo, PRO HAC VICE, Arnold & Porter Kaye Scholer LLP, San Francisco, CA; Zachary Adam Kerner, LEAD ATTORNEY, Holwell Shuster & Goldberg, New York, NY; Anthony D. Boccanfuso, Arnold & Porter, New York, NY; Laura J. Butte, Arnold & Porter Kaye Scholer, Washington, DC; Robert S. Jones, Rosemary Szanyi, Arnold & Porter Kaye Scholer LLP, Washington, DC.

For Bank of America Corporation, Defendant: Adam James Hunt, LEAD ATTORNEY, Michael B. Miller, Morrison & Foerster LLP, New York, NY; Eliot Fielding Turner, LEAD ATTORNEY, PRO HAC VICE, Norton Rose Fulbright US LLP, Houston, TX; Jeffrey K. Rosenberg, Mark P. Ladner, [\*\*44] Robert James Baehr, LEAD ATTORNEYS, Morrison & Foerster, New York, NY; Layne E. Kruse, LEAD ATTORNEY, PRO HAC VICE, Fulbright & Jaworski LLP, Houston, TX.

For Texas Independent Bancshares, Inc., Defendant: Dennis R Bettison, LEAD ATTORNEY, PRO HAC VICE, Bettison Doyle et al, Galveston, TX; Adam S. Mocciole, Pullman & Comley, LLC, Bridgeport, CT.

For First National Bank of Omaha, Defendant: Eliot Fielding Turner, LEAD ATTORNEY, PRO HAC VICE, Norton Rose Fulbright US LLP, Houston, TX.

For Barclays Financial Corp., Defendant: James P. Tallon, Shearman & Sterling, New York, NY.

For Chase Paymentech Solutions, LLC, Defendant: Kamali P Willett, Skadden Arps Slate Meagher & Flom, New York, NY.

For Wachovia Bank, NA., Wachovia Corporation, Defendants: Peter Abraham Nelson, Robert P. LoBue, LEAD ATTORNEY, Terra Hittson, Patterson Belknap Webb & Tyler LLP, New York, NY.

For Discover Financial Services, Defendant: Dana Lynn Cook-Milligan, Winston and Strawn LLP, San Francisco, CA; Elizabeth P Papez, Winston and Strawn LLP, Washington, DC; Eva W. Cole, Jeffrey L. Kessler, Johanna Rae Hudgens, Winston & Strawn LLP, New York, NY; James Franklin Herbison, Winston and Strawn LLP, Chicago, IL; Sean D. Meenan, [\*\*45] PRO HAC VICE, Jeanifer Ellen Parsigian, Winston and Strawn, San Francisco, CA.

For Unlimited Vacations and Cruises Inc, Top Gun Wrecker, Orange County Bldg Materials, Bishop, Defendants: John Jacob Pentz, III, LEAD ATTORNEY, John J. Pentz, Esq., Sudbury, MA.

For Daviss Donuts and Deli, Defendant: John Jacob Pentz, III, LEAD ATTORNEY, PRO HAC VICE, John J. Pentz, Esq., Sudbury, MA.

For Lane Courkamp, Permier Enterprises Group, Defendants: Daniel L. Brown, Sheppard, Mullin, Richter & Hampton, New York, NY.

For Class Action Recovery Service, Defendant: Dennis M. Campbell, LEAD ATTORNEY, PRO HAC VICE, Mershon, Sawyer, Johnston, Dunwody & Cody, Miami, FL.

For Refund Recovery Services, LLC, Defendant: Robert M. Gardner, PRO HAC VICE, Gardner Law Office, Burnsville, MN.

For Electronic Payment Systems, LLC, Electronic Payment Systems, LLC, Defendants: Scotty P. Krob, LEAD ATTORNEY, PRO HAC VICE, Krob Law Office, LLC, Greenwood Village, CO.

For Jonbro, Defendant: Brent O. Hatch, Shaunda L. McNeill, LEAD ATTORNEYS, HATCH JAMES & DODGE, SALT LAKE CITY, UT.

For Visa Europe Limited, Defendant: Demian Alexander Ordway, Robert C. Mason, Holwell Shuster & Goldberg LLP.

For Visa Europe Services Inc., Defendant: **[\*\*46]** Demian Alexander Ordway, Holwell Shuster & Goldberg LLP, New York, NY; Robert C. Mason, Arnold & Porter Kaye Scholer LLP, New York, NY.

For Visa Inc., Defendant: Blair Eden Kaminsky, Demian Alexander Ordway, LEAD ATTORNEYS, Holwell Shuster & Goldberg LLP, New York, NY; Jayme Alyse Jonat, Robert J. Morrow, LEAD ATTORNEYS, Holwell Shuster Goldberg LLP, New York, NY; Lee L. Kaplan, LEAD ATTORNEY, PRO HAC VICE, Smyser Kaplan & Veselka, LLP, Houston, NY; Mark R. Merley, LEAD ATTORNEY, PRO HAC VICE, Karen Otto, Ron Ghatan, Arnold & Porter LLP, Washington, DC; Robert John Vizas, LEAD ATTORNEY, Arnold and Porter LLP, San Francisco, CA; Sharon D. Mayo, LEAD ATTORNEY, PRO HAC VICE, Arnold & Porter Kaye Scholer LLP, San Francisco, CA; Zachary Adam Kerner, LEAD ATTORNEY, Holwell Shuster & Goldberg, New York, NY; Laura J. Butte, Arnold & Porter Kaye Scholer, Washington, DC; Robert S. Jones, Rosemary Szanyi, Arnold & Porter Kaye Scholer LLP, Washington, DC; Robert C. Mason, Arnold & Porter Kaye Scholer LLP, New York, NY.

For Capital One Bank, (USA), N.A., Defendant: Abby Faith Rudzin, Andrew J. Frackman, LEAD ATTORNEYS, O'Melveny & Myers LLP, New York, NY; Jamie Alan Acock, LEAD ATTORNEY, AZA, Houston, **[\*\*47]** TX; John Zavitsanos, LEAD ATTORNEY, PRO HAC VICE, Ahmad Zavitsanos et al, Houston, TX; Jordan Lyn Warshauer, LEAD ATTORNEY, PRO HAC VICE, Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing P.C., Houston, TX.

For Chase Manhattan Bank USA, N.A., Defendant: Kamali P Willett, Skadden Arps Slate Meagher & Flom, New York, NY.

For Citibank (South Dakota), N.A., Defendant: David Graham, Sidley Austin Brown & Wood LLP, Chicago, IL.

For JP Morgan Chase Bank, N.A., Defendant: Noelle M Reed, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, Houston, TX; Peter Edward Greene, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Kamali P Willett, Skadden Arps Slate Meagher & Flom, New York, NY.

For Barclays Bank Delaware, Defendant: Brent Lockhart Brown, LEAD ATTORNEY, PRO HAC VICE, Cotten Schmidt Abbott LLP, Fort Worth, TX; Brian Calandra, James Tallon, LEAD ATTORNEYS, PRO HAC VICE, Shearman & Sterling LLP, New York, NY.

For BA Merchant Services LLC, formerly known as National Processing, Inc, Defendant: Adam James Hunt, LEAD ATTORNEY, Morrison & Foerster LLP, New York, NY; Eliot Fielding Turner, LEAD ATTORNEY, PRO HAC VICE, Norton Rose Fulbright US LLP, Houston, TX; Layne E. Kruse, **[\*\*48]** LEAD ATTORNEY, PRO HAC VICE, Fulbright & Jaworski LLP, Houston, TX; Mark P. Ladner, Robert James Baehr, LEAD ATTORNEYS, Morrison & Foerster, New York, NY.

For MBNA America Bank, N.A., Defendant: Adam James Hunt, LEAD ATTORNEY, Morrison & Foerster LLP, New York, NY; Mark P. Ladner, Robert James Baehr, LEAD ATTORNEYS, Morrison & Foerster, New York, NY.

For HSBC Finance Corporation, Defendant: Bradley C Weber, Roger Brian Cowie, LEAD ATTORNEYS, PRO HAC VICE, Locke Lord LLP, Dallas, TX; David Sapir Lesser, LEAD ATTORNEY, PRO HAC VICE, Wilmer Cutler Pickering Hale & Dorr, LLP, New York, NY; Perry A Lange, LEAD ATTORNEY, PRO HAC VICE, Wilmer Hale, Washington, DC.

For HSBC North America Holdings Inc, Defendant: Bradley C Weber, Roger Brian Cowie, LEAD ATTORNEYS, PRO HAC VICE, Locke Lord LLP, Dallas, TX; David Sapir Lesser, LEAD ATTORNEY, Wilmer Cutler Pickering Hale & Dorr, LLP, New York, NY; Perry A Lange, LEAD ATTORNEY, PRO HAC VICE, Wilmer Hale, Washington, DC.

For PNC Financial Services Group, Inc., Defendant: Bruce Allen Blefeld, LEAD ATTORNEY, PRO HAC VICE, Reed Smith LLP, Houston, TX; Edward William Duffy, LEAD ATTORNEY, PRO HAC VICE, ReedSmith LLP, Houston, TX; Frederick N. Egler, LEAD **[\*\*49]** ATTORNEY, PRO HAC VICE, Reed Smith, Pittsburgh, PA.

For Suntrust Bank, Suntrust Banks Inc, Defendants: Jared M Slade, LEAD ATTORNEY, PRO HAC VICE, Alson Bird LLP, Dallas, TX.

For Wells Fargo Bank N.A., Defendant: Robert P. LoBue, Patterson, Belknap, Webb & Tyler LLP, New York, NY.

For Wells Fargo Merchant Services, LLC, Defendant: Charles Bedford Hampton, LEAD ATTORNEY, PRO HAC VICE, McGuireWoods LLP, Houston, TX.

For Visa Inc., Defendant: Blair Eden Kaminsky, LEAD ATTORNEY, Demian Alexander Ordway, Holwell Shuster & Goldberg LLP, New York, NY; Daniel M. Meyers, LEAD ATTORNEY, Arnold & Porter Kaye Scholer LLP, Chicago, IL; Nina Rachel Kanovitch, LEAD ATTORNEY, Holwell Shuster & Goldberg, New York, NY.

For Discover, ThirdParty Defendant: Matthew L. Cantor, LEAD ATTORNEY, Constantine Cannon, P.C., New York, NY.

MNZ Inc, Interpleader, Pro se.

HealthSource Pharmacy III B Inc., Interested Party, Pro se.

HealthSource Pharmacy III Inc., Interested Party, Pro se.

HealthSource Pharmacy II Inc., Interested Party, Pro se.

HealthSource Pharmacy Inc., Interested Party, Pro se.

Johnson Family Pharmacy, Interested Party, Pro se.

Home Convalescent Aids, Inc., Interested Party, Pro se.

Peace Pharmacy, Interested **[\*\*50]** Party, Pro se.

Citizens Pharmacy, Interested Party, Pro se.

Fort Thomas Drug Center, Interested Party, Pro se.

Rocky Mountain Pharmacy of Estes Park, Interested Party, Pro se.

Hieber's Pharmacy, Interested Party, Pro se.

Newts Pharmacy LLC, Interested Party, Pro se.

Turner Drug, Interested Party, Pro se.

Shannon Hills Pharmacy, Interested Party, Pro se.

Faulkenberg Harth, Interested Party, Pro se.

Medical Towers Pharmacy, Interested Party, Pro se.

Downtown Drug, Interested Party, Pro se.

Monument Pharmacy, Inc., Interested Party, Pro se.

Jack's Market Pharmacy, Interested Party, Pro se.

Hayden Family Pharmacy, P.C., Interested Party, Pro se.

WHJ Enterprises, Interested Party, Pro se.

Arrochar Pharmacy, Interested Party, Pro se.

J&J Pharmacy, Interested Party, Pro se.

DJH, Inc., Interested Party, Pro se.

Kiowa County Pharmacy, LLC, Interested Party, Pro se.

Abeldt's Gaslight Pharmacy, Interested Party, Pro se.

Charlie's Drug, Inc., Interested Party, Pro se.

Thornville Pharmacy, Interested Party, Pro se.

Emporium Pharmacy, Interested Party, Pro se.

Hillcrest Pharmacy, Interested Party, Pro se.

Anson Plaza Pharmacy, Interested Party, Pro se.

The Drug Store, Interested Party, Pro se.

Jim & Phil's Family Pharmacy [\*\*51] LTD., Interested Party, Pro se.

Victory Tampa Medical Pharmacy, Interested Party, Pro se.

Medicap Pharmacy 8209, Interested Party, Pro se.

Larimore Drug and Gift, Interested Party, Pro se.

RG Drug Corp, Interested Party, Pro se.

Portes Pharmacy, Inc., Interested Party, Pro se.

Douglas & Ogden Medical Center Pharmacy Inc., Interested Party, Pro se.

Olde Towne Pharmacy, Interested Party, Pro se.

Oakdale Pharmacy, Interested Party, Pro se.

Todds Discount Drugs, Interested Party, Pro se.

Lo Cost Pharmacy, Interested Party, Pro se.

Stoll's Pharmacy, Inc., Interested Party, Pro se.

DeBlaquiere Ent. Inc., doing business as White Cross Pharmacy, Interested Party, Pro se.

Soldotna Professional Pharmacy, Interested Party, Pro se.

Medicine Plus, Interested Party, Pro se.

Maddox Drugs, Interested Party, Pro se.

Kiefer Inc. D.B.A. Watson's City Drug, Interested Party, Pro se.

Park Plaza Pharmacy, Inc., Interested Party, Pro se.

Blende Drug Inc., Interested Party, Pro se.

Clinic Drug, Inc., Interested Party, Pro se.

St Bernard Drugs #2 LLC, Interested Party, Pro se.

The Apothecary, Interested Party, Pro se.

Almadad Inc. DBA / Bronx Pharmacy, Interested Party, Pro se.

Kelley Drug & Selections, Interested Party, Pro se. [\*\*52]

A & H Stores, Inc., Interested Party, Pro se.

Golden Rock Pharmacy, Interested Party, Pro se.

Medicap Pharmacy, Interested Party, Pro se.

Village Drug Shop of Athens Inc., Interested Party, Pro se.

Elm Plaza Pharmacy, Interested Party, Pro se.

Mt. Olympus Compounding, Interested Party, Pro se.

Reliable Discount Pharmacy, Interested Party, Pro se.

Millers of Wyckoff, Inc., Interested Party, Pro se.

Sellersville Pharmacy, Interested Party, Pro se.

Chads Payless Pharmacy, Inc., Interested Party, Pro se.

Super Saver Pharmacy #4, LLC, Interested Party, Pro se.

Super Saver Pharmacy #3, LLC, Interested Party, Pro se.

Super Saver Pharmacy #2, LLC, Interested Party, Pro se.

Super Saver Pharmacy LLC, Interested Party, Pro se.

Camacho Pharmacy Supply, Inc., Interested Party, Pro se.

Estherville Drug, Inc. DBA Estherville, Snyder Drug, Interested Party, Pro se.

Carrollwood Pharmacy, Interested Party, Pro se.

E Street Discount Pharmacy, Interested Party, Pro se.

Noble Pharmacy, Interested Party, Pro se.

Main Street Drug & Lakeside Pharmacy, Interested Party, Pro se.

Econo-Med Pharmacy, Inc, Interested Party, Pro se.

Cottrill's Pharmacy, Inc., Interested Party, Pro se.

Union City Pharmacy, Interested Party, Pro se.

Medical [\*\*53] Pharmacy & Supply, Interested Party, Pro se.

Waverly Pharmacy, Interested Party, Pro se.

Marengo Community Pharmacy, Inc., Interested Party, Pro se.

Rider Pharmacy, Interested Party, Pro se.

Quincy Pharmacy, Interested Party, Pro se.

Harvard Family Physicians Pharmacy, Interested Party, Pro se.

Hoffman Drug-True Value, Interested Party, Pro se.

RP Healthcare, Inc., Interested Party, Pro se.

VM Pharmacy, Interested Party, Pro se.

Evans Pharmacy, Interested Party, Pro se.

BPRS, Inc. dba Avenue Pharmacy, Interested Party, Pro se.

Sooner Pharmacy of Davis, Inc., Interested Party, Pro se.

USave Pharmacy, Interested Party, Pro se.

Plateau Drugs, Inc., Interested Party, Pro se.

Bissell Pharmacy, Interested Party, Pro se.

Valley Mission Homecare Pharmacy, Interested Party, Pro se.

Bird's Hill Pharmacy, Inc., Interested Party, Pro se.

Duncan's Pharmacy, Inc., Interested Party, Pro se.

E&M Pharmacy, Interested Party, Pro se.

Anthony Pharmacy, Interested Party, Pro se.

M&M Pharmacy Corp dba Continental Drugs, Interested Party, Pro se.

Wilson Pharmacy, Interested Party, Pro se.

Bridges & James, Inc., DBA, Wannamaker Drug, Interested Party, Pro se.

Sherry's Discount Drug, Interested Party, Pro se.

RPB Pharmacy, Inc., [\*\*54] DBA Pharmahealth Pharmacy, Interested Party, Pro se.

Pharmahealth Heuthorn, Inc., Interested Party, Pro se.

Pharmahealth Long Term Care, Inc., Interested Party, Pro se.

Seitz Drug Company, Inc., Interested Party, Pro se.

P&S Pharmacy LLC dba Wurtsboro Pharmacy, Interested Party, Pro se.

McLoud Clinic Pharmacy, Interested Party, Pro se.

Mark's Family Pharmacy, Interested Party, Pro se.

Minooka Pharmacy, Inc., Interested Party, Pro se.

Seeley Swan Pharmacy, Interested Party, Pro se.

Parkhill Pharmacy, Inc. dba, Lopez Island Pharmacy, Interested Party, Pro se.

Turtle Lake Rexall Drug, Interested Party, Pro se.

Osborn Drugs, Inc., Interested Party, Pro se.

Hayen Pharmacies, P.A. dba Paul's Pharmacy, Interested Party, Pro se.

Millersburg Pharmacy, Inc., Interested Party, Pro se.

Perry Drug, Inc., Interested Party, Pro se.

Liberty Drug, Interested Party, Pro se.

Pharmacy Services, Inc., Interested Party, Pro se.

Greenville Drug Store, Inc., Interested Party, Pro se.

Family Pharmacy & Med Serv International, Interested Party, Pro se.

Standard Pharmacy, Interested Party, Pro se.

Standard Pharmacy @ HealthFirst, Interested Party, Pro se.

Paris Apothecary, LLC, Interested Party, Pro se.

Johnson Drug aka Johnson Compounding [\*\*55] and Wellness Center, Interested Party, Pro se.

Apothecare Pharmacy LLC, Interested Party, Pro se.

Lamas Drug, Inc. DBA Barre Family Pharmacy, Interested Party, Pro se.

Acton Pharmacy, Inc., Interested Party, Pro se.

Towne Pharmacy of Rincon, LLC, Interested Party, Pro se.

Perham Health Retail Pharmacy, Interested Party, Pro se.

Loris Drug Store, Inc., Interested Party, Pro se.

Adams Pharmacy, Inc., Interested Party, Pro se.

Headrick's Drug Store, Interested Party, Pro se.

Malheur Drug, Inc., Interested Party, Pro se.

Great Oak Pharmacy, Interested Party, Pro se.

Thompson Pharmacy & Medical, Interested Party, Pro se.

Lexar Corporation, Interested Party, Pro se.

Scepter Pharmacy, Interested Party, Pro se.

Focus Respiratory, Inc., Interested Party, Pro se.

Headland Discount Pharmacy, Interested Party, Pro se.

Hartig Drug Company, Inc., Interested Party, Pro se.

Doganieros Pharmacy Inc., Interested Party, Pro se.

Marshland Pharmacy, Inc., Interested Party, Pro se.

Tuttle's Pharmacy, Inc., Interested Party, Pro se.

Professional Pharmacy LLC, Interested Party, Pro se.

Prescription Center LLC, Interested Party, Pro se.

North Pole Prescription Lab. Inc., Interested Party, Pro se.

Peak Pharmacy Inc., Interested Party, **[\*\*56]** Pro se.

Mifflintown Pharmacy Inc., Interested Party, Pro se.

Dollex Pharmacy, Interested Party, Pro se.

Dunes Family Pharmacy Inc., Interested Party, Pro se.

Roberds Pharmacy, Interested Party, Pro se.

East End Pharmacy, Inc., Interested Party, Pro se.

Hankinson Drug, Inc., Interested Party, Pro se.

J.E. Pierce Apothecary and Compound, Interested Party, Pro se.

Weatherly Area Community Pharmacy, Interested Party, Pro se.

Nash Drugs, Inc., Interested Party, Pro se.

Matthewson Drug Co., Interested Party, Pro se.

City Drug Co, Interested Party, Pro se.

MedPark Pharmacy, Inc., Interested Party, Pro se.

Tanglewood Pharmacy, Inc., Interested Party, Pro se.

RJT Pharmacy, Inc. DBA The Medicine Shoppe #0500, Interested Party, Pro se.

Gateway Pharmacy, Interested Party, Pro se.

Family Pharmacy of Dover, LLC, Interested Party, Pro se.

The Compounding Shoppe, Interested Party, Pro se.

The Medicine Shoppe, Interested Party, Pro se.

Wood Pharmacy, Interested Party, Pro se.

Mill Run Community Pharmacy, Interested Party, Pro se.

Jonestown Pharmacy, Interested Party, Pro se.

Healthlink Pharmacy, Interested Party, Pro se.

Pharma LLC DBA Sebring Pharmacy, Interested Party, Pro se.

Fisherville Pharmacy, LLC, Interested Party, [\*\*57] Pro se.

Bucklow Pharmacy, Inc., Interested Party, Pro se.

Immediate Pharmaceutical Services, Inc., Interested Party, Pro se.

Towne Drugs Inc., Interested Party, Pro se.

Discount Drug Mart, Inc., Interested Party, Pro se.

Star Medical Center Pharmacy, Interested Party, Pro se.

Holst Pharmacy d/b/a The Medicine Store, Interested Party, Pro se.

Krittenbrink Pharmacy, Interested Party, Pro se.

Pharm-A-Save Inc., Interested Party, Pro se.

Sumpter Pharmacy, Inc., Interested Party, Pro se.

Medicap Pharmacy, Interested Party, Pro se.

Pineland Pharmacy, Interested Party, Pro se.

Yorkville Drugstore, Interested Party, Pro se.

Ider Discount Drugs, Inc., Interested Party, Pro se.

Donlon Healthmart Pharmacy, Interested Party, Pro se.

R&M Drugs, Interested Party, Pro se.

Hawco, Inc. dba Ver Helst Drug Center, Interested Party, Pro se.

West Pointe Pharmacy, Interested Party, Pro se.

Minersville Pharmacy, Interested Party, Pro se.

Orange Pharmacy, Interested Party, Pro se.

Kansas Pharmacy LLC, Interested Party, Pro se.

Catoosa Family Pharmacy, LLC, Interested Party, Pro se.

Four Star Drug of Bethany, Inc., Interested Party, Pro se.

Trumm Drug, Inc., Interested Party, Pro se.

Lindsay Drug Co., Inc., Interested Party, Pro [\*\*58] se.

Elliott Plaza Pharmacy, LLC, Interested Party, Pro se.

Valley Pharmacy, Interested Party, Pro se.

Inola Drug Inc., Interested Party, Pro se.

Family Drug, Interested Party, Pro se.

Bouvier Pharmacy Inc., Interested Party, Pro se.

Brown's Main Street Pharmacy, Inc., Interested Party, Pro se.

Langston Drug Store, Interested Party, Pro se.

Ron's Pharmacy, Inc., Interested Party, Pro se.

WPR Food Enterprises, LLC, Interested Party, Pro se.

Lawson Pharmacy, Interested Party, Pro se.

Powell Foods of 104th Street, LLC, Interested Party, Pro se.

Los Ebanos Pharmacies and Home Health Care, Inc., Interested Party, Pro se.

Robert Fox Inc, Interested Party, Pro se.

Wilderness Center Pharmacy Inc., Interested Party, Pro se.

Doctors Park Pharmacy, Interested Party, Pro se.

Louis Morgan Drugs No. 5 Inc., Interested Party, Pro se.

Vet's Oil Company Inc, Interested Party, Pro se.

Kems Pharmacy/optiMed Pharmacy/D&C enterprise Inc., Interested Party, Pro se.

Elkton Family Pharmacy, Interested Party, Pro se.

MJKL Enterprises, MJKL Enterprises Midwest, Pizza Revolucion, and Frontier Star, Interested Party, Pro se.

Clayton Hometown Pharmacy, Interested Party, Pro se.

Patient Care Pharmacy, Interested Party, Pro se.

Stop-N-Go **[\*\*59]** Foodmart, Interested Party, Pro se.

Elmer Hometown Pharmacy, Interested Party, Pro se.

Lindberg Pharmacy, Interested Party, Pro se.

Lindenwold Hometown Pharmacy, Interested Party, Pro se.

Trader Gus Shell, Interested Party, Pro se.

Central Avenue Pharmacy Inc., Interested Party, Pro se.

Matlack Hometown Pharmacy, Interested Party, Pro se.

Riverside Hometown Pharmacy, Interested Party, Pro se.

Buy For Less Discount Pharmacy dba Sheridan Express Pharmacy, Interested Party, Pro se.

Spruce Mountain Pharmacy, Interested Party, Pro se.

Byard-Mercer Pharmacy, Interested Party, Pro se.

Community Pharmacy, Inc., Interested Party, Pro se.

Total Care Pharmacy, Interested Party, Pro se.

Glenview Apothecary Inc., Interested Party, Pro se.

The Medicine Shoppe, Interested Party, Pro se.

Dairyland Depot, Interested Party, Pro se.

Jordan Pharmacy Inc., Interested Party, Pro se.

Medicine Shoppe and Washington Healthmart Medford Food Co-op, Interested Party, Pro se.

Gore Green County Drug, Inc., Interested Party, Pro se.

The Medicine Shoppe, Interested Party, Pro se.

Nicson, Inc. and Abrams BP, Inc., Interested Party, Pro se.

Family Pharmacy of Chester LLC dba Victor Drugs Healthmart, Interested Party, Pro se.

Prairie Drug, **[\*\*60]** Interested Party, Pro se.

Westpark Discount Pharmacy, Interested Party, Pro se.

The Country Squire Disc. Pharmacy, Inc., Interested Party, Pro se.

Mike Biehl D.B.A. Golden Sands Mini Mart, Interested Party, Pro se.

City Limits C-Store, Interested Party, Pro se.

Glen Ed Pharmacy, Interested Party, Pro se.

Trilogy Health Care, LLC, Interested Party, Pro se.

Upper Darby Pharmacy, Interested Party, Pro se.

Double Quick Inc., Gresham Service Stations and Tobacco Quick, Interested Party, Pro se.

Coleman Oil Company, Interested Party, Pro se.

Vanderheyden Enterprise LLC, Interested Party, Pro se.

S&K Med Pharmacy, Interested Party, Pro se.

M.W.S. Enterprises, Inc., Interested Party, Pro se.

Jon's Drug Inc., Interested Party, Pro se.

Peakside Pharmacy Care Center, Interested Party, Pro se.

Thompson Oconto Enterprises Inc., Interested Party, Pro se.

Nord's Pharmacy & Gifts Inc., Interested Party, Pro se.

Gresham Petroleum Co., Gresham McPherson Oil Co., Quick 7 Star, Triple Stop, One Stop Market, Windham Service Station, and Byrd Service Station, Interested Party, Pro se.

Kidd Healthmart Drug Co., Inc., Interested Party, Pro se.

Pilot Travel Centus LLC, Interested Party, Pro se.

R&Q Corporation, Interested Party, **[\*\*61]** Pro se.

MTG Management Inc, Interested Party, Pro se.

Lawrence Drug Inc., Interested Party, Pro se.

Kidsmeds Pharmacy, Interested Party, Pro se.

Dundee Pharmacy, Interested Party, Pro se.

R&R Health Care Solutions, Inc., Interested Party, Pro se.

Salem Crossroads Apothecary, Interested Party, Pro se.

Jeffrey P. Biddle Inc. dba Village Pharmacy, Interested Party, Pro se.

Investing Associates Inc., Interested Party, Pro se.

Keystone Pharmacy, Interested Party, Pro se.

Meadow Valley Pharmacy, Interested Party, Pro se.

Golden Cove Pharmacy, Interested Party, Pro se.

Quick Check Convenience Store, Inc., Interested Party, Pro se.

Tunkhannock Compounding Center, Interested Party, Pro se.

Pill Box Inc., Interested Party, Pro se.

Quick Check Corp., Interested Party, Pro se.

Kirk's Pharmacy, Inc., Interested Party, Pro se.

Winola Pharmacy, Interested Party, Pro se.

Kirk's Pharmacy at Sunrise, Interested Party, Pro se.

Konicki Pharmacy, Interested Party, Pro se.

Steaks N Stuff Lincoln, Interested Party, Pro se.

IDM Pharmacy/Dollar Maven, Interested Party, Pro se.

Kirk's Pharmacy at Hartland, Interested Party, Pro se.

Towne Drugs Inc., Interested Party, Pro se.

Country Yankee Grocer, Interested Party, Pro se.

Goody Koontz **[\*\*62]** Drug Store Inc., Interested Party, Pro se.

Yorkville Drugstore, Interested Party, Pro se.

Getman-Apothecary Shoppe, Interested Party, Pro se.

Pharmacy World Inc., Interested Party, Pro se.

FMS Pharmacy, Interested Party, Pro se.

Leon's Medical Clinic Pharmacy, Interested Party, Pro se.

By-Lo Oil Co., Speedy Q Markets, Inc. Craig Food Stores, Inc. and Lawrence Oil Co., Interested Party, Pro se.

English Plaza Pharmacy, Interested Party, Pro se.

Shop-N-Go, Interested Party, Pro se.

Montevallo Drug, Interested Party, Pro se.

Brighton-Eggert Pharmacy, Interested Party, Pro se.

RTTF Enterprises, Interested Party, Pro se.

Northern Bedford Pharmacy, Interested Party, Pro se.

Brabham Oil Co., Inc., Interested Party, Pro se.

J&S Professional Pharmacy, Inc., Interested Party, Pro se.

Hampton Allied Pharmacy, Interested Party, Pro se.

Esco Drug Co., Interested Party, Pro se.

North Scranton CFM LLC, Interested Party, Pro se.

Little Five Points Pharmacy Inc., Interested Party, Pro se.

Galva Pharmacy, Interested Party, Pro se.

Thrifty Drug Stores, Inc., Interested Party, Pro se.

Nebraska Grocery Industry Association, Inc., Interested Party, Pro se.

Southall Pharmacy, PLLC, Interested Party, Pro se.

Dusini Drug Inc., Interested **[\*\*63]** Party, Pro se.

Bull City Homebrew, Interested Party, Pro se.

Foster's Eastside Pharmacy, Interested Party, Pro se.

Hartig Drug Company, Inc., Interested Party, Pro se.

Corner Pharmacy, LLC, Interested Party, Pro se.

Madison Pharmacy, Interested Party, Pro se.

Curtis Convenience Stores, Inc., Interested Party, Pro se.

Reed's Family Pharmacy, Interested Party, Pro se.

Island Pharmacy, Interested Party, Pro se.

Liebe Drug Inc., Interested Party, Pro se.

Suburban Pharmacy, Interested Party, Pro se.

Speedy Car Wash, LLC, Interested Party, Pro se.

Pharmacy Center, Interested Party, Pro se.

Thrifty Way Pharmacy of St. Martinville, Interested Party, Pro se.

Mission Trail Oil Co., Interested Party, Pro se.

Robinson Oil Corp., Interested Party, Pro se.

Schmidt Oil Co., Inc., Interested Party, Pro se.

Fabulous Freddy's, Interested Party, Pro se.

Northwest Petroleum, LP, Interested Party, Pro se.

Braker Park, LP, Interested Party, Pro se.

Farmacia CDT Cayey, Interested Party, Pro se.

M & D Star Drug Inc., Interested Party, Pro se.

LeeMak 529, LLC, Interested Party, Pro se.

LeeMak Jarrell, LLC, Interested Party, Pro se.

LeeMak Normandy, LLC, Interested Party, Pro se.

LeeMak Lakeline, LLC, Interested Party, Pro se.

LeeMak [\*\*64] Teravista, LLC, Interested Party, Pro se.

Westbrook Park Pharmacy, Interested Party, Pro se.

Galeton Drug, Interested Party, Pro se.

LeeMak St John, LLC, Interested Party, Pro se.

LeeMak Wilson, LLC, Interested Party, Pro se.

Corkreans The Pharmacist, Interested Party, Pro se.

LeeMak Beechnut, LLC, Interested Party, Pro se.

Canby Drug & Gifts, Interested Party, Pro se.

Weick's Pharmacy, Interested Party, Pro se.

North Dallas Petroleum, LP, Interested Party, Pro se.

Hideg Pharmacy Inc., Interested Party, Pro se.

Toms One Stop, Interested Party, Pro se.

Main Street Apothecary, Interested Party, Pro se.

LB Metcalf, Inc, Interested Party, Pro se.

Bolton's Pharmacy II, Inc, Interested Party, Pro se.

Old Corner Drug, Interested Party, Pro se.

Island Drug, Interested Party, Pro se.

David Michael Foods Inc, Interested Party, Pro se.

Minersville Pharmacy, Interested Party, Pro se.

Jeffrey Michael Foods Inc, Interested Party, Pro se.

William Michael Foods Inc, Interested Party, Pro se.

Ken's Pharmacy, Interested Party, Pro se.

Cynthia D Lee Enterprises Inc, Interested Party, Pro se.

OrangeSubway Inc., Interested Party, Pro se.

Stilwell Pharmacy, Interested Party, Pro se.

Hometown Subways, LLC, Interested Party, Pro [\*\*65] se.

Medic Pharmacy, Interested Party, Pro se.

Johnston Drug, Inc., Interested Party, Pro se.

Randy's Pharmacy, Inc., Interested Party, Pro se.

C & B Warehouse Distributing, Inc., Interested Party, Pro se.

The Corner Drug Store, Interested Party, Pro se.

P & P Marketplace dba Pump & Pantry, Interested Party, Pro se.

Hospital Pharmacy, Inc., Interested Party, Pro se.

Trag Industries Incorporated, Interested Party, Pro se.

Linden Drug Co., Inc., Interested Party, Pro se.

Hometown subways, LLC, Interested Party, Pro se.

Doyle's Drug, Interested Party, Pro se.

Redinger Pharmacy, Interested Party, Pro se.

Trinity & Zamora Investments Inc, Interested Party, Pro se.

Dunaway's Imperial Pharmacy, Interested Party, Pro se.

Ike's 25th Street Exxon, Interested Party, Pro se.

Ike's Airport Garage, Interested Party, Pro se.

Zitomer - Z Chemists - Thriftway Far Rockaway Drug, Interested Party, Pro se.

Ikes Airport Sunoco, Interested Party, Pro se.

Friends Pharmacy, Inc., Interested Party, Pro se.

Ike's Shell, Interested Party, Pro se.

Valley Pharmacy, Interested Party, Pro se.

Five J's Service CO LLC, Interested Party, Pro se.

Bob Johnson's Pharmacy, Interested Party, Pro se.

Subway #14951, Interested Party, Pro se.

Tahoka [\*\*66] Drug, Interested Party, Pro se.

Ross Fogg Fuel Oil Company, Interested Party, Pro se.

Prescriptions Compounding Pharmacy, Interested Party, Pro se.

Hoagies, Inc. dba Subway, Interested Party, Pro se.

Budny Humidifier, Interested Party, Pro se.

Eagle Petroleum, Interested Party, Pro se.

Budny Fuel Oil Company, Interested Party, Pro se.

Hometown Subways, LLC, Interested Party, Pro se.

JW Pierson Co, Interested Party, Pro se.

Super Subways Inc, Interested Party, Pro se.

Mazzo Oil, Interested Party, Pro se.

Vatterman's Sand Point Pharmacy, Interested Party, Pro se.

GMD Services, Inc., Interested Party, Pro se.

Theraderm, Inc., Interested Party, Pro se.

Deull Fuel Company, Interested Party, Pro se.

Z-Stop Drugs, Inc., Interested Party, Pro se.

Lakeview Pharmacy, Interested Party, Pro se.

LeMars Subway Inc., Interested Party, Pro se.

Foulk's Service Inc, Interested Party, Pro se.

Smith Drug, PLLC, Interested Party, Pro se.

TMB Corporation, Interested Party, Pro se.

jada prooperties, Interested Party, Pro se.

Hominy Rexall, Inc., Interested Party, Pro se.

Jasland, Inc dba Subway Sandwich Shop, Interested Party, Pro se.

Merwin Long Term Care, Inc., Interested Party, Pro se.

V & P Inc, Interested Party, Pro se.

Rushville [\*\*67] Pharmacy, Interested Party, Pro se.

Puckett Discount Pharmacy, Interested Party, Pro se.

marty inc dba subway, Interested Party, Pro se.

WB Drug, Interested Party, Pro se.

marty inc dba subway, Interested Party, Pro se.

South Miami Pharmacy, Inc., Interested Party, Pro se.

South Miami Pharmacy II, Inc., Interested Party, Pro se.

South Miami Pharmacy Compounding, LLC, Interested Party, Pro se.

Hutton Pharmacy, Interested Party, Pro se.

Payne Family Pharmacy, Interested Party, Pro se.

Greenwood-Stearns Enterprises, Interested Party, Pro se.

GDK Enterprises, Inc., Interested Party, Pro se.

Harvard Family Physicians Pharmacy, Interested Party, Pro se.

SVG Enterprises Inc, Interested Party, Pro se.

Subway of Ozarks Eldon, Interested Party, Pro se.

Martin's Pharmacy, Interested Party, Pro se.

Quick Meds Express Pharmacy, Interested Party, Pro se.

Subco Enterprises Inc, Interested Party, Pro se.

Martin's Pharmacy in Piggly Wiggly, Interested Party, Pro se.

Medicap Pharmacy, Interested Party, Pro se.

nchise Owner, Interested Party, Pro se.

Eichelberger Subs Inc., Interested Party, Pro se.

Medicap Pharmacy #8011, Interested Party, Pro se.

Spurgeon's 66 Service, Interested Party, Pro se.

Medicap Pharmacy #8036, Interested [\*\*68] Party, Pro se.

VCM Inc., Interested Party, Pro se.

Oberlin Subway Inc, Interested Party, Pro se.

Medicap Pharmacy #8043, Interested Party, Pro se.

Clairmont Development, Inc dba Subway #23607, Interested Party, Pro se.

Bomber, Inc. DBA Subway, Interested Party, Pro se.

Medicap Pharmacy #8052, Interested Party, Pro se.

Medicap Pharmacy #8057, Interested Party, Pro se.

Clairmont Capital Corp dba Subway #23529, Interested Party, Pro se.

subway, Interested Party, Pro se.

Lo Cost Pharmacy, Interested Party, Pro se.

NB Subs, LLC, Interested Party, Pro se.

Lo Cost Pharmacy, Interested Party, Pro se.

Getzville Subs, LLC, Interested Party, Pro se.

Blount Discount Pharmacy, Inc., Interested Party, Pro se.

Medicap Pharmacy #8287, Interested Party, Pro se.

DeBlaquiere Ent. Inc., Interested Party, Pro se.

Terrence J McMorrow dba Subway, Interested Party, Pro se.

Mullins Pharmacy, Interested Party, Pro se.

Sioux Falls Subway, Inc., Interested Party, Pro se.

Leier Investments, Inc. DBA Subway Sandwiches, Interested Party, Pro se.

Joslyn's Food Center, Interested Party, Pro se.

RCM Subs, Inc., Interested Party, Pro se.

F & M Morton Co, Interested Party, Pro se.

D. Gigme, Inc., Interested Party, Pro se.

Sherman Enterprises **[\*\*69]** Inc., Interested Party, Pro se.

Terrence McMorrow dba Subway, Interested Party, Pro se.

North Coast Subway Inc., Interested Party, Pro se.

J A Hoover Associates Inc, Interested Party, Pro se.

Discover Subway Inc., Interested Party, Pro se.

Dinero Inc, Interested Party, Pro se.

SharJen Inc. d/b/a Subway, Interested Party, Pro se.

JL Subs Inc, Interested Party, Pro se.

Scott County Pharmacy, Inc., Interested Party, Pro se.

Newport Subway Inc, Interested Party, Pro se.

Nicholasville Pharmacy Services Inc., Interested Party, Pro se.

North Bernen Pharmacy, Interested Party, Pro se.

Subway stores 228089 and 39268, Interested Party, Pro se.

Kenmar Pharmacy Inc., Interested Party, Pro se.

Poole's Pharmacy Inc., Interested Party, Pro se.

T&M Pharmacy, Inc., Interested Party, Pro se.

Five Rivers Subs Inc, Interested Party, Pro se.

E&L Subway Sandwich Shop Inc., Interested Party, Pro se.

Howell Mill Pharmacy, Inc., Interested Party, Pro se.

Eagleridge Subs Inc., Interested Party, Pro se.

Moore Pharmacy, Interested Party, Pro se.

Murphy Subs Inc., Interested Party, Pro se.

Moden-Giroux Inc. dba Thee Barker Store, Interested Party, Pro se.

Subway #27630, Interested Party, Pro se.

Massachusetts Independent Pharmacists **[\*\*70]** Association, Interested Party, Pro se.

Summit Park Pharmacy Inc., Interested Party, Pro se.

Keyes Drug, Inc., Interested Party, Pro se.

West Pueblo Subs Inc., Interested Party, Pro se.

Lockport Pharmacy Inc. dba Lockport Home Medical Equipment, Interested Party, Pro se.

Gibsons Pharmacy / Medical Arts Pharmacy, Interested Party, Pro se.

Moden-Giroux Inc. dba Transit Hill Pharmacy, Interested Party, Pro se.

Great Oak Pharmacy, Interested Party, Pro se.

Rosenkrans Pharmacy Inc. dba Hilton Family Pharmacy, Interested Party, Pro se.

MNZ Inc, Interested Party, Pro se.

Rosenkrans Pharmacy Inc. dba Oakfield Family Pharmacy, Interested Party, Pro se.

Pueblo Subway Inc., Interested Party, Pro se.

Rosenkrans Pharmacy Inc., Interested Party, Pro se.

Hipp Drug, Interested Party, Pro se.

Hyde Druge Store, Interested Party, Pro se.

D & G Duncan Ent. Inc., Interested Party, Pro se.

Tura's Pharmacy Inc., Interested Party, Pro se.

KRSNA Inc., Interested Party, Pro se.

Letourneau's Pharmacy Inc., Interested Party, Pro se.

Cayucos Pharmacy, Interested Party, Pro se.

Keystone Pharmacy Alliance, Interested Party, Pro se.

Thorson LLC dba Subway, Interested Party, Pro se.

Bridges & James Inc. dba Wannamaker Drug, Interested Party, [\*\*71] Pro se.

Subway #36165, Inc., Interested Party, Pro se.

R&S Drug Stores, Inc., Interested Party, Pro se.

TDC Enterprises, LP, Interested Party, Pro se.

Pasadena Pharmacy, Interested Party, Pro se.

Satdad Subway, Interested Party, Pro se.

Sai Subway, Interested Party, Pro se.

Motihera Inc., Interested Party, Pro se.

Bragdon & Company Inc, Interested Party, Pro se.

SKV Inc, Interested Party, Pro se.

GM Towers, Inc, Interested Party, Pro se.

Highhouse Oil Co., Inc., Interested Party, Pro se.

Riggs Oil Company, Interested Party, Pro se.

Vandegrift Investment Corp., Interested Party, Pro se.

Convenient Food Mart #175, Inc., Interested Party, Pro se.

FEBE Brothers, Ltd., Interested Party, Pro se.

Genaud Drugs LLC, Interested Party, Pro se.

MH Commonwealth, Inc., Interested Party, Pro se.

Denville Sub LLC, Interested Party, Pro se.

Haledon Sub LLC, Interested Party, Pro se.

The Learning Tree, LLC, Interested Party, Pro se.

Yorkville Drugstore, Interested Party, Pro se.

Cochran Brothers Co., Interested Party, Pro se.

Towne Drugs, Inc., Interested Party, Pro se.

Woolpets, LLC, Interested Party, Pro se.

Indeliciae LLC dba Ebenezer Books, Interested Party, Pro se.

Northgate Cinema, Inc., Interested Party, Pro se.

Kwik Chek **[\*\*72]** Food Stores, Inc., Interested Party, Pro se.

Pennsylvania Toy Academy & Party Shop, Inc., Interested Party, Pro se.

Wymore Superette, Interested Party, Pro se.

Lowry's Books, Interested Party, Pro se.

Wymore Liquor LLC, Interested Party, Pro se.

Cusick Corporation, Interested Party, Pro se.

Vintners Distributors, Inc., Interested Party, Pro se.

Midwest Petroleum Company, Interested Party, Pro se.

Nakash Enterprises, LLC, Interested Party, Pro se.

Panama Mainstreet Corp., Interested Party, Pro se.

Dougs Hometown Foods, Interested Party, Pro se.

Stompin Grounds Plus, Inc. dba Aunt Bea's Pantry, Interested Party, Pro se.

Doc's Deli'licious, Interested Party, Pro se.

Collamer Stop & Shop, Interested Party, Pro se.

Jimmy Kwik Store, Interested Party, Pro se.

Citgo Quick Mart, Interested Party, Pro se.

Mason Corporation, Interested Party, Pro se.

Westhall Inc., Interested Party, Pro se.

Dragon's Toy Box LLC, Interested Party, Pro se.

GPMS Inc. dba Wind Up Here, Interested Party, Pro se.

Clark's Pharmacy, Interested Party, Pro se.

Pedretti, Inc., Interested Party, Pro se.

Dabblers LLC, Interested Party, Pro se.

Sperring Enterprises Inc. dba Burlingame Valero, Interested Party, Pro se.

Family Rexall Drug, Interested **[\*\*73]** Party, Pro se.

Thomas Myers, Interested Party, Pro se.

Hollin Hall Automotive Services, Inc., Interested Party, Pro se.

Parker's, Interested Party, Pro se.

Don Ritter Group - Ritter Express Pharmacy, Interested Party, Pro se.

TSP Enterprises LLC dba Dorsett Mobil, Interested Party, Pro se.

Just Imagine Toys, Interested Party, Pro se.

Mabardy Oil Inc. Salisbury Mini Mart Inc., Seabrook One Stop, Inc., Interested Party, Pro se.

Steaks N' Stuff PI, Interested Party, Pro se.

Book House of Stuyveant Plaza, Inc., Interested Party, Pro se.

Pester Marketing, Interested Party, Pro se.

Moody Book Corporation, Interested Party, Pro se.

kiddywampus, Interested Party, Pro se.

Thompson Oconto Enterprises, Inc., Interested Party, Pro se.

Stevenson's Hi-Pointe Standard Service Inc., Interested Party, Pro se.

Clifford's Pet Specialties, Interested Party, Pro se.

More Than Convenience, Interested Party, Pro se.

Kay Jays Doll Shoppe, Interested Party, Pro se.

Calico cat Toy Shoppe, Interested Party, Pro se.

Nutfield Trading, LLC dba Troy Country Store, Interested Party, Pro se.

Sutton Superette, LLC, Interested Party, Pro se.

Buddy's Mini-Marts, Interested Party, Pro se.

Wayside South LLC, Interested Party, Pro se.

Children's [\*\*74] World Uniform Supply, Interested Party, Pro se.

Integrity Auto, Interested Party, Pro se.

Wayside, Inc., Interested Party, Pro se.

Captus LLC dba Earth Explorer Toys, Interested Party, Pro se.

Mazen Owydat, Interested Party, Pro se.

Inter Island Petroleum, Inc., Interested Party, Pro se.

Melrose Pharmacy, Interested Party, Pro se.

Flowerama, Interested Party, Pro se.

Play Clothes, LLC, Interested Party, Pro se.

Home Oil Company, LLC, Interested Party, Pro se.

Ports Petroleum Co., Interested Party, Pro se.

Steve's Madhouse Market Inc., Interested Party, Pro se.

Meeks Mart, Interested Party, Pro se.

Driver Heating Oil, Inc, Interested Party, Pro se.

Pyramid Books, Interested Party, Pro se.

E & S Service LLC dba Community Exxon, Interested Party, Pro se.

Waters Auto Centers Inc. dba McCausland Auto Center & dba Kirkwood Service Center, Interested Party, Pro se.

Degen Properties, Inc., Interested Party, Pro se.

Texas Trail Market, Interested Party, Pro se.

Swarthmore College Bookstore, Interested Party, Pro se.

Franchisee 7-Eleven, Interested Party, Pro se.

Medicap Pharmacy, Interested Party, Pro se.

Citgo Quik Mart, Interested Party, Pro se.

In Gathering, Inc., Interested Party, Pro se.

PL Squared, Inc., Interested [\*\*75] Party, Pro se.

City of De Pere, Interested Party, Pro se.

Hansen's AutoCare, Inc., Interested Party, Pro se.

Dollar General Corporation, Interested Party, Pro se.

The Trading Post LLC, Interested Party, Pro se.

Tommy Bahama Group, Inc., Interested Party, Pro se.

The Association of Kentucky Fried Chicken Franchisees, Inc., Interested Party, Pro se.

Sugartown Worldwide LLC, Interested Party, Pro se.

Oxford Industries, Inc., Interested Party, Pro se.

Sheetz, Inc., Interested Party, Pro se.

Waffle House, Inc., Interested Party, Pro se.

Ozark Waffles, LLC, Interested Party, Pro se.

East Coast Waffles, Inc., Interested Party, Pro se.

Mid South Waffles, Inc., Interested Party, Pro se.

Midwest Waffles, Inc., Interested Party, Pro se.

Pizzoli LLC, Interested Party, Pro se.

Pilot Travel Centers LLC, Interested Party, Pro se.

National Association of Convenience Stores, Interested Party, Pro se.

C.N. Brown Company, Interested Party, Pro se.

Tommy Bahama R&R Holdings, Inc., Interested Party, Pro se.

Northbrook Seafood LLC, Interested Party, Pro se.

Melcar, Inc., Interested Party, Pro se.

Petterino's LLC, Interested Party, Pro se.

Eiffel Tower LLC, Interested Party, Pro se.

Vegas Tapas LLC, Interested Party, Pro se.

One [\*\*76] Fin, Inc., Interested Party, Pro se.

Water Tower Place Restaurants LP, Interested Party, Pro se.

Hough Petroleum Corp., Interested Party, Pro se.

Bob Brandi Stations, Inc., Interested Party, Pro se.

Eat in the Mall Too, Inc., Interested Party, Pro se.

Tucci of Arizona, LP, Interested Party, Pro se.

Vegas Tapas LLC, Interested Party, Pro se.

Reston Canteen LLC, Interested Party, Pro se.

For Little Pub Holdings, LLC, Interested Party: Sherli Shamtoub, PRO HAC VICE, Brownstein Hyatt Farber Schreck, LLP, Los Angeles, CA.

For Dollar General Corporation, Interested Party: Joseph Michael Vanek, LEAD ATTORNEY, PRO HAC VICE, Vanek, Vickers & Masini, P.C., Chicago, IL.

For National Association of Convenience Stores, Interested Party: Daniel Hume, David E. Kovel, Meghan Joan Summers, Kirby McInerney LLP, New York, NY; Eric Citron, Thomas Goldstein, Goldstein & Russell P.C., Bethesda, MD.

Labone, Inc. DBA Tucci Benuccch, Interested Party, Pro se.

Labone Limited Partnership, Interested Party, Pro se.

Dearborn Hubbard LLC, Interested Party, Pro se.

Tucci of Minnesota, Inc., Interested Party, Pro se.

Joe's Stone Crab of Chicago LLC, Interested Party, Pro se.

Joe's of Las Vegas LLC, Interested Party, Pro se.

Phase **[\*\*77]** One LLC, Interested Party, Pro se.

Make It Special LLC, Interested Party, Pro se.

Shaw's Schaumburg LLC, Interested Party, Pro se.

Vegas Tapas LLC, DBA Stripburger, Interested Party, Pro se.

LGO Santa Monica LLC, Interested Party, Pro se.

L. Woods LLC, Interested Party, Pro se.

M Street Kitchen LLC, Interested Party, Pro se.

Lettuce Entertain You Enterprises, Inc., Interested Party, Pro se.

Lettuce Entertain You Enterprises, Inc. DBA Lettuce Frequent Diner's Club, Interested Party, Pro se.

Lettuce Wine Club LLC, DBA Lettuce Wine Cellars, Interested Party, Pro se.

Phase One LLC, DBA M Burger, Interested Party, Pro se.

OVS LLC, DBA M Burger Ontario, Interested Party, Pro se.

M Burger Thompson LLC, DBA M Burger Thompson, Interested Party, Pro se.

Just B'Claws, Inc., Interested Party, Pro se.

Water Tower Place Restaurants LP, DBA M Burger Water Tower, Interested Party, Pro se.

M Street Kitchen LLC, DBA M Street Kitchen, Interested Party, Pro se.

Just B'Claws, Inc., DBA Shaw's Crab House - Chicago, Interested Party, Pro se.

Jessica's High Ceilings, Inc., Interested Party, Pro se.

The Crepe Stand LLC, DBA Magic Pan Crepe Stand, Interested Party, Pro se.

Magic Pan Northbrook LLC, DBA Magic Pan Crepe Stand, **[\*\*78]** Interested Party, Pro se.

Osteria Wheeling LLC, Interested Party, Pro se.

Magic Pan - Ridgedale LLC, DBA Magic Pan Crepe Stand - Ridgedale, Interested Party, Pro se.

Kremeworks Hawaii LLC, Interested Party, Pro se.

Water Tower Place Restaurants LP, DBA Mity Nice Grill, Interested Party, Pro se.

Kremeworks Oregon LLC, Interested Party, Pro se.

Mon Ami Bethesda LLC, DBA Mon Ami Gabi - Bethesda, Interested Party, Pro se.

Kremeworks Oregon LLC, DBA Krispy Kreme- Clackamas, Interested Party, Pro se.

Kremeworks Oregon LLC, DBA Krispy Kreme- Beaverton, Interested Party, Pro se.

La Creme, Inc., DBA Mon Ami Gabi - Chicago, Interested Party, Pro se.

Mon Ami Bethesda LLC, DBA Mon Ami Gabi - Bethesda, Interested Party, Pro se.

Mon Ami Gabi Development LLC, DBA Mon Ami Gabi - Oakbrook, Interested Party, Pro se.

Mon Ami Reston LLC, DBA Mon Ami Gabi - Reston, Interested Party, Pro se.

NFG Salem, LLC, Interested Party, Pro se.

NFG Portland, LLC, Interested Party, Pro se.

NFG Seattle, LLC, Interested Party, Pro se.

French Cafe LLC, DBA Mon Ami Gabi, Interested Party, Pro se.

Seal Pizza, LLC, Interested Party, Pro se.

Nacional LLC, DBA NACIONAL 27, Interested Party, Pro se.

OVS LLC, DBA OSTERIA VIA STATO/PIZZARIA, Interested [\*\*79] Party, Pro se.

EMB State LP, DBA PAPAGUS - CHICAGO, Interested Party, Pro se.

Papagus Oakbrook, Inc., DBA PAPAGUS - OAKBROOK, Interested Party, Pro se.

Petterino's LLC, DBA PETTERINO'S, Interested Party, Pro se.

Oak Brook Seafood LLC, DBA REEL CLUB, Interested Party, Pro se.

Lettuce Entertain You Enterprises, Inc., DBA RJ GRUNTS, Interested Party, Pro se.

River North Italian LLC, DBA RPM ITALIAN, Interested Party, Pro se.

Wildfire Eden Prairie LLC, DBA WILDFIRE - EDEN PRAIRIE, Interested Party, Pro se.

Wildfire Glenview LLC, DBA WILDFIRE - GLENVIEW, Interested Party, Pro se.

Wildfire, Inc., DBA WILDFIRE - LINCOLNSHIRE, Interested Party, Pro se.

Wildfire, Inc., DBA WILDFIRE - OAK BROOK, Interested Party, Pro se.

Wildfire Schaumburg LLC, DBA WILDFIRE - SCHAUMBURG, Interested Party, Pro se.

Wildfire Tysons LLC, DBA WILDFIRE - TYSON, Interested Party, Pro se.

Wow Bao Jackson LLC, DBA WOW BAO - JACKSON, Interested Party, Pro se.

Wow Bao Jackson LLC, DBA WOW BAO WIRELESS - JACKSON, Interested Party, Pro se.

Wow Bao 225 LLC, DBA WOW BAO-MICHIGAN, Interested Party, Pro se.

Wow Bao State Lake LLC, DBA WOW BAO - STATE AND LAKE, Interested Party, Pro se.

Wow Bao Buns LLC, DBA WOW BAO - WATERTOWER, Interested [\*\*80] Party, Pro se.

Kremeworks Washington LLC, DBA KRISPY KREME - ISSAQAH, Interested Party, Pro se.

Kremeworks Washington LLC, DBA KRISPY KREME - SPOKANE, Interested Party, Pro se.

Kremeworks Washington LLC, DBA KRISPY KREME - NORTH SEATTLE, Interested Party, Pro se.

Kremeworks Washington LLC, DBA KRISPY KREME - SODO, Interested Party, Pro se.

Kremeworks Washington LLC, DBA KRISPY KREME - BURLINGTON, Interested Party, Pro se.

Kremeworks Washington LLC, DBA KRISPY KREME - TACOMA, Interested Party, Pro se.

Kremeworks Washington LLC, DBA KRISPY KREME - PUYALLUP, Interested Party, Pro se.

Payson Professional Management Corp., Interested Party, Pro se.

MCL Main & Alma Restaurant, LLC, Interested Party, Pro se.

Citgo Quik Mart, Interested Party, Pro se.

Christina Wallerstein, Interested Party, Pro se.

MCL Catalina Restaurant, Inc., Interested Party, Pro se.

Tucson Restaurants, Inc., Interested Party, Pro se.

MCL Tucson Alvernon Restaurant, Inc., Interested Party, Pro se.

Lincoln Skyline Deli, Interested Party, Pro se.

MCL Gilbert Road Restaurants, LLC, Interested Party, Pro se.

MCL Happy Valley Restaurant, LLC, Interested Party, Pro se.

MCL Camp Verde Restaurant, LLC, Interested Party, Pro se.

Showtop Restaurants, [\*\*81] Inc., Interested Party, Pro se.

MCL River & LaCholla Restaurant, LLC, Interested Party, Pro se.

Cumberland Farms, Inc & Gulf Oil Limited, Interested Party, Pro se.

MCL Country Club Restaurant, LLC, Interested Party, Pro se.

MCL Prescott Restaurants, LLC, Interested Party, Pro se.

MCL Enterprises, Inc., Interested Party, Pro se.

MCL Whiteriver Restaurant, LLC, Interested Party, Pro se.

Watermark Donut Company DBA Dunkin Donuts, Interested Party, Pro se.

Epstein Porter 2, LLC DBA Dunkin Donuts, Interested Party, Pro se.

Epstein Porter 1, LLC DBA Dunkin Donuts, Interested Party, Pro se.

David Michael's Salon, LLC, Interested Party, Pro se.

Zuri, Inc. DBA Dunkin Donuts / Baskin Robbins, Interested Party, Pro se.

Division "L" DBA Dunkin Donuts, Interested Party, Pro se.

Western "L" DBA Dunkin Donuts, Interested Party, Pro se.

Jordan Pizza, LLC, Interested Party, Pro se.

Dakota Direct Furniture, LLC, Interested Party, Pro se.

Maverik, Inc., Interested Party, Pro se.

Equilon Enterprises LLC, Interested Party, Pro se.

Motiva Enterprises LLC, Interested Party, Pro se.

Shimurima II, Inc., Interested Party, Pro se.

Shimurima, Inc., Interested Party, Pro se.

Gourmet Catalog Inc., Interested Party, Pro se.

Old Warsaw [\*\*82] Restaurant, Interested Party, Pro se.

Swarovski, Interested Party, Pro se.

For Managed Care Advisory Group, Inc., Interested Party: Joe R. Whatley, Jr., LEAD ATTORNEY, Patrick J. Sheehan, Whatley Drake & Kallas LLC, New York, NY.

For Heartland Payment Systems, Inc., Interested Party: Jason Brown, Ropes & Gray LLP, New York, NY; Seth C. Harrington, Ropes & Gray LLP, Boston, MA.

For Spectrum Settlement Recovery LLC, Interested Party: Eric L. Lewis, Lewis Baach PLLC, Washington, DC.

For Listed Entities, Interested Party: Deborah E. Arbabi, PRO HAC VICE, Daniel A. Sasse, Crowell & Moring LLP, Irvine, CA; Kelly T. Currie, Crowell & Moring, LLP, New York, NY.

For Class Action Recovery Services, Interested Party: Dennis M. Campbell, LEAD ATTORNEY, Mershon, Sawyer, Johnston, Dunwody & Cody, Miami, FL.

For Claims Compensation Bureau, LLC, Interested Party: Brian Dale Graifman, LEAD ATTORNEY, Borah, Goldstein, Altschuler, Nahins & Goldstein, P.C., New York, NY.

For Stephen Greiner, Interested Party: Stephen William Greiner, LEAD ATTORNEY, Willkie Farr & Gallagher LLP, New York, NY.

For Gary Friedman, Interested Party: Gary B. Friedman, LEAD ATTORNEY, Friedman Law Group LLP, New York, NY.

For PNC Bank [\*\*83] National Association, Interested Party: Frederick N. Egler, LEAD ATTORNEY, PRO HAC VICE, Reed Smith, Pittsburgh, PA; Jennifer P Snyder, Dilworth Paxson LLP, Philadelphia, PA.

For Carlson Transportation, Inc., Interested Party: Frederick N. Egler, LEAD ATTORNEY, Reed Smith, Pittsburgh, PA; Hae Sung Nam, Kaplan, Kilsheimer & Fox, LLP, New York, NY.

For Boss Dental Care PLLC, Interested Party: Anne Kristin Fornecker, LEAD ATTORNEY, Hilliard Munoz Gonzales LLP, Corpus Christi, TX; Bart D. Cohen, LEAD ATTORNEY, Berger & Montague, P.C., Philadelphia, PA; Donald S. Nation, Matthew C. Weiner, Steve D. Shadowen, LEAD ATTORNEYS, PRO HAC VICE, Hilliard & Shadowen LLP, Austin, TX; Linda P. Nussbaum, LEAD ATTORNEY, Nussbaum Law Group, PC, New York, NY; Brian M. Hogan, Michael J. Freed, PRO HAC VICE, Robert J. Wozniak, Freed Kanner London & Millen LLC, Bannockburn, IL; Daniel Lawrence Berger, Deborah A. Elman, Grant & Eisenhofer P.A., New York, NY; Robert G. Eisler, Grant & Eisenhofer P.A., Wilmington, DE.

For rue21, Inc., Interested Party: Carter Hoel, Meyer Darragh Bebenek & Eck, PLLC, Pittsburgh, PA.

For rue21, Inc., Interested Party: Edward G. Brandenstein, Paul Robinson, Meyer Darragh [\*\*84] Buckler Bebenek & Eck, P.L.L.C., Pittsburgh, PA.

For Financial Recovery Strategies, Inc., Interested Party: Eric Todd Kanefsky, LEAD ATTORNEY, Calcagni & Kanefsky, Newark, NJ.

For The Clearing House Payments Company L.L.C. ("TCH"), Interested Party: Mary Gail Gearns, Richard S. Taffet, LEAD ATTORNEYS, Morgan Lewis & Bokius LLP, New York, NY.

For ATMIA, ATMIA, Amicus: Anthony Joseph Staltari, LEAD ATTORNEY, Manatt, Phelps & Phillips, LLP, New York, NY; Benjamin G. Shatz, LEAD ATTORNEY, Manatt, Phelps & Phillips, LLP, Los Angeles, CA.

For Paypal, Inc., Amicus: Francis Michael Curran, LEAD ATTORNEY, McCormick & O'Brien, LLP, New York, NY.

For Amici Objecting States, Amici Objecting States, Amicus: Robert Lee Hubbard, New York Attorney General's Office, Attorney General's Office, New York, NY.

For Verifone, Inc., Subpoenaed third part, Material Witness: Karen P. Anderson, LEAD ATTORNEY, VeriFone, Inc., San Jose, CA.

For Auriemma Consulting Group, Inc., Objector: Lita B. Wright, Storch Amini & Munves, P.C., New York, NY.

For A & D Wine Corp and other Objectors, Objector: Jerrold S. Parker, LEAD ATTORNEY, Parker & Waichman, LLC, Great Neck, NY.

For Home Depot U.S.A., Inc., Objector: Alicia K. Cobb, [\*\*85] LEAD ATTORNEY, PRO HAC VICE, Quinn Emanuel Urquhart & Sullivan, LLP-WA, Seattle, WA; Benjamin W. Thorpe, LEAD ATTORNEY, Bondurant, Mixson & Elmore, LLP, Atlanta, GA; Deborah K. Brown, LEAD ATTORNEY, Quinn Emanuel, New York, NY; Frank M. Lowrey, Ronan P. Doherty, LEAD ATTORNEYS, PRO HAC VICE, Bondurant Mixson & Elmore, LLP, Atlanta, GA; Steig David Olson, Stephen R. Neuwirth, LEAD ATTORNEYS, Quinn Emanuel Urquhart & Sullivan LLP, New York, NY.

For American Express Co., Objector: Philip C. Korologos, LEAD ATTORNEY, Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY; Rory Ann Leraris, LEAD ATTORNEY, Cravath Swaine & Moore LLP, New York, NY.

For First Data Corporation, First Data Government Solutions, First Data Merchant Services Corporation, TASQ Technology, Inc., TRS Recovery Services Inc., Telecheck Services Inc., Objectors: Jason A. Yurasek, Perkins Coie LLP, San Francisco, CA.

For Landers McClarty Ford Chrysler Dodge Jeep, Landers McClarty Nissan, Landers McClarty Dodge Chrysler Jeep, Landers Dodge Chrysler Jeep, Tri-Lakes Motors, Burleson Nissan, Bel Air Honda, Landers McClarty Toyota Scion, Nissan of Fort Worth, Landers McClarty Chevrolet, Landers McClarty Huntsville Dodge Chrysler [\*\*86] Jeep, Mercedes Benz of Huntsville, Landers McClarty Nissan of Huntsville, Landers McClarty Subaru, Lees Summit Dodge Chrysler Jeep Ram, Lees Summit Nissan, Olathe Dodge Chrysler Jeep, Waxahachie Dodge Chrysler Jeep, Waxahachie Ford-Mercury, Landers Harley-Davidson Hot Springs, Landers Harley-Davidson Little Rock, Lander Harley-Davidson Conway, Landers Auto Group No. 1 d/b/a Landers Scion, Landers Auto Group No. 1 d/b/a Landers Toyota, Landers Auto Group No. 1 d/b/a The Boutique at Landers Toyota, Landers Chrysler Jeep Dodge, LLC, Landers Chrysler Dodge Jeep d/b/a Landers Pre-Owned, Landers Chrysler Dodge Jeep d/b/a Landers Suzuki, A&D Wine Corp., A&Z Restaurant Corp., 105 Degrees, LLC, The Pantry Restaurant Group, LLC, PPT Inc., d/b/a Graffitis Restaurant, Sansoles Tanning Salon, Greenhaws, Inc., Dons Pharmacy, Incorporated, Gossett Motor Cars, Inc.- Tennessee, Gossett Motor Cars, Inc. - Georgia, JB Cook, LLC d/b/a Downtown Oil & Lube, Storage World Limited Partnership, LLC, Leisure Landing RV Park, Pinnacle Valley Liquor Store, Inc., Landers Brothers Auto No. 2, LLC f/d/b/a Landers Buick Pine Bluff, Landers Brothers Auto No. 3, LLC f/d/b/a Landers Hyundai Pine Bluff, Landers Brothers [\*\*87] Auto No. 4, LLC f/d/b/a Landers Honda Jonesboro, Landers Brothers Auto No. 5, LLC f/d/b/a Landers Chrysler Dodge Jeep Pine Bluff, Landers Brothers Auto Group, Inc. f/d/b/a Landers Honda Pine Bluff, The Tennis Shoppe, Inc., The Grady Corporation (Bentonville Location) d/b/a Whole Hog Barbeque, The Grady Corporation II (Fayetteville Location) d/b/a Whole Hog Barbeque, Coulson Oil Company, Diamond State Oil, LLC, Superstop Stores, LLC, PetroPlus, LLC, Port Cities Oil, LLC, New Mercury, LLC, New Vista, LLC, New Neptune, LLC, SVI Security Solutions, Objectors: Jerrold S. Parker, Parker & Waichman, LLC, Great Neck, NY.

For National ATM Council, Inc., ATMs Of The South, Inc., Objectors: Don Allen Resnikoff, Washington, DC.

For Business Resource Group, Inc., Cabe & Cato, Inc., Just Atms, Inc., Wash Water Solutions, Inc., ATM Bankcard Services, Inc., Meiners Development Company of Lee's Summit, Missouri, LLC, represented by Don Allen Resnikoff, Mills-Tel Corp., Scot Gardner d/b/a SJI, Selman Telecommunications Investment Group, LLC, represented by Don Allen Resnikoff, Turnkey ATM Solutions, LLC, Trinity Holdings Ltd., Inc., T & T Communications Inc. & Randall N. Bro d/b/a T & B Investments, represented [\*\*88] by Don Allen Resnikoff, Objectors: Don Allen Resnikoff, Washington, DC.

For Target Corporation, Macy's, Inc., J.C. Penney Corporation, Inc., Big Lots Stores, Inc., Ascena Retail Group, Inc., Abercrombie & Fitch Co., Saks Incorporated, Chico's FAS, Inc., American Signature, Inc., Objectors: Michael J. Canter, LEAD ATTORNEY, Alycia Nadine Broz, PRO HAC VICE, Kenneth J. Rubin, Mitchell A. Tobias, Nina I. Webb-Lawton, Robert N. Webner, Timothy B. McGranor, Vorys, Sater, Seymour and Pease LLP, Columbus, OH; Douglas Robert Matthews, James A. Wilson, Kimberly Weber Herlihy Vorys, Sater, Seymour and Pease, LLP

(Columbus), Columbus, OH; Gregory Alan Clarick, Isaac Berkman Zaur, Nicole L. Gueron, Clarick Gueron Reisbaum LLP, New York, NY.

For The Gap, Inc., Dillard's, Inc., Bob Evans Farms, Inc., CKE Restaurants, Inc., Papa John's International, Inc., Objectors: Gregory Alan Clarick, Isaac Berkman Zaur, Nicole L. Gueron, Clarick Gueron Reisbaum LLP, New York, NY; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY.

For Limited Brands, Inc., The Neiman Marcus Group, Inc., Boscov's Department Store, LLC, American Booksellers Association, National Association of College Stores, Objectors: [\*89] Gregory Alan Clarick, Isaac Berkman Zaur, Nicole L. Gueron, Clarick Gueron Reisbaum LLP, New York, NY.

For National Retail Federation, Objector: Andrew G. Celli, Jr, LEAD ATTORNEY, Emery, Celli, Brinckerhoff & Abady LLP, New York, NY; Diane Lee Houk, Emery Celli Brinckerhoff & Abady LLP, New York, NY; Gregory Alan Clarick, Isaac Berkman Zaur, Nicole L. Gueron, Clarick Gueron Reisbaum LLP, New York, NY.

For Valuevision Media, Inc., Royal Caribbean Cruises LTD., Objectors: Cheryl L. Davis, Menaker & Herrmann LLP, New York, NY.

For American Express Travel Related Services Company, Inc., Objector: Philip C. Korologos, LEAD ATTORNEY, Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY; Rory Ann Leraris, LEAD ATTORNEY, Cravath Swaine & Moore LLP, Worldwide Plaza, New York, NY.

For Travel Impressions, Ltd., Objector: Philip C. Korologos, LEAD ATTORNEY, Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY.

For American Express Publishing Corp., Objector: Philip C. Korologos, LEAD ATTORNEY, Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY.

For U.S. Public Research Interest Group, Objector: Robert L. Begleiter, Schlam, Stone & Dolan, LLP, New York, NY.

For Kevan McLaughlin, Objector: [\*90] John W. Davis, LEAD ATTORNEY, PRO HAC VICE, Law Office of John W. Davis, San Diego, CA.

For office depot, Objector: Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY.

For Discover Financial Services, Objector: Jennifer M. Selendy, Quinn Emanuel Urquhart & Sullivan LLP, New York, NY.

For The City of Oakland, California, Academy, Ltd., Aldo US Inc., Barnes & Nobles, Inc, Best Buy Enterprise Services, Inc., BJ's Wholesale Club, Inc., Carter's, Inc., Costco Wholesale Corporation, Crate & Barrel Holdings, Inc., Darden Restaurants, Inc., David's Bridal, Inc., Dillard's, Inc., General Nutrition Corporation, Genesco Inc., The Gymboree Corporation, Ikea North America Services, LLC, J. Crew Group, Inc., Kwik Trip, Inc., Lowe's Companies, Inc., Michaels Stores, Inc., National Railroad Passenger Corporation (Amtrak), Nike, Inc., Panera, LLC, Petco Animal Supplies, Inc., Petsmart, Inc., RaceTrac Petroleum, Inc., Sears Holdings Corporation, Starbucks Corporation, Thermo Fisher Scientific Inc., The Wendy's Company, Alon USA Energy, Inc., Recreational Equipment, Inc., Cardtronics, Inc., Family Dollar, Inc., Barnes & Noble College Booksellers, LLC, Drury Hotels Company, LLC, Marathon Petroleum [\*91] Company LP, Objectors: Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY.

For 7-Eleven Inc., Objector: David Alan Scupp, Constantine Cannon LLP, New York, NY; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY.

For Retail Industry Leaders Association, Objector: David G. Trachtenberg, LEAD ATTORNEY, Trachtenberg Rodes & Friedberg LLP, New York, NY; Michael C Rakower, LEAD ATTORNEY, Rakower Lupkin PLLC, New York, NY; Andrew G. Celli, Jr, Emery, Celli, Brinckerhoff & Abady LLP, New York, NY; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY.

For Wal-Mart Stores, Inc., Objector: Drew Hansen, LEAD ATTORNEY, PRO HAC VICE, Susman Godfrey L.L.P., Seattle, WA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY; John D. Comerford, Dowd Bennett LLP, Saint Louis, MO.

For Roundy's Supermarkets, Inc., Objector: William Jay Blechman, LEAD ATTORNEY, Kenny Nachwalter, P.A., Miami, FL; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY; Joshua Barton Gray, Kenny Nachwalter, P.A., Washington, DC.

For WellPoint, Inc., Objector: Robert N. Webner, LEAD ATTORNEY, Kenneth J. Rubin, Vorys, Sater, Seymour and Pease LLP, Columbus, OH; Isaac Berkman Zaur, Clarick Gueron [\*\*92] Reisbaum LLP, New York, NY.

For Bon-Ton Stores, Inc., Objector: Michael J. Canter, LEAD ATTORNEY, Kenneth J. Rubin, Mitchell A. Tobias, Nina I. Webb-Lawton, Robert N. Webner, Timothy B. McGranor, Vorys, Sater, Seymour and Pease LLP, Columbus, OH; Alycia Nadine Broz, PRO HAC VICE, Vorys, Sater, Seymour and Pease LLP, Columbus, OH; Douglas Robert Matthews, James A. Wilson, Kimberly Weber Herlihy, Vorys, Sater, Seymour and Pease, LLP (Columbus), Columbus, OH; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY.

For Kohl's Corporation, L Brands, Inc., Luxottica U.S. Holdings Corp., Office Depot, Inc., OfficeMax Incorporated, Staples, Inc., TJX Companies, Inc., Objectors: Michael J. Canter, LEAD ATTORNEY, Kenneth J. Rubin, Mitchell A. Tobias, Nina I. Webb-Lawton, Robert N. Webner, Timothy B. McGranor, Vorys, Sater, Seymour and Pease LLP, Columbus, OH; Alycia Nadine Broz, PRO HAC VICE, Vorys, Sater, Seymour and Pease LLP, Columbus, OH; Douglas Robert Matthews, James A. Wilson, Kimberly Weber Herlihy, Vorys, Sater, Seymour and Pease, LLP (Columbus), Columbus, OH; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY; Isaac Berkman Zaur, Clarick Gueron Reisbaum LLP, New [\*\*93] York, NY.

For Speedway LLC, Martin's Super Markets, Inc., Whole Foods Market Group, Inc., Stein Mart, Inc., Dick's Sporting Goods, Inc., Foot Locker, Inc., Zappos.com, Inc., Amazon.com, Inc., Panda Restaurant Group, Inc., P.C. Richard & Son, Inc., YUM! Brands, Inc., HMSHost Corporation, Objectors: Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY.

For The Iron Barley Restaurant, Objector: Steve A. Miller, LEAD ATTORNEY, Steve A. Miller, P.C., Denver, CO.

For SuperTest Service Stations of IN, Inc., Objector : Christopher Braun, PRO HAC VICE, Tonya Bond, PRO HAC VICE, Plews Shadley Racher & Braun LLP, Indianapolis, IN.

For Restoration Hardware, Inc., Objector: Joe Vecchione Demarco, DeVore & DeMarco LLP, New York, NY.

For Teatro Dallas, Objector: Dennis Dean Gibson, Gibson Law Firm, Dallas, TX.

For Vicente Consulting LLC, Objector: Edward F Siegel, Law Offices of Edward F. Siegel, Denver, CO.

For Dell Inc., Objector: James B. Niehaus, LEAD ATTORNEY, Gregory R. Farkas, Frantz Ward LLP, Cleveland, OH.

For Maison Weiss Inc., Objector: James Warren, LEAD ATTORNEY, PRO HAC VICE, Carroll Warren & Parker PLLC, Jackson, MS.

For Temple Eagle Partners LLC, Objector: David Stein, LEAD ATTORNEY, [\*\*94] Samuel & Stein, New York, NY.

For Fiesta Restaurant Group, Inc., Objector: Sanford H. Greenberg, LEAD ATTORNEY, Greenberg Freeman LLP, New York, NY.

For Auto Europe Holdings, Inc., Hertz UK Limited, Objectors: Brian A. Ratner, Hausfeld LLP, Washington, DC.

For Blue Cross Blue Shield entities, Objector: Adam P. Feinberg, Anthony F. Shelley, Miller & Chevalier Chartered, Washington, DC.

For Barneys New York, Boston Market Corporation, Objectors: Cheryl L. Davis, Menaker & Herrmann LLP, New York, NY.

For The Egg Store, Objector: Roger J. Maldonado, Balber Pickard Battistoni Maldonado & Van Der Tuin, PC, New York, NY.

For T-Mobile USA, Inc., Objector: Arun Srinivas Subramanian, LEAD ATTORNEY, Susman Godfrey LLP, New York, NY.

For Hermes of Paris, Inc., 99 Only Stores, Smart & Final Holdings, Inc., Objectors: Alyse Fiori Stach, LEAD ATTORNEY, Proskauer Rose LLP, New York, NY.

For Metropolitan Transportation Authority, Objector: Daniel Louis Russo, Metropolitan Transportation Authority, New York, NY.

For City of New York, Objector: Amy Nkemka Okereke, LEAD ATTORNEY, New York City Law Department, Office of the Corporation Counsel, Affirmative Litigation Division, New York, NY; Melanie C.T. Ash, LEAD [\*\*95] ATTORNEY, New York City Law Department, New York, NY.

For Jon M Zimmerman, Objector: Joshua R. Furman, LEAD ATTORNEY, Joshua R. Furman Law Corp., Sherman Oaks, CA.

For DFS Services, LLC, Discover Home Loans, Inc., Discover Bank, Objectors: Jennifer M. Selendy, Quinn Emanuel Urquhart & Sullivan LLP, New York, NY.

MILK JUG, Objector, Pro se.

Market Street Fast Serv Inc, Objector, Pro se.

For Buc-ee's Ltd, Objector: William R. H. Merrill, Susman Godfrey LLP (TX), Houston, TX.

For R&M Objectors, Objectors: Jerrold S. Parker, Parker & Waichman, LLC, Great Neck, NY.

For Falls Auto Gallery dba Falls Car Collection, Objector: Sam P. Cannata, LEAD ATTORNEY, Cannata Phillips LPA, Cleveland, OH.

For Temple Eagle Partners LLC, Objector: David Stein, LEAD ATTORNEY, Samuel & Stein, New York, NY.

For Serve Virtual Enterprises, Inc, Amex Assurance Company, Accertify, Inc, ANCA 7 LLC, doing business as Vente Privee, USA, Objectors: Donald L. Flexner, LEAD ATTORNEY, PRO HAC VICE, Boies, Schiller & Flexner LLP, New York, NY; Eric Brenner, John Francis LaSalle, Philip C. Korologos, LEAD ATTORNEYS, Boies Schiller & Flexner LLP, New York, NY.

For State of Arizona, State of California, Objectors: Robert Lee Hubbard, [\*\*96] LEAD ATTORNEY, New York Attorney General's Office, Attorney General's Office, New York, NY.

**Judges:** MARGO K. BRODIE, United States District Judge.

**Opinion by:** MARGO K. BRODIE

## **Opinion**

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### **[\*18] MEMORANDUM & ORDER**

MARGO K. BRODIE, United States District Judge:

A putative [Rule 23\(b\)\(3\)](#) class of over twelve million nationwide merchants brought an antitrust action under the [Sherman Act, 15 U.S.C. §§ 1](#) and [2](#), and state antitrust laws, against Defendants Visa and Mastercard networks, as well as various issuing and acquiring banks.<sup>1</sup> See [In re Payment Card Interchange Fee & Merch. Disc. Antitrust](#)

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<sup>1</sup> The putative [Rule 23\(b\)\(3\)](#) class sought relief in the form of monetary damages, and brought the action along with a separate class that sought equitable relief. (See First Consolidated Am. Class Action Compl. 1, Docket Entry No. 317.) At the earliest stages of this litigation, multiple class actions, as well as individual lawsuits by large retailers, were filed against the Defendants. All actions were consolidated together into a multi-district litigation in 2005 (the "MDL"). See [In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.](#), 986 F. Supp. 2d 207, 220 n.12 (E.D.N.Y. 2013) ("Interchange Fees I"). Since the initial

Litig., 986 F. Supp. 2d 207, 213, 223 (E.D.N.Y. 2013) ("Interchange Fees I"), rev'd and vacated, 827 F.3d 223 (2d Cir. 2016) ("Interchange Fees II"); (First Consolidated Am. Class Action Compl., Docket Entry No. 317.) Plaintiffs are merchants that accept(ed) Visa-and Mastercard-branded cards, and have alleged that Defendants harmed competition and charged the merchants supracompetitive fees by creating unlawful contracts and rules and by engaging in various antitrust conspiracies.<sup>2</sup> See id. at 213; Interchange Fees II, 827 F.3d at 228-29.

[\*19] Plaintiffs sought both injunctive and monetary relief, and after years of litigation, former District Judge John Gleeson approved a settlement for an injunctive relief class and a monetary damages relief class, see Interchange Fees I, 986 F. Supp. 2d at 216 n.7, 240, which was vacated by the Second Circuit on June 30, 2016, and remanded to this Court, Interchange Fees II, 827 F.3d at 227, 229.<sup>3</sup> After additional extensive discovery and renegotiations, the named representatives of the damages class (the "Rule 23(b)(3) Class Plaintiffs") and Defendants reached a new and separate settlement agreement.

Currently before the Court is the Rule 23(b)(3) Class Plaintiffs' Motion for Class Settlement Preliminary Approval. The Rule 23(b)(3) Class Plaintiffs and Defendants move for preliminary approval of the settlement and preliminary certification of a settlement class under Rule 23(b)(3) of the Federal Rules of Civil Procedure. (Notice of Rule 23(b)(3) Class Pls. Mot. and Mot. for Class Settlement [\*98] Prelim. Approval ("Mot. for Prelim. Approval"), Docket Entry No. 7257.) In support of the motion, interim class counsel for the Rule 23(b)(3) class ("Rule 23(b)(3) Class Counsel" or "Class Counsel") submitted a memorandum of law, a superseding Rule 23(b)(3) class settlement agreement ("Superseding Settlement Agreement") — with amended escrow agreements, a proposed Notice Plan, proposed Class Notices, and a proposed Plan of Administration and Distribution, among other items (the "Settlement Documents") — and the declarations of two mediators who facilitated settlement discussions.<sup>4</sup>

consolidation, a number of matters have been continuously added to the MDL, which now involves over seventy associated cases.

<sup>2</sup> In general, in a credit card transaction, a "merchant receives the purchase price minus two fees: the 'interchange fee' that the issuing bank charge[s] the acquiring bank and the 'merchant discount fee' that the acquiring bank charge[s] the merchant." Interchange Fees II, 827 F.3d at 228. As previously summarized by the Second Circuit, Plaintiffs challenged several credit card network rules as anticompetitive:

The "default interchange" fee applies to every transaction on the network (unless the merchant and issuing bank have entered into a separate agreement). The "honor-all-cards" rule requires merchants to accept all Visa or MasterCard credit cards if they accept any of them, regardless of the differences [\*97] in interchange fees. Multiple rules prohibit merchants from influencing customers to use one type of payment over another, such as cash rather than credit, or a credit card with a lower interchange fee. These "anti-steering" rules include the "no-surcharge" and "no-discount" rules, which prohibit merchants from charging different prices at the point of sale depending on the means of payment.

Id. at 228-29. "Plaintiffs allege[d] that these [anticompetitive] rules were adopted pursuant to unlawful agreements among the banks and Visa [and MasterCard]," and "that the banks owned and effectively operated Visa and MasterCard, such that Visa and MasterCard were unlawful 'structural conspiracies' or 'walking conspiracies' with respect to their network rules and practices." Interchange Fees I, 986 F. Supp. 2d at 220-21. For a further explanation of credit card transactions and interchange fees, see id. at 214-15. As discussed *infra*, some of these challenged rules have been altered as a result of changes in the credit card industry, and some have been altered as a result of a prior settlement in this action.

<sup>3</sup> Following remand, the two putative classes — the Rule 23(b)(2) injunctive class, and the Rule 23(b)(3) damages class — have been proceeding separately, and are each represented by separate counsel. (See Mem. and Order dated Nov. 30, 2016 ("Interim Class Counsel Order"), Docket Entry No. 6754.)

<sup>4</sup> (See Mem. in Supp. of Rule 23(b)(3) Class Pls. Mot. for Class Settlement Prelim. Approval ("Mem. in Supp. of Prelim. Approval"), Docket Entry No. 7257-1; Superseding and Am. Definitive Class Settlement Agreement of the Rule 23(b)(3) Class Pls. and the Defs. ("Superseding Settlement Agreement"), Docket Entry No. 7257-2; Amended and Restate Class Settlement Cash Escrow Agreement, annexed to Superseding Settlement Agreement as App. C; Amended and Restated Class Settlement Interchange Escrow Agreement, annexed to Superseding Settlement Agreement as App. D; Notice Plan, annexed to Superseding Settlement Agreement as App. F; Settlement Class Notices, annexed to Superseding Settlement Agreement as

For the reasons discussed below, on January 24, 2019, the Court granted the Motion for Class Settlement Preliminary Approval (the "January 24, 2019 Order"). (Prelim. Approval Order, Docket Entry No. 7361.)

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[\*20]

## I. Background

The Court assumes familiarity with the facts and extensive procedural history as set forth in [Interchange Fees I, 986 F. Supp. 2d 207; Interchange Fees II, 827 F.3d 223; In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-MD-1720, 2017 U.S. Dist. LEXIS 160045, 2017 WL 4325812, \(E.D.N.Y. Sept. 27, 2017\)](#), order set aside, [No. 05-MD-1720, 2018 U.S. Dist. LEXIS 148316, 2018 WL 4158290 \(E.D.N.Y. Aug. 30, 2018\)](#); and [In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-MD-1720, 2017 U.S. Dist. LEXIS 170103, 2017 WL 4620988 \(E.D.N.Y. Oct. 13, 2017\)](#). The Court therefore provides only a summary of the relevant facts and procedural history.

### a. Prior settlement approval and class certification

On November 27, 2012, Judge Gleeson granted preliminary approval of a jointly submitted class settlement agreement (the "Original Settlement Agreement"). *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720, 2012 WL 12929536, at \*1 (E.D.N.Y. Nov. 27, 2012). Judge Gleeson [\*101] also provisionally certified two separate classes for settlement purposes only, (1) a mandatory [Rule 23\(b\)\(2\)](#) settlement class seeking injunctive relief, from which class members could not opt out; and (2) a [Rule 23\(b\)\(3\)](#) class seeking damages, [\*21] from which class members could opt out.<sup>5</sup> See *id.* at \*1-2. After issuance of notice to the class and an allotted period for putative class members to object to or opt out of the settlement, on April 11, 2013, the parties moved for final approval of the settlement. (Notice of Mot. and Mot. for Class Pls. Final Approval of Settlement, Docket Entry No. 2111.)

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<sup>5</sup> Under [Rule 23](#), members of a class certified under [Rule 23\(b\)\(3\)](#) are afforded "opt-out" rights, or the right to exclude themselves from the class. [Fed. R. Civ. P. 23\(c\)\(2\)\(B\)\(v\)](#). No such rights are afforded under [Rule 23](#) to classes certified under [Rule 23\(b\)\(2\)](#).

After holding a fairness hearing on September 12, 2013, Judge Gleeson granted final approval of the Original Settlement Agreement on December 13, 2013<sup>6</sup> ("final approval decision" or "prior settlement approval"). See [Interchange Fees I, 986 F. Supp. 2d at 213, 240](#). Under the terms of the Original Settlement Agreement, the Defendants agreed to pay a cash award of \$7.25 billion, before reductions for opt outs and other expenses, to the [Rule 23\(b\)\(3\)](#) class members, and to implement reforms of the Defendants' rules and practices to settle the claims of the [Rule 23\(b\)\(2\)](#) class members.<sup>7</sup> [Id. at 213, 217](#).

### b. The Second Circuit's reversal

On June 30, 2016, the Second Circuit vacated the settlement, and remanded [\[\\*102\]](#) for further proceedings. [Interchange Fees II, 827 F.3d at 240](#). Objectors to the settlement and plaintiffs that chose to opt out of the class prior to final approval argued on appeal that the "class action was improperly certified and that the settlement was unreasonable and inadequate." [Id. at 227](#). The Second Circuit agreed that the class was improperly certified — holding that the class certification requirement of adequate representation under [Rule 23\(a\)\(4\)](#) had not been satisfied.<sup>8</sup> [Id.](#) The Court found that an inherent conflict of interest existed because a single set of counsel represented both the [\(b\)\(2\)](#) and [\(b\)\(3\)](#) class interests. See [id. at 233-35](#).

Because of the conflict, the Court concluded that "members of the (b)(2) class were inadequately represented . . ." [Id. at 231](#). Relying on Supreme Court precedent, the [\[\\*22\]](#) Second Circuit held that settlement classes that consist of holders of present claims, such as the [\(b\)\(3\)](#) class seeking monetary relief for *past* harm, and holders of future claims, such as the [\(b\)\(2\)](#) class seeking injunctive relief to reform current and *future* rules and policies of the Defendants, must be divided "into homogenous subclasses . . . with separate representation." [Id. at 234](#) (quoting [Ortiz v. Fibreboard Corp., 527 U.S. 815, 856, 119 S. Ct. 2295, 144 L. Ed. 2d 715 \(1999\)](#)).

<sup>6</sup> To assist with his determination, Judge Gleeson appointed an economic and legal expert, Dr. Alan O. Sykes of New York University School of Law, to aid the court in weighing the settlement agreement and accompanying expert reports because "[t]he proponents of the settlement disagree[d] strongly with the objectors over the economic value of the proposed settlement to the class members, and specifically over the benefits of the proposed rules changes to the merchant class." See [Interchange Fees I, 986 F. Supp. 2d at 218](#). Dr. Sykes filed his written analysis with the court on August 28, 2013. (Report from Court Appointed Expert Professor Alan O. Sykes ("Sykes Report"), Docket Entry No. 5965.)

<sup>7</sup> The reforms included, among other things, "Visa and MasterCard rule modifications to permit merchants to surcharge on Visa- or MasterCard-branded credit card transactions at both the brand and product levels"; "[a]n obligation on the part of Visa and MasterCard to negotiate interchange fees in good faith with merchant buying groups"; "[a]uthorization for merchants that operate multiple businesses under different 'trade names' or 'banners' to accept Visa and/or MasterCard at fewer than all of its businesses"; and "[t]he locking-in of the reforms in the Durbin Amendment [of the **Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010**] and the DOJ [United States Department of Justice] consent decree with Visa and MasterCard, even if those reforms are repealed or otherwise undone." [Interchange Fees I, 986 F. Supp. 2d at 217](#). The Durbin Amendment "limited the interchange fee that issuing banks could charge for debit card purchases, and allowed merchants to discount debit card purchases relative to credit card purchases." [Interchange Fees II, 827 F.3d at 229](#). In the DOJ consent decree, "after an investigation assisted by the information developed by the [P]laintiffs," and following lawsuits that the Department of Justice initiated against Visa, Mastercard, and American Express in 2010, [Interchange Fees I, 986 F. Supp. 2d at 215](#), "Visa and MasterCard agreed to remove their rules prohibiting merchants from product-level discounting of credit and debit cards," *id.*; see also [Interchange Fees II, 827 F.3d at 229](#) ("pursuant to a consent decree with the Department of Justice in 2011, Visa and Mastercard agreed to permit merchants to discount transactions to steer consumers away from credit cards use. None of these developments affected the honor-all-cards or no-surcharging rules, or the existence of a default interchange fee.").

<sup>8</sup> In particular, the Second Circuit found that unitary representation of the classes violated [Rule 23\(a\)\(4\)](#) — the class certification requirement that representative parties adequately protect the interests of the class — and the [Due Process Clause](#), which requires that named plaintiffs in a class action adequately protect the interests of absent class members. [Id. at 228, 231](#) (citations omitted).

The Second Circuit also found that the issues stemming from unitary **[\*\*103]** representation were exacerbated by the inability of members of the (b)(2) class to opt out of the settlement or from their release of claims against the Defendants. See [\*id. at 231, 234\*](#); [\*id. at 241\*](#) (Leval, J., concurring). The Court expressed further concern that the injunctive relief secured for the (b)(2) class would not apply uniformly to benefit all (b)(2) class members. See [\*id. at 238\*](#). For example, the Court noted that (b)(2) merchants that operated in certain states would be prohibited from surcharging costs to customers at the point of sale, as permitted under the Original Settlement Agreement, while merchants that operated in other states would not be prohibited from doing so. See [\*id. at 230-31\*](#) (noting that "[t]he incremental value and utility of surcharging relief is limited, however, because many states, including New York, California, and Texas, prohibit surcharging as a matter of state law." (citations omitted)); [\*id. at 238-39\*](#) ("A significant proportion of merchants in the (b)(2) class are either legally or commercially unable to obtain incremental benefit from the primary relief . . . and class counsel knew at the time the Settlement Agreement was entered into that this relief was virtually worthless to vast numbers of class members."). **[\*\*104]**<sup>9</sup>

Despite these significant concerns, the Second Circuit did not abrogate Judge Gleeson's analysis in its entirety, and the majority of its concerns were circumscribed to representation and relief afforded to the (b)(2) injunctive class. The Court acknowledged the due diligence and extensive time and labor that accompanied the final approval process, stating:

Discovery included more than 400 depositions, 17 expert reports, 32 days of expert deposition testimony, and the production of over 80 million pages of documents. The parties fully briefed a motion for class certification, a motion to dismiss supplemental complaints, and cross-motions for summary judgment. Beginning in 2008, the parties participated in concurrent settlement negotiations assisted by well-respected mediators. At the end of 2011, the district judge and the magistrate judge participated in the parties' discussions with the mediators. In October 2012, after several more marathon negotiations with the mediators (including one more with the district court and magistrate judges), the parties executed the [Original] Settlement Agreement.

[\*Id. at 229.\*](#)

### c. Relevant subsequent proceedings

After remand, **[\*\*105]** on August 11, 2016, the Court held a case management conference to discuss, among other items, the Second Circuit's decision. (See Minute Entry dated Aug. 11, 2016, Docket Entry No. 6654.) In order to address the Second Circuit's concerns regarding unitary representation of the classes, on November 30, 2016, pursuant to [\*Rule 23\(g\)\(3\)\*](#), the Court appointed two separate groups of interim co-lead counsel to represent (1) merchants seeking certification under [\*Rule 23\(b\)\(2\)\*](#) for injunctive relief, and (2) merchants seeking certification under [\*Rule 23\(b\)\(3\)\*](#) for monetary damages.<sup>10</sup> See [\*\\*23\] In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 2017 U.S. Dist. LEXIS 160045, 2017 WL 4325812, at \\*4.\*](#) The Court appointed the Nussbaum Law Group, P.C., Hilliard & Shadowen LLP, Freed Kanner London & Millen LLC, and Grant & Eisenhofer P.A. to serve as interim [\*Rule 23\(b\)\(2\)\*](#) Class Counsel for the merchants seeking injunctive relief, and appointed Robins Kaplan LLP, Berger & Montague P.C., and Robbins Geller Rudman & Dowd LLP (the "Robins Group") to serve as interim [\*Rule 23\(b\)\(3\)\*](#) Class Counsel for the merchants seeking damages relief — the same three firms that represented the entire consolidated class in the proceedings before Judge Gleeson. (See Mem. and Order dated Nov. 30, 2016 ("Interim Class Counsel Order") 1, Docket Entry No. 6754.)

<sup>9</sup> The Court notes that the landscape of state no-surcharging laws is changing. For example, in 2017, the Supreme Court held that a New York state statute that prohibited merchants from imposing a surcharge on customers using credit cards regulated speech, and remanded the matter to the Second Circuit to determine whether such speech regulation violates the [\*First Amendment\*](#). See [\*Expressions Hair Design v. Schneiderman, --- U.S. ---, 137 S. Ct. 1144, 1146, 197 L. Ed. 2d 442 \(2017\)\*](#). In addressing a similar California statute, the Ninth Circuit recently held that the statute violated [\*First Amendment\*](#) commercial free speech rights. [\*Italian Colors Restaurant v. Becerra, 878 F.3d 1165, 1179 \(9th Cir. 2018\)\*](#).

<sup>10</sup> Magistrate Judge James Orenstein, who has been ably managing the discovery and other matters in this litigation for many years, decided the Class Counsel motions.

On March 31, 2017, [Rule 23\(b\)\(2\)](#) Class Counsel filed [\\*\\*106](#) a complaint on behalf of the [Rule 23\(b\)\(2\)](#) representative class plaintiffs, and a putative [Rule 23\(b\)\(2\)](#) class. (Equitable Relief Class Action Compl., Docket Entry No. 6910.) On October 30, 2017, [Rule 23\(b\)\(3\)](#) Class Counsel filed a Third Consolidated Amended Class Action Complaint ("TAC") on behalf of named [Rule 23\(b\)\(3\)](#) representative class plaintiffs ("[Rule 23\(b\)\(3\)](#) Class Plaintiffs" or "Class Plaintiffs"), and a putative [Rule 23\(b\)\(3\)](#) class.<sup>11</sup> (Third Consolidated Am. Class Action Compl., Docket Entry No. 7123 ("TAC").) According to the TAC, the [Rule 23\(b\)\(3\)](#) Class Plaintiffs include: Photos Etc. Corporation; Traditions, Ltd.; Capital Audio Electronics, Inc.; CHS, Inc.; Crystal Rock, LLC;<sup>12</sup> Discount Optics, Inc.; Leon's Transmission Service, Inc.; Parkway Corp.; and Payless, Inc. (See TAC ¶ 2.) All seek to represent a class certified under [Rules 23\(a\)](#) and [\(b\)\(3\)](#). (*Id.* ¶ 66.)

#### **d. Class Plaintiffs' allegations**

The TAC alleges that Defendants<sup>13</sup> — in violation of [Section 1 of the Sherman Act \(15 U.S.C. § 1\)](#), [Section 7 of the Clayton Act \(15 U.S.C. § 18\)](#), the [California Cartwright Act \(Section 16700 et seq.\)](#) of the California Business and Professions Code, and the [California Unfair Competition Law \(Section 17200 et seq.\)](#) of the California [\[\\*\\*107\]](#) Business and Professions Code) — entered into "contracts, combinations, conspiracies, and understandings" that harmed competition and the [Rule 23\(b\)\(3\)](#) Class Plaintiffs through supracompetitive fixed prices, unfair acts and practices, and unreasonable restraints of trade. (TAC ¶¶ 4-5, 408-516.) Class Plaintiffs allege that these practices have resulted in a common antitrust injury to an entire class of merchants, and they seek damages under [Section 4 of the Clayton Act, 15 U.S.C. § 15](#). (*Id.* ¶¶ 27, 112, 115.)

#### **e. [Rule 23\(b\)\(3\)](#) Motion for Class Settlement Preliminary Approval**

After engaging in renewed discovery and mediation efforts, the [Rule 23\(b\)\(3\)](#) Class Plaintiffs and Defendants reached an agreement in principle on June 7, 2018. (See Decl. [[\\*24](#)] of K. Craig Wildfang ("Wildfang Decl.") ¶¶ 201-39, Docket Entry No. 7257-3.) On September 19, 2018, [Rule 23\(b\)\(3\)](#) Class Counsel, on behalf of Class Plaintiffs, moved the Court for preliminary approval of the Superseding Settlement Agreement and preliminary certification of a [Rule 23\(b\)\(3\)](#) settlement class. (See Mot. for Prelim. Approval; Mem. in Supp. of Prelim. Approval.)

The Superseding Settlement Agreement defines the proposed [Rule 23\(b\)\(3\)](#) putative class to include:

[a]ll persons, businesses, and other entities that have accepted any Visa-Branded [\\*\\*108](#) Cards and/or Mastercard-Branded Cards in the United States at any time from January 1, 2004 to the Settlement Preliminary

<sup>11</sup> In 2017, Class Plaintiffs moved to amend their Complaint. (See Class Pls. Mot. for Leave to Amend Compl., Docket Entry No. 6880.) On August 30, 2018, after finding that the amended pleadings related back to earlier complaints under [Rule 15\(c\)](#), the Court affirmed Plaintiffs' ability "to amend the Complaints to assert an alternative, two-sided market theory following the Second Circuit's decision in [United States v. Am. Express Co.](#), 838 F.3d 179 (2d Cir. 2016), aff'd sub nom. [Ohio v. Am. Express Co.](#), --- U.S. ---, 138 S. Ct. 2274, 2285, 201 L. Ed. 2d 678 (2018)." [In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.](#), No. 05-MD-1720, 2018 U.S. Dist. LEXIS 148316, 2018 WL 4158290, at \*3 (E.D.N.Y. Aug. 30, 2018). In [United States v. American Express Company](#), the Second Circuit held that "[t]he District Court erred in excluding the market for cardholders from its relevant market definition." [838 F.3d at 197](#).

<sup>12</sup> On April 27, 2018, the Court dismissed the claims and actions of Crystal Rock, LLC without prejudice. (Stipulation and Order of Dismissal dated Apr. 27, 2018, Docket Entry No. 7197 (stating, however, that "[a]ll discovery taken of Crystal Rock, LLC . . . will remain in the factual record").) As a result, Crystal Rock, LLC is not listed as a Class Plaintiff in the Superseding Settlement Agreement, and the Court does not consider the facts as to Crystal Rock, LLC in this Memorandum and Order. (See Superseding Settlement Agreement ¶ 3(ii); TAC ¶ 14.)

<sup>13</sup> In the TAC, the [Rule 23\(b\)\(3\)](#) Class Plaintiffs list the Defendants as "Visa U.S.A., Inc., Visa International Service Association, and Visa, Inc. ('Visa'), MasterCard International Incorporated ('MasterCard'), and the other Defendants named in th[e] Complaint ('Bank Defendants') . . ." (See TAC ¶ 2.)

Approval Date, except that the [Rule 23\(b\)\(3\)](#) Settlement Class shall not include (a) the Dismissed Plaintiffs, (b) the United States government, (c) the named Defendants in this Action or their directors, officers, or members of their families, or (d) financial institutions that have issued Visa-Branded Cards or Mastercard-Branded Cards or acquired Visa-Branded Card transactions or Mastercard-Branded Card transactions at any time from January 1, 2004 to the Settlement Preliminary Approval Date.

(Superseding Settlement Agreement ¶ 4.) All class members will have the right to "opt out" — or exclude themselves — from participation in the class and from being bound by the terms of the Superseding Settlement Agreement. (See *id.* ¶ 39(f); Mem. in Supp. of Prelim. Approval 2.)

The Superseding Settlement Agreement provides for an award of as much as approximately \$6.26 billion in relief before opt-out reductions and expense takedowns<sup>14</sup> — a figure that Class Counsel believes is the largest cash settlement in antitrust class action history. (Mem. in Supp. of Prelim. Approval 1; Wildfang Decl. [\*\*109] ¶ 3.) Putative class members that do not opt out of the settlement will "receive the same benefit — a *pro rata* share of the monetary fund based on the interchange fees attributable to their transactions during the class period . . ." (Mem. in Supp. of Prelim. Approval 2; Plan of Administration and Distribution I-2, 3.)

In return, the class members will release the claims raised in the TAC. Specifically, class members will release "claims arising out of or relating to conduct or acts that were alleged or raised or that could have been alleged or raised relating to the subject matter of this litigation," (*id.* at 2), that have accrued through the date of the Court's preliminary approval of the settlement, i.e., January 24, 2019, and that "accrue no later than five years after the Settlement Final Date . . .," (Superseding Settlement Agreement ¶ 31(a) (stating that class members "fully, finally, and forever . . . release [Defendants] from . . . claims . . . that have accrued as of the Settlement Preliminary Approval Date or accrue no later than five years after the Settlement Final Date arising out of or relating to any conduct . . . alleged or otherwise raised . . . or that could have been [\*\*110] alleged or raised . . . or arising out of or relating to a continuation or continuing effect of any such conduct . . . .").<sup>15</sup> The released claims also encompass claims that were or could have been alleged in this action relating to, among other things, interchange fees, anti-steering rules, and honor-all-card rules. (See *id.* ¶ 31(b)(i–vi).)

The Superseding Settlement Agreement does not release the right of any [Rule 23\(b\)\(3\)](#) class member to participate in the [Rule 23\(b\)\(2\)](#) action, "solely as to injunctive relief claims . . ."<sup>16</sup> (See *id.* ¶ 34(a); see also [\*25] Mem. in Supp. of Prelim. Approval 23 ("the release does not bar the injunctive relief claims asserted in the pending proposed [Rule 23\(b\)\(2\)](#) class action . . . Nothing in the release affects in any way the scope of injunctive relief which the [[Rule 23\(b\)\(2\)](#)] Plaintiffs and proposed class can seek.").)

#### f. Objections to preliminary approval and class certification

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<sup>14</sup> Although reductions from the \$6.25 billion figure will be made in accordance with the number of class members that choose to exclude themselves from the settlement, the award figure will not be reduced below approximately \$5.56 billion. (See Mem. in Supp. or Prelim. Approval 1.)

<sup>15</sup> "Settlement Final Date" is defined as the business day after the affirmation by any appeals court of this Court's final approval of the proposed settlement. (See Superseding Settlement Agreement ¶ (3)(ss).) According to Class Counsel, this effectively means that "[t]he release will bar claims that have accrued within five years following . . . the exhaustion of all appeals." (Mem. in Supp. of Prelim. Approval 23.)

<sup>16</sup> The Court notes that documents and filings refer to the [Rule 23\(b\)\(2\)](#) action in a variety of ways. The [Rule 23\(b\)\(2\)](#) action is proceeding in this MDL as *Barry's Cut Rate Stores Inc. et al. v. Visa, Inc., et al.*, No. 05-MD-01720. The action is sometimes referred to as "*Barry's*" and the class is sometimes referred to as the "equitable relief class." For the purposes of consistency across opinions, the Court uses the terms "[Rule 23\(b\)\(2\)](#)" and "injunctive relief" to refer to the action, as opposed to "*Barry's*" and "equitable relief."

After a November 1, 2018 status conference with the parties, on November 6, 2018, the Court ordered that "[a]ny objections to the proposed class settlement . . . be filed, in writing, on or before November 20, 2018."<sup>17</sup> (Order dated Nov. 6, 2018.) On November [\*\*111] 20, 2018, the Court received three sets of objections from (1) Leathers Enterprises, Inc.; (2) Fikes Wholesale Inc., Midwest Petroleum Company, and Slidell Oil Company, LLC; and (3) the National Association of Shell Marketers, the Petroleum Marketers Association of America, and the Society of Independent Gasoline Marketers of America (collectively, the "Branded Operators").<sup>18</sup> The Branded Operators own and/or operate gas stations and convenience stores that sell petroleum products that are produced and branded by major oil refiners such as Shell and ConocoPhillips. (Mem. in Opp'n to Prelim. Approval 1.) They raised several concerns in their submissions to the Court.

First, the Branded Operators argue that preliminary settlement approval should not be granted because an intra-class conflict exists and class members will have competing claims over funds for the same merchant transactions. The Branded Operators contend that the major oil companies will attempt to make claims for funds that the Branded Operators are allegedly owed. (Mem. in Opp'n to Prelim. Approval 7-8.) They argue that "[u]nless it is clear who will receive distributions from the settlement for the transaction accepted [\*\*112] by Branded Operators, class members will not know whether they can or should participate in the settlement or opt out." (*Id.* at 3.)

Second, the Branded Operators argue that [Rule 23\(b\)\(3\)](#) Class Counsel is not adequately representing them because of "dueling class members." (See *id.* at 14-18 ("class counsel is inherently conflicted based on its representation of a class that contains dueling class members.").)

Third, the Branded Operators express concern that some portion of them have been excluded from the class. (*Id.* at 19 ("the Defendants have been allowing the Oil Brands to negotiate opt-out settlement agreements on behalf of all of their branded operators without the consent of the operators.").) For example, the Branded Operators refer to a list submitted by "Valero,"<sup>19</sup> which [\*26] "identifies more than 400 branded operators that are now purportedly excluded from the [Superseding Settlement Agreement]." (*Id.* at 19-20.) The Branded Operators argue that there will be a "failure to notify" hundreds of class members as a result of these exclusion lists. (*Id.* at 5.)

<sup>17</sup> Prior to the November 1, 2018 status conference, on October 30, 2018, the Court received a letter, notifying the Court of an intention to object to preliminary approval of the Superseding Settlement Agreement. (Letter notice of intention to object to proposed settlement dated Oct. 30, 2018 ("Letter of Intention to Object"), Docket Entry No. 7280.) On November 15, 2018, [Rule 23\(b\)\(3\)](#) Class Counsel filed a response to the October 30, 2018 letter. ([Rule 23\(b\)\(3\)](#) Class Counsel's response to Branded Operators' letter of October 30 dated Nov. 15, 2018 ("Class Counsel's Nov. 15 Response"), Docket Entry No. 7294.) On November 23, 2018, [Rule 23\(b\)\(3\)](#) Class Counsel filed a response to the objections that were ultimately filed on November 20, 2018. ([Rule 23\(b\)\(3\)](#) Class Counsel's Response to Objections to Class Settlement Dkts. 7299, 7300, 7301 dated Nov. 23, 2018 ("Class Counsel's Nov. 23 Response"), Docket Entry No. 7303.)

<sup>18</sup> (See Statement of Obj. Regarding the Proposed Class Settlement by Leathers Enterprises, Inc., Docket Entry No. 7299; Mem. in Opp'n to Prelim. Approval of Class Settlement ("Mem. in Opp'n to Prelim. Approval"), Docket Entry No. 7300; Statement of Obj. Regarding the Proposed Class Settlement by the National Association of Shell Marketers, the Petroleum Marketers Association of America, and the Society of Independent Gasoline Marketers of America, Docket Entry No. 7301.)

<sup>19</sup> Valero Energy Corporation and Valero Marketing and Supply Company are listed as Dismissed Plaintiffs. (See Dismissed Plaintiffs, annexed to Superseding Settlement Agreement as App. B.) "Dismissed Plaintiffs," as defined in the Superseding Settlement Agreement, means:

the individual plaintiffs and former opt-out plaintiffs that have dismissed with prejudice an action against any Defendant and that are listed in Appendix B [of the Superseding Settlement [\[\\*\\*113\]](#) Agreement], and any additional persons, businesses, or other entities included in an exclusion request that those plaintiffs previously submitted to the Class Administrator in connection with the [Original] Settlement Agreement.

(Superseding Settlement Agreement ¶ 3(t).) The Branded Operators object to the fact that the content of the exclusion requests have not been disclosed to the Court or putative class members, and have not been included with the proposed class notice. (See Mem. in Opp'n to Prelim. Approval 20.)

In addition to the Branded Operator filings, on December 3, 2018, the Court received a letter from [Rule 23\(b\)\(2\)](#) Class Counsel on behalf of the injunctive relief Class Plaintiffs, expressing concern that the Superseding Settlement Agreement only preserves *injunctive* relief claims in the [Rule 23\(b\)\(2\)](#) injunctive relief action, instead of *injunctive, declaratory, or other equitable relief* claims. (See Letter from Equitable Relief Plaintiffs re Language in Settlement Agreement ("Letter re Language in Settlement Agreement"), Docket Entry No. 7313 (pointing out that the claims otherwise released in the Superseding Settlement Agreement include "injunctive, declaratory, or other equitable relief," while the claims preserved for pursuit in the [Rule 23\(b\)\(2\)](#) action are "solely . . . injunctive relief claims[,]"; and expressing the desire to "avoid a release that is broader than the . . . claims preserved" by the Superseding Settlement Agreement).)

The Court addresses the concerns of the Branded Operators [\\*\\*114](#) and [Rule 23\(b\)\(2\)](#) Class Counsel *infra*.

#### **g. Hearing on the Superseding Settlement Agreement and subsequent filings**

On December 6, 2018, the Court held a hearing on the Superseding Settlement Agreement. (See Hrg Tr., Docket Entry No. 7331.) The Court discussed with the parties, among other things, the concerns of [Rule 23\(b\)\(2\)](#) Class Counsel regarding the preservation of injunctive, declaratory, and other equitable relief claims, (*id.* at 3:19-7:2), the Branded Operators' objections, (*id.* at 7:11-17:9), the Court's concerns regarding the terms of the Superseding Settlement Agreement, (*id.* at 17:14-28:23), and the factors of consideration for preliminary approval and class certification for the purposes of settlement, (*id.* at 32:7-38:20).

At the conclusion of the hearing, the Court informed the parties that it would approve the proposed settlement subject to the discussions had at the hearing, and requested that the parties submit a revised proposed preliminary approval order and Class Notices based on those discussions. (See *id.* at 38:18-38:22; see also Minute Entry dated Dec. 6, 2018, Docket Entry No. 7327 (instructing parties to incorporate clarifying language in the Class Notices to the putative class and instructing [\\*\\*115](#) Class Counsel to "submit all relevant updated documents to the Court for review.").)

On January 15, 2019, in light of the discussions held at the hearing, [Rule 23\(b\)\(3\)](#) Class Counsel, Counsel for Visa, and Counsel for Mastercard, jointly submitted a letter to the Court, with revised versions of a proposed preliminary approval order, and proposed Class Notices. (Letter dated Jan. 15, 2019 ("January 15, 2019 Letter"), Docket Entry No. 7354; Proposed Revised [Rule 23\(b\)\(3\)](#) Class Settlement Prelim. Approval Order ("Proposed Prelim. Approval Order"), Docket Entry No. 7354-1; Revised Class Notices, annexed to Proposed Prelim. Approval Order as Ex. 1.) Pursuant to the Court's request, Class Counsel also drafted and submitted a Notice of Exclusion to be sent to Dismissed Plaintiffs — i.e., entities and their affiliates that have previously dismissed their lawsuits against the Defendants — in order to notify the Dismissed Plaintiffs that they will be ineligible to receive settlement funds. (See Notice of Exclusion from Class Action Settlement ("Notice of Exclusion"), annexed to Proposed Prelim. Approval Order as Ex. 2.) [\[27\]](#) Shortly thereafter, on January 18, 2019, [Rule 23\(b\)\(2\)](#) Class Counsel submitted a letter to the Court, noting that, [\\*\\*116](#) based on the "representations" in the January 15, 2019 Letter and the revised versions of the proposed preliminary approval order and Class Notices regarding the scope of the release in the Superseding Settlement Agreement, the [Rule 23\(b\)\(2\)](#) Class Plaintiffs "would not be filing an objection to the proposed [Superseding Settlement Agreement]." (Letter dated Jan. 18, 2019, Docket Entry No. 7359.) The Court understands this to mean that the adjustments made to the proposed preliminary approval order and Class Notices have alleviated [Rule 23\(b\)\(2\)](#) Class Counsel's concern noted in Section I.f *supra*, surrounding the preservation of injunctive relief claims in the [Rule 23\(b\)\(2\)](#) action.

#### **h. Preliminary approval of the Superseding Settlement Agreement**

On January 24, 2019, the Court preliminarily approved the Superseding Settlement Agreement and preliminarily granted class certification for the purposes of settlement, appointed Class Counsel and the Class Administrator, and approved the proposed Notice Plan, Class Notices, and Plan of Administration and Distribution. (Prelim. Approval Order.)

## II. Discussion

### a. Preliminary approval of a proposed settlement

[Rule 23\(e\) of the Federal Rules of Civil Procedure](#) sets forth the standards and procedures that apply to class action settlements. Under [Rule 23\(e\)](#), a court [\*\*117] may grant final approval of a proposed settlement "only after a hearing and only on finding that it is *fair, reasonable, and adequate.*" [Fed. R. Civ. P. 23\(e\)\(2\)](#) (emphasis added); see also [Charron v. Wiener](#), 731 F.3d 241, 247 (2d Cir. 2013). A class action settlement approval procedure typically occurs in two stages: (1) preliminary approval — where "prior to notice to the class, a court makes a preliminary evaluation of fairness," and (2) final approval — where "notice of a hearing is given to the class members, [and] class members and settling parties are provided the opportunity to be heard on the question of final court approval." [In re LIBOR-Based Fin. Instruments Antitrust Litig.](#), No. 11-CV-5450, 2016 U.S. Dist. LEXIS 180481, 2016 WL 7625708, at \*2 (S.D.N.Y. Dec. 21, 2016) (citing [In re NASDAQ Mkt.-Makers Antitrust Litig.](#), 176 F.R.D. 99, 102 (S.D.N.Y. 1997)); see also [In re Initial Pub. Offering Sec. Litig.](#), 243 F.R.D. 79, 87 (S.D.N.Y. 2007) ("Review of a proposed class action settlement generally involves a two-step process: preliminary approval and a subsequent 'fairness hearing.' The court first must review the proposed terms of settlement and make a preliminary determination on the fairness, reasonableness and adequacy of the settlement terms.").

During the preliminary approval stage, a court "must review the proposed terms of settlement and make a preliminary determination on the fairness, reasonableness and adequacy of the settlement terms." [In re Initial Pub. Offering Sec. Litig.](#), 243 F.R.D. at 87. The judicial role in reviewing a proposed settlement is demanding. [Zink v. First Niagara Bank](#), N.A., 155 F. Supp. 3d 297, 308 (W.D.N.Y. 2016) (noting that such review "is [\*\*118] demanding because the adversariness of litigation is often lost after the agreement to settle." (quoting [Martin v. Cargill, Inc.](#), 295 F.R.D. 380, 383-84 (D. Minn. 2013)).

Even where parties have reached agreement in the class settlement context, courts need not grant preliminary approval, and have denied motions for class settlement preliminary approval. See, e.g., [Patterson v. Premier Construction Co. Inc.](#), No. 15-CV-00662, 2017 U.S. Dist. LEXIS 4845, 2017 WL 122986, at \*2 (E.D.N.Y. Jan. 12, 2007); [Oladapo v. Smart One Energy, LLC](#), No. 14-CV-7117, 2017 U.S. Dist. LEXIS 187299, 2017 WL 5956907, at \*16 (S.D.N.Y. Nov. 9, 2017), report and recommendation adopted, [No. 14-CV-7117, 2017 U.S. Dist. LEXIS 197039, 2017 WL 5956770](#) (S.D.N.Y. Nov. 30, 2017). Courts should remain mindful, however, "of the 'strong judicial policy in favor of settlements, particularly in the class action context.'" [Wal-Mart Stores, Inc. v. Visa U.S.A., Inc. \("Wal-Mart Stores"\)](#), 396 F.3d 96, 116 (2d Cir. 2005) (quoting [In re PaineWebber Ltd. P'ships Litig.](#), 147 F.3d 132, 138 (2d Cir. 1998)).

#### [\*28] i. Preliminary approval standards

New amendments to [Rule 23](#) took effect on December 1, 2018. These amendments alter the standards that guide a court's preliminary approval analysis.<sup>20</sup> Prior to the amendments, [Rule 23](#) did not specify standards for courts to follow when deciding whether to grant preliminary approval. Instead, courts in the Second Circuit interpreted [Rule 23](#) to require a determination of whether the proposed settlement fell "within the range of possible final approval." See [In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.](#), No. 05-MD-1720, 2012 U.S. Dist. LEXIS 153637, 2012 WL 5989763, at \*1 (E.D.N.Y. Oct. 24, 2012) ("Preliminary approval is appropriate where the proposal appears to be the product of serious negotiation [\*\*119] and further appears to be within the range of possible final approval." (citing [In re NASDAQ Mkt.-Makers Antitrust Litig.](#), 176 F.R.D. at 102)); see also [In re Traffic Exec. Ass'n](#),

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<sup>20</sup> Among other things, the new amendments set forth standards under [Rule 23\(e\)\(1\)\(B\)\(i-ii\)](#) that a district court must ensure are met prior to a grant of *preliminary approval* of a proposed settlement, and factors under [Rule 23\(e\)\(2\)](#) that a district court must now consider when evaluating whether to grant *final approval* of a proposed settlement. See [Fed. R. Civ. P. 23\(e\)](#).

627 F.2d 631, 634 (2d Cir. 1980) (suggesting that for preliminary approval, a court need only find "probable cause to submit the [settlement] to class members . . . ." (internal citation omitted)); Davis v. J.P. Morgan Chase & Co., 775 F. Supp. 2d 601, 607 (W.D.N.Y. 2011) ("A proposed settlement of a class action should be . . . preliminarily approved where it 'appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval.'" (quoting In re NASDAQ MKT.-Makers Antitrust Litig., 176 F.R.D. at 102)); Menkes v. Stolt-Nielsen S.A., 270 F.R.D. 80, 101 (D. Conn. 2010) (quoting Reade-Alvarez v. Eltman, Eltman & Cooper, P.C., 237 F.R.D. 26, 33 (E.D.N.Y. 2006)) (same).

Under the new Rule 23(e), in weighing a grant of preliminary approval, district courts must determine whether "giving notice is justified by the parties' showing that the court *will likely be able to*: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B)/(i–ii) (emphasis added). Because Rule 23(e)(2) sets forth the factors that a court must consider when weighing *final* approval, it appears that courts must assess at the preliminary approval stage whether the parties have shown that the court will likely **[\*\*120]** find that the factors weigh in favor of final settlement approval. This standard appears to be more exacting than the prior requirement.<sup>21</sup>

## ii. Preliminary approval factors

To guide its analysis during the preliminary approval stage in determining whether it will likely approve a proposal under Rule 23(e)(2), the Court looks to the factors contained in the text of Rule 23(e)(2), which a court must consider when weighing final approval. See Fed. R. Civ. P. 23(e)(2) ("If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering" the factors set forth in Rule 23(e)(2)). Although the factors apply to final approval, the Court looks to them to determine whether it will likely grant final approval based on the information currently before the Court.

Prior to the December 1, 2018 amendments, Rule 23(e)(2) was silent on the factors that courts needed to assess when weighing final approval — the Rule only required that courts hold a final fairness hearing and find the proposed settlement to be "fair, reasonable, and adequate." District courts therefore looked to guidance from, and factors set **[\*29]** forth in, circuit law and treatises in making the assessment. Courts **[\*\*121]** in the Second Circuit have traditionally considered nine factors, known as the *Grinnell* factors, to assist in weighing final approval and determining whether a settlement is substantively "fair, reasonable, and adequate." These factors are:

- (1) the complexity, expense and likely duration of the litigation;
- (2) the reaction of the class to the settlement;
- (3) the stage of the proceedings and the amount of discovery completed;
- (4) the risks of establishing liability;
- (5) the risks of establishing damages;
- (6) the risks of maintaining the class through the trial;
- (7) the ability of the defendants to withstand a greater judgment;
- (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and
- (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

In re Initial Pub. Offering Sec. Litig., 260 F.R.D. 81, 88 (S.D.N.Y. 2009) (citing City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974), abrogated on other grounds by Goldberger v. Integrated Res., Inc., 209 F.3d 43 (2d Cir. 2000); D'Amato v. Deutsche Bank, 236 F.3d 78, 86 (2d Cir. 2001)).

The amended Rule 23(e)(2) requires courts to consider whether:

- (A) the class representatives and class counsel have adequately represented the class;

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<sup>21</sup> It appears that a "likelihood standard" now guides a district court's analysis of whether to grant preliminary approval. That is, a district court must assess whether the parties have shown that the court *will likely be able to* grant final approval and certify the class. See Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment ("The decision to give notice of a proposed settlement to the class is an important event. It should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object.").

- (B) the proposal was negotiated at arm's length;
- (C) the relief provided for the class is adequate, taking into account:
  - (i) the costs, risks, and delay of trial and **\*\*122** appeal;
  - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, if required;
  - (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
  - (iv) any agreement required to be identified under [Rule 23\(e\)\(3\)](#); and
- (D) the proposal treats class members equitably relative to each other.

[Fed. R. Civ. P. 23\(e\)\(2\)](#). Paragraphs (A) and (B) constitute the "procedural" analysis factors, and examine "the conduct of the litigation and of the negotiations leading up to the proposed settlement." [Fed. R. Civ. P. 23](#) advisory committee's note to 2018 amendment. Paragraphs (C) and (D) constitute the "substantive" analysis factors, and examine "[t]he relief that the settlement is expected to provide to class members . . ." *Id.*

The Court understands the new [Rule 23\(e\)](#) factors to add to, rather than displace, the *Grinnell* factors. See *id.* ("The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal."). Indeed, there is significant overlap between the *Grinnell* factors and the [Rule 23\(e\)\(2\)\(C-D\)](#) factors, as they both guide a court's substantive, as opposed to procedural, **\*\*123** analysis. Accordingly, the Court considers both sets of factors below in its analysis of whether the Court will likely find that the proposed settlement is fair, reasonable, and adequate, and grant final approval.

### iii. The Court will likely approve the proposed settlement

The Court first considers the [Rules 23\(e\)\(2\)](#) factors, and then considers additional *Grinnell* factors not otherwise addressed by the [Rule 23\(e\)\(2\)](#) factors.<sup>22</sup> The only factor that the Court does not fully address below is the second *Grinnell* factor — "the reaction of the class to the settlement." The Court has considered this factor to the limited extent possible at the preliminary approval stage, through its consideration of the objections received prior to the preliminary approval **\*30** hearing.<sup>23</sup>

After consideration of all relevant factors in issuing the January 24, 2019 Order, the Court concluded for the following reasons that based on the record before it, it will likely grant final approval of the proposed settlement.<sup>24</sup>

<sup>22</sup> The Court finds that the following *Grinnell* factors do not appear to be addressed by the [Rule 23\(e\)\(2\)](#) factors: the ability of the defendants to withstand a greater judgment; the range of reasonableness of the settlement fund in light of the best possible recovery; and the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

<sup>23</sup> The Court notes that, based on the objections received during the preliminary approval process, as compared to the objections received during the prior preliminary approval process for the Original Settlement Agreement before Judge Gleeson, it appears that the class' reaction to the Superseding Settlement Agreement is more favorable, as the Court has received fewer objections both in volume and substance. (See, e.g., Objecting Pls. Opp'n to Class Pls. Mot. for Prelim. Approval of Proposed Class Settlement, Docket Entry No. 1681 (objecting to preliminary approval on behalf of the majority of the named plaintiffs in the action); Amicus Br. From ATMIA Challenging Prelim. Approval of Class Settlement, Docket Entry No. 1683 (objecting to preliminary approval on behalf of the ATM Industry Association on the basis that the definition of the settlement class was overbroad, the scope of the injunctive relief, and the breadth of the release); Am. Retailers & Merchants' Obj. to Proposed Class Settlement Agreement, Docket Entry No. 1701 (objecting to preliminary approval on behalf of a wide range of businesses, including retailers, restaurants, oil companies, and pharmacies, and objecting on the basis that the size of the settlement fund was inadequate, that the release was excessive and overbroad, that the attorneys' fees were excessive, and that the injunctive relief was inadequate).)

## 1. Adequate representation by class representatives and class counsel

"Determination of adequacy typically 'entails inquiry as to whether: (1) plaintiff's interests are antagonistic to the interest of other [\*\*124] members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation.'" [Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.](#), 502 F.3d 91, 99 (2d Cir. 2007) (quoting [Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.](#), 222 F.3d 52, 60 (2d Cir. 2000)).<sup>25</sup>

In its review of the prior settlement approval, the Second Circuit concluded "that class members of the (b)(2) class were inadequately represented in violation of both [Rule 23\(a\)\(4\)](#) and the [Due Process Clause](#)." [Interchange Fees II](#), 827 F.3d at 231. The Second Circuit held that the "class representatives had interests antagonistic to those of some of the class members they were representing," because the (b)(3) damages class "would want to maximize cash compensation for past harm," while the (b)(2) injunctive class "would want to maximize restraints on network rules to prevent harm in the future," and thus, "[t]he class counsel and class representatives who negotiated and entered into [\*31] the Settlement Agreement were in the position to trade diminution of (b)(2) relief for increase of (b)(3) relief." [Id. at 233-34](#) (holding that the Supreme Court's decisions in [Amchem Prods. v. Windsor](#), 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) and [Ortiz](#), 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715, require separate representation when a class can be divided between members that hold present claims, and members that hold future claims). In addition, the Second Circuit held that the issue of unitary representation was exacerbated "because the [\*\*125] members of the worse-off (b)(2) class could not opt out." [Id. at 234](#).

The structural defect of unitary representation no longer exists — the [\(b\)\(2\)](#) and [\(b\)\(3\)](#) classes now have separate interim Class Counsel, with the Robins Group serving as interim [Rule 23\(b\)\(3\)](#) Class Counsel. (See Interim Class Counsel Order.) The (b)(2) and (b)(3) classes also now have separate class representatives, i.e., Class Plaintiffs. (See Equitable Relief Class Action Complaint ¶ 2; TAC ¶ 2.) The named [Rule 23\(b\)\(3\)](#) Class Plaintiffs seek to represent a finite class that desires and will receive the same type of relief — damages for past harm. (See Superseding Settlement Agreement ¶¶ 4, 27-28.) Thus, all [Rule 23\(b\)\(3\)](#) Class Plaintiffs and members of the [Rule 23\(b\)\(3\)](#) class will have the same incentive to "maximize cash compensation for past harm." [Interchange Fees II](#), 827 F.3d at 233. Moreover, the [Rule 23\(b\)\(3\)](#) class will have "opt out" rights. See [Fed. R. Civ. P. 23\(c\)\(2\)\(B\)\(v\)](#).

<sup>24</sup> Although both the [Rule 23\(e\)](#) and *Grinnell* factors are meant to guide a court's final approval analysis, as alluded to *supra*, in consideration of the new [Rule 23](#) likelihood standard applicable to the preliminary approval process, the Court looked to these final approval factors in determining whether the Court will likely grant final approval. The Court nevertheless recognizes that it cannot engage in a complete analysis at the preliminary approval stage, and, as other courts in this Circuit have held, "it is not necessary to exhaustively consider the factors applicable to final approval" at this stage. [In re Platinum & Palladium Commodities Litig.](#), No. 10-CV-3617, 2014 U.S. Dist. LEXIS 96457, 2014 WL 3500655, at \*12 (S.D.N.Y. July 15, 2014). Critical information as to whether a proposed settlement is fair, reasonable, and adequate, will be obtained through the notice and opt-out process, and the final fairness hearing.

<sup>25</sup> This adequate representation factor is nearly identical to the [Rule 23\(a\)\(4\)](#) prerequisite of adequate representation in the class certification context. As a result, the Court looks to [Rule 23\(a\)\(4\)](#) case law to guide its assessment of this factor. As a prerequisite to bringing a class action, [Rule 23\(a\)\(4\)](#) requires that "the representative parties will fairly and adequately protect the interests of the class." [Fed. R. Civ. P. 23\(a\)\(4\)](#); see also [Amchem Prods. v. Windsor](#), 521 U.S. 591, 592, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) ("To gain certification under [Rule 23\(b\)\(3\)](#), a class must satisfy the requirements of [Rule 23\(a\)](#), among them, that named class representatives will fairly and adequately protect class interests."). In addition, because this factor guides the Court's analysis of the procedural, as opposed to substantive fairness of the settlement, see [Fed. R. Civ. P. 23](#) advisory committee's note to 2018 amendment, the Court also looks to case law that assesses the procedural fairness of proposed settlements, see, e.g., [In re Giant Interactive Group., Inc. Securities Litigation](#), 279 F.R.D. 151, 160 (S.D.N.Y. 2011) (noting that when evaluating whether a proposed settlement is fair, reasonable, and adequate, "a Court must consider 'both the settlement's terms and the negotiating process leading to settlement,' that is, it must review the settlement for both procedural and substantive fairness," and noting that the *Grinnell* factors are used to guide a court's analysis of substantive fairness (quoting [Wal-Mart Stores](#), 396 F.3d at 116)).

For these and the following reasons, the Court finds that the bifurcation of the (b)(2) and (b)(3) classes and their Class Counsel sufficiently addresses the Second Circuit's concern and that this factor will likely weigh in favor of a grant of final approval.

#### A. Adequacy of class representatives

One of the purposes of assessing adequate representation is to "uncover conflicts [\*\*126] of interest between named parties and the class they seek to represent." *Amchem Prods., Inc.*, 521 U.S. at 625. "[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Wal-Mart Stores, Inc. v. Dukes ("Dukes")*, 564 U.S. 338, 348-49, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011) (citations and quotations omitted). The analysis of whether a class representative is adequate "is twofold: the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006). In addition to the adequate representation requirement of *Rule 23(a)(4)* and *Rule 23(c)(2)(A)*, "[t]he *Due Process Clause* . . . requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Interchange Fees II*, 827 F.3d at 231 (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)).

##### (1) The named *Rule 23(b)(3)* Class Plaintiffs suffer the same injury as the putative class members and have an interest in vigorous pursuit of the claims

The proposed *Rule 23(b)(3)* putative class consists of a group of merchants that accepted Visa-and/or Mastercard-branded cards at any point during a finite time period — from January 1, 2004 to the settlement preliminary approval date, i.e., January 24, 2019. (See Superseding Settlement Agreement ¶ 4.) The *Rule 23(b)(3)* Class Plaintiffs seek [\*\*127] to challenge the same allegedly unlawful conduct that they claim has harmed them — Defendants' imposition of "supracompetitive interchange and merchant-discount fees on purchases using Visa-and/or Mastercard-Branded cards, and anti-steering and other restraints that have injured them." (TAC ¶¶ 10-13, 15-18.) This alleged harm would apply to all members of the putative class.

The Second Circuit did not conclude that members of the *Rule 23(b)(3)* class were inadequately represented. Rather, the Second Circuit was concerned that the *Rule 23(b)(3)* Class Plaintiffs had *too much* incentive to maximize their own interests, at the expense of the interests of the (b)(2) class. See *Interchange Fees II*, 827 F.3d at 233-34. Because of the formal separation of the (b)(3) [\*32] and (b)(2) classes and named Class Plaintiffs, the Court finds that it is unlikely that the *Rule 23(b)(3)* Class Plaintiffs are operating at the expense of the putative class members.

The named *Rule 23(b)(3)* Class Plaintiffs represent a wide-range of business interests and experience, including internet-based photography finishing services, retail furniture, wholesale and retail consumer electronics, agricultural cooperative ownership and product supply of farm stores, gas stations, and convenience stores, wholesale optical [\*\*128] supplies, automotive transmission servicing, automobile parking, and shoe retail. (TAC ¶¶ 10-13, 15-18.) They have their principal places of business in California, Minnesota, New York, Florida, Pennsylvania, and Kansas. (*Id.*) All Class Plaintiffs currently operate businesses that continue to accept payment by Visa and Mastercard credit and debit cards. (*Id.*)

The *Rule 23(b)(3)* Class Plaintiffs therefore represent a diverse array of business locations and interests, but seek the same type of redress for the same type of harms. The Court will likely find at the final approval stage that the named *Rule 23(b)(3)* Class Plaintiffs adequately represent the putative class members.

##### (2) The *Rule 23(b)(3)* Class Plaintiffs' interests are not antagonistic to the putative class members

Generally, "not every potential disagreement between a representative and the class members will stand in the way of a class suit." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 145 (2d Cir. 2001) (citation and quotation marks omitted). "A conflict or potential conflict alone will not . . . necessarily defeat class certification — the conflict must be 'fundamental.'" *Denney*, 443 F.3d at 268 (citing *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d at 145 and holding that no conflict existed where all members of the class could be identified and those members had the opportunity to opt out, even [\*\*129] where the class representatives already knew the amount of IRS penalties leveled against them but members of the class did not).

The fundamental conflict identified by the Second Circuit no longer exists. The *Rule 23(b)(3)* Class Plaintiffs are no longer "in the position to trade diminution of (b)(2) relief for increase of (b)(3) relief," *Interchange Fees II*, 827 F. 3d at 234, because the classes have been separated, there is no overlap between the named representative Class Plaintiffs in the (b)(3) and (b)(2) classes, and the Superseding Settlement Agreement only provides for monetary, and not injunctive relief. In addition, all of the Class Plaintiffs are operating businesses that continue to be subject to the complained-of conduct by Defendants. They have every incentive to negotiate for the highest damages figure possible, especially as they will continue to incur the complained-of monetary injuries. See *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y. 2004) (finding class plaintiffs to be adequate representatives where "[a]ll share[d] the common goal of maximizing recovery.").

The Court further finds that the "conflict" raised by the Branded Operators — that certain putative class members may have competing claims — does not rise to the level of a "fundamental" conflict sufficient [\*\*130] for the Court to find that *Rule 23(b)(3)* Class Plaintiffs have not adequately represented the Branded Operators.<sup>26</sup> The Court agrees with *Rule 23(b)(3)* Class Counsel that the conflict does not amount to an "intra-class conflict," because the Superseding Settlement Agreement "does not treat groups of class members differently." (Class Counsel's Nov. 15 Response 2.)

[\*33] Rather, as Class Counsel notes, the Branded Operators' concerns appear to stem from a contractual issue regarding the ownership of claims. (*Id.*; see also Class Counsel's Nov. 23 Response at 1.) Thus, because the conflict is not between class members, but between entities disputing who has the right to claim class status, there is no intra-class conflict or inadequate representation; Class Counsel and Class Plaintiffs are not responsible to, and do not represent, the entity that loses the dispute over the right to claim settlement funds.

The main case relied upon by the Branded Operators is inapposite. The Branded Operators cite to *Amchem* and argue that "[a] settlement class cannot be certified where it includes class members with competing claims." (Mem. in Opp'n to Prelim. Approval 3, 3 n.6.) However, the [\*\*131] cited portion of *Amchem* discusses the need for separate representatives for subclasses, similar to the manner in which the Second Circuit discussed the need for separate representation in this case. (*Id.* at 3 n.6 (citing *Amchem Prod., Inc.*, 521 U.S. at 627 (citation omitted))). *Amchem* is not a case about *competing* claims. Rather, it is a case about different types, and risk, of injuries. Subclasses were deemed necessary in *Amchem* — a case about asbestos exposure where certification was sought for settlement purposes only — because of the disparity between the plaintiffs that were injured, and the plaintiffs that had been exposed to asbestos, but had not yet had any injury manifest. See *Amchem Prod., Inc.*, 521 U.S. at 609 ("class members in this case were exposed to different asbestos-containing products, in different ways, over

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<sup>26</sup> The Court acknowledges that the issue of competing claims is a genuine issue that will need to be addressed in the future. At the hearing on the Superseding Settlement Agreement, the Court heard from the parties on the matter, and expressed the belief that the issue could be taken care of through a subsequent administrative process. (Hrg Tr. 11:16-11:18.) The Court notes that a nearly identical issue arose in *In re Visa Check/Mastermoney Antitrust Litigation*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003). There, the court appointed a special master to resolve disputes over claims that did "not fit within the category of challenges contemplated by the Settlement Agreement and Plan of Allocation." See *In re Visa Check/Mastermoney Antitrust Litig.*, No. 96 CV-5238 (E.D.N.Y.), Order dated Jan. 19, 2006, Docket Entry No. 1244.

different periods, and for different amounts of time; some suffered no physical injury, others suffered disabling or deadly diseases.").<sup>27</sup>

For these reasons, the Court will likely find at the final approval stage, that the named [Rule 23\(b\)\(3\)](#) Class Plaintiffs' interests are not antagonistic to members of the class.

## B. Adequacy of class counsel

"A court reviewing a proposed settlement must pay close attention to the negotiating process, to ensure [\*\*132] that . . . plaintiffs' counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interests." [D'Amato, 236 F.3d at 85](#) (citation and internal quotations omitted); see also [Fed. R. Civ. P. 23](#) advisory committee's note to 2018 amendment ("the nature and amount of discovery in this or other cases, or the actual outcomes of other cases, may indicate whether counsel negotiating on behalf of the class had an adequate information base . . . ."). A district "[c]ourt must evaluate adequacy of representation by considering . . . whether class counsel is qualified, experienced, and generally able to conduct the litigation." [In re Glob. Crossing Sec. & ERISA Litig., 225 F.R.D. at 453](#) (citation omitted). In *D'Amato*, the Second Circuit upheld a district court's determination of adequacy of class counsel where the district court noted counsels' experience, involvement in other similar litigation, and knowledge in the area of complex class actions. See [id. at 85-86](#).

The Robins Group represented the entire consolidated class in the proceedings before Judge Gleeson. In holding that representation in the prior settlement was inadequate, the Second Circuit clarified that it "expressly d[id] not impugn the motives or acts of class counsel. [\*\*133] Nonetheless, class counsel was charged with an inequitable task." [Interchange Fees II, 827 F.3d at 234](#). As noted, the inadequacy resulted from unitary representation and the incentive to trade maximization of benefits for one class over benefits to the other class. [Id. at 236](#) ("Structural [\*34] defects in this class action created a fundamental conflict between the (b)(3) and (b)(2) classes and sapped class counsel of the incentive to zealously represent *the latter*." (emphasis added)).

In acknowledging the concerns raised by objectors to the Original Settlement Agreement, Judge Gleeson noted that the record "demonstrates beyond any reasonable doubt that the negotiations were adversarial and conducted at arm's length by extremely capable counsel." [Interchange Fees I, 986 F. Supp. 2d at 222](#). When weighing competing applications to become interim class counsel for the (b)(3) class after the Second Circuit's remand, Judge Orenstein concluded that:

in the circumstances of this litigation, the Robins Group is in the best position to continue to represent the interests of the Damages Class. They have already demonstrated their ability to work cooperatively with the court and with the other non-lead counsel, they have the support of a larger and more diverse group of clients, and those [\*\*134] clients collectively advance a broader array of the legal theories at issue in this litigation.  
(Interim Class Counsel Order 4.)

The Court agrees with this assessment. Although the Second Circuit held that Class Counsel's representation was inadequate, the structural barrier that created the conflict of interest has been removed. Since 2006, the Robins Group has ardently represented a variety of plaintiffs' groups in this action. (See Pretrial Order dated Feb. 24, 2006, Docket Entry No. 279.). All three law firms that comprise the Robins Group have extensive antitrust class

<sup>27</sup> In addition to citing *Amchem*, the Branded Operators also reference the Second Circuit's decision to overturn the prior settlement approval, to support their argument that the Superseding Settlement Agreement should not be preliminarily approved "because it includes class member with competing claims for settlement proceeds for the same merchant transactions." (See, e.g., Mem. in Opp'n to Prelim. Approval 7, 14.) As summarized in other Sections of this opinion the conflict recognized in the Second Circuit's decision concerned the issue of unitary representation for two separate classes, and involved concern over an entire class potentially receiving "nothing." This does not provide support for the Branded Operator's concern regarding competing class members' contractual or other rights to receive settlement funds.

action litigation experience. (See Mem. in Support re Co-Lead Counsel's Appl. for Continued Leadership of the [Rule 23\(b\)\(3\)](#) Class, Ex. A, Docket Entry No. 6665-1); see also [Godson v. Eltman, Eltman, & Cooper, P.C., No. 11-CV-764, 328 F.R.D. 35, 2018 U.S. Dist. LEXIS 182034, 2018 WL 5263071, at \\*4 \(W.D.N.Y. Oct. 23, 2018\)](#) (finding class counsel's representation to be adequate where class counsel had "significant experience litigating cases" in the relevant field and had served as counsel in numerous class actions). Class Counsel has also negotiated what they believe is the largest antitrust settlement in history. See [Wal-Mart Stores, 396 F.3d at 117](#) (noting that representation quality is determined best by looking at results and highlighting that plaintiffs' counsel had produced what was at the time the largest [\*\*135] antitrust settlement in history (internal citations omitted)).

In the representation before Judge Gleeson, the Robins Group engaged in discovery that resulted in "more than 400 depositions, the production and review of more than 80 million pages of documents, the exchange of 17 expert reports, and a full 32 days of expert deposition testimony." [Interchange Fees I, 986 F. Supp. 2d at 215](#). Since the Second Circuit's reversal, the Robins Group has engaged in new discovery efforts and has taken or participated in over 170 additional depositions, (*id.* ¶¶ 210-11), reviewed millions of additional documents, (*id.* ¶ 219), and facilitated the production of updated expert reports, (*id.* ¶¶ 224-28). In addition, new negotiations between the [Rule 23\(b\)\(3\)](#) Class Plaintiffs and the Defendants lasted for over a year. (Wildfang Decl. ¶¶ 232-39.)

For these reasons, the Court will likely deem the Robins Group's representation to be adequate at the final approval stage.<sup>28</sup>

## 2. Arms-length negotiations

"A 'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" [\*\*35] [Wal-Mart Stores, 396 F.3d at 116](#) (quoting Manual for Complex Litigation (Third) § 30.42 (1995)); cf. Ann. Manual for Complex Litigation (Fourth) § 21.612 (2018) ("If, by contrast, the [\*\*136] case is filed as a settlement class action . . . with little or no discovery, it may be more difficult to assess the strengths and weaknesses of the parties' claims and defenses.").

Although the Second Circuit held that "even 'an intense, [protracted], adversarial mediation, involving multiple parties,' including 'highly respected and capable' mediators and associational plaintiffs, does not 'compensate for the absence of independent representation,'" the Court nevertheless acknowledged that "a court-appointed mediator's involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure." [Interchange Fees II, 827 F.3d at 235](#) (first quoting [In re Literary Works in Electronic Databases Copyright Litigation, 654 F.3d 242, 252-53 \(2d Cir. 2011\)](#); and then quoting [D'Amato, 236 F.3d at 85](#)); see also 2 McLaughlin on Class Actions § 6:7 (15th ed. 2018) ("A settlement reached after a supervised mediation receives a presumption of reasonableness and the absence of collusion." (citing cases)).

As set forth above, the parties have engaged in protracted discovery for over a decade. In addition, two highly qualified mediators have assisted both sets of settlement negotiations in this action. The Honorable Edward A. Infante, a former Chief Magistrate Judge and current mediator, became involved [\*\*137] in 2008 to mediate a first round of settlement negotiations in this action. (Infante Decl. ¶ 1-2.) Eric Green, a retired Boston University School

<sup>28</sup> The Court finds the Branded Operators' argument that Class Counsel has not adequately represented the Branded Operators unconvincing. (See generally Mem. in Opp'n to Prelim. Approval 15-18.) The Branded Operators' argument rests on the assumption that "[C]lass [C]ounsel is inherently conflicted based on its representation of a class that contains dueling class members." (*Id.* at 15.) As elaborated upon elsewhere in this opinion, the Court finds that disagreement over the right to the funds does not amount to an intra-class conflict that would affect the Court's adequate representation analysis. The Branded Operators' argument assumes that they are class members deserving of Class Counsel's representation, which may not be the case, pending the outcome of any dispute over who has rights to settlement funds. Class Counsel does not have a duty to represent the Branded Operators in their dispute with other entities over which entities hold those rights.

of Law professor and current full-time mediator, became involved in 2009 to mediate a first round of settlement negotiations for a subset of Plaintiffs in this action.<sup>29</sup> (Green Decl. ¶ 1, 5-6.)

Since the separation of the (b)(2) and (b)(3) classes, both mediators have been involved "in the (b)(3) class action to restart mediation for the damage claims only." (Infante Decl. ¶ 12.) Over the course of more than a year, the parties have engaged in twelve "mediation sessions," including six day-long sessions. (See *id.* ¶¶ 13-25.) On June 2, 2018, the mediators issued a mediators' proposal to the parties, and on June 5, 2018, received "unanimous consent" from the parties to move forward. (Infante Decl. ¶ 26; Green Decl. ¶ 11.) "The settlement negotiations were extended, extraordinarily complicated, and contentious. On several occasions the discussions were on the verge of collapsing." (See Infante Decl. ¶ 31.) "[C]ounsel involved in these mediation sessions are among the most knowledgeable, sophisticated and accomplished attorneys in the fields [\*\*138] of antitrust, class actions, and complex litigation." (Green Decl. ¶ 10.) Both mediators state that *Rule 23(b)(3)* class counsel at all times emphasized the need to be independent from any *Rule 23(b)(2)* class claims resolution, and at no time were (b)(2) Class Counsel involved in the *Rule 23(b)(3)* class negotiations. (Infante Decl. ¶ 30; Green Decl. ¶ 12.)

Accordingly, the Court finds that this factor will likely weigh in favor of granting final approval.

### **3. Adequate relief for the class**

In assessing whether the settlement provides adequate relief for the putative class under *Rule 23(e)(2)(C)*, the Court is directed to consider:

- (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, if required; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under *Rule 23(e)(3)*.<sup>30</sup>

[\*36] *Fed. R. Civ. P. 23(e)(2)(C)(i-iv)*. As one district court has noted, "[i]f the class settlement does not provide effectual relief to the class . . . then the class representatives have failed in their duty under *Rule 23* to fairly and adequately protect the interests of the class." *Scott v. Weig*, No. 15-CV-9691, 2018 U.S. Dist. LEXIS 83645, 2018 WL 2254541, at \*4 (S.D.N.Y. May 17, 2018) (quoting *In re Subway Footlong Sandwich Marketing and Sales Practice Litig.*, 869 F.3d 551, 556 (7th Cir. 2017) (citation omitted)).

The [\*\*139] first factor — costs, risks, and delay of trial and appeal — subsumes several *Grinnell* factors, which the Court considers below. The Court also considers the proposed release from liability as an additional factor under this section, as it affects the determination of the fairness, reasonableness, and adequacy of class relief.

For the following reasons, the Court finds that this factor will likely weigh in favor of granting final approval.

#### **A. Costs, risks, and delay of trial and appeal**

Under this *Rule 23(e)(2)* factor, "courts may need to forecast the likely range of possible classwide recoveries and the likelihood of success in obtaining such results." *Fed. R. Civ. P. 23* advisory committee's note to 2018

<sup>29</sup> Green also served as a settlement mediator in *In re Visa Check/Mastermoney Antitrust Litigation*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003), a class action antitrust case brought by merchants against Visa and Mastercard, where the Second Circuit affirmed the district court's approval of the settlement and plan of allocation. See also *Wal-Mart Stores*, 396 F.3d at 117 (affirming the district court's agreement with Green's opinion that the proceedings operated with procedural integrity).

<sup>30</sup> As to the fourth factor, the Court confirmed at the hearing that there are no agreements under *Rule 23(e)(3)* that the Court must review. (Hrg Tr. 33:9-33:17.)

amendment. This assessment implicates several *Grinnell* factors, including: (i) the complexity, expense and likely duration of the litigation; (ii) the risks of establishing liability; (iii) the risks of establishing damages; and (iv) the risks of maintaining the class through the trial. The Court uses these *Grinnell* factors to guide its assessment of whether the Court will likely find that this [Rule 23\(e\)\(2\)](#) factor will weigh in favor of granting final approval.

### (1) The complexity, expense, and likely duration of the litigation

[\*\*140] "Settlement is favored if settlement results in 'substantial and tangible present recovery, without the attendant risk and delay of trial.'" [Sykes v. Mel Harris & Assocs., LLC, No. 09-CV-8486, 2016 U.S. Dist. LEXIS 74566, 2016 WL 3030156, at \\*12 \(S.D.N.Y. May 24, 2016\)](#) (quoting [In re Am. Bank Note Holographics, Inc., 127 F. Supp. 2d 418, 425 \(S.D.N.Y. 2001\)](#)). "[C]lass action suits' in general 'have a well-deserved reputation as being most complex.'" [In re Sumitomo Copper Litig., 189 F.R.D. 274, 281 \(S.D.N.Y. 1999\)](#) (quoting [Cotton v. Hinton, 559 F.2d 1326, 1331 \(5th Cir. 1977\)](#)). In particular, "[f]ederal antitrust cases are complicated, lengthy, and bitterly fought." [Wal-Mart Stores, 396 F.3d at 118](#) (quoting [Weseley v. Spear, Leeds & Kellogg, 711 F. Supp. 713, 719 \(E.D.N.Y. 1989\)](#)).

This case is complex and costly. The present litigation has been active for over a decade, and has involved litigation in both district and appellate courts. The proposed class include millions of putative members, and encompasses alleged injuries from 2004, approximately fourteen years ago. (See Superseding Settlement Agreement ¶ 4.) The first phase of MDL discovery alone involved 370 depositions, and multiple expert reports, and according to Class Counsel, "Class Plaintiffs have reviewed and analyzed more than 65 million pages of documents." (Wildfang Decl. ¶¶ 53, 115; Mem. in Supp. of Prelim. Approval 13.) Class Counsel's lodestar figure of attorneys' fees through November of 2012 approximated \$160 million. [In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 991 F. Supp. 2d 437, 439 \(E.D.N.Y. 2014\)](#). In the litigation prior to the Original Settlement Agreement, the parties filed several motions, including *Daubert* motions, class certification motions, motions to dismiss, and motions for summary judgment, which the Court never decided. See [Interchange Fees I, 986 F. Supp. 2d at 222](#). "[E]ven if [Class] Plaintiffs were to prevail at trial, post-trial motions and the potential [\*\*141] for appeal could prevent the class members from obtaining any recovery for several years, if at all." [Sykes, 2016 U.S. Dist. LEXIS 74566, 2016 WL 3030156, at \\*12](#) (citations omitted).

Because of the complexity and difficulty of the issues in this case, it requires, and would continue to require, costly counsel and experts, and a wealth of time. This subfactor will likely weigh in favor of granting final approval.

### (2) The risks of establishing liability

"This factor does not require the Court to adjudicate the disputed issues or [\*37] decide unsettled questions; rather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." [In re Glob. Crossing Sec. & ERISA Litig., 225 F.R.D. at 459](#) (citing [In re Austrian & German Bank Holocaust Litig., 80 F. Supp. 2d 164, 177 \(S.D.N.Y. 2000\)](#), aff'd sub nom. [D'Amato, 236 F.3d 78](#)). "Courts approve settlements where plaintiffs would have faced significant legal and factual obstacles to proving their case." *Id.*

Based on the fact that the parties have briefed motions to dismiss, *Daubert* motions, class certification motions, and motions for summary judgment, Class Counsel has had to consider the requirements for and risks of establishing liability in this case. If the case were to proceed to trial, many of these motions would have to be relitigated, and they present challenges to recovery. Indeed, "[t]hese motions would have [\*\*142] to be briefed and argued again, given the significant legal and factual developments, and additional discovery since their original briefing and argument over six years ago." (Mem. in Supp. of Prelim. Approval 14.)

Moreover, Defendants have previously raised affirmative defenses to liability (and have moved to dismiss the complaint), which also weighs in favor of settlement.<sup>31</sup> (See generally Mem. in Support of Mot. to Dismiss Second Consolidated Am. Class Action Complaint, Docket Entry No. 1171); see also *Ayzelman v. Statewide Credit Servs. Corp.*, 242 F.R.D. 23, 27 (E.D.N.Y. 2007) (finding that the risk of establishing liability weighed in favor of settlement approval where "defendants . . . presented several affirmative defenses through which they may avoid liability.").

In assessing the risks of further litigation, Charles B. Renfrew<sup>32</sup> has highlighted Defendants' intention to exclude as inadmissible one of Plaintiffs' economic experts, warning that:

[i]f this testimony is excluded there may be little, if any, evidence to establish plaintiffs' theory that they suffered injury or measurable damages as a result of the establishment of the default interchange rates and merchant acceptance rules, or that the establishment of definitive interchange rates and merchant acceptance rates had an anti-competitive effect in any marked degree to Class Plaintiffs.

(Decl. of Charles B. Renfrew as to the Risks of Litigation ("Renfrew Decl.") ¶¶ 33-34, Docket Entry No. 2111-4.) Renfrew raises other hurdles that the Class Plaintiffs would likely face, including the effect that the Visa and Mastercard initial public offerings would have on their theories of anticompetitive behavior. (*Id.* ¶¶ 49-55); see also *Interchange Fees I*, 986 F. Supp. 2d at 226 (noting that after the commencement of the initial action, "both Visa and MasterCard came out from under the control of their member banks. The IPOs that accomplished that result strengthened the defendants' argument that they were no longer structural [\*\*144] or 'walking' conspiracies, and thus that the setting of interchange fees cannot constitute horizontal price-fixing.").<sup>33</sup> Renfrew further notes the [\*38] issue of whether the release from a prior settlement agreement covers the scope of the Class Plaintiffs' claims. (Renfrew Decl. ¶¶ 56-64). Although Renfrew does not assess the merits of Class Plaintiffs' or Defendants' arguments, and equally emphasizes that litigation risks exist for Defendants, his submission highlights that there is substantial litigation risk for Class Plaintiffs'.

Similarly, Dr. Alan O. Sykes, the independent economic expert appointed by Judge Gleeson for the purposes of assessing the Original Settlement Agreement, highlighted the litigation risks that Plaintiffs will likely face, concluding that Class Plaintiffs "face a substantial probability of securing little or no relief at the conclusion of trial." (Sykes Report 3.) In particular, Dr. Sykes found that the Class Plaintiffs would "face considerable difficulty" in establishing that certain practices such as default interchange and honor-all-card rules cause anticompetitive harm that outweighs any procompetitive benefits, if the "rule of reason" rather than the "per [\*\*145] se rule" were ultimately applied to determine liability, which is yet another hurdle that Class Plaintiffs would face in litigating their case.<sup>34</sup> (*Id.*

<sup>31</sup> As summarized by Class Counsel, Defendants previously moved to dismiss on the following bases:

(i) that the release in the *In re Visa Check* case released all of Class Plaintiffs' damages and injunctive-relief claims; (ii) that the complaint failed to allege a "restraint on trade" sufficiently to state a claim under § 1 of the *Sherman Act*; (iii) that the complaint failed to allege a "plausible" inter-network conspiracy under *Bell Atlantic v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); (iv) that *Twombly* barred the complaint's allegations of post-IPO conspiracies within Visa and Mastercard; and (v) that Class Plaintiffs' claims were barred by the doctrine [\*\*143] of *Illinois Brick*.

(Wildfang Decl. ¶ 107.) Although raising affirmative defenses in and of itself weighs in favor of settlement, the Court does not take a position on whether Defendants would be successful on such defenses. Instead, the Court simply acknowledges that the existence of affirmative defenses presents risk to Class Plaintiffs.

<sup>32</sup> In support of the Original Settlement Agreement, Class Plaintiffs submitted a declaration from former District Judge Charles B. Renfrew, assessing the risks of further litigation. (See Decl. of Charles B. Renfrew as to the Risks of Litigation ("Renfrew Decl."), Docket Entry No. 2111-4.)

<sup>33</sup> "[I]n 2008 and 2006, respectively, initial public offerings ('IPOs') converted [Visa and Mastercard] from a consortium of competitor banks into single-entity, publicly traded companies with no bank governance." *Interchange Fees I*, 986 F. Supp. 2d at 215.

<sup>34</sup> In weighing antitrust liability, courts apply either the rule of reason, or the per se rule in determining whether restraints of trade violate *Section 1* of the Sherman Act. Under a rule of reason analysis, courts weigh whether the alleged anticompetitive harm

at 3, 7-8.) Class Plaintiffs dispute the findings of Dr. Sykes' report, and the Court draws no conclusions based on his findings. However, Dr. Sykes' report and his conclusion that the putative class would "face considerable difficulty" indicates the risk Class Plaintiffs face in litigating these claims.

Further, since the prior motions were briefed and argued, several important legal and factual developments may increase the risk that Class Plaintiffs face in establishing liability. Of particular concern to Class Counsel is the Supreme Court's recent decision in *Ohio v. American Express Company*, U.S., 138 S. Ct. 2274, 201 L. Ed. 2d 678 (2018) ("American Express"). Class Counsel states that the case "represents the first time the Supreme Court has analyzed the conduct of a credit card network towards both its cardholders and merchants as a single so-called two-sided market, not as two separate markets (cardholders and merchants). For the first time, the Court applied a market analysis where changes on one side of the platform, say merchant [\*\*146] fees, were analyzed for their impact on the other side of the platform, cardholder products." (Mem. in Supp. of Prelim. Approval 14.) Thus, Class Plaintiffs would need to prove harm in this new, two-sided market, consisting of both merchants and cardholders, and would perhaps face greater difficulty in proving that the procompetitive justifications of interchange [\*39] fees outweigh their harm.<sup>35</sup> (See, e.g., Sykes Report 18 ("an important body of theoretical work on two-sided markets suggests that it may be socially desirable for prices to be higher on the side of the market that is less price sensitive."); *id. at 24* ("a question arises as to how damages should be conceptualized in a two-sided market").)

In addition to the Supreme Court's American Express decision, other developments in the payment card markets may increase Class Plaintiffs' legal uncertainty and affect whether Class Plaintiffs will be able to prove ongoing antitrust claims and injuries. For example and as noted supra n.7, the *Durbin Amendment to the Dodd-Frank Act* passed in 2010, which creates a cap on interchange fees for debit card transactions and "other important relief, such as requiring issuing banks to enable debit cards to be processed over at least two competing [\*\*147] networks, allowing merchants to provide discounts to consumers for payment by cash, check, or debit card, in lieu of credit cards, and allowing merchants to place a minimum purchase amount of up to \$10.00 on credit-card transactions." (Wildfang Decl. ¶ 91.) Further, a 2008 United States Department of Justice investigation into the rules and conduct of Visa and Mastercard "led to a consent decree that provided another important benefit to merchants by reforming . . . Visa and MasterCard's point-of-sale rules." (*Id.* ¶ 98). While the Court makes no finding as to how these issues could ultimately affect Class Plaintiffs' case, it finds that these developments introduce additional risks to Class Plaintiffs.

For these reasons, the Court finds that this subfactor will likely weigh in favor of granting final approval.

outweighs the procompetitive benefits of the behavior at issue. See *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007) ("The rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and those with procompetitive effect that are in the consumer's best interest."); see also *Interchange Fees I*, 986 F. Supp. 2d at 227 (noting that in this action, "the prospect that [the networks' rules] anticompetitive effects remain outweighed by [their] procompetitive ones is real."). In contrast, some antitrust restraints are deemed per se unlawful. See *United States v. Apple, Inc.*, 791 F.3d 290, 314 (2d Cir. 2015) (noting that in contrast to "vertical" agreements, "horizontal" agreements . . . which involve coordination 'between competitors at the same level of [a] market structure,' . . . with limited exceptions, [are deemed] per se unlawful." (first citing and quoting *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 182 (2d Cir. 2012); and then citing *Leegin Creative Leather Prod. Inc.*, 551 U.S. at 893)). Although for the purposes of this opinion the Court need not make a finding as to whether the rule of reason or per se rule would apply in determining antitrust liability, the Court notes that Judge Gleeson found that "the setting of default interchange fees would almost certainly be evaluated under the Rule of Reason." *Interchange Fees I*, 986 F. Supp. 2d at 227. Similarly, in *Ohio v. Am. Express Co.*, both parties acknowledged, and the Supreme Court affirmed, that American Express' antisteering provisions constituted vertical restraints "i.e., restraints imposed by agreement between firms at different levels of distribution," that should be assessed under the rule of reason test. *Ohio v. Am. Express Co. ("American Express")*, 138 S. Ct. at 2284 (internal quotation marks and citations omitted); see also *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988) (noting that given the potential for "significant procompetitive benefits," standard-setting by private associations is typically evaluated under the rule of reason).

<sup>35</sup> The Court expressly does not draw any conclusion regarding how the Supreme Court's decision in American Express might impact Class Plaintiffs' claims if the case were to proceed to trial, and only acknowledges that the case affects the overall assessment of risk.

### (3) The risks of establishing damages

"[T]he history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal." [Wal-Mart Stores, 396 F.3d at 118](#); see also [In re Sumitomo Copper Litig., 189 F.R.D. at 283](#) ("Even outside of the particularly risky proof of damages in commodity price manipulation cases, the history of litigation is replete [\*\*148] with cases in which plaintiffs succeeded at trial on liability, but recovered no damages, or only disappointing damages, at trial, or on appeal." (citing cases)).

As Judge Gleeson noted in his final approval decision, "[e]ven if liability is established, Class Plaintiffs would still face the problems and complexities inherent in proving damages to the jury . . . . These damages-related issues may not be insurmountable, but they are formidable." [Interchange Fees I, 986 F. Supp. 2d at 229](#). The parties previously submitted competing expert reports on damages, and at a trial, damages would likely be heavily contested. Dr. Sykes concluded that "plaintiffs face considerable difficulty in proving their damages . . . , " (Sykes Report 3), and that the approaches they used would be "subject to substantial challenges," (*id. at 23-25*). In assessing the risks of proving damages, former Judge Renfrew also predicted that "[i]t will be a battle of experts . . ." (Renfrew Decl. ¶ 33.) He noted that "Defendants have moved to exclude as inadmissible, the opinion of plaintiffs' economic expert, Dr. Alan S. Frankel regarding . . . injury and damages attributed to the challenged conduct of defendants . . . . Dr. Frankel's testimony is highly supportive of [\*\*149] Class Plaintiffs' theory and is some of the strongest evidence that they have as to essential elements of their antitrust claims."<sup>36</sup> (*Id.*)

Based on the opinions of multiple experts, there will be risks associated with establishing damages in this case. The Court finds that this subfactor will likely weigh in favor of granting final approval.

### (4) The risks of maintaining the class through the trial

Although the "risk of maintaining a class through trial is present in [every] [\*40] class action," see [Guippone v. BH S&B Holdings LLC, No. 09-CV-1029, 2016 U.S. Dist. LEXIS 134899, 2016 WL 5811888, at \\*7 \(S.D.N.Y. Sept. 23, 2016\)](#) (citation omitted), "this factor [nevertheless] weighs in favor of settlement" where "it is likely that defendants would oppose class certification" if the case were to be litigated, [Garland v. Cohen & Krassner, No. 08-CV-4626, 2011 U.S. Dist. LEXIS 136622, 2011 WL 6010211, at \\*8 \(E.D.N.Y. Nov. 29, 2011\)](#) (citation omitted); see also [In re Bear Stearns Companies, Inc. Sec., Derivative, & ERISA Litig., 909 F. Supp. 2d 259, 268-69 \(S.D.N.Y. 2012\)](#) ("The risk that Defendants could in fact succeed in their efforts to decertify the class militates in favor of settlement approval.").

Class Plaintiffs previously moved for class certification over Defendants' objection, but the Court never ruled on the motion, instead approving the Original Settlement Agreement. If the case were to proceed to trial, Defendants could — and likely would — move for decertification of any class that the Court might ultimately certify. See [Fed. R. Civ. P. 23\(c\)\(1\)\(C\)](#) ("An order that grants [\*\*150] or denies class certification may be altered or amended before final judgment."); (Superseding Settlement Agreement ¶ 4 ("Defendants will not oppose, the Court's certification of a settlement class, for settlement purposes *only*" (emphasis added)); Superseding Settlement Agreement ¶ 64(e) (noting that in the event of termination, "Defendants shall revert to their position before the execution of the . . . [Superseding Settlement Agreement], including with respect to the appropriateness of class certification.")) Although Class Counsel has provided enough information for the Court to determine that it will likely be able to certify the class at the final approval stage for settlement purposes, there is no guarantee that the class could be certified if the parties proceeded with the litigation, and Defendants have indicated that they are only consenting to class certification for the purposes of settlement. See, e.g., [Reade-Alvarez v. Eltmann, Eltmann, & Cooper, P.C., No. 04-CV-2195, 2006 U.S. Dist. LEXIS 89226, 2006 WL 3681138, at \\*6 \(E.D.N.Y. Dec. 11, 2006\)](#) ("The parties

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<sup>36</sup> The Court notes that the Supreme Court's recent decision in [American Express, 138 S. Ct. 2274, 201 L. Ed. 2d 678](#), may increase the difficulty Class Plaintiffs face in proving damages.

stipulated to class certification for settlement purposes only. If the class action were litigated, however, it is likely that defendants would oppose certification." (citation omitted)); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 476-77 (S.D.N.Y. 1998) (noting that "there is no guarantee that this class [\*\*151] would not be decertified before or during trial" and stating that "if the Class were to be decertified at trial, or if class certification were to be reversed on appeal, the class members (other than a few dozen plaintiffs) would recover nothing at all").

For these reasons, the Court finds that this subfactor will likely weigh in favor of granting final approval.

## B. Effectiveness of distributing relief to the class

This factor requires courts to look at "the method of processing class-member claims." *Fed. R. Civ. P. 23(e)(2)(C)(ii)*. "A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." *Fed. R. Civ. P. 23* advisory committee's note to 2018 amendment. The method used in the present action is set forth primarily in the Plan of Administration and Distribution. (Plan of Administration and Distribution.)

"To warrant approval, the plan of allocation must also meet the standards by which the settlement was scrutinized — namely, it must be fair and adequate . . . An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005) (internal citations and quotation marks omitted). [\*\*152] "[N]umerous courts have held . . . [that] a plan of allocation need not be perfect." *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, No. 05-CV-10240, 2007 U.S. Dist. LEXIS 57918, 2007 WL 2230177, at \*11 (S.D.N.Y. July 27, 2007) (collecting cases).

Class Counsel, who are experienced and competent in complex class actions, prepared the Plan of Administration and Distribution. Under its terms, the Class Administrator will estimate the interchange fees paid by each claimant during the class period, and each claimant will receive a *pro rata* share of the settlement fund based on its interchange fees paid. (Plan of Administration and Distribution [\*41] I-2.) Claimants will have the opportunity to "contest the accuracy of the statement or estimates" made by the Class Administrator. (See *id.* at I-7, 8, 13.) If the Court grants final approval, and once claims are estimated, the Class Administrator will disseminate a claim form. (*Id.* at I-10.) According to Class Counsel, the majority of the claim form can be "pre-populated" with data provided by Visa and potentially other Defendants. (Mem. in Supp. of Prelim. Approval 40.) Once a claim form is received, the Class Administrator will commence its audit, and "[c]laimants whose claims are denied, or who disagree with the final calculation of their claims, may challenge such denials or final calculations [\*\*153] in writing, together with supporting documentation, mailed or emailed to the Class Administrator within thirty days after receipt of the notice of the denial or final calculation . . . ." (See Plan of Administration and Distribution I-13.) A website containing relevant documents and forms in multiple languages, and telephone support will be available to "obtain information and request documents related to the claims process." (See *id.* at I-13, 14.)

The Court finds that at this stage, the Plan of Administration and Distribution appears to be an effective form of relief distribution, and that this factor will likely weigh in favor of granting final approval. See *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 519 (E.D.N.Y. 2003) (approving allocation plan where "Class members will receive an award of money from the [settlement funds] directly proportional to their debit and credit purchase volume (as well as online debit transactions) during the Class period"); *Shapiro v. JPMorgan Chase & Co.*, No. 11-CV-7961, 2014 U.S. Dist. LEXIS 37872, 2014 WL 1224666, at \*13 (S.D.N.Y. Mar. 24, 2014) (approving an allocation plan where the settlement amount, less administration costs, would be distributed on a *pro rata* basis of net losses); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 475 (S.D.N.Y. 2009) (same).

## C. The terms of any proposed award of attorneys' fees

Class Counsel "intend to apply for an Attorneys' Fee Award in a reasonable amount not to [\*\*154] exceed ten percent (10%) of the Total Cash Consideration and for Expense Awards comprising all reasonable expenses and costs incurred not to exceed \$40 million." (Superseding Settlement Agreement ¶ 57.)

"Courts may award attorneys' fees in common fund cases under either the 'lodestar' method or the 'percentage of the fund' method." [Wal-Mart Stores, 396 F.3d at 121](#) (citing [Goldberger, 209 F.3d 43](#)). However, "[t]he trend in this Circuit is toward the percentage method, which 'directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.'" *Id.* (internal citation omitted) (quoting [In re Lloyd's Am. Trust Fund Litig., No. 96-CV-1262, 2002 U.S. Dist. LEXIS 22663, 2002 WL 31663577, at \\*25 \(S.D.N.Y. Nov. 26, 2002\)](#)). Although the percentage method is an appropriate method by which to award attorneys' fees, the lodestar method "remains useful as a baseline even if the percentage method is eventually chosen." [Goldberger v. Integrated Res., Inc., 209 F.3d 43, 50 \(2d Cir. 2000\)](#).

In cases with large settlement awards, courts have noted that smaller percentage awards of attorneys' fees are reasonable. See, e.g., [Wal-Mart Stores, 396 F.3d at 106, 123](#) (upholding a district court's award of \$220,290,160.44, which amounted to 6.5 percent of a \$3.05 billion settlement fund, or a 3.5 multiplier of the lodestar amount, and noting that "the sheer size of the instant fund makes a smaller percentage [\*\*155] appropriate"); see also [Goldberger, 209 F.3d at 52-53](#) (holding that a percentage fee award of roughly four percent did not constitute an abuse of discretion, reasoning that "empirical analyses demonstrate that in cases like this one, with recoveries of between \$50 and \$75 million, courts have traditionally accounted for these economies of scale by awarding fees in the lower range of about 11% to 19%" (citations omitted)); Ann. Manual for Complex Litigation (Fourth) § 14.121 (2018) (noting that in "mega-cases" such as this, where "large settlements or awards serve as the basis for calculating a percentage, courts have often found considerably lower percentages of recovery to be appropriate." (citing [Krell v. Prudential Ins. Co. of Am. \(In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions\), 148 F.3d 283, 339-40 \(3d Cir. 1998\)](#)).

[\*42] The proposal by Class Counsel to seek up to ten percent of any settlement is comparable to the percentage of attorneys' fees previously awarded by Judge Gleeson in this action.<sup>37</sup> See [In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 991 F. Supp. 2d at 439-40](#) (granting a \$544.8 award of attorneys' fees and a \$27,037,716.97 request for expenses where the settlement fund after reductions for opt outs amounted to approximately \$5.7 billion).<sup>38</sup> The Court is aware that [Rule 23\(b\)\(3\)](#) Class Counsel have expended enormous time and effort in litigating this action and should be rewarded for those efforts.<sup>39</sup>

<sup>37</sup> Judge Gleeson based his award in part on the "enormous" risk that Class Counsel undertook in bringing the litigation. [In re Payment Card Interchange Fee, 991 F. Supp. 2d at 441](#). He also found the injunctive relief that accompanied the monetary fund to weigh in favor of a larger attorney fee award because "the settlement constitutes a significant step toward remedying the merchants' complaints about interchange rates in Visa and MasterCard credit card transactions . . . . [and because] the merchants' newly acquitted ability to surcharge the use of credit cards at the product level has great value." *Id.*; *id. at 442* ("When the rules changes are combined with the massive damages fund, the settlement must be labeled a significant success."). He determined that a lodestar multiplier of 3.41, for a lodestar amount of approximately \$160 million, was reasonable. *Id. at 447-48*.

<sup>38</sup> While Class Counsel's representation that they will seek "up to ten percent" of the fund for attorneys' fees is not unreasonable, the Court notes that case law suggests that larger settlements warrant lower percentages of attorneys' fee awards. Because "up to ten percent" suggests that the amount Class Counsel will seek could vary from one through ten percent, this factor does not weigh against granting preliminary approval of the settlement.

<sup>39</sup> Although on appeal the Second Circuit noted that "Class [C]ounsel stood to gain enormously if they got the deal done," [Interchange Fees II, 827 F.3d at 234](#), the Court was concerned with Class Counsel's lack of financial motivation to achieve greater gains for the (b)(2) class because "counsel got more money for each additional dollar they secured for the (b)(3) class." *Id.* Such a conflict no longer exists, and Class Counsel's sole duty in negotiating the current settlement is to maximize recovery for the (b)(3) class.

Accordingly, the Court finds that this subfactor **[\*\*156]** does not weigh against preliminary approval. The Court will engage in a full analysis at the final approval stage or thereafter, taking into consideration the "mega-case" nature of the suit, as well as the six *Goldberger* factors.<sup>40</sup>

#### **D. Release from liability**

"The law is well established in this Circuit and others that class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct."<sup>41</sup> [Wal-Mart Stores, 396 F.3d at 107](#) (citing [TBK Partners, Ltd. v. W. Union Corp., 675 F.2d 456, 460 \(2d Cir. 1982\)](#)); see also [TBK Partners, Ltd. v. W. Union Corp., 675 F.2d at 460](#) (setting forth the "identical factual predicate" standard and noting that the Court had "previously 'assume(d) that a settlement could properly be framed so as to prevent class members from subsequently asserting claims relying on a legal theory different from that relied upon in the class action complaint but depending upon the very same set of facts.'") (alteration in original) (quoting [National Super Spuds, Inc. v. New York Mercantile Exchange, 660 F.2d 9, 18 n.7 \(2d Cir. 1981\)](#)).

"Broad class action settlements are common, since defendants and their cohorts would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the country." **[\*43]** [Wal-Mart Stores, 396 F.3d at 106](#). However, releases cannot be boundless; "[p]laintiffs in **[\*\*157]** a class action may release claims that were or could have been pled in exchange for settlement relief' . . . [but] this authority 'is limited by the 'identical factual predicate' and 'adequacy of representation' doctrines.'" [Interchange Fees II, 827 F.3d at 236-37](#) (quoting [Wal-Mart Stores, 396 F.3d at 106](#)). Courts have denied preliminary approval where releases from liability are deemed to be overly broad. See, e.g., [Oladapo, 2017 U.S. Dist. LEXIS 187299, 2017 WL 5956907, at \\*15](#) (taking issue with the release for using the phrase "similar conduct" and finding it unacceptable that "the proposed release would extend to all claims that arise out of or relate to 'the conduct alleged in the Complaints or similar conduct.'") (quoting the release)); [Karvaly v. eBay, Inc., 245 F.R.D. 71, 88 \(E.D.N.Y. 2007\)](#) (expressing dismay that "[a]s written, the release would constitute a waiver of claims completely unrelated to this action that could be brought under any of the statutes or common-law theories that are alleged in the Second Amended Complaint.").

In vacating the prior settlement approval, the Second Circuit expressed concern over the Original Settlement Agreement's broad release provisions, noting that Class Plaintiffs' authority to "release claims that were or could have been pled in exchange for settlement relief' . . . 'is limited by the 'identical factual **[\*\*158]** predicate' and 'adequacy of representation' doctrines.'" [Interchange Fees II, 827 F.3d at 236-37](#) (quoting [Wal-Mart Stores, 396 F.3d at 106](#)).

##### **(1) The releases in the Original Settlement Agreement**

In the Original Settlement Agreement negotiated on behalf of both the (b)(2) and (b)(3) classes, the parties negotiated a separate release for each class. (See Original Settlement Agreement ¶¶ 31-38, 66-74.) Both releases required the classes to "expressly and irrevocably waive, and fully, finally, and forever settle, discharge and release

<sup>40</sup> Courts in the Second Circuit apply the six [Goldberger v. Integrated Res., Inc., 209 F.3d 43 \(2d Cir. 2000\)](#) factors in determining whether a fee is reasonable in common fund cases: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." [Id. at 50](#) (citation and quotation marks omitted). The Court also notes that it will not necessarily adopt the graduated schedule that Judge Gleeson developed to calculate the previous attorney fee award. See [In re Payment Card Interchange Fee, 991 F. Supp. 2d at 445](#).

<sup>41</sup> Although this is not an official [Rule 23\(e\)\(2\)](#) or Grinnell factor, analysis of the release provision of the Superseding Settlement Agreement will assist in determining whether relief is adequate for the class. The Court also separately discusses the release provision because of the concerns raised by the Second Circuit in its decision to vacate the prior settlement approval.

[Defendants] from any and all manner of claims, demands, actions, suits and causes of action, whether individual, class, representative, parens patriae, or otherwise in nature . . ." (*Id.* ¶¶ 33, 68.) The (b)(2) class released "relief relating to the period after the date of the Court's entry of the Class Settlement Preliminary Approval Order," (*id.* ¶ 68), while the (b)(3) class released relief "which could have been alleged from the beginning of time until the date of the Court's" preliminary approval, (*id.* ¶ 33).

The [Rule 23\(b\)\(3\)](#) class as defined in the Original Settlement Agreement consisted of persons, businesses and other entities that had accepted Visa-and/or Mastercard-branded Cards at any point between January 1, 2004 and the settlement [\[\\*159\]](#) preliminary approval date. (Original Settlement Agreement ¶ 2(a).) Thus, the [Rule 23\(b\)\(3\)](#) class was comprised of a finite class of merchants already in existence. In addition, pursuant to [Fed. R. Civ. P. 23\(c\)\(2\)\(B\)\(vi\)](#), members of the [Rule 23\(b\)\(3\)](#) class had an opportunity to exclude themselves from the class, or opt out, while class members certified under [Rule 23\(b\)\(2\)](#) were offered no such relief.

The Second Circuit found the releases to be evidence of inadequate representation, determining that that holders of present claims such as the (b)(3) class, and holders of future claims such as the (b)(2) class, could not be jointly represented. See [Interchange Fees II, 827 F.3d at 231](#); *id. at 236-37* ("the bargain that was struck between relief and release on behalf of absent class members is so unreasonable that it evidences inadequate representation.").

Ultimately, the Second Circuit was primarily concerned about the release with respect to the (b)(2) class, and not the (b)(3) class. As discussed in Sections I.b and II.a.iii.3.D, *supra*, the Court was concerned that the (b)(3) class benefitted from the Original Settlement Agreement at the expense of the (b)(2) class. See, e.g., [id. at 240](#) (Leval, J., concurring) (taking issue with the terms of the settlement because "one class of Plaintiffs accepts substantial payments [\[\\*160\]](#) . . . in return for which they compel Plaintiffs in another class, who receive no part of the Defendants' payments, to give up forever their potentially valid claims, without ever having an opportunity to reject the settlement by opting out of the class"). The Second Circuit expressed concern that the "[m]erchants in the (b)(2) class that accept American Express or operate in states that prohibit surcharging gain no appreciable [\[\\*44\]](#) benefit from the settlement, and merchants that begin business after July 20, 2021 gain no benefit at all."<sup>42</sup> [Id. at 238](#). The (b)(2) class release effectively meant that merchants that came into existence after the preliminary settlement approval date would be barred by the release from ever bringing certain claims, without having been a part of the process, and the Second Circuit expressed concern that some of the (b)(2) merchants "actually received nothing" for the release of their claims. *Id.* The Court compared the release before it to the *res judicata* issues presented in [Stephenson v. Dow Chemical Company, 273 F.3d 249 \(2d Cir. 2001\)](#), *aff'd in part, vacated in part, 539 U.S. 111, 123 S. Ct. 2161, 156 L. Ed. 2d 106 (2003), which involved a class action settlement fund that provided compensation for persons injured by Agent Orange, who discovered their injury prior to 1994. The panel [\[\\*161\]](#) in *Stephenson* held that the two individual plaintiffs had not been adequately represented because the settlement extinguished their claims without affording them access to recovery, simply because they discovered their injury after 1994. *Id.* ("Because the prior litigation purported to settle all future claims, but only provided for recovery for those whose death or disability was discovered prior to 1994, the conflict . . . [with] the class representatives becomes apparent. No provision was made for post-1994 claimants, and the settlement fund was permitted to terminate in 1994."); see also [Interchange Fees II, 827 F.3d at 238](#) (analyzing *Stephenson* and noting that "[t]he two challengers could not have been adequately represented if their class representative negotiated a settlement and release that extinguished their claims without affording them any recovery.").*

## (2) The release in the Superseding Settlement Agreement

The release from liability in the Superseding Settlement Agreement Release and Covenant Not to Sue ("Release Provision") reads in pertinent part:

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<sup>42</sup> The Original Settlement Agreement provided "that all of the injunctive relief will terminate on July 20, 2021." [Interchange Fees II, 827 F.3d at 230](#).

The [Rule 23\(b\)\(3\)](#) Settlement Class Releasing Parties hereby expressly and irrevocably waive, and fully, finally, and forever settle, discharge, and release the [Rule 23\(b\)\(3\)](#) Settlement Class [\*\*162] Released Parties from, any and all manner of claims, demands, actions, suits, and causes of action, whether individual, class, representative, parens patriae, or otherwise in nature, for damages, restitution, disgorgement, interest, costs, expenses, attorneys' fees, fines, civil or other penalties, or other payment of money, or for injunctive, declaratory, or other equitable relief, whenever incurred, whether directly, indirectly, derivatively, or otherwise, whether known or unknown, suspected or unsuspected, in law or in equity, that any [Rule 23\(b\)\(3\)](#) Settlement Class Releasing Party ever had, now has, or hereafter can, shall, or may have and that have accrued as of the Settlement Preliminary Approval Date or accrue no later than five years after the Settlement Final Date arising out of or relating to any conduct, acts, transactions, events, occurrences, statements, omissions, or failures to act of any [Rule 23\(b\)\(3\)](#) Settlement Class Released Party that are or have been alleged or otherwise raised in the Action, or that could have been alleged or raised in the Action relating to the subject matter thereof, or arising out of or relating to a continuation or continuing effect of any such conduct, acts, transactions, [\*\*163] events, occurrences, statements, omissions, or failures to act. For avoidance of doubt, this release shall extend to, but only to, the fullest extent permitted by federal law.

(Superseding Settlement Agreement ¶ 31(a).)

The Release Provision broadly releases claims arising out of certain rules challenged in the litigation and other rules that are substantially similar. It specifies that the (b)(3) class members agree to release "any claims arising out of or relating to" the allegations of the (b)(3) class including "any interchange fees, interchange rates, or any Rule of any Visa Defendant or MasterCard Defendant relating to interchange fees," (*id.* ¶ 31(b)(i)), "any . . . 'honor all cards' rules . . . [or] rules or conduct relating to routing options regarding acceptance technology for mobile, e-commerce, or online payments, or [\*45] development and implementation of tokenization standards," (*id.* ¶ 31(b)(iii).) It further specifies that reference to these rules "mean those rules as they are or were in place on or before the Settlement Preliminary Approval Date and rules in place thereafter that are *substantially similar* . . . ." (*Id.* ¶ 31(c) (emphasis added).)

In addition, although the Release [\*\*164] Provision releases class members' ability to seek injunctive relief generally, it does not release a [Rule 23\(b\)\(3\)](#) class member's participation in the (b)(2) injunctive action, "solely as to injunctive relief claims alleged" in that action. (*Id.* ¶ 34(a).)<sup>43</sup> Specifically, the Release Provision does not release:

A [Rule 23\(b\)\(3\)](#) [class member's] continued participation, as a named representative or non-representative class member, in *Barry's Cut Rate Stores, Inc., et al. v. Visa, Inc., et al.*, MDL No. 1720 Docket No. 05-md-01720-MKB-JO ("Barry's"), solely as to injunctive relief claims alleged in *Barry's*. As to all such claims for injunctive relief in *Barry's*, the [Rule 23\(b\)\(3\)](#) [class members] retain all rights pursuant to [Rule 23 of the Federal Rules of Civil Procedure](#) which they have as a named representative plaintiff or absent class member in *Barry's* except the right to initiate a new separate action before five years after the Settlement Final Date. Nothing in this Paragraph shall be read to enlarge, restrict, conflict with, or affect the terms of any release or judgment to which any [Rule 23\(b\)\(3\)](#) Settlement Class Releasing Party may become bound in *Barry's*, and nothing in the

<sup>43</sup> Although (b)(2) Class Counsel originally expressed concern regarding the scope of "injunctive relief claims" that are preserved under the Superseding Settlement Agreement, (see Letter re Language in Settlement Agreement), following the parties' adjustments to the proposed preliminary approval order and the Class Notices, which further explain the extent to which such claims are preserved, (b)(2) Class Counsel subsequently informed the Court that it "would not be filing an objection to the proposed [Superseding Settlement Agreement]." (Letter dated Jan. 18, 2019.) The Class Notices now expressly state that with respect to the (b)(2) injunctive relief action, the Release Provision in the Superseding Settlement Agreement does not release "injunctive relief claims," nor does it release "the declaratory relief claims that are a predicate for the injunctive relief claims." (Revised Class Notices G1-4, G2-11; Prelim. Approval Order ¶ 31.) Injunctive relief claims are claims that are understood "to prohibit or require certain conduct." (*Id.* at G1-4, G1-5, G2-11; Prelim. Approval Order ¶ 31.) The Class Notices further explain that claims for injunctive relief do "not include claims for payment of money, such as damages, restitution, or disgorgement." (Revised Class Notices G1-4, G1-5, G2-11; see also Prelim. Approval Order ¶ 31.) The Court approves and adopts this understanding of "injunctive relief claims."

release in Paragraphs 29-33 above shall be interpreted to enlarge, restrict, conflict with, or affect the [\*\*165] request for injunctive relief that the plaintiffs in *Barry's* may seek or obtain in *Barry's*.

(*Id.*)

As in the release for the (b)(3) class under the Original Settlement Agreement, the Superseding Settlement Agreement's Release Provision applies only to merchants who accepted Visa-branded cards or Mastercard-branded cards between January 1, 2004 and the January 24, 2019 Settlement Preliminary Approval Date. (See Superseding Settlement Agreement ¶ 4.) It is consistent with the release deemed acceptable in *Wal-Mart Stores*, because the "injured parties may obtain remuneration from the settlement fund if they accepted Visa or MasterCard within a finite period . . . ." [Wal-Mart Stores, 396 F.3d at 110.](#)

However, unlike the (b)(3) release in the Original Settlement Agreement, which "fully, finally, and forever settle[d], discharge[d] and release[d]" the Defendants from claims, (Original Settlement Agreement ¶ 33), the Release Provision of the Superseding Settlement Agreement "is limited in duration" and only bars "claims that have accrued within five years following the Court's approval of the settlement and the exhaustion of all appeals." (Mem. in Supp. of Prelim. Approval 23; see also Superseding Settlement Agreement [\*\*166] ¶ 31(a).)

### **(3) Analysis of the new release**

The Court understands the Release Provision to mean that, apart from any injunctive relief claims that are raised in the [Rule 23\(b\)\(2\)](#) injunctive relief action, and unless individual members choose to opt out, the [Rule 23\(b\)\(3\)](#) class members release certain rights that have already accrued or that [\*46] will accrue up to five years after all appeals have been resolved in this action, that are based on rules that are the same or "substantially similar" to the rules in place on January 24, 2019, the date of preliminary approval. At the hearing, the Court clarified its understanding as to what was being released, and asked the parties to include such clarifying language in the Class Notices. (See Hrg Tr. 18:7-19:6, 23:8-24:13.)

As agreed to at the hearing, on January 15, 2019, the parties submitted revised Class Notices to the Court, which clarify the terms of the Release Provision. (Revised Class Notices.) According to these revised Class Notices, the Release Provision bars:

Claims based on conduct and rules that were alleged or raised in the litigation, or that could have been alleged or raised in the litigation relating to its subject matter. This includes any claims based on [\*\*167] interchange fees, network fees, merchant discount fees, no-surcharge rules, no-discounting rules, honor-all-cards rules, and certain other conduct and rules. These claims are released if they already have accrued or accrue in the future up to five years following the court's approval of the settlement and the resolution of all appeals.

(*Id.* at G1-3, G1-4, G2-10.) The Release Provision further bars:

Claims based on rules in the future that are substantially similar to — i.e., do not change substantively the nature of — the above-mentioned rules as they existed as of preliminary approval of the settlement. These claims based on future substantially similar rules are released if they accrue up to five years following the court's approval of the settlement and the resolution of all appeals.<sup>44</sup>

(*Id.* at G1-4, G2-10.)

<sup>44</sup> The parties also adjusted the Class Notices to clarify that the Release Provision does *not* extinguish, among other things: "[c]laims based on conduct or rules that could not have been alleged or raised in the litigation;" "[c]laims based on future rules that are not substantially similar to rules that were or could have been alleged or raised in the litigation;" and/or "claims that accrue more than five years after the court's approval of the settlement and the resolution of any appeals." (See Class Notices G1-4, G2-10.)

At the hearing, the parties also clarified that the Release Provision as written is meant to comport with the Second Circuit's "identical factual predicate" test, despite using different language. (See Hr'g Tr. 20:19–24:6.) Paragraph 31(a) of the Release Provision states that the "release shall extend to, but only to, the fullest extent permitted by federal law." (Superseding [\\*\\*168](#) Settlement Agreement ¶ 31(a).) In addition, paragraph 34(c) of the Release Provision states that "references to rules identified in [the Release Provision] mean those rules as they are or were in place on or before the Settlement Preliminary Approval Date and rules in place thereafter that are *substantially similar*.<sup>45</sup> (*Id.* ¶ 34(c).) The parties have expressed that while the language is different, the Release Provision should not be read to release any rules or conduct not based on an identical factual predicate. (See Defs. Letter to the Court dated Dec. 4, 2018, 1, Docket Entry No. 7314; see also Class Counsel's Letter to the Court dated Dec. 5, 2018, 3, Docket Entry No. 7316 ('the reference to 'federal law' in Paragraph 31(a), incorporates the Identical Factual Predicate doctrine. The parties chose to refer to 'federal law' rather than the Identical Factual Predicate doctrine, however, because some courts use different language to describe the scope of the law.); Revised Class Notices G1-4, G2-10 (noting that the Superseding Settlement Agreement's "resolution and release of these claims is intended to be consistent with and no broader than federal law on the identical factual predicate [\\*\\*169](#) doctrine.").)

[\[\\*47\]](#) As to the "substantially similar" language, [Rule 23\(b\)\(3\)](#) Class Counsel has clarified to the Court that the parties included this phrase to ensure that Defendants are protected from suit in the event of a minor change such as a "word" or "punctuation," but further clarified that a substantive change to a rule could perhaps be challenged under the identical factual predicate test to allows for claims to be brought that are based on the substantive change. (See Hr'g Tr. 26:24-28:19.)

Having clarified the parties' intent with regard to the language in the Release Provision, the Court is satisfied that the terms of the release comport with the Second Circuit's standards. To ensure that putative class members understand what rights they are releasing, the parties have included language in the Class Notices to clarify the scope of the Release Provision and to clarify that it comports with the identical factual predicate test. (Revised Class Notices G1-3, G1-4, G2-10; see also Hr'g Tr. 23:8-24:17, 26:13-26:16, 28:9-28:11.)

Because the terms of the Release Provision comport with the Second Circuit's identical factual predicate test, and does not implicate the issues that the Second Circuit [\\*\\*170](#) raised in relation to the (b)(2) release in the Original Settlement Agreement, the Court will likely find that the Release Provision as written, in conjunction with the clarifying information in the Class Notices, permits a finding that the Superseding Settlement Agreement is fair, reasonable, and adequate at the final approval stage.

#### 4. Equitable treatment of class members relative to one another

Consideration under this [Rule 23\(e\)\(2\)](#) factor "could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." [Fed. R. Civ. P. 23](#) advisory committee's note to 2018 amendment.

For the reasons set forth in Section II.a.iii.3.B, *supra*, the Court finds that the *pro rata* distribution scheme is sufficiently equitable. See also [Meredith Corp. v. SESAC, LLC, 87 F. Supp. 3d 650, 667 \(S.D.N.Y. 2015\)](#) (finding that a *pro rata* allocation plan "appear[ed] to treat the class members equitably . . . and has the benefit of simplicity"). Further, the scope of the release applies uniformly to putative class members, and does not appear to

<sup>45</sup> Some courts have expressed concern that the term "similar" when used in releases is broader than the Second Circuit's identical factual predicate test. See [Oladapo, 2017 U.S. Dist. LEXIS 187299, 2017 WL 5956907, at \\*6](#) (expressing concern that the settlement agreement "released not only claims arising out of conduct alleged in the Complaint, but also claims arising out of any 'similar' conduct"). Dr. Sykes, the court-appointed expert, also expressed concern that the inclusion of the phrase "'substantially similar' conduct or rules raises a danger of adverse, unintended consequences in a technologically dynamic industry." (See Sykes Report 49-51.)

affect the apportionment of the relief to class members, apart from securing the opportunity [\*\*171] to participate in the (b)(2) action. Accordingly, the Court finds that this factor will likely weigh in favor of granting final approval.

## 5. The ability of Defendants to withstand a greater judgment

Undoubtedly, Defendants can withstand a greater judgment. Defendants have agreed to pay a maximum settlement award of \$6.26 billion. (Memo. in Support of Mot. for Prelim. Approval 1.) Although the agreed upon payment is objectively a large sum of money, it is less so when viewed in perspective. By 2005, "interchange fee revenue paid by merchants to Visa and Mastercard card-issuing banks had risen to over \$30 billion per year." (Wildfang Decl. ¶ 13.) In under one decade, one retailer alone — Wal-Mart Stores, Inc. — "paid approximately \$5.6 billion in interchange fees for payment card transactions on the Visa and MasterCard networks." (Wal-Mart's Obj. to the Proposed Settlement, Docket Entry No. 2644.) Defendants do not dispute that they could withstand a greater judgment.

Although the Court finds that this factor weighs against a grant of final approval, it does not necessarily preclude a finding that the settlement is fair. See [Charron v. Pinnacle Grp. N.Y. LLC, 874 F. Supp. 2d 179, 201 \(S.D.N.Y. 2012\)](#) ("A defendant[s] ability to withstand a greater judgment, standing [\*\*172] alone, does not suggest that the settlement is unfair." (citation and internal quotation marks omitted) (alteration in original)).

## 6. The range of reasonableness of the settlement in light of the best possible recovery and all the attendant risks of litigation

The range of reasonableness of the settlement in light of the best possible recovery, [\*48] and the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation, are two *Grinnell* factors that are often combined for the purposes of analysis. See, e.g., [Interchange Fees I, 986 F. Supp. 2d at 229–230; Godson v. Eltman, Eltman, & Cooper, P.C., 328 F.R.D. 35, 2018 U.S. Dist. LEXIS 182034, 2018 WL 5263071, at \\*12–13; Ferrick v. Spotify USA Inc., No. 16-CV-8412, 2018 U.S. Dist. LEXIS 86083, 2018 WL 2324076, at \\*5–6 \(S.D.N.Y. May 22, 2018\).](#)

"In considering the reasonableness of the settlement fund, a court must compare "the terms of the compromise with the likely rewards of litigation." [Godson, 2018 U.S. Dist. LEXIS 182034, 2018 WL 5263071, at \\*12](#) (quoting [In re Citigroup Inc. Sec. Litig., 965 F. Supp. 2d 369, 384 \(S.D.N.Y. 2013\)](#) (citation omitted)). "In order to calculate the 'best possible' recovery, the Court must assume complete victory on both liability and damages as to all class members on every claim asserted against each defendant in the Action." [Teachers' Ret. Sys. of Louisiana v. A.C.L.N., Ltd., No. 01-CV-11814, 2004 U.S. Dist. LEXIS 8608, 2004 WL 1087261, at \\*5 \(S.D.N.Y. May 14, 2004\)](#). The range of reasonableness is "a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." [\*\*173] [Wal-Mart Stores, 396 F.3d at 119](#) (quoting [Newman v. Stein, 464 F.2d 689, 693 \(2d Cir. 1972\)](#)).

The monetary settlement award could be as much as \$6.26 billion, but will be no less than approximately \$5.56 billion after the opt-out reductions, which the parties represent is "the largest ever class settlement fund in an antitrust action." (See Mem. in Supp. of Prelim. Approval at 1, 7; *id.* at 1 n.1.) A large settlement figure, however, does not mandate a finding that the award falls within a range of reasonableness. The Court notes that the entire amount of the settlement award will not be distributed to claimants, as attorneys' fee awards, taxes, class exclusion takedown payments, and administrative fees — rising to hundreds of millions of dollars — will be deducted from the maximum settlement fund figure. (See Superseding Settlement Agreement ¶¶ 19–25, 27.)

The Court looks to information in the record to estimate what the best possible recovery might be in this case.<sup>46</sup> Assuming Class Plaintiffs can establish liability and recover damages, based on the expert reports exchanged in 2009 and 2010, the parties presented competing figures for what the best possible recovery would be. From 2004 to 2008 alone, for example, Class Plaintiffs' claim that they can attribute over \$100 billion [\*\*174] in damages to Defendants' unlawful conduct. (See Mot. in Supp. of Prelim. Approval 18-19.) For the same period, Defendants contend that they would be responsible for no more than \$661 million in damages. (*Id. at 18.*) When analyzing the terms of the Original Settlement Agreement, Judge Gleeson found that the figure agreed to, \$7.25 billion, "represent[ed] approximately 2.5% of total interchange fees paid by class members during the class period, and thus 2.5% of the largest possible estimate of actual damage to merchants." [Interchange Fees I, 986 F. Supp. 2d at 229](#). Despite the \$7.25 billion figure, objectors argued that the amount represented "only a few months of interchange fee collections" when divided among the millions of merchants that could claim damages. (See Sykes Report 47 (noting that such a statement "appear[s] to be correct").) The [\*49] same is true of the settlement currently before the Court.

However, "the fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." [Grinnell, 495 F.2d at 455](#). "There is no reason, at least in theory, why a satisfactory [\*\*175] settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Id. at 455 n.2*; see also [Morris v. Affinity Health Plan, Inc., 859 F. Supp. 2d 611, 621 \(S.D.N.Y. 2012\)](#) ("It is well-settled that a case settlement amounting to only a fraction of the potential recovery will not *per se* render the settlement inadequate or unfair."); [Davis v. J.P. Morgan Chase & Co., 827 F. Supp. 2d 172, 178 \(W.D.N.Y. 2011\)](#) ("[I]t is more important to assess the judgment in light of plaintiffs' claims and the other factors.").

Although the Superseding Settlement Agreement only provides for \$6.5 billion, which may be only several months of interchange fees, the Court finds that this settlement figure falls within a range of reasonableness for the following reasons.

First, the Court finds it pertinent that the Second Circuit did not take issue with the monetary relief secured for the (b)(3) class in the Original Settlement Agreement. See [Interchange Fees II, 827 F.3d at 240](#) (expressing concern that the (b)(2) class would be forced to give up claims forever with no opportunity to opt out, while "one class of Plaintiffs accepts substantial payments from the Defendants" (Leval, J., concurring)).

Second, the Court notes that while the members of the [Rule 23\(b\)\(3\)](#) class are required to release certain rights to claims in return for damages, putative members of the (b)(3) class [\*\*176] can opt out at will and pursue their own actions. In addition, those members of the (b)(3) class that are also members of the [Rule 23\(b\)\(2\)](#) injunctive relief class action are not prohibited from participating in that action to secure injunctive relief. (See Superseding Settlement Agreement ¶ 34(a).) Thus, the Superseding Settlement Agreement does not prohibit recovery of additional structural relief in the future.

Third, since the commencement of this lawsuit in 2005, several forms of injunctive relief related to the [Rule 23\(b\)\(3\)](#) Class Plaintiffs' claims have been secured. Although this injunctive relief does not constitute consideration for the

<sup>46</sup> Class Counsel should use their best efforts to provide the best possible recovery estimate when seeking final approval of the settlement. The Court recognizes, however, that it may be a difficult figure to generate, and, ultimately, this information, while helpful in assessing this factor, is not absolutely necessary. See, e.g., [In re Facebook, Inc., IPO Sec. and Derivative Litig., No. 12-MD-2389, 343 F. Supp. 3d 394, 2018 U.S. Dist. LEXIS 199829, 2018 WL 6168013, at \\*13 \(S.D.N.Y. Nov. 26, 2018\)](#) (finding that although "particularized evidence ha[d] not been adduced to support a 'best possible' judgment, the agreed-upon figure [was] reasonable in light of the substantial risks to recovery."); [In re LIBOR-Based Fin. Instruments Antitrust Litig., 327 F.R.D. 483, 2018 WL 3677875, at \\*8 \(S.D.N.Y. 2018\)](#) (finding in a complex antitrust conspiracy action that calculation of recoverable damages was "particularly complex" and therefore concluding "that an assessment of the 'best possible recovery' would be of little value in assessing the substantive fairness of the settlement."); see also [Frank v. Eastman Kodak Co., 228 F.R.D. 174, 186 \(W.D.N.Y. 2005\)](#) ("The determination whether a settlement is reasonable does not involve the use of a 'mathematical equation yielding a particularized sum.'" (quoting [In re Austrian & German Bank Holocaust Litig., 80 F. Supp. 2d at 178](#))).

purposes of settling the [Rule 23\(b\)\(3\)](#) Class Plaintiffs' claims, the value of such injunctive relief cannot be ignored in assessing the range of reasonableness of this settlement. The Court notes that the Visa and Mastercard rule changes secured in the Original Settlement Agreement remain in effect today. (Mem. in Supp. of Prelim. Approval 28.) These changes include, among others, permitting "merchants to surcharge on Visa-or Mastercard-branded credit card transactions at both the brand and product levels," and "[a]n obligation on the part of Visa and MasterCard to negotiate interchange [\*\*177] fees in good faith with merchant buying groups." [Interchange Fees I, 986 F. Supp. 2d at 217](#). The injunctive relief secured in the prior settlement approval was valued by Class Plaintiffs' expert to be worth at least \$26 billion. (See Renfrew Decl. ¶ 17 ("[I]n addition to the monetary recovery, the Class Plaintiffs achieved significant modifications to the existing rules, which according to Plaintiffs' expert Frankel are estimated to be worth at a minimum \$26+ billion.").) These forms of relief serve to partially address Plaintiffs' claims regarding supracompetitive interchange fees and anti-steering restraints.

Fourth, as one district Court has aptly stated, "the history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial or on appeal." [In re NASDAQ Mkt.-Makers Antitrust Litig., 187 F.R.D. at 476](#) (collecting cases). As set forth in Section II.a.iii.3.A, *supra*, the Court believes that there is a significant risk of proceeding with the action in light of the attendant risks and complexities of proving liability and damages, and maintaining the class action. See also [In re Glob. Crossing Sec. & ERISA Litig., 225 F.R.D. at 461](#) ("Due to the complexities inherent in this case, the certainty of this settlement amount has to be judged in [\*\*178] this context of the legal and practical obstacles to obtaining a large recovery.").

[\*50] Accordingly, the Court finds that these *Grinnell* factors will likely weigh in favor of granting final approval.

In sum, for the foregoing reasons, the Court finds that under the [Rule 23\(e\)\(2\)](#) and the *Grinnell* factors, preliminary approval of the settlement is warranted because the Court will likely find the Superseding Settlement Agreement to be fair, reasonable, and adequate at the final approval stage.

#### **b. Certification of settlement class**

In 2009, the parties submitted motions to the Court on the issue of class certification. On November 19, 2009, Judge Orenstein heard oral argument on the motions, but reserved making a recommendation at that time. (See Minute Entry dated Nov. 23, 2009, Docket Entry No. 1319.) After the parties informed the Court of their intent to settle the case, the Court deemed the class certification motions withdrawn without prejudice. (See Order dated July 17, 2012.)

The parties sought preliminary certification of the following class under subsection [Rule 23\(b\)\(3\)](#) for the purposes of settlement only:

All persons, businesses, and other entities that have accepted any Visa-Branded Cards and/or Mastercard-Branded [\*\*179] Cards in the United States at any time from January 1, 2004 to the Settlement Preliminary Approval Date, except that the [Rule 23\(b\)\(3\)](#) Settlement Class shall not include (a) the Dismissed Plaintiffs, (b) the United States government, (c) the named Defendants in this Action or their directors, officers, or members of their families, or (d) financial institutions that have issued Visa-Branded Cards or Mastercard-Branded Cards or acquired Visa-Branded Card transactions or Mastercard-Branded Card transactions at any time from January 1, 2004 to the Settlement Preliminary Approval Date.

(Superseding Settlement Agreement ¶ 4.)

"The ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement." [Fed. R. Civ. P. 23](#) advisory committee's note to 2018 amendment. When deciding whether to grant preliminary approval, district courts must determine whether "giving notice is justified by the parties' showing that the court *will likely be able to . . .* certify the class for purposes of judgment on the proposal." [Fed. R. Civ. P. 23\(e\)\(1\)\(B\)\(ii\)](#) (emphasis added). The Court therefore looks to the factors for class certification to make this determination.

"Before approving a class settlement [\*\*180] agreement, a district court must first determine whether the requirements for class certification in [Rule 23\(a\)](#) and [\(b\)](#) have been satisfied." [In re Am. Int'l Grp., Inc. Sec. Litig.](#), 689 F.3d 229, 238 (2d Cir. 2012). "This applies even to conditional certification for settlement purposes only." See [Tart v. Lions Gate Entm't Corp., No. 14-CV-8004, 2015 U.S. Dist. LEXIS 139266, 2015 WL 5945846](#), at \*1 (S.D.N.Y. Oct. 13, 2015) (citing [Long v. HSBC USA Inc., No. 14-CV-6233, 2015 U.S. Dist. LEXIS 122655, 2015 WL 5444651](#), at \*5 (S.D.N.Y. Sept. 11, 2015)).

"To obtain certification of a class action for money damages, a plaintiff must satisfy prerequisites of numerosity, commonality, typicality, and adequacy of representation," pursuant to [Rule 23\(a\)](#), and "must also establish that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy," pursuant to [Rule 23\(b\)\(3\)](#). [Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds](#), 568 U.S. 455, 460, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013); [Sykes v. Mel S. Harris & Assocs. LLC](#), 780 F.3d 70, 80 (2d Cir. 2015). In addition to the explicit requirements of [Rule 23\(a\)](#), the class must satisfy the implied requirement of ascertainability. [In re Petrobras Sec.](#), 862 F.3d 250, 266 (2d Cir. 2017). "[Rule 23](#) does not set forth a mere pleading standard." [Dukes](#), 564 U.S. at 350. "The party seeking class certification must affirmatively demonstrate . . . compliance with the Rule, and a district court may only certify a class if it is satisfied, after a rigorous analysis, that the requirements of [Rule 23](#) are met." [In re Am. Int'l Grp., Inc. Sec. Litig.](#), 689 F.3d at 237-38 (quotation marks and citations omitted); see also [\*51] [Myers v. Hertz Corp.](#), 624 F.3d 537, 547 (2d Cir. 2010) ("The party seeking class certification bears the burden [\*\*181] of establishing by a preponderance of the evidence that each of [Rule 23](#)'s requirements has been met." (citations omitted)).

Assessment of class certification in the settlement context invokes a "responsibility imposed upon [the courts] to exercise independent judgment for the protection of class absentees." [In re Traffic Exec. Ass'n-E. Railroads](#), 627 F.2d at 634 (citation omitted). Under Supreme Court guidance, consideration of problems that would occur in managing the class are relaxed in the settlement context, while the other requirements of [Rule 23](#) must receive undiluted, if not heightened, scrutiny, even where a proposed settlement has been deemed fair, reasonable and adequate:

Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial. But other specifications of the Rule — those designed to protect absentees by blocking unwarranted or overbroad class definitions — demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to [\*\*182] adjust the class, informed by the proceedings as they unfold.

[Amchem Prod., Inc.](#), 521 U.S. at 620 (citations omitted); see also [In re Literary Works](#), 654 F.3d 242 ("When a court is asked to certify a class and approve its settlement in one proceeding, the class-certification rule requirements designed to protect absent class members demand undiluted, even heightened, attention."); [Denney](#), 443 F.3d at 270 ("Before certification is proper for any purpose — settlement, litigation, or otherwise — a court must ensure that the requirements of [Rule 23\(a\)](#) and [\(b\)](#) have been met. These requirements should not be watered down by virtue of the fact that the settlement is fair or equitable." (citing [In re Ephedra Products Liab. Litig.](#), 231 F.R.D. 167, 169-70 (S.D.N.Y. 2005))); [Amchem Prod., Inc.](#), 521 U.S. at 620 n.16 (disapproving a settlement class in a multi-party asbestos litigation and noting that "[s]ettlement, though a relevant factor, does not inevitably signal that class-action certification should be granted more readily than it would be were the case to be litigated."). Nevertheless, "[t]he Second Circuit has emphasized that [Rule 23](#) should be given liberal rather than restrictive construction, and it seems beyond peradventure that the Second Circuit's general preference is for granting rather than denying class certification." [Espinoza v. 953 Assocs. LLC](#), 280 F.R.D. 113, 124 (S.D.N.Y. 2011) (quoting [Gortat v. Capala Bros., Inc.](#), 257 F.R.D. 353, 361 (E.D.N.Y. 2009), aff'd, 568 F. App'x 78 (2d Cir. 2014)).

In issuing the January 24, 2019 Order, the Court concluded for the [\*\*183] following reasons, that based on the record before it, it will likely be able to certify the proposed class at the final approval stage.

### i. Rule 23(a) requirements

The Court first addresses whether Class Plaintiffs have presented sufficient information to suggest that the Court will likely be able to "certify the class for purposes of judgment on the proposal" under the explicit Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation, and the implied factor of ascertainability.

#### 1. Numerosity

In order to proceed as a class action, the class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "[N]umerosity is presumed at a level of [forty] members." Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995).

Class Plaintiffs have satisfied the numerosity requirement. At the time of the final approval hearing in 2013, "class counsel reported that the class was composed of about 12 million merchants." Interchange Fees II, 827 F.3d at 235. The proposed class still consists of "millions of [m]erchants." (TAC ¶ 4.)

#### [\*52] 2. Commonality

Under Rule 23(a)(2), there must be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2); see also Marisol A. v. Giuliani, 126 F.3d 372, 376 (2d Cir. 1997) ("The commonality requirement is met if plaintiffs' grievances share a common question of law or fact."). A question is common if it is "capable [\*\*184] of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Dukes, 564 U.S. at 350. "[I]t is not enough to raise questions at such a high level of generality that they become common to the class." Tart v. Lions Gate Entm't Corp., 2015 U.S. Dist. LEXIS 139266, 2015 WL 5945846, at \*2 (citing Dukes, 564 U.S. at 350). Instead, plaintiffs must demonstrate "the capacity of a classwide proceeding to generate common answers apt to drive the resolution" of the case. Dukes, 564 U.S. at 350.

"Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." Id. at 349-50. "The claims for relief need not be identical for them to be common," instead, "Rule 23(a)(2) simply requires that there be issues whose resolution will affect all or a significant number of the putative class members. Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question." Johnson v. Nextel Commc'n Inc., 780 F.3d 128, 137 (2d Cir. 2015) (citations and quotation marks omitted). "Even a single common legal or factual question will suffice" to prove commonality. Dukes, 564 U.S. at 357; Freeland v. AT&T Corp., 238 F.R.D. 130, 140 (S.D.N.Y. 2006) (citing In re Agent Orange Prod. Liab., 818 F.2d 145, 166-67 (2d Cir. 1987)). "Numerous courts have held that allegations concerning the existence, scope, and efficacy of an alleged antitrust conspiracy present important common [\*\*185] questions sufficient to satisfy the commonality requirement of Rule 23(a)(2)." In re Platinum & Palladium Commodities Litig., No. 10-CV-3617, 2014 U.S. Dist. LEXIS 96457, 2014 WL 3500655, at \*9 (S.D.N.Y. July 15, 2014) (quoting In re NASDAQ Mkt.-Makers Antitrust Litig., 169 F.R.D. 493, 509 (S.D.N.Y. 1996) (collecting cases)).

In their original class certification briefing, Defendants did not contest the issue of commonality. (See Redacted Defs. Corrected. Mem. of Law in Opp'n to Pls. Mot. for Class Certification Docket Entry No. 1166; Class Certification Hrg Tr. 45:1, Docket Entry No. 1406 ("the defendants do not contest commonality").) Class Plaintiffs' overarching claims are that the Defendants conspired to fix prices and impose supracompetitive interchange fees on merchants that accept Visa and Mastercard debit and credit cards, and through certain anticompetitive restrictions, have prevented those merchants from protecting themselves. Thus, Class Plaintiffs represent a putative class that has suffered an alleged common harm: payment of supracompetitive interchange fees. Unlike in Dukes, where the class plaintiffs failed to show that the defendant, Wal-Mart, had a uniform discrimination policy,

Class Plaintiffs point to specific policies and rules that they allege causes them uniform harm, such as the setting of default interchange fees, honor-all-card rules, and anti-steering restraints.<sup>47</sup> (See TAC ¶ 170 [\*\*186] (citing to Visa and Mastercard's honor-all-card rules that they enforce on merchants); *id.* ¶ 177 (citing to Visa and Mastercard's prior no-surcharge rules).)

Although even a single common question is sufficient, Class Plaintiffs identify several questions that are common to the putative class, and that would generate common answers, including whether Visa and Mastercard, and their respective member banks, including the Bank Defendants, (1) collectively fixed and set interchange fees in violation [\*53] of **antitrust law**; (2) collectively imposed anti-steering rules that disincentivized merchants from steering paying customers to other payment methods, thereby protecting Defendants from competitive pressure to lower interchange fees; and (3) continued the alleged behavior after becoming publicly-owned corporations. (See Mem. in Supp. of Mot. for Prelim. Approval 27-28.) If this case were to proceed to trial, these questions would need to be determined on a classwide basis, regardless of how each merchant was individually affected.

In addition, the putative class members' injuries raise common questions because they derive from a unitary course of alleged conduct, specifically, [\*\*187] that Defendants collectively fixed suprareactive interchange fees, and collectively imposed and enforced rules and restrictions on merchants. See *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1175, 2014 U.S. Dist. LEXIS 180914, 2014 WL 7882100, at \*30 (E.D.N.Y. Oct. 15, 2014), report and recommendation adopted, *No. 06-MD-1775*, 2015 U.S. Dist. LEXIS 90402, 2015 WL 5093503 (E.D.N.Y. July 10, 2015) (citation omitted) (noting that common questions "are often present where there are legal or factual disputes pertaining to the defendants' 'unitary course of conduct,' since such questions tend to give rise to answers that are broadly applicable to the entire class."); see also *Sykes*, 780 F.3d at 84 (upholding the district court's decision that the commonality requirement was satisfied where the district court found that "plaintiffs' injuries derive from defendants' alleged unitary course of conduct" of fraudulently procuring default judgments). Further, resolving the question of whether Defendants collectively set these fees would "resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350.

The questions that Class Plaintiffs raise are fundamental to both the outcome of the case, and would generate common answers that would assist in determining the resolution of Class Plaintiffs' claims. The Court will likely find that commonality [\*\*188] is met at the final approval stage.

### 3. Typicality

The typicality prong of **Rule 23(a)(3)** requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." **Fed. R. Civ. P. 23(a)(3)**. The typicality requirement "is satisfied when each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 252 (2d Cir. 2011) (quoting *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993)); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009). "The commonality and typicality requirements often 'tend to merge into one another, so that similar considerations animate analysis' of both." *Brown v. Kelly*, 609 F.3d 467, 475 (2d Cir. 2010) (quoting *Marisol A.*, 126 F.3d at 376). "The purpose of typicality is to ensure that class representatives have the incentive to prove all the elements of the cause of action which would be presented by the individual members of the class were they initiating individualized actions." *Floyd v. City of New York*, 283 F.R.D. 153, 175 (S.D.N.Y. 2012) (citation and internal quotation marks omitted). "Since the claims only need to share the same essential characteristics, and need not be identical, the typicality requirement is not highly demanding." *In re Platinum &*

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<sup>47</sup> In *Dukes*, the Supreme Court found that the class plaintiffs alleging discrimination on the basis of gender did not satisfy the commonality requirement of **Rule 23(a)(2)**, because they had not offered evidence that Wal-Mart operated under a policy of discrimination. *Dukes*, 564 U.S. at 355 ("The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's 'policy' of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action.").

Palladium Commodities Litig., 2014 U.S. Dist. LEXIS 96457, 2014 WL 3500655, at \*9 (quoting *Bolanos v. Norwegian Cruise Lines Ltd.*, 212 F.R.D. 144, 155 (S.D.N.Y. 2002)).

The Court will likely find that the typicality requirement is met at the final approval stage. Class Plaintiffs allege, on behalf of the putative class, that they were harmed [\*\*189] by the same course of events — Defendants' unlawful price fixing of interchange fees and restraints of trade. See In re Air Cargo Shipping Servs. Antitrust Litig., 2014 U.S. Dist. LEXIS 180914, 2014 WL 7882100, at \*31 ("Here, the plaintiffs allege that the defendants engaged in a global conspiracy to fix prices, so it is nearly tautological that the class representatives will rely on the same factual and legal arguments to establish the defendants' liability."). The Class Plaintiffs all currently operate businesses that continue to accept payment by Visa and [\*54] Mastercard credit and debit cards, and represent a diverse array of merchant and business interests. (See TAC ¶¶ 10-13, 15-18.) Although the Class Plaintiffs represent a diverse array of interests, they seek redress for the same type of harms due to the same course of conduct.

#### 4. Adequate representation

For the reasons set forth in Section II.a.iii.1, *supra*, the Court will likely find that the Class Plaintiffs and Class Counsel have provided adequate representation to the Rule 23(b)(3) putative class.

#### 5. Ascertainability

Rule 23(a) contains an implied requirement of ascertainability. In re Petrobras Sec., 862 F.3d at 266 ("Most circuit courts of appeals have recognized that Rule 23 contains an implicit threshold requirement that the members of a proposed class be readily identifiable, often characterized [\*\*190] as an 'ascertainability' requirement."). Unlike other circuits, the Second Circuit does not have a "heightened" requirement of ascertainability — it only requires that a "class be defined using objective criteria that establish a membership with definite boundaries," and does not require "administrative feasibility" of identifying each class member based on that objective criteria. *Id.* (distinguishing the Second Circuit's approach to ascertainability from circuits with a heightened ascertainability requirement); *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 567 (S.D.N.Y. 2014) ("The standard for ascertainability is 'not demanding' and is 'designed only to prevent the certification of a class whose membership is truly indeterminable.'" (quoting *Gortat v. Capala Bros., Inc.*, 2010 U.S. Dist. LEXIS 35451, 2010 WL 1423018, at \*2 (E.D.N.Y. Apr. 9, 2010)); *Charron v. Pinnacle Grp. N.Y. LLC*, 269 F.R.D. 221, 229 (S.D.N.Y. 2010) ("To be ascertainable, the class must be 'readily identifiable, such that the court can determine who is in the class and, thus, bound by the ruling.'" (quoting *McBean v. City of N.Y.*, 260 F.R.D. 120, 132-33 (S.D.N.Y. 2009)); *In re Methyl Tertiary Butyl Ether ("MTBE") Prod. Liab. Litig.*, 209 F.R.D. 323, 337 (S.D.N.Y. 2002). "The ascertainability requirement, as defined in this Circuit, asks district courts to consider whether a proposed class is defined using objective criteria that establish a membership with definite boundaries." In re Petrobras Sec., 862 F.3d at 269.

The proposed class is defined using the objective criteria of merchants that have accepted [\*\*191] Visa-and/or Mastercard-branded cards. (Superseding Settlement Agreement ¶ 4.) The membership's boundaries are definite in that the proposed class only includes merchants that accepted such cards during a defined period of time — January 1, 2004 through January 24, 2019, the date that the proposed class settlement received preliminary approval. *Id.* As a result, the Court will likely find that the ascertainability requirement is met at the final approval stage.

##### ii. Rule 23(b)(3) requirements

In addition to satisfying the Rule 23(a) requirements, certification must be appropriate under Rule 23(b). Comcast Corp. v. Behrend, 569 U.S. 27, 34, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013). Certification under Rule 23(b)(3) requires both that (1) "questions of law or fact common to class members predominate over any questions affecting

only individual members," and that (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." [Fed. R. Civ. P. 23\(b\)\(3\)](#); [Amgen Inc., 568 U.S. at 460](#); [Sykes, 780 F.3d at 80](#).

Under [Rule 23\(b\)\(3\)](#) generally, matters pertinent to both of these requirements — that common questions predominate, and that a class action is superior — include:

- (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun [\*\*192] by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

[Fed. R. Civ. P. 23\(b\)\(3\)\(A-D\)](#). However, "[s]ome inquiries essential to litigation class certification are no longer problematic in the settlement context." [In re Am. Int'l Grp., Inc. Sec. Litig., 689 F.3d at 239](#) (quoting [\*55] [Sullivan v. DB Invs., Inc., 667 F.3d 273, 335 \(3d Cir. 2011\)](#) (Scirica, J., concurring) (citing [Amchem Prod., Inc., 521 U.S. at 620](#))). As noted in [Section II.b, supra](#), in the class settlement context, a district court "need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial." [Amchem Prod., Inc., 521 U.S. at 620](#) (citing [Fed. R. Civ. P. 23\(b\)\(3\)\(D\)](#)).

## 1. Predominance

"The 'predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" [Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045, 194 L. Ed. 2d 124 \(2016\)](#) (quoting [Amchem Prod., Inc., 521 U.S. at 623](#)). According to the Supreme Court:

This calls upon courts to give careful scrutiny to the relation between common and individual questions in a case. An individual question is one where "members of a proposed class will need to present evidence that varies from member to member," while a common question is one where "the same evidence will suffice for each member to make a *prima facie* showing [or] the issue [\*\*193] is susceptible to generalized, class-wide proof."

*Id.* (quoting 2 Newberg on Class Actions § 4:50 at 196-97 (5th ed. 2012)).

Predominance is satisfied "if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." [Roach v. T.L. Cannon Corp., 778 F.3d 401, 405 \(2d Cir. 2015\)](#) (internal quotation marks omitted) (quoting [UFCW Local 1776 v. Eli Lilly & Co., 620 F.3d 121, 131 \(2d Cir. 2010\)](#)). Typically, common issues predominate when liability is determinable on a class-wide basis, even where class members have individualized damages. See [In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d at 139](#); see also [Tyson Foods, Inc., 136 S. Ct. at 1045](#) ("When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under [Rule 23\(b\)\(3\)](#) even though other important matters will have to be tried separately, such as damages . . . .'" (citing 7AA C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1778 at 123-24 (3d ed. 2005) (footnotes omitted))).

While more demanding than commonality, [Rule 23\(b\)\(3\)](#) "does not require a plaintiff seeking class certification to prove that each elemen[t] of [her] claim [is] susceptible to classwide proof." [Amgen Inc., 568 U.S. at 468](#) (citations and internal quotation [\*\*194] marks omitted) (emphasis and alterations in original). Instead, a class plaintiff is only required to show that "questions common to the class predominate, [and] not that those questions will be answered, on the merits, in favor of the class." *Id. at 459*. Thus, [Rule 23\(b\)\(3\)](#) contemplates the presence of individual questions as long as those questions do not predominate over the common questions which affect the class as a whole. [Sykes, 780 F.3d at 81-82](#) (citing [Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 815 \(7th Cir. 2012\)](#)). "If the most substantial issues in controversy will be resolved by reliance primarily upon common proof, class certification will generally achieve the economies of litigation that [Rule 23\(b\)\(3\)](#) envisions." [In re Air Cargo Shipping Servs. Antitrust Litig., 2014 U.S. Dist. LEXIS 180914, 2014 WL 7882100, at \\*36](#).

"While predominance may be difficult to demonstrate in mass tort cases, such as *Amchem*, in which the 'individual stakes are high and disparities among class members great,' it is a 'test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws.'" *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d at 240 (quoting *Amchem Prod., Inc.*, 521 U.S. at 625). In the context of antitrust class actions, "allegations of the existence of a price-fixing conspiracy are susceptible to common proof . . ." *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2014 U.S. Dist. LEXIS 180914, 2014 WL 7882100 at \*37 (quoting *Cordes*, 502 F.3d at 105).

[\*56] In addition, "the predominance inquiry will sometimes be easier to satisfy in the settlement context." *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d at 241; see also *In re Petrobras Secs. Litig.*, 317 F. Supp. 3d 858, 870 (S.D.N.Y. 2018) ("[T]he [\*195] predominance requirement differs between trial and settlement." (citation omitted)). Because predominance and manageability overlap, "the existence of a settlement that eliminates manageability problems can alter the outcome of the predominance analysis." *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d at 242 (citing *In re Initial Pub. Offering Sec. Litig.*, 226 F.R.D. 186, 195 n.51 (S.D.N.Y. 2005)); *In re Nat. Football League Players' Concussion Injury Litig.*, 307 F.R.D. 351, 380 (E.D. Pa. 2015) ("[S]ettlement itself allows common issues to predominate. [C]ourts are more inclined to find the predominance test met in the settlement context." (second alteration in original) (citation and internal quotation marks omitted)); see also 2 Newberg on Class Actions § 4:63 (5th ed. 2018) ("in settlement class actions, because manageability need not be a concern, predominance — the main focus of manageability — recedes in importance as well . . . Courts therefore regularly certify settlement classes that might not have been certifiable for trial purposes because of manageability concerns.").

For example, in *In re Am. Int'l Grp., Inc. Sec. Litig.*, the Second Circuit vacated a district court's denial of class certification in a preliminary approval decision. 689 F.3d at 241. There, the district court had held that a settlement class of securities purchasers had to satisfy the fraud-on-the-market presumption — which in the context of a litigation [\*196] class would spare the plaintiffs from having to prove individual reliance on misrepresentations — in order to demonstrate predominance. *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d at 241. In reaching its holding, the district court had relied upon a class certification decision from a Second Circuit litigation case rather than a settlement case. *Id. at 241-42*. In reversing the decision, the Second Circuit concluded that in the settlement context, failure to satisfy the fraud-on-the-market presumption did "not necessarily preclude a finding of predominance." *Id. at 242-43*.

Class Plaintiffs raise numerous common questions that are essential to the claims of all putative class members, including whether Defendants conspired to engage in anticompetitive price fixing of interchange fees, and enforced rules and policies that hindered the introduction of competition that would reduce the interchange fees. (See Mem. in Supp. of Prelim. Approval 36 (citing Pls. Mem. of Law in Supp. of Class Pls. Mot. for Class Certification, Docket Entry No. 1165).) For many of the common questions that Class Plaintiffs raise, "the same evidence will suffice for each [class] member" in proving antitrust violation and injury.<sup>48</sup> *Tyson Foods, Inc.*, 136 S. Ct. at 1045 (citation and internal quotation marks omitted). In [\*197] particular, the question of whether Defendants conspired to collectively impose and fix interchange fees is a common question that requires generalized proof to answer — common

<sup>48</sup> Class Counsel asserts that the following issues associated with Class Plaintiffs claims present common questions that would rely on class-wide evidence:

- (1) whether Defendants' conspired to fix and impose interchange fees, including whether Defendants require merchants to pay fixed interchange so as to fix the price of card acceptance services at supra-competitive levels; (2) whether Class Plaintiffs' price-fixing claims would be analyzed under the *per se* rule or the rule of reason; (3) whether the imposition [\*198] of the anti-steering rules insulated fixed interchange fees from competitive pressure; (4) the anticompetitive effects and procompetitive effects, if any, of Defendants' conduct; (5) the relevant market; (6) whether Defendants had market power; (7) whether Defendants willfully maintained monopoly power; (8) whether the restructuring agreements that resulted in Mastercard's and Visa's initial public offerings, and the IPOs themselves, are antitrust violations; (9) whether the *NaBanco* decision applies to the claims in this case; and (10) whether the *Illinois Brick* indirect purchaser doctrine is a defense to Plaintiffs' claims.

(Mem. in Supp. of Prelim. Approval 36-37 (internal citations omitted) (citing Pls. Mem. of Law in Supp. of Class Pls. Mot. for Class Certification).)

evidence for all class members would be needed to prove a conspiracy to fix interchange fees. See [Cordes, 502 F.3d at 107](#) (finding that "[b]ecause each class member allegedly suffered the same type of injury," i.e., overcharges paid in a [\*57] price-fixing conspiracy, "the legal question of whether such an injury is 'of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful,' is a common one." (quoting [Brunswick Corp. v. Pueblo Bowl-Brunswick Corp.](#), 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)); [In re LIBOR-Based Fin. Instruments Antitrust Litig.](#), 299 F. Supp. 3d 430, 590 (S.D.N.Y 2018) (concluding that "the existence of a conspiracy is a common question" and noting that Defendants did not dispute that the existence of a price-fixing conspiracy was susceptible to common proof).

Although individual class members would be impacted to different degrees by the alleged behavior, these individual issues, such as differences in individual damages assessments, are largely minimized in the settlement context. The common questions in this action appear to predominate over individual questions regarding the individual effect of such a conspiracy because the general proof needed to answer those questions — for example, the existence of the alleged conspiracy — is far more essential than the individualized proof necessary to determine individual harm. [\*\*199] See generally [In re NASDAQ Mkt.-Makers Antitrust Litig.](#), 169 F.R.D. at 518 ("Courts repeatedly have held that the existence of a conspiracy is the predominant issue in price fixing cases, warranting certification of the class even where significant individual issues are present."). As noted *supra*, the Court need not consider aspects of manageability in the settlement context, which erases concerns that might otherwise be considered in a predominance analysis, and makes a finding of predominance more likely. See, e.g., [Amgen Inc., 568 U.S. at 470](#) (upholding class certification in a securities action "[b]ecause the question of materiality is common to the class"); [In re Petrobras Sec. Litig.](#), 317 F. Supp. 3d at 870 (preliminarily certifying a settlement class in a securities action where all plaintiffs "claim[ed] injury by reason of the same conduct, defendants' purported misrepresentations and omissions [were] common to all, plaintiffs' proof of intent would not differ between class members, and all class members . . . suffered an identical kind of injury"); [Mayhew v. KAS Direct, LLC, No. 16-CV-698, 2018 U.S. Dist. LEXIS 106680, 2018 WL 3122059, at \\*6 \(S.D.N.Y. June 26, 2018\)](#) (preliminarily certifying a settlement class in a consumer products case and finding that "issues of proof regarding whether defendants' product labeling was false and misleading and would have deceived a reasonable consumer are common to all members of the class, [\*\*200] and predominate over any issues any individual class member may have"); [In re Initial Pub. Offering Sec. Litig.](#), 226 F.R.D. at 195 n.51 (noting that "[i]n this case, the removal of [the manageability] factor from consideration alleviates the predominance defect").

For these reasons, the Court will likely find that common questions predominate at the final approval stage.

## 2. Superiority

A class action may be maintained under [Rule 23\(b\)\(3\)](#) if a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." [Fed. R. Civ. P. 23\(b\)\(3\)](#). To satisfy the superiority requirement, the moving party must show that the class action presents economies of "time, effort and expense, and promote[s] uniformity of decision." [In re U.S. Foodservice Inc. Pricing Litig.](#), 729 F.3d 108, 130 (2d Cir. 2013). The superiority requirement is designed to avoid "repetitious litigation and possibility of inconsistent adjudications." [In re Air Cargo Shipping Servs. Antitrust Litig.](#), 2014 U.S. Dist. LEXIS 180914, 2014 WL 7882100, at \*64 (citing [D'Alauro v. GC Servs. Ltd. P'ship](#), 168 F.R.D. 451, 458 (E.D.N.Y. 1996)).

Individual trials for a putative class of millions of members under any circumstance, but especially after thirteen years of litigation, would be far less efficient, and far more costly and repetitious than continuing to proceed as a class action. See [Fed. R. Civ. P. 23\(b\)\(3\)](#) (stating that "the extent and nature of any litigation concerning the controversy already begun by or against class members" is pertinent to the superiority [\*\*201] determination). The Court finds that the superiority requirement will likely be met at the final approval stage.

[\*58] In sum, for the foregoing reasons, the Court finds that under [Rules 23\(a\)](#) and [23\(b\)\(3\)](#), that preliminary certification of the [Rule 23\(b\)\(3\)](#) settlement class, for the purposes of settlement only, is warranted because the Court will likely be able to certify the class at the final approval stage.

### c. Appointment of Class Counsel

When a district court certifies a class, it must appoint class counsel. In doing so, a court must consider:

- (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.

#### Fed. R. Civ. P. 23(g)(1)(A)(i–iv).

For the reasons set forth in Sections II.a.iii.1 and II.a.iii.2, *supra*, the Court finds that to date, the Robins Group has fairly and adequately represented the putative class in accordance with [Rule 23\(g\)](#). The Robins Group was first appointed as co-lead Interim Class Counsel over a decade ago, (Wildfang Decl. ¶ 24), and has been deemed competent [\[\\*\\*202\]](#) by this Court numerous times. The Court, in the January 24, 2019 Order, therefore appointed Robins Kaplan LLP, Berger & Montague P.C., and Robbins Geller Rudman & Dowd LLP to serve as [Rule 23\(b\)\(3\)](#) Class Counsel.

### d. Notice Plan and Plan of Allocation and Distribution

Class Counsel submitted for the Court's review a Notice Plan and two Notices — a short "Publication Notice," and a Long Form Notice. (Notice Plan; Revised Class Notices.)

Once a court has determined that "giving notice is justified by the parties' showing that the court will likely be able to" approve the proposed settlement and certify the class, the court "must direct notice in a reasonable manner to all class members who would be bound by the proposal . . ." [Fed. R. Civ. P. 23\(e\)\(1\)\(B\)\(i–ii\)](#). "For any class certified under [Rule 23\(b\)\(3\)](#) — or upon ordering notice under [Rule 23\(e\)\(1\)](#) to a class proposed to be certified for purposes of settlement under [Rule 23\(b\)\(3\)](#) — the court must direct to class members the best notice that is practicable under the circumstances." [Fed. R. Civ. P. 23\(c\)\(2\)\(B\)](#). This includes "individual notice to all members who can be identified through reasonable effort." *Id.* Notice may be made by "United States mail, electronic mean, or other appropriate means," and:

must clearly and concisely state in plain, easily [\[\\*\\*203\]](#) understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under [Rule 23\(c\)\(3\)](#).

#### Fed. R. Civ. P. 23(c)(2)(B)(i–vii).

"The standard for the adequacy of a settlement notice in a class action under either the [Due Process Clause](#) or the Federal Rules is measured by reasonableness." [Wal-Mart Stores, 396 F.3d at 113–14](#) (citations omitted). "[N]otice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceeding." [Id. at 114](#) (citation and internal quotation marks omitted). In addition, notice "is adequate if it may be understood by the average class member." *Id.* (citation and internal quotation marks omitted). "There are no rigid rules for determining whether a settlement notice to the class satisfies constitutional or [Rule 23\(e\)](#) requirements." [Charron v. Pinnacle Grp. N.Y. LLC, 874 F. Supp. 2d 179, 191 \(S.D.N.Y. 2012\)](#), aff'd sub nom. [Charron, 731 F.3d 241](#).

"Courts in this Circuit have explained that a [Rule 23](#) Notice will satisfy due [\[\\*\\*204\]](#) process when it 'describe[s] the terms of the settlement generally,' " "inform[s] the class about the allocation of attorneys' fees, and provide[s] specific information regarding the date, time, and place of the final approval hearing." [Id. at 191](#) (alteration in original) (first citing [\[\\*59\]](#) [In re Michael Milken & Assocs. Sec. Litig., 150 F.R.D. 57, 60 \(S.D.N.Y. 1993\)](#); and then

citing [\*Clark v. Ecolab Inc., Nos. 07-CV-8623, 04-CV-4488, and 06-CV-5672, 2009 WL 6615729, at \\*6, 2009 U.S. Dist. LEXIS 108736, at \\*22 \(S.D.N.Y. Nov. 17, 2009\)\*](#).

Both the Publication Notice and the Long Form Notice satisfy each of the [Rule 23\(c\)\(2\)\(B\)](#) requirements and adequately notify class members of the proposed settlement. The Publication Notice describes basic information in plain, clear terms, including the class claims, the class definition, potential attorneys' fees and expense awards, the date and location of the final approval fairness hearing, and merchant rights including opt-out and objection rights. (See Revised Class Notices, G1-1 to G1-5.) The Long Form Notice includes frequently asked questions and the full text of the release. (See Revised Class Notices, G2-4 to G2-24.) The Court therefore finds the Class Notices to be sufficient and reasonable. See [\*Hall v. ProSource Techs., LLC, No. 14-CV-2502, 2016 U.S. Dist. LEXIS 53791, 2016 WL 1555128, at \\*5 \(E.D.N.Y. Apr. 11, 2016\)\*](#) (finding notice sufficient where the notice and claim form "described essential and relevant information in plain terms, including . . . [\*\*205] . the terms of the Settlement Agreement . . . and the various rights of potential class members, such as the right to opt out of the Settlement Class or object to the instant Final Approval Motion.").

The Court also finds reasonable the manner in which the notices will be provided. The "Long Form Notice will be sent via First Class mail," and "an Email Notice will also be sent" to available email addresses. (Decl. of Cameron R. Azari, Esq. on Proposed Settlement Class Notice Program ("Azari Decl.") ¶ 13, annexed to Superseding Settlement Agreement as App. F.) To determine who will receive individualized notice, the Class Administrator "will work with the settling parties to develop a notice database using the extensive database developed for the proposed 2012 settlement, combined with additional data provided by Visa and MasterCard, and 2013-forward acquirer records."<sup>49</sup> (Azari Decl. ¶ 23.) During the first attempt to certify the class, "[t]he Class Administrator notified class members of the terms of the proposed settlement through a mailed notice and publication campaign that included more than 20 million mailings and publication in more than 400 publications." [\*Interchange Fees I, 986 F. Supp. 2d at 217.\*](#)

The same website that was used in the prior settlement process — [www.PaymentCardSettlement.com](http://www.PaymentCardSettlement.com) — will be maintained as the case website and contain relevant deadlines and documents, including the Superseding Settlement Agreement, the Long Form Notice, and "all papers filed in connection with the motions for approval of the class settlement and any motions for attorneys' fees, expenses, or service awards, and answers to frequently asked questions (FAQs)." (Azari Decl. ¶ 49.) The website will be available in English, Spanish, Chinese, Japanese, Korean, Russian, Thai, and Vietnamese, (*id.*), and is listed in both Notices as a resource. (See, e.g., Revised Class Notices G1-2, G2-1.)

The only objections to the Notice Plan were filed by the Branded Operators. Because of the existence of exclusion lists, the Branded Operators warned that there would be a "failure to notify" hundreds of class members, and expressed concern that the Branded Operators' rights to participate in the class would be excluded "without even providing these class members with notice that identifies them as excluded." (Mem. in Opp'n [\*\*207] to Prelim. Approval 5, 21; see generally [\*id. at 19-21.\*](#)) The Court has addressed these objections. First, at the hearing, Class Counsel assured the Court that the Branded Operators would in fact receive notice. (Hrg Tr. 9:1-9:13; *id.* at 9:5-9:7 (clarifying that "[t]he exclusion list isn't to exclude [potential class members] from getting notice; it would be potentially down the road that [potential [\*60] class members] may not be able to make a claim from the settlement fund.").) Second, the Court further requested that Class Counsel send notice of exclusion to persons, businesses, or other entities found on any exclusion list. (*Id.* at 13:9-13:18; see also Notice of Exclusion; Prelim. Approval Order ¶¶ 12, 15.) Third, "a Long Form Notice will be mailed to all persons who request one via the toll-free phone number or by mail or email." (Azari Decl. ¶ 26.)

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<sup>49</sup> In addition to individualized notice, notice will be published in targeted language publications, general media, newspaper, and business publications, including, among other locations, the *New York Times*, *Forbes* [\*\*206], the *Wall Street Journal*, *National Geographic*, *Sports Illustrated*, *People*, and *People en Español*. (Azari Decl. ¶¶ 29-35.) "The combined, measured media notice effort is estimated to reach 80.4% all U.S. Adults aged 18+ with an average frequency of 2.8 times, 84.2% of all US Business Owners with an average frequency of 3.2 times; and 84.4% of all US Adults in Business and Finance Occupations, with an average frequency of 3.4 times." (*Id.* ¶ 22.) Banner advertisements will also be placed on websites. (*Id.* ¶¶ 36-42.)

For the foregoing reasons the Court found the Notice Plan and proposed Class Notices to be reasonable and constitute "the best notice that is practicable under the circumstances." See Fed. R. Civ. P. 23(c)(2)(B). In the January 24, 2019 Order, the Court therefore approved the method of notice to be provided to the Rule 23(b)(3) class members as set forth in the Notice Plan, and approved **[\*\*208]** the Class Notices. The Court also approved Epiq Systems, Inc. as the Settlement Administrator to perform duties in accordance with the Superseding Settlement Agreement.

#### e. Final approval procedure

The Court has set forth a schedule with deadlines for the mailing and publication of the Class Notices and the notice of exclusion, exclusion and opt out requests, submission of written statements of objection, submission of notices of intention to appear at the final approval hearing, submission of motions for class settlement final approval, filing of the Class Administrator report, submission of responses to objections, and the final approval hearing. (See Prelim. Approval Order.)

The Court will hold the final approval hearing at 10:00 AM on Thursday, November 7, 2019.

### III. Conclusion

For the foregoing reasons, on January 24, 2019, the Court preliminarily approved the Superseding Settlement Agreement and preliminarily granted class certification for the purposes of settlement, appointed Class Counsel and the Class Administrator, and approved the proposed Notice Plan, Class Notices, and Plan of Administration and Distribution.

Brooklyn, New York

Dated: January 28, 2019

SO ORDERED:

/s/ MKB

MARGO K. **[\*\*209]** BRODIE

United States District Judge

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## Westinghouse Air Brake Techs. Corp. v. Siemens Mobility, Inc.

United States District Court for the District of Delaware

January 29, 2019, Decided; January 29, 2019, Filed

Civil Action No. 17-1687-LPS-CJB

### **Reporter**

330 F.R.D. 143 \*; 2019 U.S. Dist. LEXIS 14849 \*\*; 2019 WL 359220

WESTINGHOUSE AIR BRAKE TECHNOLOGIES CORPORATION (d/b/a WABTEC CORPORATION), Plaintiff, v. SIEMENS MOBILITY, INC., Defendant.

**Prior History:** [Westinghouse Air Brake Techs. Corp. v. Siemens Indus., 2018 U.S. Dist. LEXIS 129670 \(D. Del., Aug. 2, 2018\)](#)

## **Core Terms**

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Counterclaims, patent, antitrust, sever, patent infringement, occurrence, factors, infringes, judicial economy, question of law, allegations, technology, discovery, parties, amend

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**Judges:** Christopher J. Burke, UNITED STATES MAGISTRATE JUDGE.

**Opinion by:** Christopher **[\*\*2]** J. Burke

## **Opinion**

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### **[\*145] MEMORANDUM ORDER**

Presently pending before the Court in this patent infringement case is Plaintiff Westinghouse Air Brake Technologies Corporation's ("Plaintiff" or "Wabtec") motion seeking severance of certain of Defendant Siemens Mobility, Inc.'s ("Defendant" or "Siemens") counterclaims, pursuant to [Federal Rule of Civil Procedure 21](#). (D.I. 146) Siemens opposes the Motion. For the reasons set forth below, Plaintiff's Motion is GRANTED.

## I. BACKGROUND

### A. Procedural Background

On April 21, 2016, Siemens filed suit against Wabtec in this Court, alleging that Wabtec infringed a number of Siemens' patents concerning various aspects of positive train control ("PTC") technology. See *Siemens Mobility Inc. v. Westinghouse Air Brake Technologies Corp. d/b/a/ Wabtec Corp.*, Civil Action No. 16-284-LPS (D. Del.) (hereafter, the "16-284 Action"). Thereafter, Wabtec filed counterclaims in the 16-284 Action, including counterclaims asserting that Siemens infringes the three asserted patents that are now at issue in the instant action: United States Patent Nos. 7,398,140 (the "140 Patent"), 8,175,764 (the "764 Patent") and 8,478,463 ("463 Patent") (the "asserted patents"). (D.I. 56, 16-284 Action) Siemens moved to sever those counterclaims from the 16-284 Action, and the Court granted Siemens' **[\*\*3]** severance motion on August 17, 2017. Instead of re-filing the patent infringement allegations in an affirmative Complaint in this District, however, on September 8, 2017, Wabtec filed such a Complaint in the United **[\*146]** States District Court for the Western District of Pennsylvania ("Western District of Pennsylvania"). (D.I. 1 at ¶¶ 1, 21-23) That filing gave rise to the instant action. On September 19, 2017, Wabtec filed a First Amended Complaint, containing similar infringement allegations as to the three asserted patents. (D.I. 14)

Soon after, Siemens moved to transfer venue for the instant action back to this District. (D.I. 19) The Western District of Pennsylvania Court granted that transfer motion on November 20, 2017. (D.I. 34) On November 30, 2017, Chief Judge Leonard P. Stark referred the instant case to the Court to, *inter alia*, resolve any matters related to scheduling, and any motions to dismiss, stay or transfer venue. (D.I. 38) And on December 15, 2017, Siemens filed its Answer to the First Amended Complaint; that Answer included six counterclaims (all related to at least one of the asserted patents) that are not at issue with the instant Motion. (D.I. 42 at 17-29)

About seven **[\*\*4]** months later, on July 19, 2018, Siemens filed a motion seeking leave to amend its counterclaims. This motion (the "motion to amend") sought to add four counterclaims alleging violations of U.S. **antitrust law** (the "antitrust counterclaims"), one alleging a violation of the Lanham Act, **15 U.S.C. § 1125(a)(1)(B)**, and one alleging a violation of the **Delaware Deceptive Trade Practices Act, 6 Del. C. § 2531 et seq. ("DDTPA")**, (together, the "Amended Counterclaims"). (D.I. 107 & exs. A-B) Wabtec opposed the motion to amend, but on October 3, 2018, Chief Judge Stark issued an order granting that motion. (D.I. 142) In doing so, Chief Judge Stark found that: (1) the motion to amend was not untimely; (2) Wabtec had not shown that the Amended Counterclaims were futile; and (3) the addition of the Amended Counterclaims to the instant case would not unfairly prejudice Wabtec as "their addition to this case, which still has ample time left for discovery, is more likely to promote the just, speedy, and relatively inexpensive resolution of the parties' disputes than would the initiation of yet another case between these parties." (*Id.*) Chief Judge Stark ruled that Wabtec "may, if it wishes, file a motion to sever under **Rule 21**, motion to dismiss [the Amended **[\*\*5]** Counterclaims] under **Rule 12**, or particularized objections to requested discovery, but discovery on all claims and counterclaims will proceed unless and until any such motion is granted or other relief is ordered." (*Id.*)

Thereafter, on October 18, 2018, Wabtec filed the instant Motion seeking severance of the Amended Counterclaims, (D.I. 146), along with a motion seeking dismissal of the Amended Counterclaims ("the motion to dismiss"), (D.I. 148). Chief Judge Stark later referred the instant Motion to the Court for resolution, (D.I. 160), and briefing on the instant Motion was completed on November 12, 2018, (D.I. 168).<sup>1</sup>

### B. Factual Background

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<sup>1</sup> On October 30, 2018, Wabtec additionally filed a motion seeking a protective order and a stay of discovery regarding the Amended Counterclaims, pending resolution of the instant Motion and the motion to dismiss. (D.I. 156) The Court subsequently denied that motion on January 8, 2019. (D.I. 180)

Wabtec develops, manufactures and sells PTC technology, which is used to construct collision avoidance systems in trains. (D.I. 14 at ¶¶ 24-25) In 2008, Congress enacted the *Rail Safety Improvement Act* ("RSIA") which required all Class I railroads and passenger rail operators to implement a mandatory PTC collision avoidance system. (*Id.* at ¶ 25) Wabtec owns the asserted patents, which, as was previously noted above, are patents to aspects of PTC technology. (*Id.* at ¶¶ 21-23)

Siemens also develops, manufactures and sells PTC technology, specifically the Trainguard [\*\*6] PTC system, which includes the Trainguard PTC Onboard Unit ("OBU"). (*Id.* at ¶¶ 59-60) With its affinuative patent claims here, Wabtec is asserting that Siemens directly, indirectly and willfully infringes the asserted patents by making, using, offering to sell, selling, and/or importing the Trainguard PTC and/or the Trainguard PTC OBU. (*Id.* at ¶¶ 87, 101, 115)

As noted above, the Amended Counterclaims include six different counterclaims. [\*147] The four antitrust counterclaims all relate to Siemens' allegation that Wabtec has "engaged in an ongoing scheme to exclude Siemens from the [Interoperable Train Control, or "ITC"]-PTC market[,] and has used "illegal anticompetitive actions such as tying, unfair exclusive dealing, and deception [to] maintain its monopoly over the ITC-PTC, [ITC-PTC Onboard Computer, or "OBC"], and [ITC-PTC Back Officer Server Software, or "BOS"] markets[,] to the detriment of its "only competitive threat" in those markets, Siemens. (D.I. 143 at 29-30) The four antitrust counterclaims allege, respectively, that Wabtec engages in monopolization in violation of the *Sherman Antitrust Act* (*"Sherman Act"*), attempted monopolization in violation of the Sherman Act, tying in [\*\*7] violation of the Sherman Act and the *Clayton Act*, and agreements in restraint of trade in violation of the Sherman Act. (*Id.* at ¶¶ 156-205) The Lanham Act counterclaim alleges that Wabtec has made knowingly false or misleading statements in commercial advertising about the interoperability, safety, technical or other characteristics of Siemens' ITC-PTC components, which materially mislead customers to Siemens' detriment. (*Id.* at ¶¶ 206-15) Lastly, the DDTPA counterclaim is very similar in nature to the Lanham Act counterclaim. (*Id.* at ¶¶ 216-23)

## II. DISCUSSION

### A. Legal Standard

*Rule 21* provides that the "court may . . . sever any claim against a party." *Fed. R. Civ. P. 21*. Motions to sever in a patent case are governed by Federal Circuit law. *Vehicle IP, LLC v. AT&T Mobility LLC, C.A. No. 09-1007-LPS, 2016 U.S. Dist. LEXIS 149431, 2016 WL 6404093, at \*1* (D. Del. Oct. 20, 2016) (citing *In re EMC Corp., 677 F.3d 1351, 1354 (Fed. Cir. 2012)*). The Federal Circuit, in turn, has noted that because *Rule 21* does not otherwise provide a standard for district courts to consider when assessing a motion to sever, "courts have looked to [Federal Rule of Civil Procedure] 20 for guidance." *In re EMC Corp., 677 F.3d at 1356* (internal quotation marks and citation omitted); see also *In re Nintendo Co., Ltd., 544 F. App'x 934, 938 (Fed. Cir. 2013)*; *Vehicle IP, 2016 U.S. Dist. LEXIS 149431, 2016 WL 6404093, at \*1; Power Integrations, Inc. v. ON Semiconductor Corp., No. 16-CV-06371-BLF, 2018 U.S. Dist. LEXIS 94686, 2018 WL 2688875 at \*2 (N.D. Cal. June 5, 2018)*. Defendants may be joined in one action pursuant to *Rule 20* "only if the two independent [\*\*8] requirements of *Rule 20* are satisfied: (1) the claims against them must be asserted 'with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences,' and (2) there must be a 'question of law or fact common to all defendants.'" *In re EMC Corp., 677 F.3d at 1356* (quoting *F.R.C.P. 20(a)(2)*); see also *Vehicle IP, 2016 U.S. Dist. LEXIS 149431, 2016 WL 6404093, at \*1*. These two requirements are necessary, but not sufficient conditions for joinder; the Federal Circuit has noted that even if the claims at issue meet both requirements, joinder may still be refused "in the interest of avoiding prejudice and delay, ensuring judicial economy, or safeguarding principles of fundamental fairness." *In*

*re EMC Corp., 677 F.3d at 1360* (internal quotation marks and citation omitted); see also *In re Nintendo Co., Ltd., 544 F. App'x at 939; Power Integrations, Inc., 2018 U.S. Dist. LEXIS 94686, 2018 WL 2688875 at \*2.*<sup>2</sup>

Below, the Court will address the two *Rule 20*-related factors first, and will thereafter consider other factors such as avoidance of [\*148] prejudice and delay, ensuring judicial economy and safeguarding principles of fundamental fairness.

## B. Application of *Rule 20*-related Factors

### 1. Do the respective claims arise out of the same transaction, occurrence, or series of transactions or occurrences?

In deciding whether the Amended Counterclaims arise out of the same transaction or occurrence, or series of transaction or occurrences, [\*\*9] as do Wabtec's patent infringement claims, the Court analyzes whether there is a "logical relationship between the separate causes of action" such that "there is substantial evidentiary overlap in the facts giving rise to the" different sets of claims or the claims "share an aggregate of operative facts." *In re EMC Corp., 677 F.3d at 1358*, see also *Vehicle IP, LLC, 2016 U.S. Dist. LEXIS 149431, 2016 WL 6404093, at \*1*. "*Rule 20* makes clear that the existence of a single common question of law or fact alone is insufficient to satisfy the transaction-or-occurrence requirement." *In re EMC Corp., 677 F.3d at 1357*.

Here, it is not difficult for the Court to conclude that Siemens' Amended Counterclaims do not share "a logical relationship" or "an aggregate of operative facts" with Wabtec's patent infringement claims. (Indeed, in its briefing, Siemens never really argues that they do.). This is not surprising, as, for the most part, the resolution of patent infringement claims and antitrust-related claims require different types of analysis. The question of whether Siemens' Trainguard PTC system infringes Wabtec's patents will focus on technical issues relating to the comparison of system components or methods of use to the content of the asserted patent claims. As to these claims, it is Siemens' conduct that will be at issue. Conversely, [\*\*10] Siemens' antitrust claims are broad in scope and will be primarily focused on Wabtec's alleged monopolistic activity that is said to have occurred in three different product markets. There, it will be Wabtec's conduct that is being called out. Thus, it can be said that "[b]ecause the [a]ntitrust Mitigation arises from [Wabtec's] conduct, and the [patent] Mitigation arises from [Siemens'] conduct, the two [sets of claims] could not arise from the same transaction or occurrence." *Syngenta Seeds, Inc. v. Monsanto Co., No. Civ. 04-908-SLR, 2005 U.S. Dist. LEXIS 4651, 2005 WL 678855 at \*2* (D. Del. Mar. 24, 2005) (holding that patent infringement and antitrust claims do not arise from the same transaction or occurrence where the claims arise from the separate conduct of different actors); see also *Sanofi-Synthelabo v. Apotex Inc., No. 02 Civ. 2255(SHS), 2006 U.S. Dist. LEXIS 80203, 2006 WL 3103321, at \*4* (S.D.N.Y. Nov. 2, 2006) (granting a motion to sever defendant's antitrust counterclaims from plaintiffs' action asserting patent infringement in part because "[t]he Antitrust Allegations arise out of recent commercial activity that is distinct from the underlying patent dispute."). For this reason alone, *Rule 20*'s requirements would not be satisfied.

<sup>2</sup> In their briefing, the parties addressed most or all of the factors relating to severance/joinder decisions cited in the above paragraph. That said, the parties (citing to non-patent cases) each utilized different tests for resolving motions to sever. Wabtec, for example, asserted that the Court should utilize a five-factor test (which appears to include most or all of the factors referenced in the paragraph above): "(1) whether the claims arise out of the same transaction or occurrence; (2) whether the claims present some common questions of law or fact; (3) whether settlement of the claims or judicial economy would be facilitated; (4) whether prejudice would be avoided if severance were granted; and (5) whether different witnesses and documentary proof are required for the separate claims." (D.I. 147 at 4-5 (citing *Karlo v. Pittsburgh Glass Works, LCC, No. 2:10-cv-1283, 2015 U.S. Dist. LEXIS 141057, 2015 WL 6134052, at \*2* (W.D. Pa. Oct. 16, 2015))). Siemens, for its part, did not directly address the two *Rule 20*-related factors at all, instead focusing on the following three-factor analysis: "(1) the convenience of the parties; (2) avoiding prejudice; and (3) expedience and economy." (D.I. 158 at 3 (citing *Graudins v. Retro Fitness, LLC, 921 F. Supp. 2d 456, 467-68* (E.D. Pa. 2013))).

## 2. Is there a question of law or fact common to the disparate claims?

With regard to whether the two sets of claims share any common issues of law and fact, [\*\*11] it is likely that there will be at least some fact questions relevant to Wabtec's patent case that will also be relevant to Siemens' Amended Counterclaims. For example, the commercial success of Wabtec's products that read on the asserted patents may be relevant to both cases. (D.I. 158 at 7) Similarly, Wabtec's asserted market dominance and the scope of its market power will be relevant to patent damages and to antitrust issues. (*Id.*); cf. [Dentsply Intern. Inc. v. New Tech. Co., Civ.A. No. 96-272 MMS, 1996 WL 756766, at \\*4 \(D. Del. Dec. 19, 1996\)](#). And Siemens' Trainguard PTC system's sales will be relevant to damages in the patent case and to issues of competition in the antitrust matter. (D.I. 158 at 7)

But in the main, the key questions of law and fact at issue will be very different. As was noted above, Wabtec's patent litigation will focus on patent law issues, such as construction of the patent claims and whether the asserted patents are valid and whether those patents are infringed by Siemens' Trainguard PTC product. Cf. [Syngenta Seeds, 2005 U.S. Dist. LEXIS 4651, 2005 WL 678855 at \\*2](#). Siemens' antitrust case, in contrast, will focus on "typical antitrust issues such as whether [Wabtec is a] [\*149] monopolist[,] whether [Wabtec] engaged in anticompetitive [\*\*12] conduct[,] and what are the relevant product markets and/or consumers. [Syngenta Seeds, 2005 U.S. Dist. LEXIS 4651, 2005 WL 678855 at \\*2](#); see also [Eurand Inc. v. Mylan Pharms. Inc., Civ. No. 08-889-SLR, 2009 U.S. Dist. LEXIS 92542, 2009 WL 3172197 at \\*2 \(D. Del. Oct. 1, 2009\)](#) (noting the "distinct lack of evidentiary overlap between issues of patent validity and infringement and issues of . . . antitrust"); [Sanofi-Synthelabo, 2006 U.S. Dist. LEXIS 80203, 2006 WL 3103321, at \\*4](#) ("[T]he Antitrust Allegations principally concern questions of **antitrust law** and contract law, not patent law."). The documentary proof, fact witness testimony and expert witness testimony needed to litigate both sets of claims will therefore vary significantly.

Thus, although there would likely be *some* common questions of law or fact, the significant difference in legal and factual issues still suggests that severance is appropriate. See [Sanofi-Synthelabo, 2006 U.S. Dist. LEXIS 80203, 2006 WL 3103321, at \\*4](#); [Syngenta Seeds, 2005 U.S. Dist. LEXIS 4651, 2005 WL 678855 at \\*2](#); see also [Federal Trade Commission v. Endo Pharmaceuticals, Inc., Civ. No. 16-1440, 2016 U.S. Dist. LEXIS 145329, 2016 WL 6124376, at \\*4 \(E.D. Pa. Oct. 20, 2016\)](#) (noting that with regard to [Rule 20](#)'s "common question of law or fact" requirement, only one such common question need be shared to satisfy the Rule, but that "[c]ourts in [the Third] Circuit have found that the same series of transactions or occurrences prerequisite under [Rule 20](#) essentially consumes the second requirement that there arise a question of law or fact common to all joined parties.") (internal quotation marks and citation omitted).

## C. Other Relevant Factors

Because both [Rule 20](#) [\*\*13] factors are not satisfied, the Court could end its analysis, with the result that the Motion would be granted. But for sake of completeness, the Court will also analyze the other factors mentioned in Federal Circuit caselaw that sometimes come into play when a district court analyzes a [Rule 21](#) motion. As will be seen below, review of those factors does not suggest that grant of the Motion is inappropriate.

With regard to whether severance (or the lack thereof) would engender prejudice to one side or the other, or whether it would contravene the principle of fundamental fairness, both sides make understandable arguments. On the one hand, Wabtec rightly asserts that the complexity and cost inherent in antitrust litigation could serve to unnecessarily delay the resolution of its earlier-filed patent claims, were the Amended Counterclaims not severed. (D.I. 147 at 14) On the other hand, Siemens understandably worries that were the Amended Counterclaims severed, the mechanics of getting a new case up and running could lead to some further delay in resolving its antitrust case (a case that will already be complicated enough). (D.I. 158 at 6-7) In the end, those arguments each have some force, but [\*\*14] they about cancel each other out.

As to the issue of judicial economy, the Court recognizes that in Chief Judge Stark's earlier order on the motion to amend, he noted his expectation that adding the Amended Counterclaims to this case "which still has ample time left for discovery, is more likely to promote the just, speedy, and relatively inexpensive resolution of the parties' disputes than would the initiation of yet another case between these parties." (D.I. 142)<sup>3</sup> But in the interval, Siemens Amended Counterclaims have not moved forward much, as the parties have been tied up in further litigation over how and whether such discovery should proceed. (See D.I. 180) And because antitrust litigation surely "holds the potential for enormously costly and time-consuming discovery[.]" [Superior Offshore Int'l. Inc. v. Bristow Grp., Inc., CIVIL ACTION No. 1:09-CV-00438-LDD, 2010 U.S. Dist. LEXIS 147376, 2010 WL 11470613, at \\*6 \(D. Del. Dec. 1, 2010\)](#), were the Amended Counterclaims not severed at this stage, it would almost certainly mean that the current case schedule "will be entirely displaced[.]" (D.I. 147 at 15). It does seem, then, that disentangling Wabtec's earlier-filed patent infringement allegations from Siemens' Amended Counterclaims will at least help Wabtec's [\[\\*\\*15\] patent case get to resolution on a much speedier timetable. Cf. Masimo Corp. v. Philips Elecs. N. Am. Corp., No. CIV.A 09-80-JJF-MPT, 2010 U.S. Dist. LEXIS 23057, 2010 WL 925864, at \\*2 \(D. Del. Mar. 11, 2010\)](#) ("[T]here is a strong likelihood that consideration of the patent validity issues will be delayed significantly if tried together with the antitrust issues. Major antitrust litigation is often enormously time-consuming ") (internal quotation marks and citation omitted). And getting resolution on at least a subset of the current action, sooner rather than later, might well aid overall judicial economy.<sup>4</sup> This factor at least slightly favors grant of the Motion. See [Eurand Inc., 2009 U.S. Dist. LEXIS 92542, 2009 WL 3172197 at \\*1](#) (granting severance of patent infringement and antitrust claims where "this request is supported by the promotion of judicial economy and avoiding the injection of complex, unrelated and perhaps unnecessary issues into the patent infringement case.").

### III. CONCLUSION

Ultimately, Wabtec has shown that the [Rule 20](#) factors do not both militate in favor of keeping the claims at issue in one litigation, as the two sets of claims really are related to distinct transactions and occurrences. In light of that, and because judicial economy may be somewhat better served via severance, [\[\\*\\*16\]](#) the Court GRANTS Plaintiffs Motion. Although Siemens will now have to file its counterclaims in a separate case, the Court expects that the parties will work together to avoid inefficiency and to move both cases forward at a good pace.<sup>5</sup>

Dated: January 29, 2019

/s/ Christopher J. Burke

Christopher J. Burke

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<sup>3</sup>The Court assumes that were the Amended Counterclaims not severed, they would ultimately be bifurcated for trial from Wabtec's patent claims Cf. [Orthophoenix, LLC v. Dfine, Inc., No. CV 13-1003-LPS, 2015 U.S. Dist. LEXIS 61417, 2015 WL 1938702, at \\*1 \(D. Del. Apr. 28, 2015\)](#) (bifurcating an antitrust counterclaim from an affirmative patent infringement case relating to 15 patents-in-suit); see [Ciena Corp. v. Corvis Corp., 210 F.R.D. 519, 521 \(D. Del. 2002\)](#) (holding that "bifurcation is an important discretionary tool that district courts can use in patent cases to ensure that the cases are resolved in a just manner by juries that understand the complex issues before them."). Thus, the Court need not consider Wabtec's argument that to add the Amended Counterclaims to this "already complex patent infringement case . . . will . . . make the trial unmanageable for the Court and the jury." (D.I. 147 at 11)

<sup>4</sup>With all of the above said, the Court makes no final decision here on whether the instant action and any newly-filed action that includes Siemens' currently-filed Amended Counterclaims should be consolidated for pre-trial purposes pursuant to [Federal Rule of Civil Procedure 42](#).

<sup>5</sup>Regarding Siemens' concern about having to "repeat the entire motion to dismiss briefing stage" if severance is granted, (D.I. 158 at 5), that is not going to happen. When the new case is filed, and assuming there is no material change to the substance of Siemens' allegations, a responsive pleading will be filed on an abbreviated timeline and the entire motion to dismiss briefing package will simply be re-filed at once in the new case. (D.I. 168 at 7) Additionally, the Court expects that the parties' cross-use discovery agreement will apply to the new case. (*Id.*)

UNITED STATES MAGISTRATE JUDGE

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## In re Mercedes-Benz Emissions Litig.

United States District Court for the District of New Jersey

February 1, 2019, Decided; February 1, 2019, Filed

Civil Action No.: 16-881 (JLL)(JAD)

### **Reporter**

2019 U.S. Dist. LEXIS 16381 \*; 2019 WL 413541

IN RE MERCEDES-BENZ EMISSIONS LITIGATION

**Notice:** NOT FOR PUBLICATION

**Subsequent History:** Vacated by, Remanded by [In re: Mercedes-Benz Emissions Litig., 2020 U.S. App. LEXIS 837 \(3d Cir. N.J., Jan. 10, 2020\)](#)

**Prior History:** [In re Mercedes-Benz Emissions Litig., 2016 U.S. Dist. LEXIS 168535 \(D.N.J., Dec. 5, 2016\)](#)

## **Core Terms**

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Plaintiffs', allegations, emissions, diesel, Polluting, argues, enterprise, Defendants', arbitration, clean, defeat, omissions, deceptive, engine, advertisements, traceable, state-law, mail, misrepresentation, regulators, consumer, consumer protection, overpayment, fraudulent, damages, preemption, injuries, software, concealed, cases

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**Judges:** HON. JOSE L. LINARES, Chief United States District Judge.

**Opinion by:** JOSE L. LINARES

## Opinion

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**LINARES**, Chief District Judge.

This matter comes before the Court by way of Defendants Mercedes-Benz [\*3] USA, LLC's and Daimler AG's motion to dismiss the Fourth Consolidated and Amended Class Action Complaint ("FAC"), (ECF No. 117), as well as Defendant Robert Bosch LLC's motion to dismiss the FAC, (ECF No. 118). Plaintiffs have opposed these motions (ECF Nos. 126-27), and Defendants have replied thereto, (ECF Nos. 131-32). The Court decides this matter without oral argument, pursuant to *Federal Rule of Civil Procedure 78*. For the reasons stated below, Defendants' motions are granted in part and denied in part.

### I. BACKGROUND<sup>1</sup>

#### A. Facts

This is a putative class action involving allegations that Defendants Mercedes-Benz USA, LLC and Daimler AG (collectively, "Mercedes"), together with Bosch GmbH and Bosch LLC (collectively, "Bosch") have unlawfully misled consumers into purchasing certain "BlueTEC diesel" vehicles (the "Polluting Vehicles") by misrepresenting the environmental impact of these vehicles during on-road driving. (FAC ¶ 10-20).<sup>2</sup>

According to Plaintiffs, "Mercedes' advertisements, promotional campaigns, and public statements represented that the Polluting Vehicles had high fuel economy, low emissions, reduced NOx by 90%, had lower emissions than comparable diesel vehicles, and had lower emissions than other comparable [\*4] vehicles." (FAC ¶ 323). However, Mercedes, with help of Bosch, installed an electronic control unit in the Polluting Vehicles known as the EDC17. (FAC ¶ 358). The EDC17 allegedly functions as a defeat device, meaning it turned off or limited emissions reductions during real-world driving conditions. (FAC ¶¶ 16-17, 21). This defeat device was "only discoverable when conducting over-the-road testing that is not part of the certification protocol." (FAC ¶ 252). The Polluting Vehicles also allegedly failed to perform up to their touted environmental standards in other situations, such as when ambient temperatures drop below 50°F/10°C—a defect Mercedes has acknowledged. (FAC ¶ 135).

Plaintiffs contend that Mercedes never disclosed the existence of the defeat device, nor the fact that the BlueTEC engines emit emissions substantially higher than those of gasoline vehicles, and thus, "defrauded its customers by omission, and engaged in fraud and unfair and deceptive conduct under federal and state law." (FAC ¶¶ 19, 313). Had Plaintiffs known of the emissions issues associated with the Polluting Vehicles, they would not have purchased those vehicles, or they would have paid substantially less [\*5] for them. (FAC ¶ 317). As to Bosch, the FAC sets

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<sup>1</sup> The facts as stated herein are taken as alleged in the FAC, (ECF No. 107).

<sup>2</sup> The Polluting Vehicles consist of the following Mercedes models powered by B1ueTEC diesel engines: ML 320, ML 350, GL 320, E320, S350, R320, E Class, GL Class, ML Class, R Class, S Class, GLK Class, GLE Class, and Sprinter. (FAC ¶ 18).

forth that Mercedes and Bosch entered into a scheme to evade U.S. emissions requirements and to deceive "the public into believing the Polluting Vehicles were 'clean diesels,'" in order to "bolster revenue, augment profits and increase Mercedes' share of the diesel vehicle market." (FAC ¶¶ 17, 356).

Plaintiffs, on behalf of a national class and state subclasses, now assert claims for violation of the RICO Act, as well as violations of state consumer protection statutes, and fraudulent concealment. (FAC ¶¶ 342-1752).

## B. Procedural History

Plaintiffs initiated this action on February 18, 2016. (ECF No. 1). On May 6, 2016, Plaintiffs filed the Consolidated and Amended Class Action Complaint ("CAC"). (ECF No. 17). Mercedes moved to dismiss the CAC on July 8, 2016. (ECF No. 38). This Court granted that motion on December 6, 2016. (ECF Nos. 58-59). The Court found that Plaintiffs failed to establish Article III standing because the CAC did not allege that their injury was fairly traceable to Mercedes' conduct. (ECF No. 58 at 11-14). In particular, the Court found that "Plaintiffs have not alleged that they actually viewed any category of advertisements [\*6] . . . that contained the alleged misrepresentations." (ECF No. 58 at 14). Accordingly, the Court dismissed the CAC without prejudice. (ECF Nos. 58-59). Plaintiffs then filed a third consolidated and amended class action complaint on March 3, 2017, (ECF No. 81), and finally, they filed the operative FAC on September 25, 2017 adding Bosch as a defendant and the accompanying RICO allegations. Mercedes and Bosch now move separately to dismiss the FAC arguing that Plaintiffs lack Article III standing, that Plaintiffs' state-law claims are preempted by the Clean Air Act or, alternatively, fail to state a claim, and finally that Plaintiffs fail to state a RICO claim.

## II. LEGAL STANDARD

### A. Federal Rule of Civil Procedure 12(b)(1): Standing

Defendants seek to dismiss Plaintiffs' Complaint for lack of standing. "Rule 12(b)(1) governs motions to dismiss for lack of standing, as standing is a jurisdictional matter." N. Jersey Brain & Spine Ctr. v. Aetna, Inc., 801 F.3d 369, 371 n.3 (3d Cir. 2015).

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Storino v. Borough of Point Pleasant Beach, 322 F.3d 293, 296 (3d Cir. 2003) (quoting Warth v. Seldin, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)). "It is axiomatic that, in addition to those requirements imposed by statute, plaintiffs must also satisfy Article III of the Constitution . . ." Horvath v. Keystone Health Plan E., Inc., 333 F.3d 450, 455 (3d Cir. 2003). The requirements of Article III standing are as follows:

[\*7] (1) the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Taliaferro v. Darby Twp. Zoning Bd., 458 F.3d 181, 188 (3d Cir. 2006) (quoting United States v. Hays, 515 U.S. 737, 742-43, 115 S. Ct. 2431, 132 L. Ed. 2d 635 (1995)); see also Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016) (reiterating the same factors and articulating the second factor as "fairly traceable to the challenged conduct of the defendant").

On a motion to dismiss for lack of standing, the plaintiff "bears the burden of establishing' the elements of standing, and each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." FOCUS v.

Allegheny Cly. Ct. Com. Pl., 75 F.3d 834, 838 (3d Cir. 1996) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). "For the purpose of determining standing, [the court] must accept as true all material allegations set forth in the complaint, and must construe those facts in favor of the complaining party." Storino, 322 F.3d at 296 (citing Warth, 422 U.S. at 501).

#### B. Federal Rule of Civil Procedure 12(b)(6)

To withstand a motion to dismiss for failure to state a claim, a "complaint [\*8] must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 678 (citing Twombly, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. (quoting Twombly, 550 U.S. at 556).

To determine the sufficiency of a complaint under Twombly and Iqbal in the Third Circuit, the Court must take three steps. "First, it must 'tak[e] note of the elements [the] plaintiff must plead to state a claim.' Second, it should identify allegations that, 'because they are no more than conclusions, are not entitled to the assumption of truth.' Finally, '[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." Connelly v. Lane Constr. Corp., 809 F.3d 780, 787 (3d Cir. 2016) (quoting Iqbal, 556 U.S. at 675, 679) (citations omitted). "In deciding a Rule 12(b)(6) motion, a court must consider only the complaint, exhibits attached to the complaint, matters of public record, [\*9] as well as undisputedly authentic documents if the complainant's claims are based upon these documents." Mayer v. Belichick, 605 F.3d 223, 230 (3d Cir. 2010).

### III. ANALYSIS

#### A. Article III Standing

As mentioned briefly above, this Court had previously dismissed Plaintiffs' CAC for lack of standing. In its prior Opinion, this Court found that while the Plaintiffs had set forth allegations "sufficient to support [their] claims that the [Polluting Vehicles] do not live up to Defendants' representations," Plaintiffs nevertheless failed to establish Article III standing because it was not clear that the injury was "fairly traceable" to Defendants' conduct. (ECF No. 58 at 8, 14). This was because "no Plaintiff ha[d] alleged that he or she relied upon any of the cited advertisements in deciding to lease or purchase one of Defendants' vehicles." (ECF No. 58 at 13-14). Both Mercedes and Bosch now argue that Plaintiffs lack Article III standing. (ECF Nos. 117-1 at 19-25; 118-1 at 19-27). Mercedes and Bosch both claim that Plaintiffs failed to address the traceability deficiencies raised in the Court's prior Opinion. (ECF Nos. 117-1 at 19-23; 118-1 at 25-27). Mercedes also argues that Plaintiffs' allegations contain three theories of injury that are [\*10] foreclosed as a matter of law: allegations regarding public environmental and health harms, violations of environmental regulations, and allegations of fixture harm, and that Plaintiffs have nevertheless abandoned these theories as a basis for standing. (ECF No. 117-1 at 24). Mercedes argues that Plaintiffs' benefit of the bargain theory is unsupported by allegations in the FAC. (ECF No. 117-1 at 24). Bosch similarly claims that Plaintiffs have abandoned all theories of injury except for a benefit-of-the-bargain injury, but that the "benefit of the bargain, upon which Plaintiffs base their claim for overpayment, cannot serve as the basis for an Article III injury in the absence of a contract or any 'bargain' between [Bosch] and Plaintiffs." (ECF No. 118-1 at 20-21). The Court will address these arguments in turn.

##### 1. Injury-in-Fact

Plaintiffs have established an injury in fact that can serve as the basis for Article III standing. In its prior Opinion, this Court found that "Plaintiffs have plausibly pled that the products received did not live up to the claims made by

Defendants," and that "benefit of the bargain damages are recoverable for overpayment and recoverable to confer standing." [\*11] (ECF No. 58 at 6, 8). In challenging Plaintiffs' benefit of the bargain theory of injury in fact, both Mercedes and Bosch argue that Plaintiffs have not shown that the Polluting Vehicles "failed to work for [their] intended purpose or [are] worth objectively less than what one could reasonably expect." (ECF No. 117-1 at 24 (quoting *Koronthaly v. L'Oreal USA, Inc.*, 374 F. App'x 257, 259 (3d Cir. 2010)); ECF No. 118-1 at 21). However, accepting Plaintiffs' allegations as true, they paid a higher price for the BlueTEC clean diesel engines, which, in reality, polluted at levels far higher than would be expected. (FAC ¶¶ 317, 323). "In other words, they paid for a product which did not operate in the way they believed it did." *In re Duramax Diesel Litig.*, 298 F. Supp. 3d 1037, 1052 (E.D. Mich. 2018). Claims of overpayment for a misrepresented product are "classic form[s] of injury in fact," that "[are] concrete and particularized." *In re Gerber Probiotic Sales Practice Litig.*, No. 12-835, 2013 U.S. Dist. LEXIS 121192, 2013 WL 4517994, at \*5 (D.N.J. Aug. 23, 2013).

Defendants' reliance on cases like *Koronthaly* and *Estrada v. Johnson & Johnson*, No. 16-7492, 2017 U.S. Dist. LEXIS 109455, 2017 WL 2999026 (D.N.J. July 14, 2017), is misplaced, as those cases are distinguishable. In fact, *Estrada* explains why the facts before Judge Wolfson in that case and before the Third Circuit in *Koronthaly* are different from those present here. Judge Wolfson wrote that:

[w]hile Plaintiff places reliance on several cases recognizing standing on a benefit-of-the-bargain theory of economic harm, those cases [\*12] are distinguishable from the present matter[, because] . . . in each of those cases, the courts found that the plaintiffs did not receive the benefit of their bargain because either: (i) the plaintiffs received a defective product; or (ii) the plaintiffs pled facts sufficient for the court to conclude that they would not have purchased the product at issue but for a specific misrepresentation by the defendants; i.e., that the plaintiff was induced into purchasing the product by a specific misrepresentation.

*Estrada*, 2017 U.S. Dist. LEXIS 109455, 2017 WL 2999026, at \*9. In both *Koronthaly* and *Estrada*, the plaintiffs pled injury-in-fact based on economic harm from an alleged physical injury that came from an undisclosed risk from using a cosmetic product. 374 F. App'x at 259; 2017 U.S. Dist. LEXIS 109455, 2017 WL 2999026, at \*9. However, these are cases where "the plaintiffs suffered no ill effects." *In re Gerber*, 2013 U.S. Dist. LEXIS 121192, 2013 WL 4517994, at \*5. That is not the case here, as Plaintiffs have pled facts asserting that they fall into either of the two categories recognizing standing on a benefit of the bargain theory as outlined in *Estrada*.

In addition, Bosch argues that Plaintiffs have not established an injury-in-fact in their claims against it, because "[Bosch] was not a party to any of Plaintiffs' vehicle-purchase contracts, and no named Plaintiff makes any [\*13] allegation that they had any relationship with [Bosch]." (ECF No. 118-1 at 21). Bosch's reliance on the absence of privity of contract is not relevant in this context. In the cases Bosch cites in support of this proposition—*Koronthaly*, *Bowman v. RAM Med., Inc.*, No. 10-cv-4403, 2012 U.S. Dist. LEXIS 75218, 2012 WL 1964452 (D.N.J. May 31, 2012), and *Young v. Johnson & Johnson*, No. 11-4580, 2012 U.S. Dist. LEXIS 55192, 2012 WL 1372286 (D.N.J. Apr. 19, 2012)—the lack of the contract alone was not the only reason the plaintiffs failed to establish injury-in-fact. In each case, it was the lack of privity of contract in addition to a failure to allege facts demonstrating that the product failed to work as intended or was worth less than what a reasonable consumer would expect. *Koronthaly*, 374 F. App'x at 259; *Bowman*, 2012 U.S. Dist. LEXIS 75218, 2012 WL 1964452, at \*3; *Young*, 2012 U.S. Dist. LEXIS 55192, 2012 WL 1372286, at \*4. Judge Chen explained in *In re Cluysler-Dodge-Jeep Ecodiesel Marketing, Sales Practices and Products Liability Litigation* ("FCA"):

[T]he courts in *L'Oreal* and *Johnson & Johnson* never held that a plaintiff must have a contractual relationship with a defendant in order to assert a cognizable overpayment injury. Instead, those courts simply noted that the plaintiffs there had invoked a benefit-of-the-bargain theory of injury, but could not maintain such a theory because they had not entered into contracts with the defendants. Here, Plaintiffs do not allege that they entered into contracts [\*14] with the Bosch Defendants, which were then breached. Rather, Plaintiffs assert that the Bosch Defendants played a role in designing, implementing, and concealing software that was used in the Class Vehicles to cheat emissions tests. . . . The benefit-of-the-bargain contract analysis in *L'Oreal* and *Johnson & Johnson* is therefore inapplicable.

[295 F. Supp. 3d 927, 953 \(N.D. Cal. 2018\)](#).<sup>3</sup>

## 2. Fairly Traceable

Defendants' traceability arguments also fail. While this Court is very cognizant of its previous Opinion dismissing the CAC on traceability grounds, it now finds that the FAC addresses these concerns, in light of Plaintiffs amendments and a spate of recent decisions in other districts addressing Article III standing in very similar cases which support a finding that Plaintiffs have established Article III standing. Mercedes and Bosch attack the traceability query from different angles, so the Court will address their arguments separately.

### i. Mercedes

Mercedes argues that "fifty-four out of the sixty named plaintiffs in the FAC [] still fail to allege facts sufficient to support Article III standing," despite the Court's prior Opinion holding that those same Plaintiffs did not establish reliance on the cited advertisements in their [\*15] decision to purchase or lease a Polluting Vehicle. (ECF No. 117-1 at 19-20). Mercedes claims that twenty-four of those plaintiffs reallege the same boilerplate, generalized assertions of deception and reliance that the Court previously rejected. (ECF No. 117-1 at 20-21). Another seventeen Plaintiffs point to advertising from non-party dealerships, while seven Plaintiffs do not allege that the advertisements they saw "contained the alleged misrepresentations." (ECF No. 117-1 at 21-22). Finally, six more Plaintiffs do not allege that they viewed or relied on Mercedes' ads before buying or leasing their vehicle. (ECF No. 117-1 at 23).

Plaintiffs argue that they have cured these defects by retooling their complaint and "focusing on Mercedes' omissions and referencing the 'clean diesel' marketing campaign to demonstrate that those omissions were plausibly material to the targeted consumers." (ECF No. 126 at 28). The Court agrees. Plaintiffs have, for example, alleged that "Mercedes marketed the B1ueTEC-equipped vehicles as environmentally friendly and fuel efficient," that this advertising "[was] widely disseminated throughout the United States," and that Mercedes "h[eld] itself out as a [\*16] protector of the environment." (FAC ¶¶ 321-22, 324). At the same time, Plaintiffs allege that "Mercedes intentionally shut[] down or severely limit[ed] the emissions control system when the B1ueTEC vehicles are on the road," and that Mercedes "intentionally concealed" and hid this fact "from the consuming public at the same time that" it "touted the vehicles as 'clean,' earth friendly, and compliant with all the relevant emissions standards." (FAC ¶ 16).

Similar allegations have been found by other courts addressing defeat device-based diesel emissions scandals across the country. In *Counts v. General Motors*, the plaintiffs also asserted an overpayment theory. [237 F. Supp. 3d 572, 582 \(E.D. Mich. 2017\)](#). The Court explained as follows:

GM promised a clean diesel engine—including at least 90% less nitrogen oxide and particulate emissions—but actually delivered a vehicle that turns off its emissions reduction system when in use. GM charged more for the diesel Chevrolet Cruze model than a comparable gasoline model and Plaintiffs chose the diesel model based at least in part on its 'clean diesel' features. Accordingly, Plaintiffs allege that GM's misrepresentations resulted in their overpaying for a vehicle because the vehicle did [\*17] not work in the way GM promised it would.

*Id.* The *Counts* Court found that:

[t]his alleged disparity between what the Cruze was represented to be and what it actually is . . . is sufficient to constitute an injury in fact. Even if the Plaintiffs did not specifically rely on the 'clean diesel' advertising in choosing to buy the Cruze, they paid a price, determined the market, which relied upon GM's representation

<sup>3</sup> Bosch also argues that the R320 and GLE types of the Polluting Vehicles should excluded from the claims because, "Plaintiffs have no standing to pursue claims based on Affected Vehicles that they did not purchase or lease." (ECF No. 118-1 at 13-14). This argument is premature at the motion to dismiss stage. [Luppino v. Mercedes-Benz USA, LLC, No. 09-5582, 2013 U.S. Dist. LEXIS 161689, 2013 WL 6047556, at \\*6 \(D.N.J. Nov. 12, 2013\)](#) (finding that "dismissal of Plaintiffs' claims related to vehicle/wheel/tire combinations Plaintiffs did not purchase would be premature" at the motion to dismiss stage).

that the vehicle included a fully functional 'clean diesel' system. . . . Plaintiff's overpayment can thus be traced directly to GM's alleged actions.

*Id. at 586.*

In *In re Duramax Diesel Litigation*, the plaintiffs alleged that GM "represented the Duramax [diesel] engine as providing both low emissions and high performance." [298 F. Supp. 3d 1037, 1046 \(E.D. Mich. 2018\)](#). However, the Duramax plaintiffs alleged that the high power and efficiency of the Duramax engine was obtained only by reducing emissions controls with the aid of a defeat device. *Id. at 1047*. The Duramax plaintiffs alleged that had they known "of the higher emissions at the time they purchased or leased their Polluting Vehicles, they would not have purchased or leased those vehicles, or would have paid substantially less for the vehicles than they did." [\*Id. at 1050\*](#). The Duramax Court found [\*18] that the injury was "traceable to GM's actions: GM developed the Duramax engine (including the alleged defeat devices), marketed its diesel vehicles as environmentally friendly, and set the MSRP for its diesel vehicles." [\*Id. at 1052.\*](#)

Lastly, in *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, the Court analyzed whether inflated financing and leasing fees paid by former lessees of the class vehicles were fairly traceable to the conduct of Volkswagen. [349 F. Supp. 3d 881 , 2018 U.S. Dist. LEXIS 171598, 2018 WL 4777134, at \\*9 \(N.D. Cal. Oct. 3, 2018\)](#). The plaintiffs in that case alleged that they paid a premium for Volkswagen's TDI "clean diesel" vehicles, which Volkswagen marketed as "being low-emission, environmentally friendly, fuel efficient, and high performing," while concealing "the fact that VW had installed software in these cars that caused their emission controls to perform one way during emissions testing, and another (less effective) way during normal driving conditions." [2018 U.S. Dist. LEXIS 171598, \[WL\] at \\*1](#). The Court found that the increased fees were fairly traceable to Volkswagen's conduct, because the "clean diesel" premium plausibly increased the price of the financed vehicles, which in turn would have led directly to higher financing fees." [2018 U.S. Dist. LEXIS 171598, \[WL\] at \\*9.](#)

The allegations in the three cases [\*19] finding Article III standing above are sufficiently similar to those before this Court to support a finding that the alleged injury in fact was fairly traceable to Mercedes' conduct. As to Mercedes' argument that fifty-four of the sixty named plaintiffs fail to establish Article III standing, this argument fails for the same reasons elaborated above. The "boilerplate" allegations that Mercedes' claims are insufficient are quite the opposite. That language is as follows:

Unknown to Plaintiff, at the time the vehicle was purchased, it was equipped with an emissions system that turned off or limited its emissions reduction system during normal driving conditions and emitted pollutants such as NOx at many multiples of emissions emitted from gasoline-powered vehicles, at many times the level a reasonable consumer would expect from a "Clean Diesel", and at many multiples of that allowed by federal law. Mercedes' unfair, unlawful, and deceptive conduct in designing, manufacturing, marketing, selling, and leasing the ML 350 without proper emission controls has caused Plaintiff out-of-pocket loss, future attempted repairs, and diminished value of his vehicle. Mercedes knew about, manipulated, [\*20] or recklessly disregarded, the inadequate emission controls during normal driving conditions, but did not disclose such facts or their effects to Plaintiff, so Plaintiff purchased his vehicle on the reasonable, but mistaken, belief that his vehicle was a "clean diesel" as compared to gasoline vehicles, complied with United States emissions standards, and would retain all of its operating characteristics throughout its useful life, including high fuel economy. Plaintiff selected and ultimately purchased his vehicle, in part, because of the BlueTEC Clean Diesel system, as represented through advertisements and representations made by Mercedes. Plaintiff recalls that the advertisements and representations touted the cleanliness of the engine system for the environment and the efficiency and power/performance of the engine system. None of the advertisements reviewed or representations received by Plaintiff contained any disclosure that the Polluting Vehicle had high emissions compared to gasoline vehicles and the fact that Mercedes had designed part of the emissions reduction system to turn off during normal driving conditions. Had Mercedes disclosed this design, and the fact that the [\*21] ML 350 actually emitted pollutants at a much higher level than gasoline vehicles do, and at a much higher level

than a reasonable consumer would expect, and emitted unlawfully high levels of pollutants, Plaintiff would not have purchased the vehicle, or would have paid less for it.

(FAC ¶ 27). The FAC sets out these same allegations for each named Plaintiff. (FAC ¶¶ 27-87). These allegations mirror those in *Counts*, *Durantax*, and *Volkswagen*, in addition to the other portions of the FAC already outlined above. As such, the Court rejects Mercedes' arguments regarding the deficiencies of the named plaintiffs' claims as to Article III standing.

## ii. Bosch

Bosch argues that Plaintiffs' allegations are based on its alleged misconduct with Volkswagen and Fiat-Chrysler, and Bosch's conduct with respect to other auto-makers "cannot serve to establish a causal relationship to Plaintiffs' alleged injuries concerning Mercedes vehicles." (ECF No. 118-1 at 25). Even if those allegations could establish a causal relationship, Bosch argues, Plaintiffs have failed to identify any advertisements, representations, or omissions by Bosch itself, and thus Plaintiffs' injuries are not fairly traceable to Bosch. [\*22] (ECF No. 118-1 at 26).

Plaintiffs argue that they have adequately alleged that their injuries are fairly traceable to Bosch's conduct for the same reasons that the injuries are fairly traceable to Mercedes' conduct. (ECF No. 127 at 16). This Court agrees. The FAC is littered with allegations detailing Bosch's active participation in the alleged scheme to market the BlueTEC line of vehicles as "clean diesels" when Bosch knew they were not. For example, Plaintiffs allege that without Bosch's "knowing and active cooperation, Mercedes would not have been able to carry out the 'Clean Diesel' scheme outlined in this complaint," and that Bosch "participated not just in the development of the defeat device, but in the scheme to prevent U.S. regulators from uncovering the device's true functionality." (FAC ¶¶ 20, 106). Bosch also allegedly "marketed 'Clean Diesel' in the United States and lobbied U.S. regulators to approve 'Clean Diesel.'" (FAC ¶ 106).

In *FCA*, the Northern District of California dealt with facts nearly identical to the case before this court. There, the plaintiffs alleged that they paid more for the EcoDiesel feature, which the defendant falsely advertised as delivering more [\*23] power, performance, fuel economy, and environmental friendliness than comparable gasoline vehicles. 295 F. Supp. 3d at 946. Bosch argued similarly that the plaintiffs had "not identified any statement that [Bosch] made to [the plaintiffs] that could support a purportedly inflated price for the Class Vehicles," and that because Bosch was not a party to the contract with Plaintiffs, it could not have deprived them of their benefit of the bargain. Id. at 951. There, as here, the plaintiffs alleged that Bosch "participated in a scheme and conspiracy with [the auto manufacturers] to develop, implement, and conceal software used in the Class Vehicles to cheat emissions tests." Id. The *FCA* Court found that the hidden software in the EDC17 rendered the affected vehicles defective, and thus less valuable, and that because Bosch "had a hand in developing and implementing this software, their conduct plausibly caused Plaintiffs' economic loss." Id. The *FCA* Court continued: "to the extent [Bosch] knowingly concealed the software installed in the Class Vehicles from regulators and consumers, Plaintiffs' economic injuries are also fairly traceable to that conduct," because the *FCA* plaintiffs, like the Plaintiffs here, alleged [\*24] that they would not have bought or leased the Polluting Vehicles, or would have paid less to do so had the defeat device been disclosed. Id. at 952. Thus, the *FCA* court determined that the plaintiffs did not "need to identify a statement on which they relied that was made by [Bosch] to plausibly trace their economic injuries to these entities." Id.

The *Duramax* Court reached the same conclusion when facing Bosch's arguments regarding traceability. There, the Plaintiffs alleged that Bosch participated in the scheme to develop the defeat device and prevent U.S. regulators from discovering it, in addition to lobbying U.S. regulators to approve "clean diesel." 298 F. Supp. 3d at 1053. Faced with these allegations, Bosch argued that, because it did not manufacture the Duramax engine or market the affected vehicles, "any overpayment by Plaintiffs [was] attributable solely to GM's actions." Id. The *Duramax* Court reasoned that though "the exact nature of [Bosch's] marketing is unclear, it is plausible that Bosch's efforts contributed to the market demand for 'clean diesel' vehicles, generally, in the United States," and that the premiums Plaintiffs paid for those vehicles "were a natural consequence of that market demand." [\*25] Id. "In other words, Plaintiffs overpaid for their vehicles because Bosch worked closely with GM to install working defeat devices in the Duramax vehicles." Id. Thus, the *Duramax* Plaintiffs adequately alleged that their injury was fairly traceable to Bosch's conduct. Id. at 1054. Both *FCA* and *Duramax* lay out factually analogous precedent for finding that Plaintiffs

have established Article III standing as to their claims against Bosch, and this Court will apply that precedent here in finding the same.

## B. Rico Claims

Plaintiffs have also alleged a RICO claim against defendants. They state:

For many years now, the RICO Defendants have aggressively sought to increase the sales of Polluting Vehicles in an effort to bolster revenue, augment profits and increase Mercedes' share of the diesel vehicle market. Finding it impossible to achieve their goals lawfully, however, the RICO Defendants resorted instead to orchestrating a fraudulent scheme and conspiracy. In particular, the RICO Defendants, along with other entities and individuals, created and/or participated in the affairs of an illegal enterprise ("Emissions Fraud Enterprise") whose direct purpose was to deceive the regulators and the public into [\*26] believing the Polluting Vehicles were "clean diesels." As explained in greater detail below, the RICO Defendants' acts in furtherance of the Emissions Fraud Enterprise violate [§ 1962\(c\)](#) and [\(d\)](#).

(FAC ¶ 336).

The [\*Racketeer Influenced and Corrupt Organizations Act\*](#) "makes it unlawful 'for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.'" [\*In re Ins. Brokerage Antitrust Litig.\*, 618 F.3d 300, 362 \(3d Cir. 2010\)](#) (quoting [18 U.S.C. § 1962\(c\)](#)). [\*Section 1962\(d\)\*](#) expands liability under the statute by making it "unlawful for any person to conspire to violate [18 U.S.C. § 1962(c)]". [18 U.S.C. § 1962\(d\)](#). "The RICO statute provides for civil damages for 'any person injured in his business or property by reason of a violation of [\[§ 1962\]](#).'" [\*Amos v. Franklin Fill. Servs. Corp.\*, 509 F. App'x 165, 167 \(3d Cir. 2013\)](#) (quoting [\*Tabas v. Tabas\*, 47 F.3d 1280, 1289 \(3d Cir. 1995\)](#)). A violation of the statute requires:

(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. The plaintiff must, of course, allege each of these elements to state a claim. Conducting an enterprise that affects interstate commerce is obviously not in itself a violation of [§ 1962](#), nor is the mere commission of the predicate offenses. In addition, the plaintiff only has [\*27] standing if and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.

*Id.* (quoting [\*Sedima S.P.R.L. v. Imrex Co.\*, 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 \(1985\)](#)).

Defendants argue that Plaintiffs have failed to allege a RICO injury, RICO causation, and a RICO enterprise, and that they have otherwise failed to allege a pattern of racketeering with particularity. (ECF Nos. 117-1 at 25-39; 118-1 at 27-55).

### 1. RICO Injury

The injury to business or property element of a RICO claim requires "proof of a concrete financial loss and not mere injury to a valuable intangible property interest." [\*Maio v. Aetna, Inc.\*, 221 F.3d 472, 483 \(3d Cir. 2000\)](#) (quoting [\*Steele v. Hosp. Corp. of Am.\*, 36 F.3d 69, 70 \(9th Cir. 1994\)](#)). A complaint therefore must contain allegations "of actual monetary loss, i.e., an out-of-pocket loss" to adequately plead the injury element. *Id.* Physical or emotional harm to a person is insufficient to show that a person was injured in his business or property under the act. [\*Magnum v. Archdiocese of Phila.\*, 253 F. App'x 224, 227 \(3d Cir. 2007\)](#). "Similarly, losses which flow from personal injuries are not [damage to] property under RICO." *Id.* (quotations omitted).

Defendants argue that Plaintiffs alleged injuries—diminished value and overpayment—are not cognizable under RICO. Diminished value is not a proper RICO injury, according to Defendants, because Plaintiffs have [\*28] not alleged facts showing that the vehicles have a lower resale value, and RICO injury cannot be based on possible future events or factual speculation. (ECF Nos. 117-1 at 26; 118-1 at 31-32). Defendants are correct that RICO

does not recognize injuries conditioned on future events or injuries that are impermissibly speculative. [Maio, 221 F.3d at 495](#).

In fact, Plaintiffs fail to address Defendants' contentions that their diminished value claims are not sufficient for RICO purposes. "Where an issue of fact or law is raised in an opening brief, but it is uncontested in the opposition brief, the issue is considered waived or abandoned by the non-movant in regard to the uncontested issue." [Markert v. PNC Fin. Servs. Grp., 828 F. Supp. 2d 765, 773 \(E.D. Pa. 2011\)](#). Thus, to the extent Plaintiffs' RICO claims are based on their diminished value theory of injury,<sup>4</sup> Plaintiffs do not have RICO standing. See [Duramax, 298 F. Supp. 3d at 1071](#) (finding that the plaintiffs' diminished value damages—based on a nearly identical paragraph to paragraph 332 of the FAC—"are contingent on future, uncertain developments," and that those "injuries may never occur," "are . . . currently unmeasurable," and "cannot give rise to RICO standing").

Plaintiffs' overpayment theory does not suffer from the same fatal flaws. As described above, [\*29] Plaintiffs allege that had Defendants disclosed the existence of the defeat device and the true emissions performance of the Polluting Vehicles, they would not have purchased those vehicles or would have paid substantially less for them. Defendants argue that Plaintiffs' overpayment allegations fail to establish RICO standing because "loss of value" or "benefit of the bargain" damages are typically not available in RICO suits, and because "absent the sale of [a Polluting] Vehicle at a loss, Plaintiffs' overpayment theory is a claim for a speculative, intangible property interest rather than a concrete financial loss." (ECF Nos. 117-1 at 27; 118-1 at 29). The existing diesel emissions litigation decisions squarely reject these arguments and distinguish the cases relied upon by Mercedes and Bosch. [Volkswagen, 2018 U.S. Dist. LEXIS 171598, 2018 WL 4777134, at \\*13-15, FCA, 295 F. Supp. 3d at 959-61; Duramax, 298 F. Supp. 3d at 1068-73](#). The Court agrees with those decisions.

Defendants rely heavily on *In re Bridgestone/Firestone, Inc. Tires Products Liabilities Litigation*, 155 F. Supp. 2d 1069 (S.D. Ind. 2001), [In re General Motors LLC Ignition Switch Litigation, Nos. 14-md-2543, 14-mc-2543, 2016 U.S. Dist. LEXIS 92499, 2016 WL 3920353 \(S.D.N.Y. July 15, 2016\)](#), and [McLaughlin v. American Tobacco Co., 522 F.3d 215 \(2d Cir. 2008\)](#), in support of their claim that overpayment allegations are insufficient to create RICO standing.

The *Bridgestone* plaintiffs asserted a RICO claim against Bridgestone/Firestone on the grounds that there was an alleged defect in certain [\*30] tires that created a dangerous likelihood of tread separation. [155 F. Supp. 2d at 1077](#). The plaintiffs based their RICO injury on their need to "bear the financial loss associated with the cost of replacing the Tires and/or the diminished value of their vehicles equipped with the Tires now that the truth regarding their safety and lack of roadworthiness is known." [Id. at 1089](#). Plaintiffs also based RICO injury on the fact that, had they known of the defect, they would not have bought, or would have paid substantially less for the defective tires or the vehicles equipped with them. *Id.* The Court determined that these injuries were too speculative to sustain a RICO injury as "[t]he actual failure of the Tires . . . is a contingency upon which Plaintiffs' economic damages are dependent." [Id. at 1092](#).

In *Ignition Switch*, the plaintiffs' RICO claim was premised on GM's manufacture of vehicles with a defective ignition switch. [2016 U.S. Dist. LEXIS 92499, 2016 WL 3920353, at \\*1](#). The plaintiffs' theory of injury was that they would not have purchased those cars, or paid less for them, had they known of the defective ignition switch. [2016 U.S. Dist. LEXIS 92499, \[WL\] at \\*7](#). The Court held that this theory did not create RICO standing, because "'loss of value' or 'benefit of the bargain' damages 'are generally unavailable in [\*31] RICO suits' and 'plainly' unavailable where (similar to the case here) a RICO claim 'sound[s] in fraud in the inducement.'" [2016 U.S. Dist. LEXIS 92499, \[WL\] at \\*16](#) (quoting [McLaughlin, 522 F.3d at 228-29](#)).

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<sup>4</sup> Plaintiffs diminished value theory is articulated as follows: "Moreover, when and if Mercedes recalls the Polluting Vehicles and degrades the BlueTEC Clean Diesel engine performance and fuel efficiency in order to make the Polluting Vehicles compliant with EPA standards, Plaintiffs and Class members will be required to spend additional sums on fuel and will not obtain the performance characteristics of their vehicles when purchased. Moreover, Polluting Vehicles will necessarily be worth less in the marketplace because of their decrease in performance and efficiency and increased wear on their cars' engines." (FAC ¶ 332).

Finally, *McLaughlin* concerned a class action based on allegations that the defendants—tobacco companies—fraudulently marketed light cigarettes as healthier alternatives to "full-flavored" cigarettes. [522 F.3d at 220](#). The plaintiffs' theory of injury in this case was again based on a benefit of the bargain argument: the plaintiffs created a "loss of value" model which measured "the difference between the price plaintiffs paid for light cigarettes as represented by defendants and the (presumably lower) price they would have paid (but for defendants' misrepresentation) had they known the truth." [Id. at 228](#). The Second Circuit held that these expectation-based damages did not suffice to create a RICO injury, because "Defendants' misrepresentation could in no way have reduced the value of the cigarettes that plaintiffs actually purchased, they simply could have induced plaintiffs to buy Lights instead of full-flavored cigarettes." [Id. at 229](#). Additionally, the plaintiffs' theory required the Second Circuit to "conceptualize the impossible—a healthy cigarette—and then to imagine what a consumer [\*32] might have paid for such a thing." [Id. at 229](#).

There are critical differences between the theory of injury set forth here by Plaintiffs and the RICO injuries alleged in the three aforementioned cases. First, Plaintiffs allege that they overpaid for the Polluting vehicles *at the time of purchase*. FAC ¶ 400. All three courts to have dealt with the question of RICO injury in the context of a defeat device-based diesel emissions litigation have concluded that the fact that the injury occurred at the time of purchase constitutes a RICO injury. In *Duramax*, the Court wrote that such an injury, "clearly suffices to create RICO standing," as the plaintiffs had identified "a specific payment attributable directly to the vehicle component at issue which they opted to purchase on the basis of fraudulent conduct." [298 F. Supp. 3d at 1071-72](#). In *FCA*, the Court similarly found that "Plaintiffs' allegations of overpayment easily clear[ed] the threshold" for establishing a concrete RICO injury where "Plaintiffs . . . identified a particular, reasonably narrow range by which they allegedly overpaid for the Class Vehicles." [295 F. Supp. 3d at 962](#).

While Defendants argue that *Duramax* and *FA* are distinguishable because they allege an overpayment of a specific amount, [\*33] (ECF Nos. 134-35,143-44), that is not the hill upon which RICO injury dies. In *Volkswagen*, Plaintiffs adequately alleged a RICO injury where they contended that "they each paid a premium for something that they did not receive—a vehicle with low emissions." [2018 U.S. Dist. LEXIS 171598, 201x8 WL 4777134, at \\*14](#). This injury was sufficiently concrete and tangible, despite the fact that these plaintiffs did not identify the specific amount of damage. *Id.* In fact, the FGA Court acknowledged the same. [295 F. Supp. 3d at 962](#) (noting that the threshold for RICO injury does not require a particular dollar amount); see also [In re Avandia Mktg., Sales Practices & Prods. Liab. Litig., 804 F.3d 633,639-640 \(3d Cir. 2015\)](#) (finding plaintiffs adequately alleged RICO injury based on allegations that they overpaid—absent a specific dollar amount—for a drug due to the inflationary effect that a drug manufacturer's illegal or deceptive marketing practices had on the drug); [In re Aetna UCR Litig., MDL No. 2020, Civ. No. 07-3541, 2015 U.S. Dist. LEXIS 84600, 2015 WL 3970168, at \\*10 \(D.N.J. June 30,2015\)](#) (finding plaintiffs adequately alleged RICO injury where plaintiffs claimed they suffered "out-of-pocket losses in the form of higher co-payments" and "overpaid for their health insurance plans"). What is important, and what is alleged here, is that the overpayment occurred at the time of purchase, rather than being "contingent on a future occurrence or on the vagaries of the free market." [Duramax, 298 F. Supp. 3d at 1072](#).

Additionally, [\*34] "courts have recognized expectation damages under RICO . . . where an agreement between the parties provided for a certain performance guarantee that the defendant had no intention of keeping." [Ignition Switch, 2016 U.S. Dist. LEXIS 92499, 2016 WL 3920353, at \\*17](#) (collecting cases). Here, as in *Volkswagen*, *FCA*, and *Duramax*, Plaintiffs allege that Defendants participated in a scheme to place a defeat device in the Polluting Vehicles, rendering them defective from the moment they were manufactured. Because Defendants allegedly knew of—and orchestrated the creation of—that defect, they had no intention of delivering vehicles with heightened fuel efficiency and environmental friendliness. See [Duramax, 298 F. Supp. 3d at 1072](#) ("But, here, GM allegedly sold Duramax vehicles, for a premium, which did not perform as a reasonable consumer would expect. In other words, Defendants had no intention of delivering the emissions performance which consumers expected.").

Finally, to the extent there remains a question whether Plaintiffs' overpayment theory constitutes an injury to business or property for the purposes of RICO, Supreme Court precedent indicates that it does. *Reiter v. Sonotone Corporation* is an antitrust case in which the Supreme Court interpreted [Section 4](#) of the Clayton Act, which allows any [\*35] person injured "in his business or property" by the violation of an [antitrust law](#) to sue under that statute.

442 U.S. 330, 337, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979) (quoting 15 U.S.C. § 15). The Supreme Court concluded that when "a consumer . . . acquir[es] goods or services for personal use, [she] is injured in 'property' when the price of those goods or services is artificially inflated by reason of the anticompetitive conduct complained of." Id. at 339. The Third Circuit has referenced the Supreme Court's rationale in *Reiter* when analyzing a RICO claim as support for the conclusion that monetary loss suffices to constitute a RICO injury. Maio, 221 F.3d at 483-84 (3d Cir. 2000). Thus, *Reiter* would indicate that Plaintiffs' allegations that they overpaid for the Polluting Vehicles as a result of Defendants' deceptive conduct constitute injuries to property. See Volkswagen, 2018 U.S. Dist. LEXIS 171598, 2018 WL 4777134, at \*14 (interpreting *Reiter* the same way); FCA, 295 F. Supp. 3d at 959 (same); Duramax, 298 F. Supp. 3d at 1067-68, 1072-73 (same).

## 2. RICO Causation

A civil RICO plaintiff is required "to show that a RICO predicate offense 'not only was a "but for" cause of his injury, but the proximate cause as well.'" Hemi Grp., LLC v. City of N.Y., 559 U.S. 1, 9, 130 S. Ct. 983, 175 L. Ed. 2d 943 (2010) (quoting Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (2010)). The "central question" is "whether the alleged violation led directly to the plaintiff's injuries." Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 461, 126 S. Ct. 1991, 164 L. Ed. 2d 720 (2006). Mercedes argues that Plaintiffs' "entire theory of RICO conduct relies on the claim that" the defendants [\*36] perpetrated a fraud against United States government regulators, and thus Plaintiffs have failed to allege that they were injured by the enterprise's conduct. (ECF No. 117-1 at 28). Even if Plaintiffs do allege that they were directly deceived by the enterprise, Mercedes argues that Plaintiffs' RICO allegations should be dismissed because they "are based on the same generalized advertising scheme that the Court previously found insufficient to satisfy the 'fairly traceable' requirement of Article III standing." (ECF No. 117-1 at 29). Bosch separately argues that Plaintiffs have not established either proximate or "but for" cause, because they have failed "to allege (1) reliance upon any actionable misstatement or omission, or (2) a direct relationship between Bosch LLC's purported conduct and their alleged injuries." (ECF No. 118-1 at 33).

### i. Mercedes

Mercedes makes the argument that Plaintiffs fail to establish RICO causation for the same reasons that they failed to establish traceability for the purposes of Article III standing. (ECF No. 117-1 at 29). As this Court has already determined that Plaintiffs have adequately alleged that Plaintiffs' injuries were fairly traceable to Mercedes' [\*37] conduct, it need to not rehash that analysis here, as Mercedes has not set forth any new arguments to the contrary.

Alternatively, Mercedes argues that, because Plaintiffs' RICO claim centers around a fraud-on-the-regulators theory, Plaintiffs have failed to meet RICO's proximate cause requirement. (ECF No. 117-1 at 30). The reasoning goes: because the purpose of the alleged enterprise was to deceive regulators (rather than promulgate advertisements), Plaintiffs' overpayment as a result of the advertisements touting the emissions bona fides of the Polluting Vehicles is in no way connected to the fraud on the regulators. (ECF No. 117-1 at 30-31).

Mercedes relies on *Anza* as support for its claim that Plaintiffs' RICO allegations do not satisfy the proximate cause requirement. In *Anza*, the plaintiff sued its primary competitor under the RICO statute, alleging that the competitor reduced its prices without harming its bottom line by "failing to charge the requisite New York sales tax to cash-paying customers." 547 U.S. at 453-54. The Supreme Court found that this theory of injury did not satisfy RICO's proximate cause requirement, because "[i]t was the State that was being defrauded and the State that lost [\*38] tax revenue as a result." Id. at 458. The Court also observed that the cause of Plaintiff's injury—lower prices—was "entirely distinct" from the alleged RICO violation—the defrauding of the state—and that the plaintiff's lost sales could have resulted from any number of alternative factors. Id. at 458-59.

The facts in *Anza* are distinct from what Plaintiff's allege here. Plaintiff's specifically allege that Mercedes defrauded its customers when it failed to disclose the existence of the defeat device, and that this deception caused Plaintiffs' injuries. (FAC ¶¶ 313-15). Furthermore, while Plaintiffs allege that Defendants deceived regulators, those regulators are not alleged to have been harmed by that deception like the State of New York was in *Anza*. FCA, 295 F. Supp.

3d at 966. Plaintiffs argue that the deception of the regulators inevitably led to their injuries, because "but for [that] deception about compliance, it would not have been able to sell the Polluting Vehicles." (ECF No. 126 at 36-37). These allegations are sufficient to establish RICO causation. FCA, 295 F. Supp. 3d at 967 ("By deceiving regulators, Defendants were able to sell Class Vehicles that emitted NOx at levels up to 20 times legal limits and that contained one or more defeat devices . . . , [\*39] [which] plausibly caused Plaintiffs to overpay for the defective Class Vehicles by an amount directly attributable to the alleged wrongful conduct of the Defendants."); see also Volkswagen, 2018 U.S. Dist. LEXIS 171598, 2018 WL 4777134, at \*15 ("[T]he regulators were more like gatekeepers than victims of the fraud: they did not lose money from the fraud like consumers did. Also, Plaintiffs base their RICO claims at least in part on allegations that VW (on behalf of the enterprise) directly deceived consumers into believing that the class vehicles were 'clean' and 'environmentally friendly,' when they were not. To prevail on this theory, Plaintiffs would not even need to prove that VW first defrauded EPA and CARB; they would only need to demonstrate that VW defrauded *them* about certain vehicle attributes.") (citations omitted).

## ii. Bosch

Bosch first argues that the misstatements Plaintiffs allegedly relied on are either non-actionable puffery, assert compliance with U.S. emissions standards, or made by Mercedes, breaking "any causative link to Bosch."<sup>5</sup> (ECF No. 118-1 at 33-34). Secondly, Bosch argues that Plaintiffs fail to establish "any direct relationship between [Bosch's] alleged conduct and their alleged injuries." (ECF No. 118-1 at 35). These [\*40] arguments have all been rejected in Duramax, FCA, and Volkswagen, and this Court agrees with those prior decisions.

In Duramax, Bosch argued that "to the extent Plaintiffs claim that their injury resulted from their reliance on purportedly false ads by GM, that itself breaks any causal link to the Bosch Defendants." 298 F. Supp. 3d at 1075. The Duramax Court deemed that argument "clearly inconsistent" with Supreme Court precedent, pointing to the Supreme Court's decision in Bridge v. Phoenix Bond & Indemnification Co., 553 U.S. 639, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008). *Id.* Duramax explained that Bridge held that reliance is not a requirement of a RICO cause of action and explicitly rejected the notion that "a plaintiff who brings [a RICO claim predicated on mail fraud] must show that it relied on the defendant's misrepresentations in order to establish the requisite element of causation." *Id. at 1076* (quoting Bridge, 553 U.S. at 653). In fact, Bridge stands for the proposition that a plaintiff has identified a "a sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury" where "[i]t was a foreseeable and natural consequence of [the defendant's] scheme." Bridge, 553 U.S. at 657-58. The Duramax Court, applying this standard, then found that the plaintiffs' allegations established but-for and proximate cause. 298 F. Supp. 3d at 1076-77 ("According [\*41] to Plaintiffs, Bosch 'exerts near-total control' over the customization of EDC17, eliminating the possibility that GM programmed the functionality which enables use of defeat devices without Bosch's knowledge.").

Here, Plaintiffs make nearly identical allegations: "All Bosch ECUs, including the EDC17, run on complex, highly proprietary engine management software over which Bosch GmbH exerts near-total control. In fact, the software is typically locked to prevent customers, like Mercedes, from making significant changes on their own. Accordingly, both the design and implementation are interactive processes, requiring Bosch's close collaboration with the automaker from beginning to end." (FAC ¶ 270). Thus, Plaintiffs have established a sufficiently direct relationship between Bosch and the alleged RICO injury for purposes of RICO causation. See Volkswagen, 2018 U.S. Dist. LEXIS 171598, 2018 WL 4777134, at \*15-17 (rejecting Bosch's argument that the actions of the car manufacturer break the causal link in the chain, and thus, that there is not a sufficiently direct relationship between Bosch and the plaintiff's RICO injury); FCA, 295 F. Supp. 3d at 967-68 (same).

## 3. The Merits of the RICO Claim

### i. Impermissible Group Pleading

<sup>5</sup> The actionability of the misstatements as puffery are addressed *infra* Section III.B.3.iv. To the extent Bosch claims that Plaintiffs are trying to enforce compliance with emissions standards, that argument is addressed by Parts III.B.2.i and III.C.

Bosch contends that Plaintiffs "make impermissible group pleadings [\*42] against 'RICO Defendants' and varying definitions of 'Bosch.'" (ECF No. 118-1 at 38). Bosch argues that this "blurs the conduct of the various defendants and does not put each defendant on notice of its precise conduct," and thus fails to satisfy the pleading requirements of [Rule 9\(b\)](#). (ECF No. 118-1 at 38-39). [Rule 9\(b\)](#) requires that Plaintiffs "state the circumstances of the alleged fraud with sufficient particularity to place the defendant on notice of the 'precise misconduct with which [it is] charged.' *Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir. 2007) (quoting 1,111,711 '1'. *Bank of Am.*, 361 F.3d 217, 223 (3d Cir. 2004)). However, [Rule 9\(b\)](#) does not require that a plaintiff plead with specificity "which fraudulent acts were caused or performed by which individual defendants." *In re Midlantic Corp. Shareholder Litig.*, 758 F. Supp. 226, 233 (D.N.J. 1990).

Bosch made similar, unsuccessful arguments in both *FA* and *Duramax*. See [FCA](#), 295 F. Supp. 3d at 976-77 (rejecting Bosch's arguments that the plaintiffs "improperly 'lumped' the Bosch entities together" for the purposes of [Rule 9\(b\)](#), because the structure of the Bosch entities was such that there were employees "at both entities [who] work together on certain projects, including the EDC17 project"); [Duramax](#), 298 F. Supp. 3d at 1056 ("Given Plaintiffs' allegation that Bosch employees and constituent entities often blur the legal boundaries between Bosch subsidiaries, the allegations against the [\*43] Bosch Defendants are sufficiently specific."). Here, Plaintiffs plead allegations similar to those that were found sufficient in *FA* and *Duramax*: Bosch GmbH and Bosch LLC "operate under the umbrella of the Bosch Group," individuals from both Bosch GmbH and Bosch LLC worked in divisions relevant to the creation and design of the EDC17, and Bosch itself does not distinguish between its own legal entities when describing its business. (FAC ¶¶ 109,111-12). The FAC sufficiently puts Bosch on notice of the claims made against it.

## ii. RICO Enterprise

To allege an association-in-fact enterprise, which Plaintiffs purport to do here, they must plead a "purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *In re Ins. Brokerage*, 618 F.3d at 366 (quoting *Boyle v. United States*, 556 U.S. 938, 946, 129 S. Ct. 2237, 173 L. Ed. 2d 1265 (2009)). Defendants argue that Plaintiffs have not alleged a sufficient purpose or relationship between Defendants to constitute an association-in-fact enterprise. (ECF Nos. 117-1 at 31-35; 118-1 at 40-43).

An association-in-fact enterprise "need have no formal hierarchy or means for decision-making, and no purpose or economic significance beyond or independent from the group's pattern of racketeering [\*44] activity." *In re Aetna UCR Litig.*, 2015 U.S. Dist. LEXIS 84600, 2015 WL 3970168, at \*27 (quoting *In re Ins. Brokerage*, 618 F.3d at 366). Plaintiffs allege that the purpose of Defendants' enterprise was to "deceive the regulators and the public into believing the Polluting Vehicles were 'clean diesels.'" (FAC ¶ 356). Defendants worked together to design, manufacture, distribute, test, and sell the Polluting Vehicles, while implanting the EDC17, falsifying emissions tests, and distributing deceptive marketing materials. (FAC ¶¶ 360-67). Plaintiffs allege that Defendants profited from this enterprise due to the increased number of vehicles sold as a result of the fraudulently obtained Certificates of Compliance ("COCs") and Executive Orders ("EOs"), as well as through misleading advertising. (FAC ¶ 367). These allegations sufficiently allege a purpose of the enterprise. See *In re Ins. Brokerage Antitrust Litig. ("In re Ins. Brokerage II")*, MDL No. 1663, No. 04-5184, 2017 U.S. Dist. LEXIS 136684, 2017 WL 3642003, at \*10 (D.N.J. Aug. 23, 2017) (finding that plaintiffs properly pleaded a purpose for the enterprise where they alleged that certain agreements existed "to facilitate the sale of insurance, in particular, the sale of insurance at supra-competitive rates to compensate both brokers and syndicates above what a competitive market would dictate"); *In re Aetna UCR Litig.*, 2015 U.S. Dist. LEXIS 84600, 2015 WL 3970168, at \*27 (finding that plaintiffs properly alleged a purpose [\*45] for the enterprise where the plaintiffs alleged a dual purpose: "(1) 'to create a mechanism through which Aetna, UHG and the Insurer Conspirators could under-reimburse subscribers . . . for Nonpar services through use of flawed and invalid data' and (2) to increase insurer profits by deceptively underpaying ONET benefits to their policy holders") (citation omitted); see also *Duramax*, 298 F. Supp. 3d at 1066, 1078-79 (finding a properly plead common purpose based on nearly identical allegations to those in this case, including that the purpose of the enterprise was "to deceive the regulators and the public into believing the Polluting Vehicles were 'clean' and 'environmentally friendly,'" and that GM and Bosch "associated for the common purpose of designing,

manufacturing, distributing, testing, and selling the Polluting Vehicles through fraudulent COCs. . . and EO<sub>s</sub> . . . , false emissions tests, deceptive and misleading marketing and materials, and deriving profits and revenues from those activities").

With respect to the relationships of those associated with the enterprise, Mercedes argues that Plaintiff's FAC is deficient in that nearly all of the allegations "address Bosch's relationships with *other* vehicle manufacturers, [\*46] namely Volkswagen and FCA." (ECF No. 117-1 at 32). Bosch, meanwhile, contends that Plaintiffs have done no more than "list the purported RICO participants," and have provided no allegations "plausibly implying the existence of an enterprise' separate from the legal entities." (ECF No. 118-1 at 42 (citations omitted)). Both Defendants allege that Plaintiffs plead nothing more than an ordinary business relationship. (ECF No. 117-1 at 34-35; ECF No. 118-1 at 42-43).

It is true that ordinary business relationships are not sufficient to impose RICO liability. *Duramax*, 298 F. Supp. 3d at [1080](#) (describing a "widespread consensus" to this effect). However, both *Duramax* and *FCA* addressed similar arguments and concluded that similar pleadings sufficiently alleged the existence of the kind of relationships necessary to establish an association-in-fact. The *Duramax* Court rejected GM and Bosch's argument that "any alleged relationship between them [was] simply a routine business relationship." [298 F. Supp. 3d at 1079](#). There, the plaintiffs alleged that defendants "associated for the common purpose of designing, manufacturing, distributing, testing, and selling the Polluting Vehicles through fraudulent COCs and EO<sub>s</sub>, false emissions tests, and deceptive [\*47] and misleading marketing and materials, and deriving profits and revenues from those activities." *Id. at 1080*. The Court held that such allegations established a business relationship that was "far from 'routine,'" and was instead a course of conduct that was "inherently deceptive[, because] Bosch and GM collaborated to create an engine which performed one way when being tested for emissions and another way when in normal use." *Id.*

The Court in *FCA* came to the same conclusion. *FCA* reasoned that the EDC17 "had only a deceitful purpose—to cheat emissions tests," and that the plaintiffs' "allegations plausibly support[ed] that each Defendant participated in developing or implementing the [defeat devices]." [295 F. Supp. 3d at 981](#). The *FCA* court came to this conclusion based on allegations that set forth "that the Bosch Defendants' software documentation describes parameters and functions that correlate with many of the hidden [defeat devices]," and that "the FCA Defendants initiated and oversaw development of the EcoDiesel engine and activated the [defeat devices] in the Class Vehicles." [295 F. Supp. 3d at 981-82](#). Such allegations went "beyond connecting Defendants to each other by way of normal commercial dealings." *Id. at 982*. Plaintiffs here have laid [\*48] out many of the same allegations in the FAC, alleging, for example, that Bosch "continuously cooperated with Mercedes to ensure that the EDC Unit 17 was fully integrated into the Polluting Vehicles," and that it concealed "the defeat devices on U.S. documentation and in communications with U.S. regulators." (FAC ¶ 374). The EDC17 was "customized . . . for installation in the Polluting Vehicles with unique software code to detect when it was undergoing emissions testing." (FAC ¶ 360). Such allegations are sufficient to show a relationship between Defendants beyond a normal business relationship.

### iii. Directing the Conduct of the RICO Enterprise

As part of their RICO claim, Plaintiffs must also allege that Defendants "conducted or participated in the conduct of the 'enterprise's affairs,' not just their *own* affairs." *Reves v. Ernst & Young*, 507 U.S. 170, 185, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993). "The word 'participate' makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase 'directly or indirectly' makes clear that RICO liability is not limited to those with a formal position in the enterprise, but *some* part in directing the enterprise's affairs is required." *Id. at 179*. Defendants again argue that [\*49] Plaintiffs have failed to assert anything more than legal conclusions as to their participation in the enterprise, and that any facts alleged show merely an ordinary business relationship. (ECF No. 117-1 at 35-37; ECF No. 118-1 at 43-47).

On top of Plaintiffs' allegations mentioned *supra* in Section III.B.3.ii, Plaintiffs have sufficiently alleged the participation of Mercedes and Bosch in the enterprise. They set forth that the EDC17 contains a "unique set of specifications and software code" made for the Polluting vehicles, that the implementation of those EDC17s into the Polluting Vehicles required Mercedes and Bosch to collaborate closely, and that Defendants knowingly and actively

intended the EDC17 to function as a defeat device to evade United States emissions requirements. (FAC ¶¶ 13, 104, 108, 268, 270, 360, 374). Plaintiffs then allege that Defendants concealed the existence of the defeat device and lied to U.S. regulators. (FAC ¶¶ 125, 273-74, 374). Very similar allegations based on very similar facts have been found to satisfy this pleading element of a RICO claim in other diesel emissions litigations. See [295 F. Supp. 3d at 983](#) (finding that the plaintiffs adequately alleged FCA, participation in [\*50] the enterprise where the FCA Defendants "conspired to install and conceal emission control software in the EcoDiesel® engines to illegally circumvent stringent U.S. emission standards" and oversaw the development of those engines, while Bosch's argument "that they were simply performing services for the enterprise," was "not sustainable at the pleading stage" "given the level of control they are alleged to have maintained over the emissions software in the Class Vehicles"); [Duramax, 298 F. Supp. 3d at 1086-87](#) (holding that Bosch's argument that it simply "worked together with GM to design and implement software and . . . participated in promoting clean diesel technology generally" was a similarly faulty "repackaging of [its] previous argument that . . . the relationship between the Defendants was merely a routine business relationship," where the plaintiffs alleged "that Bosch was an integral part of the operation of the enterprise because Bosch 'locked out' EDC17 . . . [and] worked closely with its customers to customize EDC17," which performed "an inherently deceptive function," and thus Bosch's responsibility for programming the operation of the EDC17 was at the "heart of the fraudulent enterprise").

#### iv. Pattern of [\*51] Racketeering Activity

A pattern of racketeering activity "requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years. . . after the commission of a prior act of racketeering activity." [18 U.S.C. § 1961\(5\)](#). "These predicate acts of racketeering may include, *inter alia*, federal mail fraud under [18 U.S.C. § 1341](#) or federal wire fraud under [18 U.S.C. § 1343](#)." [In re Ins. Brokerage, 618 F.3d at 363](#) (quoting [Lum, 361 F.3d at 223](#)). Here, Plaintiffs allege precisely these two predicate acts. In order to plead mail or wire fraud, Plaintiffs must describe "(1) the existence of a scheme to defraud; (2) the use of the mails [or wires] . . . in furtherance of the fraudulent scheme; and (3) culpable participation by the defendant, that is, participation by the defendant with specific intent to defraud." [United States v. Dobson, 419 F.3d 231, 237 \(3d Cir. 2005\)](#). These allegations must satisfy the pleading standards of [Federal Rule of Civil Procedure 9\(b\)](#). [In re Ins. Brokerage II, 2017 U.S. Dist. LEXIS 136684, 2017 WL 3642003, at \\*6](#).

Mercedes argues that Plaintiffs have failed to plead a pattern of racketeering activity for two reasons: First, they have failed to satisfy [Rule 9\(b\)](#), because they "allege only nondescript acts by unidentified parties at unspecified times, and second, Plaintiffs "have not pled any facts demonstrating how the applications [for certification [\*52] to the EPA] further the purposes of the alleged" enterprise. (ECF No. 117-1 at 38-39). Bosch additionally argues that Plaintiffs have failed to plead a claim of mail or wire fraud against it with the particularity required by [Rule 9\(b\)](#), as they have failed to allege a scheme to defraud, any participation by Bosch in that scheme, facts showing that Bosch should be held vicariously liable for Mercedes' alleged acts of mail and wire fraud, or a specific intent to defraud. (ECF No. 118-1 at 49-55).

Plaintiffs have sufficiently plead a pattern of racketeering activity with respect to Defendants. First, the allegations discussed at length in Parts III.B.3.ii and iii clearly allege the existence of scheme to defraud. Importantly, as noted in this Opinion's standing analysis, Plaintiffs pin Defendants' alleged liability on omissions rather than affirmative misrepresentations. Reliance on omissions on their own is sufficient to plead the predicate acts of mail and wire fraud. [Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1415 \(3d Cir. 1991\)](#) ("Under the mail fraud statute, a scheme or artifice to defraud 'need not be fraudulent on its face, but must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary [\*53] prudence and comprehension . . . [and] [t]he scheme need not involve affirmative misrepresentation.") (quoting [United States v. Pearlstein, 576 F.2d 531, 535 \(3d Cir. 1978\)](#); [Livingston v. Shore Shiny Seal, Inc., 98 F. Supp. 2d 594, 597 \(D.N.J. 2000\)](#) (quoting the same language from *Kehr Packages*). As laid out in *Duramax*:

allegations of omissions—as opposed to affirmative misrepresentations—will inevitably be less specific. Misrepresentations occur at a definite point in time, but omissions occur over periods of time. And, because misrepresentations involve action while omissions involve inaction, plaintiffs are less likely to uncover discrete

evidence of omissions. It must be remembered that the essential purpose of [Rule 9\(b\)](#) is to provide the defendants with adequate notice of the allegations so that they can defend against the claims.

[298 F. Supp. 3d at 1083](#) (citations omitted); see also [Christidis V. First Pa. Mortg. Tr., 717 F.2d 96, 99-100 \(3d Cir. 1983\)](#) ("In applying the first sentence of [Rule 9\(b\)](#) courts must be sensitive to the fact that its application, prior to discovery, may permit sophisticated defrauders to successfully conceal the details of their fraud. Moreover, in applying the rule, focusing exclusively on its 'particularity' language 'is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the rules.'") (quoting 5 C. Wright & A. Miller, Federal Practice and [<sup>54</sup>] Procedure § 1298, at 407 (1969)). As such, "plaintiffs pleading a fraud by omission claim are not required to plead fraud as precisely as they would for a false representation claim." [Feldman v. Mercedes Benz USA, No. 11-984, 2012 U.S. Dist. LEXIS 178924, 2012 WL 6596830, at \\*10 \(D.N.J. Dec. 18, 2012\)](#).

To adequately plead the use of the mails and wires in furtherance of the scheme, Plaintiffs need not allege that each Defendant personally mailed or wired the allegedly fraudulent communications, only that the mailing or wiring of that communication was foreseeable to Defendants. [United States v. Tiller, 302 F.3d 98, 101 \(3d Cir. 2002\)](#). Furthermore, "the gravamen of the offense is the scheme to defraud, and any 'mailing that is incident to an essential part of the scheme satisfies the mailing element,' even if the mailing itself 'contain[s] no false information.'" [Bridge, 553 U.S. at 647](#) (quoting [Schmuck v. United States, 489 U.S. 705, 712, 715, 109 S. Ct. 1443, 103 L. Ed. 2d 734 \(1989\)](#)). Plaintiffs allege several uses of the mails and wires in furtherance of the scheme, such as numerous, specific applications for certification of various Polluting Vehicles to the EPA, (FAC ¶ 384), as well as advertisements touting the low emissions and environmental friendliness of the BlueTEC engine, (see, e.g., FAC ¶¶ 32, 33, 36, 321, 323, 325).

These allegations are sufficient to establish the use of the mails and wires in furtherance of the scheme. The applications submitted to the EPA

[<sup>55</sup>] affirmed that the vehicles complied with emission standards. Without those mailings and electronic communications, [Mercedes] would have been unable to sell the vehicles. The applications and resulting certificates also increased the likelihood that consumers would perceive the [BlueTEC] vehicles as emitting pollution at a low level. And although Bosch may not have directly used the mail or wire to further the fraudulent scheme, [Mercedes'] uses of the mail and wire were inevitable and thus reasonably foreseeable.

[Duramax, 298 F. Supp. 3d at 1084](#),<sup>6</sup> see also FCA, [295 F. Supp. 3d at 979](#) (applying the same standard to similar facts and coming to the same conclusion). As to the advertisements identified by Plaintiffs, if they

were relying on these advertisements as the basis for [their] claim of fraud, then Defendants' arguments regarding puffery and duty to disclose would become relevant. However, these representations do not constitute the fraudulent scheme; they merely further it. The level of emissions produced by a diesel engine was a material consideration for consumers purchasing a vehicle. [Mercedes'] extensive advertising which emphasized the low emissions and environmentally-friendly nature of its "clean diesel" engine underscores its understanding [<sup>56</sup>] of that fact. Thus, regardless of whether these advertisements would be actionable on their own, they were material to the scheme.

[Duramax, 298 F. Supp. 3d at 1084](#).

Finally, with respect to Defendants' culpable participation in the scheme, Plaintiffs need only allege intent generally. [Fed. R. Civ. P. 9\(b\)](#); [In re Ins. Brokerage II, 2017 U.S. Dist. LEXIS 136684, 2017 WL 3642003, at \\*9](#). Defendants' intent to defraud can be inferred from the scheme alone. [United States v. Chartock 283 F. App'x 948, 954-55 \(3d](#)

<sup>6</sup> Duramax also explicitly rejects "Bosch's repeated argument that Plaintiffs must specifically allege that Bosch used the mail or wire to defraud," as "simply, wrong," and notes that even though the plaintiffs had not "specifically alleged the date of the applications or the specific identity of the employee who prepared them," the plaintiffs had "alleged enough detail to put Defendants on notice of the alleged predicate acts." *Id.*

*Cir. 2008); United States v. Pearlstein, 576 F.2d 531, 541 (3d Cir. 1978); see also FCA, 295 F. Supp. 3d at 977* ("Because the AECDs themselves plausibly have a deceitful purpose, allegations supporting that each Defendant knew about yet concealed the AECDs also support a plausible claim that each Defendant intended to defraud."); *Duramax, 298 F. Supp. 3d at 1083* ("[I]ntent can be inferred from the nature of the alleged conduct. The way in which EDC17 interacted with the Duramax engine is inherently deceptive. The alleged purpose of the device is to provide the perception of reduced emissions while avoiding the reality of reduced emissions. Defendants cannot reasonably argue that the deceptive nature of EDC17 was unanticipated or unintended, and even if they do, that argument could be resolved only by a jury."); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, and Prods. Liab. Litig., MDL No. 2672, 2017 U.S. Dist. LEXIS 179652, 2017 WL 4890594, at \*15 (N.D. Cal. Oct. 30, 2017)* ("Bosch's intent to defraud reasonably [could] be inferred from the scheme itself," as no party had "sought to justify, or explain a lawful [\*57] purpose for, software that effectively turns a vehicle's emission systems on or off depending on whether the vehicle is undergoing emissions testing or being operated under normal driving conditions."). Thus, Plaintiffs have adequately alleged Defendants' intent to defraud and have adequately established a pattern of racketeering activity based on the predicate acts of mail and wire fraud.

#### v. RICO Conspiracy

Bosch argues that Plaintiffs failed to adequately plead a RICO conspiracy because they failed to plead a substantive RICO violation. As Plaintiffs have adequately plead their substantive RICO claim and that Bosch had knowledge of the racketeering activity, they have adequately plead a RICO conspiracy.

### C. Preemption

Defendants contend that Plaintiffs' state-law claims are preempted by the *Clean Air Act ("CAA")*. (ECF No. 117-1 at 39; ECF No. 118-1 at 55). This argument has been discussed thoroughly and rejected several times over by courts dealing with diesel emissions litigations. *Volkswagen, 2018 U.S. Dist. LEXIS 171598, 2018 WL 4777134, at \*18-23; FCA, 295 F. Supp. 3d at 990-1003; Duramax, 298 F. Supp. 3d at 1057-65; Counts, 237 F. Supp. 3d at 588-92*. For the same reasons, this Court also rejects Defendants' preemption arguments.

"Federal law can preempt state law in three ways: (1) express preemption, (2) field preemption, and (3) conflict preemption." [\*58] *Farina v. Nokia, 625 F.3d 97, 115 (3d Cir. 2010)*.

Express preemption applies where Congress, through a statute's express language, declares its intent to displace state law. Field preemption applies where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Conflict preemption nullifies state law inasmuch as it conflicts with federal law, either where compliance with both laws is impossible or where state law erects an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

*Id.* (quoting *Hillsborough Cty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985)*). Both Defendants argue that Plaintiffs state-law claims are expressly preempted by the CAA, while Mercedes advances an additional implied preemption argument.

#### 1. Express Preemption

Section 209 of the Clean Air Act reads:

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling [\*59] (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

42 U.S.C. § 7543(a). Defendants are correct that the CAA contains an express preemption clause. See In re Caterpillar, Inc. C13 and CIS Engine Prods. Liab. Litig., 14-3722, 2015 U.S. Dist. LEXIS 98784, 2015 WL 4591236, at \*10 (D.N.J. July 29, 2015) ("The CAA's express preemption provision is specific and unambiguous.").

Defendants argue that Plaintiffs' state-law claims fall squarely within that preemption provision because they relate to the Polluting Vehicles' compliance with emissions standards and are an attempt to enforce federal regulatory standards under state law. (ECF No. 117-1 at 41-42; ECF No. 118-1 at 56-57). Plaintiffs' state-law claims do not fall under the express preemptive scope of the CAA for several reasons. First, while Plaintiffs do reference violations of federal emissions standards those violations are not an essential element of their state-law claims. To prove their state-law claims, Plaintiffs must show that Defendants lied to or deceived them, not that Defendants violated federal emissions standards. The proof in which Plaintiffs must ground their claims pulls those claims outside the scope of the express preemption of the CAA. Volkswagen, 2018 U.S. Dist. LEXIS 171598, 2018 WL 4777134, at \*19; FCA, 295 F. Supp. 3d at 993-94; Duramax, 298 F. Supp. 3d at 1061; Counts, 237 F. Supp. 3d at 591-92. Second, Plaintiffs could prove [\*60] that Mercedes lied about claims concerning its BlueTec engines, such as that it was "the world's cleanest and most advanced diesel" with "ultra-low emissions, high fuel economy and responsive performance," (FAC ¶ 11), without having to prove that emissions exceeded EPA-established limitations or that Defendants installed a defeat-device prohibited by the EPA. Volkswagen, 2018 U.S. Dist. LEXIS 171598, 2018 WL 4777134, at \*20; FCA, 295 F. Supp. 3d at 993-94; Duramax, 298 F. Supp. 3d at 1061-62; Counts, 237 F. Supp. 3d at 591-92. Thus, Plaintiffs' state-law claims are not expressly preempted by the CAA.<sup>7</sup>

## 2. Implied Preemption

Mercedes argues that even if Plaintiffs' claims are not expressly preempted, they are impliedly preempted under Buckman Co. v. Plaintiffs' Legal Committee, 531 U.S. 341, 121 S. Ct. 1012, 148 L. Ed. 2d 854 (2001). When dealing with a question of implied preemption, the Court begins its "analysis 'with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States." Altria Grp. v. Good, 555 U.S. 70, 77, 129 S. Ct. 538, 172 L. Ed. 2d 398 (2008) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)). Buckman involved a defendant that allegedly made fraudulent representations to the FDA in order to gain approval for its orthopedic bone screws that plaintiffs alleged caused their injuries. 531 U.S. at 343. The [\*61] Supreme Court held that allowing the plaintiffs to proceed on their state tort claims based on the alleged fraud on the FDA would "inevitably conflict with the [agency's] responsibility to police fraud consistently with [its] judgment and objectives." Id. at 350. Mercedes argues that Buckman thus preempts all state tort claims "stemming from a defendant's alleged fraud on a federal agency." (ECF No. 117-1 at 43-44).

Importantly, Buckman's holding rested in part on the fact that the Supreme Court had "clear evidence that Congress intended that the [Medical Device Amendments] be enforced exclusively by the Federal Government," and that the plaintiffs' "fraud claims exist[ed] solely by virtue of the [Food, Drug, and Cosmetic Act] disclosure requirements." 531 U.S. at 352-53. While Mercedes frames Plaintiffs' claims as "all stem[ing] from the threshold allegation that 'the COCs were fraudulently obtained' and the vehicles were therefore 'never legal for sale; nor were they EPA and/or CARB complaint,'" (ECF No. 117-1 at 44 (quoting FAC ¶ 275)), this does not place Plaintiffs' state-law claims within the realm of Buckman. As explained above, Plaintiffs' claims do not "exist solely by virtue" of the alleged violations of the EPA's emissions [\*62] standards. The core allegation of Plaintiffs' state-law tort claims is that Defendants lied to and deceived consumers, and so Buckman does not preempt these claims. See FCA, 295 F. Supp. 3d at 994-95 (applying the same reasoning to distinguish Buckman from state-law claims nearly identical

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<sup>7</sup> The key cases that Defendants rely on in support of their express preemption argument, such as Morales v. Trans World Airlines, Inc., 504 U.S. 374, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992), Jackson v. Gen. Motors Corp., 770 F. Supp. 2d 570 (S.D.N.Y. 2011), and Detroit Diesel Corp. v. AG (In re Quash Subpoenas Duces Tecum), 269 A.D.2d 1, 709 N.Y.S.2d 1 (App. Div. 2000), have already been discussed at length and distinguished appropriately by the four cases cited in this paragraph. As such, in the interest of judicial economy, the Court refers the parties to the appropriate discussion of these cases in Volkswagen, FCA, Duramax, and Counts.

to those before this Court); *In re Caterpillar*, 2015 U.S. Dist. LEXIS 98784, 2015 WL 4591236, at \*14 (holding that consumer fraud claims were not impliedly preempted by the CAA, as those claims were not "about the ability of Caterpillar's Engines to comply with EPA emissions standards").

#### D. Plaintiffs' State-Law Misrepresentation Claims

Mercedes argues that "[a] vast majority of plaintiffs' misrepresentation claims—including those arising under state common law and state consumer protection statutes—should also be dismissed because they are based on nonactionable puffery." (ECF No. 117-1 at 44). As mentioned *supra* Section III.A.2.i, Plaintiffs have shifted the focus of the FAC away from claims relying on Defendants' affirmative misrepresentations and are instead basing those claims on Defendants' omissions. This is reinforced by the fact that Plaintiffs do not respond to Mercedes' argument that their state-law misrepresentation claims should be dismissed. (See ECF No. 126 at 60 (addressing Mercedes' [\*63] puffery arguments only in the context of fraudulent concealment)). Thus, to the extent that Plaintiffs' state-law consumer protection claims are based solely on affirmative misrepresentations, those affirmative misrepresentation claims are dismissed. *Griglak v. CTX Mortg. Co.*, No. 09-5247, 2010 U.S. Dist. LEXIS 34941, 2010 WL 1424023, at \*3 (D.N.J. Apr. 8, 2010) ("The failure to respond to a substantive argument to dismiss a count, when a party otherwise files opposition, results in a waiver of that count.").

#### E. Plaintiffs' State-Law Fraudulent Concealment Claims

Defendants also argue that this Court should dismiss Plaintiffs' fraudulent concealment claims. Both Defendants claim that Plaintiffs have failed to set forth facts showing a duty to disclose, (ECF Nos. 117-1 at 51-53; 118-1 at 58-60), while Mercedes also attacks the fraudulent concealment allegations in the FAC under *Rule 9(b)*, (ECF No. 117-1 at 48-51). Defendants principally challenge Plaintiffs' fraudulent concealment claims under New Jersey law, which Plaintiffs seek to apply to the nationwide class.<sup>8</sup> To state a claim for fraudulent concealment under New Jersey law, a plaintiff must establish: (1) a material misrepresentation or omission of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity or knowing [\*64] the omission to be material; (3) intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages. *Delaney v. Am. Express Co.*, No. 06-5134, 2007 U.S. Dist. LEXIS 34699, 2007 WL 1420766, at \*5 (D.N.J. May 11, 2007); *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 610, 691 A.2d 350 (1997). *Rule 9(b)* applies to fraudulent concealment claims, *GKE Enters., LLC v. Ford Motor Credit Co. LLC USA*, No. 09-4656, 2010 U.S. Dist. LEXIS 53714, 2010 WL 2179094, at \*4 (D.N.J. May 26, 2010); however, as mentioned above, Plaintiffs are not required to plead fraud by omissions claims as precisely as affirmative misrepresentation claims, *Feldman*, 2012 U.S. Dist. LEXIS 178924, 2012 WL 6596830, at \*10, so long as the complaint places "the defendant on notice of the precise misconduct with which it is charged, *Montich v. Miele USA, Inc.*, 849 F. Supp. 2d 439, 443 (D.N.J. 2012) (quoting *Frederico*, 507 F.3d at 200).

Mercedes contends that Plaintiffs have failed to satisfy the what, who, where, or when of the alleged fraudulent concealment, as required by *Rule 9(b)*. In doing so, Mercedes mistakenly focuses on Mercedes' affirmative

<sup>8</sup> Mercedes' challenges to fraudulent concealment claims under laws other than New Jersey's are few. Defendant alleges that there is no private cause of action for fraudulent concealment under Connecticut law, (ECF No. 117-1 at 48 n.17 (citing *Traylor v. Awwa*, 899 F. Supp. 2d 216, 224-25 (D. Conn. 2012))), and argues that a commercial transaction does not give rise to a duty to disclose under Illinois law, and thus mirrors New Jersey law, (ECF No. 117-1 at 52 n.22). The Court agrees with Plaintiffs regarding Connecticut law, in that Connecticut recognizes claims for fraudulent concealment but calls them fraud by "suppression" or "nondisclosure." *Reville v. Reville*, 312 Conn. 428, 441, 93 A.3d 1076 (2014) ("Fraud by nondisclosure . . . involves the failure to make a full and fair disclosure of known facts connected with a matter about which a party has assumed to speak, under circumstances in which there is a duty to speak. . . . A lack of full and fair disclosure of such facts must be accompanied by an intent or expectation that the other party will make or will continue in a mistake, in order to induce that other party to act to her detriment."). As to the question of whether Defendants had a duty to disclose under Illinois law, that question is answered below.

misrepresentations set forth in the FAC. For example, Mercedes argues that "every plaintiff fails to plead sufficiently the 'what' to satisfy [Rule 9\(b\)](#) because they fail to specify what false statements were allegedly made regarding *their* vehicle." (ECF No. 117-1 at 48-49 (referring to Plaintiff Andary, who "allege[d] that she read on the 'Mercedes website' 'something about a 'green generation of Mercedes'"') (quoting FAC ¶ 33)). With regard to the "who" element of [Rule 9\(b\)](#), Mercedes again argues that "[forty-nine plaintiffs . . .] attributed[e] claimed statements to dealership representatives or unidentified third-party websites." (ECF No. 117-1 at 49). In attacking Plaintiffs' fraudulent concealment claims, Mercedes applies a heightened [Rule 9\(b\)](#) standard to affirmative statements that Plaintiffs no longer rely on except to show the materiality of the omissions.

When looking at Plaintiffs' allegations concerning Defendants' omissions, they have sufficiently notified Mercedes and Bosch of the precise misconduct with which they are charged. Plaintiffs allege that Defendants "programmed [the] B1ueTEC vehicles to turn off or otherwise limit the effectiveness of the emission reduction systems during normal real world driving," throughout the entire period of BlueTEC vehicle production and sale in the U.S. (FAC ¶¶ 10, 13). Plaintiffs also allege that Mercedes failed to disclose these facts about the emissions controls nationwide. (FAC ¶ 316). Similar allegations have been found to satisfy [Rule 9\(b\)](#) both within and outside of this district in other automotive defect cases. See [Volkswagen, 2018 U.S. Dist. LEXIS 171598, 2018 WL 4777134, at \\*24](#) (dismissing plaintiffs' fraudulent misrepresentation claims but finding that the fraudulent omissions claims survived, because plaintiffs identified "the specifics [\*66] of what VW failed to disclose: (1) that 'the Clean Diesel engine systems were not EPA-compliant,' and (2) that the class vehicles 'used software that caused the vehicles to operate in low-emission test mode during emissions testing'); [Counts, 237 F. Supp. 3d at 599](#) (finding that plaintiffs sufficiently alleged that GM "actively concealed and had exclusive knowledge of the alleged 'defeat device'"); [Feldman, 2012 U.S. Dist. LEXIS 178924, 2012 WL 6596830, at \\*10](#) (holding that plaintiffs adequately stated a claim of fraud by omission where they "allege[d] specific facts showing Defendants' knowledge and concealment of the alleged defect"). This Court will not dismiss Plaintiffs' state-law fraudulent concealment claims for failure to meet the standards of [Rule 9\(b\)](#).

Mercedes concludes that "[b]ecause no plaintiff has sufficiently alleged under [Rule 9\(b\)](#)'s heightened pleading standard the *what*, *who*, *where*, and *when* of any fraud, no plaintiff has adequately pled reliance, and all of their claims must be dismissed." (ECF No. 117-1 at 50-51). However, as the Court just found, Plaintiffs met the standards of [Rule 9\(b\)](#). Even still, the burden of establishing reliance on an omission is not difficult. Plaintiffs need not "offer direct proof that the entire class relied on defendant's representation that omitted [\*67] materials facts, where the plaintiffs have established that the defendant withheld these material facts for the purpose of inducing the very action the plaintiffs pursued." [Varacallo v. Mass. Mut. Life Ins. Co., 332 N.J. Super. 31, 50, 752 A.2d 807 \(App. Div. 2000\)](#); see also [Counts, 237 F. Supp. 3d at 596-97](#) (citing Varacallo and concluding that the plaintiffs need not plead individualized reliance for fraud by omission under New Jersey law).<sup>9</sup>

Bosch also contends that Plaintiffs "fail[ed] to plead any facts to suggest reliance on any specific or actionable representation by [it]." (ECF No. 118-1 at 59). However, for the same reasons that Plaintiffs need not establish direct reliance on Mercedes representations, they need not establish direct reliance on Bosch's: they allege that Bosch intentionally withheld the existence of the defeat device while simultaneously promoting clean diesel technology around the country.

Under New Jersey law, "courts will not imply a duty to disclose, unless such disclosure is necessary to make a previous statement true or the parties share a 'special relationship.'" [Lightning Lube, Inc. v. Witco Cap., 4 F.3d](#)

<sup>9</sup> Mercedes does not brief the Court on the differences in the laws of the various state subclasses with respect to reliance and fraudulent concealment. To the extent that Mercedes purports to rely on Appendix A to its brief, that attachment does not provide state-specific legal citation or information beyond a boilerplate statement that there was a "[f]ailure to satisfy [Rule 9\(b\)](#) with respect to *reliance*, by failing to allege the *what* and *when* of the purported fraud." (e.g., ECF No. 117-2 at 4 (referencing Plaintiff Roberts)). Thus, the Court declines to do a state-by-state analysis on the differing requirements for pleading reliance in fraudulent concealment claims at this stage. See [Counts, 237 F. Supp. 3d at 597](#) (deciding that "the Court will not *sua sponte* analyze the elements of fraudulent concealment from each state's law that Plaintiffs purport to sue under" where the defendant did not specifically raise the argument).

1153, 1185 (3d Cir. 1993). The categories of relationships that give rise to a duty to disclose are: "(1) fiduciary relationships, such as principal and agent, client and attorney, or beneficiary and trustee; [<sup>68</sup>] (2) relationships where one party expressly reposes trust in another party, or else from the circumstances, such trust necessarily is implied; and (3) relationships involving transactions so intrinsically fiduciary that a degree of trust and confidence is required to protect the parties." *Id.* Here, Plaintiffs do not assert that they fall into one of the special relationship categories with Defendants. As such, the Court will only focus on the parties' arguments challenging whether or not a duty to disclose existed to make a previous statement true.<sup>10</sup>

Mercedes claims that Plaintiffs "cannot establish that disclosure was necessary to make true a previous statement made by [Mercedes]," because "the alleged representations vary from plaintiff to plaintiff." (ECF No. 117-1 at 53). Mercedes argues that this distinguishes the facts at hand from In re Volkswagen Timing Chain Products Liability Litigation, No. 16-2765, 2017 U.S. Dist. LEXIS 70299, 2017 WL 1902160 (D.N.J. May 8, 2017), because in *Timing Chain*, the partial disclosures were uniform. (ECF No. 117-1 at 53). The Court disagrees and finds that the facts at hand establish a duty to disclose for Mercedes and Bosch. Here, Plaintiffs set forth numerous examples of Mercedes' nationwide marketing efforts to promote its BlueTEC clean diesel vehicles. (FAC ¶¶ 323-27). In none [<sup>69</sup>] of those examples does Mercedes disclose that the purported benefits of the BlueTEC engine could only be achieved through or were completely obscured by the use of a defeat device. These allegations are sufficient to establish partial disclosures that Mercedes had an obligation to make true. See Timing Chain, 2017 U.S. Dist. LEXIS 70299, 2017 WL 1902160, at \*20 (finding that the plaintiffs plead a partial disclosure after which the defendant had a duty to disclose "any and all information regarding the Timing Chain System" to plaintiffs, where the plaintiffs alleged that the defendant "represent[ed] in the maintenance schedules that the timing belt, which performs the same function as the Timing Chain System, will need service after a certain time but makes no representation that the Timing Chain System will need maintenance"); Strawn v. Canuso, 271 N.J. Super. 88, 104, 638 A.2d 141 (App. Div. 1994) (establishing a duty on buyers and brokers of real estate to disclose the existence of off-site conditions that were unknown to the buyer but that were known or should have been known to the seller and that would reasonably and foreseeably affect the value or desirability of the property), aff'd 140 N.J. 43, 657 A.2d 420 (1995).

In fact, in *Strawn*, the New Jersey Supreme Court adopted the interpretation of the Restatement (Second) of Torts which imposes [<sup>70</sup>] a "duty upon a party to disclose to another 'facts basic to the transaction, if he knows that the other is about to enter into it under a mistake . . . and the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts,'" where the nondisclosure of those facts amounts to taking advantage of the plaintiffs ignorance, such that it would be "shocking to the ethical sense of the community, and [would be] so extreme and unfair, as to amount to a form of swindling." United Jersey Bank v. Kensey, 306 N.J. Super. 540, 554, 704 A.2d 38 (App. Div. 1997) (citations omitted). It is this Court's opinion that Mercedes and Bosch's active concealment of the existence of the defeat device amounts to such a situation. Cf. FCA, 295 F. Supp. 3d at 1009 (finding that allegations of defendants' active concealment of the defeat devices was sufficient to establish a duty to disclose under New Jersey law); Counts, 237 F. Supp. 3d at 600 (noting that the defendant's alleged active concealment of the defeat device was sufficient to establish a duty to disclose in some states).<sup>11</sup>

## F. Plaintiffs' State Statutory Claims

### 1. Rule 9(b), Causal Nexus, and False, Deceptive, or Misleading Statements

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<sup>10</sup> Bosch ignores the aspect of the duty to disclose that flows from a previous false statement and instead only focuses on the existence of a special relationship. (ECF No. 118-1 at 59).

<sup>11</sup> As to Mercedes' contention that Illinois law would also not impose a duty to disclose in this scenario, that argument fails. See Heider v. Leewards Creative Crafts, 245 Ill. App. 3d 258, 613 N.E.2d 805, 814, 184 Ill. Dec. 488 (1993) ("Mere silence in a business transaction does not amount to fraud. Yet, silence accompanied by deceptive conduct or suppression of material facts gives rise to active concealment; it is then the duty of the party which has concealed information to speak.").

Mercedes argues that Plaintiffs fail to state claims for violations [\*71] of various states' consumer protection statutes under [Rule 9\(b\)](#) because Plaintiffs have not pled a "causal nexus" between Mercedes' unlawful conduct and Plaintiffs' injury with enough specificity and because Plaintiffs have "failed to allege facts establishing that the Mercedes Defendants made" false, deceptive, or misleading statements. (ECF No. 117-1 at 54-55). Mercedes attempts to address these state-specific arguments by citing to an "Appendix B," attached to their brief. (ECF No. 117 at 54-55). Appendix B is a six-page document containing four columns: the state law that applies, the causes of action under that state's law, the elements of the cause of action that Plaintiffs allegedly fail to establish, and "relevant authorities." (ECF No. 117-3 at 1-6). There is no context or analysis accompanying this document. Two courts have rejected similar attempts to argue that Plaintiffs have failed to meet the pleading requirements of various states' consumer protection statutes through an appendix. See [FCA, 295 F. Supp. 3d at 1015](#) (deeming arguments made in a joint appendix regarding the plaintiffs' failure to allege reliance, a deceptive act, omission, or practice, and a concrete, non-speculative loss in relation to consumer [\*72] protection claims as waived); [Counts, 237 F. Supp. 3d at 593-94](#) ("Neither party makes a colorable effort to individually address the validity of Plaintiffs' . . . consumer protection . . . claims on a state specific basis. Rather, each attempts to 'raise' certain state-specific arguments by referencing appendices attached to their briefing. . . . The parties' scattershot effort to raise arguments and defenses by simply citing to dozens, if not hundreds, of state court cases will not be addressed."). This Court will also do the same. As in *Counts*, this Court agrees that "[c]ourts are not responsible for combing through appendices in an attempt to *sua sponte* raise and resolve legal arguments which the parties have not briefed." [237 F. Supp. 3d at 594](#).

In any event, Mercedes' arguments regarding causal nexus and false, deceptive, or misleading statements have been adequately addressed elsewhere in this Opinion. As to the existence of a causal nexus, this Court conducted an in-depth analysis of the causal link between Mercedes' alleged unlawful conduct and Plaintiffs' alleged injuries in the portions of the brief discussing Article III standing and RICO causation. See *supra* Sections III.A.2, B.2. With respect to whether Plaintiffs have adequately [\*73] pled false, deceptive, or misleading statements, that has been discussed throughout, but particularly in reference to Plaintiffs' common law fraud claims *supra* Section III.E. This Court also notes that *Duramax* analyzed the state consumer protection claims in conjunction with the state common law fraud claims without meaningful distinction. [298 F. Supp. 3d at 1057-65](#).

## 1. Bosch and the Michigan Consumer Protection Act

Bosch argues that Plaintiffs fail to state a claim under the [Michigan Consumer Protection Act \("MCPA"\)](#), because they have failed "to identify any purportedly false affirmative misrepresentation by" Bosch, they have not identified Bosch's duty to disclose, and they have not alleged any injury as a result of Bosch's conduct. (ECF No. 118-1 at 60). By Bosch's own admission, an omission suffices as a "material misrepresentation" under the MCPA. (ECF No. 118-1 at 60). The Court has already established that Bosch made material omissions that it had a duty to disclose. *Supra* Section III.E. Additionally, the Court has rejected Bosch's argument that Plaintiffs have not adequately pled that they suffered an injury as a result of Bosch's conduct. *Supra* Section III.A.2.ii.

## 2. Ascertainable Loss under New Jersey [\*74] and Florida Law

Mercedes argues that Plaintiffs Caputo, Caniero, Watkins, Carroll, and Cunningham "fail to plead injury with the specificity required under the consumer protection statutes of New Jersey and Florida because they have not alleged sufficient facts to show they suffered an ascertainable loss." (ECF No. 117-1 at 56). Ascertainable loss is an essential element of a claim under the [New Jersey Consumer Fraud Act \(NJCFA\)](#). [Smajlaj v. Campbell Soup Co., 782 F. Supp. 2d 84, 97 \(D.N.J. 2011\)](#). Mercedes claims that because Plaintiffs have failed to plead how much they paid for their vehicles and how much a comparable vehicle would cost, they have not satisfied the standard for ascertainable loss. (ECF No. 117-1 at 56 (citing [In re Riddell Concussion Reduction Litig., 77 F. Supp. 3d 422, 439 \(D.N.J. 2015\)](#))). Plaintiffs contend that *Riddell* is in conflict with New Jersey Supreme Court precedent, suggesting that New Jersey's highest court does not require a plaintiff to plead a price comparison, because "if the damages calculation were so simple, expert testimony would never be necessary." (ECF No. 126 at 66-67).

Here, Mercedes has the better argument. "In cases involving . . . misrepresentation, either out-of-pocket loss or a demonstration of loss in value will suffice to meet the ascertainable loss hurdle . . ." [Thiedemann v. Mercedes-Benz](#)

USA, LLC, 183 N.J. 234, 248, 872 A.2d 783 (2005). In demonstrating [\*75] that out-of-pocket loss or loss in value, the New Jersey Supreme Court has explicitly endorsed the necessity of a price comparison in pleadings seeking to state a claim under the NJCFA. See D'Agostino v. Maldonado, 216 N.J. 168, 191, 78 A.3d 527 (2013) (detailing that an ascertainable loss must be capable of calculation); Thiedemann, 183 N.J. at 248 (describing ascertainable loss as "not hypothetical or illusory" and a loss that "must be presented with some certainty demonstrating that it is capable of calculation, although it need not be demonstrated in all its particularity"). This district has interpreted the New Jersey Supreme Court precedent to require this price comparison as well. E.g., Riddell, 77 F. Supp. 3d at 439; Smajlaj, 782 F. Supp. 2d at 100-01. In fact, in Bosland v. Warnock Dodge, Inc., the New Jersey Supreme Court addressed the question of ascertainable loss in an automobile overcharge case. There, the Supreme Court held that "the overcharge in question is one that can be readily quantified and thus [] ascertainable within the meaning of the CFA." 197 N.J. 543, 549, 964 A.2d 741 (2009). The plaintiff in Bosland though had specifically outlined the fee payments demonstrating that she could have been overcharged by either \$40 or \$20. Id. at 548.

Plaintiffs have not done that here. In their brief they do not set forth any instances of a price comparison in the FAC, nor [\*76] can the Court find any. What Plaintiffs have done is set the table for a price comparison, alleging that Plaintiffs would not have purchased or leased the BlueTEC vehicles at the prices they paid, or would have purchased or leased a less expensive alternative. (E.g., FAC ¶ 535). They have not gone one step further to compare the price of a Polluting Vehicle with what they believe to be a comparable replacement. E.g., Smajlaj, 782 F. Supp. 2d at 103 (finding a sufficient allegation of ascertainable loss where plaintiffs alleged that when they bought a can of soup mislabeled as low-sodium they overpaid for what was essentially full-sodium soup that they alleged to be 20 to 80 cents cheaper).

Additionally, Plaintiffs' argument that expert testimony would never be required if the NJCFA only allowed claims with easily calculable ascertainable losses misses the mark. This is because, as mentioned above, the pleading need not demonstrate the ascertainable loss "in all its particularity." Thiedemann, 183 N.J. at 248. Ascertainable loss sets "the stage for establishing the measure of damages." *Id.* "There is no calculation of 'damages sustained' unless the ascertainable loss requirement is first satisfied. The two concepts indeed have separate functions [\*77] in the analysis." D'Agostino, 216 N.J. at 192. Thus, the idea that requiring Plaintiffs to plead ascertainable loss as described above will necessarily write out a nuanced calculation of damages is incorrect. As such, Plaintiffs have failed to state a claim under the NJCFA. The Court will allow Plaintiffs to amend this claim.

As to Florida's Deceptive and Unfair Trade Practices Act (FDUTPA), this Court agrees with Judge Simandle in Riddell that actual damages under the FDUTPA are measured as "the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties." 77 F. Supp. 3d at 439 (quoting Rollins, Inc. v. Butland, 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006)). However, this Court does not agree that this definition from Rollins establishes a pleading standard, as nothing in that case indicates that the Florida District Court of Appeal intended that definition to apply as a hurdle that must be cleared at the motion to dismiss phase. In fact, the 11th Circuit, the Southern District of Florida, and other courts analyzing FDUTPA have held that the *pleading standard* for a FDUTPA claim is less stringent than the definition of actual damages. See, e.g., [\*78] Fitzpatrick v. General Mills, Inc., 635 F.3d 1279, 1283 (11th Cir. 2011) ("[E]ach putative class member would only need to show that he or she paid a premium for YoPlus to be entitled to damages under the FDUTPA."); Hasemann v. Gerber Prods. Co., No. 15-2995, 2016 U.S. Dist. LEXIS 134019, 2016 WL 5477595, at \* 21 (E.D.N.Y. Sept. 28, 2016) ("A plaintiff may recover damages under the FDUTPA by alleging that the plaintiff 'paid a price premium' for the allegedly deceptive product.") (quoting Carriuolo v. Gen. Motors Co., 823 F.3d 977, 986 (11th Cir. 2016)); Moss v. Walgreen Co., 765 F. Supp. 2d 1363, 1367 n.1 (S.D. Fla. 2011) (stating that a consumer suffers damages when she pays "more for the product than she otherwise would have," based on a manufacturer's deceptive practice, regardless of whether or not the consumer relied on the deceptive practice). Thus, Plaintiffs have adequately stated their FDUTPA claim.

### 3. Statutory Time Bars

Mercedes next argues that Plaintiff Mose's Alabama claim, Findlay and Rubey's Indiana claims, and Watkins' Florida claim are time barred, as those statutes of limitation and repose "begin to run from the date that the alleged tort occurred—i.e., the original purchase date of the vehicles." (ECF No. 117-1 at 57).

The parties do not dispute that Alabama's consumer protection statute is subject to a four-year statute of repose. Mercedes presumes that Mose's purchase took place "in or near 2007," because it was a 2007 model vehicle. (ECF No. 117-1 at 57). However, the FAC explicitly states [\*79] that Mose purchased his vehicle in February of 2013, (FAC ¶ 29), and thus falls within the statute of repose. Mercedes also argues in a footnote that because Mose asserted an [Alabama Deceptive Trade Practices Act](#), he waived his right to bring other claims. (ECF No. 117-1 at 57 n.25). Given that Mercedes asserted an argument on which there is a split of authority, [In re Gen. Motors LLC Ignition Switch Litig.](#), 257 F. Supp. 3d 372, 405 (S.D.N.Y. 2017), in a footnote, this Court declines to address that argument. [John Wyeth & Bro. Ltd. v. CIGNA Int'l Corp.](#), 119 F.3d 1070, 1076 n.6 (3d Cir. 1997) ("[A]rguments raised in passing (such as, in a footnote), but not squarely argued, are considered waived").

As to Plaintiff Watkins' Florida claim, Mercedes again argues that because Watkins purchased a used vehicle in 2013, the vehicle must have originally been sold prior to 2013 and thus is subject to a four-year statute of limitations. (ECF No. 117-1 at 57-58). Mercedes cites no law supporting its proposition that the original sale date of the new car is what starts the clock running on the statute of limitations rather than the purchase date of the used car by Plaintiff Watkins. Moreover, Mercedes incorrectly argues that FDUTPA's statute is not tolled by the actions at bar. [In re Takata Airbag Prods. Liab. Litig.](#), 193 F. Supp. 3d 1324, 1344, 1346 (S.D. Fla. 2016) (stating that "the doctrine of fraudulent concealment will operate to toll the statute [\*80] of limitations when it can be shown that fraud has been perpetrated on the injured party sufficient to place him in ignorance of his right to a cause of action or to prevent him from discovering his injury," and tolling the plaintiff's FDUTPA claim based on this reasoning). Plaintiff Watkins' FDUTPA claim is not barred by the statute of limitations.

With respect to Findlay and Rubey's Indiana consumer protection claims, Mercedes again uses the vehicle model years as the purchase dates, (ECF No. 117-1 at 58), when Findlay purchased his vehicle in August 2015 and Rubey purchased his vehicle in January 2014. This would put Findlay's purchase inside the two year statute of limitations. [Ind. Code § 24-5-0.5-5\(b\)](#). As to Rubey's purchase, Mercedes' alleged active and intentional fraudulent concealment operates to toll the statute of limitations. [Cwiakala v. Economy Autos, Ltd.](#), 587 F. Supp. 1462, 1466 (N.D. Ind. 1984).

#### 4. State Consumer Protection Class Action Bars

Mercedes also argues that Plaintiffs' claims under the consumer protection laws of Alabama, Georgia, Mississippi, Montana, Ohio, South Carolina, and Tennessee are barred because the consumer protection laws of those states do not permit class actions. (ECF No. 117-1 at 59). Mercedes argues that pursuant to [Shady Grove Orthopedic Associates, P.A. v Allstate Insurance Company](#), 559 U.S. 393, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010), Rule 23 does not override [\*81] state substantive law to permit class actions in this situation. (ECF No. 117-1 at 59). This Court has twice addressed and rejected this argument. [In re Liquid Aluminum Sulfate Antitrust Litig.](#), 16-md-2687, 2017 U.S. Dist. LEXIS 115294, 2017 WL 3131977, at \*25 (D.N.J. July 20, 2017) (holding that Shady Grove instructs that state consumer protection class action bars do not apply to those claims if brought as a class action under [Federal Rule of Civil Procedure 23](#)); [Timing Chain](#), 2017 U.S. Dist. LEXIS 70299, 2017 WL 1902160, at \*24 (holding the same); see also [Fitzgerald v. Gann Law Books, Inc.](#), 956 F. Supp. 2d 581, 586 (D.N.J. 2013) ("Shady Grove holds that, even where a federal-court plaintiff asserts a state-law cause of action, [Rule 23](#) may permit class-wide relief where state law would deny it.").

#### G. Arbitration

Mercedes' final argument is that two plaintiffs, Andary and Feller, are bound to arbitrate all of their claims pursuant to their purchase agreements. (ECF No. 117-1 at 61). Generally, an agreement to arbitrate a dispute "is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." [E.M. Diagnostic Systems, Inc. v. Local 169, International Brotherhood of Teamsters, etc.](#), 812 F.2d 91, 94 (3d Cir. 1987) (quoting [United Steelworkers of Am. v. Warrior & Gulf Navigation Co.](#), 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960)). The [Federal Arbitration Act \("FAA"\)](#), applies to arbitration clauses contained in contracts involving matters of interstate commerce. See 9 U.S.C. § 2; [Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.](#), 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). When a party, whose claims are subject to the FAA,

refuses to arbitrate the district court must decipher whether the claims are [\*82] arbitrable. *Medtronic Ave, Inc. v. Advanced Cardiovascular Sys., Inc.*, 247 F.3d 44, 54 (3d Cir. 2001) (citing *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986)). In doing so, the district court applies "the relevant state contract law to questions of arbitrability, which may be decided as a matter of law only if there is no genuine issue of material fact when viewing the facts in the light most favorable to the nonmoving party." *Aliments Krispy Kernels, Inc. v. Nichols Farms*, 851 F.3d 283, 288-89 (3d Cir. 2017).

"[F]ederal policy favors arbitration and thus a court resolves doubts about the scope of an arbitration agreement in favor of arbitration." *Medtronic*, 247 F.3d at 55 (citing *Moses H. Cone*, 460 U.S. at 24-25). However, "[i]f there is doubt as to whether such an agreement [to arbitrate] exists, the matter, upon a proper and timely demand, should be submitted to a jury." *Par-Knit, Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 (3d Cir. 1980), abrogated on other grounds by *Aliments*, 851 F.3d at 287-88. In considering a motion to compel arbitration, a court must engage in a two-step analysis: it must determine first whether there is a valid agreement to arbitrate and, if so, whether the specific dispute falls within the scope of said agreement. See *Century Indem. Co. v. Certain Underwriters at Lloyd's*, 584 F.3d 513, 523 (3d Cir. 2009).

Andary and Feller's arbitration provision reads as follows:

#### ARBITRATION PROVISION

#### PLEASE REVIEW • IMPORTANT • AFFECTS YOUR LEGAL RIGHTS

1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.
2. IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT [\*83] TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.
3. DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT, AND OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.

(ECF No. 117-4 at 9, 13).

Mercedes admits that it was not a signatory to these purchase or lease agreements. (ECF No. 117-1 at 62). As this Court explained in *Timing Chain*:

Basic contract law requires parties to be in privity with each other in order for them to enforce the terms of a contract. See *Black's Law Dictionary* (10th ed. 2014) (defining privity of contract as "[t]he relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so"). Since the parties never personally entered into an agreement with each other, no privity of contract between Plaintiffs and Defendant can be established. . . . Hence, without privity of contract between the parties, Defendant . . . cannot enforce the arbitration clause contained within the purchase and/or lease agreements [\*84] signed by Plaintiffs and the various dealerships. Thus, in accordance with [Century Indemnification Company,] there is no valid agreement between the parties that this Court can enforce, and the Motion to Compel Arbitration must be denied.

2017 U.S. Dist. LEXIS 70299, 2017 WL 1902160, at \*8.

Even still, Mercedes argues, this is the type of relationship in which a non-signatory can enforce the arbitration agreement. (ECF No. 117-1 at 62). Courts have permitted "non-signatory third party beneficiaries to compel arbitration against signatories of arbitration agreements." *E.L DuPont de Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S.*, 269 F.3d 187, 195 (3d Cir. 2001). For example, courts have "bound a signatory to arbitrate with a non-signatory at the nonsignatory's insistence because of the close relationship between the entities

involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract . . . and [the fact that] the claims were intimately founded in and intertwined with the underlying contract obligations." *E.I. DuPont*, 269 F.3d at 199-200 (citations and quotations omitted). "The distinction between signatories and non-signatories is important to ensure that short of piercing the corporate veil, a court does not ignore the corporate form of a non-signatory based solely on the interrelatedness of [\*85] the claims alleged." *Id.* at 202.

This Court rejected the same argument in *Timixng Chain*, 2017 U.S. Dist. LEXIS 70299, 2017 WL 1902160, at \*9. As in *Timing Chain*, the FAC indicates that Plaintiffs each purchased and/or leased their vehicle from an authorized car dealership, that they entered into the purchase or lease agreement with that dealership, and that the agreement contained only the dealership's name and Andary and Feller's names. "Accordingly, there [is] no relationship, let alone a close one, that" indicates that the Court should permit Mercedes to enforce the arbitration agreements. As such Mercedes' motion to compel arbitration is denied.

#### IV. CONCLUSION

For the reasons stated herein, Mercedes' motion to dismiss the First Amended Complaint is granted in part and denied in part, and Bosch's motion to dismiss the First Amended Complaint is denied. An appropriate Order accompanies this Opinion.

DATED: February 1st, 2019

/s/ Jose L. Linares

HON. JOSE L. LINARES

Chief Judge, United States District Court

#### ORDER

This matter comes before the Court by way of Defendants Mercedes-Benz USA, LLC's and Daimler AG's motion to dismiss the Fourth Consolidated and Amended Class Action Complaint ("FAC") (ECF No. 107), (ECF No. 117), as well as Defendant Robert Bosch LLC's motion [\*86] to dismiss the FAC, (ECF No. 118). For the reasons set forth in the Court's corresponding Opinion,

IT IS on this 1st day of February, 2019,

**ORDERED** that Defendants' motions to dismiss the FAC are hereby GRANTED IN PART AND DENIED IN PART; and it is further

**ORDERED** that to the extent Plaintiffs' state-law claims are premised solely and Defendants' alleged affirmative misrepresentations, Defendants' motions are GRANTED as to those claims, and Plaintiffs will not be able to proceed on state-law claims that are not also based on Defendants' omissions. The Court notes, however, that it is not readily apparent that there are any of Plaintiffs claims state-law based solely on affirmative misrepresentations; and it is further

**ORDERED** that Mercedes' motion is GRANTED as to Plaintiffs' New Jersey state law consumer protection claim, and that claim is hereby DISMISSED WITHOUT PREJUDICE; and it is further

**ORDERED** that Defendants' motions are DENIED as to the rest of the claims in the FAC. **SO ORDERED.**

HON. JOSE L. LINARES

Chief Judge, United States District Court

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End of Document

## *In re Zetia Ezetimibe Antitrust Litig.*

United States District Court for the Eastern District of Virginia, Norfolk Division

February 6, 2019, Decided; February 6, 2019, Filed

CIVIL ACTION NO. 2:18-md-2836

**Reporter**

2019 U.S. Dist. LEXIS 59469 \*; 2019 WL 1397228

In re ZETIA (EZETIMIBE) ANTITRUST LITIGATION. THIS DOCUMENT RELATES TO: All cases

**Subsequent History:** Adopted by, Modified by, in part, Objection overruled by, Dismissed by, in part [\*In re Zetia \(Ezetimibe\) Antitrust Litig., 2019 U.S. Dist. LEXIS 134791 \(E.D. Va., Aug. 9, 2019\)\*](#)

**Prior History:** [\*In re Zetia Ezetimibe Antitrust Litig., 2018 U.S. Dist. LEXIS 218116 \(E.D. Va., Sept. 6, 2018\)\*](#)

## **Core Terms**

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generic, patent, consumer protection, Defendants', unjust enrichment, Antitrust, allegations, ezetimibe, motion to dismiss, settlement, recommends, brand, manufacturer, purchaser, indirect, Retailers, settlement agreement, invalid, no-AG, courts, consumer, antitrust claim, anticompetitive, effects, infringement, prices, reissue, notice, federal court, launch

## **LexisNexis® Headnotes**

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

### [\*\*HN1\*\*](#) Agriculture & Food, Federal Food, Drug & Cosmetic Act

Under the Federal Food, Drug, and Cosmetic Act (FDCA), pharmaceutical companies must obtain approval from the Food and Drug Administration (FDA) before marketing new drugs. [21 U.S.C.S. § 355](#). A company seeking approval files a New Drug Application (NDA), which must include information about the safety and efficacy of the drug, the drug's components, how the drug is made and packaged, and any patents on the drug's ingredients or methods of use. [§ 355\(b\)](#). The process of compiling an NDA, which requires comprehensive clinical testing (subject to its own approval processes) is long and expensive.

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

### [\*\*HN2\*\*](#) Agriculture & Food, Federal Food, Drug & Cosmetic Act

Once the Food and Drug Administration (FDA) approves a manufacturer's New Drug Application (NDA), the manufacturer may list it in the directory of Approved Drug Products with Therapeutic Equivalence Evaluations, commonly known as the Orange Book. [21 U.S.C.S. § 355\(b\)\(1\)](#).

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

#### [HN3](#) Agriculture & Food, Federal Food, Drug & Cosmetic Act

Certain New Drug Applications (NDA) qualify for New Chemical Entity (NCE) exclusivity, which bars the Food and Drug Administration (FDA) from accepting for review any Abbreviated New Drug Application (ANDA) referencing the New Drug Application (NDA) for a period of five years (or four in certain circumstances). [21 U.S.C.S. § 355\(c\)\(3\)\(E\)\(ii\)](#).

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

#### [HN4](#) Agriculture & Food, Federal Food, Drug & Cosmetic Act

The Drug Price Competition and Patent Term Restoration Act, commonly known as the Hatch-Waxman Act. Pub. L. No. 98-417, 98 Stat. 1585 (1984), has simplified the regulatory process that generic drug manufacturers must traverse to bring generic drugs to market. Under the Hatch-Waxman Act, generic manufacturers may file an Abbreviated New Drug Application (ANDA) in lieu of a full New Drug Application (NDA). An ANDA allows the generic manufacturer to piggy-back on the pioneer's approval efforts in order to come to market quicker and with less expense. NDAs may rely on the safety and effectiveness findings in the listed drug's NDA by specifying that the generic is bioequivalent to the listed drug—that it contains the same active ingredient and exhibits the same bioavailability. [21 U.S.C.S. §§ 355\(j\)\(2\)\(A\)\(ii\)](#) and [\(iv\)](#).

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

#### [HN5](#) Agriculture & Food, Federal Food, Drug & Cosmetic Act

Because generic manufacturers can submit Abbreviated New Drug Applications (ANDAs) before the patent terms covering brand drugs expire, they must also certify that the generic drug will not infringe any patents listed in the Orange Book. Generic manufacturers may submit one of four types of certifications: (I) that the Orange Book does not list any patents covering the brand drug; (II) that any listed patents are expired; (III) that the generic is not seeking approval until the date any listed patents expire; or (IV) that any listed patent is invalid, unenforceable, or will not be infringed by the generic drug. [21 U.S.C.S. § 355\(j\)\(2\)\(A\)\(vii\)](#). The fourth option is commonly referred to as paragraph IV certification. Paragraph IV ANDAs may be filed four years after approval of an New Drug Application (NDA). [§ 355\(j\)\(5\)\(F\)\(ii\)](#).

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

#### [HN6](#) Agriculture & Food, Federal Food, Drug & Cosmetic Act

A generic manufacturer filing an Abbreviated New Drug Application (ANDA) with a paragraph IV certification must notify the patent holder of the filing. [§ 355\(j\)\(2\)\(B\)](#). Although no competing generic has yet been manufactured, submission of a paragraph IV certification ANDA automatically triggers a claim for patent infringement. 35 U.S.C.S. § 274(e)(2)(A). If a brand manufacturer files a patent infringement suit against the generic ANDA filer within 45 days of receiving notice, it results in an automatic 30-month stay, during which the Food and Drug Administration (FDA) may not approve the ANDA. [21 U.S.C.S. § 355\(j\)\(5\)\(B\)\(iii\)](#). But if during that 30-month period the parties litigate the infringement suit to a final judgment or settlement which declares the patent invalid or not infringed, then the FDA may approve the ANDA prior to expiration of the 30 months.

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

#### [\*\*HN7\*\*](#) Agriculture & Food, Federal Food, Drug & Cosmetic Act

To incentivize generic drug development and market entry, as well as challenges to potentially suspect patents listed in the Orange Book, the Hatch-Waxman Act permits the first company to file a paragraph IV Abbreviated New Drug Application (ANDA) (a first-filer) a 180-day period of generic marketing exclusivity. [21 U.S.C.S. § 355\(j\)\(5\)\(B\)\(iv\)](#). During this 180 days the Food and Drug Administration (FDA) may not approve a later-filed ANDA referencing the same listed brand drug. Only the brand drug manufacturer is permitted to market a competing generic (a so-called "Authorized Generic" or "AG") during this time; all other generic manufacturers must await expiration of the exclusivity window. The 180-day exclusivity period can be extremely valuable for the first-filer. Generic manufacturers reap most of their potential profits during this time, which can be hundreds of millions of dollars. Generic drug market entry is aided by state laws permitting, and in many cases requiring, pharmacies to substitute therapeutically equivalent generic drugs for brand drugs absent a physician's contrary instructions.

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

#### [\*\*HN8\*\*](#) Agriculture & Food, Federal Food, Drug & Cosmetic Act

The U.S. Supreme Court has concluded that agreements containing reverse payments can harm consumers if, in exchange, the generic manufacturer agrees to abandon a meritorious invalidity claim and enter the market later than it could have, assuming the patent were invalidated. The key issue is whether the reverse payment is "large and unjustified." The Court has declined to adopt a presumption that such settlements are unlawful, noting that the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification.

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

#### [\*\*HN9\*\*](#) Agriculture & Food, Federal Food, Drug & Cosmetic Act

A "No-AG" agreement is a promise by a brand manufacturer not to market an Authorized Generic (AG) version of the brand drug for some period of time after the first generic enters.

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

## [HN10](#) [blue document icon] Defenses, Demurrs & Objections, Motions to Dismiss

Each motion to dismiss requires the court to accept all facts alleged in the complaint as true and draw all reasonable inferences in favor of the plaintiff.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Inequitable Conduct

## [HN11](#) [blue document icon] Defenses, Inequitable Conduct

A finding of inequitable conduct related to the prosecution of a patent invalidates the entire patent.

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

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

## [HN12](#) [blue document icon] Motions to Dismiss, Failure to State Claim

A pleading that states a claim for relief must contain a short and plain statement of the claim showing that the pleader is entitled to relief. [Fed. R. Civ. P. 8\(a\)\(2\)](#). A pleading fails to meet this standard and is subject to dismissal under [Fed. R. Civ. P. 12\(b\)\(6\)](#) when it does not contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Factual allegations must be enough to raise a right to relief above the speculative level and beyond the level that is merely conceivable. Legal conclusions and threadbare recitals of the elements of a cause of action do not state a claim.

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

## [HN13](#) [blue document icon] Motions to Dismiss, Failure to State Claim

The United States Supreme Court has described the motion to dismiss analysis in two parts. First, the court must accept the allegations of fact as true. However, a court is not required to accept as true a legal conclusion couched as a factual allegation, or a legal conclusion unsupported by factual allegations. After reviewing the allegations, the court must then consider whether they are sufficient to state a plausible claim for relief. This is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. A [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion, then, should be granted if, after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief.

Antitrust & Trade Law > Procedural Matters

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

## [HN14](#) [blue document icon] Antitrust & Trade Law, Procedural Matters

In antitrust cases in particular, the United States Supreme Court has stated that dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope

## [HN15](#) [ ] Sherman Act, Claims

Section 1 of the Sherman Act broadly prohibits contracts or combinations in restraint of trade, [15 U.S.C.S. § 1](#). Not every agreement resolving brand-generic patent litigation produces the anti-competitive effects the Sherman Act sought to address. Only settlement agreements that have genuine adverse effects on competition plausibly give rise to antitrust remedies.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization

## [HN16](#) [ ] Regulated Practices, Monopolies & Monopolization

Patent holders enjoy the right to exclude competition for the duration of their patents. A patent is an exception to the general rule against monopolies. As a result, settlements of Paragraph IV litigation, which frequently allow the generic manufacturer to enter earlier than the patent's expiration, do not always produce antitrust harm. If they do not include a reverse payment from the patentee as compensation for the generic's agreement to delay generic entry, they are more likely to reflect the compromise of disputed issues than an allocation of monopoly profits. But where the settlement includes a payment from the patent holder to an alleged infringer, the question presented is, what are the reasons for the payment? If the payment represents no more than a rough approximation of the litigation expenses saved through the settlement or compensation for other services that the generic has promised to perform, there is less concern the settlement is intended to divide and extend the monopoly. But very large payments may not be justified by such traditional settlement considerations.

Antitrust & Trade Law > Regulated Practices > Private Actions

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

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

## [HN17](#) [ ] Regulated Practices, Private Actions

Those appellate courts which have examined reverse payment antitrust claims require no heightened level of pleading detail. Requiring facts sufficient to support the legal conclusion that the settlement at issue involves a large and unjustified reverse payment. In the case of a reverse payment based on allegations of a no-Authorized Generic (AG) agreement, the Third Circuit has held it sufficient for the Plaintiff to allege the manufacturer had an incentive to launch its own authorized generic and did not do so, and that the alleged infringer would earn many millions of dollars in additional revenue, from the no-AG agreement. These courts recognize that the value of non-cash reverse payments may be much more difficult to compute than that of their cash counterparts. But antitrust litigation often requires an elaborate inquiry into the reasonableness of a challenged business practice. And the absence of detailed support for the value of a no-AG promise should not bar the claim at the pleading stage.

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

## [HN18](#) [ ] Defenses, Demurrsers & Objections, Motions to Dismiss

Ordinarily, documents outside the complaint not expressly incorporated may not be considered by the court on a motion to dismiss without converting it to a motion for summary judgment. However, the court may examine documents sufficiently referred to in the complaint so long as the authenticity of these documents is not disputed. Permitting consideration of extraneous material if such materials are integral to and explicitly relied on in the complaint.

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

#### [HN19](#) [blue icon] **Defenses, Demurrsers & Objections, Motions to Dismiss**

Considering documents outside the pleadings does not alter the standard of review on a motion to dismiss requiring that facts and reasonable inferences from those facts must be examined in the light most favorable to the plaintiffs.

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

#### [HN20](#) [blue icon] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

[21 U.S.C.S. § 355\(t\)\(3\)](#) requires the Food and Drug Administration (FDA) to maintain a database listing of all authorized generic drugs. The statute defines an authorized generic for purposes of inclusion in the database as a listed drug which is sold under a different labeling, packaging, product code, trade name, or trade mark than the listed drug. [21 U.S.C.S. § 355\(t\)\(3\)\(B\)](#).

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

#### [HN21](#) [blue icon] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

A large and unjustified payment to a first filer removes from consideration the most motivated challenge to a suspect patent. The U.S. Supreme Court has recognized the special advantage that the 180-day exclusivity period gives to first filers, and the resulting incentive to patent holders in this context to overcome the ordinary incentives to resist paying off such challengers.

Antitrust & Trade Law > Sherman Act > Claims

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

#### [HN22](#) [blue icon] **Sherman Act, Claims**

To state a claim under [§ 2](#) of the Sherman Antitrust Act, [15 U.S.C.S. § 2](#), a plaintiff must allege a concerted action, a specific intent to achieve an unlawful monopoly, and commission of an overt act in furtherance of the conspiracy. While a conspiracy does require proof of specific intent, the overt acts of each alleged conspirator do not themselves need to be predatory. Specific intent refers to an intent to conspire, a meeting of minds in an unlawful arrangement.

Antitrust & Trade Law > Sherman Act > Claims

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

### [\*\*HN23\*\*](#) [L] Sherman Act, Claims

A monopolist's use of exclusive contracts, in certain circumstances, may give rise to a [15 U.S.C.S. § 2](#) violation even though the contracts foreclose less than a 40% to 50% share. Allegations of a dominant market share, combined with exclusionary contracts, are generally sufficient to state a [§ 2](#) claim.

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule

### [\*\*HN24\*\*](#) [L] Per Se Rule & Rule of Reason, Per Se Violations

Per se analysis under the Sherman Act applies to agreements between competitors because repeated review of similar conduct produced the consistent conclusion that it was plainly anticompetitive, lacking any redeeming virtue. The per se rule permits courts to make categorical judgments that certain practices, including price fixing, horizontal output restrictions, and market-allocation agreements, are illegal per se. But it is only appropriate after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that such agreements would be invalidated in all or almost all instances under the rule of reason.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

### [\*\*HN25\*\*](#) [L] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Courts analyzing reverse payment agreements have consistently applied the rule of reason analysis.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

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

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

### [\*\*HN26\*\*](#) [L] Judges, Discretionary Powers

Dismissal under [Fed.R. Civ. P. 12\(b\)\(6\)](#) is ordinarily with prejudice unless the court specifically orders dismissal without prejudice. That determination is within the district court's discretion.

Antitrust & Trade Law > Regulated Practices > Private Actions > Remedies

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

### [\*\*HN27\*\*](#) [L] Private Actions, Remedies

Plaintiffs seeking injunctive relief must demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur. When the anticompetitive actions have ceased-such as with the entry of generic competition-there is usually nothing to enjoin.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Constitutional Law > ... > Case or Controversy > Standing > Elements

Civil Procedure > Preliminary Considerations > Justiciability > Standing

#### **HN28** [blue icon] **Class Actions, Certification of Classes**

U.S. Const. art. III standing requires that claimants demonstrate three elements: injury in fact, causation, and redressability. Standing is ordinarily a threshold jurisdictional question decided at the outset of a case. However, the U.S. Supreme Court has recognized an exception in certain circumstances where class-certification issues are logically antecedent to Article III considerations. However, courts are split on when exactly that exception applies.

Civil Procedure > ... > Class Actions > Class Members > Absent Members

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Class Members > Named Members

#### **HN29** [blue icon] **Class Members, Absent Members**

Whether named plaintiffs may properly represent absent class members is exactly the focus of the [Fed. R. Civ. P. 23](#) class certification analysis. This is precisely the situation where class certification is logically antecedent to U.S. Const. art. III standing.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

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

#### **HN30** [blue icon] **Purchasers, Indirect Purchasers**

The U.S. Supreme Court has held that indirect purchasers of goods produced by-entities engaged in anticompetitive conduct lack standing to bring claims under the federal antitrust laws. Because state antitrust laws are largely modeled off federal law and interpreted accordingly, this effectively limited indirect purchaser antitrust actions in any forum. In response, many states passed so-called Illinois Brick repealer statutes which specifically authorize suits by indirect purchasers under state antitrust laws. The Supreme Court has upheld these statutes.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

#### **HN31** [blue icon] **Purchasers, Indirect Purchasers**

Indirect purchaser actions are permitted under the antitrust laws of Puerto Rico.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

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

#### **HN32**[ **Purchasers, Indirect Purchasers**

Cases examining the antitrust laws in Mississippi, Nevada, New York, North Carolina, South Dakota, Tennessee, West Virginia, Wisconsin, and the District of Columbia generally agree that they require allegations of intrastate conduct or effects but define those terms to give the statutes broad scope.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

#### **HN33**[ **Purchasers, Indirect Purchasers**

740 ILCS 10/7(2) provides that indirect purchasers may not maintain class actions in any court of Illinois. [§ 10/7\(2\)](#). By its plain language, that does not include a federal court in another state. It is not obvious that the formulaic expression "in any court of this State" appearing in an Illinois statute applies to a federal court in another state.

Antitrust & Trade Law > Regulated Practices > Private Actions > Remedies

Civil Procedure > Special Proceedings > Class Actions > Class Members

#### **HN34**[ **Private Actions, Remedies**

Illinois' class-action bar does not prevent plaintiffs from maintaining their class action suit in federal court under the Illinois Antitrust Act. Furthermore, to the extent the plaintiffs have stated an independent claim for violation of Illinois' consumer protection statute, they are entitled to seek remedies by the means available under that law. Furthermore, the Illinois CFA has broad scope by its own terms and has no corresponding class-action limitation. 815 ILCS 505/2 prohibits unfair methods of competition in harmony with the Federal Trade Commission (FTC) Act. 815 ILCS 505/10a.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

#### **HN35**[ **Purchasers, Indirect Purchasers**

The Missouri Supreme Court has rejected any direct privity requirement for suits under Missouri's consumer protection statute and seemed to endorse indirect purchaser actions.

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

#### **HN36**[ **Deceptive & Unfair Trade Practices, State Regulation**

The U.S. Supreme Court has construed the Federal Trade Commission (FTC) Act, on which many state consumer protection laws are modeled, to broadly cover unfair trade practices. Thus, state laws with equivalent unfairness language and an FTC Act harmonization provision can safely be assumed to have similarly broad scope.

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

#### [HN37](#) [blue icon] **Deceptive & Unfair Trade Practices, State Regulation**

Arizona's consumer protection law, as amended in 2013, prohibits unfair practices and contains an Federal Trade Commission Act harmonization provision. [Ariz. Rev. Stat. Ann. § 44-1522](#).

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

#### [HN38](#) [blue icon] **Deceptive & Unfair Trade Practices, State Regulation**

Arkansas's consumer protection laws prohibit deceptive and unconscionable trade practices, [Ark. Code Ann. § 4-88-107](#), language that Arkansas courts construe broadly.

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

#### [HN39](#) [blue icon] **Deceptive & Unfair Trade Practices, State Regulation**

Washington D.C.'s consumer protection laws prohibit unfair trade practices and include both an expansive list of enumerated examples and an FTC Act harmonization provision. [D.C. Code §§ 28-3901](#), -3904. Courts regularly permit claims under D.C. law premised on anticompetitive conduct.

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

#### [HN40](#) [blue icon] **Deceptive & Unfair Trade Practices, State Regulation**

Idaho prohibits unfair methods of competition and aligns its consumer protection statute with the Federal Trade Commission (FTC) Act. [Idaho Code Ann. §§ 48-603](#). The United States Supreme Court agree with those cases that have permitted claims premised on anticompetitive conduct to proceed under this statute.

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

#### [HN41](#) [blue icon] **Deceptive & Unfair Trade Practices, State Regulation**

Maine's consumer protection statute covers unfair methods of competition and includes an Federal Trade Commission (FTC) Act harmonization provision. [Me. Rev. Stat. Ann. tit. 5, § 207](#). It encompasses harms premised on antitrust violations.

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

#### [HN42](#) [blue icon] **Deceptive & Unfair Trade Practices, State Regulation**

Michigan's consumer protection law refers to the Federal Trade Commission (FTC) Act but does not contain an express harmonization provision. [Mich. Comp. Laws § 445.911\(3\)](#). The enumerated unlawful practices in section 445-903 are primarily directed at deceptive practices, and several courts have dismissed claims under Michigan law for failure to allege fraud or deception. Other cases permit claims based on allegations of anticompetitive conduct have made specific findings of deceptive conduct. Courts have concluded that Michigan consumer protection statute requires proof of intent to deceive and finding element satisfied by allegations that defendants fabricated a drug safety issue.

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

#### [HN43](#) [+] **Deceptive & Unfair Trade Practices, State Regulation**

The Minnesota consumer protection law applies only to conduct that is deceptive or fraudulent, as opposed to merely anticompetitive. Courts permitting claims of anticompetitive conduct under [Minn. Stat. § 325F.69\(1\)](#) have relied on allegations of deception or fraud.

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

#### [HN44](#) [+] **Deceptive & Unfair Trade Practices, State Regulation**

New York's consumer protection law does not include broad unfairness language but is instead directed only at deceptive or misleading practices. It does not cover anticompetitive conduct that is not premised on consumer deception.

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

#### [HN45](#) [+] **Deceptive & Unfair Trade Practices, State Regulation**

Rhode Island's consumer protection statute contains broad unfairness language and an Federal Trade Commission (FTC) Act harmonization provision. [R.I. Gen. Laws. §§ 6-13.1-2](#), -3. Courts have permitted claims under the state's consumer protection statute premised on anticompetitive conduct.

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

#### [HN46](#) [+] **Deceptive & Unfair Trade Practices, State Regulation**

South Dakota's consumer protection law specifically requires proof of deceptive conduct causing consumer harm.

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

#### [HN47](#) [+] **Deceptive & Unfair Trade Practices, State Regulation**

The Vermont Consumer Fraud Act prohibits unfair methods of competition and contains an Federal Trade Commission (FTC) Act harmonization provision. [Vt. Stat. Ann. tit. 9, § 2453](#). The statute should be liberally construed to have as broad a reach as possible in order to best protect consumers against unfair trade practices.

The Vermont Supreme Court has explicitly held that indirect purchasers could bring antitrust claims under the civil penalty provision of the Act.

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

#### **HN48** [Deceptive & Unfair Trade Practices, State Regulation]

The Idaho Supreme Court has limited Idaho consumer protection statute to unconscionable sales conduct that is direct at the consumer. Despite the Kansas Consumer Protection Act's seemingly broad language, the Supreme Court of Kansas has distinguished between consumer harms redressable thereunder and pricing harms governed by the Kansas antitrust statute. Courts typically dismiss claims under Oregon's consumer protection law that lack allegations of deceptive conduct. Plaintiffs cannot bring claims based on anticompetitive conduct under the Tennessee Consumer Protection Act. Although Utah's Consumer Sales Practices Act contains an Federal Trade Commission (FTC) Act harmonization provision, it lacks the broad unfair competition language on which federal courts have relied in extending the latter to cover price-fixing. The Utah CSPA's broadest provision covers "unconscionable" conduct, which Utah courts have interpreted using contract law definitions.

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

#### **HN49** [Deceptive & Unfair Trade Practices, State Regulation]

Every jurisdiction defines consumer for the purposes of setting out the scope of its consumer protection laws and the persons or entities entitled to sue under those laws.

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

#### **HN50** [Deceptive & Unfair Trade Practices, State Regulation]

Virginia's consumer protection law (1) provides a right of action to any person (including a legal entity) that suffers a loss caused by a violation of the statute, (2) covers fraudulent acts or practices committed by a supplier in connection with a consumer transaction, and (3) defines a consumer transaction as one that involves goods purchased primarily for personal, family, or household purposes. [Va. Code Ann §§ 59.1-198](#).

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

#### **HN51** [Deceptive & Unfair Trade Practices, State Regulation]

D.C.'s consumer protection statute is intended to reach the ultimate retail transaction between the final distributor and the individual member of the consumer public. Secondary reimbursement transactions are outside the ambit of the statute. Kansas law narrowly defines consumer in terms of individuals or natural persons. [Kan. Stat. Ann. § 50-624](#). Although Maine's consumer protection law defines person to include legal entities, it limits private actions to persons who purchase or lease goods primarily for personal, family, or household purposes. [Me. Rev. Stat. Ann. tit. 5, §§ 206, 213](#). Plaintiffs that have engaged in trade or commerce must proceed under section 11 of the Massachusetts Consumer Protection Act. However, § 11 bars indirect purchaser claims. and Missouri's consumer protection law are limited to persons who purchase or lease merchandise primarily for personal, family or household purposes. Private actions under Missouri's consumer protection law are limited to persons who purchase or lease merchandise primarily for personal, family or household purposes. [Mo. Rev. Stat. § 407.025](#). Third-party payors like

health plans may not assert claims under this provision. Only persons who purchase goods for personal, family, or household purposes may sue under Rhode Island's consumer protection law. [R.I. Gen. Laws § 6-13.1-5.2](#).

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

Civil Procedure > ... > Pleadings > Complaints > Prelitigation Notices

#### **[HN52](#) [+] Deceptive & Unfair Trade Practices, State Regulation**

The Massachusetts notice provision only applies to claims under § 9 of the state's consumer protection act. Section 11 of the state's consumer protection act has no notice requirement.

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

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

#### **[HN53](#) [+] Deceptive & Unfair Trade Practices, State Regulation**

The Florida consumer protection law's unfair methods of competition prong encompasses antitrust violations and avoids the heightened pleading standard applicable to the fraud prong.

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

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

#### **[HN54](#) [+] Complaints, Requirements for Complaint**

At minimum, an unjust enrichment plaintiff must ordinarily allege receipt of a benefit by the defendant at plaintiff's expense and that it would be inequitable or unjust for defendant to accept and retain the benefit.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

#### **[HN55](#) [+] Equitable Relief, Quantum Meruit**

In some states, plaintiffs pursuing unjust enrichment claims must demonstrate that they conferred the unjust benefit directly on the defendant.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

#### **[HN56](#) [+] Equitable Relief, Quantum Meruit**

There is no element in Kansas unjust enrichment law requiring that the benefit flow directly from the plaintiff to the defendants.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

**HN57** [blue icon] **Equitable Relief, Quantum Meruit**

In New York, a plaintiff need not plead direct dealing or an actual substantive relationship with the defendant. The only requirement is that the connection between plaintiff and defendant not be too attenuated. North Carolina Supreme Court precedent embraces an expansive view of unjust enrichment and the role or particulars of the conferral of a benefit element.

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**Judges:** DOUGLAS E. MILLER, UNITED STATES MAGISTRATE JUDGE.

**Opinion by:** DOUGLAS E. MILLER

## Opinion

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### MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

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## V. Analysis

A. Plaintiffs have Plausibly Alleged a Claim under [§ 1](#) of the Sherman Act Arising from a Reverse Payment Settlement between Merck and [\*10]

Glenmark

1. The written Settlement Agreement does not unambiguously contradict Plaintiffs' allegations of a no-AG agreement
2. Merck's vindication of the patent in the Mylan litigation does not diminish the plausibility of Plaintiffs' allegations of anticompetitive effect

B. Plaintiffs' Allegations of a No-AG Reverse Payment Settlement Agreement Plausibly Allege a Conspiracy to Monopolize the Market for

Ezetimibe under [§ 2](#) of the Sherman Act

C. The Retailer Plaintiffs Have Failed to Plausibly Allege a Per Se

Violation of [§ 1](#) of the Sherman Act, or Any Claim for Injunctive Relief

D. The End Payor Plaintiffs Have Standing and Plausibly Allege Claims under the Laws of Thirty Jurisdictions, but Some Claims Should Be Dismissed for Failing to Allege Elements Required by the Authority They Rely on

1. The EPPs have alleged anticompetitive conduct sufficient to plausibly state antitrust claims
2. The EPPs have Article III standing and Defendants' objection to the named class representatives' ability to represent absent class members

in other states should be addressed under [Rule 23](#)

3. Defendants' motion to dismiss the EPPs' state antitrust claims in nineteen jurisdictions should be denied

4. Defendants' motion to [\*11] dismiss the EPPs' state monopolization claims should be denied except as to the claim under California Code section

17200

5. The EPPs have stated consumer protection claims in some jurisdictions but have failed to allege required elements in others

6. The EPPs' state unjust enrichment claims should be dismissed in some jurisdictions and allowed in others

Conclusion

## Introduction

In this multidistrict antitrust litigation, Plaintiffs allege that Defendants illegally conspired to artificially inflate the price of prescription drugs. The Complaints principally arise out of a patent infringement settlement concerning the drug ezetimibe, the active ingredient in the branded cholesterol-control medication Zetia. Plaintiffs allege that as part of their settlement, the brand manufacturer defendants made an unlawful "reverse payment" in exchange for the generic manufacturer's delayed entry into the market. Plaintiffs claim that this quid pro quo agreement is subject to

antitrust scrutiny under the Supreme Court's decision in *FTC v. Actavis*, 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013). Plaintiffs assert claims under the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2, along with antitrust and other claims under the laws of thirty-eight states, the District of Columbia, and Puerto Rico.

The matter is now before the court on three separate Motions to Dismiss all claims, each directed at one of the three classes of plaintiffs in the case.<sup>1</sup> Defendants argue that Plaintiffs have failed to plausibly allege any payment or other agreement that would give rise to antitrust liability under federal law. They also assert that plaintiffs proceeding under state law either lack standing or have failed to state a claim for various reasons particular to those claims.

Pursuant to 28 U.S.C. §636(b)(1)(B) and Federal Rule of Civil Procedure 72(b), the assigned district judge referred the motions to the undersigned for a report and recommendation. The court heard oral argument on all the motions January 14, 2019. As explained in greater detail below, this Report concludes that Plaintiffs have stated claims under both Sherman Act counts. Such claims are analyzed under the rule of reason approach set out by the Supreme Court in *Actavis*. There is, however, no per se violation of **antitrust law** arising from the same conduct. The count asserting a per se violation alleged only by the Retailer Plaintiffs fails to state a claim and should be dismissed. The Report also concludes the named End Payor Plaintiffs have standing to pursue the claims [\*13] they assert, and any challenge to claims they assert in a representative capacity should be addressed at the class certification stage under [Rule 23](#).

Finally, while some of the state antitrust, consumer protection, and unjust enrichment claims are adequately pled, the Report concludes that several are barred by the law of the states which created the remedies sought to be enforced here. Accordingly, as set out below, this Report recommends the Motions to Dismiss be GRANTED IN PART and DENIED IN PART.

## I. Parties and Claims

### A. Defendants

Merck & Company, Inc. is a New Jersey corporation that through itself and its subsidiaries markets and sells Zetia throughout the United States. Direct Purchaser Plaintiffs' Consolidated Class Action Complaint ("DPP Compl.") ¶ 10 (ECF No. 128 at 9). In 2009, Merck & Company, Inc. merged into defendant Schering-Plough Corporation and the resulting entity changing its name to Merck & Company, Inc. DPP Compl. ¶ 14. The original Merck & Company, Inc. changed its name to Merck Sharp & Dohme Corporation, another named defendant. DPP Compl. ¶ 14. Schering Corporation was a wholly owned subsidiary of Schering-Plough corporation and the original assignee of the relevant [\*14] patents in this matter. DPP Compl. ¶ 13. Those patents are now assigned to defendant Merck Sharp & Dohme Corporation. DPP Compl. ¶ 11. MSP Singapore Company LLC ("MSP") is a subsidiary of Merck & Company, Inc.; it held the New Drug Application ("NDA") for ezetimibe and was the exclusive licensee of the relevant patents. DPP Compl. ¶ 15; Br. Supp. Defs' Mot. Dismiss DPP Compl. 2 n.1 (ECF No. 158 at 7 n.1). Except where otherwise indicated, all these Merck Defendants will be collectively referred to in this Report as "Merck."

Glenmark Pharmaceuticals Limited is a foreign company, which, along with its wholly owned subsidiary Glenmark Pharmaceuticals Inc., USA, will be collectively referred to in this Report as "Glenmark."<sup>2</sup> Glenmark is a generic drug manufacturer which, on October 25, 2006, filed the first Abbreviated New Drug Application seeking FDA approval

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<sup>1</sup> See explanation of plaintiff classes, *infra*. The three motions, as docketed in the consolidated MDL (Case No. 2:18md2836), are ECF No. 157 (Direct Purchaser Plaintiffs); ECF No. 160 (Retailer Plaintiffs); and ECF No. 162 (End Payor Plaintiffs).

<sup>2</sup> According to Defendants, Plaintiffs incorrectly identified Glenmark Pharmaceuticals Inc., USA as "Glenmark Generics Inc., USA" in their Complaints. Br. Supp. Mot. Dismiss EPP Compl. 1 (ECF No. 163 at 1).

for its generic version of Zetia. DPP Compl. ¶ 146. After Merck sued Glenmark for patent infringement, the two companies entered into the Settlement Agreement that is the core subject matter of this litigation.

## B. Plaintiffs

Plaintiffs are corporations or other entities that allegedly purchased brand-name and generic Zetia at supracOMPETITIVE [\*15] prices from late 2011 until at least June 12, 2017. DPP Compl. 84-85. Plaintiffs are divided into three groups. The Direct Purchaser Plaintiffs ("DPPs") are drug wholesalers that purchased brand-name and generic Zetia directly from the Defendants.<sup>3</sup> The DPPs assert federal antitrust claims on behalf of themselves and similarly situated class members under [15 U.S.C. §§ 1 & 2](#).

The Retailer Plaintiffs CVS, Walgreens, and Rite Aid ("Retailers") are large pharmacy retailers which assert claims on their own behalf and as assignees of claims from pharmaceutical wholesalers which purchased Zetia directly from Merck for resale to Retailers. Retailers assert three federal antitrust claims: (1) per se violation of [15 U.S.C. § 1](#); (2) violation of [§ 1](#) under rule of reason analysis; and (3) violation of [§ 2](#). Although the retailers are also direct purchasers, they are pursuing their claims individually and do not seek class certification.

The End Payor Plaintiffs ("EPPs") are a collection of municipal corporations, employee welfare benefit plans, or other similar entities. The EPPs allege that they purchased and/or provided reimbursement for purchases of Zetia and its generic equivalents for members or plan beneficiaries at supracOMPETITIVE [\*16] prices.<sup>4</sup> Because the EPPs were downstream buyers who did not purchase Zetia directly from Defendants, they allege only indirect injury caused by Defendants' conduct. End Payor Consol. Class Action Compl. 80-81 (ECF No. 130 at 85-86). On their own behalf, and for similarly situated class members, the EPPs bring four sets of claims: (1) conspiracy and combination in restraint of trade under the antitrust laws of twenty-six states, the District of Columbia, and Puerto Rico; (2) analogous state-law monopolization claims in those same jurisdictions; (3) consumer protection claims under the laws of twenty-seven states and the District of Columbia; and (4) unjust enrichment claims under the laws of thirty-seven states and the District of Columbia.

## II. Regulatory Background

**[HN1](#)** Under the Federal Food, Drug, and Cosmetic Act ("FDCA"), pharmaceutical companies must obtain approval from the Food and Drug Administration ("FDA") before marketing new drugs. [21 U.S.C. § 355](#). A company seeking approval files a New Drug Application ("NDA"), which must include information about the safety and efficacy of the drug, the drug's components, how the drug is made and packaged, and any patents on the drug's ingredients or methods [\*17] of use. *Id.* [§ 355\(b\)](#). The process of compiling an NDA, which requires comprehensive clinical testing (subject to its own approval processes) is long and expensive.

**[HN2](#)** Once the FDA approves a manufacturer's NDA, the manufacturer may list it in the directory of "Approved Drug Products with Therapeutic Equivalence Evaluations," commonly known as the "Orange Book." *Id.* [§ 355\(b\)\(1\)](#). The Orange Book listing contains any patents that the manufacturer believes it could assert against a generic manufacturer that makes, uses, or sells a generic version of the drug. *Id.* **[HN3](#)** Certain NDAs qualify for New

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<sup>3</sup> The named class representatives for the DPPs are FWK Holdings, LLC; Rochester Drug Cooperative, Inc.; and Cesar Castillo, Inc. DPP Compl. 3-4.

<sup>4</sup> The named class representatives for the EPPs are the Sergeants Benevolent Association Health & Welfare Fund; United Food and Commercial Workers Local 1500 Welfare Fund; Philadelphia Federation of Teachers Health & Welfare Fund; Self-Insured Schools of California; City of Providence, Rhode Island; Law Enforcement Health Benefits, Inc.; Painters District Council No. 30 Health & Welfare Fund; International Union of Operating Engineers Local 49 Health & Welfare Fund; Turlock Irrigation District; Uniformed Firefighters' Association of Greater New York Security Benefit Fund; and the Retired Firefighters' Security Benefit Fund of the Uniformed Firefighters' Association of Greater New York Security Benefit Fund; and United Food and Commercial Workers Local 1500 Welfare Fund.

Chemical Entity ("NCE") exclusivity, which bars the FDA from accepting for review any ANDA referencing the NDA for a period of five years (or four in certain circumstances). *Id.* [§ 355\(c\)\(3\)\(E\)\(ii\)](#).

### A. Hatch-Waxman Amendments and Generic Drug Approval

**HN4** In 1984, Congress passed the Drug Price Competition and Patent Term Restoration Act, commonly known as the Hatch-Waxman Act. [Pub. L. No. 98-417, 98 Stat. 1585 \(1984\)](#). The Act simplified the regulatory process that generic drug manufacturers must traverse to bring generic drugs to market. Under the Hatch-Waxman Act, generic manufacturers may file an Abbreviated New Drug Application ("ANDA") in lieu of a full NDA. An ANDA allows the generic manufacturer to "piggy-back on the pioneer's [\*18] approval efforts" in order to come to market quicker and with less expense. [Actavis, 570 U.S. at 142](#). ANDAs may rely on the safety and effectiveness findings in the listed drug's NDA by specifying that the generic is "bioequivalent" to the listed drug—that it contains the same active ingredient and exhibits the same "bioavailability." *Id.* (citing [21 U.S.C. §§ 355\(j\)\(2\)\(A\)\(ii\)](#) and [\(iv\)](#)).

**HN5** Because generic manufacturers can submit ANDAs before the patent terms covering brand drugs expire, they must also certify that the generic drug will not infringe any patents listed in the Orange Book. *Id. at 143* (citation omitted). Generic manufacturers may submit one of four types of certifications: (I) that the Orange Book does not list any patents covering the brand drug; (II) that any listed patents are expired; (III) that the generic is not seeking approval until the date any listed patents expire; or (IV) that any listed patent is invalid, unenforceable, or will not be infringed by the generic drug. [21 U.S.C. § 355\(j\)\(2\)\(A\)\(vii\)](#). The fourth option is commonly referred to as "paragraph IV certification." [In re Opana ER Antitrust Litig., 162 F. Supp. 3d 704, 711 \(N.D. Ill. 2016\)](#). Paragraph IV ANDAs may be filed four years after approval of an NDA which receives NCE exclusivity. 21 U.S.C. *Id.* [§ 355\(j\)\(5\)\(F\)\(ii\)](#).

**HN6** A generic manufacturer filing an ANDA with a paragraph IV certification [\*19] must notify the patent holder of the filing. [§ 355\(j\)\(2\)\(B\)](#). Although no competing generic has yet been manufactured, submission of a paragraph IV certification ANDA automatically triggers a claim for patent infringement. 35 U.S.C. § 274(e)(2)(A). If a brand manufacturer files a patent infringement suit against the generic ANDA filer within 45 days of receiving notice, it results in an automatic 30-month stay, during which the FDA may not approve the ANDA. [21 U.S.C. § 355\(j\)\(5\)\(B\)\(iii\)](#). But if during that 30-month period the parties litigate the infringement suit to a final judgement or settlement which declares the patent invalid or not infringed, then the FDA may approve the ANDA prior to expiration of the 30 months. *Id.*

### B. Generic Drug Exclusivity

**HN7** To incentivize generic drug development and market entry, as well as challenges to potentially suspect patents listed in the Orange Book, the Hatch-Waxman Act permits the first company to file a paragraph IV ANDA (a "first-filer") a 180-day period of generic marketing exclusivity. [§ 355\(j\)\(5\)\(B\)\(iv\)](#). During this 180 days the FDA may not approve a later-filed ANDA referencing the same listed brand drug. Only the brand drug manufacturer is permitted to market a competing generic (a so-called "Authorized Generic" or "AG") during [\*20] this time; all other generic manufacturers must await expiration of the exclusivity window.

The 180-day exclusivity period can be extremely valuable for the first-filer. Generic manufacturers reap most of their potential profits during this time, which can be hundreds of millions of dollars. See [Actavis, 570 U.S. at 144](#). Generic drug market entry is aided by state laws permitting, and in many cases requiring, pharmacies to substitute therapeutically equivalent generic drugs for brand drugs absent a physician's contrary instructions. See [Opana, 162 F. Supp. 3d at 712](#). As a result, generics can quickly capture a large portion of the market for the corresponding branded drug. *See id.*; DPP Compl. ¶¶ 51-55.

### C. "Reverse Payment" Patent Settlements and the Actavis Decision

The regulatory framework above gives generic manufacturers strong incentive to bring paragraph IV challenges to seemingly vulnerable patents. And brand manufacturers, faced with the prospect of losing their exclusivity, have good reason to respond with infringement suits against those companies. Given the expense of patent infringement litigation, however, brand manufacturers may seek to settle such claims, particularly if they "suspect their challenged patents may indeed be [\*21] vulnerable." [In re Aggrenox Antitrust Litig., 94 F. Supp. 3d 224, 234 \(D. Conn. 2015\)](#). Such settlements sometimes result in the plaintiff (the patent holder) paying the defendant (the generic manufacturer and accused infringer). This type of settlement is commonly called a "reverse payment" settlement agreement. See id.; see also Actavis, 570 U.S. at 155-56 (noting that "reverse payment" patent infringement settlements are confined almost exclusively to the pharmaceutical industry). These settlements may also permit the generic manufacturer to enter the market at a later date but *before* the patent's expiration date. See Aggrenox, 94 F. Supp. 3d at 234. Such "pay for delay" settlements have uncertain market impacts.

Assuming the patent is valid, and that the patentholder would ultimately prevail, such a settlement means that the patent-holder is avoiding the cost of litigation by agreeing to shorten the length of its legal monopoly and to share some of its monopoly profits with the challenger. Consumers benefit by enjoying the lower prices of generics sooner than they otherwise would under the patent. Assuming, however, that the patent is invalid, and that the challenger would ultimately prevail, then such a settlement amounts to a "pay to delay" agreement: the patent-holder's monopoly is illegitimate, and it is [\*22] paying a would-be competitor to delay its entry into the market. Consumers who should enjoy competitive prices now will instead pay monopoly prices until the end of the term of the anticompetitive collusion. The availability of such settlements allows manufacturers of brand-name drugs to avoid the invalidation of potentially weak patents and keep prices high by sharing their monopoly profits with manufacturers of generics.

Id. Before Actavis, some courts reasoned that because any pay for-delay settlement inevitably allowed generic market entry before the expiration of the brand's patent, the brand manufacturer was not gaining any exclusive time it was not already entitled to via its patent monopoly. See Actavis 570 U.S. at 146. The result was a split in circuit authority over whether such agreements could violate antitrust law.

**HN8** [↑] The Supreme Court in Actavis said that they could - in certain circumstances. 570 U.S. at 141. The Court concluded that agreements containing reverse payments can harm consumers if, in exchange, the generic manufacturer agrees to abandon a meritorious invalidity claim and enter the market later than it could have, assuming the patent were invalidated. The key issue is whether the reverse payment is [\*23] "large and unjustified." The Court declined the FTC's request to adopt a presumption that such settlements are unlawful, noting that "the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification." Id. at 159.

#### D. "No-AG" Agreements

As scrutiny over reverse payment settlement agreements increased, antitrust plaintiffs began challenging not only cash payments (at issue in Actavis), but also more complex arrangements that still provide value to generic manufacturers. The form alleged in this case is a **HN9** [↑] "No-AG" agreement - a promise by a brand manufacturer "not to market an AG version of the brand drug for some period of time after the first generic enters." DPP Compl. ¶ 79; see in re Lipitor Antitrust Litig., 868 F.3d 231, 252 (3rd. Cir. 2017) (holding reverse payment may be in the form of a no-AG agreement).

No-AG agreements compensate a first-filer's delayed entry by ensuring that it will face no generic competition during its 180-day exclusivity period. Depending on the brand's sales, the difference in generic profits can be hundreds [\*24] of millions of dollars. DPP Compl. ¶ 84; see also Actavis, 570 U.S. at 153-54. These arrangements may harm consumers by extending the period of brand exclusivity and by eliminating the price competition that would result if the first-filer's generic had to compete with the brand's AG. Lost consumer savings would instead flow to the brand and generic manufacturers in the form of increased monopoly profits. See DPP Compl. ¶¶ 82-84.

Numerous courts relying on the Supreme Court's reasoning in *Actavis* have found potential antitrust violations deriving from no-AG agreements. See, e.g., In re Loestrin 24 FE Antitrust Litig., 814 F.3d 538, 551-52 (1st Cir. 2016); King Drug Co. of Florence v. SmithKline Beecham Corp., 791 F.3d 388, 403 (3rd Cir. 2015); In re Opana, 162 F. Supp. 3d at 717; United Food & Com. Workers Local 1776 & Participating Employers Health & Welfare Fund v. Teikoku Pharma USA, Inc. (Lidoderm I), 74 F. Supp. 3d 1052, 1068-69 (N.D. Cal. 2014); In re Niaspan Antitrust Litigation, 42 F. Supp. 3d 735, 751-52 (E.D. Pa. 2014).

### **III. Factual Background**

#### **A. Merck Develops Ezetimibe and Seeks Patent Protection and FDA Approval**

In the 1990s, Merck was working on a program to develop chemicals that would be useful in reducing cholesterol levels in humans.<sup>5</sup> Merck researchers discovered a lead compound and several of its metabolites and metabolite-like analogues, including ezetimibe, the active ingredient in Zetia. Merck quickly sought broad patent protection for these compounds. DPP Compl. 29-31 ¶¶ 96-97.<sup>6</sup>

Beginning with U.S. Patent Application 102,440 in September of 1993, Merck prosecuted a series of patents [\*25] over the next few years. Merck would ultimately obtain several patents on azetidinone compounds. See DPP Compl. ¶ 103, Fig. 6 (depicting application and patent history of the azetidinone patents). Plaintiffs' allegations contain an extensive history of these patents and descriptions of their respective claims. Although much of this information may become relevant later in a potential motion for summary judgment or at trial, for present purposes only a simplified account is necessary.

Among the patents Merck ultimately obtained was U.S. Patent No. 5,767,115 ("the '115 patent"). Plaintiffs allege that ezetimibe is within the scope of several claims in this patent. The '115 patent expired on June 16, 2015. DPP Compl. ¶¶ 123-25. As it began preparing an NDA for the compound, Merck filed a reissue application on the '115 patent. The reissue application sought to add additional claims with narrower scope directed at "one of the most preferred compounds disclosed in the specification"—specifically, ezetimibe. DPP Compl. ¶¶ 128-29.

On December 27, 2001, Merck submitted an NDA seeking approval to market ezetimibe tablets as a cholesterol-control drug under the brand name Zetia. While the NDA was pending, the PTO issued U.S. Patent No. RE37,721 ("the '721 patent"), a reissue of the '115 patent. The '721 patent included the [\*26] new claims for the compound ezetimibe, a composition of ezetimibe, and a method of using ezetimibe to treat high cholesterol. The FDA approved Merck's NDA on October 25, 2002 and granted it a five-year NCE exclusivity. Merck then sought extension of the 1721 patent term based on the duration of the FDA's review of the Zetia NDA. The PTO granted an extension of 497 days, which set the '721 patent's expiration date on October 25, 2016, not including pediatric exclusivity. Merck ultimately listed three patents in the Orange Book in conjunction with the Zetia NDA: (1) the '721 patent; (2) U.S. Patent No. 5,846,966, which claimed azetidinone compounds combined with statins; and (3) U.S. Patent No. 7,030,106, which claimed compounds that inhibit sterol absorption and methods for their use. DPP Compl. ¶¶ 126-45.

#### **B. Merck Sues First-Filer Glenmark for Patent Infringement**

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<sup>5</sup> Although the three motions addressed in this Report are directed to three different complaints, the factual allegations describing the anticompetitive conduct are generally the same. HN10 Each motion to dismiss requires the court to accept all facts alleged in the complaint as true and draw all reasonable inferences in favor of the plaintiff. Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999).

<sup>6</sup> The Retailer Complaints and the EPPs' Consolidated Complaint recite substantially identical allegations to those contained in the DPPs' Complaint.

On October 25, 2006, generic drug manufacturer Glenmark filed an ANDA seeking FDA approval to market a generic version of Zetia. Glenmark's ANDA contained a paragraph IV certification to all of the ezetimibe patents listed in the Orange Book at that time. On or about February 9, 2007, Glenmark notified Merck of its ANDA filing. Merck sued Glenmark on March 22, 2007, alleging that it was infringing [\*27] the 1721 patent. This triggered the automatic stay of FDA's approval of Glenmark's ANDA until the earlier of (i) the expiration of the 30-month stay, or (ii) entry of a final judgment that the 1721 patent was invalid, unenforceable, or not infringed. Glenmark answered and counterclaimed, seeking declaratory judgment that the 1721 patent was invalid and/or unenforceable.

Glenmark raised several arguments. It alleged that at least two compounds claimed in the 1721 patent are inherent metabolites of a compound disclosed in an earlier Schering patent application. See DPP Compl. ¶¶ 155-57. Glenmark also argued that Merck's failure to disclose the inherency of these metabolites to the PTO during prosecution of the 1721 patent was inequitable conduct. It alleged that Merck failed to disclose material publications that investigated these metabolites to the PTO during prosecution. It also alleged that Merck committed inequitable conduct in seeking patent term extension for the '721 patent without disclosing that certain claims were invalid for inherent anticipation. HN11 [↑] A finding of inequitable conduct related to the prosecution of a patent invalidates the entire patent. *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1288 (Fed. Cir. 2011). DPP Compl. ¶¶ 158-60. Glenmark also [\*28] argued that the '721 patent was invalid for lack of enablement, failure to name the inventors, lack of proper reissue, and obviousness-type double patenting. DPP Compl. ¶¶ 161-65.

On April 24, 2009, the FDA tentatively approved Glenmark's Zetia ANDA. With this approval, Glenmark secured the 180-day generic exclusivity afforded to first-filers. However, Glenmark remained unable to launch its generic due to the 30-month stay triggered by Merck's infringement suit. DPP Compl. ¶¶ 166-67.

Glenmark filed two motions for partial summary judgment in the Merck/Glenmark patent litigation. Each motion focused on a discrete issue attacking the validity of the '721 patent. Specifically, Glenmark argued (1) that the '115 patent was wholly or partly invalid and therefore could not be reissued (as the '721 patent) under 35 U.S.C. § 251, and (2) that most of the claims in the '721 patent were invalid for obviousness-type double patenting. DPP Compl. ¶¶ 169-72.

On April 19, 2010, the district court granted Glenmark's motion for summary judgment on improper reissue and denied its motion on obviousness-type double patenting. The functional result of this partial ruling would have been invalidation of claims 10-13 in the '721 patent, which claimed ezetimibe expressly and had been added in [\*29] reissue. Merck moved for reconsideration of the partial order on April 30, 2010. DPP Compl. ¶¶ 176-77.

### C. Merck and Glenmark Settle the Infringement Suit

Two days before trial was scheduled to begin, and prior to any ruling in Merck's motion to reconsider, Merck and Glenmark reached the Settlement Agreement that is central to this case. As part of the settlement, the parties agreed to entry of a consent judgment and requested an order from the court vacating its partial summary judgment on improper reissue, thereby reinstating claims 10-13 in the '721 patent. The court referenced the Settlement Agreement in its consent judgment but did not docket the parties' written agreement in the record. DPP Compl. ¶¶ 178-82.

Plaintiffs allege that this Settlement Agreement contains a no-AG provision as quid pro quo for Glenmark's agreement to delay its generic launch until late 2016. Drafted without access to the Settlement Agreement itself, all the complaints assert certain facts which, in Plaintiffs' opinion, lead to the logical inference that Merck agreed not to launch a competing AG during Glenmark's 180-day exclusivity period in exchange for Glenmark's agreement to delay entry. Among the allegations Plaintiffs [\*30] rely on are that: (1) Merck has previously acknowledged the economic benefit of marketing AGs; (2) Merck has a history of launching AGs after its patent exclusivity expires; (3) Zetia was a blockbuster drug with billions of dollars in sales when Glenmark launched its generic in 2016; and that (4) Merck ultimately did not launch an AG during Glenmark's exclusivity period. See DPP Compl. ¶¶ 183-90.

After reviewing the Settlement Agreement itself (which was produced in discovery but remains sealed), Plaintiffs identify two provisions which, functioning together, they allege act as the contractual no-AG agreement forecast in their pleadings. The first is the definition of Generic Ezetimibe, which reads:

The term "Generic Ezetimibe" shall mean a drug product containing ezetimibe as its sole active ingredient (a) that refers to the Approved Zetia Product as the reference-listed drug in an ANDA or pursuant to an application under [21 U.S.C. § 355\(b\)\(2\)](#) or [\(b\)](#) that is sold pursuant to NDA No. 21-445 but is not sold under the trademark Zetia® or another trademark or trade name of Schering, MSP or their Affiliates.

Br. Supp. Def. Glenmark's Mot. to Dismiss DPP Compl. Ex. A "Sett. Agr." § 1.14 (filed under seal as ECF No. 159). [\*31] Because any authorized generic would have to be sold pursuant to Merck's Zetia NDA, Plaintiffs allege its inclusion in the definition of Generic Ezetimibe indicates Merck intended to give up AG rights during Glenmark's exclusivity period. The second provision provides an express promise that the right to market "Generic Ezetimibe" would be "exclusive to Glenmark" except pursuant to a third-party ANDA. It reads:

During any period of exclusivity to which Glenmark is entitled under [21 U.S.C. § 355\(j\)\(5\)\(B\)\(iv\)](#), and through the expiration of Schering's rights under the 1721 Patent and Ezetimibe Pediatric Exclusivity, Schering's grant of the rights in Paragraphs 5.1 and 5.2 is exclusive to Glenmark and its Affiliates with respect to the commercial distribution and sale of Generic Ezetimibe, subject only to Schering's right to grant rights to or otherwise authorize Third Parties to make, have made, use, sell, offer to sell, import, or distribute Generic Ezetimibe pursuant to such Third Parties' ANDAs or applications pursuant to [21 U.S.C. § 355\(b\)\(2\)](#).

Sett. Agr. § 5.3.

Plaintiffs claim that these provisions, and Merck's actions in not launching an AG during Glenmark's period of exclusivity, amount to a reverse payment settlement. Absent these provisions, [\*32] Plaintiffs allege Glenmark would have entered the market long before 2016, possibly as early as December 6, 2011. Plaintiffs base this assertion on two alternative possibilities. First, in the absence of a reverse payment agreement, Merck and Glenmark may have agreed to settle the infringement claim with an earlier agreed entry date. The settlement would have been based on the relative merits of the parties' claims in the infringement suit and ordinary considerations over the cost of litigating the claims. DPP Compl. ¶¶ 194-200. Under this theory, Glenmark would have insisted on an earlier entry date in compromise of its claims of invalidity, but-for the compensation it received in the No-AG agreement.

As a second possibility, Plaintiffs argue that Glenmark would have prevailed in the infringement suit and secured a declaration that the '721 patent, which Merck asserted against Glenmark's generic version of Zetia, was invalid or unenforceable. Glenmark would have thereafter taken reasonable and economically rational steps to launch its generic at the earliest possible date. DPP Compl. ¶¶ 201-02.<sup>7</sup>

The result in either scenario would have been the earlier launch of Glenmark's generic, perhaps [\*33] as early as December of 2011. Plaintiffs allege that Merck would also have launched its competing AG around the same time, and that additional generics would have entered the market after Glenmark's 180-day exclusivity expired, as early as June of 2012. DPP Compl. ¶¶ 203-04.

Plaintiffs' allegations regarding the value of a pay-for-delay, no-AG agreement to both Merck and Glenmark center on the substantial market for Zetia during the period at issue and their estimates of market effects from generic entry. See DPP Compl. at 58-61. Plaintiffs allege that branded Zetia sales in 2011 totaled approximately \$1.3 billion. DPP Compl. ¶ 208. In a scenario where Glenmark introduced its generic in December 2011, roughly

<sup>7</sup> In April 2011, the Court of Appeals for the Federal Circuit issued its decision in [Ex parte Tanaka, 640 F.3d 1246 \(Fed. Cir. 2011\)](#). In [Tanaka](#), the court held that reissue was a proper remedy for a patentee seeking to add dependent claims "as a hedge against possible invalidity of original claims." [Id. at 1249](#). Plaintiffs argue that while this decision functionally overturned the basis for the district court's partial summary judgment grant in the earlier Merck-Glenmark litigation, it had no impact on Glenmark's other meritorious claims of invalidity. DPP Compl. ¶¶ 227-28.

concurrent with a Merck AG, Plaintiffs allege that the generic market would have captured roughly 80% of the branded sales during the first six months (which correspond to Glenmark's 180-day first-filer exclusivity). Glenmark's generic and Merck's AG would have split those generic sales roughly in half, and the generic would have sold at half the branded price. Merck would also retain a small portion of its branded revenue, which Plaintiffs estimate at about 10% of its pre-generic [\*34] volume. Combining these figures, Plaintiffs estimate Merck's total branded and generic Zetia sales at about \$780 million over the five-year class period in a scenario with generic entry in December 2011. DPP Compl. ¶¶ 205-09.

Plaintiffs estimate that Merck's actual sales during the class period were between \$6.5 and \$9.1 billion. Subtracting the early-entry sales estimate yields a predicted value between \$5.7 and \$8.3 billion. In other words, Plaintiffs allege that by trading a no-AG promise for Glenmark's delayed entry, Merck earned at least \$5.7 billion more in profits on Zetia sales than it otherwise would have during the class period. DPP Compl. ¶¶ 210-11.

Glenmark, Plaintiffs allege, also benefited tremendously from the agreement. Using the same assumptions as for Merck, Plaintiffs estimate that Glenmark would have seen about \$180 million in generic sales during its 180-day exclusivity period in the absence of a no-AG agreement. With the agreement, however, Glenmark captured the entire generic market during that time (which Plaintiffs allege was about 80% of the branded sales). It was also able to charge a higher price for its generic (90% of the brand price rather than 50%) owing [\*35] to the lack of AG competition. Using a 2016 annual Zetia sales figure of \$2.6 billion, Plaintiffs allege that Glenmark enjoyed about \$936 million in generic sales during its exclusivity window. Thus, Glenmark's agreement with Merck was worth about \$806 million in additional sales to Glenmark (or a lesser but still significant \$225 million if the Zetia market remained flat from 2011). DPP Compl. ¶¶ 212-17.

#### D. Subsequent Patent Litigation between Merck and Additional Generic Manufacturers

After settling its litigation with Glenmark, Merck sought reissue of the 1721 patent. In its declaration, Merck acknowledged that at least one claim in the 1721 patent was potentially invalid for inherent anticipation by Merck's earlier disclosures. See DPP Compl. ¶¶ 218-20. The 1721 patent would eventually reissue as U.S. Patent No. RE42,461 ("the '461 patent"). As reissued, it included claims 8 through 13 and parts of claims 3 and 7 of the '721 patent. DPP Compl. ¶¶ 229-30.

In mid-2010, generic manufacturers Mylan Pharmaceuticals, Inc. ("Mylan") and Teva Pharmaceuticals ("Teva") each filed paragraph IV ANDAs seeking approval to market generic Zetia. Merck sued both manufacturers after receiving notice of their filings. DPP Compl. ¶¶ 221-26. Teva would later [\*36] settle its claims with Merck by confidential agreement on July 7, 2011. The court entered a consent judgment that prohibited Teva from launching its generic version of Zetia before April 25, 2017. Teva also admitted that its generic infringed the '461 patent. DPP Compl. ¶ 231.

The Mylan litigation continued without settlement. After Merck substituted the reissued '461 patent for the '721 patent, Mylan filed an answer and counterclaims. Mylan argued that Merck's patent was invalid for inherent anticipation and unenforceable for failure to disclose prior art and for failure to disclose an ezetimibe inventor. The court denied Merck's motion for summary judgment on the inequitable conduct issue but granted Merck's motion on infringement, concluding that Mylan's ANDA infringed claims 3, 10, 11, and 12. DPP Compl. ¶¶ 232-35.

On November 18, 2011, Mylan withdrew its defense "based on the non-disclosure of information demonstrating a relationship between compounds claimed in predecessor patents and metabolites of a prior art compound." DPP Compl. ¶ 237. Plaintiffs allege that Mylan's decision was not a reflection of the relative substantive merits of its various arguments but simply a recognition of Mylan's present litigation [\*37] position. Because it was not a first-filer, Mylan's potential gains if it succeeded in its litigation were smaller than Glenmark's had been. Mylan would likely be faced with immediate and substantial generic competition on entering the market and would have to wait out Glenmark's 180-day exclusivity in any case. As Plaintiffs characterize it, "Mylan's litigation strategy reflected the choice of not necessarily the best substantive defense, but the cheapest and fastest within the practical constraints." DPP Compl. ¶¶ 238-39.

The Mylan case proceeded to a bench trial. The sole issue at trial was whether the '461 patent was unenforceable for inequitable conduct by Merck in allegedly misrepresenting the inventorship. The court ruled that Mylan had failed to prove inequitable conduct on this issue and therefore upheld the '461 patent against that challenge. The Federal Circuit later affirmed the district court. DPP Compl. ¶¶ 240-41, 241 n.62.

In August 2012, Sandoz filed its own generic Zetia ANDA. Merck sued Sandoz for infringement of the '461 patent. Sandoz counterclaimed seeking a declaratory judgment of invalidity and unenforceability. Among other arguments, it alleged the '461 patent was unenforceable for inequitable conduct based [\*38] on Merck's failure to disclose certain publications concerning metabolites of a prior art compound. On September 5, 2013, before the pleadings stage of the suit was complete, Merck and Sandoz settled. Sandoz admitted the '461 patent was valid and infringed and agreed not to launch its generic before April 25, 2017. DPP Compl. ¶¶ 243-47.

#### **IV. Standard of Review**

**HN12** [+] "A pleading that states a claim for relief must contain ... a short and plain statement of the claim showing that the pleader is entitled to relief." [Fed. R. Civ. P. 8\(a\)\(2\)](#). A pleading fails to meet this standard and is subject to dismissal under [Rule 12\(b\)\(6\)](#) when it does not "contain sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" [Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#) (quoting [Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#)). A claim has facial plausibility when the plaintiff pleads factual content "that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Factual allegations must be enough to raise a right to relief above the speculative level" and beyond the level that is merely conceivable. [Twombly, 550 U.S. at 555](#). Legal conclusions and "[t]hreadbare recitals of the elements of a cause of action" do not state a claim. [Iqbal, 556 U.S. at 678](#).

**HN13** [+] The United States Supreme Court has described the [\*39] motion to dismiss analysis in two parts. First, the court must accept the allegations of fact as true. *Id.* However, a court is not required "to accept as true a legal conclusion couched as a factual allegation," [Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 \(1986\)](#), or a legal conclusion unsupported by factual allegations, [Iqbal, 556 U.S. at 678-79](#). After reviewing the allegations, the court must then consider whether they are sufficient to state a plausible claim for relief. This is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* A [Rule 12\(b\)\(6\)](#) motion, then, should be granted if, "after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." [Edwards v. City of Goldsboro, 178 F.3d 231, 244 \(4th Cir. 1999\)](#).

**HN14** [+] "In antitrust cases in particular, the Supreme Court has stated that 'dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.'" [Advanced Health-Care Servs., Inc. v. Radford Cnty. Hosp., 910 F.2d 139, 144 \(4th Cir. 1990\)](#) (quoting [Hospital Bldg. Co. v Trs. of Rex Hosp., 425 U.S. 738, 747, 96 S. Ct. 1848, 48 L. Ed. 2d 338 \(1976\)](#)).

#### **V. Analysis**

Defendants raise two primary arguments in favor of outright dismissal of all antitrust claims. First, they argue that the written Settlement [\*40] Agreement resolving the Merck/Glenmark litigation undermines Plaintiff's allegations that it included a "large and unjustified" reverse payment as required by [Actavis](#). Secondly, Defendants contend that Merck's successful defense of the '721 patent in its later litigation with Mylan renders Plaintiffs' claims of anticompetitive effect implausible. Mylan's loss, according to Defendants, undermines Plaintiffs' allegations that Glenmark would have succeeded in its Paragraph IV challenge, thus forcing earlier generic entry. Additionally, Defendants' argue the [§ 2](#) Sherman Act claims falter on Plaintiffs' failure to plausibly allege a specific intent to monopolize.

The Plaintiffs contend that the written Settlement Agreement supports rather than undermines their other allegations of a reverse payment settlement between the two companies. They argue that the language of the Settlement Agreement is fully consonant with those allegations and supports the claim that Merck's promise not to introduce an authorized generic constituted a large and unjustified reverse payment. Plaintiffs also contend that Merck's defeat of Mylan's later challenge to the validity of the '721 patent does not preclude their claims of anticompetitive [\*41] effect because they were not parties to the Mylan litigation. They also note that Glenmark had obtained a favorable ruling on summary judgment and alleged several other bases to invalidate the '721 patent-arguments not pressed by Mylan. These allegations are also sufficient, Plaintiffs claim, to plausibly support their claims of conspiracy to monopolize under §2.

#### A. Plaintiffs have Plausibly Alleged a Claim under § 1 of the Sherman Act Arising from a Reverse Payment Settlement between Merck and Glenmark.

**HN15**[] [Section 1](#) of the Sherman Act broadly prohibits contracts or "combination[s] in restraint of trade," [15 U.S.C. § 1](#). Not every agreement resolving brand-generic patent litigation produces the anti-competitive effects the Sherman Act sought to address. Only settlement agreements that have "genuine adverse effects on competition" plausibly give rise to antitrust remedies. [Actavis, 570 U.S. at 153](#) (quoting [FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460-61, 106 S. Ct. 2009, 90 L. Ed. 2d 445 \(1986\)](#)).

**HN16**[] Patent holders already enjoy the right to exclude competition for the duration of their patents. [Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247](#) ("[A] patent ... is an exception to the general rule against monopolies." (quoting [Precision Instrument Mfg. Co. v. Auto Maint. Mach. Co., 324 U.S. 806, 816, 65 S. Ct. 993, 89 L. Ed. 1381, 1945 Dec. Comm'r Pat. 582 \(1945\)](#))). As a result, settlements of Paragraph IV litigation, which frequently allow the generic manufacturer to enter earlier than the patent's expiration, do not always produce [\*42] antitrust harm. If they do not include a reverse payment from the patentee as compensation for the generic's agreement to delay generic entry, they are more likely to reflect the compromise of disputed issues than an allocation of monopoly profits. [Actavis, 570 U.S. at 158](#). But where the settlement includes a payment from the patent holder to an alleged infringer, the question presented is, what are the reasons for the payment? If the payment represents no more than "a rough approximation of the litigation expenses saved through the settlement ... [or] compensation for other services that the generic has promised to perform," there is less concern the settlement is intended to divide and extend the monopoly. [Id. at 156](#). But very large payments may not be justified by such traditional settlement considerations. "An unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival." [Id. at 157](#). If so, then its objective may be "to maintain supracompetitive prices to be shared among the patentee and the challenger." [Id.](#) Such "large and unjustified" reverse payments raise antitrust concerns and subject the agreement to scrutiny for antitrust harms. [Id.](#)

Since [Actavis](#) was [\*43] decided, the Fourth Circuit has not had occasion to address the precise contours of pleading reverse payment antitrust claims. **HN17**[] But those appellate courts which have examined them, require no heightened level of pleading detail. See [Loestrin 24, 814 F.3d at 542](#) (requiring "facts sufficient to support the legal conclusion that the settlement at issue involves a large and unjustified reverse payment under [Actavis](#)"); [King Drug Co., 791 F.3d at 409-10](#). In the case of a reverse payment based on allegations of a no-AG agreement, the Third Circuit held it sufficient for the Plaintiff to allege the manufacturer "had an incentive to launch its own authorized generic" and did not do so, and that the alleged infringer would earn "many millions of dollars in additional revenue," from the no-AG agreement. [King Drug Co., 791 F.3d at 410](#). These courts recognize that "the value of non-cash reverse payments may be much more difficult to compute than that of their cash counterparts." [Loestrin 24, 814 F.3d at 552](#). But antitrust litigation "often requires an 'elaborate inquiry into the reasonableness of a challenged business practice.'" [Id.](#) (quoting [Arizona v. Maricopa Cty. Med. Soc'y., 457 U.S. 332, 343, 102 S. Ct. 2466, 73 L. Ed. 2d 48 \(1982\)](#)). And the absence of detailed support for the value of a no-AG promise should not bar the claim at the pleading stage. [Id.](#)

In this case, detailed factual [\*44] allegations in the Complaints support the Plaintiffs' claim that the Merck/Glenmark settlement included a large and unjustified reverse payment. As recited earlier, the Complaints allege in detail the regulatory framework encouraging generic competition in the pharmaceutical market and the powerful price effects it produces. DPP Compl. ¶¶ 28-64. They allege that Merck had "a well-established history" of launching AG competitors after losing its exclusivity on other brand name drugs. DPP Compl. at ¶ 185 (identifying 12 Merck branded drugs for which the company produced an AG). Zetia was a highly profitable drug and introducing an AG to compete with Glenmark's generic would have been in Merck's financial interest. DPP Compl. ¶¶ 63-64, 186, 211. Plaintiffs also allege that Merck expressly agreed not to do so in the case of Zetia. DPP Compl. ¶¶ 62, 183. On announcing its entry to the generic market, Plaintiffs allege Glenmark issued a press release stating that it would be selling the "first and only generic version of Zetia in the United States." DPP Compl. ¶ 187. Most importantly, Merck did not produce an authorized generic version of Zetia, leaving the generic market entirely to Glenmark [\*45] during its 180-day period of exclusivity. DPP Compl. ¶¶ 57, 191, 216. Finally, Plaintiffs estimate the value to Glenmark of Merck's agreement not to introduce an AG at between \$225 and \$806 million. DPP Compl. ¶¶ 216-17. All of these claims must be taken as true on a motion to dismiss.

Defendants argue that all these factual claims are rendered implausible by the language of the written Settlement Agreement itself, which they claim preserved Merck's ability to launch an AG and to compete with Glenmark through "conventional commercial conduct." Sett. Agr. § 7.2(c). After reviewing the language of the Settlement Agreement in detail, this Report concludes that it does not unambiguously contradict any of Plaintiffs' claims. In fact, construing the Agreement in the light most favorable to Plaintiffs, it actually supports the claim that Merck agreed to limit competition from an authorized generic version of ezetimibe.

### **1. The written Settlement Agreement does not unambiguously contradict Plaintiffs' allegations of a no-AG agreement.**

The Merck/Glenmark Settlement Agreement expressly provides Glenmark with the exclusive rights to distribute "Generic Ezetimibe" during its 180-day period of exclusivity. [\*46] Sett. Agr. § 5.3. The definition of "Generic Ezetimibe" includes not only generics offered by generic competitors under separate ANDA filings, but also any drug sold pursuant to the Zetia NDA, unless the drugs were sold "under the trademark Zetia?? or another trademark or trade name of Schering, MSP or their Affiliates." Sett. Agr. § 1.14. According to Defendants, this reservation language in the definition of Generic Ezetimibe would have allowed Merck to introduce an AG in competition with Glenmark and thus all of Plaintiffs' allegations of a no-AG agreement are no longer entitled to the presumption of truth.

**HN18** [+] Ordinarily, documents outside the complaint not expressly incorporated may not be considered by the court on a motion to dismiss without converting it to a motion for summary judgment. *Witthohn v. Fed. Ins. Co., 164 F. App'x 395, 396 (4th Cir. 2006)*. However, the court may examine "documents sufficiently referred to in the complaint so long as the authenticity of these documents is not disputed." *Id. at 396* (citing *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co., 267 F.3d 30, 33 (1st Cir. 2001)*); see also *Phillips v. LCI Int'l, Inc., 190 F.3d 609, 618 (4th Cir. 1999)* (permitting consideration of extraneous material if such materials are "integral to and explicitly relied on in the complaint"). In this case, no party has disputed the authenticity of the Settlement Agreement. Because the Agreement memorializes [\*47] a settlement which is integral to the Plaintiffs' Complaint, the court may consider it without converting the motion into one for summary judgment. But its language is only relevant if it unambiguously contradicts the factual claims in the Complaint. It does not.

**HN19** [+] Considering documents outside the pleadings does not alter the standard of review on a motion to dismiss requiring that facts and reasonable inferences from those facts must be examined in the light most favorable to the Plaintiffs. And even without any special deference, it is clear that the language of the Settlement Agreement would not permit Merck to sell an AG under the generic name, ezetimibe. A plain language interpretation of the clause suggests the reservation's most likely purpose was to preserve competition only from branded drugs. As a result, the contract language does not render Plaintiffs' claims of a reverse payment no-AG agreement implausible.

First, in light of the other allegations in the Complaint, the Agreement's clear reservation of the ability to sell branded Zetia does not undermine the Plaintiffs' antitrust claims. Plaintiffs have not alleged that Merck could not compete by continuing to sell branded [\*48] Zetia, by lowering its price, or generally trying to preserve its market share after generic entry. But the economics of generic competition, which are alleged in detail in the DPP's Consolidated Complaint, plausibly support Plaintiffs' claims that competition from the branded drug Zetia would not diminish the alleged value of the no-AG agreement to Glenmark. See DPP Compl. ¶¶ 54-55, 212-15.

Slightly more difficult is the question of whether a drug sold pursuant to Merck's NDA under "another trademark or trade name of Schering, MSP, or their Affiliates" might still qualify as an AG. If so, it might have competed with Glenmark's own generic sufficient to undermine the plausibility of the facts supporting Plaintiffs' claimed value of the no-AG agreement to Glenmark, and hence its claims of a "large and unjustified" reverse payment. On this point the parties strongly dispute what the written document would permit. Defendants argue that reservation of the ability to market a drug pursuant to Merck's NDA and under a "trade name" suggests that Merck retained the ability to market an authorized generic product so long as the company's name (i.e. Merck) appeared on the label. In support, Defendants [\*49] cited the provisions of [21 U.S.C. § 355\(t\)\(3\)](#). [HN20](#)↑ This code section requires the FDA to maintain a database listing of all "authorized generic drugs." The statute defines an "authorized generic" for purposes of inclusion in the database as a listed drug which is sold "under a different labeling, packaging, ... product code, labeler code, trade name, or trade mark than the listed drug." [§ 355\(t\)\(3\)\(B\)](#). Because the statute uses terms similar to the Settlement Agreement - namely, trade name and trademark - Defendants argue that the Settlement Agreement must be read to permit Merck to release an AG competitor.

This argument reads too much into the language of the statutory listing requirements and ignores the Settlement Agreement's language mandating any drug excluded from the definition of Generic Ezetimibe must be sold "under" a Merck trademark or trade name. The reservation does not mirror the language of [§ 355\(t\)\(3\)](#) exactly. As a result, if it is relevant to interpreting the Agreement, its language suggests that certain AGs - including those sold using a "different labeling, packaging product code [or] labeler code" - would be included in the Agreement's definition of Generic Ezetimibe and thus exclusive to Glenmark during its 180-day [\*50] window.

The parties' briefing did not fully address the relevance of the FDA database required by subsection 355(t). But the statute reinforces the regulatory process which provides that all AGs are approved under the brand's NDA (as opposed to a competitor's separate ANDA). Because any authorized generic would have to be approved pursuant to Merck's NDA for Zetia (NDA #21-445), the Settlement Agreement's reference to the NDA in the definition of Generic Ezetimibe most likely indicates that Merck intended to limit its ability to launch an AG. Otherwise, why would there be any reference to the NDA in this defined term?

The Defendants urge the court to construe the Agreement's use of the term "trade name" in section 1.14 to mean any name the company uses in trade - including its company name, Merck. But an earlier provision of the same statutory section suggests that the term "trade name" means something other than the name of the manufacturer. See [21 U.S.C. § 355\(t\)\(1\)\(A\)\(i\)](#) specifying that entries in the database are to include a "drug trade name, brand company manufacturer, and the date the authorized generic entered the market").

More importantly, generic drug names like ezetimibe are expressly not trade names. Generic drug [\*51] names do not belong to the drug manufacturers, but are assigned to the drug by the United States Adopted Names Council, an official body of the American Medical Association.<sup>8</sup> The AMA's description of the USAN Council notes that it is responsible for "selecting simple, informative and unique non-proprietary (generic) drug names."<sup>9</sup> Thus, the name ezetimibe - under which generic forms of the drug are sold - is by definition nonproprietary and therefore not a trade name. And pharmaceuticals are not sold "under" a manufacturer's name, but under either a trademarked specialty

<sup>8</sup> See Daphne E. Smith Marsh, [Overview of Generic Drugs and Drug Naming](#), Merck Manual Consumer Version (Aug. 2017), [www.merckmanuals.com/home/drugs/brand-name-and-generic-drugs/overview-of-generic-drug-and-drug-naming](http://www.merckmanuals.com/home/drugs/brand-name-and-generic-drugs/overview-of-generic-drug-and-drug-naming).

<sup>9</sup> United States Adopted Names Council Home Page, [www.ama-assn.org/about/united-states-adopted-names/usancouncil](http://www.ama-assn.org/about/united-states-adopted-names/usancouncil) (last visited January 29, 2019) (emphasis added).

name for branded drugs (e.g. Zetia, Lipitor, or Celebrex) or under the generic name assigned by the USAN Council (e.g. ezetimibe, atorvastatin, celecoxib). In either case the manufacturer's name (Merck, in the case of Zetia) would appear on the label.

So even if the court construed the Settlement Agreement's use of the term trade name to allow Merck to market something with a different trade name that might be recognized as an AG under the terms of § 355(t)(3), it would not fundamentally change Plaintiffs' theory. The Agreement's plain language would still prevent Merck from selling an [\*52] AG under the nonproprietary name ezetimibe. In fact, Plaintiffs concede that the reservation in the definition of Generic Ezetimibe would permit the sale of branded Zetia or another branded drug (should Merck choose to launch one) using the same active ingredient. Absent additional evidence regarding the parties' intention in crafting the definition of Generic Ezetimibe in the Settlement Agreement, this is the most that can be said of Merck's ability to compete in the generic market during the 180-day period of Glenmark's exclusivity. And this reservation - the ability to make another branded competitor - is insufficient to contradict and render implausible all of Plaintiffs' express allegations of a large reverse payment resulting from the no-AG agreement.

The Complaint describes dynamics of the market for generic drugs which produce rapid price decreases following generic entry. DPP Compl. ¶¶ 50-53. It asserts that "every state has adopted drug product selection laws that either require or permit pharmacies to substitute AB-rated generic equivalents for brand prescriptions." DPP Compl. ¶ 51. It describes generics as "essentially commodities" with price as the primary basis for competition. [\*53] DPP Compl. ¶ 50. It also describes the effects of brand manufacturers selling an AG. DPP Compl. ¶¶ 59-64. Like other generics, AGs primarily compete on price. These allegations, accepted in the light most favorable to Plaintiffs, are sufficient to establish a significant value in Merck's promise not to launch an AG under the generic name "ezetimibe." The other allegations in the Complaint, and the language of the Settlement Agreement itself, are sufficient to plausibly allege that they made such a promise. This is particularly so in light of other corroborating evidence of the Agreement, including Glenmark's claims to exclusivity on release of its generic ezetimibe and Merck's failure to release any authorized generic in competition with Glenmark's generic product throughout the 180-day period of exclusivity.

At this stage of the proceedings, it is not necessary for the court to finally resolve the meaning of Generic Ezetimibe which was exclusively reserved to Glenmark under the Settlement Agreement. Plaintiffs have expressly pled the existence of a no-AG agreement, as well as other corroborating facts. Although the court could disregard facts which were contradicted by unambiguous [\*54] language of the written Settlement Agreement, reservation of the right to sell branded Zetia, or another trademarked or trade-named drug with the same active ingredient would not so diminish the value of the no-AG agreement Plaintiffs have alleged as to render their claims deficient. Because the Settlement Agreement appears to reserve only these options to Merck, the language of that Agreement does not undermine the allegations of a large and unjustified reverse payment.

## **2. Merck's vindication of the patent in the Mylan litigation does not diminish the plausibility of Plaintiffs' allegations of anticompetitive effect.**

Defendants also challenge the § 1 claim on the grounds that Plaintiffs have failed to plausibly allege anticompetitive effects. This argument is based on Merck's later defeat of a challenge to the validity of a reissued version of the '721 patent in litigation it filed against Mylan labs, another generic competitor. Because Merck upheld the patent in its later litigation with Mylan, Defendants argue that Plaintiffs' allegation that Glenmark would have prevailed in the Merck/Glenmark litigation and entered the market with a generic competitor earlier is rendered implausible. According [\*55] to Defendants, absent Glenmark's ability to invalidate the '721 patent and begin generic competition earlier, its decision to delay entry did not produce any anticompetitive effect. Instead, its delay simply respected Merck's valid patent exclusivity through the remainder of the term.

As with Defendants' contractual arguments, the Plaintiffs counter by noting the express allegations in the Complaint which suggest that the Merck/Glenmark settlement produced anticompetitive effects. They allege that but for the no-AG promise, the strength of Glenmark's patent challenge would have produced one of two outcomes. The two companies would have settled with an earlier generic entry date, or Glenmark would have prevailed in the litigation,

invalidated the '721 patent, and launched its generic thereafter. DPP Compl. ¶¶ 199-203. Plaintiffs allege either of these alternative outcomes would have accelerated generic entry and reduced prices. DPP Compl. ¶¶ 78-88, 203-204. Both outcomes depend on the plausibility of Plaintiffs' allegations that Glenmark's patent claims against Merck had substantial merit. If these allegations are plausible, the § 1 claim alleges anticompetitive effect because Glenmark's delay is not entirely [\*56] out of respect for a valid patent, but rather the result of the Defendants' agreement to allocate unlawful monopoly profits obtained by paying Glenmark to delay generic entry in the form of the no-AG agreement.

As alleged in the Complaint, Glenmark's validity and enforceability claims against the '721 patent relied in part on the theory that certain compounds claimed in the '721 patent were inherent metabolites of a compound disclosed in an earlier Schering patent application. DPP Compl. ¶¶ 155-57. Glenmark claimed Merck failed to disclose these metabolites to the PTO during the reissue proceedings. It also alleged other failures to cite prior art, and that the combination of these failures to disclose amounted to inequitable conduct, which would invalidate the entire patent. DPP Compl. ¶¶ 158-60. None of these claims were litigated to final resolution in the Mylan case.

Plaintiffs also allege that Glenmark argued Merck may have failed to name all inventors of ezetimibe and that the '721 patent was invalid for obviousness-type double patenting over the claims of the earlier expiring '365 patent. DPP Compl. ¶¶ 163-65. Finally, Glenmark argued that certain claims in the '721 patent were invalid because Merck failed to identify in the predecessor [\*57] patent the type of error that can be corrected on reissue. DPP Compl. ¶ 164.

Glenmark moved for summary judgment on two of its claims, and shortly before trial the district court granted summary judgment on one and denied the other. Specifically, the court granted Glenmark summary judgment on its claim of improper reissue, finding that Merck had failed to identify a type of error subject to correction on reissue. The court denied Glenmark's other argument, concluding that disputes of material fact precluded summary judgment on its obviousness-type double patenting claims. DPP Compl. ¶ 171. Merck did not move for summary judgment on any of Glenmark's claims, and the remaining arguments, including the claims of inherent anticipation and inequitable conduct, were reserved for trial at the time the parties settled. DPP Compl. ¶¶ 178-80.

Following its settlement with Glenmark, Merck sought reissue of the '721 patent to correct errors in certain claims. The reissue petition acknowledged that at least one claim in the '721 patent was potentially invalid for inherent anticipation as a result of the metabolite issue. DPP Compl. ¶¶ 218-20. Merck also faced new paragraph IV filings from Teva, Sandoz, and Mylan, and [\*58] brought infringement actions against each. Both the Teva and Sandoz matters settled, but Mylan's proceeded to a bench trial before the same district judge who had presided over the Merck/Glenmark litigation. DPP Compl. ¶¶ 240-41. As in the Glenmark case, Mylan argued that Merck's patent was invalid for inherent anticipation and unenforceable as a result of its failure to disclose prior art. Mylan also alleged inequitable conduct in the failure to disclose an ezetimibe inventor. Merck moved for summary judgment on the inequitable conduct claims, which the district court denied. Later, Mylan withdrew its defenses based on failure to disclose compounds claimed in predecessor patents and inherent metabolites of prior art. DPP Compl. ¶ 237. The company proceeded to trial solely on the basis of its claim that Merck committed inequitable conduct in failing to disclose a named ezetimibe inventor. The district court resolved this issue in favor of Merck and upheld the patent against this remaining challenge. DPP Compl. ¶¶ 240-41.

As the foregoing summary demonstrates, Merck's defense of the patent in litigation initiated after the Merck/Glenmark settlement does not entirely negate Plaintiffs' [\*59] claims of anticompetitive effects resulting from that settlement. Although the Mylan litigation may eventually bear on Plaintiffs' claims of anticompetitive effect, important differences between the Mylan and Glenmark challenges undercut the Defendants' argument that Plaintiffs' claims of anticompetitive effect lack plausibility.

In In re Lipitor Antitrust Litigation, the Third Circuit addressed and rejected a similar claim. 868 F.3d 231. There, the district court had dismissed antitrust claims alleging Walker Process fraud largely because a different district court had rejected similar allegations and foreign courts had upheld the patent against the related fraud claims in previous litigation. Id. at 267. The Third Circuit reversed the district court's dismissal, finding that the lower court's

reliance on cases to which plaintiffs had not been party "amounted to the application of collateral estoppel and was therefore improper." *Id.*

While not precisely analogous, the Third Circuit's opinion is instructive. There, as here, the issue was not whether the plaintiff was literally bound by a prior ruling, but whether a prior ruling contrary to the facts alleged in the case before the court could render those allegations [\*60] implausible. After noting that numerous factors prevented the direct application of collateral estoppel, the court also held that the prior decisions had no bearing on the plausibility of allegations made by the plaintiff before it. *Id. at 269*. Resolution of similar fraud allegations in litigation not involving those plaintiffs "should not dictate the plausibility of ... plaintiff's allegations when they were not parties to that litigation." *Id.*

Likewise here, the outcome of the Mylan litigation does not dictate the plausibility of Plaintiffs' allegations of anticompetitive effect. In addition to the fundamental issue that none of these Plaintiffs were parties to the prior litigation, the Mylan and Glenmark challenges were both procedurally and factually different. Procedurally, it is obvious that at the time of the Merck/Glenmark settlement, the litigating parties were in a significantly different posture than Mylan and Merck. Glenmark had already secured first filer status and would profit immensely from its 180-day period of exclusivity. Mylan, though it might force generic entry sooner, would still not enjoy any period of exclusive distribution and its concomitant period of higher margins [\*61] on generic sales. DPP Compl. ¶ 55 (alleging 80% of first-filing generic's lifetime profit is earned during period of exclusivity).

Glenmark had also already persuaded the trial judge that certain claims in the '721 patent were invalid as a result of improper reissue. Several other of Glenmark's arguments were set for trial, suggesting Merck did not believe any were subject to dismissal on a motion for summary judgment. Although the Federal Circuit later reversed the precedent underlying Glenmark's summary judgment win, the facts alleged in this court establish that at the time of the settlement, Glenmark's case against the Merck patent could plausibly be described as very strong.

The question to be examined in this litigation is not whether later-developed facts undermined the strength of Glenmark's claims. Rather, it is whether the parties' actions at the time of the settlement were motivated exclusively by traditional settlement considerations or, as Plaintiffs allege, the allocation of monopoly profits to unlawfully extend Merck's patent exclusivity. In this regard, the existence of a large reverse payment in the form of a no-AG agreement disproportionate in value to anticipated litigation costs, [\*62] and independent from services to be rendered or other justifications, makes the possibility of such anticompetitive effects far more likely. *Lipitor, 868 F.3d at 256* (citing *Actavis, 570 U.S. at 59*).

In short, the fact that Merck successfully defeated a single challenge by a later-in-time ANDA filer does not totally undermine Plaintiffs' claims of anticompetitive effect. The no-AG settlement Plaintiffs allege arose almost two years before Merck's win in the Mylan case. DPP Compl. ¶ 241. Despite not having discovery, Plaintiffs have also credibly alleged that Mylan's decision to abandon certain claims of inequitable conduct was motivated by practical trial strategy and its dim prospects for obtaining first filer status as to any of Merck's branded cholesterol drugs. DPP Compl. ¶¶ 237-39. The no-AG Agreement alleged in the Complaint plausibly asserts a large and unjustified payment to a first filer. *HN21*[↑] Such payments "remove[] from consideration the most motivated challenge to a suspect patent." *Actavis, 570 U.S. at 155* (quoting C. Scott Hemphill, Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem, *81 N.Y.U. L. Rev. 1553, 1586 (2006)*). The Supreme Court recognized the "special advantage that the 180-day exclusivity period gives to first filers," and the resulting [\*63] incentive to patent holders in this context to overcome the ordinary incentives to resist paying off such challengers. *Id. at 156*. Plaintiffs have plausibly alleged that Merck and Glenmark reached such an agreement and the court should DENY Defendants' motion to dismiss the § 1 Sherman Act claims.

## B. Plaintiffs' Allegations of a No-AG Reverse Payment Settlement Agreement Plausibly Allege a Conspiracy to Monopolize the Market for Ezetimibe under § 2 of the Sherman Act.

Defendants also moved to dismiss Plaintiffs' claims under § 2 of the Sherman Act, which allege a conspiracy to monopolize trade. *15 U.S.C. § 2*. They argue that Plaintiffs' § 2 claims fail for the same reasons already analyzed in

regard to their § 1 claims. They also claim that Plaintiffs have failed to plausibly allege facts sufficient to support the specific intent required of a conspiracy to monopolize.

**HN22**[] To state a claim under § 2, Plaintiffs must allege a "concerted action, a specific intent to achieve an unlawful monopoly, and commission of an overt act in furtherance of the conspiracy." [Advanced Health-Care Servs., 910 F.2d at 150](#). While a conspiracy does require proof of specific intent, the overt acts of each alleged conspirator do not themselves need to be predatory. *Id.* Specific intent refers to [\*64] an intent to conspire, "a meeting of minds in an unlawful arrangement." [Am. Tobacco Co. v. United States, 328 U.S. 781, 810, 66 S. Ct. 1125, 90 L. Ed. 1575 \(1946\)](#).

The cases Defendants cite in support of this brief argument do not support dismissal. In fact, [Advanced Health-Care Services](#), which the Defendants rely on for the elements of the claim, reversed a district court's dismissal of § 2 claims where the Plaintiff had alleged a conspiracy to monopolize a regional market for durable medical equipment (DME). [910 F.2d at 150](#). That case involved allegations of exclusionary contracts between hospitals and another DME supplier. The Fourth Circuit wrote that the agreements themselves and their implementation were sufficient to state a colorable claim for conspiracy to monopolize the DME markets around the hospitals. See *id. at 147-49*. While not precisely analogous, the Plaintiffs here have also alleged that the Merck/Glenmark Settlement Agreement involved a contract which sought to extend Merck's monopoly for the sale of ezetimibe and exclude competitors by preventing competition from an authorized generic. The Complaint details Merck's monopoly power, derived from direct evidence of its ability to control the price of ezetimibe and exclude competitors. DPP Compl. ¶ 280. It alternatively pleads a relevant market, [\*65] both in terms of product and geography. DPP Compl. ¶¶ 281-82; see [E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 450 \(4th Cir. 2011\)](#). Plaintiffs also allege that the Settlement Agreement provided Glenmark with exclusive rights to sell Generic Ezetimibe for the lucrative 180-day first-filer window, and that Glenmark agreed to settle its patent claims in order to receive this exclusive arrangement. DPP Compl. ¶¶ 212-17. **HN23**[] "[A] monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than [a] 40% to 50% share." [United States v. Microsoft Corp., 253 F.3d 34, 70, 346 U.S. App. D.C. 330 \(D.C. Cir. 2001\)](#). Allegations of a dominant market share, combined with exclusionary contracts, are generally sufficient to state a § 2 claim. See [E.I. du Pont de Nemours, 637 F.3d at 452](#); [Advanced Health-Care Servs., 910 F.2d at 147](#).

Defendants do not contest Plaintiffs' pleading with respect to § 2's requirements of overt acts or antitrust injury. Because the facts alleged in the Complaint are also sufficient to plausibly support the specific intent necessary to state a conspiracy claim, the court should DENY the Defendants' motion to dismiss the § 2 claims.

### C. The Retailer Plaintiffs Have Failed to Plausibly Allege a Per Se Violation of § 1 of the Sherman Act, or Any Claim for Injunctive Relief.

The Retailer Plaintiffs' three Complaints also allege a per se violation of § 1, arguing [\*66] that the Merck/Glenmark Settlement Agreement is per se illegal under the Sherman Act. Retailers claim the Agreement includes a horizontal market allocation, output restriction, and price fixing agreement, all of which they argue presumptively violate longstanding antitrust precedent. See e.g., [Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 100 S. Ct. 1925, 64 L. Ed. 2d 580 \(1980\)](#) (holding competitors' price fixing agreement was illegal per se); [United States v. Topco Assocs., Inc., 405 U.S. 596, 92 S. Ct. 1126, 31 L. Ed. 2d 515 \(1972\)](#) (agreement among competitors to allocate market geographically is illegal per se).

**HN24**[] Per se analysis under the Sherman Act applies to such agreements because repeated review of similar conduct produced the consistent conclusion that it was "plainly anticompetitive," lacking any "redeeming virtue." [Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 9-10, 99 S. Ct. 1551, 60 L. Ed. 2d 1 \(1979\)](#). The per se rule "permits courts to make 'categorical judgments' that certain practices, including price fixing, horizontal output restrictions, and market-allocation agreements, are illegal *per se*." [Continental Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 509 \(4th Cir. 2002\)](#) (quoting [Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289, 105 S. Ct. 2613, 86 L. Ed. 2d 202 \(1985\)](#)). But it is only appropriate after courts

have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that such agreements "would be invalidated in all or almost all instances under the rule of reason." [Leegin Creative Leather Prods., Inc. v. PSKS, Inc.](#), 551 U.S. 877, 886-87, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007).

This authority demonstrates that the Retailers have failed to plausibly [\*67] allege a per se violation of § 1. Most fundamentally, this is because Retailers' allegations of market allocation, output restriction, and price fixing ignore Merck's existing patent rights. Absent a loss in the Merck/Glenmark patent litigation, Merck already enjoyed the right to exclude Glenmark as a competitor beyond the entry date fixed by the Settlement Agreement. The same patent monopoly allowed Merck to set prices for its branded Zetia throughout the term of the patent and to license other manufacturers to produce the drug, all without running afoul of the per se rules. See [Broadcast Music](#), 441 U.S. at 24-25 (analyzing license agreement under the rule of reason).

While Retailers have alleged that Merck's patent was subject to Glenmark's invalidity challenge and thus insufficient to support the reverse payment alleged, those facts are sharply in dispute. The problem with Retailers' per se claim is that it would eliminate Defendants' right to contest the issue. A claim of a per se price fixing agreement, for example, depends upon the existence of a naked agreement to fix prices. See [Ratino v. Med. Serv. of Dist. of Columbia](#), 718 F.2d 1260, 1269-70 (4th Cir. 1983). Retailers have not alleged such an agreement because the agreement they do allege also settled contested patent litigation that would [\*68] have affected Defendants' ability to set prices.

[Actavis](#) itself recognized that certain patent Settlement Agreements could have procompetitive effects, including (as in this case) permitting generic competition before the scheduled patent term expires. See [Actavis](#), 570 U.S. at 154. In addition, settling parties may lawfully provide for payments premised on "traditional settlement considerations such as avoided litigation costs or fair value for services." [Id. at 156](#). In making these observations, the Supreme Court rejected the more cursory "quick look" review of reverse payment settlement agreements urged by the FTC. [Id. at 159](#). And in so doing, the Court implicitly held that per se treatment of reverse payment settlements was inappropriate.

Much of the Retailers' briefing on this point is spent analogizing the market effects of the Settlement Agreement to forms of anticompetitive conduct which make up the "principal per se rules." Retailers Br. at 11. They observe that the Defendants agreed in the Settlement Agreement to "allocate" the market for ezetimibe exclusively to Merck until the generic entry date fixed by the Agreement. Thereafter, they argue that the market for Generic Ezetimibe would be reserved to Glenmark for its [\*69] 180-day first-filer window. But for a per se violation based on market allocation to exist, such an allocation would have to be the sole — or at least a primary — purpose of the Agreement. Such a claim, which would be essential to the already strained market-allocation analogy, is rendered implausible by Merck's existing patent. In short, before the paragraph IV filing Merck already retained the right to legally "allocate" the ezetimibe market to preclude competition from Glenmark. Likewise, Glenmark's status as a first filer earned it a 180-day period of exclusivity precluding competition from other generic makers. Retailers' claimed per se bar fails to account for the complexity presented by these facts. Indeed, application of a per se rule would appear to preclude a mechanism for even examining the Defendants' proffered justifications for settlement. [HN25](#) [↑] For this reason, courts analyzing reverse payment agreements have consistently applied the rule of reason analysis. [In re Lipitor Antitrust Litig.](#), 855 F.3d 126, 136, 140 (3rd Cir. 2017); [In re Nexium \(Esomeprazole\) Antitrust Litig.](#), 842 F.3d 34, 41-42 (1st Cir. 2016).

The Retailers' claims of a horizontal output restriction and horizontal price fixing have the same fatal defect. Each relies solely on a characterization of the Agreement's effects while ignoring entirely the admittedly [\*70] lawful basis Defendants assert for those same effects.

There may come a time when reverse payment settlements are sufficiently uniform that "courts can predict with confidence that [they] would be invalidated in all or almost all instances under the rule of reason. [Leegin Creative](#), 551 U.S. at 886-87. But that time does not appear close at hand. [FTC v. Abbvie, Inc.](#), 107 F. Supp. 3d 428, 436-37 (E.D. Pa. 2015) (finding that alleged reverse payment agreement was "procompetitive" and granting defendants' motion to dismiss), [appeal docketed No. 18-2621](#) (3d Cir. Jul. 23, 2018); [In re Wellbutrin XL Antitrust Litig.](#), 133 F.

Supp. 3d 734 (E.D. Pa. 2015) (granting summary judgment for defendants in reverse payments case after applying rule of reason analysis); aff'd, 868 F.3d 132 (3rd Cir. 2017). Accordingly, this Report recommends the court GRANT Defendants' motion to dismiss Count 1 of the Retailer's Complaint which asserts per se claims under § 1 with prejudice.<sup>10</sup>

Defendants also moved to dismiss Retailers' request for injunctive relief. Walgreens Compl. ¶¶ 218-19; Rite Aid Compl. ¶¶ 217-18; CVS Compl. ¶¶ 217-18. They argue that Retailers' complaints do not allege any ongoing conduct to enjoin as the market for ezetimibe is now fully competitive with multiple generic competitors. The Retailers - the only group of plaintiffs to request injunctive relief - argue that they are not required [\*71] to plead the exact nature of the injunctive relief they are requesting. They claim an injunction may be necessary to address "continuing effects" of Defendants' actions, or to prevent future wrongdoing. Neither of these arguments is sufficient to plausibly allege a right to injunctive relief.

**HN27**[] Plaintiffs seeking injunctive relief must "demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969). When the anticompetitive actions have ceased - such as with the entry of generic competition - there is usually nothing to enjoin. See United Food & Commercial Workers Local 1776 & Participating Emp's Health & Welfare Fund v. Teikoku Pharma USA, Inc., No. 14-md-02521, 2015 U.S. Dist. LEXIS 94220, 2015 WL 4397396, at \*3 (N.D. Cal. July 17, 2015) (dismissing injunctive relief claims because "generic drugs were able to enter the market"); United Food & Commercial Workers Unions & Emp's Midwest Health Benefits Fund v. Novartis Pharm. Corp., No. 15cv12732, 2017 U.S. Dist. LEXIS 102389, 2017 WL 2837002, at \*1 (D. Mass. June 30, 2017), aff'd, 902 F.3d 1 (1st Cir. 2018) (request for injunction mooted by generic entry).

The Retailers do not really distinguish this precedent; rather they insist that at this stage of the proceedings they are not required to specify the exact behavior sought [\*72] to be enjoined. They argue that courts commonly enter injunctions after unlawful conduct has ceased. See, e.g., California v. Am. Stores Co., 495 U.S. 271, 274-75, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990) (approving court-ordered divestiture to address effects of unlawful merger). But in this case, the only anticompetitive conduct alleged has been addressed by the entry of multiple generic competitors. CVS Compl. ¶¶ 200-203. And any continuing effects of the past conduct alleged can be addressed by money damages. CVS Compl. ¶¶ 159-65. While Plaintiffs may not be compelled to specify the exact nature of injunctive relief, they must at least allege some basis to suggest that enjoining future behavior will be a necessary component of full relief. Because money damages capable of calculation will adequately remedy any harm Retailers allege, they have not plausibly alleged a basis for injunctive relief to address continuing harm.

The threat that future similar harm might arise without specifying "which drugs might be involved, or what fraudulent conduct might be undertaken, or which Plaintiffs might buy the drugs at supra-competitive prices" is also insufficient to state a claim for injunctive relief. See In re DDAVP Indirect Purchaser Antitrust Litig., 903 F. Supp. 2d 198, 210-11 (S.D.N.Y. 2012). Such claims are too speculative to provide a basis for the extraordinary [\*73] remedy of injunction. See In re Plavix Indirect Purchaser Antitrust Litig., No. 1:06-cv-226, 2011 U.S. Dist. LEXIS 8940, 2011 WL 335034, at \*4 (S.D. Ohio Jan. 31, 2011) (dismissing claim for injunctive relief based on "yet-to-be-determined reverse payment agreement on some yet unidentified drug").

The Retailers note that Defendants have previously had to defend reverse payment allegations, and imply this pattern distinguishes their claims from others seeking to enjoin future behavior. But the conduct in other reverse payment actions arose before Actavis was decided, at a time when circuits were split over whether such agreements were even subject to antitrust scrutiny. With the Supreme Court's pronouncement in 2013, the

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<sup>10</sup> **HN26**[] Dismissal under Rule 12(b)(6) is ordinarily with prejudice unless the court specifically orders dismissal without prejudice. Carter v. Norfolk Community Hosp. Ass'n, Inc., 761 F.2d 970, 974 (4th Cir. 1985). That determination is within the district court's discretion. Id. Given the early posture of this class action, this Report recommends without-prejudice dismissal of certain state consumer protection claims if the addition of specific new class members or additional facts learned in discovery might permit the claim to proceed. However, no party has requested leave to amend.

suggestion that Merck or Glenmark is likely to commit some unspecified future antitrust violation with respect to some unnamed future drug requires too much conjecture to survive the Defendants' motion. The court should GRANT the motion to dismiss the Retailers' request for injunctive relief without prejudice.

#### **D. The End Payor Plaintiffs Have Standing and Plausibly Allege Claims under the Laws of Thirty Jurisdictions, but Some Claims Should Be Dismissed for Failing to Allege Elements Required by the Authority They Rely on.**

The proposed EPP class [\*74] asserts four separate categories of claims under the laws of thirty-eight states, the District of Columbia, and Puerto Rico. Defendants challenge these claims on multiple fronts. As explained in the following subsections, this Report recommends GRANTING IN PART and DENYING IN PART Defendants' motion to dismiss all the EPPs' state-law claims. This Report first addresses Defendants' challenges that apply to all categories of claims the EPPs are asserting. It then examines each category separately and by state as necessary. A summary of the recommended dispositions organized by jurisdiction is attached to this Report as Exhibit A. Exhibit B to the Report lists the ten states as to which all claims are recommended to be dismissed, and the claims remaining in the other thirty jurisdictions.

##### **1. The EPPs have alleged anticompetitive conduct sufficient to plausibly state antitrust claims.**

First, Defendants argue that all of the EPPs' claims fail for the reasons asserted against the DPPs and Retailers—namely, that the EPP Complaint fails to allege a large and unjustified reverse payment. As described above, this Report concludes that the various complaints have alleged sufficient facts to state [\*75] a claim under §§ 1 and 2 of the Sherman Act. The EPPs' derivative state claims rest on the same allegations and likewise should not be dismissed on this basis.

##### **2. The EPPs have Article III standing and Defendants' objection to the named class representatives' ability to represent absent class members in other states should be addressed under Rule 23.**

In their second broad challenge to the EPP claims, Defendants argue that the EPPs lack standing to assert claims in states where no named plaintiff resides or suffered an injury—that is, paid for allegedly overpriced Zetia or generic ezetimibe. Defendants insist that because the named EPP class representatives themselves cannot assert claims in those states, they lack standing to assert them at this stage in the litigation. The EPPs reply that Defendants are improperly conflating standing issues with Federal Rule of Civil Procedure 23's class certification requirements.

**HN28** Article III standing requires that claimants demonstrate three elements: injury in fact, causation, and redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Standing is ordinarily a "threshold jurisdictional question" decided at the outset of a case. See *Pye v. United States*, 269 F.3d 459, 466 (4th Cir. 2001). However, the Supreme Court has recognized an exception in certain circumstances where class-certification [\*76] issues are "logically antecedent" to Article III considerations. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997); see also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999).

As the parties' extensive briefing illustrates, courts are split on when exactly that exception applies.<sup>11</sup> At minimum, *Amchem* appeared to endorse deferring standing questions when class-certification issues are dispositive. See [521](#)

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<sup>11</sup> Compare Mem. Opp. Defs.' Mot. Dismiss EPP Compl. 6 & n.7 (ECF No. 188) (citing numerous cases representing a "growing consensus on this question"), with Reply Mem. Supp. Mot. Dismiss EPP Compl. 5 & n.2 (ECF No. 202) (citing numerous decisions among the "majority of cases" that have "rejected EPPs' position").

U.S. at 612; see also Winfield v. Citibank, N.A., 842 F. Supp. 2d 560, 574 (S.D.N.Y. 2012). If class certification could affect the standing inquiry (such as by eliminating certain claims or proposed class members), then deferring the latter makes logical sense.<sup>12</sup> Other courts have gone further, explicitly holding that whether named plaintiffs may properly represent nonparty class members with claims under the laws of different states "is a question of predominance under Rule 23(b)(3), not a question of 'adjudicatory competence' under Article III." Langan v. Johnson & Johnson Consumer Cos., 897 F.3d 88, 93 (2d Cir. 2018); accord In re Asacol Antitrust Litig., 907 F.3d 42, 48-51 (1st Cir. 2018); Payton v. Cty. of Kane, 308 F.3d 673, 680, 682 (7th Cir. 2002).

I am persuaded by those opinions examining Amchem and Ortiz that this case is one where class certification is "logically antecedent" to Article III standing issues. The named class representatives clearly have standing to press claims in those states where they reside and made or reimbursed purchases. Defendants allege only that they may not, at this stage, assert claims in other states on behalf of those [\*77] class members who are currently absent. HN29 But whether named plaintiffs may properly represent absent class members is exactly the focus of the Rule 23 class certification analysis. The named class representatives are not themselves seeking recovery under the laws of foreign states. They merely allege that all the claims derive from the same source-Defendants' unlawful reverse payment Settlement Agreement. And the proposed class members from those foreign states would, if certified, undoubtedly have standing to pursue claims under those states' laws. This is precisely the situation where class certification is "logically antecedent" to Article III standing. See In re Polyurethane Foam Antitrust Litig., 799 F. Supp. 2d 777, 804-06 (N.D. Ohio 2011); Jepson v. Ticor Title Ins. Co., No. C06-1723, 2007 U.S. Dist. LEXIS 53480, 2007 WL 2060856, at \*1-2 (W.D. Wash. May 1, 2007). Closely scrutinizing class standing at this juncture "would render superfluous the Rule 23 commonality and predominance requirements because any case that survived such a strict Article III analysis would by definition present only common issues." Asacol, 907 F.3d at 49.

This Report therefore recommends that the court DENY Defendants' motion to dismiss for lack of standing the EPPs' claims in the following jurisdictions: Alaska, Hawaii, Maine, Nebraska, New Hampshire, Vermont, Puerto Rico, and the District of Columbia. Instead, any standing challenges should be [\*78] examined during the class certification proceedings.

The remaining challenges to the EPPs' claims can be broken down by category and in many cases by specific states when the laws of those states vary in form or function. This Report analyzes each of these challenges in turn, addressing specific states where necessary.

### **3. Defendants' motion to dismiss the EPPs' state antitrust claims in nineteen jurisdictions should be denied.**

In count one, the EPPs assert antitrust claims under the laws of twenty-four states, the District of Columbia, and Puerto Rico. Defendants moved to dismiss claims in nineteen of these jurisdictions either for lack of standing or for additional reasons as described below.

#### **a. Indirect purchasers have standing under Puerto Rico law.**

Defendants argue that the EPPs cannot maintain a claim under the antitrust laws of Puerto Rico because the jurisdiction has not passed an Illinois Brick repealer statute. HN30 In Illinois Brick, the Supreme Court held that indirect purchasers of goods produced by-entities engaged in anticompetitive conduct lack standing to bring claims under the federal antitrust laws. Illinois Brick Co. v. Illinois, 431 U.S. 720, 746-47, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977). Because state antitrust laws are largely modeled off federal law and interpreted [\*79] accordingly, this effectively limited indirect purchaser antitrust actions in any forum. In response, many states passed so-called Illinois Brick repealer statutes which specifically authorize suits by indirect purchasers under state antitrust laws.

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<sup>12</sup> It may also have some appeal as constitutional avoidance. See In re Wellbutrin XL Antitrust Litig., 260 F.R.D. 143, 154 (E.D. Pa. 2009).

The Supreme Court upheld these statutes in [\*California v. ARC America Corp., 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86 \(1989\)\*](#).<sup>13</sup>

Defendants argue that the antitrust laws in Puerto Rico are subject to the Illinois Brick prohibition and therefore do not permit actions by indirect purchasers. The EPPs respond that the Puerto Rico Supreme Court has rejected this limitation, thereby-permitting indirect purchaser actions.

Authority on this question is mixed. Compare [\*Aggrenox, 94 F. Supp. 3d at 252\*](#) (indirect purchaser actions not permitted), with [\*Rivera-Muniz v. Horizon Lines Inc., 737 F. Supp. 2d 57, 61 \(D.P.R. 2010\)\*](#) (indirect purchaser actions permitted). The [\*Aggrenox\*](#) court reasoned that because the Puerto Rico Antitrust Act is modeled on the Clayton Act, it is subject to the Illinois Brick prohibition in the absence of a clear repealer. See [\*Aggrenox, 94 F. Supp. 3d at 252\*](#).

Having reviewed several cases, I agree with the District of Puerto Rico's reasoning in [\*Rivera-Muniz\*](#). There the court noted that under Puerto Rico Supreme Court precedent, private antitrust plaintiffs "need not establish anything beyond a factual causal relation between [\*80] the injury and the violation." [\*Rivera-Muniz, 737 F. Supp. 2d at 61\*](#) (quoting [\*Pressure Vessels P.R. v. Empire Gas P.R., 137 D.P.R. 497, 520, 1994 Juris P.R. 144 \(P.R. 1994\)\*](#)). Based on this interpretation of the statute and Puerto Rico's liberal construction of antitrust standing requirements, the court held that "it is immaterial whether plaintiffs are direct or indirect purchasers." *Id.*; see also Order, [\*Sergeants Benevolent Ass'n Health & Welfare Fund v. Actavis, PLC, No. 15 Civ. 6549, 2018 U.S. Dist. LEXIS 220574, 2018 WL 7197233, at \\*23 \(S.D.N.Y. Dec. 26, 2018\)\*](#). While true that [\*Pressure Vessels\*](#) did not explicitly mention Illinois Brick, its expansive standing test is clearly incompatible with Illinois Brick's indirect purchaser prohibition. See [\*Pressure Vessels, 137 D.P.R. at 518-20\*](#). This indicates that Puerto Rico's antitrust law is not subject to that prohibition. See [\*Aggrenox, 94 F. Supp. 3d at 252\*](#) (acknowledging that a jurisdiction's own courts can "authoritatively interpret their laws as allowing antitrust recovery by indirect purchasers even in the absence of an express Illinois Brick repealer by the legislature").

In light of the Puerto Rico Supreme Court's statements in [\*Pressure Vessels\*](#), this Report concludes that [\*\*HN31\*\*](#) indirect purchaser actions are permitted under the antitrust laws of that jurisdiction. Defendants' motion to dismiss the EPPs' claims on this basis should therefore be DENIED.

#### **b. The EPPs' plausibly allege intrastate connection sufficient to meet the requirements of state law.**

Defendants argue that the antitrust laws of [\*81] certain jurisdictions require proof of some degree of intrastate connection. As Defendants characterize the broad allegations in the complaints, they describe only a nationwide pattern of conduct that lacks substantial intrastate action or effects. Defendants argue that failure to make such allegations is fatal to claims in states requiring this intrastate element. This challenge applies to the antitrust claims in Mississippi, Nevada, New York, North Carolina, South Dakota, Tennessee, West Virginia, Wisconsin, and the District of Columbia.

[\*\*HN32\*\*](#) Cases examining the antitrust laws in these states generally agree that they require allegations of intrastate conduct or effects but define those terms to give the statutes broad scope. See, e.g., [\*In re Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772, 816 \(N.D. Ill. 2017\)\*](#) (finding "substantial" intrastate effects based on allegations of purchases at supracompetitive prices within a state); [\*Aggrenox, 94 F. Supp. 3d at 253\*](#) ("[I]t is not obvious why the *intra* state effect of anticompetitive conduct would not be reached by the cited statutes merely because inter state conduct predominates."). Defendants' cited cases applying a more rigorous pleading standard are plainly in the minority and are unpersuasive. I rely instead on the ample authority permitting [\*82] claims to proceed on allegations comparable to those before this court. See, e.g., [\*Aggrenox, 94 F. Supp. 3d at 253\*](#) (denying motion to

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<sup>13</sup> The EPPs have not asserted state antitrust claims in the states which follow Illinois Brick, see e.g., [\*Vacco v. Microsoft Corp., 260 Conn. 59, 793 A.2d 1048 \(Conn. 2002\)\*](#) (holding indirect purchasers lack standing to assert antitrust claims under Connecticut antitrust statute).

dismiss claims under Mississippi, New York, Tennessee, Wisconsin, and District of Columbia law); [Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 737 F. Supp. 2d 380, 397, 400 \(E.D. Pa. 2010\)](#) (same in Nevada, North Carolina, and West Virginia); [In re Intel Corp. Microprocessor Antitrust Litig., 496 F. Supp. 2d 404, 414 \(D. Del. 2007\)](#) (same in South Dakota).

This Report concludes that the allegations in the EPPs' Consolidated Complaint sufficiently allege the necessary intrastate connections in each of the challenged jurisdictions. The EPPs allege that Defendants engaged in a nationwide pattern of anticompetitive conduct that resulted in the sale of brand and generic Zetia at supracompetitive prices. They allege that these sales took place in every state where they have asserted claims. The volume of sales and the proceeds realized from the alleged anticompetitive conduct are in the billions of dollars. The court should therefore DENY Defendants' motion to dismiss on the basis of failing to allege intrastate effects.

**c. The EPPs' delay in meeting statutory notice requirements does not warrant dismissal.**

Defendants next argue that the EPPs failed to comply with provisions in certain state antitrust laws that require private antitrust plaintiffs [\*83] bringing claims under those laws to file notice of the suit with the state's Attorney General. Defendant moved to dismiss claims in Arizona, Hawaii, Nevada, Rhode Island, and Utah on this ground. The EPPs respond that they have since provided notice in each of those states,<sup>14</sup> that dismissal for late notice would frustrate the statutes' remedial purposes, and that these notice provisions are inapplicable in federal court under [Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 130 S. Ct. 1431, 176 L. Ed. 2d 311 \(2010\)](#).

Again, courts are split on the impact these notice requirements have in federal court. Some give them preclusive effect and dismiss claims when plaintiffs fail to comply. [See, e.g., In re Asacol Antitrust Litig., No. 15-cv-12730, 2016 U.S. Dist. LEXIS 94605, 2016 WL 4083333, at \\*14-15 \(D. Mass. July 20, 2016\)](#). Others hold that they are merely state procedural rules that do not apply in federal court. [See, e.g., Aggrenox, 94 F. Supp. 3d at 253-54](#). Still others conclude that, even assuming the notice provisions apply in federal court, late or improper notice does not warrant dismissal of the entire claim. [See, e.g., In re Aftermarket Filters Antitrust Litig., No. 08C4883, 2009 U.S. Dist. LEXIS 104114, 2009 WL 3754041, at \\*6 \(N.D. Ill. Nov. 5, 2009\)](#) (refusing to dismiss Hawaii antitrust claim for failure to comply with notice requirement and noting that "nothing in the statutory scheme suggests that defendants may use the statute as a shield to avoid answering for alleged anti-competitive behavior"); [see also \[\\*84\] Broiler Chicken, 290 F. Supp. 3d at 817](#) ("Defendants do not cite any authority that late notice requires dismissal, so the Court will not dismiss Plaintiffs' Arizona and Rhode Island antitrust claims on this basis.").

I am persuaded by this last group of cases that dismissal is unwarranted here. Nothing in any of the cited provisions dictates that failure to provide notice requires dismissal. And in this case, the EPPs provided notice. Although notice may have followed initiation of the suit it was provided early in litigation and prior to consolidation or the commencement of any discovery. Dismissing the claims now would be an inefficient and heavy-handed remedy for a relatively minor delay, as to which no one claims prejudice. No Attorney General or other state official has objected to the notice provided or indicated any intent to intervene in the litigation. Moreover, to the extent the statutes prescribe more complex procedural requirements, [see, e.g., Haw. Rev. Stat. § 480-13.3, Shady Grove](#) may preclude their operation in federal court, [see In re Propranolol Antitrust Litig., 249 F. Supp. 3d 712, 728 \(S.D.N.Y. 2017\)](#). Accordingly, Defendants' motion to dismiss based on improper notice should be DENIED.

**d. The Illinois Antitrust Act class-action bar does not apply in federal court.**

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<sup>14</sup> Records of the notices may be found in MDL Member Case No. 2:18cv108, ECF Nos. 54-1 to -5. In each instance the EPPs provided the notice only after filing suit.

Defendants next argue that the EPPs are [\*85] not authorized to bring their claims under the Illinois Antitrust Act as a class action. They cite to a provision of the Act reading "[N]o person shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act, with the sole exception of this State's Attorney General." [740 Ill. Comp. Stat. 10/7\(2\)](#). Some courts have read this provision to bar indirect purchaser class actions under Illinois law from proceeding in federal court. [See, e.g., Opana ER, 162 F. Supp. 3d at 723; In re Wellbutrin XL Antitrust Litig., 756 F. Supp. 2d 670, 676-77 \(E.D. Pa. 2010\)](#). These courts reason that the class action bar is a substantive restriction on the antitrust remedy fashioned by the Illinois legislature. [Opana ER, 162 F. Supp. 3d at 723.](#)

The EPPs' response raises two questions: First, does the Illinois Antitrust Act's class-action bar apply in federal court by its own terms? Second, if yes, does Shady Grove dictate that its prohibition on class actions yield to Federal Rule of Civil Procedure 23?

**HN33** [↑] The provision quoted above provides that indirect purchasers may not maintain class actions "in any court of this State." [§ 10/7\(2\)](#). By its plain language, that does not include this court. Cf. [In re Aggrenox Antitrust Litig., No. 3:14-md-2516, 2016 U.S. Dist. LEXIS 104647, 2016 WL 4204478, at \\*5 \(D. Conn. Aug. 9, 2016\)](#) ("It is not obvious that the formulaic expression 'in any court of this State' appearing in an Illinois statute applies [\*86] to a federal court in Connecticut."); [Piechur v. Redbox Automated Retail, LLC, No. 09cv984, 2010 U.S. Dist. LEXIS 16324, 2010 WL 706047, at \\*4 \(S.D. Ill. Feb. 24, 2010\)](#) (concluding that the Southern District of Illinois, "while it may sit in the state of Illinois, is not a court of the state of Illinois"). But see [Wellbutrin XL, 756 F. Supp. 2d at 676](#) ("Courts outside of Illinois, however, have read the attorney general restriction to apply to bar indirect purchaser actions in federal court.").

Even if, contrary to its text, the bar applies in this court, I am persuaded by those courts which have concluded that under Shady Grove, Rule 23 governs class actions in federal court and permits the EPPs' suit under the Illinois statute. In Shady Grove, the Supreme Court held that Rule 23 controlled over New York's general class-action bar in federal court. See [559 U.S. at 398-99](#) (plurality opinion). Writing for a plurality, Justice Scalia concluded that both provisions answered the question whether plaintiffs could pursue their claims via class action. But since Rule 23 was a federal enactment, it was presumed to control the procedural point as long as it was validly enacted. Because the court found it was, its provisions controlled. See [id. at 399-400](#). Justice Stevens concurred but suggested that seemingly procedural state laws may still control if they [\*87] are "actually ... part of a State's framework of substantive rights or remedies." [Id. at 419](#) (Stevens, J., concurring).

Shady Grove's split opinion has left some questions unresolved. See [Mitchell-Tracey v. United General Title Ins. Co., 442 F. App'x 2, 6 \(4th Cir. 2011\)](#) (suggesting that some state procedural requirements survived Shady Grove). But the bar Defendants seek to apply here is functionally indistinguishable from the bar in Shady Grove. It plainly says that the EPPs may not maintain their claims in a class action; Rule 23 says just the opposite. See [Aggrenox, 2016 U.S. Dist. LEXIS 104647, 2016 WL 4204478, at \\*5-6](#) (evaluating the Shady Grove issue and concluding that Rule 23 overrides Illinois class-action bar in federal court); see also [Broiler Chicken, 290 F. Supp. 3d at 818](#) ("[W]hether such plaintiffs may bring a class action does not affect their substantive rights.").

Accordingly, this Report recommends the court DENY Defendants' motion to dismiss the EPPs' Illinois antitrust claims.

#### e. The EPPs have alleged class members with standing under the Utah Antitrust Act.

Defendants contend that standing to sue under Utah's Antitrust Act is limited to citizens and residents of Utah. See [Utah Code Ann. § 76-10-3109\(1\)\(a\)](#) (2018). Echoing their broader standing argument, Defendants argue that the EPPs have not alleged that any named plaintiffs are residents of Utah. The EPPs respond that the class definition in their consolidated [\*88] complaint includes end-payors who purchased Zetia in Utah, thus satisfying the statute. See EPP Compl. ¶ 311 (ECF No. 130 at 88).

For the reasons detailed in the earlier standing discussion,<sup>15</sup> the EPPs' allegations that the class includes Utah residents is sufficient at this stage. See [In re Liquid Aluminum Sulfate Antitrust Litig., No. 16md2687, 2017 U.S. Dist. LEXIS 115294, 2017 WL 3131977, at \\*28 \(D.N.J. July 20, 2017\)](#). The court should therefore DENY Defendants' motion to dismiss the EPPs' claims under the Utah Antitrust Act.

**f. Antitrust claims - summary of recommended action.**

As explained in the foregoing sections, this Report recommends that Defendants' motion to dismiss the EPPs' state antitrust claims be DENIED on all counts. Exhibit A to this Report provides a summary of the recommended disposition for all the EPP claims.

**4. Defendants' motion to dismiss the EPPs' state monopolization claims should be denied except as to the claim under California Code [section 17200](#).**

In their second count, EPPs assert monopolization claims under the Sherman Act [§ 2](#) state analogues of the same twenty-six jurisdictions as in their count one antitrust claims. As with their other claims, EPPs rely on the same allegations set forth by the DPPs and the Retailers. With one exception, [\*89] Defendants have not raised any specific challenges to these claims or provided any authority to suggest that they should be treated differently. They instead merely reiterate that the state monopolization claims should be dismissed for the same reasons as their federal counterparts.

As discussed above,<sup>16</sup> this Report concludes that Plaintiffs have alleged sufficient facts to state a claim of conspiracy to monopolize under [§ 2](#) of the Sherman Act. Therefore, to the extent Defendants' motion seeks dismissal of the corresponding state claims on the same grounds, it should be DENIED.

The sole exception relates to the EPPs' monopolization claim under California law. Defendants argue that under [California's Business and Professions Code section 17200 et seq.](#), plaintiffs pursuing a monopolization claim are limited to equitable relief and may not seek damages. See [Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 131 Cal. Rptr. 2d 29, 63 P.3d 937, 943 \(Cal. 2003\)](#). The EPPs essentially conceded this point at oral argument. And on review of the pleadings, the EPPs have not asserted claims for restitution, instead seeking only damages which are expressly precluded under the California statute. Therefore, to the extent the EPPs' monopolization claim under California law seeks damages, it should be DISMISSED with prejudice.

**5. The EPPs have stated consumer [\*90] protection claims in some jurisdictions but have failed to allege required elements in others.**

The EPPs' third category of claims arises under the consumer protection laws of twenty-seven states and the District of Columbia. Defendants argue that claims in twenty-five of these jurisdictions should be dismissed either for lack of standing or for specific reasons detailed below. As explained above, this Report concludes that Defendants' Article III standing challenge is better addressed at class certification and therefore recommends the court DENY their motion to dismiss on that ground. The remaining challenges will be addressed by category, addressing specific states as necessary. Note that in some instances claims in a particular state may be recommended for dismissal on some grounds but not others. The summary at the end of this subsection will identify those state claims recommended for dismissal on any ground and is reflected in Exhibit A.

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<sup>15</sup> See [supra](#) section V.D.2.

<sup>16</sup> See [supra](#) section V.D.3.d.

**a. Indirect purchasers may assert consumer protection claims under Illinois and Missouri law in federal court.**

Defendants' assertion that indirect purchaser class actions are not permitted under Illinois' consumer protection statute is premised on their analogous challenge [\*91] to the EPPs' antitrust claims under Illinois law.<sup>17</sup> They argue that, assuming indirect purchasers are barred from pursuing antitrust class actions, permitting them to do so under the consumer protection statute would undermine that policy determination. See *In re Flonase Antitrust Litig. (Flonase II)*, 692 F. Supp. 2d 524, 539 (E.D. Pa. 2010).

**HN34** [+] As explained above, however, Illinois' class-action bar does not prevent the EPPs from maintaining their class action suit in federal court under the Illinois Antitrust Act. Furthermore, to the extent the EPPs have stated an independent claim for violation of Illinois' consumer protection statute, they are entitled to seek remedies by the means available under that law. See *Siegel v. Shell Oil Co.*, 480 F. Supp. 2d 1034, 1048-49 (N.D. Ill. 2007) (recognizing that actionable conduct under the Illinois Consumer Fraud Act may also be covered by the Illinois Antitrust Act). Furthermore, the Illinois CFA has broad scope by its own terms and has no corresponding class-action limitation. See 815 Ill. Comp. Stat. 505/2 (prohibiting "unfair methods of competition" in harmony with the FTC Act); id. § 505/10a. *Laughlin v. Evanston Hosp.*, 133 Ill. 2d 374, 550 N.E.2d 986, 140 Ill. Dec. 861 (Ill. 1990), does not withdraw the EPPs' present claims from that coverage as Defendants' claim. See Siegel, 480 F. Supp. 2d at 1046-49. And allowing the claims under the CFA does not circumvent any substantive policy, because Illinois does not bar indirect purchaser antitrust [\*92] claims. Accordingly, the EPPs' class action is not categorically barred under Illinois' consumer protection laws and this Report recommends that Defendants' motion to dismiss on this basis be DENIED.

Similarly, Defendants argue that because Missouri has not passed an Illinois Brick repealer, permitting the EPPs to bring an indirect purchaser action under Missouri's consumer protection statute "would provide an end-run around the state's prohibition of antitrust claims by indirect purchasers." In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig., 64 F. Supp. 3d 665, 702 (E.D. Pa. 2014).

In response, the EPPs cite to the Missouri Supreme Court's decision in Gibbons and subsequent cases applying it. Gibbons rejected any direct privity requirement for suits under Missouri's consumer protection statute and seemed to endorse indirect purchaser actions. See Gibbons v. J. Nuckolls, Inc., 216 S.W.3d 667, 669-70 (Mo. 2007). **HN35** [+] Federal courts applying Gibbons have followed suit. See, e.g., In re Packaged Seafood Prods. Antitrust Litig., 242 F. Supp. 3d 1033, 1079 (S.D. Cal. 2017) ("This Court joins the majority of our sister courts and concludes that Illinois Brick does not bar indirect-purchaser claims under the MMPA."). Defendants' sole post-Gibbons case to the contrary rests on speculative reasoning and goes against the majority view. See Suboxone, 64 F. Supp. 3d at 702 (reasoning that Gibbons should not apply to claims premised on antitrust-type injury). Because Gibbons [\*93] appears to answer the Defendants' indirect purchaser objection, this Report recommends the court DENY Defendants' motion on this basis.

**b. The EPPs' allegations do not satisfy the deception and/or reliance requirements in some state consumer protection statutes.**

Defendants challenge the EPPs' claims in eleven jurisdictions for failure to specifically allege deceptive conduct by Defendants or reliance by the EPPs. Defendants' broad contention is that the EPPs have alleged only antitrust violations that fail to satisfy the required elements under the laws of these jurisdictions, many of which are specifically directed at deceptive or fraudulent commercial conduct. The EPPs respond that many of these statutes prohibit "unfair" or "unconscionable" conduct and should be construed broadly regardless of their exact language.

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<sup>17</sup> See supra section V.D.3.d.

**HN36**[] One recurring statutory pattern among several of these jurisdictions is the prohibition of "unfair methods of competition" (or similar language) and incorporation of a Federal Trade Commission ("FTC") Act harmonization provision. The latter is important because the Supreme Court has construed the FTC Act, on which many state consumer protection laws are modeled, to broadly [\*94] cover unfair trade practices. See *Ind. Fed'n of Dentists, 476 U.S. at 454* (recognizing that "unfairness" under the FTC Act encompasses "practices that violate the Sherman Act and the other antitrust laws"). Thus, state laws with equivalent "unfairness" language and an FTC Act harmonization provision can safely be assumed to have similarly broad scope. Other states, however, target a narrower range of conduct not included in the EPPs' claims of anticompetitive collusion. This Report's recommendations on this issue are as follows:

- **Arizona.** [HN37](#)[] Arizona's consumer protection law, as amended in 2013, prohibits "unfair" practices and contains an FTC Act harmonization provision. [Ariz. Rev. Stat. Ann. § 44-1522](#). Defendants' sole cited case predates the addition of the "unfairness" language, which substantially broadens the statute's scope. Cf. [Sheet Metal Workers, 737 F. Supp. 2d at 404](#). The court should DENY Defendants' motion to dismiss the Arizona claims on this basis.
- **Arkansas.** [HN38](#)[] Arkansas's consumer protection laws prohibit "[d]eceptive and unconscionable trade practices," [Ark. Code Ann. § 4-88-107](#), language that Arkansas courts construe broadly, see *Baptist Health v. Murphy, 365 Ark. 115, 226 S.W.3d 800, 811 (Ark. 2006)*; see also [Packaged Seafood Prods., 242 F. Supp. 3d at 1072](#). However, the reliance requirement in [section 4-88-113\(f\)](#)'s private cause of action is incompatible with the allegations in the EPPs' Complaint. The EPPs cannot plausibly claim to have [\*95] "relied" on any of the Defendants' acts which produced the elevated pricing of Zetia or ezetimibe. Coupled with the absence of broadly construed "unfairness" language in the statute, I conclude that the EPPs have not sufficiently alleged a violation of Arkansas's consumer protection laws. The EPPs' claims should therefore be DISMISSED without prejudice.
- **District of Columbia.** [HN39](#)[] Washington D.C.'s consumer protection laws prohibit "unfair" trade practices and include both an expansive list of enumerated examples and an FTC Act harmonization provision. [D.C. Code §§ 28-3901, -3904](#). Courts regularly permit claims under D.C. law premised on anticompetitive conduct. See, e.g., [In re Processed Egg Prods. Antitrust Litig., 851 F. Supp. 2d 867, 898-99 \(E.D. Pa. 2012\)](#). The case of [Williams v. Purdue Pharma Co., 297 F. Supp. 2d 171 \(D.D.C. 2003\)](#), cited by Defendants, is distinguishable on its facts and because it considered only the statute's prohibition on "deceptive" conduct without addressing unfairness. Defendants' motion to dismiss the D.C. consumer protection claims should be DENIED.
- **Idaho.** [HN40](#)[] Idaho prohibits unfair methods of competition and aligns its consumer protection statute with the FTC Act. See [Idaho Code §§ 48-603, -604](#). I agree with those cases that have permitted claims premised on anticompetitive conduct to proceed under this statute. See, e.g., [Intel Corp., 496 F. Supp. 2d at 418](#). The motion to dismiss [\*96] the EPPs' Idaho consumer protection claims should be DENIED.
- **Maine.** [HN41](#)[] Maine's consumer protection statute covers "unfair methods of competition" and includes an FTC Act harmonization provision. [Me. Stat. tit. 5, § 207](#). It encompasses harms premised on antitrust violations. See *In re New Motor Vehicles Canadian Export Antitrust Litig., 350 F. Supp. 2d 160, 186-87, 187 n.40 (D. Me. 2004)*. Defendants' motion to dismiss the Maine consumer protection claims should therefore be DENIED.
- **Michigan.** [HN42](#)[] Michigan's consumer protection law refers to the FTC Act but does not contain an express harmonization provision. See *Mich. Comp. Laws § 445.911(3)*. The enumerated unlawful practices in section 445-903 are primarily directed at deceptive practices, and several courts have dismissed claims under Michigan law for failure to allege fraud or deception. See *Packaged Seafood Prods., 242 F. Supp. 3d at 1076-77*. The EPPs point to [Solodyn](#), which held that anticompetitive conduct could be actionable under an anti-price-gouging provision. [In re Solodyn \(Minocycline Hydrochloride\) Antitrust Litig., No. 14-md-02503, 2015 U.S. Dist. LEXIS 125999, 2015 WL 5458570, at \\*17 \(D. Mass. Sept. 16, 2015\)](#). But that case appears to be an outlier on this point, and other cases permitting claims based on allegations of anticompetitive conduct have

made specific findings of deceptive conduct. See, e.g., Suboxone, 64 F. Supp. 3d at 700-01 (concluding that Michigan consumer protection statute requires proof of "intent to deceive" and finding [\*97] element satisfied by allegations that defendants fabricated a drug safety issue). Because the EPPs have not sufficiently alleged deceptive conduct, their consumer protection claims under Michigan law should be DISMISSED without prejudice.

- **Minnesota.** [HN43](#)[] The Minnesota consumer protection law applies only to "conduct that is deceptive or fraudulent, as opposed to merely anticompetitive." Niaspan, 42 F. Supp. 3d 735, at 760. Courts permitting claims of anticompetitive conduct under Minnesota Code section 325F.69(1) have relied on allegations of deception or fraud. See id. (collecting examples). Because the EPPs have made not made such allegations here, their consumer protection claims under Minnesota law should be DISMISSED without prejudice.
- **New York.** [HN44](#)[] New York's consumer protection law does not include broad "unfairness" language but is instead directed only at deceptive or misleading practices. See In re Digital Music Antitrust Litig., 812 F. Supp. 2d 390, 410 (S.D.N.Y. 2011) (examining state court authority). It does not cover "anticompetitive conduct that is not premised on consumer deception." Id. (quoting Leider v. Ralfe, 387 F. Supp. 2d 283, 295 (S.D.N.Y. 2005)). Because the allegations here do not reflect consumer-oriented deception by any Defendants, the EPPs' consumer protection claims under New York law should be DISMISSED without prejudice.
- **Rhode Island.** [HN45](#)[] Rhode [\*98] Island's consumer protection statute contains broad unfairness language and an FTC Act harmonization provision. 6 R.I. Gen. Laws. Ann. §§ 6-13.1-2, -3. The Rhode Island Supreme Court has also endorsed a broad reading of the law. See Ames v. Oceanside Welding & Towing Co., 767 A.2d 677, 681 (R.I. 2001). Courts applying the Ames standard have permitted claims under the state's consumer protection statute premised on anticompetitive conduct. See, e.g., In re Effexor Antitrust Litig., 357 F. Supp. 3d 363, 2018 WL 6003893, at \*22 (D.N.J. Nov. 15, 2018) (permitting claim based on anticompetitive conduct "which resulted in consumers purchasing Effexor XR at a premium rate"). In light of the Rhode Island Supreme Court's opinion, This Report recommends that the court DENY Defendants' motion to dismiss the EPPs' Rhode Island consumer protection claims.
- **South Dakota.** [HN46](#)[] South Dakota's consumer protection law specifically requires proof of deceptive conduct causing consumer harm. See DDAVP, 903 F. Supp. 2d at 229. The conduct complained of here—an unlawful pay-for-delay settlement agreement—may have harmed consumers, but it did not defraud or mislead them. The EPPs have included allegations in their complaint that Defendants engaged in inequitable conduct before the Patent and Trademark Office, but those claims are ancillary to the alleged anticompetitive practices central [\*99] to the complaint. The EPPs have cited no authority supporting a broader scope for South Dakota law. Their South Dakota consumer protection claims should therefore be DISMISSED without prejudice.
- **Vermont.** [HN47](#)[] The Vermont Consumer Fraud Act prohibits "unfair methods of competition" and contains an FTC Act harmonization provision. Vt. Stat. Ann. 9, S 2453 (West 2018). The statute should be liberally construed "to have as broad a reach as possible in order to best protect consumers against unfair trade practices." Elkins v. Microsoft Corp., 174 Vt. 328, 817 A.2d 9, 13 (Vt. 2002). In Elkins the court explicitly held that indirect purchasers could bring antitrust claims under the civil penalty provision of the VCFA. Id. at 20. Propranolol, cited by Defendants, seemingly ignored the "unfair methods of competition" prong of the Vermont statute in dismissing a claim for failure to show a deceptive act. See 249 F. Supp. 3d at 729. Similarly, Aggrenox, which suggested that the VCFA did not reach antitrust conduct, seems to have overlooked Elkins. See Aggrenox, 2016 U.S. Dist. LEXIS 104647, 2016 WL 4204478, at \*9 (further concluding that plaintiffs were not "consumers" under the VCFA). The EPPs' citation to Vermont caselaw is more persuasive. This Report therefore recommends the court DENY Defendants' motion to dismiss the EPPs' Vermont consumer protection [\*100] claims on this ground.

**c. The EPP's claims of anticompetitive conduct are not actionable under some states' consumer protection laws.**

Defendants next argue that "pure antitrust" violations, as they have characterized the EPPs' allegations, are not cognizable claims under the consumer protection laws of several states. After reviewing the respective state laws and cases applying them, this Report recommends the court DENY Defendants' motion to dismiss the EPPs' consumer protection claims under the laws of Illinois and West Virginia. See [Packaged Seafood Prods., 242 F. Supp. 3d at 1087-88](#) (sustaining price-fixing claim under West Virginia's consumer protection statute after highlighting importance of FTC Act harmonization provision added in 2015); [Seigel, 480 F. Supp. 2d at 1043-49](#) (permitting antitrust-type claim to proceed under Illinois Consumer Fraud Act).

The court should DISMISS the EPPs' consumer protection claims with prejudice in each of the remaining challenged states for the reasons and on the authority cited:

- **Idaho.** See [State ex rel. Wasden v. Daicel Chem. Indus., Ltd., 141 Idaho 102, 106 P. 3d 428, 433-35 \(Idaho 2005\) HN48](#) [↑] (limiting Idaho consumer protection statute to "unconscionable "sales conduct" that is direct at the consumer"); see also [Polyurethane Foam, 799 F. Supp. 2d at 786](#).
- **Kansas.** "Despite the [Kansas Consumer Protection Act's] seemingly broad language, the Supreme Court of Kansas has distinguished [\*101] between consumer harms redressable thereunder and pricing harms governed by the Kansas antitrust statute." [In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538, 584 \(M.D. Pa. 2009\)](#) (citing [Equitable Life Leasing Corp. v. Abbrick, 243 Kan. 513, 757 P.2d 304, 306-08 \(Kan. 1988\)](#)).
- **Oregon.** Courts typically dismiss claims under Oregon's consumer protection law that lack allegations of deceptive conduct, as is the case here. See, e.g., [In re Lidoderm Antitrust Litig. \(Lidoderm II\), 103 F. Supp. 3d 1155, 1170-71 \(N.D. Cal. 2015\)](#); see also [In re Dynamic Random Access Memory \(DRAM\) Antitrust Litig., 516 F. Supp. 2d 1072, 1115-16 \(N.D. Cal. 2007\)](#) (holding that plaintiffs could not state a price-fixing claim under Oregon's consumer protection law); cf. [Packaged Seafood Prods., 242 F. Supp. 3d at 1083-84](#) (sustaining claim under Oregon law where plaintiffs "plausibly allege[d] affirmative misrepresentations").
- **Tennessee.** "[P]laintiffs cannot bring claims based on anticompetitive conduct under the Tennessee Consumer Protection Act." [In re Flonase Antitrust Litig. \(Flonase I\), 610 F. Supp. 2d 409, 417 \(E.D. Pa. 2009\)](#) (citing [Sherwood v. Microsoft Corp., No. M2000-01850-COA-R9-CV, 2003 Tenn. App. LEXIS 539, 2003 WL 21780975, at \\*110 \(Tenn. Ct. App. July 31, 2003\)](#)); see also [Bennett v. Visa USA, Inc., 198 S.W.3d 747, 754-55 \(Tenn. Ct. App. 2006\)](#) (discussing the significance of TCPA's lack of "unfair competition" language).
- **Utah.** Although Utah's Consumer Sales Practices Act contains an FTC Act harmonization provision, it lacks the broad "unfair competition" language on which federal courts have relied in extending the latter to cover price-fixing. See [DRAM, 516 F. Supp. 2d at 1117](#). The Utah CSPAs broadest provision covers "unconscionable" conduct, which Utah courts have interpreted using contract law definitions. See [New Motor Vehicles, 350 F. Supp. 2d at 203-05](#) (surveying state court decisions). The EPPs have [\*102] not pled sufficient facts to state a claim under this standard of unconscionability.

#### d. The EPPs have pled sufficient intrastate connection.

Defendants argue that the EPPs have not pled sufficient intrastate conduct or effects under the consumer protection laws of New Hampshire, New York, or North Carolina. As with state antitrust laws requiring intrastate allegations, see supra section V.D.3.b, the clear trend is to broadly construe these "intrastate" pleading requirements to include allegations of causing substantial harm to in-state residents. See, e.g., [Suboxone, 64 F. Supp. 3d at 702](#) (sustaining claim under New York consumer protection statute on the basis of overcharges that occurred in the state); [DDAVP, 903 F. Supp. 2d at 231](#) (concluding that allegations of in-state sales at supracompetitive prices satisfy the intrastate requirement); [LaChance v. U.S. Smokeless Tobacco Co., 156 N.H. 88, 931 A.2d 571, 578 \(N.H. 2007\)](#) (holding that allegations state a claim under New Hampshire Consumer Protection Act if they "encompass conduct which was part of trade or commerce that had direct or indirect effects on" state citizens). Because the EPPs have alleged a nationwide pattern of conduct that resulted in consumers in

each of the challenged jurisdictions purchasing ezetimibe at elevated prices, they have pled sufficient intrastate [\*103] connections under those consumer protection statutes. The court should therefore DENY Defendants' motion to dismiss the New Hampshire, New York, and North Carolina consumer protection claims on this basis.

**e. The EPPs are not "Consumers" as defined by some state consumer protection laws.**

**HN49** Every jurisdiction defines "consumer" for the purposes of setting out the scope of its consumer protection laws and the persons or entities entitled to sue under those laws. Defendants argue that the EPPs as a class are not proper plaintiffs under the laws of eight jurisdictions. These jurisdictions, according to Defendants, do not provide a right of action to municipal corporations or health plans that reimburse members for private purchases.

The EPPs respond that the class definition is broad enough to encompass both third-party payors and individual purchasers.<sup>18</sup> However, the current named class representatives do not include any individuals and, as third-party payors, they would be unable to effectively represent individuals on these particular claims. This is because, as explained below, the current named plaintiffs cannot plausibly allege a right to recover under those state consumer protection laws [\*104] that exclude third-party payors from their definition of "consumer." The current named class representatives therefore lack any incentive to litigate those claims.<sup>19</sup> In such circumstances, dismissal is proper even against plaintiffs purporting to be acting in representative capacity. See Asacol, 907 F.3d at 49 ("[T]he pertinent question is: Are the differences that do exist [between the claims of the class members and those of the class representative] the type that leave the class representative with an insufficient personal stake in the adjudication of the class members' claims?"). Accordingly, this court should not permit the EPPs' claims to go forward simply because the class may include individuals in the challenged states.

**HN50** The EPPs are proper plaintiffs under Virginia's consumer protection law, which (1) provides a right of action [\*105] to any person (including a legal entity) that suffers a loss caused by a violation of the statute, (2) covers fraudulent acts or practices committed by a supplier in connection with a consumer transaction," and (3) defines a consumer transaction as one that involves goods purchased primarily for personal, family, or household purposes. See Va. Code Ann §§ 59.1-198, -200. Drawing reasonable inferences in their favor, the EPPs plausibly allege that Defendants violated the statute in connection with the commercial sale of overpriced ezetimibe and that the EPPs, responsible for reimbursement of the purchase prices in those transactions, suffered a loss as a result. The court should therefore DENY Defendants' motion to dismiss the EPPs' consumer protection claim under Virginia law.

The presently named EPPs cannot, however, invoke the consumer protection laws of the other seven jurisdictions challenged on this basis. As health and benefit plans, they do not actually make purchases—rather, they reimburse their members or pharmacies for the costs of Zetia or ezetimibe purchases when their members fill prescriptions. That transaction is strictly commercial, carried out as a matter of contract between the named EPPs [\*106] and their premium-paying members.<sup>20</sup> See In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig., 355 F.

<sup>18</sup> The class definition in the EPPs' Consolidated Complaint reads:

All persons and entities in the Indirect Purchaser States that indirectly purchased, paid and/or provided reimbursement for some or all of the purchase price of Zetia or its AB-rated generic equivalents in any form, other than for resale, from December 6, 2011 through and until the anticompetitive effects of Defendants' unlawful conduct cease (the "Class Period").

EPP Compl. ¶ 311 (ECF No. 130 at 83).

<sup>19</sup> This nuance in state consumer protection laws distinguishes this issue from, for example, the question of whether the EPPs can assert an antitrust claim in Utah even though no named class representative resides there. See supra section V.D.3.e. Analogous antitrust laws in the named representatives' respective states do not restrict third-party payors from bringing claims.

Supp. 3d 145, 2018 WL 5928143, at \*12 (E.D.N.Y. Nov. 13, 2018). And contrary to the EPPs' suggestion, the mere fact that the underlying transaction (that is, the drug purchase) is for "personal, family, or household use," as most of the laws at issue require, does not extend a right of action to third-party payors which reimburse those payments as part of a separate insurance obligation. This Report therefore recommends the court DISMISS the EPPs' consumer protections claims without prejudice in the following jurisdictions:

- **District of Columbia.** HN51[<sup>20</sup>] D.C.'s consumer protection statute is intended to reach "the ultimate retail transaction between the final distributor and the individual member of the consumer public." Adam A. Weschler & Son, Inc. v. Klank, 561 A. 2d 1003, 1005 (D.C. 1989). Secondary reimbursement transactions are outside the ambit of the statute. See Lidoderm II, 103 F. Supp. 3d at 1164-65 (dismissing health plan's consumer protection claim under D.C. law).
- **Kansas.**<sup>21</sup> Kansas law narrowly defines "consumer" in terms of individuals or natural persons, excluding the named EPP class representatives. See Kan. Stat. Ann. § 50-624; Solodyn, 2015 U.S. Dist. LEXIS 125999, 2015 WL 5458570, at \*17.
- **Maine.** Although Maine's consumer protection law defines "person" to include legal entities, it limits private actions to persons [\*107] who "purchase[] or lease[] goods ... primarily for personal, family, or household purposes." Me. Stat. tit. 5, §§ 206, 213. This category does not include the named EPP class representatives.
- **Massachusetts.** Plaintiffs engaged in trade or commerce, a group that includes the third-party payor EPPs, must proceed under section 11 of the Massachusetts Consumer Protection Act. See Lidoderm I, 74 F. Supp. 3d at 1084-85 (concluding that municipality and welfare plan that purchased and/or reimbursed purchases of prescription drugs were engaged in "trade or commerce" within meaning of MCPA). However, section 11 bars indirect purchaser claims. Id. at 1086.
- **Missouri.** Private actions under Missouri's consumer protection law are limited to persons who purchase or lease merchandise "primarily for personal, family or household purposes." Mo. Rev. Stat. § 407.025. Third-party payors like health plans may not assert claims under this provision. See Asacol, 2016 U.S. Dist. LEXIS 94605, 2016 WL 4083333, at \*12.
- **Rhode Island.** Only persons who purchase goods "for personal, family, or household purposes" may sue under Rhode Island's consumer protection law. R.I. Gen. Laws § 6-13.1-5.2; see also In re Effexor Antitrust Litig., 337 F. Supp. 3d 435, 467 (D.N.J. 2018).
- **Vermont.** See Aggrenox, 2016 U.S. Dist. LEXIS 104647, 2016 WL 4204478, at \*9 ("The fact that Humana's members are consumers, and that Humana co-purchases or reimburses for consumer products that its members use, does not make Humana a consumer of those products."). [\*108]

#### f. The EPPs have substantially complied with statutory notice provisions.

Defendants argue that the EPPs' consumer protection claims in Massachusetts and West Virginia should be dismissed for failure to comply with the notice provisions in those states' laws. As explained above, it is unclear whether these provisions even apply in federal court, let alone demand dismissal for noncompliance. See supra section V.D.3.C. The case for applying them in the consumer protection context is stronger than in the antitrust

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<sup>20</sup> It is also not unique to Zetia, ezetimibe, or any particular drug; the EPPs simply reimburse consumers for some portion of all qualified healthcare costs.

<sup>21</sup> This Report recommends dismissing with prejudice the EPPs' consumer protection claim in Kansas on another basis. See supra section V.D.5.C

context because the required notice is to the defendant (in the form of a demand letter and cure opportunity), rather than to the state attorney general.<sup>22</sup> However, neither provision requires dismissal in this case.

**HN52**[] The Massachusetts notice provision only applies to claims under [section 9](#) of the state's consumer protection act. [Section 11](#), under which the EPPs must proceed here, has no notice requirement. As for West Virginia, Defendants' characterization of the notice provision as a rigid pre-suit requirement ignores the language added by 2015 amendment that explicitly contemplates post-filing demand letters. [See id.](#) (specifying twenty days from receipt of notice to make [\*109] a cure offer "but ten days in the case a cause of action has already been filed"). [Waters v. Electrolux Home Prods., Inc., 154 F. Supp. 3d 340 \(N.D.W. Va. 2015\)](#), a post-amendment case cited by Defendants, is factually distinguishable. There the plaintiffs never provided a written demand letter specifying the cure opportunity, but merely relied on their complaint to give notice. [Id. at 354](#). Here, by contrast, the EPPs provided separate written notice with a ten-day cure offer window, as [section 46A-6-106\(c\)](#) requires.<sup>23</sup>

For these reasons, this Report recommends the court DENY Defendants' motion to dismiss the EPPs' Massachusetts and West Virginia consumer protection claims on this basis.

#### **g. Florida's heightened pleading standard does not apply-in this case.**

Defendants assert that the EPPs must plead their Florida consumer protection claims with particularity under the heightened pleading standard of [Federal Rule of Civil Procedure 9\(b\)](#). See, e.g., [Suboxone, 64 F. Supp. 3d at 699-700](#). **HN53**[] However, the EPPs are proceeding under the statute's "unfair methods of competition" prong which encompasses antitrust violations and avoids the heightened pleading standard applicable to the fraud prong. [See Processed Egg Prods., 851 F. Supp. 2d at 900](#). The court should therefore DENY Defendants' motion to dismiss on this basis.

#### **h. Tennessee's class-action bar does not apply in federal court.**

Defendants contend that Tennessee's [\*110] consumer protection statute does not permit class actions. [See Tenn. Code Ann. § 47-18-109\(a\)\(1\)](#) ("Any person who suffers an ascertainable loss ... may bring an action individually to recover actual damages."). The EPPs argue that to the extent this statute prohibits class actions, it must yield to [Rule 23](#) under [Shady Grove](#).

This Report has already recommended dismissal of the EPPs' Tennessee consumer protection claims on alternative grounds.<sup>24</sup> The [Shady Grove](#) issue remains unsettled, but as discussed above, these procedural restrictions appear to conflict with [Rule 23](#). This Report therefore recommends the court DENY Defendants' motion to dismiss the EPPs' Tennessee consumer protection claims on this basis.

#### **i. Consumer protection claims - Summary of recommended action.**

For the foregoing reasons, this Report recommends that the court GRANT Defendants' motion and DISMISS the EPPs' consumer protection claims in the following jurisdictions: Arkansas, Idaho, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, New York, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont, and the District of Columbia. For claims which may be affected by the addition of tag along cases, the definition of the

<sup>22</sup> See [Mass. Gen. Laws ch. 93A, § 9](#); [W. Va. Code § 46A-6-106\(c\)](#).

<sup>23</sup> Record of this notice may be found in MDL Member Case No. 4:18cv108, ECF No. 54-6. The EPPs sent the letter slightly less than two months after filing suit.

<sup>24</sup> See [supra](#) section V.D.5.C.

class, or more specific [\*111] evidence of deception not yet pled, the Report recommends without-prejudice dismissals as noted. The court should DENY Defendants' motion to dismiss the consumer protection claims in the remaining jurisdictions. A summary of the recommended disposition of all the EPP claims is included as Exhibit A.

## **6. The EPPs' state unjust enrichment claims should be dismissed in some jurisdictions and allowed in others.**

Finally, the EPPs assert common-law unjust enrichment claims under the laws of thirty-seven states and the District of Columbia. Defendants renew their general objections to these claims and assert additional grounds for dismissal applicable to some or all. As with the previous sections, this Report will address each dismissal argument by category and by state as necessary. A summary follows and is reflected in Exhibit A.

### **a. The EPPs' Complaint satisfies the [Rule 8](#) pleading requirement for unjust enrichment.**

Defendants' initial challenge, applicable to every jurisdiction where the EPPs have asserted unjust enrichment claims, contends that the EPPs have not adequately pled their claims under [Rule 8](#). Defendants argue that the EPPs have only "pled" unjust enrichment claims by alleging facts aimed at [\*112] antitrust violations and then stating, in conclusory fashion, that such facts are also actionable as unjust enrichment. Cf. [Aggrenox, 94 F. Supp. 3d at 254-56](#) (dismissing all state unjust enrichment claims without prejudice for failure to satisfy [Rule 8](#)). The EPPs argue in response that their Complaint broadly satisfies the elements for state unjust enrichment claims, which are "materially the same throughout the United States." [Singer v. AT&T Corp., 185 F.R.D. 681, 692 \(S.D. Fla. 1998\)](#).

**HN54** [↑] At minimum, an unjust enrichment plaintiff must ordinarily allege receipt of a benefit by the defendant at plaintiff's expense and "that it would be inequitable or unjust for defendant to accept and retain the benefit." [Flonase II, 692 F. Supp. 2d at 541](#). Examining the allegations in the EPPs' Complaint as a whole and drawing all reasonable inferences in their favor, I find that they have adequately pled the necessary elements of common-law unjust enrichment. Cf. [In re Automotive Parts Antitrust Litig., 29 F. Supp. 3d 982, 1014-15 \(E.D. Mich. 2014\)](#) (declining to dismiss all unjust enrichment claims for conclusory pleading because "the Court does not read these allegations in isolation, but in light of all of the factual allegations in the complaints"). The EPPs allege that Defendants unlawfully maintained monopoly pricing on ezetimibe products and unjustly reaped extraordinarily increased profits at the expense of [\*113] the EPPs, who paid supracompetitive prices for those products for five years. Although the portion of the Complaint asserting unjust enrichment is somewhat conclusory, it incorporates by reference the extensive factual allegations that precede it. EPP Compl. ¶ 360 (ECF No. 130 at 105). Requiring recharacterization of every allegation into an unjust enrichment framework would create needlessly repetitive pleading. And conclusory pleading is to some degree unavoidable, given that an element of unjust enrichment is the character of the defendants' actions, not simply the actions themselves. This Report therefore recommends that Defendants' motion to dismiss all unjust enrichment claims for inadequate pleading be DENIED.

### **b. The EPPs cannot rely on common-law unjust enrichment to circumvent [Illinois Brick](#).**

Several of the jurisdictions in which the EPPs assert unjust enrichment claims follow the [Illinois Brick](#) rule precluding antitrust claims by indirect purchasers. Defendants argue that allowing unjust enrichment claims premised on antitrust violations in these jurisdictions circumvents state policy against indirect purchaser antitrust actions.

Although the EPPs cite some authority in their [\*114] favor, the clear majority view favors Defendants on this point. See, e.g., [Lidoderm I, 74 F. Supp. 3d at 1088-90](#) ("I agree with the majority of courts who have directly addressed this issue and find that the EPPs cannot circumvent the [Illinois Brick](#) prohibition absent authority from the courts of those states that would allow unjust enrichment claims to proceed."); [DDAVP, 903 F. Supp. 2d at 231-33](#). The EPPs' few cited cases disagree with the general proposition but offer little in the way of state authority to contradict

it.<sup>25</sup> Accordingly, this court should DISMISS with prejudice the EPPs' unjust enrichment claims in the following states: Alaska, Arkansas, Colorado, Connecticut, Maryland, Massachusetts, Missouri, Montana, and South Carolina.

**c. The EPPs' allegations do not satisfy the direct benefit requirement under some states' unjust enrichment laws.**

**HN55** In some states, plaintiffs pursuing unjust enrichment claims must demonstrate that they conferred the unjust benefit directly on the defendant. Because the EPPs as a class did not deal directly with any Defendant, they may not advance an "indirect" unjust enrichment theory in states following this rule. The court should therefore DISMISS with prejudice the EPPs' [\*115] unjust enrichment claims in the following states on the authority cited:

- **Florida.** See [Kopel v. Kopel, 229 So. 3d 812, 818 \(Fla. 2017\)](#) ("[T]o prevail on an unjust enrichment claim, the plaintiff must directly confer a benefit to the defendant.").
- **Idaho.** See [Lincoln Land Co. v. LP Broadband, Inc., 163 Idaho 105, 408 P.3d 465 \(Idaho 2017\)](#); [Stevenson v. Windermere Real Estate/Capital Grp., Inc., 152 Idaho 824, 275 P.3d 839, 842-44 \(Idaho 2012\)](#).
- **Michigan.** See [Fenerjian v. Nongshim Co., 72 F. Supp. 3d 1058, 1086-88 \(N.D. Cal. 2014\)](#) (analyzing state cases and concluding that indirect unjust enrichment claims are not permitted under Michigan law). The EPPs' cited cases find less support in state authority.

Defendants challenge claims in five additional states, which they claim require a direct benefit to impose unjust enrichment liability. However, this Report concludes that indirect unjust enrichment claims are permitted in those states. **HN56** The court should therefore DENY Defendants' motion to dismiss the EPPs' unjust enrichment claims in the following states on the authority noted:

- **Kansas.** See [Automotive Parts, 29 F. Supp. 3d at 1019-20](#) ("[T]here is no element [in Kansas unjust enrichment law] requiring that the benefit flow directly from the plaintiff to the defendants."). Cases reaching the opposite conclusion frequently rely on the Kansas Supreme Court's decision in [Haz-Mat Response, Inc. v. Certified Waste Servs. Ltd., 259 Kan. 166, 910 P. 2d 839 \(Kan. 1996\)](#). But Haz-Mat Response involved complicated factual issues and did not conclusively hold that indirect unjust enrichment claims cannot proceed under Kansas law. [\*116] The case examined whether a plaintiff subcontractor hired by a prime contractor to do work on the defendant property owner's property could recover from the property owner via unjust enrichment when the prime contractor failed to pay the subcontractor. The court held that on the facts of the case, plaintiffs had not demonstrated "special circumstances" showing the defendant inequitably retained a benefit from the plaintiff when it reasonably should have known the plaintiff expected to be compensated. See [id. at 847-48](#).
- **Maine.** See [In re Opana ER Antitrust Litig., No. 14C10150, 2016 U.S. Dist. LEXIS 105915, 2016 WL 4245516, at \\*2-3 \(N.D. 111. Aug. 11, 2016\)](#) (sustaining indirect unjust enrichment theory and observing that "[t]he critical inquiry is whether the Defendants received a benefit at EPPs' expense").
- **New York.** **HN57** Plaintiffs need not plead "direct dealing" or an "actual substantive relationship" with the defendant. The only requirement is that the connection between plaintiff and defendant not be "too attenuated." See [Sperry v. Crompton Corp., 8 N.Y.3d 204, 215-16, 863 N.E.2d 1012, 831 N.Y.S.2d 760 \(N.Y. 2007\)](#).

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<sup>25</sup> This Report rejected similar Illinois Brick-circumvention challenges to consumer protection claims in some jurisdictions, but did so because state authority made clear that those claims were independently actionable or otherwise not barred by Illinois Brick. By contrast, little if any state authority exists to support common-law unjust enrichment claims by indirect purchasers alleging antitrust injury in jurisdictions following Illinois Brick.

• **North Carolina.** See [Processed Egg Prods., 851 F. Supp. 2d at 930-32](#) (concluding that North Carolina Supreme Court precedent embraces an "expansive view of unjust enrichment and the role or particulars of the conferral of a benefit element" (citing [Embree Const. Grp., Inc. v. Rafcor, Inc., 330 N.C. 487, 411 S.E.2d 916 \(N.C. 1992\)](#))).

• **North Dakota.** See [Automotive Parts, 29 F. Supp. 3d at 1025](#) (sustaining indirect purchaser unjust enrichment [\*117] claim).

**d. The EPPs may plead unjust enrichment in the alternative.**

Finally, Defendants claim that the EPPs' unjust enrichment claims fail in Alabama, Hawaii, and Massachusetts because their Complaint alleges adequate remedies at law. But [Rule 8](#) explicitly permits pleading in the alternative, and the EPPs' Consolidated Complaint does just that. [Fed. R. Civ. P. 8\(d\)\(2\)](#); EPP Compl. ¶ 361 (ECF No. 130 at 105). The court should therefore DENY Defendants' motion to dismiss on this basis.

**e. Unjust Enrichment - Summary of recommended action.**

For the foregoing reasons, this Report recommends the court GRANT Defendants' motion and DISMISS with prejudice the EPPs' unjust enrichment claims in Alaska, Arkansas, Colorado, Connecticut, Florida, Idaho, Maryland, Massachusetts, Michigan, Missouri, Montana, and South Carolina. The court should DENY Defendants' motion to dismiss the EPPs' unjust enrichment claims in the remaining jurisdictions. Exhibit A summarizes the recommended disposition for all of the EPP claims.

**Conclusion**

For the reasons described above, the court should DENY the Defendants' Motion to Dismiss the DPPs' Consolidated Complaint (ECF No. 157). The court should GRANT IN PART and DENY IN PART the Defendants' Motion [\*118] to Dismiss the Retailers Complaints (ECF No. 160), denying the motion with respect to the Retailers' [§ 1](#) Sherman Act claim under the rule of reason (Count 2), and Retailers' [§ 2](#) Sherman Act claims (Count 3), but GRANTING the Motion with respect to Retailers' claims of a per se violation under [§ 1](#) (Count 1) and their request for injunctive relief.

Finally, this Report recommends the court GRANT IN PART and DENY IN PART Defendants' Motion to Dismiss the EPPs' claims, (ECF No. 162). The court should GRANT the Motion with respect to all claims asserted under the laws of Alaska, Arkansas, Colorado, Connecticut, Idaho, Maryland, Massachusetts, Missouri, Montana and South Carolina. With respect to the claims asserted under the laws of the remaining thirty jurisdictions, this Report's recommended dispositions are summarized in the attached Exhibit A. The state law claims remaining in those jurisdictions, should the court adopt the recommendation, are set forth on the attached Exhibit B.

**Review Procedure**

By copy of this Report and recommendation, the parties are notified that pursuant to [28 U.S.C. § 636\(b\)\(1\)\(C\)](#):

1. Any party may serve upon the other party and file with the Clerk written objections to the foregoing findings and [\*119] recommendations within fourteen (14) days from the date of service of this Report on the objecting party, see [28 U.S.C. § 636\(b\)\(1\)](#), computed pursuant to [Rule 6 \(a\) of the Federal Rules of Civil Procedure](#). A party may respond to any other party's objections within fourteen (14) days after being served with a copy thereof. See [Fed. R. Civ. P. 72\(b\)\(2\)](#) (also computed pursuant to [Rule 6\(a\) of the Federal Rules of Civil Procedure](#)).

2. A district judge shall make a de novo determination of those portions of this Report or specified findings or recommendations to which objection is made.

The parties are further notified that failure to file timely objections to the findings and recommendations set forth above will result in a waiver of appeal from a judgment of this Court based on such findings and recommendations.

[Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 \(1985\)](#); [Carr v. Hutto, 737 F.2d 433 \(4th Cir. 1984\)](#); [United States v. Schronce, 727 F.2d 91 \(4th Cir. 1984\)](#).

/s/ Douglas E. Miller

DOUGLAS E. MILLER,

UNITED STATES MAGISTRATE JUDGE

February 6, 2019

**EXHIBIT A -- In re Zetia (Ezetimibe) Antitrust Litig., MDL No. 2:18-md-2836**

**Summary of Recommended Dispositions of End-Payor Plaintiff Claims**

Jurisdiction	Antitrust	Consumer Protection	Unjust Enrichment
Alabama	NO CLAIM	NO CLAIM	SUSTAIN
Alaska	NO CLAIM	NO CLAIM	DISMISS
Arizona	SUSTAIN	SUSTAIN	SUSTAIN
Arkansas	NO CLAIM	DISMISS	DISMISS
California	DISMISS § 17200 ONLY	SUSTAIN	SUSTAIN
Colorado	NO CLAIM	NO CLAIM	DISMISS
Connecticut	NO CLAIM	NO CLAIM	DISMISS
District of [*120] Columbia	SUSTAIN	DISMISS	SUSTAIN
Florida	NO CLAIM	SUSTAIN	DISMISS
Hawaii	SUSTAIN	SUSTAIN	SUSTAIN
Idaho	NO CLAIM	DISMISS	DISMISS
Illinois	SUSTAIN	SUSTAIN	SUSTAIN
Iowa	SUSTAIN	NO CLAIM	SUSTAIN
Kansas	SUSTAIN	DISMISS	SUSTAIN
Maine	SUSTAIN	DISMISS	SUSTAIN
Maryland	NO CLAIM	NO CLAIM	DISMISS
Massachusetts	NO CLAIM	DISMISS	DISMISS
Michigan	SUSTAIN	DISMISS	DISMISS
Minnesota	SUSTAIN	DISMISS	SUSTAIN
Mississippi	SUSTAIN	NO CLAIM	SUSTAIN
Missouri	NO CLAIM	DISMISS	DISMISS
Montana	NO CLAIM	NO CLAIM	DISMISS
Nebraska	SUSTAIN	SUSTAIN	SUSTAIN
Nevada	SUSTAIN	SUSTAIN	SUSTAIN
New Hampshire	SUSTAIN	SUSTAIN	SUSTAIN
New Mexico	SUSTAIN	SUSTAIN	SUSTAIN
New York	SUSTAIN	DISMISS	SUSTAIN
North Carolina	SUSTAIN	SUSTAIN	SUSTAIN
North Dakota	SUSTAIN	NO CLAIM	SUSTAIN
Oregon	SUSTAIN	DISMISS	SUSTAIN
Puerto Rico	SUSTAIN	NO CLAIM	NO CLAIM
Rhode Island	SUSTAIN	DISMISS	SUSTAIN
South Carolina	NO CLAIM	NO CLAIM	DISMISS
South Dakota	SUSTAIN	DISMISS	SUSTAIN

**Summary of Recommended Dispositions of End-Payor Plaintiff Claims**

Jurisdiction	Antitrust	Consumer Protection	Unjust Enrichment
Tennessee	SUSTAIN	DISMISS	SUSTAIN
Utah	SUSTAIN	DISMISS	SUSTAIN
Vermont	NO CLAIM	DISMISS	SUSTAIN
Virginia	NO CLAIM	SUSTAIN	NO CLAIM
West Virginia	SUSTAIN	SUSTAIN	SUSTAIN
Wisconsin	SUSTAIN	NO CLAIM	SUSTAIN

"SUSTAIN" means this Report recommends DENYING Defendants' motion to dismiss that claim.

"DISMISS" means this Report recommends GRANTING Defendants' motion to dismiss that claim.

"NO CLAIM" means Plaintiffs [\*121] are not asserting that type of claim in the jurisdiction.

**EXHIBIT B -- In re Zetia (Ezetimibe) Antitrust Litig., MDL No. 2:18-md-2836**

**The following table lists the jurisdictions in which this Report recommends GRANTING Defendants' Motion to Dismiss as to ALL EPP claims:**

Alaska

Arkansas

Colorado

Connecticut

Idaho

Maryland

Massachusetts

Missouri

Montana

South Carolina

**The following table lists all of the EPPs' claims (by jurisdiction) as to which this Report recommends DENYING Defendants' Motion to Dismiss:**

Alabama			Unjust Enrichment
Arizona	Antitrust	Consumer Protection	Unjust Enrichment
California	Antitrust(*)	Consumer Protection	Unjust Enrichment
District of Columbia	Antitrust		Unjust Enrichment
Florida		Consumer Protection	
Hawaii	Antitrust	Consumer Protection	Unjust Enrichment
Illinois	Antitrust	Consumer Protection	Unjust Enrichment
Iowa	Antitrust		Unjust Enrichment
Kansas	Antitrust		Unjust Enrichment
Maine	Antitrust		Unjust Enrichment
Michigan	Antitrust		
Minnesota	Antitrust		Unjust Enrichment

**The following table lists all of the EPPs' claims (by jurisdiction) as to which this Report recommends DENYING Defendants' Motion to Dismiss:**

Mississippi	Antitrust		Unjust Enrichment
Nebraska	Antitrust	Consumer Protection	Unjust Enrichment
Nevada	Antitrust	Consumer Protection	Unjust Enrichment
New Hampshire	Antitrust	Consumer Protection	Unjust Enrichment
New Mexico	Antitrust	Consumer Protection	Unjust Enrichment [*122]
New York	Antitrust		Unjust Enrichment
North Carolina	Antitrust	Consumer Protection	Unjust Enrichment
North Dakota	Antitrust		Unjust Enrichment
Oregon	Antitrust		Unjust Enrichment
Puerto Rico	Antitrust		
Rhode Island	Antitrust		Unjust Enrichment
South Dakota	Antitrust		Unjust Enrichment
Tennessee	Antitrust		Unjust Enrichment
Utah	Antitrust		Unjust Enrichment
Vermont			Unjust Enrichment
Virginia		Consumer Protection	
West Virginia	Antitrust	Consumer Protection	Unjust Enrichment
Wisconsin	Antitrust		Unjust Enrichment

(\*) The EPPs' monopolization claim under Cal. Bus. & Prof. Code § 17200 should be DISMISSED.

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## Premier Comp Sols. LLC v. UPMC

United States District Court for the Western District of Pennsylvania

February 7, 2019, Decided; February 7, 2019, Filed

2:15cv703

### **Reporter**

2019 U.S. Dist. LEXIS 19814 \*; 2019-1 Trade Cas. (CCH) P80,667; 2019 WL 480480

PREMIER COMP SOLUTIONS LLC, Plaintiff, v. UPMC, a Pennsylvania nonprofit non-stock corporation, UPMC BENEFIT MANAGEMENT SERVICES, INC., d/b/a UPMC WORKPARTNERS, UPMC HEALTH BENEFITS, INC., d/b/a UPMC WORKPARTNERS, and MCMC, LLC, a wholly-owned subsidiary of York Risk Management, Defendants.

**Prior History:** [Premier Comp Solutions LLC v. UPMC, 163 F. Supp. 3d 268, 2016 U.S. Dist. LEXIS 19785 \(W.D. Pa., Feb. 18, 2016\)](#)

## **Core Terms**

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antitrust, reliability, methodology, expert testimony, markets, motion to exclude, qualifications, scientific, workers' compensation, expert witness, trade secret, good ground, healthcare, economist, expertise, training, argues

**Counsel:** [\*1] For Premier Comp Solutions, Llc, Plaintiff: Stanley M. Stein, LEAD ATTORNEY, Stanley M. Stein, PC, Pittsburgh, PA USA; Jeffrey S. Jacobovitz, PRO HAC VICE, Arnall Golden Gregory LLP, Washington, DC USA.

For Upmc, a Pennsylvania nonprofit non-stock corporation, Defendant: Daniel K. Oakes, Richard B. Dagen, LEAD ATTORNEYS, Axinn, Veltrop and Harkrider, Washington, DC USA; Thomas G. Rohback, Axinn, Veltrop & Harkrider, LLP, Hartford, CT USA.

For Upmc Benefit Management Services, Inc., doing business as UPMC WORKPARTNERS, Upmc Health Benefits, Inc., doing business as UPMC WORKPARTNERS, Defendants: Daniel K. Oakes, Richard B. Dagen, LEAD ATTORNEYS, PRO HAC VICE, Axinn, Veltrop and Harkrider, Washington, DC USA; Peter S. Wolff, Pietragallo Gordon Alfano Bosick & Raspanti, LLP, Pittsburgh, PA USA; Thomas G. Rohback, Axinn, Veltrop & Harkrider, LLP, Hartford, CT USA.

For Mcmc, Llc, a wholly-owned subsidiary of York Risk Management, Defendant: Curtis M. Schaffner, Paul S. Mazeski, Stephenie G. Anderson, Buchanan Ingersoll & Rooney PC, Pittsburgh, PA USA.

**Judges:** David Stewart Cercone, United States District Judge.

**Opinion by:** David Stewart Cercone

## **Opinion**

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### **MEMORANDUM OPINION**

### **Electronic Filing**

## I. INTRODUCTION

Plaintiff, Premier Comp [\*2] Solutions, LLC ("Premier" or "Plaintiff") initiated this action by filing a seven (7) count Complaint against Defendants, UPMC ("UPMC"), UPMC Benefit Management Services, Inc. ("UPMC-BMS"), UPMC Health Benefits, Inc.<sup>1</sup> ("UPMC-HB") (collectively the "UPMC Defendants"), and MCMC, LLC ("MCMC") (collectively the "Defendants") alleging violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 et seq., violation of Section 12 of the Clayton Act, 15 U.S.C. § 22, and common law Unfair Competition. Premier has filed a Motion *in Limine* to Exclude UPMC Expert Witness Dr. David Reitman (**Document No. 258**) and the UPMC Defendants have filed a Motion to Exclude the Testimony of Dr. Joseph P. Fuhr (**Document No. 272**). The parties have responded and the motions are now before the Court.

The UPMC Defendants identified Dr. David Reitman ("Dr. Reitman") as their economics expert, who intends to offer the following opinions:

1. Dr. Joseph P. Fuhr, Premier's expert witness, has failed to lay out a coherent theory of antitrust harm, including a failure to properly define relevant antitrust markets, to assess monopoly power, and to describe a theory of harm to competition.
2. UPMC does not have monopoly power or a dangerous probability of acquiring monopoly power [\*3] in any of the relevant product markets identified by Plaintiff.
3. UPMC had neither the incentive nor the ability to monopolize those product markets or specifically to exclude Premier from those markets.
4. UPMC's actions at the core of Plaintiff's allegations of anticompetitive conduct, namely requesting additional information from Premier and switching from Premier to MCMC and Align for cost containment services, were done for procompetitive reasons: lowering costs and monitoring performance.

Premier argues that Dr. Reitman's opinions are without basis and are unreliable because Dr. Reitman lacks the knowledge, skill, experience, training, or education to render any opinion concerning the economic operation or incentives in the workers' compensation insurance or health care markets. Further, Premier contends that Dr. Reitman lacks the requisite expertise to provide an opinion concerning whether the theft of trade secrets from Premier had an anticompetitive effect in any of the relevant markets.

Premier identified Dr. Joseph P. Fuhr, Jr. ("Dr. Fuhr"), an economist with experience in analyzing antitrust issues in healthcare markets, as its expert. Dr. Fuhr produced a ten (10) page report [\*4] which the UPMC Defendants contend "contains no relevant economic analysis, no acceptable methodology and no legitimate support for any of the few antitrust-related opinions expressed therein. Specifically, the UPMC argues that Dr. Fuhr's testimony must be excluded because:

- (1) Dr. Fuhr failed to adequately define any plausible relevant product market based on data or analysis;
- (2) The totality of Dr. Fuhr's geographic market definition opinion consists of one line: "The geographic market for each relevant product market is no larger than Western PA," but contains no citation, no theoretical or empirical support, and no methodology;
- (3) Dr. Fuhr provides no analysis of whether UPMC has market or monopoly power;
- (4) Dr. Fuhr failed to opine that PCS was substantially foreclosed from any market, one of the requirements necessary to establish PCS's claims; and
- (5) Dr. Fuhr did not find any anticompetitive effects on the market as a whole, but only considered PCS's loss of WorkPartners' customers.

## III. DISCUSSION

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<sup>1</sup> Both UPMC-BMS and UPMC-HB do business as UPMC WorkPartners ("WorkPartners"). Amended Complaint ("Am. Compl.") ¶¶ 17 & 18.

The motions before the Court implicate the admissibility standard for expert witnesses under [Rule 702 of the Federal Rules of Evidence](#) as elucidated by the Supreme Court in [Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 \(1993\)](#). In *Daubert*, the Supreme Court set forth parameters [\*5] for determining when proffered expert testimony can be admitted into evidence. The Court held:

Proposed testimony must be supported by appropriate validation -- *i.e.*, "good grounds," based on what is known. In short, the requirement that an expert's testimony pertaining to "scientific knowledge" establishes a standard of evidentiary reliability.

[Daubert, 509 U.S. at 590](#). The Court concluded that [Rule 702](#) "clearly contemplates some degree of regulation of the subjects about which an expert may testify." [509 U.S. at 589](#). Thus, the Court established a "gatekeeping role for the judge." [Id. at 597](#). The Court wrote:

Faced with a proffer of expert scientific testimony, . . . the trial judge must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

[Id. at 592-593](#). Moreover, the Third Circuit has established that [Rule 702](#) includes "three distinct substantive restrictions on the admission of expert testimony: qualifications, reliability [\*6] and fit." [United States v. Mathis, 264 F.3d 321, 335 \(3d Cir. 2001\)](#); [Elcock v. Kmart Corp., 233 F.3d 734, 741 \(3d Cir. 2000\)](#).

First, the witness must be a qualified expert, meaning that the witness must possess specialized expertise. [Feit v. Great-West Life & Annuity Ins. Co., 460 F. Supp. 2d 632, 636 \(D.N.J. 2006\)](#). Courts have interpreted this requirement liberally, holding that a broad range of knowledge, skills, and training qualify an expert. [In re TMI Litig., 193 F.3d 613, 664 \(3d Cir. 1999\)](#).

Second, [Rule 702](#) requires that the testimony be reliable. The Supreme Court instructed that an "expert's opinion must be based on the 'methods and procedures of science' rather than on 'subjective belief or unsupported speculation;' the expert must have 'good grounds' for his or her belief." [In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 742 \(3d Cir. 1994\)](#), cert. denied, 513 U.S. 1190, 115 S. Ct. 1253, 131 L. Ed. 2d 134 (1995) (quoting [Daubert, 509 U.S. at 590](#)). The Court emphasized, however, that the "focus . . . must be solely on principles and methodology, not on the conclusions they generate." [Daubert, 509 U.S. at 595](#). The issue, therefore, is whether the evidence should be excluded because the flaw is large enough that the expert lacks good grounds for his or her conclusion. [In re Paoli R.R. Yard PCB Litigation, 35 F.3d at 746](#). Further, an "expert's testimony must be accompanied by a sufficient factual foundation before it can be submitted to the jury." [Elcock v. Kmart Corp., 233 F.3d at 754](#).

*Daubert* identified several factors which a district court should take into account in evaluating whether a particular scientific methodology is reliable. [In re Paoli R.R. Yard PCB Litigation, 35 F.3d at 742](#). The factors that *Daubert* and the Third Circuit [\*7] have declared important include: (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put. [In re Paoli R.R. Yard PCB Litigation, 35 F.3d at 742 n.8](#). See also [Oddi v. Ford Motor Co., 234 F.3d 136, 145 \(3d Cir. 2000\)](#), cert. denied, 532 U.S. 921, 121 S. Ct. 1357, 149 L. Ed. 2d 287 (2001); [Elcock v. Kmart Corp., 233 F.3d at 745-746](#); [In re TMI Litig., 193 F.3d 613, 664 \(3d Cir. 1999\)](#).

*Daubert* makes clear that these factors do not constitute a "definitive checklist or test." [Daubert, 509 U.S. at 593](#). A court's gatekeeping inquiry must be "tied to the facts" of a particular "case." [Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150, 119 S. Ct. 1167, 143 L. Ed. 2d 238 \(1999\)](#). "Whether *Daubert*'s specific factors are, or are not,

reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." *Id. at 153.*

Moreover, the court's role as a gatekeeper "is not intended to serve as a replacement for the adversary system." See *Crowley v. Chait*, 322 F. Supp. 2d 530, 536 (D. N. J. 2004) quoting *Fed. R. Evid. 702*, Advisory Committee's Note. The *Daubert* Court recognized that jurors will have the capacity to distinguish "junk science" [\*8] from the real thing. Accordingly, where an expert is expected to deliver "shaky" testimony, admission of the testimony may still be proper because "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596. The Third Circuit further commented on the reliability notion of *Daubert*, stating:

The evidentiary requirement of reliability is lower than the merits standard of correctness. Further, a court may determine that "good grounds" exist for the expert opinion to be offered, even though the judge may believe "better grounds" exist for an alternate conclusion or that a somewhat flawed methodology, if fixed, would lead to a different conclusion.

*Allstate Ins. Co. v. Hamilton Beach/Proctor-Silex, Inc.*, 2008 U.S. Dist. LEXIS 63355 \*12 (W.D. Pa. Aug. 19, 2008) (citing *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d at 744).

Finally, the expert's testimony must "fit" or "be relevant for the purposes of the case and must assist the trier of fact." *Calhoun v. Yamaha Motor Corp., U.S.A.*, 350 F.3d 316, 321 (3d Cir. 2003) (quoting *Schneider v. Fried*, 320 F.3d 396, 405 (3d Cir. 2003)). The touchstone for admissibility under *Rule 702*, is helpfulness to the trier of fact. *Fed. R. Evid. 702 (a)*. However, while the standard for fitness is higher than bare relevance, it is not that high. *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d at 745. In order to assist the trier of fact in understanding the evidence or in determining an issue [\*9] of fact, the scientific or other specialized knowledge must be logically connected to the questions at issue in the case. *Id. at 742-743*. In contrast, expert testimony based on assumptions that lack any factual support in the record are properly excluded. *Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 414 (3d Cir. 2002); *Elcock v. Kmart Corp.*, 233 F.3d at 756 n.13.

The proponent of the expert testimony bears the burden of establishing the reliability and admissibility of the expert's testimony by a preponderance of the evidence. See *Daubert*, 509 U.S. at 593 n. 10; *In re TMI Litig.*, 193 F.3d at 663. Moreover, *Rule 702* embodies a liberal policy of admissibility. *Pineda v. Ford Motor Co.*, 520 F.3d 237, 243 (3d Cir. 2008); *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 857 (3d Cir. 1990).

#### A. Dr. Reitman

Premier argues that Dr. Reitman is not qualified to offer expert opinions in this action because he lacks "appreciable background, experience or education" in the workers' compensation and health care industries, as well as in the area of trade secrets. Specifically, Premier contends that Dr. Reitman lacks qualifications and expertise regarding:

- (1) the unique economic incentives built in the workers' compensation insurance industry and the specialized market for cost containment in the industry;
- (2) whether the misappropriation of trade secrets can constitute an antitrust violation; and
- (3) a vertically integrated health care organization which includes a health care provider and a workers' compensation [\*10] cost containment entity.

Dr. Reitman is being presented by the UPMC Defendants as an expert in antitrust economics. He has a Master's Degree in Economics from Stanford University and a Ph.D. from Stanford in Decision Sciences, an interdisciplinary program that includes elements of both economics and operations management. Dr. Reitman was an Assistant Professor of Economics at Ohio State University for approximately nine (9) years, and he was employed as an economist at the Department of Justice Antitrust Division for ten (10) years. Moreover, while at the Department of Justice, Dr. Reitman worked on numerous cases involving health care products and health insurance, including insurer mergers and health insurance monopolization claims. Further, some of Dr. Reitman's cases at the Department of Justice involved vertical issues in the health care industry.

Dr. Reitman has testified on behalf of the Department of Justice in its successful lawsuit alleging that a company monopolized the market for denture teeth in the U.S. through the use of exclusionary conduct. [United States v. Dentsply International, Inc.](#), 277 F. Supp. 2d 387 (D. Del. 2003), rev'd and remanded, 399 F.3d 181 (3d Cir. 2005). Dr. Reitman has also provided testimony, or has been retained as an expert in, other monopolization cases [\*11] involving allegations of exclusionary conduct, including restrictions on dealers or other complementary service providers.

As set forth above, a qualified expert must possess specialized expertise. *Feit v. Great-West Life & Annuity Ins. Co.*, 460 F. Supp. 2d 632, 636 (D.N.J. 2006). Courts have interpreted this requirement liberally, holding that a broad range of knowledge, skills, and training qualify an expert. [In re TMI Litig.](#), 193 F.3d 613, 664 (3d Cir. 1999). While specialized knowledge is a requirement, the basis of such knowledge can be "practical experience as well as academic training and credentials." [Betterbox Commc'n's Ltd. v. BB Techs., Inc.](#), 300 F.3d 325, 328 (3d Cir. 2002) (noting that the specialized knowledge requirement has been construed "liberally").

The Court finds, therefore, that Dr. Reitman is indeed qualified to opine on the issues involved in this matter. The Court agrees that experience in the workers' compensation insurance industry is of no moment. Dr. Reitman's academic qualifications and experience as an antitrust economist certainly gives him the ability to analyze the relevant antitrust market or markets at issue here. Further, Premier's contention that Dr. Reitman should be precluded from opining on whether certain information was a trade secret is without merit. In his antitrust analysis, Dr. Reitman accepts the premise that compilation of data, which Premier [\*12] contends was misappropriated by the Defendants, were trade secrets. Dr. Reitman acknowledged that such a theft could, "under certain conditions," constitute an antitrust violation but opined that such circumstances were not present in this case.

Premier argues that Dr. Reitman's opinions are unreliable, based on speculation, because of his lack of appropriate qualifications and experience. This Court has found that Dr. Reitman is qualified as an antitrust economist and, therefore, Premier's contention is without merit. Accordingly, Premier's motion to exclude Dr. Reitman's testimony will be denied.

#### B. Dr. Fuhr

The UPMC Defendants do not challenge Dr. Fuhr's qualifications, but contend that his testimony must be excluded because Dr. Fuhr's report contains no relevant economic analysis, no acceptable methodology and no legitimate support for any of the few antitrust-related opinions he expresses.

The court's role as a gatekeeper "is not intended to serve as a replacement for the adversary system." See [Crowley v. Chait](#), 322 F. Supp. 2d 530, 536 (D. N. J. 2004) quoting [Fed. R. Evid. 702](#), Advisory Committee's Note. The *Daubert* Court recognized that jurors will have the capacity to distinguish "junk science" from the real thing. Accordingly, where an expert is expected [\*13] to deliver "shaky" testimony, admission of the testimony may still be proper because "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." [Daubert](#), 509 U.S. at 596. The Third Circuit further commented on the reliability notion of *Daubert*, stating:

The evidentiary requirement of reliability is lower than the merits standard of correctness. Further, a court may determine that "good grounds" exist for the expert opinion to be offered, even though the judge may believe "better grounds" exist for an alternate conclusion or that a somewhat flawed methodology, if fixed, would lead to a different conclusion.

[Allstate Ins. Co. v. Hamilton Beach/Proctor-Silex, Inc.](#), 2008 U.S. Dist. LEXIS 63355 \*12 (W.D. Pa. Aug. 19, 2008) (citing [In re Paoli R.R. Yard PCB Litigation](#), 35 F.3d at 744). A district court is not obligated to accept an expert's legal conclusion, [Dalberth v. Xerox Corp.](#), 766 F.3d 172, 189 (2d Cir. 2014), nor should a court "impermissibly weigh[] expert evidence by picking out "potential flaws." [Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.](#), 998 F.2d 1224, 1241 (3d Cir. 1993).

Premier argues that Dr. Fuhr's expert report is not as lengthy or detailed as the report of the UPMC Defendant's expert, however neither the brevity of the Dr. Fuhr's report, nor his arguably limited or summary-like opinions,

require that his testimony be excluded. Dr. Fuhr should be allowed [\*14] to testify based on his extensive relevant experience and his commonsense application of his expertise to the issues in dispute. Moreover, Premier contends that, because of Dr. Fuhr's training and experience as a health care economist, his testimony will be helpful to the jury.

The Court, having read Dr. Fuhr's report, finds it to be a rather elementary, commonsense approach to matters at issue in this case. Such approach will be helpful to the jury in understanding certain aspects of the litigation, though it may do little in helping Premier prove the elements required to establish an antitrust violation. The Court agrees that the report lacks empirical data, however, we cannot say that Dr. Fuhr's opinions are not based on "good grounds" nor can his report be labeled "junk science."

Ultimately, Dr. Fuhr must defend his opinions under cross-examination, the presentation of the opinions of Dr. Reitman, and this Court's instruction on the elements of antitrust law and the burden of proof. The perceived failings of Dr. Fuhr's report are real, however, they do not rise to a level that requires exclusion. The motion to exclude Dr. Fuhr's testimony will be denied.

An appropriate Order follows. [\*15]

Cercone, J.

#### ORDER OF COURT

AND NOW, this 7th day of February, 2019, upon consideration of the Motion *in Limine* to Exclude UPMC Expert Witness Dr. David Reitman (**Document No. 258**) filed on behalf of Plaintiff and the Motion to Exclude the Testimony of Dr. Joseph P. Fuhr (**Document No. 272**) filed on behalf of the UPMC Defendants, the responses thereto, and the briefs filed in support thereof, in accordance with Memorandum Opinion filed herewith,

IT IS HEREBY ORDERED that Plaintiff's motion to exclude Dr. Reitman is **DENIED**. The UPMC Defendants' motion to exclude Dr. Fuhr is also **DENIED**.

/s/ DAVID STEWART CERCONNE

David Stewart Cercone

United States District Judge

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## Sims v. Inch

United States District Court for the Southern District of Florida

February 12, 2019, Decided; February 12, 2019, Entered on Docket

CASE NO.: 18-14443-CV-MARTINEZ

**Reporter**

2019 U.S. Dist. LEXIS 23589 \*

DURELL SIMS, Plaintiff, v. MARK S. INCH, et al., Defendants.

**Subsequent History:** Adopted by, Dismissed by, Motion denied by, As moot [Sims v. Inch, 2019 U.S. Dist. LEXIS 69556 \(S.D. Fla., Apr. 22, 2019\)](#)

## **Core Terms**

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canteen, prices, inmate, immunity, allegations, courts, state action doctrine, cases, commissary, vendors, prison, report and recommendation, official capacity, antitrust claim, anti trust law, frivolous, products, due process claim, convenience, conclusory, retail

**Counsel:** [\*1] Durell Sims, Plaintiff, Pro se, Indiantown, FL.

**Judges:** Reid, UNITED STATES MAGISTRATE JUDGE.

**Opinion by:** Reid

## **Opinion**

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### **REPORT OF MAGISTRATE JUDGE**

Plaintiff, a state inmate, has filed a complaint pursuant to [42 U.S.C. § 1983](#). Plaintiff asserts federal **antitrust law** and due process violations, as well as a state-law claim.

This case has been referred to the undersigned for consideration and report. DE#7. The undersigned has granted plaintiff's motion for leave to proceed *in forma pauperis* and screened the complaint pursuant to [28 U.S.C. § 1915\(e\)](#). As discussed below, plaintiff's federal claims should be dismissed, and the court should decline to exercise supplemental jurisdiction over plaintiff's state-law claim.

### **I. FACTUAL ALLEGATIONS**

The following allegations come from plaintiff's complaint. DE#1. The court assumes their truth to screen the complaint.

Plaintiff is incarcerated at Martin Correction Institution ("MCI"). *Id.* at 2.<sup>1</sup> Plaintiff has sued Julie Jones, the former Secretary of the Florida Department of Corrections ("FDOC"). Defendant Mark S. Inch is currently the FDOC's Secretary. Ordinarily, the court would refer to Jones as Inch. See [Fed. R. Civ. P. 25\(d\)](#). However, nominally at least, plaintiff has sued Jones in her official and individual capacities. DE#1 at 1. Therefore, [\*2] the undersigned will refer to Jones as Inch when discussing plaintiff's official-capacity claims. By contrast, the undersigned will refer to Jones as a defendant when discussing plaintiff's individual-capacity claims.

Plaintiff has also sued Trinity Service Group, Inc. ("Trinity"). *Id.* at 2. Trinity sells products at MCI's canteen (i.e., commissary). *Id.* at 3.

Inch and Trinity allegedly have "agreed and conspired to a monopoly and fixed prices on products sold in the inmate canteens under [Inch's] control[.]" *Id.* Inch conducts fair market value surveys. *Id.* at 5. Thus, he knows that prices for inmate canteen items are above prices for the same or similar items at retail and convenience stores. *Id.* Inch and Trinity have done so intentionally; they know that plaintiff "does not have a choice as to where he wishes to buy canteen items." *Id.* at 3.

Based on these allegations, plaintiff asserts: (1) claims under the [Sherman](#) and [Clayton Acts](#); (2) a due process claim; and (3) a claim under the [Florida Deceptive and Unfair Trade Practices Act \("FDUTPA"\)](#). *Id.* at 3-5. Plaintiff seeks: (1) economic damages; and (2) an injunction requiring Inch to lower the "canteen prices to a fair market price consistent [with] that of a [convenience] or [\*3] retail store." *Id.* at 4.

## **II. STANDARD UNDER 28 U.S.C. § 1915(e)**

"[\[Section\] 1915\(e\)](#) . . . applies to cases in which the plaintiff is proceeding IFP." [Farese v. Scherer, 342 F.3d 1223, 1228 \(11th Cir. 2003\)](#) (per curiam). Under [28 U.S.C. § 1915\(e\)\(2\)](#):

Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that--

- (A) the allegation of poverty is untrue; or
- (B) the action or appeal--
  - (i) is frivolous or malicious;
  - (ii) fails to state a claim on which relief may be granted; or
  - (iii) seeks monetary relief against a defendant who is immune from such relief.

In reviewing the complaint under [§ 1915\(e\)](#), the court takes the allegations as true and construes them in the most favorable light. [Hughes v. Lott, 350 F.3d 1157, 1159-60 \(11th Cir. 2003\)](#); [Maps v. Miami Dade State Atty., 693 F. App'x 784, 785 \(11th Cir. 2018\)](#) (per curiam). Furthermore, courts hold complaints that *pro se* prisoners file to "less stringent standards than formal pleadings drafted by lawyers[.]" [Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 \(1972\)](#) (per curiam).

Nonetheless, under [§ 1915\(e\)\(2\)\(B\)\(i\)](#), courts may dismiss as frivolous claims that are "based on an indisputably meritless legal theory" or "whose factual contentions are clearly baseless." [Neitzke v. Williams, 490 U.S. 319, 327, 109 S. Ct. 1827, 104 L. Ed. 2d 338 \(1989\)](#).

Furthermore, the same standards govern dismissal for failure to state a claim under [Fed. R. Civ. P. 12\(b\)\(6\)](#) and dismissal for failure to state a claim under [28 U.S.C. §1915\(e\)\(2\)\(B\)\(ii\)](#). [Mitchell v. Farcass, 112 F.3d 1483, 1490 \(11th Cir. 1997\)](#). Thus, under [§ 1915\(e\)\(2\)\(B\)\(ii\)](#), the court may dismiss a complaint that fails "to state a claim [\*4] to relief that is plausible on its face." [Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." [Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#).

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<sup>1</sup> All citations to docket entries refer to the page stamp number located at the top, right-hand corner of the page.

### **III. DISCUSSION**

#### **A. Federal Antitrust Law Claims**

##### **1. State Action Doctrine**

Plaintiff's federal **antitrust law** claims are not cognizable under the state action doctrine.

The U.S. Supreme Court has "interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity." [N.C. State Bd. of Dental Exam'r v. FTC, 135 S. Ct. 1101, 1110, 191 L. Ed. 2d 35 \(2015\)](#) (citing [Parker v. Brown, 317 U.S. 341, 350-51, 63 S. Ct. 307, 87 L. Ed. 315 \(1943\)](#)); see also [Nicholl v. Bd. of Regents of Univ. Sys. of Ga., 706 F. App'x 493, 495 \(11th Cir. 2017\)](#) (per curiam) ("[N]either the Sherman Act nor the Clayton Act was intended to authorize restraint of governmental action." (alteration in original) (citation omitted)). Courts commonly call this doctrine the *Parker* doctrine, state action immunity doctrine, or state action doctrine. See, e.g., [Crosby v. Hosp. Auth. of Valdosta & Lowndes Cnty., 93 F.3d 1515, 1521 \(11th Cir. 1996\)](#) (citations omitted); [Nicholl, 706 F. App'x at 495](#).

Relying on this doctrine, courts have repeatedly rejected inmates' claims that state prisons have charged them exorbitant prices at canteens, thus violating federal antitrust laws. [Riley v. O'Brien, No. CV 16-11064-LTS, 2016 U.S. Dist. LEXIS 120039, 2016 WL 8679258, at \\*9 \(D. Mass. Sep. 6, 2016\)](#); [Campbell v. Othoff, No. 4:15-CV-00143, 2016 U.S. Dist. LEXIS 34684, 2016 WL 1066287, at \\*3 \(D.N.D. Feb. 17, 2016\)](#), report and recommendation adopted, [\[\\*5\] No. 4:15-CV-00143, 2016 U.S. Dist. LEXIS 34683, 2016 WL 1065813 \(D.N.D. Mar. 17, 2016\)](#); [Fields v. Doe, No. CIV.A. 14-4573, 2015 U.S. Dist. LEXIS 72172, 2015 WL 3513367, at \\*4 n.14 \(E.D. Pa. June 4, 2015\)](#); [Countryman v. Access Securepak Keefe Commissary/Network, LLC, No. 3:12-CV-00253-LRH, 2012 U.S. Dist. LEXIS 185274, 2012 WL 6962294, at \\*2-3 \(D. Nev. Nov. 2, 2012\)](#), report and recommendation adopted, [No. 3:12-CV-00253-LRH, 2013 U.S. Dist. LEXIS 11845, 2013 WL 357821 \(D. Nev. Jan. 29, 2013\)](#); [Moore v. Ozmint, No. CIV.A. 3:10-3041-RBH, 2012 U.S. Dist. LEXIS 31519, 2012 WL 762460, at \\*10 \(D.S.C. Feb. 16, 2012\)](#), report and recommendation adopted, [No. CIV.A. 3:10-3041-RBH, 2012 U.S. Dist. LEXIS 30412, 2012 WL 762439 \(D.S.C. Mar. 6, 2012\)](#); [Orr v. Dawson, No. CV06-53-S-BLW, 2006 U.S. Dist. LEXIS 68943, 2006 WL 8427300, at \\*6-7 \(D. Idaho Sep. 25, 2006\)](#); [Wheeler v. Beard, No. CIV.A. 03-4826, 2005 U.S. Dist. LEXIS 9778, 2005 WL 1217191, at \\*2-7 \(E.D. Pa. May 19, 2005\)](#); [Dehoney v. S.C. Dep't of Corrs., No. CIV.A.0:94-3169-21BD, 1995 U.S. Dist. LEXIS 21446, 1995 WL 842006, at \\*1 \(D.S.C. July 31, 1995\)](#); [Guyer v. Frame, No. CIV. A. 85-3808, 1985 U.S. Dist. LEXIS 12505, 1985 WL 4984, at \\*2 \(E.D. Pa. Dec. 20, 1985\)](#).

Likewise, based on the state action doctrine, courts have rejected the related claim that "monopolistic control of the prison inmate collect calling market . . . is a restraint of trade[.]" [McGuire v. Ameritech Servs., Inc., 253 F. Supp. 2d 988, 1006 \(S.D. Ohio 2003\)](#); see also [Ray v. Evercom Sys., Inc., No. CIV.A.4:05-CV2904RBH, 2009 U.S. Dist. LEXIS 85223, 2009 WL 2997607, at \\*16-17 \(D.S.C. Sep. 15, 2009\)](#); [Byrd v. Goord, No. 00 CIV. 2135 \(GBD\), 2005 U.S. Dist. LEXIS 18544, 2005 WL 2086321, at \\*4-5 \(S.D.N.Y. Aug. 29, 2005\)](#); [Miranda v. Michigan, 168 F. Supp. 2d 685, 691-92 \(E.D. Mich. 2001\)](#).

Courts have extended *Parker* immunity to the contracting vendor. [Riley, 2016 U.S. Dist. LEXIS 120039, 2016 WL 8679258, at \\*9](#); [Countryman, 2012 U.S. Dist. LEXIS 185274, 2012 WL 6962294, at \\*2-3](#); [Ray, 2009 U.S. Dist. LEXIS 85223, 2009 WL 2997607, at \\*16-17](#); [Byrd, 2005 U.S. Dist. LEXIS 18544, 2005 WL 2086321, at \\*4-5](#); [Wheeler, 2005 U.S. Dist. LEXIS 9778, 2005 WL 1217191, at \\*7](#); [McGuire, 253 F. Supp. 2d at 1006](#). These courts have relied on various rationales. To wit:

- The vendor is providing the goods or services on behalf of the state itself, [Byrd, 2005 U.S. Dist. LEXIS 18544, 2005 WL 2086321, at \\*5](#); [McGuire, 253 F. Supp. 2d at 1009](#).

- The vendor's provision of the goods or services is incidental to the state's primary purpose of providing and regulating goods and services to inmates to further its correctional objectives. [Wheeler, 2005 U.S. Dist. LEXIS 9778, 2005 WL 1217191, at \\*6.](#)
- Similarly, prison markets for goods and services are not like free markets in a traditional sense. Rather, single-provider markets [\*6] are a type of captive market that furthers prisons' correctional objectives. [Byrd, 2005 U.S. Dist. LEXIS 18544, 2005 WL 2086321, at \\*5; Wheeler, 2005 U.S. Dist. LEXIS 9778, 2005 WL 1217191, at \\*6.](#)
- The prices that vendors charge are subject to prisons' review and approval. [Ray, 2009 U.S. Dist. LEXIS 85223, 2009 WL 2997607, at \\*17.](#)
- Operating a prison requires specialized judgments regarding security. [Countryman, 2012 U.S. Dist. LEXIS 185274, 2012 WL 6962294, at \\*3.](#)

One goal of the FDOC is to "provide a safe and humane environment for offenders and staff in which rehabilitation is possible." [Fla. Stat. § 20.315\(1\)\(d\)](#). Inch, as head of the FDOC, "is responsible for planning, coordinating, and managing the corrections system of the state." *Id.* [§ 20.315\(1\)\(c\)](#). Inch must "ensure that the programs and services of the [FDOC] are . . . consistent with [Florida's] legislative intent." *Id.* The FDOC "has authority to adopt rules . . . to implement its statutory authority." [Fla. Stat. § 944.09\(1\)](#).

The Florida Legislature contemplated the creation of inmate canteens for the welfare of inmates. See generally [Fla. Stat. § 945.215](#); see also *id.* [§ 945.2151](#) (noting that canteen accounts may be opened under [§ 945.215](#)). Florida administrative regulations provide that each Florida prison "shall provide a canteen to be operated within the institution for the convenience of the inmates in obtaining items which are not furnished by the [FDOC], but which are allowable within the institution through canteen purchase." [Fla. Admin. Code r. 33-602.101](#). The FDOC has "the power [\*7] to contract for [canteen] goods and services." [Am. Home Assur. Co. v. Nat'l R.R. Passenger Corp., 908 So. 2d 459, 463 \(Fla. 2005\)](#) (citing, *inter alia*, [Fla. Stat. § 945.215](#)); see [Fla. Admin. Code r. 33-203.101](#). A "Canteen Review Team" reviews and approves product prices. See *id.* [r. 33-203.101\(2\)](#).

Moreover, canteen operations in Florida prisons are extensively regulated. See, e.g., [Fla. Stat. § 945.215\(1\)\(a\)](#) (providing that net proceeds from inmate canteens must be deposited in Florida's General Revenue Fund); *id.* [§ 945.215\(1\)\(f\)](#) (inmates generally may not spend more than \$100 a week on canteen purchases); *id.* [§ 945.2151](#) ("Prior to opening a canteen account . . . , an inmate who is eligible to receive a social security number must report his or her social security number."); [Fla. Admin. Code r. 33-203.101](#) (discussing canteen operations); *id.* [r. 33-602.101\(1\)](#) (requiring audits of canteen operations); *id.* [r. 33-602.201\(4\)\(e\)](#) (inmates generally must maintain receipts for items purchased at canteens).

Here, the state action doctrine immunizes defendants from plaintiff's federal antitrust claims. While there does not appear to be any controlling authority on point, it appears that every federal district court addressing the issue has held that the state action doctrine bars an inmate's claim that exorbitant canteen prices violate federal antitrust laws. Plaintiff's conclusory allegations of monopoly [\*8] and price-fixing do not warrant a departure from this long line of authority.

Likewise, this immunity extends to Trinity here because Trinity is providing goods on behalf of the FDOC, which is an arm of the state of Florida. [Wayne v. Fla. Dep't of Corr., 157 F. Supp. 3d 1202, 1204 \(S.D. Fla. 2016\)](#) (citation omitted). The above Florida authority shows a clear policy to allow inmates to purchase approved canteen products to foster their care and welfare. The FDOC has adopted numerous regulations to implement this policy. These include contracting with vendors, approving goods and prices, and putting conditions on inmates' canteen access. In these circumstances, [Parker](#) immunity applies to Trinity as well. [McGuire, 253 F. Supp. 2d at 1006](#) ("Where an actively supervised state policy is identified, the immunity extends not only to the state, but to the private parties acting pursuant to and in conformity with the state policy." (citation omitted)).

One can liberally construe Plaintiff's complaint to allege that the state action doctrine does not apply in light of [Fla. Stat. § 945.215\(1\)\(e\)](#). See DE#1 at 6. Thereunder, "[i]tems for resale at inmate canteens . . . shall be priced

comparatively with like items for retail sale at fair market prices." Thus, the argument would go, Florida policy actually forbids the alleged [\*9] monopoly and price-fixing at issue.

This is an overbroad construction of [§ 945.215\(1\)\(e\)](#). Again, the above Florida authority shows that, to implement the policy of allowing inmates to purchase canteen products, the FDOC must contract with vendors and approve prices. Thus, read in context, [§ 945.215\(1\)\(e\)](#) merely guides the prices that the FDOC may charge for canteen products. However, this provision does not negate Florida's authorization of the FDOC to operate canteens, which includes setting product prices. Indeed, [§ 945.215\(1\)\(e\)](#) requires only that the products be "comparatively" priced with "like items for retail sale at fair market prices." And these terms, which on their face do not require equivalent pricing, are not defined. Therefore, [§ 945.215\(1\)\(e\)](#) envisions the FDOC's exercise of discretion in setting product prices and selecting vendors. Allowing inmates to bring federal antitrust claims whenever they disagree with the FDOC's exercise of this discretion "is the type of threat to our federalism that fomented the [Supreme] Court to imply a state action exemption[.]" See [Guyer, 1985 U.S. Dist. LEXIS 12505, 1985 WL 4984, at \\*2](#) (citation omitted). In short, [§ 945.215\(1\)\(e\)](#) does not preclude the application of the state action doctrine.

The fact that plaintiff has nominally sued Jones in her individual capacity [\*10] does not preclude *Parker* immunity. This allegation is wholly conclusory. DE#1 at 1. Notably, plaintiff explicitly alleges that he sues Jones (now Inch) in her official capacity. And the remaining allegations, coupled with the above authority, compel the conclusion that plaintiff sues Jones (now Inch) in only her official capacity. Jones's actions of contracting with Trinity and setting prices for canteen items fall squarely within the ambit of her official duties. Plaintiff's conclusory allegation that Jones "conspired" with Trinity to monopolize the canteen market and fix prices fails to show otherwise. Compare *id.* at 3, with [Iqbal, 556 U.S. at 678](#) (Courts "are not bound to accept as true a legal conclusion couched as a factual allegation[.]" (citation omitted)). Accordingly, the fact that plaintiff has nominally sued Jones in her individual capacity does not preclude *Parker* immunity. See [Hunter v. Holsinger, No. 5:15-CV-00043, 2016 U.S. Dist. LEXIS 20057, 2016 WL 1169308, at \\*10 \(W.D. Va. Feb. 19, 2016\)](#), report and recommendation adopted, [No. 5:15-CV-00043, 2016 U.S. Dist. LEXIS 38286, 2016 WL 1223347 \(W.D. Va. Mar. 24, 2016\)](#).

In sum, the state action doctrine bars plaintiff's federal antitrust claims and, consequently, precludes plaintiff's request for injunctive relief. [Cohn v. Bond, 953 F.2d 154, 158 \(4th Cir. 1991\)](#); [Griffith v. Health Care Auth. of City of Huntsville, 705 F. Supp. 1489, 1502 \(N.D. Ala. 1989\)](#). The claims are frivolous. See [Neitzke, 490 U.S. at 327](#) ("[C]laims against which it is clear that the defendants [\*11] are immune from suit [are frivolous under § 1915(e)(2)(B)(ii)]." (citation omitted)).

## **2. Failure to State a Claim**

Plaintiff's federal antitrust claims would fail even if *Parker* immunity did not apply. Plaintiff's complaint is conclusory. Plaintiff alleges that Inch conspired with Trinity to monopolize the canteen market and fix prices, which is a legal conclusion couched as a factual allegation. See [Iqbal, 556 U.S. at 678](#). Plaintiff's only supporting factual allegation is that Inch conducts fair market value surveys and, therefore, knows that prices of canteen items are higher than prices for the same or similar items at retail and convenience stores. Therefore, plaintiff has not pleaded "factual content that allows the court to draw the reasonable inference that [defendants are] liable for the misconduct alleged." See *id.* In short, plaintiff's conclusory allegations of monopoly and price-fixing do not "suggest that an unlawful agreement was made." See [Till v. Exxon Mobil Corp., 346 F. App'x 751, 752 \(3d Cir. 2009\)](#) (citation omitted).

## **3. Sovereign Immunity**

Sovereign immunity bars plaintiff's claim for economic damages against Inch in his official capacity. As noted, the official-capacity claim against Inch is one against the state of Florida. [Will v. Mich. Dep't of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 \(1989\)](#) ("[A] suit against a state official in his [\*12] or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit

against the State itself." (citations omitted)). "[A]bsent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court." Kentucky v. Graham, 473 U.S. 159, 169, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985) (citation omitted). "This bar remains in effect when State officials are sued for damages in their official capacity." *Id.* (citations omitted). "Congress has not abrogated Eleventh Amendment immunity in 42 U.S.C. §§ 1981, 1983, or 1985 cases, and Florida has not waived its Eleventh Amendment immunity in federal civil rights actions." Henry v. Fla. Bar, 701 F. App'x 878, 880 (11th Cir. 2017) (citing cases). Accordingly, the Eleventh Amendment bars plaintiff's damages claim against Inch in his official capacity.

### **B. Due Process Claim**

Plaintiff piggybacks a due process claim onto his federal antitrust claims. DE#1 at 5-6. This claim is frivolous. "[A § 1983 claim alleging a denial of procedural due process requires proof of three elements: (1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process." Grayden v. Rhodes, 345 F.3d 1225, 1232 (11th Cir. 2003).

However, courts have consistently held that prisoners do not have a liberty or property interest in canteen access or affordable [\*13] canteen items. See, e.g., Riley, 2016 U.S. Dist. LEXIS 120039, 2016 WL 8679258, at \*9 ("[T]here is no protected liberty interest or constitutional right to canteen access." (citing cases)); Ferguson v. Thomas, No. 514CV02396RDPJHE, 2016 U.S. Dist. LEXIS 91598, 2016 WL 3774126, at \*11 (N.D. Ala. June 20, 2016) ("[P]risoners have no right to use of a prison commissary. Furthermore, an inmate has no constitutionally protected interest in buying food as cheaply as possible." (citing cases)), *report and recommendation adopted, No. 514CV02396RDPJHE, 2016 U.S. Dist. LEXIS 91286, 2016 WL 3753230* (N.D. Ala. July 14, 2016); Campbell v. Othoff, No. 4:15-CV-143, 2016 U.S. Dist. LEXIS 34684, 2016 WL 1066287, at \*4 (D.N.D. Feb. 17, 2016) ("Generally speaking, prisoners have no constitutional right of access to a jail commissary" (citing cases)), *report and recommendation adopted, No. 4:15-CV-143, 2016 U.S. Dist. LEXIS 34683, 2016 WL 1065813* (D.N.D. Mar. 17, 2016); Ozmin, 2012 U.S. Dist. LEXIS 31519, 2012 WL 762460, at \*10 ("Canteen access is [] not a protected liberty interest." (citing cases)); Jones v. Swanson Servs. Corp., No. CIV.A. 3:06-00002, 2009 U.S. Dist. LEXIS 60313, 2009 WL 2151300, at \*2 (M.D. Tenn. July 13, 2009) ("[I]nmates do not have a constitutionally protected right to purchase commissary items at low prices." (citations omitted)); Dewhart v. City of Montgomery, No. 2:08-CV-0111-MEF, 2008 U.S. Dist. LEXIS 26202, 2008 WL 900911, at \*1 (M.D. Ala. Mar. 31, 2008) ("Inmates have no constitutionally protected interest in purchasing goods available through the prison commissary . . ." (citations omitted)); Hopkins v. Keefe Commissary Network Sales, No. CIV.A. 07-745, 2007 U.S. Dist. LEXIS 50961, 2007 WL 2080480, at \*5 (W.D. Pa. July 12, 2007) ("Inmates have no federal constitutional right to be able to purchase [\*14] items from a commissary. A *fortiori*, Plaintiff has no federal constitutional right to purchase items from the ACJ commissary at any particular price or to have Keefe restrained from charging even exorbitant prices." (citing cases)). Therefore, plaintiff's due process claim fails.

### **C. State-Law Claim**

Plaintiff has asserted a claim under the FDUTPA based on the same allegations. However, because all of plaintiff's federal claims should be dismissed, the court should decline to exercise supplemental jurisdiction over this claim. See 28 U.S.C. § 1337(c) & (3) ("The district courts may decline to exercise supplemental jurisdiction over a claim . . . if [.] . . the district court has dismissed all claims over which it has original jurisdiction[.]"); Baggett v. First Nat'l Bank of Gainesville, 117 F.3d 1342, 1353 (11th Cir. 1997) (judicial economy, fairness, convenience, and comity dictate dismissal of state claims when court dismisses all federal claims before trial).

### **IV. CONCLUSION**

As discussed above, it is recommended that plaintiff's complaint be dismissed pursuant to 28 U.S.C. § 1915(e) for frivolity and failure to state a claim, with the following results:

- Plaintiff's federal antitrust claims should be dismissed.
- Plaintiff's due process claim should be dismissed.
- The court should decline to exercise supplemental **[\*15]** jurisdiction over plaintiff's FDUTPA claim.

It is further recommended that the case be closed.

SIGNED this 12th day of February, 2019. UNITED STATES MAGISTRATE JUDGE

/s/ Reid

UNITED STATES MAGISTRATE JUDGE

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## Becton v. Cytek Biosciences Inc.

United States District Court for the Northern District of California

February 14, 2019, Decided; February 14, 2019, Filed

Case No. 18-cv-00933-MMC

### **Reporter**

2019 U.S. Dist. LEXIS 24569 \*; 2019 WL 633008

BECTON, DICKINSON AND COMPANY, Plaintiff, v. CYTEK BIOSCIENCES INC., et al., Defendants.

**Prior History:** [Becton, Dickinson & Co. v. Cytek Biosciences Inc., 2018 U.S. Dist. LEXIS 85121 \(N.D. Cal., May 21, 2018\)](#)

## **Core Terms**

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alleges, Counterclaims, tying arrangement, cytometer, prong, unfair, market power, customer, tying product, injunctive relief, sufficient facts, Clayton Act, false statement, insubstantial, competitors, defamation, contends, reagent, sales, subject to dismissal, purchaser, quotation, agrees, motion to dismiss, cytometry, threatens, commerce, premised, asserts, patent

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For Ming Yan, Alfred Riley, David Vrane, Stephen Zhang, Zhenxiang Gong, Alex Zhong, Maria Jaimes, Gil Reinin, Janelle Shook, Defendants: Allan J. Gomes, LEAD ATTORNEY, Anderies & Gomes LLP, San Francisco, CA; Shane K. Anderies, Anderies & Gomes LLP, San Francisco, CA.

**Judges:** MAXINE M. CHESNEY, United States District Judge.

**Opinion by:** MAXINE M. CHESNEY

## **Opinion**

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### **ORDER GRANTING MOTION TO DISMISS; AFFORDING LEAVE TO AMEND**

Re: Dkt. No. 88

Before the Court is plaintiff/counterdefendant Becton, Dickinson and Company's ("BD") motion, filed October 29, 2018, to dismiss the First Cause of Action asserted against it in defendant/counterclaimant Cytek Biosciences,

Inc.'s ("Cytek") Counterclaims. Cytek has filed opposition, to which BD has replied. Having read and [\*2] considered the papers filed in support of and in opposition to the motion, the Court rules as follows.<sup>1</sup>

## BACKGROUND<sup>2</sup>

Cytek is a company that "provide[s] . . . flow cytometry products and services in the United States."<sup>3</sup> (See Counterclaims ¶ 2.) BD is a company that, according to Cytek, "dominates more than half the United States market for flow cytometers" (see id. ¶ 2) and "commands 30-40% of the cytometry reagent market in the United States" (see id. ¶ 19).<sup>4</sup>

In June 2017, Cytek "release[d] . . . the CytekTM Aurora ("Aurora") cytometer," a cytometer that "depart[s] from the traditional cytometer designs that BD and others have employed." (See id. ¶ 14.)

Cytek alleges that, "just months after the Aurora's release," Cytek was informed by one of its customers that "a BD executive threatened that BD would no longer supply the customer with the critical reagents for its BD cytometers if the [customer] purchased an Aurora from Cytek." (See id. ¶ 18.) Cytek further alleges that, sometime "earlier" in 2018, it "learned . . . that BD falsely told a representative of a large, public research university and potential Cytek customer that Cytek 'stole' the technology in the Aurora flow cytometer [\*3] from BD." (See id. ¶ 34.)

Moreover, Cytek alleges, BD has required its employees to "enter into employee agreements" which contain "an assignment, or 'holdover,' provision that requires former employees to assign all 'right, title, and interest in any Innovation relating to Confidential Information arising because of [their] employment with [BD], conceived or made by [them] . . . at any time for a period of one (1) year after employment." (See id. ¶¶ 51-52 (alterations in original) (emphasis omitted).)

Based on the above, Cytek filed its Answer and Counterclaims, in which Cytek asserts two Causes of Action against BD. In particular, Cytek asserts a claim for injunctive relief under [California Business and Professions Code § 17200](#), California's Unfair Competition Law ("UCL") (First Cause of Action), and a claim for declaratory relief under [28 U.S.C. § 2201](#) (Second Cause of Action).

By the instant motion, BD seeks an order dismissing the First Cause of Action pursuant to [Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#).

## LEGAL STANDARD

Dismissal under [Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#) "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." See [Balistreri v. Pacifica Police Dep't](#), 901 F.2d 696, 699 (9th Cir. 1990). [Rule 8\(a\)\(2\)](#), however, "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" [\*4] See [Bell Atlantic Corp. v. Twombly](#), 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting [Fed. R. Civ. P. 8\(a\)\(2\)](#)). Consequently, "a complaint attacked by a [Rule 12\(b\)\(6\)](#) motion to dismiss does not need detailed factual allegations." See id. Nonetheless, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a

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<sup>1</sup> By order filed January 22, 2019, the Court took the motion under submission.

<sup>2</sup> The following facts are taken from the Counterclaims.

<sup>3</sup> "Flow cytometry is a powerful, laser-based technology used for identifying and quantifying cellular characteristics on a cell-by-cell basis that offers a variety of biomedical and therapeutic applications." (See id. ¶ 1.)

<sup>4</sup> "Reagents are essential consumable substances used in flow cytometers to identify and analyze certain cellular characteristics," and "are marketed and sold separate and apart from the cytometry machines themselves." (See id. ¶ 19.)

formulaic recitation of the elements of a cause of action will not do." See id. (internal quotation, citation, and alteration omitted).

In analyzing a motion to dismiss, a district court must accept as true all material allegations in the complaint, and construe them in the light most favorable to the nonmoving party. See NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). "To survive a motion to dismiss, a complaint must contain sufficient factual material, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Twombly, 550 U.S. at 570). "Factual allegations must be enough to raise a right to relief above the speculative level[.]" Twombly, 550 U.S. at 555. Courts "are not bound to accept as true a legal conclusion couched as a factual allegation." See Iqbal, 556 U.S. at 678 (internal quotation and citation omitted).

## DISCUSSION

As noted above, BD seeks dismissal of Cytek's First Cause of Action, which asserts a claim solely for injunctive relief under the UCL.<sup>5</sup>

The UCL prohibits "any unlawful, unfair or [\*5] fraudulent business act or practice." See Cal. Bus. & Prof. Code § 17200. The California Supreme Court has recognized that "[b]ecause [the UCL] is written in the disjunctive, it establishes three varieties of unfair competition — acts or practices which are unlawful, or unfair, or fraudulent." See Cel-Tec Comm'n's, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999).

Cytek asserts BD violated the "unfair" and "unlawful" prongs of the UCL.<sup>6</sup> BD contends the First Cause of Action is subject to dismissal because Cytek has not pled sufficient facts to state a claim under either of the above-referenced prongs and because Cytek has not adequately alleged it is entitled to injunctive relief under the UCL.

The Court addresses below each of BD's proffered grounds for dismissal.

### A. Failure to Allege Sufficient Facts to State a Claim

#### 1. The "Unfair" Prong

Under the "unfair" prong of the UCL, "a practice may be deemed unfair even if not specifically proscribed by some other law." See Cel-Tech, 20 Cal.4th at 180. A competitor's conduct constitutes an "unfair" business practice when such "conduct . . . threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms [\*6] competition." See id. at 187.

Cytek alleges BD has engaged in conduct that "threatens an incipient violation" of section 3 of the Clayton Act, 15 U.S.C. § 14, as well as the Cartwright Act, specifically, California Business and Professions Code §§ 16720 and 16727. (See Counterclaims ¶ 46.) In particular, Cytek alleges, "a BD executive threatened that BD would no longer supply [a Cytek] customer with the critical reagents for its BD cytometers if the [customer] purchased an Aurora from Cytek" (see id. ¶ 18) and, in so doing, attempted to "[tie] . . . the sale of its reagents to its customers' refusal to purchase competing Cytek machines" (see id. ¶ 45) ("tying arrangement theory").<sup>7</sup>

<sup>5</sup> In its Opposition, Cytek clarifies that it "is seeking injunctive relief under the UCL, not restitution." (See Opp. at 22:18-19.)

<sup>6</sup> In their respective memoranda filed in connection with the instant motion, neither party discusses the "fraudulent" prong.

<sup>7</sup> Although Cytek alleges "BD has made similar threats to other potential Cytek customers" (see id. ¶ 21), the allegation is entirely lacking in factual support.

BD contends Cytek has not adequately alleged BD has engaged in conduct that would result in a tying arrangement that is per se illegal under either the Clayton Act or the Cartwright Act.

a. Section 3 of the Clayton Act

Pursuant to section 3 of the Clayton Act, it is "unlawful for any person engaged in commerce . . . to . . . make a sale or contract for sale of goods . . . on the condition, agreement, or understanding that the . . . purchaser thereof shall not use or deal in the goods . . . of a competitor . . . where the effect of such . . . contract for sale or condition, agreement, or understanding may [\*7] be to substantially lessen competition." See 15 U.S.C. § 14. "Although the literal terms of [section 3 of the Clayton Act] refer to exclusive dealing contracts, the Supreme Court has extended its application to tying arrangements." Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1213-14 (9th Cir. 1977).

A tying arrangement is "defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." See N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958). "Three elements must be satisfied to establish that a tying arrangement is illegal per se: (1) a tie-in between two products or services sold in different markets, (2) market power in the tying product, and (3) the tying arrangement affects a not insubstantial volume of commerce." Datagate Inc. v. Hewlett-Packard Co., 60 F.3d 1421, 1423-24 (9th Cir. 1995). The above-referenced test applies in determining whether a tying arrangement violates section 1 of the Sherman Act or section 3 of the Clayton Act. See Airweld, Inc. v. Airco, Inc., 742 F.2d 1184, 1189 n.2 (9th Cir. 1984) (applying same elements to analyze whether tying arrangement "violated . . . section 1 of the Sherman Act . . . and section 3 of the Clayton Act"); see also Mozart v. Mercedes-Benz of N. Am., 833 F.2d 1342, 1352 (9th Cir. 1987) (noting "the elements for establishing a Sherman Act § 1 claim and a Clayton Act § 3 claim" based on an illegal tying arrangement "are virtually the same").

Here, while BD acknowledges [\*8] Cytek, to state a claim under the "unfair" prong of the UCL, need not allege that a purported tying arrangement has been consummated (see Reply at 3:20-4:6; see also id. at 5:19-6:2), BD contends Cytek has not adequately alleged BD engaged in conduct that threatens an incipient violation of section 3 of the Clayton Act. Specifically, BD argues that, even if the purported tying arrangement had been consummated, Cytek "fails to plausibly allege BD's market power in the purported tying product market" (see Mot. at 12:27-28), and "fails to allege foreclosure of a not-insubstantial dollar-volume of sales in the purported tied product market" (see Mot. at 15:13-14). As set forth below, the Court agrees.

i. Market Power

Market power refers to "the power, within the market for the tying product, to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market." See United States Steel Corp. v. Fortner Enters., 429 U.S. 610, 620, 97 S. Ct. 861, 51 L. Ed. 2d 80 (1977) ("Fortner II"). In evaluating whether a seller possesses market power, courts consider "whether the seller has some advantage not shared by his competitors in the market for the tying product." See id. "When the seller's share of the market is high, or when the seller offers [\*9] a unique product that competitors are not able to offer, the [Supreme Court] has held that the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make per se condemnation appropriate." Jefferson Parish Hosp. District No. 2 v. Hyde, 466 U.S. 2, 13, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984) (internal citations omitted).

As to market share, Cytek alleges BD "commands 30-40% of the cytometry reagent market in the United States." (See Counterclaims ¶ 19.) Such allegation, does not, however, support an inference that BD has market power in the tying product market. See Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 611-12, 73 S. Ct. 872, 97 L. Ed. 1277 (holding publishing company did not have market power where its sales comprised 40% of total sales in tying product market); see also Jefferson Parish Hosp., 466 U.S. at 26-27 (holding hospital did not have market power where it served 30% of total patients in tying product market).

As to the uniqueness of the tying product, Cytek alleges "[t]he reagent BD threatened to withhold was a proprietary BD-licensed formulation . . . for which there is no market alternative" because BD holds a patent on it. (See Counterclaims ¶ 20; see also id. ¶ 20 n.5 (noting BD has "filed suit for patent infringement" against "competitor [who has] marketed what BD referred to as 'copycat products'").) Contrary to Cytek's argument, [\*10] however, ownership of "a patent does not necessarily confer market power on the patentee," see *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 45, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006), and Cytek does not allege any other facts to show "other competitors [in the tying product market] are in some way prevented from offering the distinctive product themselves," see *Fortner II*, 429 U.S. at 621.

## ii. Substantial Volume of Commerce Affected

When evaluating whether a tying arrangement affects a substantial volume of commerce, "the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie[.]" See *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 501, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969) ("Fortner I"). "The 'not insubstantial' requirement can be satisfied by the foreclosure of a single purchaser, so long as the purchaser represents a 'not insubstantial' dollar-volume of sales." *Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1425 (9th Cir. 1995).

Here, Cytek's Counterclaims lack sufficient facts to support a finding that the tying arrangement at issue, if consummated, would result in the foreclosure of sales by Cytek involving a "not insubstantial dollar-volume." Indeed, Cytek does not plead any facts showing the customer to whom the tying arrangement was presented had any interest in purchasing a cytometer from Cytek, such that the [\*11] arrangement was likely to result in the loss of a sale by Cytek. Moreover, Cytek alleges its cytometers "range in price from tens of thousands of dollars to more than [a] quarter of a million dollars per machine" (see Counterclaims ¶ 39); Cytek does not allege the price of the cytometer the above-referenced customer would have purchased, nor, given the ambiguity in the above-quoted description of the alleged lowest-priced cytometer, has Cytek shown such purchase necessarily would entail a not insubstantial sum. See, e.g., *Fortner I*, 394 U.S. at 502 (holding foreclosure of \$190,000 in sales was not "paltry or 'insubstantial'"); *Moore*, 550 F.2d at 1216 (noting "[t]he 'not insubstantial' test has been met by showing dollar volumes which total \$60,800, and estimated sales of \$86,376" (internal citations omitted)); *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1578 (11th Cir. 1991) (holding loss of membership dues "between \$30,000.00 - 70,000.00 . . . is clearly substantial").

## b. The Cartwright Act

"A tying arrangement may be condemned under either or both [Cal. Bus. & Prof. Code] section 16720 and [section 16727](#)." *Morrison v. Viacom Inc.*, 66 Cal. App. 4th 534, 541, 78 Cal. Rptr. 2d 133 (1998). To establish a "per se tying arrangement violative of [section 16720](#)," the following elements must be met:

- (1) a tying agreement, arrangement or condition whereby the sale of the tying product was linked to the sale of the tied product or service; (2) the [\*12] party had sufficient economic power in the tying market to coerce the purchase of the tied product; (3) a substantial amount of sale was affected in the tied product; and (4) the complaining party sustained pecuniary loss as a consequence of the unlawful act.

See *id. at 541-42*. "Under [section 16727](#), a per se violation is established if either element (2) or (3) is established along with elements (1) and (4)." See *id. at 542* (emphasis in original); see also *Nicolosi Distrib., Inc. v. BMW of N. Am.*, 2011 U.S. Dist. LEXIS 44544, 2011 WL 1483424, at \*2 (N.D. Cal. Apr. 19, 2011).

BD contends Cytek fails to adequately allege BD's conduct threatens an incipient violation of the Cartwright Act "for the same reasons it fails to state a federal tying claim." (See Mot. at 16:15-16; see also Reply at 9:15-16). The Court agrees.

As discussed above, Cytek's Counterclaims lack sufficient facts to support a finding that BD has market power in the reagent market in the United States, that the tying arrangement at issue would affect a substantial volume of commerce in the cytometer market, or that Cytek would suffer a pecuniary loss as a consequence of BD's conduct.

### **c. Conclusion as to "Unfair" Prong**

To the extent the First Cause of Action is premised on Cytek's tying arrangement theory, such claim is subject to dismissal.

## **2. The "Unlawful" Prong**

Under the "unlawful" [\*13] prong, the UCL "borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." See Cel-Tech, 20 Cal. 4th at 180 (internal quotation and citation omitted).

Cytek alleges BD engaged in unlawful conduct when: (1) "BD falsely told a representative of a large, public research university and potential Cytek customer that Cytek 'stole' the technology in the Aurora flow cytometer from BD" (see Counterclaims ¶ 34) ("false statement theory");<sup>8</sup> and (2) BD "require[d] its employees . . . to enter into employee agreements that are illegal under *California Business & Professions Code § 16600*" (see id. ¶ 51) ("employee agreement theory").

While BD does not challenge the sufficiency of the factual allegations underlying Cytek's claim based on its employee agreement theory,<sup>9</sup> BD contends Cytek's Counterclaims lack sufficient facts to state a claim based on its false statement theory.

First, BD contends Cytek's allegations underlying its false statement theory are insufficient to state a claim under the "unlawful" prong of the UCL because Cytek "fail[s] to identify the legal basis for this claim." (See Reply at 10:12-13.) The Court agrees.

As BD correctly points out, the allegations in [\*14] Cytek's Counterclaims do not identify the statute BD purportedly violated when it made the statement at issue. For this reason alone, Cytek has failed to state a claim under the "unlawful" prong of the UCL, as "a violation of another law is a predicate for stating a cause of action under the UCL's unlawful prong." See Berryman v. Merit Prop. Mgmt., Inc., 152 Cal. App. 4th 1544, 1554, 62 Cal. Rptr. 3d 177 (2007); see also E & E Co. v. Kam Hing Enters., 2008 U.S. Dist. LEXIS 87554, 2008 WL 1924905, at \*1 (N.D. Cal. Apr. 29, 2008) (holding "plaintiff's allegations [were] insufficient to satisfy the 'unlawful' prong, for the reason that allegations of illegality must be accompanied by reference to a particular statute"); Gonzalez v. Trust, 2015 WL 12081028, at \*2 (S.D. Cal. Sep. 28, 2015) (dismissing claim under "unlawful" prong; noting, "while [p]laintiffs may have alleged facts to support a statutory violation, [p]laintiffs have not identified any such statute in their allegations directed at [defendant]").

Next, BD argues that, even assuming Cytek's Counterclaims had identified California Civil Code § 43 as the basis for its false statement theory, see Cal. Civ. Code § 43 (providing persons "the right of protection . . . from

<sup>8</sup> Although Cytek alleges it "has learned of repeated instances of BD and its sales representatives making false statements of fact about Cytek's products and practices" (see id. ¶ 33), the allegation is lacking in any factual support beyond the above-referenced instance.

<sup>9</sup> Although Cytek characterizes the "holdover clauses" (see id. ¶ 54) as "illegal" and, consequently, unlawful, Cytek also alleges BD's use of such contractual provision is "unfair" (see id. ¶ 51). In any event, BD does not challenge the sufficiency of the underlying factual allegations under either theory.

defamation"), Cytek has not pled sufficient facts to state a claim for defamation. As set forth below, the Court again agrees.

"Defamation is the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or that causes [\*15] special damage." [Grenier v. Taylor, 234 Cal. App. 4th 471, 486, 183 Cal. Rptr. 3d 867 \(2015\)](#). In order to plead a claim for defamation, "the defamatory statement must be specifically identified, and the plaintiff must plead the substance of the statement." [See Pruitt v. Genentech, Inc., 2017 U.S. Dist. LEXIS 136258, 2017 WL 3641783, at \\*4 \(E.D. Cal. Aug. 24, 2017\)](#); [see also MacKinnon v. Logitech, Inc., 2016 U.S. Dist. LEXIS 17789, 2016 WL 541068, at \\*5 \(N.D. Cal. Feb. 11, 2016\)](#) (noting "defamatory statement must be specifically identified" and "plaintiff must plead the substance of the statement" (internal quotation and citation omitted)). Specifically, to withstand dismissal, "the complaint must reference the speakers of the defamatory communications, the recipients, the timing, or the context in which they were made, sufficient to provide [the defendant] with notice of the issues to prepare a defense." [See Pruitt, 2017 U.S. Dist. LEXIS 136258, 2017 WL 3641783 at \\*4](#) (alteration in original) (internal quotation and citation omitted); [see also MacKinnon, 2016 U.S. Dist. LEXIS 17789, 2016 WL 541068 at \\*5](#) (noting plaintiff, to plead defamation claim, must "specifically identify who made the statements, when they were made, and to whom they were made" (internal quotation and citation omitted)); [Cook v. UPS Cartage Service, Inc., 2018 U.S. Dist. LEXIS 128412, 2018 WL 3630043, at \\*2 \(E.D. Cal. July 31, 2018\)](#) (dismissing defamation claim where plaintiff failed to allege identity of speakers and recipients of defamatory statements, as well as time or context in which statements were made).

Here, although Cytek alleges "BD falsely told a representative of a large, public research university and potential [\*16] Cytek customer that Cytek 'stole' the technology in the Aurora flow cytometer from BD" (see Counterclaims ¶ 34), the allegation "lacks the requisite specificity" to state a claim for defamation. [See Pruitt, 2017 U.S. Dist. LEXIS 136258, 2017 WL 3641783 at \\*4](#). In particular, Cytek does not adequately allege the identity of the speaker or the recipient, when such statement was made, and the context in which the statement was made.<sup>10</sup>

Accordingly, to the extent the First Cause of Action is based on Cytek's false statement theory, such claim is subject to dismissal.

## B. Failure to Allege Entitlement to Injunctive Relief

As noted above, Cytek's First Cause of Action asserts a claim solely for injunctive relief. ([See](#) Counterclaims ¶ 57.) BD contends Cytek has not adequately alleged entitlement to such relief because Cytek "alleges no basis for a remedy to stop any non-speculative future harm." ([See](#) Reply at 15:23-24.) The Court agrees.

Under California law, courts may award injunctive relief "as may be necessary to prevent the use or employment . . . of any practice which constitutes unfair competition." [See Cal. Bus. & Prof. Code § 17203](#). Injunctive relief under [§ 17203](#), however, "cannot be used . . . to enjoin an event which has already transpired; a showing of threatened [\*17] future harm or continuing violation is required." [See People v. Toomey, 157 Cal. App. 3d 1, 20, 203 Cal. Rptr. 642 \(1984\)](#). "Injunctive relief has no application to wrongs which have been completed, absent a showing that past violations will probably recur." [Id.](#) (internal citation omitted). Where a plaintiff's UCL claim lacks facts showing he or she is entitled to the relief sought under the UCL, such claim is subject to dismissal. [See Ice Cream Distrib. of Evansville, LLC v. Dreyer's Grand Ice Cream, Inc., 487 Fed. App'x 362, 363 \(9th Cir. 2012\)](#) (affirming dismissal of UCL claim where plaintiff sought injunction and restitution but did not plead facts demonstrating entitlement to either form of relief).

Here, Cytek's tying arrangement and false statement theories are premised on statements purportedly made by BD representatives at some point in time between the Aurora's release in 2017 and the filing of the Counterclaims in

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<sup>10</sup> To the extent BD argues the alleged statement is privileged under California's litigation privilege, California's common interest privilege, and the [Noer-Pennington](#) doctrine, such argument is premature, given the absence of sufficient facts regarding the circumstances under which the statement was made.

2018 (see Counterclaims ¶¶ 18, 34) and, consequently, are based on events "which [have] already transpired." See [Toomey, 157 Cal. App. 3d at 20](#). Cytek's Counterclaims lack, however, sufficient facts to support a finding that such conduct "will probably recur" in the future. [See id.](#)

Next, with respect to Cytek's employee agreement theory, Cytek alleges it may be subject to future harm because "BD has asserted claims against Cytek . . . for inducing breach of [the] illegal [\*18] holdover clauses," and, although such claims "have been dismissed," BD's "discovery requests . . . make clear that BD intends to pursue this claim in the future following additional discovery." (See Counterclaims ¶ 54.) In particular, Cytek alleges, BD has "request[ed] production by Cytek . . . of '[a]ll documents concerning patents, patent applications, or invention disclosure statements relating to Flow Cytometry Systems or Spectral Flow Cytometry Systems that were drafted, submitted, or filed by [Cytek or on Cytek's behalf] . . .' from January 1, 2012 to present." ([See id.](#) ¶ 31 (alterations in original).)

Cytek's allegations do not support a finding that BD will reassert against Cytek a claim for inducement of breach of contract premised on the "holdover provision." The Court dismissed BD's inducement of breach of contract claim on the ground such claim was preempted by the [California Uniform Trade Secrets Act](#) (see Doc. No. 65 (Order Granting Cytek's Motion to Dismiss) at 10-11), and Cytek has not pleaded any facts showing how the above-referenced discovery, or any other discovery, will provide BD with information sufficient to avoid that legal bar or to allow BD to reassert the [\*19] "holdover provision" as the basis of any other claim.

Accordingly, to the extent the First Cause of Action is premised on Cytek's employee agreement theory, such claim is subject to dismissal, and, to the extent the First Cause of Action is premised on the tying arrangement and false statement theories, such claim is subject to dismissal on this additional ground as well.

## **CONCLUSION**

For the reasons set forth above, BD's motion to dismiss is hereby GRANTED and Cytek's First Cause of Action is hereby DISMISSED with leave to amend. Cytek's Amended Counterclaims, if any, shall be filed no later than March 7, 2019.

## **IT IS SO ORDERED.**

Dated: February 14, 2019

/s/ Maxine M. Chesney

MAXINE M. CHESNEY

United States District Judge



## Ni-Q, LLC v. Prolacta Bioscience, Inc.

United States District Court for the District of Oregon

February 14, 2019, Decided; February 14, 2019, Filed

Case No. 3:17-cv-000934-SI

### **Reporter**

2019 U.S. Dist. LEXIS 24272 \*; 129 U.S.P.Q.2D (BNA) 1422 \*\*; 2019 WL 637703

Ni-Q, LLC, Plaintiff and Counter-Defendant, v. PROLACTA BIOSCIENCE, INC., Defendant and Counter-Plaintiff

**Prior History:** [Ni-Q, LLC v. Prolacta Bioscience, Inc., 2018 U.S. Dist. LEXIS 98106 \(D. Or., June 12, 2018\)](#)

## **Core Terms**

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patent, infringement, baseless, bad faith, Lawsuit, summary judgment motion, sanctions, alleges, invalid, issue preclusion, asserting, sales, milk, filing date, sham, summary judgment, issue of fact, offer to sell, antitrust, effective, immunity, products, donated, argues, preemption, state-law, patent infringement, one year, communicate, competitor

**Counsel:** [\*1] For Plaintiff: Brenna K. Legaard and Angela E. Addae, SCHWABE, WILLIAMSON & WYATT PC, Portland, OR.

For Defendant: Kristin L. Cleveland, KLARKQUIST SPARKMAN LLP, Portland, OR; Orion Armon, COOLEY LLP, Broomfield, CO; Alexandra Mayhugh, COOLEY LLP, Santa Monica, CA.

**Judges:** Michael H. Simon, United States District Judge.

**Opinion by:** Michael H. Simon

## **Opinion**

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### **[\*\*1423] OPINION AND ORDER**

**Michael H. Simon, District Judge.**

In this patent action, the Court previously granted partial summary judgment in favor of Plaintiff Ni-Q, LLC ("Ni-Q"), finding that the asserted claims of the subject patent are invalid and that Plaintiff did not infringe the asserted claims. Ni-Q had sought a declaration of invalidity and noninfringement and Defendant Prolacta Bioscience, Inc. ("Prolacta") had asserted a counterclaim against Ni-Q for infringement, seeking money damages and injunctive relief. Those claims have now been resolved with the Court's Opinion and Order granting Plaintiff's motion for summary judgment. The sole claim remaining in this case is [\*1424] Plaintiff's claim for money damages and injunctive relief under [Oregon's Unlawful Trade Practices Act](#) ("UTPA"), Oregon Revised Statutes ("ORS") § 646.605, et seq. Prolacta moves for summary judgment against this claim. [\*2] For the reasons discussed below, Prolacta's motion for summary judgment is denied.

## STANDARDS

### A. Summary Judgment

A party is entitled to summary judgment if the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." [Fed. R. Civ. P. 56\(a\)](#). The moving party has the burden of establishing the absence of a genuine dispute of material fact. [Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 \(1986\)](#). The court must view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor. [Clicks Billiards Inc. v. Sixshooters Inc., 251 F.3d 1252, 1257 \(9th Cir. 2001\)](#). Although "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment," the "mere existence of a scintilla of evidence in support of the plaintiff's position [is] insufficient." [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 \(1986\)](#). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 \(1986\)](#) (citation and quotation marks omitted).

### B. Oregon's UTPA

Ni-Q alleges that Prolacta has violated Oregon's UTPA. Specifically, Ni-Q alleges that Prolacta violated [ORS § 646A.810\(2\)](#) by asserting a patent infringement [\*3] claim in bad faith. [ORS § 646A.810\(2\)](#) provides:

A person or the person's affiliate may not communicate a demand, or cause another person to communicate a demand, to a recipient if in the demand the person or the person's affiliate alleges, asserts or claims in bad faith that the recipient has infringed or contributed to infringing a patent or the rights that a patentee has . . . under the patent.

[ORS § 646A.810\(2\)](#).

In addition, [ORS § 646A.810\(4\)](#) provides a list of possible conditions that "[a] court may consider . . . as evidence that a person or the person's affiliate has, in bad faith, alleged, asserted or claimed an infringement of a patent." These include that the person making the demand did not properly compare the claims of the patent to the features of the allegedly infringing product ([§ 646A.810\(4\)\(d\)](#)) and that the person making the demand knew or should have known that the claim of infringement was without merit or was deceptive ([§ 646A.810\(4\)\(f\)](#)). Any violation of [ORS § 646A.810\(2\)](#) constitutes an unlawful practice under ORS § 646.608, which triggers the right to file suit.

## BACKGROUND

Prolacta is a corporation that produces and sells human milk formula to medical service providers. Prolacta sells its formula to hospitals for \$180 per ounce, and a single premature infant might consume thousands [\*4] of dollars' worth of formula during the course of his or her hospital stay. Ni-Q is a relatively new entrant into the market for producing and selling human milk formula. Ni-Q is a competitor of Prolacta. Ni-Q's human milk formula is sold at a significantly lower price than is Prolacta's.

On November 11, 2016, Prolacta sent a letter ("November 11 Letter") to the Chief Executive Officer ("CEO") of Ni-Q, Bill Pfost. ECF 25-2 at 1. The letter's stated intent was to apprise Mr. Pfost of the patents owned by Prolacta. Prolacta admitted to having "very limited visibility into the products and processes being developed by [Ni-Q]." *Id.* Nonetheless, Prolacta expressed a suspicion "that [Ni-Q] may be relying on matching donor genetic identity marker profiles with donated milk samples." *Id.*

In the November 11 Letter, Prolacta alleges that Ni-Q infringed U.S. Patent No. 8,628,921 (the '921 Patent), among other patents. This patent involves "methods and systems for diagnosing or screening human milk samples to confirm that the milk is from a defined source." ECF 57-1 at 5. Prolacta acquired the '921 Patent through an assignment of ownership rights from the inventors. Ni-Q asserts **[\*\*1425]** that the '921 Patent has an effective filing date of March 20, 2008, and Prolacta **[\*5]** does not dispute this date.<sup>1</sup>

Claim 1 of the '921 Patent describes "[a] method for determining whether a donated mammary fluid was obtained from a specific subject." This method comprises:

- (a) testing a donated biological sample from the specific subject to obtain at least one reference identity marker profile for at least one marker;
- (b) testing a sample of the donated mammary fluid to obtain at least one identity marker profile in step (a);
- (c) comparing the identity marker profiles, wherein a match between [them] indicates that the mammary fluid was obtained from the specific subject; and
- (d) processing the donated mammary fluid . . . wherein the processed donated mammary fluid comprises a human protein constituent of 11-20 mg/mL; a human fat constituent of 35-55 mg/mL; and a human carbohydrate constituent of 70-120 mg/mL.

'921 Patent at 21:45-65. In the November 11 Letter, Prolacta encouraged Ni-Q to review the '921 Patent, among others, to ensure that Ni-Q was not infringing the patented method of using genetic information from donated milk samples to confirm the identity of the donors.

On March 21, 2017, Mr. Pfost sent an email to Prolacta's CEO Scott Elster, contending that Ni-Q was confident that it was not infringing **[\*6]** any of Prolacta's patents. ECF 25-2 at 2. Prolacta responded by stating that it remained concerned about Ni-Q's infringement because of information in the brochure for Ni-Q's product. ECF 25-2 at 3. On May 11, 2017, Prolacta, through its legal counsel, requested samples of each product that Ni-Q made with donated human milk. ECF 25-2 at 7-8. Prolacta also inquired about the fat, protein, and carbohydrate constituents in Ni-Q's human milk products. *Id.*

Ni-Q neither submitted the samples nor answered the questions about protein, fat, and carbohydrate constituents. Instead, Ni-Q replied that Prolacta had already admitted to having "absolutely no basis for alleging infringement." ECF 25-2 at 9-10. According to Ni-Q, this admission was based on Prolacta's statement that it had so far been "unable to uncover details regarding Ni-Q's products sufficient to show whether or not Ni-Q's products are infringing Prolacta's patent[]." *Id.* Ni-Q also requested that Prolacta submit a claim chart, to indicate exactly how Ni-Q's product incorporates all the claim elements from Prolacta's patent. Prolacta did not submit the requested claim chart. *Id.*

On May 31, 2017, Prolacta filed a complaint against Ni-Q **[\*7]** in the Central District of California ("California Lawsuit"). The California Lawsuit alleged that Ni-Q was infringing the '921 Patent. In response, Ni-Q filed a Motion to Dismiss and a [Rule 11](#) Motion for Sanctions against Prolacta. [\*Prolacta Bioscience, Inc. v. Ni-Q, LLC, 2017 U.S. Dist. LEXIS 217030, 2017 WL 5664985, at \\*1 \(C.D. Cal. 2017\)\*](#) Judge James Otero decided the case, *id.*, and dismissed Prolacta's infringement complaint for lack of proper venue under [28 U.S.C. § 1400\(b\)](#).<sup>2</sup> [\*2017 U.S. Dist. LEXIS 217030, \[WL\] at \\*7.\*](#) The court declined to issue [Rule 11](#) sanctions against Prolacta. *Id.*

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<sup>1</sup> The '921 patent was filed on August 23, 2012. The '921 patent is a continuation of Application No. 13/079,923, which was filed on April 5, 2011. This application is a continuation of Application No. 12/052,253, which was filed on March 20, 2008. Ni-Q asserts that Application No. 12/052,253 is a continuation-in-part of international application PCT/US2006/036827, which was filed on September 20, 2006, in accordance with the Patent Cooperation Treaty. Ni-Q argues that because the international application contains no disclosure of either the macronutrient ranges or the mammary fluid processing treatment mentioned in claim (1)(d) of the '921 patent, the chain of continuation is broken at this point and the '921 Patent therefore has the effective filing date of March 20, 2008.

<sup>2</sup> "Any civil action for patent infringement may be brought in a judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." [28 U.S.C. § 1400\(b\)](#).

While the California Lawsuit was pending, Ni-Q filed its lawsuit in this Court, seeking declaratory relief and money damages. Prolacta filed a counterclaim alleging that Ni-Q infringed the '921 Patent. Ni-Q filed a motion for summary judgment, arguing that the asserted claims of the '921 Patent are invalid for patenting natural law and asserting that there is no genuine issue of material fact that Ni-Q infringes the '921 Patent even if it is valid. On September 21, 2018, Ni-Q moved for leave to amend its answer to Prolacta's counterclaim. **[\*\*1426]** The proposed amended answer added the affirmative defense of inequitable conduct. Ni-Q asserted that it first became aware of the fact that Prolacta might have engaged in inequitable conduct before the U.S. Patent and Trademark Office ("PTO") when Prolacta filed its response **[\*8]** to Ni-Q's motion for summary judgment. Ni-Q's new affirmative defense was based on allegations that Prolacta engaged in sales or offers to sell products covered by the '921 Patent more than one year before the effective filing date of the patent. The Court granted the motion to amend, finding that Ni-Q's proposed pleading met the heightened standard for alleging fraud. The Court concluded:

The facts alleged by Ni-Q give rise to a reasonable inference that the inventors knew of the withheld information, which allegedly all were Prolacta publications and commercial sales. Prolacta offers no explanation for the withholding of this information. At this stage of the litigation, these allegations support a reasonable inference of an intent to mislead the PTO.

## DISCUSSION

In its motion for partial summary judgment, Prolacta argues: (1) Ni-Q's UTPA claim is barred under the *Noerr-Pennington*<sup>3</sup> doctrine; (2) Ni-Q's claim for state law tort liability is preempted under federal patent law; and (3) the doctrine of issue preclusion prevents Ni-Q from arguing that Prolacta's conduct in enforcing the '921 Patent meets was objectively baseless because the Central District of California necessarily decided this issue against Ni-Q. **[\*9]** Each argument is addressed in turn.

### A. *Noerr-Pennington* Doctrine

The *Noerr-Pennington* doctrine is most often seen asserted as a defense against certain claims of antitrust liability. [\*Octane Fitness, LLC v. ICON Health & Fitness, Inc.\*, 572 U.S. 545, 134 S. Ct. 1749, 1757, 188 L. Ed. 2d 816 \(2014\)](#) ("Under the *Noerr-Pennington* doctrine . . . defendants are immune from antitrust liability for engaging in conduct (including litigation) aimed at influencing decisionmaking by the government."). The parties do not discuss whether the law of the Ninth Circuit or the Federal Circuit applies to the asserted application of *Noerr-Pennington* to a state law tort claim.<sup>4</sup> The Court, however, need not resolve that question because the analysis is the same under either circuit's law. Both Circuits apply *Noerr-Pennington* to patent litigation and pre-litigation communications. See [\*Sosa v. DIRECTV, Inc.\*, 437 F.3d 923, 934-37 \(9th Cir. 2006\); \*Globetrotter Software, Inc. v. Elan Computer Grp., Inc.\*, 362 F.3d 1367, 1377 \(Fed. Cir. 2004\)](#). Both Circuits also extend the immunity from antitrust suits to state law tort action. See [\*Theme Promotions, Inc. v. News Am. Mktg. FSI\*, 546 F.3d 991, 1007 \(9th Cir. 2008\)](#) ("There is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust."); [\*Globetrotter\*, 362 F.3d at 1377](#) ("Our decision to permit state-law tort liability for only objectively baseless allegations of infringement rests on both federal preemption **[\*10]** and the [First Amendment](#). . . . In addition, the same [First Amendment](#) policy reasons that justify the extension of *Noerr* immunity to pre-litigation conduct in the context of federal [antitrust law](#) apply equally in the context of state-law tort claims. (citation omitted)).

<sup>3</sup> The *Noerr-Pennington* doctrine is named after two cases: [\*Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.\*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 \(1961\)](#) and [\*United Mine Workers of Am. v. Pennington\*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 \(1965\)](#).

<sup>4</sup> Federal Circuit law applies in analyzing whether federal law preempts Ni-Q's state law claim. See [\*Globetrotter Software, Inc. v. Elan Computer Grp., Inc.\*, 362 F.3d 1367, 1374 \(Fed. Cir. 2004\)](#) ("We apply Federal Circuit law not only to the patent issues but also in deciding whether the patent laws preempt a state-law tort claim.").

In its Amended Complaint, Ni-Q alleges that Prolacta engaged in unfair practices by making pre-suit demands without having a reasonable basis to believe that Ni-Q was infringing Prolacta's patent, filing the California Lawsuit without having a reasonable basis to conclude that Ni-Q was infringing Prolacta's patent, and filing the California Lawsuit in California without having a reasonable basis to conclude that it was a proper venue. Thus, alleges, Ni-Q, Prolacta's conduct was done in bad faith. In response to Prolacta's motion for summary judgment, however, Ni-Q adds the bad faith assertions included in its amended answer—that Prolacta enforced the '921 Patent knowing it was invalid because Prolacta **[\*\*1427]** had engaged in commercial sales and publications more than one year before the effective filing date.

Ni-Q requests under [Rule 56\(d\) of the Federal Rules of Civil Procedure](#) that the Court stay Prolacta's motion and allow additional discovery on these new allegations. Ni-Q bases its most recent allegations **[\*11]** of bad faith on evidence submitted by Prolacta in response to Ni-Q's motion for summary judgment. Specifically, Ni-Q cites to a declaration filed by Prolacta in which the declarant testifies that she purchased Prolacta's patented product in 2006, more than one year before the effective filing date of the '921 Patent. Because, as discussed below, the Court finds that Ni-Q has sufficiently raised an issue of fact regarding Prolacta's bad faith and thus the objective and subjective baselessness of Prolacta's enforcement of the '921 Patent, the Court declines to stay Prolacta's motion for summary judgment for additional discovery.

Regardless of whether the asserted bad faith was making pre-suit demands and filing the lawsuit without ensuring that Ni-Q's product infringed or with knowledge that Prolacta's patent was invalid, the actions taken by Prolacta are conduct within the *prima facie* scope of *Noerr-Pennington* doctrine. There are, however, two primary exceptions to *Noerr-Pennington* immunity. The first exception is the "sham" exception. Under the sham exception, "activity ostensibly directed toward influencing governmental action does not qualify for *Noerr* immunity if it is a mere sham to cover an attempt **[\*12]** to interfere directly with the business relationships of a competitor." [\*Octane Fitness, 572 U.S. at 556\*](#) (quotation marks and alterations omitted). The second exception is the "Walker Process fraud" exception.<sup>5</sup> Under this exception, enforcement of a patent obtained by fraud on the PTO is not entitled to *Noerr-Pennington* immunity. See [\*Kaiser Found. Health Plan, Inc. v. Abbott Labs, Inc., 552 F.3d 1033, 1045 \(9th Cir. 2009\)\*](#). Ni-Q argues that both exceptions apply.

## 1. Sham Exception

"[W]hile genuine petitioning is immune from antitrust liability, sham petitioning is not." [\*BE & K Constr. Co. v. N.L.R.B., 536 U.S. 516, 525-26, 122 S. Ct. 2390, 153 L. Ed. 2d 499 \(2002\)\*](#). In order "to qualify as a 'sham,' a 'lawsuit must be objectively baseless' and 'must conceal an attempt to interfere directly with the business relationships of a competitor.'" [\*Octane Fitness, 572 U.S. at 556\*](#) (alterations omitted) (quoting [\*Professional Real Estate Inv'rs., Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60-61, 113 S. Ct. 1920, 123 L. Ed. 2d 611 \(1993\)\*](#) (hereinafter "PRE")). More specifically, "the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. . . . Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." [\*PRE, 508 U.S. at 60\*](#). Under the second prong, the subjective prong, "the court should focus on whether the baseless lawsuit conceals 'an attempt to interfere *directly* with the business relationships of a competitor' through the 'use [of] the governmental **[\*13]** process—as opposed to the outcome of that process—as an anticompetitive weapon.'" [\*Id. at 60-61\*](#) (emphasis and alteration in original) (citation omitted). Moreover, "[t]he existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in a sham litigation." [\*Id. at 62\*](#). In the context of a tort allegation of a "wrongful civil proceeding[]," the plaintiff carries the burden of "prov[ing] that the defendant lacked probable cause to institute an unsuccessful civil lawsuit, and that the defendant pressed the action for an improper, malicious purpose." *Id.*

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<sup>5</sup> The Walker Process fraud exception comes from [\*Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 \(1965\)\*](#).

### a. Objective Baselessness

In evaluating objective baselessness, a court must inquire into the reasonableness of a defendant's litigation at the time when the complaint was filed. [\*FilmTec Corp. v. Hydranautics\*, 67 F.3d 931, 938 \(Fed. Cir. 1995\)](#). "A bad faith patent enforcement may form the basis for . . . liability." [\*Boydston Metal Works, Inc. v. Cottrell, Inc.\*, 2017 U.S. Dist. LEXIS 175659, 2017 WL 4803938, at \\*5 \(D. Or. Oct. 24, 2017\)](#); see also [\*Octane Fitness\*, 572 U.S. at 556](#) ("In other words, the plaintiff must have brought baseless claims . . . to thwart competition (i.e. *in bad faith*).") (emphasis added)).

The Court focuses on Ni-Q's most recent argument, that Prolacta enforced its patent in bad faith because it knew its patent was invalid [\*\*1428] based on the "on sale bar" of the [U.S. Patent Act](#) in effect at the relevant time. [\*14] For patents predating the *America Invents Act of 2011* ("AIA"), if a claimed invention is either sold or offered for sale in the U.S. more than one year before the effective filing date, then the patent for that invention is not valid. [35 U.S.C. § 102\(b\)](#) (pre-AIA). This rule is known as the "on sale bar."

"The on sale bar is triggered if two conditions are met by the critical date: (1) the invention was offered for sale, and (2) the invention was ready for patenting." [\*Boydston Metal Works, Inc. v. Cottrell, Inc.\*, 519 F. Supp. 2d 1119, 1128 \(D. Or. 2007\)](#) (citing [\*Pfaff v. Wells Elecs.\*, 525 U.S. 55, 67, 119 S. Ct. 304, 142 L. Ed. 2d 261 \(1998\)](#)). For patents predating the AIA, the relevant critical date is the date of filing. [35 U.S.C. § 102\(b\)](#) (pre-AIA). "[T]he invention that is the subject matter of the offer for sale must satisfy each claim limitation of the patent." [\*Scaltech, Inc. v. Retec/Tetra, LLC\*, 269 F.3d 1321, 1329 \(Fed. Cir. 2001\)](#). The accused infringer has the burden "to establish by 'clear and convincing evidence that there was a definite sale or offer to sell more than one year before the application for the subject patent, and that the subject matter of the sale or offer to sell fully anticipated the claimed invention.'" [\*Boydston\*, 519 F. Supp. 2d at 1124](#) (quoting [\*Elan Corp., PLC v. Andrx Pharms., Inc.\*, 366 F.3d 1336, 1340 \(Fed. Cir. 2004\)](#)). Even one single sale or offer to sell may invalidate a patent under the pre-AIA Patent Act. See [\*Electromotive Div. of Gen. Motors Corp. v. Transportation Sys. Div. of Gen. Elec. Co.\*, 417 F.3d 1203, 1209 \(Fed. Cir. 2005\)](#) ("We need not consider whether the district court was correct as to all of these sales because a single sale or offer for sale suffices [\*15] to bar patentability."); [\*Atl. Thermoplastics Co. v. Faytex Corp.\*, 970 F.2d 834, 836 \(Fed. Cir. 1992\)](#) ("A single sale or offer to sell suffices to bar patentability.").

The '921 Patent's effective filing date of March 20, 2008 is before the AIA. Accordingly, the effective filing date serves as the critical date for the on sale bar analysis. Ni-Q's argument that Prolacta enforced the '921 Patent in bad faith hinges on Ni-Q's assertion that Prolacta sold or offered to sell products that satisfied the claim limitations of the '921 Patent before March 20, 2007. Because Prolacta knew or should have known about those sales, argues Ni-Q, Prolacta knew or should have known it improperly obtained the patent, the patent was invalid, and that it should not be enforcing the patent.

Prolacta submitted the testimony of Martin L. Lee, PhD, in response to Ni-Q's motion for summary judgment. According to Dr. Lee, "[t]he claims of the '921 patent . . . cover Prolacta's NEO20TM product, which is manufactured from DNA matched donor milk, and which includes the multi-nutrient enhanced ranges cited in the patent." ECF 99 at 8: P 18. Neither party argues that NEO20 is not covered by the claims of the '921 patent.

Prolacta also submitted the declaration of Dr. Sarah Lentz-Kapua in response to Ni-Q's motion for summary judgment. Dr. Lentz-Kapua [\*16] testified that she first learned about Prolacta's NEO20 product "in or around 2006" and that it was being sold at the time. ECF 98 at 1-2. This testimony is evidence that NEO20—a product that fully embodied the claims of the '921 Patent—was being sold more than one year before the effective filing date of March 20, 2008. Indeed, after Ni-Q pointed out this issue to counsel for Prolacta, counsel for Prolacta suggested that the parties file a joint motion to dismiss under [Rule 41 of the Federal Rules of Civil Procedure](#) and indicated that otherwise Prolacta "could unilaterally concede the invalidity of the asserted claims and move to dismiss its counterclaims." ECF 118-8. Prolacta later changed its position and averred that its first sale of NEO20 was March 27, 2007, one week after the on sale bar date.

There is conflicting evidence in the record regarding whether Prolacta first sold or offered for sale a product that fully anticipated the claim limitations in the '921 Patent before March 20, 2007. Accordingly, Ni-Q has raised a genuine issue of fact whether the on sale bar applies and therefore whether Prolacta enforced its patent in bad faith. There is thus an issue of fact whether Prolacta's enforcement was objectively baseless.

#### a. Subjective Baselessness [\*17]

For the same reasons there is an issue of fact on objective baselessness, there is an issue of fact on subjective baselessness. If Prolacta was enforcing a patent that it knew or should have known was invalid, then its lawsuit was to "conceal an attempt to interfere directly with the business relationships of a competitor." *Octane Fitness, 572 U.S. at 556*. [\*\*1429] Because there are genuine issues of fact regarding whether Prolacta's enforcement was objectively and subjectively baseless, there are issues of fact regarding whether the sham exception applies. Prolacta's defense based on *Noerr-Pennington*, therefore, cannot be resolved by summary judgment.

#### 2. Walker Process Fraud Exception

In *Walker Process*, the Supreme Court found "that enforcement of a fraudulently obtained patent claim could violate the *Sherman Act*." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 455, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*; see also *Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 512-13, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)* ("Use of a patent obtained by fraud to exclude a competitor from the market may involve a violation of the antitrust laws, as we held in [*Walker Process*]."). Ni-Q asserts that the '921 Patent was obtained through fraud on the PTO, and thus Prolacta is not entitled to immunity with respect to its infringement action.

In order to make out a *Walker Process* fraud claim, an "antitrust-plaintiff must show . . . that the [\*18] antitrust-defendant obtained the patent by knowing and willful fraud on the patent office and maintained and enforced the patent with knowledge of the fraudulent procurement." *TransWeb, LLC v. 3M Innovative Props. Co., 812 F.3d 1295, 1306 (Fed. Cir. 2016)*. Thus, a *Walker Process* plaintiff must allege both materiality and a clear intent to deceive. *Nobelpharma, 141 F.3d at 1069-70*. The materiality standard "requires that the patent would not have issued but for the patent examiner's justifiable reliance on the patentee's misrepresentation or omission." *Dippin' Dots, Inc. v. Mosey, 476 F.3d 1337, 1347 (Fed. Cir. 2007)*. "Walker Process intent may be inferred from the facts and circumstances of a case." *Id.* "[O]missions, as well as misrepresentations, may in limited circumstances support a finding of *Walker Process* fraud." *Nobelpharma, 141 F.3d at 1070*. "[T]he knowing failure to disclose sales" can be "particularly egregious" and it "reasonably supports an inference that [the patent applicant] intended to mislead the PTO. . . . because, unlike the applicant's failure to disclose, for example, a material patent reference, the [PTO] has no way of securing the information on [its] own." *Paragon Podiatry Lab., Inc. v. KLM Labs., Inc., 984 F.2d 1182, 1193 (Fed. Cir. 1993)*.

Ni-Q argues that the *Walker Process* exception applies because Prolacta committed fraud on the PTO by concealing sales and offers to sell of products from before March 20, 2007, which fully [\*19] anticipated the claimed limitations of the '921 Patent. These included sales and offers to sell NEO20 that occurred in 2006. As explained above, these sales would invalidate the '921 patent under the on sale bar. The concealment of these sales is material because the PTO would not have issued the '921 Patent "but for the patent examiner's justifiable reliance" on Prolacta's alleged misrepresentation and omission. *Dippin' Dots, 476 F.3d at 1347*. Likewise, the clear intent requirement would be met because "evidence of a knowing failure to disclose sales . . . reasonably supports an inference that [the patent applicant] intended to mislead the PTO." *Paragon Podiatry, 984 F.2d at 1193*.

As discussed above, there is a genuine issue regarding the first date of sale or offer for sale by Prolacta of a product covered by the '921 Patent. Accordingly, Ni-Q has raised a genuine issue regarding whether the *Walker Process* exception applies. For this reason as well, Prolacta's defense based on *Noerr-Pennington* cannot be resolved by summary judgment. Prolacta's motion for summary judgment on this basis is denied.

## B. Patent Preemption

Under the [Supremacy Clause](#), any state law that conflicts with a federal law is invalid. [U.S. Const., Art. VI, cl. 2](#). Federal Circuit law governs whether federal patent law preempts a state law claim. [Globetrotter, 362 F.3d at 1374](#). The Federal Circuit [\*20] has held that "federal patent law preempts state-law tort liability for a patentholder's good faith conduct in communications asserting infringement of its patent and warning about potential litigation." [Globetrotter, 362 F.3d at 1374](#). Such state-law claims, including Ni-Q's UTPA claim, can only avoid federal preemption "to the extent that those claims are based on a showing of 'bad faith' action in asserting the infringement." *Id.*

The consideration of "bad faith" for purposes of preemption of this type of tort claim is the same as for purposes of the *Noerr-Pennington* doctrine. See [id. at 1374-77](#) (setting forth the "jurisprudential background of the bad faith standard" by discussing *Noerr, PRE*, and other cases involving the *Noerr-Pennington* doctrine). The Federal Circuit has [\*\*1430] held that for purposes of preemption of this type of state-law tort claim, an accused infringer must show that the patent holder engaged in objectively baseless conduct. [Id. at 1377](#) ("Accordingly, the objectively baseless standard of *Professional Real Estate* applies to state-law claims based on communications alleging patent infringement, such as those in this case. A plaintiff claiming that a patent holder has engaged in wrongful conduct by asserting claims of patent [\*21] infringement must establish that the claims of infringement were objectively baseless." (footnote omitted)).

Prolacta argues that [ORS § 646A.810](#) (patent infringement claim made in bad faith) is preempted both by the federal Patent Act and by Congress's constitutional authority "[t]o promote the progress of science and the useful arts, by securing for limited times to . . . inventors the exclusive right to their respective writings and discoveries." [U.S. Const., Art. I, § 8, cl. 8](#). Accordingly, Prolacta argues that federal patent law preempts the following subsection from the UTPA:

[A person] may not communicate a demand . . . to a recipient if in the demand [the person] alleges, asserts or claims in bad faith that the recipient has infringed . . . a patent or the rights that a patentee has, or has granted to an assignee or licensee, under the patent.

[ORS § 646A.810\(2\)](#).

As discussed above, however, Ni-Q has shown a genuine issue of material fact regarding whether Prolacta's enforcement of the '921 Patent, including through pre-litigation letters and the California Lawsuit itself, was objectively baseless. Because the Federal Circuit has held that preemption of state-law torts encompassing this type of claim rests on whether the patent holder's conduct was objectively [\*22] baseless, there is an issue of fact on whether Ni-Q's UTPA claim is preempted. Accordingly, Prolacta's motion for summary judgment on this basis is denied.

## C. Issue Preclusion

The Federal Circuit applies "the law of the regional circuit to the general procedural question of whether issue preclusion applies" in a patent infringement suit. [Soverain Software LLC v. Victoria's Secret Direct Brand Mgmt., LLC, 778 F.3d 1311, 1314 \(Fed. Cir. 2015\)](#). Issue preclusion, also known as collateral estoppel, "is designed to 'bar [] successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination.'" [Paulo v. Holder, 669 F.3d 911, 918 \(9th Cir. 2011\)](#) (quoting [Taylor v. Sturgell, 553 U.S. 880, 892, 128 S. Ct. 2161, 171 L. Ed. 2d 155 \(2008\)](#)); see also [Robi v. Five Platters, Inc., 838 F.2d 318, 322 \(9th Cir. 1988\)](#) ("The doctrine of issue preclusion prevents relitigation of all issues of fact or law that were actually litigated and necessarily decided in a prior proceeding. . . . The issue must have been actually decided after a full and fair opportunity for litigation." (quotation marks and citations omitted)). Thus, the party asserting issue preclusion must demonstrate: (1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessarily decided, also described as

necessary or essential to the judgment. [\*23] <sup>6</sup> See [Howard v. City of Coos Bay, 871 F.3d 1032, 1041 \(9th Cir. 2017\)](#). Issue preclusion may be used either defensively or offensively. "In both the offensive and defensive use situations the party against whom [collateral] estoppel is asserted has litigated and lost in an earlier action." [Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329, 99 S. Ct. 645, 58 L. Ed. 2d 552 \(1979\)](#).

[\*\*1431] Prolacta asserts issue preclusion defensively against Ni-Q's UTPA claim. Prolacta argues that Judge Otero's refusal to impose sanctions under [Rule 11](#) is a final judgment that precludes Ni-Q's argument that Prolacta's California Lawsuit was objectively baseless, as is required for the sham exception to *Noerr-Pennington* and the question of federal preemption.

Whether issue preclusion applies in this case turns on whether Judge Otero's denial of [Rule 11](#) sanctions is "identical" to determining whether Prolacta's enforcement conduct was objectively baseless and whether that determination was "necessarily decided" when Judge Otero denied [Rule 11](#) sanctions. The Court finds that these elements are not met.

A federal court's authority to impose sanctions under [Rule 11](#) is discretionary, and a court may consider numerous factors. See [Fed. R. Civ. P 11\(c\)\(1\)](#) ("[T]he court *may* impose an appropriate sanction.") (emphasis added); [Fed. R. Civ. P. 11](#), 1993 Advisory Notes (noting that courts should consider the following factors [\*24] in deciding whether to impose a sanction: "Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants."); see also [Goto v. R & B Realty Grp., 69 F.3d 1485, 1488 \(9th Cir. 1995\)](#) (noting that district courts have "wide discretion in determining whether [Rule 11](#) sanctions are appropriate"); [Kersten v. Quick Collect, Inc., 152 F. Supp. 3d 1301, 1304 \(D. Or. 2016\)](#) ("[Rule 11\(c\)\(1\)](#) gives a court discretion to sanction an attorney who files a motion for an improper purpose, 'such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.'" (quoting [Fed. R. Civ. P. 11\(b\)\(1\)](#))). Furthermore, "[[Rule 11](#)] is intentionally drafted to leave the question of the type of remedy to the trial judge's discretion, and not to straitjacket the court by limiting the type or number of sanctions that [\*25] it is empowered to impose." Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse*, 283 (5th ed. 2018).

In declining to award sanctions, Judge Otero first noted that Ni-Q did not present evidence of Prolacta's improper purpose, such as harassment. [Prolacta, 2017 U.S. Dist. LEXIS 217030, 2017 WL 5664985, at \\*7](#). Judge Otero next noted that Ni-Q had not considered documents protected by the attorney work product doctrine, which might support Prolacta's claims. *Id.* Judge Otero concluded: "Though it may be the case that Prolacta could have done more work prior to filing suit to determine whether Ni-Q's products infringe one or more claims of the '921 Patent, the Court is unable to sanction Prolacta at this time." *Id.*

Judge Otero had broad discretion to impose, or decline to impose, [Rule 11](#) sanctions and had numerous factors to consider. His decision does not state precisely what factors he relied on, but the factors that he specifically

<sup>6</sup>The Ninth Circuit sometimes discusses issue preclusion as requiring either the issue be "necessarily decided" or "essential to the judgment," interchangeably. See [United States v. Weems, 49 F.3d 528, 532 \(9th Cir. 1995\)](#) (setting out the elements as including "necessarily decided" and then discussing the "necessary to the judgment" element as being the same element). The Court uses "necessarily decided" because the weight of Ninth Circuit authority describes the "essential" or "necessary" to the judgment element in this manner for issue preclusion. Additionally, the Ninth Circuit sometimes lists the elements for issue preclusion as: (1) the issue was necessarily decided; (2) the first proceeding ended with a judgment on the merits; and (3) the party against whom preclusion is sought was a party or in privity with a party in the first litigation. See [Paulo, 669 F.3d at 917](#). The Court considers the latter two elements to be more appropriate elements for claim preclusion, see [Howard, 871 F.3d at 1039](#), although part of having a full and fair opportunity to litigate encompasses being a party or being in privity with a party. See [Taylor, 553 U.S. at 892-93](#) (noting that "[a] person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit" and then discussing several exceptions to that rule).

mentioned are not coextensive with the factors relevant to a consideration of objective baselessness. Accordingly, Judge Otero's denial of [Rule 11](#) sanctions is not "identical" to a finding that Prolacta's conduct was not objectively baseless and does not result in the issue being "necessarily decided" for the purpose of issue preclusion. [\*26] Prolacta's motion for summary judgment based on issue preclusion is denied.

## **CONCLUSION**

Defendant Prolacta Bioscience Inc.'s Motion for Partial Summary Judgment (ECF 128) is DENIED.

**IT IS SO ORDERED.**

DATED this 14th day of February, 2019.

/s/ *Michael H. Simon*

Michael H. Simon

United States District Judge

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End of Document



## *In re Generic Pharms. Pricing Antitrust Litig.*

United States District Court for the Eastern District of Pennsylvania

February 15, 2019, Decided; February 15, 2019, Filed

MDL 2724 16-MD-2724; 16-CB-27240; 16-CB-27242; 16-CB-27243; 16-DG-27240; 16-DG-27242; 16-DG-27243; 16-DV-27240; 16-DV-27242; 16-DV-27243; 16-DX-27240; 16-DX-27242; 16-DX-27243; 16-EC-27240; 16-EC-27242; 16-EC-27243; 16-PV-27240; 16-PV-27242; 16-PV-27243

### **Reporter**

368 F. Supp. 3d 814 \*; 2019 U.S. Dist. LEXIS 25248 \*\*; 2019-1 Trade Cas. (CCH) P80,679; 2019 WL 653854

IN RE: GENERIC PHARMACEUTICALS PRICING ANTITRUST LITIGATION. THIS DOCUMENT RELATES TO: IN RE: CLOBETASOL CASES, All End-Payer and Indirect, Reseller Actions; IN RE: DIGOXIN CASES, All End-Payer and Indirect, Reseller Actions; IN RE: DIVALPROEX ER CASES, All End-Payer and Indirect, Reseller Actions; IN RE: DOXYCYCLINE CASES, All End-Payer and Indirect, Reseller Actions; IN RE: ECONAZOLE CASES, All End-Payer and Indirect, Reseller Actions; IN RE: PRAVASTATIN CASES, All End-Payer and Indirect, Reseller Actions

**Prior History:** [\*In re Generic Drug Pricing Antitrust Litig., 227 F. Supp. 3d 1402, 2016 U.S. Dist. LEXIS 103005, 2016 WL 4153602 \(J.P.M.L., Aug. 5, 2016\)\*](#)

## **Core Terms**

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consumer protection, Defendants', class action, drugs, antitrust, allegations, antitrust claim, purchasers, unjust enrichment, complaints, prices, deceptive, named plaintiff, state law claim, motions, consumers, damages, state law, indirect, anti trust law, class member, Pharmacy, courts, unconscionable, overcharges, divalproex, motion to dismiss, Plaintiffs', doxycycline, commerce

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For DEAL DRUG PHARMACY, Plaintiff (2:16-DG-27243-CMR): JONATHAN W. CUNEO, LEAD ATTORNEY, CUNEO GILBERT & LADUCA LLP, WASHINGTON, DC; ELIZABETH TIPPING, NEAL & HARWELL, PLC, NASHVILLE, TN.

For LANNETT COMPANY, INC., Defendant (2:16-DG-27243-CMR): PATRICK J. EGAN, FOX ROTHSCHILD LLP, PHILADELPHIA, PA.

For MYLAN PHARMACEUTICALS, INC., MYLAN INC., Defendants (2:16-DG-27243-CMR): **[\*\*9]** CHUL PAK, LEAD ATTORNEY, DANIEL P. WEICK, WILSON SONSINI GOODRICH & ROSATI PC, NEW YORK, NY; JEFFREY C. BANK, WILSON SONSINI GOODRICH & ROSATI, NEW YORK, NY; LISA DAVIS, WILSON SONSINI GOODRICH & ROSATI, PALO ALTO, CA; SETH C. SILBER, WILSON SONSINI GOODRICH & ROSATI PC, WASHINGTON, DC.

For WEST-WARD PHARMACEUTICALS CORP., Defendant (2:16-DG-27243-CMR): MELISSA HATCH O'DONNELL, PEPPER HAMILTON LLP, PHILADELPHIA, PA.

For WEST VAL PHARMACY, HALLIDAY'S & KOIVISTO'S PHARMACY, RUSSELL'S MR. DISCOUNT DRUGS, INC., CHET JOHNSON DRUG, INC., Plaintiffs (2:16-DV-27243): JONATHAN W. CUNEO, LEAD ATTORNEY, CUNEO GILBERT & LADUCA LLP, WASHINGTON, DC.

For FALCONER PHARMACY, INC., DEAL DRUG PHARMACY, Plaintiffs (2:16-DV-27243): JONATHAN W. CUNEO, LEAD ATTORNEY, CUNEO GILBERT & LADUCA LLP, WASHINGTON, DC; SHAWN M. RAITER, LEAD ATTORNEY, LARSON & KING, ST. PAUL, MN.

For MYLAN INC., MYLAN PHARMACEUTICALS INC., Defendants (2:16-DV-27243): CHUL PAK, LEAD ATTORNEY, DANIEL P. WEICK, WILSON SONSINI GOODRICH & ROSATI PC, NEW YORK, NY; JEFFREY C. BANK, WILSON SONSINI GOODRICH & ROSATI, NEW YORK, NY; LISA DAVIS, WILSON SONSINI GOODRICH & ROSATI, PALO ALTO, CA; SETH C. SILBER, WILSON SONSINI GOODRICH & ROSATI PC, **[\*\*10]** WASHINGTON, DC.

For ZYDUS PHARMACEUTICALS (USA) INC., Defendant (2:16-DV-27243): JOSEPH E. WOLFSON, LEAD ATTORNEY, STEVENS & LEE, PHILADELPHIA, PA; JASON R. PARISH, BUCHANAN INGERSALL & ROONEY PC, WASHINGTON, DC.

For WEST VAL PHARMACY, HALLIDAY'S & KOIVISTO'S PHARMACY, RUSSELL'S MR. DISCOUNT DRUGS, INC., CHET JOHNSON DRUG, INC., Plaintiffs (2:16-DX-27243-CMR): JONATHAN W. CUNEO, LEAD ATTORNEY, CUNEO GILBERT & LADUCA LLP, WASHINGTON, DC.

For FALCONER PHARMACY, INC., Plaintiff (2:16-DX-27243-CMR): JONATHAN W. CUNEO, LEAD ATTORNEY, CUNEO GILBERT & LADUCA LLP, WASHINGTON, DC; SHAWN M. RAITER, LEAD ATTORNEY, LARSON & KING, ST. PAUL, MN.

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For DEAL DRUG PHARMACY, Plaintiff (2:16-DX-27243-CMR): JONATHAN W. CUNEO, LEAD ATTORNEY, CUNEO GILBERT & LADUCA LLP, WASHINGTON, DC; ELIZABETH TIPPING, NEAL & HARWELL, PLC, NASHVILLE, TN.

For UNITED FOOD & COMMERCIAL WORKERS AND EMPLOYERS ARIZONA HEALTH AND WELFARE TRUST, THE CITY OF PROVIDENCE, RHODE ISLAND, LOUISIANA HEALTH SERVICE & INDEMNITY COMPANY, UNITE HERE HEALTH ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, DETECTIVES ENDOWMENT ASSOCIATION OF THE CITY OF NEW YORK, Plaintiffs (2:16-EC-27242-CMR): ROBERTA D. LIEBENBERG, LEAD ATTORNEY, FINE, [\*\*11] KAPLAN AND BLACK, PHILADELPHIA, PA.

For SERGEANTS BENEVOLENT ASSOCIATION OF THE POLICE DEPARTMENT OF THE CITY OF NEW YORK HEALTH AND WELFARE FUND, Plaintiff (2:16-EC-27242-CMR): ROBERTA D. LIEBENBERG, LEAD ATTORNEY, FINE, KAPLAN AND BLACK, PHILADELPHIA, PA; CHRISTINA SHARP, ELIZABETH A. KRAMER, JORDAN ELIAS, SCOTT M. GRZENCZYK, GIRARD SHARP LLP, SAN FRANCISCO, CA; PETER GEORGE SAFIRSTEIN, SAFIRSTEIN METCALF LLP, NEW YORK, NY.

For SELF-INSURED SCHOOLS OF CALIFORNIA, Plaintiff (2:16-EC-27242-CMR): ROBERTA D. LIEBENBERG, LEAD ATTORNEY, FINE, KAPLAN AND BLACK, PHILADELPHIA, PA; JOSEPH R. SAVERI, NICOMEDES S HERRERA, RYAN J MCEWAN, JOSEPH SAVERI LAW FIRM, SAN FRANCISCO, CA; JOSHUA H. GRABAR, Grabar Law Office, PHILADELPHIA, PA.

For AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES DISTRICT 37 HEALTH & SECURITY PLAN, Plaintiff (2:16-EC-27242-CMR): DAN DRACHLER, LEAD ATTORNEY, ZWERLING SCHACHTER & ZWERLING LLP, SEATTLE, WA; ROBERTA D. LIEBENBERG, LEAD ATTORNEY, FINE, KAPLAN AND BLACK, PHILADELPHIA, PA; AUDREY A. BROWNE, SETH KENNEDY, AMERICAN FEDERATION OF STATE, COUNTY AND MUNUCIPAL EMPLOYESS, NEW YORK, NY.

For PERRIGO NEW YORK, INC., Defendant (2:16-EC-27242-CMR): J. CLAYTON EVERETT, [\*\*12] JR., MORGAN LEWIS & BOCKIUS LLP, WASHINGTON, DC.

For AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN, Plaintiff (2:16-DV-27242-CMR): DAN DRACHLER, LEAD ATTORNEY, ZWERLING SCHACHTER & ZWERLING LLP, SEATTLE, WA; ROBERTA D. LIEBENBERG, LEAD ATTORNEY, FINE, KAPLAN AND BLACK, PHILADELPHIA, PA; AUDREY A. BROWNE, SETH KENNEDY, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEE, NEW YORK, NY.

For UNITE HERE HEALTH ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, LOUISIANA HEALTH SERVICE & INDEMNITY COMPANY, PHILADELPHIA FEDERATION OF TEACHERS HEALTH AND WELFARE FUND, Plaintiffs (2:16-DV-27242-CMR): ROBERTA D. LIEBENBERG, LEAD ATTORNEY, FINE, KAPLAN AND BLACK, PHILADELPHIA, PA.

For SELF-INSURED SCHOOLS OF CALIFORNIA, Plaintiff (2:16-DV-27242-CMR): ROBERTA D. LIEBENBERG, LEAD ATTORNEY, FINE, KAPLAN AND BLACK, PHILADELPHIA, PA; JOSEPH R. SAVERI, NICOMEDES S HERRERA, RYAN J MCEWAN, JOSEPH SAVERI LAW FIRM, SAN FRANCISCO, CA; JOSHUA H. GRABAR, Grabar Law Office, PHILADELPHIA, PA.

For 1199SEIU NATIONAL BENEFIT FUND, 1199SEIU GREATER NEW YORK BENEFIT FUND, 1199SEIU NATIONAL BENEFIT FUND FOR HOME CARE WORKERS, AND 1199 SEIU LICENSED [\*\*13] PRACTICAL NURSES WELFARE FUND, Plaintiff (2:16-DV-27242-CMR): DAN DRACHLER, LEAD ATTORNEY, ZWERLING SCHACHTER & ZWERLING LLP, SEATTLE, WA; ROBERTA D. LIEBENBERG, LEAD ATTORNEY, FINE, KAPLAN AND BLACK, PHILADELPHIA, PA.

For MYLAN PHARMACEUTICALS, INC., MYLAN INC., Defendants (2:16-DV-27242-CMR): CHUL PAK, LEAD ATTORNEY, DANIEL P. WEICK, JEFFREY C. BANK, WILSON SONSINI GOODRICH & ROSATI PC, NEW YORK, NY; LISA DAVIS, WILSON SONSINI GOODRICH & ROSATI, PALO ALTO, CA; SETH C. SILBER, WILSON SONSINI GOODRICH & ROSATI PC, WASHINGTON, DC.

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For WEST VAL PHARMACY, HALLIDAY'S & KOIVISTO'S PHARMACY, RUSSELL'S MR. DISCOUNT DRUGS, INC., CHET JOHNSON DRUG, INC., Plaintiffs (CASE #: 2:16-EC-27243-CMR): JONATHAN W. CUNEO, LEAD ATTORNEY, CUNEO GILBERT & LADUCA LLP, WASHINGTON, DC.

For FALCONER PHARMACY, INC., DEAL DRUG PHARMACY, INC., Plaintiffs (CASE #: 2:16-EC-27243-CMR): JONATHAN W. CUNEO, LEAD ATTORNEY, CUNEO GILBERT & LADUCA LLP, WASHINGTON, DC; ELIZABETH TIPPING, NEAL & HARWELL, PLC, NASHVILLE, TN.

For PERRIGO NEW YORK, INC., Defendant (CASE #: 2:16-EC-27243-CMR): J. CLAYTON EVERETT, JR., LEAD ATTORNEY, MORGAN LEWIS & BOCKIUS LLP, WASHINGTON, DC.

For TARO PHARMACEUTICALS USA, INC., Defendant (CASE #: [\*\*14] 2:16-EC-27243-CMR): JAMES DOUGLAS BALDRIDGE, LEAD ATTORNEY, VENABLE LLP, WASHINGTON, DC; BENJAMIN P. ARGYLE, VENABLE LLP, NEW YORK, NY; DANIELLE R. FOLEY, VENABLE LLP, WASHINGTON, DC; LISA JOSE FALES, VENABLE, LLP, WASHINGTON, DC; THOMAS J. WELLING, VENABLE LLP, NEW YORK, NY.

For TELIGENT, INC., Defendant (CASE #: 2:16-EC-27243-CMR): BRYAN DANIEL GANT, LEAD ATTORNEY, WHITE & CASE LLP, NEW YORK, NY; HEATHER K. MCDEVITT, LEAD ATTORNEY, WHITE & CASE LLP, NEW YORK, NY.

For WEST VAL PHARMACY, HALLIDAY'S & KOIVISTO'S PHARMACY, RUSSELL'S MR. DISCOUNT DRUGS, INC., CHET JOHNSON DRUG, INC. Plaintiffs (2:16-PV-27243-CMR): JONATHAN W. CUNEO, LEAD ATTORNEY, CUNEO GILBERT & LADUCA LLP WASHINGTON, DC.

For FALCONER PHARMACY, INC., Plaintiff (2:16-PV-27243-CMR): JONATHAN W. CUNEO, LEAD ATTORNEY, CUNEO GILBERT & LADUCA LLP WASHINGTON, DC; SHAWN M. RAITER, LEAD ATTORNEY, LARSON & KING, ST. PAUL, MN.

For DEAL DRUG PHARMACY, Plaintiff (2:16-PV-27243-CMR): JONATHAN W. CUNEO, LEAD ATTORNEY, CUNEO GILBERT & LADUCA LLP WASHINGTON, DC; ELIZABETH TIPPING, NEAL & HARWELL, PLC, NASHVILLE, TN.

For APOTEX CORP., Defendant JAMES W. MATTHEWS, LEAD ATTORNEY, JOHN F. NAGLE, FOLEY & LARDNER LLP, BOSTON, MA; ELIZABETH A.N. [\*\*15] HAAS, JAMES T. MCKEOWN, FOLEY & LARDNER, MILWAUKEE, WI; KATE E. GEHL, FOLEY & LARDNER LLP, MILWAUKEE, WI.

For GLENMARK PHARMACEUTICALS INC., Defendant (2:16-PV-27243-CMR): ANDREW S WELLIN, MORGAN, LEWIS & BOCKIUS LLP, NEW YORK, NY.

For LUPIN PHARMACEUTICALS, INC., Defendant (2:16-PV-27243-CMR): KATIE ROSE GLYNN, LOWENSTEIN SANDLER LLP, PALO ALTO, CA; LEIV H. BLAD, ZAREMA A. JARAMILLO, LOWENSTEIN SANDLER LLP, WASHINGTON, DC.

For SANDOZ, INC., Defendant (2:16-PV-27243-CMR): ALICE C.C. HULING, MARGARET A. ROGERS, SAUL P MORGENSEN, LEAD ATTORNEYS, ARNOLD & PORTER KAYE SCHOLER LLP, NEW YORK, NY; KATHRYN L. ROSENBERG, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLAR LLP, NEW YORK, NY; LAURA S. SHORES, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLER LLP, WASHINGTON, DC; ABBY L. SACUNAS, PETER MICHAEL RYAN, COZEN O'CONNOR, PHILADELPHIA, PA.

For TEVA PHARMACEUTICALS USA, INC., Defendant (2:16-PV-27243-CMR): AMANDA B. ROBINSON, LEAD ATTORNEY, MORGAN, LEWIS & BOCKIUS LLP, WASHINGTON, DC; ALISON TANCHYK, MORGAN LEWIS & BOKIUS LLP, PHILADELPHIA, PA; J. GORDON COONEY, JR., JOHN J. PEASE, MORGAN LEWIS & BOCKIUS LLP, PHILADELPHIA, PA; MICHAELA DRAGALIN, MORGAN LEWIS & BOCKIUS, PHILADELPHIA, PA.

For ZYDUS PHARMACEUTICALS [\*\*16] (USA) INC., Defendant (2:16-PV-27243-CMR): JOSEPH E. WOLFSON, LEAD ATTORNEY, STEVENS & LEE, PHILADELPHIA, PA; JASON R. PARISH, BUCHANAN INGERSALL & ROONEY PC, WASHINGTON, DC.

For DEFENSE LIAISON COUNSEL, IN RE (2:16-md-02724-CMR): CHUL PAK, LEAD ATTORNEY, WILSON SONSINI GOODRICH & ROSATI PC, NEW YORK, NY; JAN P. LEVINE, LEAD ATTORNEY, PEPPER HAMILTON

LLP, PHILADELPHIA, PA; LAURA S. SHORES, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLER LLP, WASHINGTON, DC; SAUL P MORGNSTERN, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLER LLP, NEW YORK, NY; SHERON KORPUS, LEAD ATTORNEY, KASOWITZ BENSON TORRES LLP, NEW YORK, NY.

For DIRECT PURCHASER PLAINTIFFS PSC, IN RE (2:16-md-02724-CMR): DAVID F. SORENSEN, LEAD ATTORNEY, BERGER & MONTAGUE, P.C. PHILADELPHIA, PA; DIANNE M. NAST, LEAD ATTORNEY, NASTLAW LLC, PHILADELPHIA, PA; LINDA P. NUSSBAUM, LEAD ATTORNEY, NUSSBAUM LAW GROUP PC, NEW YORK, NY; MICHAEL L. ROBERTS, LEAD ATTORNEY, ROBERTS LAW FIRM, LITTLE ROCK, AR; ROBERT N KAPLAN, LEAD ATTORNEY, KAPLAN FOX & KILSHEIMER, LLP, NEW YORK, NY; THOMAS M. SOBOL, LEAD ATTORNEY, HAGENS BERMAN SOBOL SHAPIRO LLP, CAMBRIDGE, MA; ROBERTA D. LIEBENBERG, FINE, KAPLAN AND BLACK, PHILADELPHIA, PA.

For END-PAYER PLAINTIFFS PSC, [\*\*17] IN RE (2:16-md-02724-CMR): ADAM J. ZAPALA, LEAD ATTORNEY, COTCHETT PITRE & MCCARTHY LLP, BURLINGAME, CA; BONNY SWEENEY, LEAD ATTORNEY, HAUSFELD LLP, SAN FRANCISCO, CA; DENA C. SHARP, LEAD ATTORNEY, GIRARD GIBBS LLP, SAN FRANCISCO, CA; ELIZABETH JOAN CABRASER, LEAD ATTORNEY, LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP, SAN FRANCISCO, CA; GREGORY S. ASCIOLLA, LEAD ATTORNEY, LABATON SUCHAROW LLP, NEW YORK, NY; HEIDI M SILTON, LEAD ATTORNEY, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; JAMES R. DUGAN, II, LEAD ATTORNEY, THE DUGAN LAW FIRM, NEW ORLEANS, LA; JAYNE A. GOLDSTEIN, LEAD ATTORNEY, SHEPHERD FINKELMAN MILLER & SHAH LLP, MEDIA, PA; JOSEPH R. SAVERI, LEAD ATTORNEY, JOSEPH SAVERI LAW FIRM, SAN FRANCISCO, CA; MICHAEL M. BUCHMAN, LEAD ATTORNEY, MOTLEY RICE LLC, NEW YORK, NY; MINDEE J. REUBEN, LEAD ATTORNEY, LITE DEPALMA GREENBERG LLC, PHILADELPHIA, PA; ROBERTA D. LIEBENBERG, LEAD ATTORNEY FINE, KAPLAN AND BLACK, PHILADELPHIA, PA.

For INDIRECT RESELLERS PSC, IN RE (2:16-md-02724-CMR): DANIEL S. MASON, LEAD ATTORNEY, FURTH SALEM MASON & LI LLP SAN FRANCISCO, CA; DON BARRETT, LEAD ATTORNEY, BARRETT LAW OFFICES, LEXINGTON, MS; ELIZABETH TIPPING, LEAD ATTORNEY, NEAL & HARWELL, PLC NASHVILLE, [\*\*18] TN; FRANCIS O. SCARPULLA, LEAD ATTORNEY, LAW OFFICES OF FRANCIS O. SCARPULLA, SAN FRANCISCO, CA; JONATHAN W. CUNEO, LEAD ATTORNEY, CUNEO GILBERT & LADUCA LLP, WASHINGTON, DC; ROBERTA D. LIEBENBERG, FINE, KAPLAN AND BLACK, PHILADELPHIA, PA.

For STATE ATTORNEYS GENERAL PLAINTIFFS, IN RE (2:16-md-02724-CMR): W. JOSEPH NIELSEN, LEAD ATTORNEY, LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE - ELM HARTFORD, CT; MAX M. MILLER, OFFICE OF THE ATTORNEY GENERAL OF IOWA, DES MOINES, IA; ROBERT L. HUBBARD, ATTORNEY GENERAL OF NEW YORK, NEW YORK, NY; ROBERTA D. LIEBENBERG, FINE, KAPLAN AND BLACK, PHILADELPHIA, PA; TIMOTHY M. FRASER, FL OFFICE OF THE ATTORNEY GENERAL, TALLAHASSEE, FL; WADE ELLIS BEAVERS, OFFICE OF THE NEVADA ATTORNEY GENERAL, CARSON CITY, NV.

For UNITED STATES OF AMERICA, Intervenor (2:16-md-02724-CMR): ANDREW J. EWALT, LEAD ATTORNEY, ELLEN R. CLARKE, JOSEPH C. FOLIO, III, U.S. DEPT OF JUSTICE, WASHINGTON, DC; JAY OWEN, U.S. DEPT OF JUSTICE - ANTITRUST DIV, WASHINGTON, DC; RYAN J. DANKS, U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, WASHINGTON, DC.

For OTTIS MCCRARY, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, UNITE HERE HEALTH, DETECTIVES ENDOWMENT ASSOCIATION OF [\*\*19] THE CITY OF NEW YORK, UFCW LOCAL 1500 WELFARE FUND, INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 30 BENEFIT FUND, VALERIE VELARDI, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, LOUISIANA HEALTH SERVICE & INDEMNITY COMPANY, Plaintiffs (2:16-DX-27242-CMR): ROBERTA D. LIEBENBERG, LEAD ATTORNEY, FINE, KAPLAN AND BLACK, PHILADELPHIA, PA.

For SELF-INSURED SCHOOLS OF CALIFORNIA, Plaintiff (2:16-DX-27242-CMR): ROBERTA D. LIEBENBERG, LEAD ATTORNEY, FINE, KAPLAN AND BLACK, PHILADELPHIA, PA; JOSHUA H. GRABAR, Grabar Law Office, PHILADELPHIA, PA; NICOMEDES S HERRERA, RYAN J MCEWAN, JOSEPH SAVERI LAW FIRM, INC., SAN FRANCISCO, CA.

For AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN, Plaintiff (2:16-DX-27242-CMR): DAN DRACHLER, LEAD ATTORNEY, ZWERLING SCHACHTER & ZWERLING LLP, SEATTLE, WA; ROBERTA D. LIEBENBERG, LEAD ATTORNEY, FINE, KAPLAN AND BLACK, PHILADELPHIA, PA; AUDREY A. BROWNE, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEE, NEW YORK, NY; SETH KENNEDY, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, NEW YORK, NY.

For HERITAGE PHARMACEUTICALS, INC., Defendant (2:16-DX-27242-CMR): ERIC J. STOCK, [\*\*20] GIBSON, DUNN & CRUTCHER LLP, NEW YORK, NY; INDRANEEL SUR, GIBSON DUNN & CRUTCHER LLP, NEW YORK, NY.

For MUTUAL PHARMACEUTICAL COMPANY, INC., SUN PHARMACEUTICAL INDUSTRIES, INC., Defendants (2:16-DX-27242-CMR): JAMES DOUGLAS BALDRIDGE, LEAD ATTORNEY, DANIELLE R. FOLEY, VENABLE LLP, WASHINGTON, DC; BENJAMIN P. ARGYLE, THOMAS J. WELLING, VENABLE LLP, NEW YORK, NY; LISA JOSE FALES, VENABLE, LLP, WASHINGTON, DC.

For MYLAN INC., MYLAN PHARMACEUTICALS, INC., Defendants (2:16-DX-27242-CMR): CHUL PAK, LEAD ATTORNEY, DANIEL P. WEICK, WILSON SONSINI GOODRICH & ROSATI PC, NEW YORK, NY; JEFFREY C. BANK, WILSON SONSINI GOODRICH & ROSATI, NEW YORK, NY; LISA DAVIS, WILSON SONSINI GOODRICH & ROSATI, PALO ALTO, CA.

For WEST-WARD PHARMACEUTICALS CORP., Defendant (2:16-DX-27242-CMR): MELISSA HATCH O'DONNELL, PEPPER HAMILTON LLP, EIGHTEENTH & ARCH STS, PHILADELPHIA, PA.

**Judges:** HON. CYNTHIA M. RUGE, J.

**Opinion by:** CYNTHIA M. RUGE

## Opinion

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### [\*819] Rufe, J.

Defendants in this multidistrict antitrust litigation have moved to dismiss the state law claims by the End-Payer Plaintiffs ("EPPs") and the Indirect-Reseller Plaintiffs ("IRPs") with respect to the following generic drugs: (1) clobetasol; (2) digoxin; [\*820] (3) divalproex ER; (4) doxycycline; (5) econazole; [\*21] and (6) pravastatin (collectively, the "Group 1" drugs).<sup>1</sup> For the reasons set forth below, the motions will be granted in part and denied in part.

#### I. BACKGROUND

The background relevant to this decision is set forth at length in the Court's October 16, 2018 Opinion<sup>2</sup> addressing Defendants' motions to dismiss Plaintiffs' Sherman Act claims with respect to the Group 1 drugs and the Court will

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<sup>1</sup> On October 16, 2018, the Court ruled on Defendants' joint and individual motions to dismiss the Sherman Act claims in the operative consolidated class action complaints brought on behalf of the Direct Purchaser Plaintiffs ("DPPs"), the End-Payer Plaintiffs ("EPPs"), and the Indirect-Reseller Plaintiffs ("IRPs") with respect to the Group 1 drugs. *In re Generic Pharms. Pricing Antitrust Litig.*, 338 F. Supp. 3d 404 (E.D. Pa. 2018). The Court reserved judgment with respect to Defendants' motions to the extent they sought to dismiss the state law claims brought on behalf of the Group 1 EPPs and IRPs. *Id.* at 434. This Opinion disposes of those motions.

<sup>2</sup> *Id.* at 411-34. Relevant formulations of the Group 1 drugs implicated in the Group 1 Plaintiffs' complaints also are identified in the Court's prior Opinion. See *id.* at 410, nn.4-9.

not here restate it in detail. Broadly, Plaintiffs contend that Defendants — pharmaceutical manufacturers — engaged in an unlawful scheme or schemes to fix, maintain and stabilize prices, rig bids, and engage in market and customer allocations of certain generic pharmaceutical products, including the Group 1 drugs. The EPPs and the IRPs allege that during the time relevant to their claims Defendants sold or distributed the Group 1 drugs "in a continuous and uninterrupted flow of interstate commerce to customers throughout the United States."<sup>3</sup>

Relevant to the issues presently before the Court, the EPPs and the IRPs assert claims for monetary damages under various state antitrust laws, as well as state law consumer protection claims and/or claims for unjust enrichment. They bring state law claims because [\*\*22] they are precluded from asserting federal antitrust claims for damages under the Supreme Court's decision in *Illinois Brick Co. v. Illinois*,<sup>4</sup> which "determined that direct purchasers are the only parties 'injured' in a manner that permits them to recover damages."<sup>5</sup>

## A. EPPS

The EPPs include employee welfare benefits funds, labor unions, and private insurers, as well as individual plaintiffs, that allege either that they indirectly purchased generic pharmaceuticals manufactured by one or more Defendants or that they provided reimbursements for some or all of the purchase price for the following drugs:

[\*821]

GROUP 1 CASES	Clobetasol	Digoxin	Divalproex
End-Payer Plaintiffs:	ER		
American Federation of State,			
County and Municipal	x	x	x
Employees District Council 37			
Health & Security Plan			
Detectives Endowment			
Association of the City of New		x	
York			
Nina Diamond		x	
Hennepin County	x		
International Union of			
Operating Engineers Local 30			
Benefits Fund			
Robby Johnson			
Louisiana Health Service &			
Indemnity Company d/b/a Blue			
Cross and Blue Shield of	x	x	x
Louisiana and HMO Louisiana,			
Inc.			

<sup>3</sup> See CB EPP Compl. ¶ 60; DG EPP Compl. ¶ 48; DV EPP Compl. ¶ 45; DX EPP Compl. ¶ 58; EC EPP Compl. ¶ 43; PV EPP Compl. ¶ 52; CB IRP Compl. ¶ 52; DG IRP Compl. ¶ 44; DV IRP Compl. ¶ 32; DX IRP Compl. ¶ 46; EC IRP Compl. ¶ 41; PV IRP Compl. ¶ 49.

<sup>4</sup> [431 U.S. 720, 730, 737, 97 S. Ct. 2061, 52 L. Ed. 2d 707 \(1977\)](#) (interpreting federal **antitrust law** to preclude indirect purchasers from recovering damages to avoid "a serious risk of multiple liability for defendants" and "whole new dimensions of complexity to treble-damages suits [which would] seriously undermine their effectiveness").

<sup>5</sup> [Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 424 F.3d 363, 366 n.2 \(3d Cir. 2005\).](#)

<b>GROUP 1 CASES</b>	<b>Clobetasol</b>	<b>Digoxin</b>	<b>Divalproex</b>
<b>End-Payer Plaintiffs:</b>			<b>ER</b>
Ottis McCrary			
Philadelphia Federation of Teachers Health and Welfare Fund			x
The City of Providence Rhode Island		x	
Sergeants Benevolent Association of the Police Department [**23] of the City of New York Health and Welfare Fund	x		
Self-Insured Schools of California	x	x	x
David Sherman			
Twin Cities Pipe Trades Welfare Fund		x	
UFCW Local 1500 Welfare Fund			
Uniformed Fire Officers Association Family Protection Plan Local 854	x		
Unite Here Health United Food & Commercial Workers and Employers Arizona Health and Welfare Trust	x	x	x
Valerie Velardi			
1199SEIU National Benefit Fund	x		x
1199SEIU Greater New York Benefit Fund	x		x
1199SEIU National Benefit Fund for Home Care Workers	x		x
1199SEIU Licensed Practical Nurses Welfare Fund	x		x
<b>GROUP 1 CASES</b>	<b>Doxycycline</b>	<b>Econazole</b>	<b>Pravastatin</b>
<b>End-Payer Plaintiffs:</b>			
American Federation of State, County and Municipal Employees District Council 37	x	x	x
Health & Security Plan Detectives Endowment			
Association of the City of New	x	x	

GROUP 1 CASES	Doxycycline	Econazole	Pravastatin
<b>End-Payer Plaintiffs:</b>			
York			
Nina Diamond			
Hennepin County			
International Union of Operating Engineers Local 30	x		
Benefits Fund			
Robby Johnson			x
Louisiana Health Service & Indemnity Company d/b/a Blue			
Cross and Blue Shield of Louisiana and HMO Louisiana, Inc.	x	x	x
Ottis McCrary	x		
Philadelphia Federation of Teachers Health and Welfare Fund			
The City of Providence Rhode Island		x	x
Sergeants Benevolent Association of the Police		x	x
Department of the City of New York Health and Welfare Fund			
Self-Insured Schools of California	x	x	x
David [**24] Sherman			x
Twin Cities Pipe Trades Welfare Fund			
UFCW Local 1500 Welfare Fund	x		
Uniformed Fire Officers Association Family Protection Plan Local 854			
Unite Here Health	x	x	x
United Food & Commercial Workers and Employers			
Arizona Health and Welfare Trust		x	
Valerie Velardi	x		
1199SEIU National Benefit Fund			
1199SEIU Greater New York Benefit Fund			

**GROUP 1 CASES****End-Payer Plaintiffs:**

1199SEIU National Benefit  
 Fund for Home Care Workers  
 1199SEIU Licensed Practical  
 Nurses Welfare Fund

**Doxycycline   Econazole   Pravastatin**

The EPPs' complaints include antitrust, consumer protection and unjust enrichment claims under the laws of various states and territories as is set forth in the following table:

[\*822]

End-Payer Plaintiffs	State Antitrust					Consumer Protection					Unjust Enrichment							
	C	D	D	D	E	P	C	D	D	D	E	PV	C	D	D	D	E	P
	B	G	V	X	C	V	B	G	V	X	C		B	G	V	X	C	V
Alabama <sup>6</sup>	w	w	w	w	w	w							x	x	x	x	x	x
	d	d	d	d	d	d												
Alaska							x	x	x	x	x	x	x	x	x	x	x	x
Arizona	x	x	x	x	x	x							x	x	x	x	x	x
Arkansas							x	x	x	x	x	x	x	x	x	x	x	x
California	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
Colorado							x	x	x	x	x	x	x	x	x	x	x	x
Connecticut													x	x	x	x	x	x
Delaware							x	x	x	x	x	x	x	x	x	x	x	x
District of Columbia	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
Florida							x	x	x	x	x	x	x	x	x	x	x	x
Georgia							x	x	x	x	x	x	x	x	x	x	x	x
Hawaii	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
Idaho													x	x	x	x	x	x
Illinois	x	x	x	x	x	x							x	x	x	x	x	x
Indiana																		
Iowa	x	x	x	x	x	x							x	x	x	x	x	x
Kansas	x	x	x	x	x	x							x	x	x	x	x	x
Kentucky													x	x	x	x	x	x
Louisiana													x	x	x	x	x	x
Maine	x	x	x	x	x	x							x	x	x	x	x	x
Maryland													x	x	x	x	x	x
Massachusetts							x	x	x	x	x	x	x	x	x	x	x	x
Michigan	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
Minnesota	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
Mississippi	x	x	x	x	x	x							x	x	x	x	x	x
Missouri [**25]							x	x	x	x	x	x	x	x	x	x	x	x

<sup>6</sup> EPPs have now withdrawn all Alabama antitrust claims. See EPPs' Response to Defs.' State Antitrust Apps.; see also CB EPP Opp. Mem. at 30 n.48; DG EPP Opp. Mem. at 34 n.55; DV EPP Opp. Mem. at 31, n.54. DX EPP Opp. Mem. at 33 n.53; EC EPP Opp. Mem. at 30 n.55; PV EPP Opp. Mem. at 30 n.63. Accordingly, they will be dismissed.

End-Payer Plaintiffs	State Antitrust					Consumer Protection					Unjust Enrichment							
	C B	D G	D V	D X	E C	P V	C B	D G	D V	D X	E C	PV	C B	D G	D V	D X	E C	P V
	B	G	V	X	C	V	B	G	V	X	C		B	G	V	X	C	V
Montana							x	x	x	x	x	x	x	x	x	x	x	x
Nebraska	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
Nevada	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
New Hampshire	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
New Jersey <sup>7</sup>							w d	w d	w d	w d	w d	wd	x	x	x	x	x	x
New Mexico	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
New York	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
North Carolina	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
North Dakota	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
Ohio																		
Oklahoma													x	x	x	x	x	x
Oregon	x	x	x	x	x	x							x	x	x	x	x	x
Pennsylvania													x	x	x	x	x	x
Puerto Rico													x	x	x	x	x	x
Rhode Island	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
South Carolina							x	x	x	x	x	x	x	x	x	x	x	x
South Dakota	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
Tennessee	x	x	x	x	x	x							x	x	x	x	x	x
Texas													x	x	x	x	x	x
Utah	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
Vermont <sup>8</sup>	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
Virgin Islands							x	x	x	x	x	x	x	x	x	x	x	P V
Virginia							x	x	x	x	x	x	x	x	x	x	x	x
Washington													x	x	x	x	x	x
West Virginia	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
Wisconsin	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
Wyoming													x	x	x	x	x	x

<sup>7</sup> EPPs have now withdrawn all New Jersey Consumer Protection Act claims. See CB EPP Opp. Mem. at 35; DG EPP Opp. Mem. at 40; DV EPP Opp. Mem. at 36; DX EPP Opp. Mem. at 38; EC EPP Opp. Mem. at 36; PV EPP Opp. Mem. at 36. Accordingly, they will be dismissed. IRPs' New Jersey Consumer Protection Act claims have not been withdrawn.

<sup>8</sup> In their motions to dismiss the digoxin and divalproex ER EPPs' complaints, Defendants argue that "Vermont does not have an antitrust statute of general application . . ." Defs.' Mem. in Support of Mot. to Dismiss DG EPPs' Compl. at 29 n.18; Defs.' Mem. in Support of Mot. to Dismiss DV EPPs' Compl. at 27 n.11. Digoxin EPPs respond that "Vermont combines its antitrust and consumer protection provisions into a single statute that plainly prohibits *both* antitrust and consumer protection violations." DG EPP Opp. Br. at 32 (*citing 9 V.S.A. § 2453(a)*). They note that the Vermont statute authorizes indirect purchaser antitrust suits, addresses antitrust remedies and expressly prohibits collusion, market allocation and price-fixing. DG EPP Opp. Br. at 32 (*citing 9 V.S.A. §§ 2453a, 2451a(h), and 2465*). The Court will not dismiss EPPs' or IRPs' Vermont antitrust claims.

[\*823] Group 1 EPPs reside in or are headquartered in various states, but not in all of the jurisdictions listed above.<sup>9</sup> Their Complaints allege that they indirectly purchased or made payments or reimbursements for the Group 1 drugs in many — but not necessarily all — of the jurisdictions where they bring their state law claims.<sup>10</sup> However, they assert their claims individually and on behalf of a class, seeking damages for "[a]ll persons and entities in the End-Payer Damages Jurisdictions who indirectly purchased, paid and/or provided reimbursement for [\*\*26] some or all of the purchase price for" the Group 1 Drugs.<sup>11</sup> The "End-Payer Damages Jurisdictions" are defined as to include all States (except Indiana and Ohio), as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands.<sup>12</sup>

## B. IRPS

The IRPs are the following independent pharmacies that allege they acquire drugs indirectly through drug wholesalers rather [\*824] than directly from drug manufacturers<sup>13</sup>:

GROUP 1 CASES	Clobetasol	Digoxin	Divalproex
	ER		
<b>Indirect Reseller Plaintiffs:</b>			
Chet Johnson Drug, Inc.	x	x	x
Deal Drug Pharmacy	x	x	x
Falconer Pharmacy, Inc.	x	x	x
Halliday-s & Koivisto-s Pharmacy	x	x	x
Russell-s Mr. Discount Drugs, Inc.	x	x	x
West Val Pharmacy	x	x	x
GROUP 1 CASES	Doxycycline	Econazole	Pravastatin
<b>Indirect Reseller Plaintiffs:</b>			
Chet Johnson Drug, Inc.	x	x	x
Deal Drug Pharmacy	x	x	x

<sup>9</sup> See CB EPP Compl. ¶¶ 37-44; DG EPP Compl. ¶¶ 31-39; DV EPP Compl. ¶¶ 32-37; DX EPP Compl. ¶¶ 35-43; EC EPP Compl. ¶¶ 31-38; PV EPP Compl. ¶¶ 37-44; see also Defs.' Mem. in Support of Mot. to Dismiss DX EPP Compl. at 20 ("EPPs fail to allege that any of the named plaintiffs is a citizen or resident of Utah . . . .").

<sup>10</sup> See, e.g., Defs.' Mem. in Support of Mot. to Dismiss CB EPP Compl. at 20 ("EPPs do not claim to have resided in, nor to have purchased or made reimbursements for clobetasol in, two of the jurisdictions in which they assert claims under consumer protection statutes and for unjust enrichment — Alaska and the U.S. Virgin Islands."); Defs.' Mem. in Support of Mot. to Dismiss DG EPP Compl. at 10 ( "EPPs do not allege that they purchased or provided reimbursement for digoxin in the District of Columbia, the U.S. Virgin Islands, or in 7 states for which they bring claims: Alaska, Kentucky, Montana, North Dakota, South Dakota, Vermont, and West Virginia."); Defs.' Mem. in Support of Mot. to Dismiss CB EPP Compl. at 20 ("[E]PPs do not claim to have resided in, or purchased or made reimbursements for Divalproex in two of the jurisdictions in which they assert claims — Vermont and the U.S. Virgin Islands."); Defs.' Mem. in Support of Mot. to Dismiss EC EPP Compl. at 20 ("EPPs here do not allege that they purchased or provided reimbursement for Econazole in seven states or territories under whose laws they assert claims: Alaska, Montana, North Dakota, South Dakota, Vermont, the U.S. Virgin Islands, and West Virginia."); Defs.' Mem. in Support of Mot. to Dismiss EC EPP Compl. at 2 ( "None of the EPPs claim to have resided, purchased, or reimbursed purchases of pravastatin in South Dakota or the U.S. Virgin Islands.").

<sup>11</sup> CB EPP Compl. ¶ 231; DG EPP Compl. ¶ 199; DV EPP Compl. ¶ 197; DX EPP Compl. ¶ 231; EC EPP Compl. ¶ 205; PV EPP Compl. ¶ 252; see also CB EPP Compl. ¶ 14; DG EPP Compl. ¶ 14; DV EPP Compl. ¶ 14; DX EPP Compl. ¶ 14; EC EPP Compl. ¶ 14; PV EPP Compl. ¶ 19.

<sup>12</sup> See CB EPP Compl. ¶ 231 n.105; DG EPP Compl. ¶ 199 n.109; DV EPP Compl. ¶ 197 n.100; DX EPP Compl. ¶ 231 n.133; EC EPP Compl. ¶ 2045 n.97; PV EPP Compl. ¶ 252 n.101.

<sup>13</sup> See, e.g. EC IRP Compl. ¶ 24 ("Independent pharmacies rarely purchase generic drugs directly from the manufacturer, and instead acquire drugs almost exclusively from drug wholesalers such as McKesson Corp., Cardinal Health Inc., or Amerisource Bergen Corp.").

GROUP 1 CASES	Doxycycline	Econazole	Pravastatin
<b>Indirect Reseller Plaintiffs:</b>			
Falconer Pharmacy, Inc.	x	x	x
Halliday-s & Koivisto-s Pharmacy	x	x	x
Russell-s Mr. Discount Drugs, Inc.	x	x	x
West Val Pharmacy	x	x	x

Chet Johnson is in Avery, Wisconsin.<sup>14</sup> Deal Drug is in Nashville, Tennessee.<sup>15</sup> Falconer is in Falconer, New York.<sup>16</sup> Russell's is in Lexington, Mississippi.<sup>17</sup> Halliday's is in Jacksonville, Florida.<sup>18</sup> West Val is in Encino, California.<sup>19</sup>

The IRPs' complaints include antitrust, consumer protection [\*\*27] and unjust enrichment claims under the laws of various states and territories as is set forth in the following table<sup>20</sup>:

[\*825]

Indirect Reseller Plaintiffs	State Antitrust										Consumer Protection					Unjust Enrichment				
	C	D	D	D	E	P	C	D	D	D	E	PV	C	D	D	D	E	P		
	B	G	V	X	C	V	B	G	V	X	C		B	G	V	X	C	V		
Alabama	x	x	x	x	x	x							x	x	x	x	x	x	x	
Alaska							x	x	x	x	x	x	x	x	x	x	x	x	x	
Arizona	x	x	x	x	x	x							x	x	x	x	x	x	x	
Arkansas							x	x	x	x	x	x	x	x	x	x	x	x	x	
California	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	
Colorado							x	x	x	x	x	x	x	x	x	x	x	x	x	
Connecticut																				
Delaware							x	x	x	x	x	x	x	x	x	x	x	x	x	
District of Columbia	x	x	x	x	x	x							x	x	x	x	x	x	x	
Columbia																				
Florida							x	x	x	x	x	x	x	x	x	x	x	x	x	
Georgia							x	x	x	x	x	x	x	x	x	x	x	x	x	
Hawaii																				
Idaho													x	x	x	x	x	x	x	
Illinois	x	x	x	x	x	x							x	x	x	x	x	x	x	
Indiana																				

<sup>14</sup> CB IRP Compl. ¶ 41.

<sup>15</sup> CB IRP Compl. ¶ 40.

<sup>16</sup> CB IRP Compl. ¶ 39.

<sup>17</sup> CB IRP Compl. ¶ 38.

<sup>18</sup> CB IRP Compl. ¶ 37.

<sup>19</sup> CB IRP Compl. ¶ 36.

<sup>20</sup> The state law claims brought by the Group 1 EPPs and IRPs largely align. However, Group 1 IRPs do not assert the following claims raised by the Group 1 EPPs: a state antitrust claim under Hawaii law; consumer protection claims under the laws of: the District of Columbia, Hawaii, Massachusetts, Missouri, Montana, Rhode Island, Utah, Vermont, and Virginia; and unjust enrichment claims under the laws of Connecticut, Hawaii, Kentucky, and Oklahoma.

Indirect Reseller Plaintiffs	State Antitrust							Consumer Protection					Unjust Enrichment				
Iowa	x	x	x	x	x	x	x						x	x	x	x	x
Kansas	x	x	x	x	x	x	x						x	x	x	x	x
Kentucky																	
Louisiana													x	x	x	x	x
Maine	x	x	x	x	x	x	x						x	x	x	x	x
Maryland													x	x	x	x	x
Massachusetts													x	x	x	x	x
Michigan <sup>21</sup>	x	x	x	x	x	x	w	x	w	w	w	wd	x	x	x	x	x
							d	d	d	d	d						
Minnesota	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
Mississippi	x	x	x	x	x	x							x	x	x	x	x
Missouri													x	x	x	x	x
Montana													x	x	x	x	x
Nebraska	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
Nevada <sup>22</sup>	x	x	x	x	x	x	w	x	w	w	w	wd	x	x	x	x	x
							d	d	d	d	d						
New Hampshire	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
New Jersey								x	x	x	x	x	x	x	x	x	x
New Mexico	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
New York	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
North Carolina	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
North Dakota	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
Ohio																	
Oklahoma																	
Oregon	x	x	x	x	x	x	x						x	x	x	x	x
Pennsylvania													x	x	x	x	x
Puerto Rico													x	x	x	x	x
Rhode Island	x	x	x	x	x	x	x						x	x	x	x	x
South Carolina									x	x	x	x	x	x	x	x	x
South Dakota	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
Tennessee	x	x	x	x	x	x							x	x	x	x	x
Texas													x	x	x	x	x

<sup>21</sup> In their response to Defendants' Motions to Dismiss, IRPs voluntarily dismiss their clobetasol, divalproex ER, doxycycline, econazole and pravastatin claims under the Michigan consumer protection statute. Accordingly, the Court will dismiss these claims. See CB IRP Opp. Mem. at 21; DV IRP Opp. Mem. at 25; DX IRP Opp. Mem. at 21; EC IRP Opp. Mem. at 24; PV IRP Opp. Mem. at 24. Digoxin IRPs' Michigan consumer protection claim remains.

<sup>22</sup> In their response to Defendants' Motions to Dismiss, IRPs voluntarily dismiss their clobetasol, divalproex ER, and pravastatin claims under the Nevada consumer protection statute. Accordingly, the Court will dismiss these claims. See CB IRP Opp. Mem. at 21; DV IRP Opp. Mem. at 25; DX IRP Opp. Mem. at 21; EC IRP Opp. Mem. at 24; PV IRP Opp. Mem. at 24. Digoxin IRPs' Nevada consumer protection claim remains.

Indirect Reseller Plaintiffs	State Antitrust	Consumer Protection	Unjust Enrichment
Utah	x x x x x x		x x x x x x
Vermont	x x x x x x		x x x x x x
Virgin Islands		x x x x x x	x x x x x x
Virginia			x x x x x x
Washington			x x x [ x x
			**
			2
			8
			1
			x
West Virginia	x x x x x x x x x x x x x x x x x x		
Wisconsin	x x x x x x x x x x x x x x x x x x		
Wyoming			x x x x x x

[\*826] Although IRPs are not located in each of the jurisdictions listed in the table above, they allege that "[t]here are approximately 22,000 privately-owned independent pharmacies in the United States" and that "[o]ver a billion prescriptions for U.S. patients are dispensed through independent pharmacies each year."<sup>23</sup> Thus, IRPs assert their state law claims individually and on behalf of a damages class of all privately-held pharmacies in the "IRP Damages Jurisdictions" that indirectly purchased the relevant Group 1 drug during the class period alleged in each Group 1 complaint.<sup>24</sup> The IRP Damages Jurisdictions are:

Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming as well as the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.<sup>25</sup>

## C. DEFENDANTS

Moving Defendants, alleged manufacturers of the Group 1 drugs,<sup>26</sup> are identified at length in the Court's October 16, 2018 Opinion and will not be thoroughly inventoried here.<sup>27</sup> Group 1 Defendants are alleged to be incorporated in the following states: Colorado (Sandoz), Delaware (Actavis, Glenmark, Impax, Heritage, Hi-Tech Pharmacal, Lannett, Lupin, Mayne, Morton Grove, Perrigo, Taro, Teligent, Teva, West-Ward, Wockhardt), Florida (Apotex), Louisiana (Akorn), Michigan (Sun), New Jersey (Dr. Reddy's, Zydus), New York (Fougera, Par), Pennsylvania

<sup>23</sup> CB IRP Compl. ¶ 29.

<sup>24</sup> CB IRP Compl. ¶ 222; DG IRP Compl. ¶ 170; DV IRP Compl. ¶ 195; DX IRP Compl. ¶ 249; EC IRP Compl. ¶ 160; PV IRP Compl. ¶ 185.

<sup>25</sup> CB IRP Compl. ¶ 222 n.88; DG IRP Compl. ¶ 170 n.91; DV IRP Compl. ¶ 195 n.68; DX IRP Compl. ¶ 249 n.97; EC IRP Compl. ¶ 160 n.88; PV IRP Compl. ¶ 185 n.88.

<sup>26</sup> No Defendant named in a Group 1 case is alleged to have manufactured all the pharmaceutical products included in the Group 1 cases. Several of the Defendants named in the Group 1 cases are alleged to have manufactured only one relevant pharmaceutical product, while others are alleged to have manufactured two or more of the pharmaceutical products included in this MDL.

<sup>27</sup> *In re Generic*, 338 F. Supp. 3d at 417-20.

(Mylan, Inc.), and West Virginia (Mylan Pharmaceuticals). They are alleged to have principal places of business in: California (Impax), Florida (Apotex), Illinois (Akorn, Morton Grove), Maryland (Lupin), New Jersey (Actavis, Dr. Reddy's, Glenmark, Heritage, Sandoz, Sun, Teligent, West-Ward, Wockhardt, Zydus), New York (Fougera, Hi-Tech Pharmacal, Par, Perrigo, Taro), North Carolina (Mayne), Pennsylvania (Lannett, Teva), and West Virginia (Mylan Defendants). Group 1 EPPs and IRPs allege that during the class period Group 1 Defendants sold the Group 1 drugs to purchasers throughout the United States.<sup>28</sup>

**[\*827]** In their complaints, Group 1 Plaintiffs allege that: "Defendants' and their coconspirators' conduct, including the marketing and sale of [the relevant Group 1 drug], took place within, has had, and was intended to have, a direct, substantial, and reasonably foreseeable anticompetitive effect upon interstate commerce within the United States"<sup>29</sup>; and/or that:

Defendants' anticompetitive conduct occurred in part in trade and commerce within the states and territories set forth herein, and also had substantial intrastate effects in that, *inter alia*, drug wholesalers within each state and territory were foreclosed from offering less expensive generic [the relevant Group 1 drug] to Plaintiffs inside each respective state and territory. The foreclosure of these less expensive generic products directly impacted and disrupted commerce for Plaintiffs within each state and territory and forced Plaintiffs to pay supracompetitive prices.<sup>30</sup>

Group 1 EPPs and IRPs allege that "Defendants engaged in unfair competition or unfair, unconscionable, deceptive or fraudulent acts or practices in violation the state consumer protection and unfair competition statutes" of various states.<sup>31</sup> They also allege **[\*\*31]** that Group 1 Defendants benefitted from their alleged conduct and that Defendants have been "enriched by revenue resulting from overcharges for" the Group 1 drugs while "Plaintiffs have been impoverished by the overcharges they paid for [the Group 1 drugs] imposed through Defendants' unlawful conduct."<sup>32</sup>

## II. DISCUSSION

Group 1 Defendants move to dismiss the state law claims brought by the Group 1 EPPs and IRPs. They argue that Group 1 EPPs' and IRPs' claims under the laws of those states or territories in which they do not reside or allege to have reimbursed purchases for Group 1 drugs should be dismissed for lack of Article III standing. Defendants also argue that Group 1 EPPs' and IRPs' state antitrust, consumer protection, and unjust enrichment claims suffer from a variety of state specific pleading failures. Finally, they assert that many of the Group 1 EPPs' and IRPs' state law claims are barred by applicable statutes of limitations. The Court considers Group 1 Defendants' arguments in turn.

### A. ARTICLE III STANDING

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<sup>28</sup> **[\*\*30]** See, e.g., CB EPP Compl. ¶¶ 42-50; PV IRP Compl. at ¶¶ 42-47.

<sup>29</sup> CB EPP Compl. ¶ 61; DG EPP Compl. ¶ 49; DV EPP Compl. ¶ 46; DX EPP Compl. ¶ 59; EC EPP Compl. ¶ 44; PV EPP Compl. ¶ 53; DV IRP Compl. ¶ 34; DX IRP Compl. ¶ 48.

<sup>30</sup> CB EPP Compl. ¶ 62; DG EPP Compl. ¶ 50; DV EPP Compl. ¶ 47; DX EPP Compl. ¶ 60; EC EPP Compl. ¶ 45, PV EPP Compl. ¶ 54; CB IRP Compl. ¶ 54; DG IRP Compl. ¶ 46; EC IRP Compl. ¶ 43; PV IRP Compl. ¶ 51. The Court notes that the divalproex ER IRP and doxycycline IRP complaints do not include this intrastate commerce allegation.

<sup>31</sup> CB EPP Compl. ¶ 287; DG EPP Compl. ¶ 255; DV EPP Compl. ¶ 253; DX EPP Compl. ¶ 287; EC EPP Compl. ¶ 260, PV EPP Compl. ¶ 307; CB IRP Compl. ¶ 279; DG IRP Compl. ¶ 227; DV IRP Compl. ¶ 252; DX IRP Compl. ¶ 316; EC IRP Compl. ¶ 217; PV IRP Compl. ¶ 242.

<sup>32</sup> CB EPP Compl. ¶¶ 321-24; DG EPP Compl. ¶¶ 289-92; DV EPP Compl. ¶¶ 287-90; DX EPP Compl. ¶¶ 321-24; EC EPP Compl. ¶¶ 294-97, PV EPP Compl. ¶¶ 341-44; CB IRP Compl. ¶¶ 304-07; DG IRP Compl. ¶¶ 252-55; DV IRP Compl. ¶¶ 277-80; DX IRP Compl. ¶¶ 441-44; EC IRP Compl. ¶¶ 242-45; PV IRP Compl. ¶¶ 267-70.

To the extent that Group 1 Defendants seek to dismiss certain of the EPP and IRP state law claims for failure to allege facts sufficient to establish Article III standing, [\*\*32] [Rule 12\(b\)\(1\) of the Federal Rules of Civil Procedure](#) applies to their [\*828] motions "because standing is a jurisdictional matter."<sup>33</sup> Article III of the Constitution requires Plaintiffs to have standing in order to assert their claims.<sup>34</sup> To sufficiently allege constitutional standing, Plaintiffs must allege three elements: (1) injury-in-fact: an invasion of a legally protected interest that is "concrete and particularized" and "actual or imminent" (not merely "conjectural" or "hypothetical"); (2) causation: an injury which is fairly traceable to the challenged conduct; and (3) redressability: that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"<sup>35</sup> Where a complaint fails to satisfy these requirements, the federal court does not have subject matter jurisdiction and the claims must be dismissed.<sup>36</sup> Because Group 1 EPPs and IRPs have invoked this Court's federal jurisdiction over their state law claims, they bear the burden of establishing the elements required for Article III standing.<sup>37</sup> When considering a 12(b)(1) motion, the Court "review[s] only whether the allegations on the face of the complaint, taken as true, allege sufficient facts to invoke the jurisdiction of the district court."<sup>38</sup>

Group 1 Defendants contend [\*\*33] Group 1 EPPs and IRPs lack Article III standing to pursue claims under the laws of the jurisdictions where the named Plaintiffs have not specifically alleged purchases or reimbursements.<sup>39</sup> "[W]hen the issue presented in a motion to dismiss concerns solely whether the *named* plaintiffs have standing to assert class action claims, the named plaintiffs' standing is a threshold issue, and there is no reason to defer the named plaintiffs' standing determination until class certification."<sup>40</sup> Here, Group 1 Defendants do not dispute that Group 1 EPPs and IRPs have standing to pursue claims under the laws of those jurisdictions where they paid for the generic drugs at issue. No named Plaintiff seeks relief for *itself* under the laws of a jurisdiction where it would not have standing. Rather, [\*829] the Group 1 EPP and IRP complaints include "a mixture of state law claims *only* because [Plaintiffs] bring [each action] as a proposed class action."<sup>41</sup>

<sup>33</sup> *Ballentine v. United States*, 486 F.3d 806, 810, 48 V.I. 1059 (3d Cir. 2007).

<sup>34</sup> See [Lujan v. Defs. of Wildlife](#), 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

<sup>35</sup> [Id. at 561](#).

<sup>36</sup> [Taliaferro v. Darby Twp. Zoning Bd.](#), 458 F.3d 181, 188 (3d Cir. 2006).

<sup>37</sup> [Lujan](#), 504 U.S. at 561.

<sup>38</sup> [Licata v. U.S. Postal Serv.](#), 33 F.3d 259, 260 (3d Cir. 1994).

<sup>39</sup> See, e.g., CB Defs.' Mem. in Support of Mot. to Dismiss EPP Compl. at 20 (arguing that EPPs lack standing to assert their claims under the laws of Alaska and the U.S. Virgin Islands because they "do not claim to have resided in, nor to have purchased or made reimbursements for Clobetasol in" those jurisdictions); CB Defs' Mem. in Support of Defs.' Mot. to Dismiss IRP Compl. at 11 (arguing IRPs only have standing to bring claims under the laws of California, Florida, Mississippi, New York, Tennessee, and Wisconsin); DV Defs.' Mem. in Support of Mot. to Dismiss EPP Compl. at 11 (arguing EPPs do not have standing to bring claims in Vermont and the U.S. Virgin Islands because they "do not claim to have resided in, or purchased or made reimbursements for Divalproex in" those jurisdictions); DV Mem. in Support of Defs.' Mot. to Dismiss IRP Compl. at 14 (arguing that "all of Plaintiffs' state law claims except those that arise under California, Florida, Mississippi, New York, Tennessee, and Wisconsin law must be dismissed" because "Plaintiffs do not claim to have purchased Divalproex in any state or territory other than the six states in which they are residents").

<sup>40</sup> [In re Processed Egg Prods. Antitrust Litig.](#), 851 F. Supp. 2d 867, 882, n.11 (E.D. Pa. 2012) (emphasis added); see also [In re Flonase Antitrust Litigation](#), 692 F. Supp. 2d 524, 534 (E.D. Pa. 2010) (finding no reason to defer the standing determination until after class certification because "[n]amed plaintiffs must have case or controversy standing").

<sup>41</sup> [In re Polyurethane Foam Antitrust Litig.](#), 799 F. Supp. 2d 777, 806 (N.D. Ohio 2011).

As one court has explained, "[t]he interplay between Article III standing and class standing presents a surprisingly difficult question."<sup>42</sup> "Courts have taken different views about how to evaluate Article III and class standing at the motion to dismiss [\*\*34] stage where putative class representatives assert claims arising under the laws of states where they neither reside nor allege to have suffered injury."<sup>43</sup> The Third Circuit has not definitively answered this question. In *Neale v. Volvo Cars of North America, LLC*,<sup>44</sup> the Court of Appeals did caution that "[r]equiring individual standing of all class members would eviscerate the representative nature of the class action." It explained that it was "not persuaded" that it should "adopt the approach taken by some of [its] sister courts that require all class members to possess standing."<sup>45</sup> It held that "so long as a named class representative has standing, a class action presents a valid 'case or controversy' under Article III."<sup>46</sup>

In this District, the decision in *In re: Niaspan Antitrust Litigation* concluded that *Neale* did not "affect the requirement that plaintiff must establish standing individually with respect to each claim asserted,"<sup>47</sup> citing "prior decisions in this district and others [that] have ruled that named plaintiffs in an antitrust class action lack standing to bring [\*\*35] claims on behalf of putative classes under the laws of states where no named plaintiff is located and where no named plaintiff purchased the product at issue."<sup>48</sup> Before *Neale*, a prior decision in the same litigation had explained that "deferring this standing determination would allow named plaintiffs in a proposed class action, with no injuries in relation to the laws of certain states referenced in their complaint, to embark on lengthy class discovery with respect to injuries in potentially every state in the Union."<sup>49</sup>

But other courts, including some in this Circuit, have taken a different view. In the case *In re Liquid Aluminum Sulfate Antitrust Litigation*, the District of New Jersey rejected the defendants' argument that the named plaintiffs "lack[ed] standing to [\*830] bring state law claims under the laws of a state in which they do not reside."<sup>50</sup> The Court explained that "class certification . . . is 'logically antecedent' to the issue of standing. This is because class discovery will unveil the various members of the currently unknown class."<sup>51</sup> Similarly, in the *In re Chocolate Confectionary Antitrust Litigation*, the Middle District of Pennsylvania found that because "the plaintiffs' [\*\*36] attempt to represent the proposed class" gave rise to the question of whether they had standing to represent

<sup>42</sup> *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. 14-md-2503, 2015 U.S. Dist. LEXIS 125999, 2015 WL 5458570, at \*13 (D. Mass. Aug. 16, 2015).

<sup>43</sup> [2015 U.S. Dist. LEXIS 125999, \[WL\] at \\*14](#).

<sup>44</sup> [794 F.3d 353, 367 \(3d Cir. 2015\)](#).

<sup>45</sup> *Id.* at 365.

<sup>46</sup> *Id.* at 369; see also *Mielo v. Steak 'n Shake Operations, Inc.*, 897 F.3d 467, 478 (3d Cir. 2018) (quoting *Neale*, 794 F.3d at 368); see also *In re Liquid Aluminum Sulfate Antitrust Litig.*, No. 16-md-2687, 2017 U.S. Dist. LEXIS 115294, 2017 WL 3131977, at \*19 (D.N.J. July 20, 2017) ("reject[ing] Defendants' argument that the named IPP Plaintiffs lack standing to bring state law claims under the laws of a state in which they do not reside").

<sup>47</sup> [No. 13-md-2460, 2015 U.S. Dist. LEXIS 164021, 2015 WL 8150588, at \\*3 \(E.D. Pa. Dec. 8, 2015\)](#).

<sup>48</sup> *Id.* (citation omitted); see also *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.*, 64 F. Supp. 3d 665, 694 (E.D. Pa. 2014) ("The fact that this is a class action should not change the analysis for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.") (internal quotation marks and citation omitted).

<sup>49</sup> *In re Niaspan Antitrust Litig.*, 42 F. Supp. 3d 735, 758 n.20 (E.D. Pa. 2014) (internal quotation and citations omitted).

<sup>50</sup> [No. 16-md-2687, 2017 U.S. Dist. LEXIS 115294, 2017 WL 3131977, at \\*19 \(D.N.J. July 20, 2017\)](#).

<sup>51</sup> *Id.*

individuals from other states, the question of class certification was "logically antecedent" to the standing concerns" and the Court declined to rule on the issue "until class certification proceedings."<sup>52</sup>

Group 1 "Defendants are not challenging [EPPs' or IRPs'] standing to bring their own claims; they are challenging their standing to bring claims on behalf of the class."<sup>53</sup> It matters that this issue arises in the context of a class action. In a recent decision in a putative class action asserting claims under the *Americans with Disabilities Act*, where the named plaintiffs sought to require the defendant "to correct alleged ADA violations at more than the two restaurant locations where they claim[ed] to have actually experienced injury," the Third Circuit rejected the defendants' "invitation to insert [Rule 23](#) issues into [its] inquiry on standing," and explained that "the standing inquiry must be limited to a consideration of the class representatives themselves, after which [the court] may 'employ [Rule 23](#) to ensure that classes are properly certified.'"<sup>54</sup>

Similarly, **[\*\*37]** the Second Circuit has explained that:

Since class action plaintiffs are not required to have individual standing to press any of the claims belonging to their unnamed class members, it makes little sense to dismiss the state law claims of unnamed class members for want of standing when there was no requirement that the named plaintiffs have individual standing to bring those claims in the first place.<sup>55</sup>

It held that "whether a plaintiff can bring a class action under the state laws of multiple states is a question of predominance under [Rule 23\(b\)\(3\)](#), not a question of standing."<sup>56</sup> And yet another court has concluded that:

there is no constitutional imperative that the named plaintiff himself have a valid claim under every legal theory he proposes to assert on behalf of a class. . . . If such a requirement exists, it is the consequence of the class-certification prerequisites imposed by [Rule 23 of the Federal Rules of Civil Procedure](#), **[\*831]** not of Article III.<sup>57</sup>

Even more recently, the First Circuit explained that:

the question of standing is not: Are there differences between the claims of the class members and those of the class representative? Rather, the pertinent question is: Are the differences that do exist the type that leave the class representative **[\*\*38]** with an insufficient personal stake in the adjudication of the class members' claims?<sup>58</sup>

The First Circuit explained the plaintiffs had successfully stated a basis for Article III standing where "success on the claim under one state's law will more or less dictate success under another state's law" and the "laws are

<sup>52</sup> [602 F. Supp. 2d 538, 579-80 \(M.D. Pa. 2009\)](#).

<sup>53</sup> [In re Loestrin 24 FE Antitrust Litig.](#), 261 F. Supp. 3d 307, 359 (D.R.I. 2017) (holding that where the scheme and injury alleged by the plaintiffs was "the same across the country" and the plaintiffs had "a collective interest in litigating their claims together to attempt to recover," the "question would be appropriately, and more efficiently, addressed at the class certification stage").

<sup>54</sup> [Mielo](#), 897 F.3d at 480 (quoting [Neale](#), 794 F.3d at 368).

<sup>55</sup> [Langan v. Johnson & Johnson Consumer Cos., Inc.](#) 897 F.3d 88, 95 (2d Cir. 2018); cf. [In re Thalomid & Revlimid Antitrust Litig.](#), No. 14-6997, 2015 U.S. Dist. LEXIS 177541, 2015 WL 9589217, at \*19 (D.N.J. Oct. 29, 2015) (holding the defendants' "attack on plaintiffs' standing to pursue state law claims on behalf of absent class members is not an Article III jurisdictional issue").

<sup>56</sup> [Langan](#), 897 F.3d at 96.

<sup>57</sup> [Muir v. Nature's Bounty \(DE\), Inc.](#), No. 15-9835, 2018 U.S. Dist. LEXIS 128738, 2018 WL 3647115, at \*7 (N.D. Ill. Aug. 1, 2018) (emphasis omitted).

<sup>58</sup> [In re Asacol Antitrust Litig.](#), 907 F.3d 42, 49 (1st Cir. 2018).

materially the same," such that "the fact that judgments for some class members will nevertheless enter under the laws of states other than the states under which any of the class representatives' judgments will enter . . . has no relevant bearing on the personal stake of the named plaintiffs in litigating the case[.]"<sup>59</sup> The court observed that "[i]n a properly certified class action, the named plaintiffs regularly litigate . . . claims of other class members based on transactions in which the named plaintiffs played no part."<sup>60</sup>

Group 1 EPPs' and IRPs' allegations are sufficient to demonstrate a substantial and shared interest in proving that Group 1 Defendants' alleged unlawful conduct resulted in overpayments for the Group 1 drugs, injuries redressable by an award of damages under the state antitrust, consumer protection and unjust enrichment laws cited in the Group 1 EPP and [\*\*39] IRP complaints.<sup>61</sup> Because the state law claims of the named Group 1 EPPs and IRPs largely parallel those of the putative class members, it is both proper and more efficient to consider whether they may pursue their claims on behalf of the unnamed class members in the context of the class certification analysis required under [Rule 23 of the Federal Rules of Civil Procedure](#) (e.g., commonality and typicality under [23\(a\)](#), and predominance under [23\(b\)](#)). Therefore, Group 1 EPPs' and IRPs' claims on behalf of absent class members will not be dismissed for lack of Article III standing.

## B. FAILURE TO STATE A CLAIM

To the extent that Group 1 Defendants seek to dismiss certain of the Group 1 EPP and IRP state law claims for failure state a claim pursuant to certain state laws, [Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#) applies to their motions. [Rule 12\(b\)\(6\)](#) provides for dismissal of a complaint for failure to state a claim upon which relief can be granted where a plaintiff's "plain statement" lacks enough substance to show that he is entitled to relief.<sup>62</sup> To withstand dismissal, the complaint must set forth "direct or inferential [\*832] allegations respecting all the material elements necessary to sustain recovery under some viable legal theory."<sup>63</sup> On a motion to dismiss, the Court "consider[s] plausibility, [\*\*40] not probability."<sup>64</sup> In other words, Plaintiffs are not required "to plead facts that, if true, definitely rule out all possible innocent explanations."<sup>65</sup> The Court must ordinarily consider only those facts alleged in the complaint, accepting the allegations as true and drawing all logical inferences in favor of the non-moving party.<sup>66</sup> In addition, "courts may consider documents *integral to* or *explicitly relied* upon in the complaint . . . or any undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the

<sup>59</sup> *Id.*

<sup>60</sup> [\*Id. at 50\*](#) (internal quotation marks and citation omitted).

<sup>61</sup> Cf. [\*In re Remicade Antitrust Litig.\*, 345 F. Supp. 3d 566, 585 \(E.D. Pa. 2018\)](#) (declining to block class standing on a motion to dismiss where the named indirect purchaser plaintiffs did not specifically allege they had made payments or reimbursements in every state where they asserted state law claims, explaining that "since Plaintiffs cover beneficiaries in numerous other states, they face an imminent threat of injury in fact in those states as well").

<sup>62</sup> [\*Bell Atl. Corp. v. Twombly\*, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#).

<sup>63</sup> [\*Id. at 562\*](#) (internal quotation marks and citations omitted).

<sup>64</sup> [\*In re Lipitor Antitrust Litig.\*, 868 F.3d 231, 260 \(3d Cir. 2017\)](#); see also [\*Twombly\*, 550 U.S. at 570](#) (holding that a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face").

<sup>65</sup> [\*In re Niaspan Antitrust Litig.\*, 42 F. Supp. 3d 735, 753 \(E.D. Pa. 2014\)](#).

<sup>66</sup> [\*ALA, Inc. v. CCAIR, Inc.\*, 29 F.3d 855, 859 \(3d Cir. 1994\)](#).

plaintiff's claims are based on the document.<sup>67</sup> Courts are not, however, bound to accept as true legal conclusions couched as factual allegations.<sup>68</sup>

## **1. STATE ANTITRUST CLAIMS**

Group 1 Defendants argue that many of Group 1 EPPs' and IRPs' state antitrust claims should be dismissed for failure to state a claim. To the extent that Group 1 Defendants contend the state antitrust claims should be dismissed because the EPPs and IRPs have not stated a claim under the overlapping federal antitrust laws, the motions fail. The Court has already determined that Group 1 Plaintiffs' allegations (with the exception of their allegations against Telligent)<sup>69</sup> are **[\*\*41]** sufficient to permit their federal antitrust claims to withstand dismissal.<sup>70</sup> Also, the Group 1 **[\*833]** EPPs and IRPs have alleged a basis for antitrust standing, the Court having held that they have sufficiently pled "that they have suffered harm that is an essential component of Defendants' anticompetitive scheme, as opposed to an ancillary byproduct of it."<sup>71</sup>

The Court considers Defendants' state specific arguments regarding the sufficiency of Group 1 EPPs and IRPs state law antitrust claims below. Some of the arguments apply to all or most of such claims, others to subsets, and still others to the laws of individual states.

### **a. Class Action Bar: Illinois Antitrust Act**

Group 1 Defendants argue that EPPs and IRPs cannot bring class claims under the *Illinois Antitrust Act*. The statute provides that "no person shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act, with the sole exception of this State's Attorney General."<sup>72</sup> "District courts are divided on whether the Illinois Antitrust Act precludes indirect purchasers from filing class actions"<sup>73</sup> and

<sup>67</sup> *In re Asbestos Prods. Liab. Litig. (No. VI)*, 822 F.3d 125, 133 n.7 (3d Cir. 2016) (emphasis in original) (brackets, internal quotation marks and citations omitted).

<sup>68</sup> *Twombly*, 550 U.S. at 555, 564.

<sup>69</sup> The Court's October 16, 2018 decision dismissed the Sherman Act claims of the econazole DPPs, EPPs, and IRPs against defendant Telgent, Inc. and permitted them to seek leave to amend their claims in accordance with the provisions of Pretrial Order No. 51. Econazole EPPs and IRPs filed consolidated amended class action complaints on December 20 and 21, 2018, respectively. The Court does not here consider the sufficiency of the allegations in the amended econazole complaints, having reserved judgment with respect to the motions to dismiss EPPs' and IRPs' state law claims for this later decision.

<sup>70</sup> See *In re Generic Pharms. Pricing*, 338 F. Supp. 3d at 454. Defendants concede that federal **antitrust law** is "either determinative or highly persuasive with respect to [its] state law analogues." Defs.' Mem. in Support of Mot. to Dismiss CB EPP Compl. at 15; Defs.' Mem. in Support of Mot. to Dismiss DX EPP Compl. at 11 (same); see also Defs.' Mem. in Support of Mot. to Dismiss DV EPP Compl. at 10 ("Courts . . . regularly dismiss state law antitrust claims when dismissing Sherman Act claims based on the same allegations."); Defs.' Mem. in Support of Mot. to Dismiss EC IRP Compl. at 4 (same); Defs.' Mem. in Support of Mot. to Dismiss DG EPP Compl. at 8 ("State claims brought in federal court must meet federal pleading standards."); Defs.' Mem. in Support of Mot. to Dismiss CB IRP Compl. at 21 ("the antitrust laws of each of the jurisdictions at issue in Count II have been construed in harmony with federal antitrust laws"); Defs.' Mem. in Support of Mot. to Dismiss PV IRP Compl. at 5, (*citing Rick-Mik Enters., Inc. v. Equilon Enters., LLC*, 532 F.3d 963, 976 n.5 (9th Cir. 2008) ("[S]tate law antitrust claims are derivative of the federal law claims. Because the federal claims fail, the state law claims fail.")).

<sup>71</sup> *In re Generic Pharms. Pricing*, 338 F. Supp. 3d at 457 (internal quotation and citation omitted).

<sup>72</sup> *740 Ill. Comp. Stat. 10/7(2)*.

<sup>73</sup> *In re Lipitor Antitrust Litig.*, 336 F. Supp. 3d 395, 417 (D.N.J. 2018). Compare *In re Propranolol Antitrust Litig.*, 249 F. Supp. 3d 712, 728 (S.D.N.Y. 2017) (holding that the statute is a "state procedural rule [that] does not control in federal court, where *Rule*

the Third Circuit has not had to resolve this question. Federal [\*\*42] courts sitting in diversity jurisdiction must utilize federal procedural law and state substantive law.<sup>74</sup> If the Illinois statute is substantive in nature, it applies, and must be followed here.<sup>75</sup> However, "there is no bright line between procedural and substantive law, and thus, the distinction is difficult to determine."<sup>76</sup>

Group 1 Defendants argue that the Illinois "restriction on indirect purchaser class actions is substantive, represents a policy judgment as to the feasibility of managing duplicative recovery, which the [Illinois] legislature has entrusted to the [State] Attorney General but not to individual indirect purchasers, and therefore must be applied in federal court."<sup>77</sup> Group 1 EPPs respond that "the class action bar is not part of Illinois' framework of substantive rights and remedies," because [Rule 23 of the Federal Rules of Civil Procedure](#), the rule governing class actions is, "merely a procedural mechanism that affects how those claims proceed in federal court."<sup>78</sup> Likewise, Group 1 IRPs assert that the Illinois Antitrust Act class action bar is a "procedural limitation" that does [\*834] not apply because they "filed in federal court and bring a class action under [Rule 23](#) . . ."<sup>79</sup>

The prevailing [\*\*43] view of the District Courts that have considered this issue within this Circuit is that the Illinois Antitrust Act prohibits indirect purchaser class actions.<sup>80</sup> Under the Supreme Court's decision in *Shady Grove Orthopedic Association v. Allstate Insurance Co.*, state procedural rules control in federal court when they are "part of a State's framework of substantive rights or remedies."<sup>81</sup> The Court is persuaded that "the indirect purchaser restrictions of the [Illinois Antitrust Act] are 'intertwined' with the underlying substantive right," and, as a result "application of [Rule 23](#) would 'abridge, enlarge or modify' Illinois' substantive rights."<sup>82</sup> Accordingly, the Court will dismiss with prejudice Group 1 EPPs' and IRPs' claims under the Illinois Antitrust Act.

<sup>73</sup> sets the only relevant requirements to file a class action") with [In re Lipitor, 336 F. Supp. 3d at 418](#) (holding that "the language of the [Illinois] Act presents a substantive conflict with [Rule 23](#)").

<sup>74</sup> [Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 \(1938\)](#).

<sup>75</sup> See [Shady Grove Orthopedic Ass'n v. Allstate Ins. Co., 559 U.S. 393, 419, 130 S. Ct. 1431, 176 L. Ed. 2d 311 \(2010\)](#) ("the balance Congress has struck turns, in part, on the nature of the state law that is being displaced by a federal rule") (Stevens, J. concurring); see also [In re Wellbutrin XL Antitrust Litig., 756 F. Supp. 2d 670, 675 \(E.D. Pa. 2010\)](#) (explaining that the five justices in the concurrence and the dissent in *Shady Grove* "concluded that the validity of Federal Rules of Civil Procedure turns, in part, on the rights afforded by the state rule that the Federal Rule displaces").

<sup>76</sup> [In re Lipitor, 336 F. Supp. 3d at 414](#).

<sup>77</sup> See PV Defs.' Mem. in Support of Mot. to Dismiss EPP Compl. at 18 (internal quotations and citations omitted).

<sup>78</sup> See PV EPP Opp. Br. at 26-27 (internal quotations and citations omitted).

<sup>79</sup> See PV IRP Opp. Br. at 16.

<sup>80</sup> See [In re Wellbutrin, 756 F. Supp. 2d at 677](#) ("The Illinois restrictions on indirect purchaser actions are intertwined with Illinois substantive rights and remedies because (1) the restrictions apply only to the [Illinois Antitrust Act], (2) they are incorporated in the same statutory provision as the underlying right, not a separate procedural rule, and (3) the restrictions appear to reflect a policy judgment about managing the danger of duplicative recoveries."); [In re Effexor Antitrust Litig., 337 F. Supp. 3d 435, 2018 WL 6003893, at \\*16 \(D.N.J. 2018\)](#) ("The language of the Act presents a substantive conflict with [Rule 23](#); as such, since the Illinois Antitrust Act controls the Court finds that EPPs lack standing to assert claims under the Act and, therefore, dismisses this claim with prejudice."); [In re Lipitor, 336 F. Supp. 3d at 418](#) (same).

<sup>81</sup> [559 U.S. at 419](#) (Stevens, J., concurring); see also [In re Opana ER Antitrust Litig., 162 F. Supp. 3d 704, 723 \(N.D. Ill. 2016\)](#).

<sup>82</sup> [In re Wellbutrin, 756 F. Supp. 2d at 677](#); but see [Contant v. Bank of Am. Corp., No. 17-3139, 2018 U.S. Dist. LEXIS 183586, 2018 WL 5292126, at \\*12 \(S.D.N.Y. Oct. 25, 2018\)](#) (holding that the Illinois Antitrust Act, "which applies exclusively to antitrust class actions" must be procedural if the state statute considered in *Shady Grove* was found to not "abridge, enlarge or modify any substantive right" even though it "foreclosed a wide range of potential class actions").

## b. Pre-Suit Notice Requirements

The antitrust laws of Arizona, Hawaii, Nevada, and Utah have pre-filing notice requirements obligating any antitrust plaintiff to serve certain state officials with pre-suit notices in order to pursue their claims.<sup>83</sup> Group 1 Defendants argue that the clobetasol, digoxin, divalproex, econazole and pravastatin EPPs' Arizona, Hawaii, Nevada, and Utah antitrust claims and the clobetasol, **[\*\*44]** divalproex, econazole, and pravastatin IRPs' Arizona, Nevada, and Utah antitrust claims must be dismissed because the relevant plaintiffs have not sufficiently alleged that they met each state's pre-suit notice requirement. The relevant EPPs respond that they "did send notices as required" and submit a declaration in support of their efforts to provide the notice required under each of the relevant state laws.<sup>84</sup> The relevant IRPs assert **[\*835]** that defendants "had notice of the incoming IRP complaints long before they were served" and "are in no way prejudiced by the IRP's omission of an allegation that notice was provided."<sup>85</sup> Group 1 Plaintiffs also contend that their "adherence to the notice requirements is not mandatory because the states' procedural rules are superseded by federal procedural rules."<sup>86</sup> Group 1 Defendants counter that compliance with the notice requirements should not be excused under *Shady Grove*.<sup>87</sup>

With respect to the *Shady Grove* issue, there is no consensus regarding whether the cited notice requirements are "substantive" or "procedural." To the extent that the relevant statutory provisions have been considered, **[\*\*45]** some have concluded that the provisions are mandatory and that declining to follow them "in federal court would encourage forum shopping and the inequitable administration of laws."<sup>88</sup> Others have found they are not sufficiently a part of the relevant States' framework of substantive rights or remedies to be controlling.<sup>89</sup> Regardless

<sup>83</sup> See [Ariz. Rev. Stat. § 44-1415\(A\)](#); [Haw. Rev. Stat § 480-13.3](#); [Nev. Rev. Stat. Ann. § 598A.210\(3\)](#); [Utah Code Ann. § 76-10-3109\(9\)](#).

<sup>84</sup> See CB EPP Opp. Mem. at 28 (*citing* CB EPP Opp. Mem. App'x H). In deciding whether EPPs have sufficiently alleged compliance with the relevant notice requirements, the Court cannot consider EPPs' declaration, as it is not part of their complaints, an exhibit attached thereto, or a matter of public record. See [In re Asbestos Prods. Liab. Litig. \(No. VI\), 822 F.3d 125, 133 n.7 \(3d Cir. 2016\)](#) ("courts may consider documents *integral to* or *explicitly relied upon* in the complaint . . . or any undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document") (brackets, internal quotation marks, and citations omitted).

<sup>85</sup> See PV IRP Opp. Mem. at 16. The relevant question is not whether Defendants have been prejudiced by any failure to follow the statutorily required notice procedures. As Defendants argue, the purpose of the statutory rules is not to give notice to Defendants, but to inform the relevant state attorney general so they may decide whether to intervene or otherwise proceed with the claim. See DV Defs.' IRP Reply Br. at 7-8.

<sup>86</sup> CB EPP Opp. Mem. at 28-29; see also PV IRP Opp. Mem. at 16 ("Pre-suit or post-suit notice is not an element required to state a claim but instead a procedural rule superseded by the Federal Rules of Civil Procedure.") (citation omitted).

<sup>87</sup> See DV Defs.' IRP Reply Br. at 6-7 ("several post-*Shady Grove* courts in this district and elsewhere have dismissed federal class actions for failure to comply with demand letter requirements, noting that the requirement is not merely a procedural nicety, but, rather, a prerequisite to suit") (citation and internal quotations omitted).

<sup>88</sup> [In re Effexor Antitrust Litig.](#), 337 F. Supp. 3d 435, 2018 WL 6003893, at \*13 (quoting [In re Asacol Antitrust Litig.](#), No. 15-12730, 2016 U.S. Dist. LEXIS 94605, 2016 WL 4083333, at \*15 (D. Mass. July 20, 2016)); see also [In re Chocolate Confectionary Antitrust Litig.](#), 749 F. Supp. 2d 224, 232 (M.D. Pa. 2010) (finding failure to comply with Hawaii notice requirement "warrants dismissal").

<sup>89</sup> See [In re Restasis \(Cyclosporine Ophthalmic Emulsion\) Antitrust Litig.](#), No. 18-2819, 355 F. Supp. 3d 145, 2018 U.S. Dist. LEXIS 194161, 2018 WL 5928143, at \*6 (E.D.N.Y. Nov. 13, 2018) ("Hawaii's law regulates only when private plaintiffs can litigate the case. It does not alter the substantive elements of plaintiffs' claims."); [In re Propranolol](#), 249 F. Supp. 3d at 728 n. 24 (dismissal not required for failure to comply with Hawaii's procedural notice rule); [In re Broiler Chicken Antitrust Litig.](#), 290 F. Supp. 3d 772, 817 (N.D. Ill. 2017) (declining to dismiss Arizona antitrust claim notwithstanding late notice to attorney general); [In re Aggrenox Antitrust Litig.](#), 94 F. Supp. 3d 224, 254 (D. Conn. 2015) (declining to dismiss based on the plaintiffs' failure to plead

of whether the relevant notice provisions are substantive or procedural, they do not alter the substantive elements of Plaintiffs' claims and are not a pleading requirement for the Complaints. Therefore, this argument is not a basis for dismissal of EPPs or IRPs state antitrust claims.

### c. Intrastate Conduct

Group 1 Defendants challenge the sufficiency of certain Group 1 EPPs' and IRPs' claims under the antitrust laws of the District of Columbia, Hawaii, Illinois<sup>90</sup>, [\*836] Kansas, Maine, Minnesota, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oregon, South Dakota, Tennessee, West Virginia and Wisconsin, arguing the laws require Plaintiffs to allege a nexus between Defendants' conduct and intrastate commerce.<sup>91</sup> Group 1 Defendants contend that the relevant state antitrust claims should be dismissed because Group 1 EPPs' and IRPs' [\*\*\*46] complaints lack specific allegations connecting Group 1 Defendants' alleged conduct to each state where they raise a state antitrust claim and instead include only conclusory allegations that Group 1 Defendants' alleged conduct "substantially affected" the commerce of each relevant state.<sup>92</sup> Group 1 Defendants assert that the Group 1 EPPs' allegations do not allow the Court to "assess whether the conduct had an incidental or substantial effect — if any at all — on the states under which the EPPs bring their claims."<sup>93</sup> Similarly, they argue that the Group 1 IRPs' allegations of a nationwide conspiracy with "conclusory and identical allegations for each state, including unspecific assertions that the conspiracy restrained competition, raised prices, and substantially affected commerce in that state" are not enough to plead a substantial effect on intrastate commerce.<sup>94</sup>

Group 1 EPPs respond that to withstand dismissal, no more is needed than their allegations that class members made purchases of the Group 1 drugs at supracompetitive prices within the states relevant to their state law claims.<sup>95</sup> They argue that "[s]tate statutes do not require that the anticompetitive conduct [\*\*47] (i.e., the act of conspiring) occur within the state, so long as the adverse effects are felt within the state. Moreover, the alleged effects need not occur entirely or even predominately within a state to meet the requirement."<sup>96</sup> Similarly, Group 1 IRPs argue that "there can be no question that it is at least plausible that each of the [relevant] states suffered a

compliance with the notice requirements of the Hawaii antitrust statute); *In re Aftermarket Filters Antitrust Litig.*, No. 08-4883, 2009 U.S. Dist. LEXIS 104114, 2009 WL 3754041, at \*6 (N.D. Ill. Nov. 5, 2009) (finding the Hawaii antitrust "statute does not provide for dismissal of the action for failure to comply [with the presuit notice requirement], and that dismissal is inconsistent with the remedial purposes of the statute").

<sup>90</sup> Because the Court has already found that Plaintiffs cannot state a claim under the Illinois Antitrust Act, it need not consider Group 1 Defendants' intrastate conduct arguments regarding Group 1 Plaintiffs' Illinois antitrust claims.

<sup>91</sup> See EPPs' Response to Defendants' Antitrust Intrastate Effects Appendices. See also CB Defs.' Mem. in Support of Mot. to Dismiss EPP Compl. at 22; DG Defs.' Mem. in Support of Mot. to Dismiss EPP Compl. at 21; DV Defs' Mem. in Support of Mot. to Dismiss EPP Compl. at 18; DX Defs' Mem. in Support of Mot. to Dismiss EPP Compl. at 21; EC Defs' Mem. in Support of Mot. to Dismiss EPP Compl. at 14; PV Defs' Mem. in Support of Mot. to Dismiss EPP Compl. at 20; CB Defs.' Mem. in Support of Mot. to Dismiss IRP Compl. at 27; DG Defs.' Mem. in Support of Mot. to Dismiss IRP Compl. at 17-18; DV Defs' Mem. in Support of Mot. to Dismiss IRP Compl. at 18-19; DX Defs' Mem. in Support of Mot. to Dismiss IRP Compl. at 20; EC Defs' Mem. in Support of Mot. to Dismiss EPP Compl. at 10-11; PV Defs' Mem. in Support of Mot. to Dismiss IRP Compl. at 19-20.

<sup>92</sup> See, e.g., PV Defs' Mem in Support of Mot. to Dismiss EPP Compl. at 20.

<sup>93</sup> *Id.*

<sup>94</sup> PV Defs' Mem in Support of Mot. to Dismiss IRP Compl. at 19; see also CB Defs' Mem in Support of Mot. to Dismiss IRP Compl. at 13-14 (arguing the clobetasol IRPs' state antitrust claims should be dismissed where "IRPs fail to allege that any conspiratorial conduct actually transpired in any of the [relevant] jurisdictions, nor do they provide anything other than boilerplate legal conclusions that the alleged price-fixing substantially affected markets in these jurisdictions").

<sup>95</sup> See PV EPP Opp. Mem. at 30.

<sup>96</sup> CB EPP Opp. Mem. at 29.

substantial effect on commerce within its borders" where they have alleged that "wholesalers, pharmacies, patients and their health plans were all illegally overcharged for generic drugs" as a result of Group 1 Defendants' alleged conduct.<sup>97</sup>

[\*837] Other courts have held that plaintiffs sufficiently pled state antitrust claims where they alleged a "nationwide antitrust violation that increased prices paid by the end payors in each state," rejecting arguments that state law antitrust claims should be dismissed because the relevant state laws "target only anticompetitive conduct that occurs solely or predominantly within the borders of the state . . ."<sup>98</sup> At this stage of the litigation, the Court agrees that the Group 1 EPPs' and IRPs' allegations of a broad nationwide-scheme to fix generic drug prices are enough to satisfy the [\*838] nexus requirement for asserting claims under the relevant state antitrust laws.<sup>99</sup> "[I]t is not obvious why the *intra* state effect of anticompetitive conduct would not be reached by the cited statutes merely because *inter* state conduct predominates."<sup>100</sup> Whether EPPs [\*838] and/or IRPs will later be able to prove the requisite nexus is a separate question to be addressed later in this litigation. "The fact-based inquiry can take place after discovery, at summary judgment."<sup>101</sup>

<sup>97</sup> PV IRP Opp. Mem. at 14.

<sup>98</sup> [In re Solodyn, 2015 U.S. Dist. LEXIS 125999, 2015 WL 5458570, at \\*16](#) (declining to dismiss the end payor plaintiffs' District of Columbia, Hawaii, Massachusetts, Mississippi, Nevada, New Hampshire, New York, Oregon and West Virginia antitrust claims).

<sup>99</sup> See [In re Suboxone, 64 F. Supp. 3d at 698-99](#) (determining similar intrastate effects allegations were sufficient to permit the plaintiffs' Mississippi and Nevada antitrust claims to withstand dismissal); [In re Liquid Aluminum Sulfate, 2017 U.S. Dist. LEXIS 115294, 2017 WL 3131977, at \\*24](#) ("pleading intrastate conduct and allegations of nationwide price-fixing satisfies the nexus requirement for asserting claims under" the antitrust statutes of California, the District of Columbia, Kansas, Nebraska, Nevada, New York, North Carolina, North Dakota, South Dakota, Tennessee, and West Virginia); [In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d at 580-82](#) (the plaintiffs' allegations of a nationwide price-fixing conspiracy were adequate to state a claim under the antitrust laws of Nevada, South Dakota, Tennessee, West Virginia, and Wisconsin); [In re Dig. Music Antitrust Litig., 812 F. Supp. 2d 390, 407-08 \(S.D.N.Y. 2011\)](#) (nexus requirement satisfied for the District of Columbia, Michigan, South Dakota, Tennessee, West Virginia, and Wisconsin antitrust laws where the plaintiffs' complaint alleged the defendants' "conduct was in a continuous and uninterrupted flow of intrastate and interstate commerce throughout the United States") (internal quotation marks omitted); see also [Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 737 F. Supp. 2d 380, 397 \(E.D. Pa. 2010\)](#) (holding that the plaintiffs sufficiently alleged a claim under the Minnesota **antitrust law** where they alleged that the defendants' actions forced purchasers to pay more for a drug because subsection b of Minn. Stat. § 325D.54 "does not on its face require any substantial in state effect"); [In re New Motor Vehicles Canadian Exp. Antitrust Litig., 350 F. Supp. 2d 160, 172 \(D. Me. 2004\)](#) ("the New Mexico antitrust provision makes it crystal clear that only the trade or commerce, not necessarily the conspiracy, must be within the state" and "further specifies that an effect on, or involvement of, interstate or foreign commerce does not bar application of the state statute"); [In re Microsoft Antitrust Litig., No. 99-709, 2001 Me. Super. LEXIS 47, 2001 WL 1711517, at \\*1 \(Me. Super. Ct. Mar. 24, 2001\)](#) (explaining that "the phrases 'in this State' and 'of this State' [in the Maine antitrust statute] modify 'trade or commerce' and not the illegal conduct," supporting a finding that allegations of intrastate effects are enough to plead a violation of the Maine antitrust statute). But see [In re Dealer Mgmt. Sys. Antitrust Litig., MDL 2817, No. 18-864, 362 F. Supp. 3d 510, 2019 U.S. Dist. LEXIS 12157, 2019 WL 334340, at \\*25 \(N.D. Ill. Jan. 25, 2019\)](#) (dismissing the plaintiffs' Tennessee **antitrust law** claim where they had "not identified any Tennessee-specific allegations supporting [their] claim"); [In re Cast Iron Soil Pipe & Fittings Antitrust Litig., No. 14-md-2508, 2015 U.S. Dist. LEXIS 121620, 2015 WL 5166014, at \\*26 \(E.D. Tenn. June 24, 2015\)](#) (dismissing the plaintiffs' claims under the antitrust laws of the District of Columbia, Mississippi, Nevada, New York, North Carolina, South Dakota, Tennessee, Wisconsin, and West Virginia because their allegations were "conclusory" and did not "address[ ] any connection between the individual state and the wrongful conduct").

<sup>100</sup> [In re Aggrenox, 94 F. Supp. 3d at 253; see also In re Auto. Parts Antitrust Litig. \(In re Instrument Panel Clusters\), No. 12-md-02311, 2014 U.S. Dist. LEXIS 90724, 2014 WL 2993753, at \\*16 \(E.D. Mich. July 3, 2014\)](#) ("This Court is not persuaded that an incidental versus a substantial in-state injury, which is a fact-based inquiry, can be assessed at this stage of the proceedings.").

<sup>101</sup> [In re Remicade Antitrust Litig., No. 17-04326, 345 F. Supp. 3d 566, 2018 U.S. Dist. LEXIS 207410, 2018 WL 6446611, at \\*12 \(E.D. Pa. Dec. 7, 2018\).](#)

#### d. Citizenship or Residency Requirements

Group 1 Defendants argue that certain of the Group 1 EPPs' and IRPs' state antitrust law claims must be dismissed because the relevant state antitrust statutes include citizenship or residency requirements that Group 1 EPPs and IRPs have not supported with sufficient allegations.<sup>102</sup> Indeed, the Utah Antitrust Act specifies that "[a] person who is a *citizen* of this state or a *resident* of this state" is permitted to bring a claim.<sup>103</sup> Group 1 EPPs and IRPs respond that that dismissal is not warranted because "nothing in the [\*\*49] relevant statutes requires that the *named Plaintiffs* in class actions be citizens or residents . . .".<sup>104</sup> They assert that there are members of the putative Group 1 EPP and IRP classes that made purchases or reimbursements for the Group 1 drugs in each relevant U.S. and state territory at supracompetitive prices and that no more is needed for their claims to withstand dismissal.<sup>105</sup> The Court agrees with EPPs and IRPs. "Allegations that members of the putative class presumably include Utah [and, in this case, South Dakota] citizens and residents are sufficient to overcome a motion to dismiss."<sup>106</sup> Defendants' motions will be denied to the extent that they seek to dismiss Group 1 EPPs' and IRPs' claims for failure to sufficiently [\*839] allege they have met citizenship or residency requirements set forth under the antitrust laws of South Dakota and Utah.

#### e. Rhode Island: Partial *Illinois Brick* Bar

Group 1 Defendants contend that the divalproex ER and doxycycline EPPs and IRPs cannot seek redress under the Rhode Island antitrust law<sup>107</sup> for their claims concerning alleged overcharges incurred before July 15, 2013, arguing that the state's *Illinois Brick* repealer statute, [\*\*50] enacted on that date, does not apply retroactively.<sup>108</sup>

<sup>102</sup> See CB Defs' Mem in Support of Mot. to Dismiss EPP Compl. at 22 (Utah); DG Defs.' Mem. in Support of Mot. to Dismiss EPP Compl. at 19 (Utah); DV Defs.' Mem. in Support of Mot. to Dismiss EPP Compl. at 18 (Utah); DX Defs.' Mem. in Support of Mot. to Dismiss EPP Compl. at 20 (Utah); EC Defs.' Mem. in Support of Mot. to Dismiss EPP Compl. at 16 (Utah); PV Defs.' Mem. in Support of Mot. to Dismiss EPP Compl. at 18-19 (South Dakota) and 20 (Utah); CB Defs' Mem in Support of Mot. to Dismiss IRP Compl. at 27 (Utah); DV Defs' Mem in Support of Mot. to Dismiss IRP Compl. at 20-21 (Utah); DX Defs' Mem in Support of Mot. to Dismiss IRP Compl. at 21-22 (Utah); EC Defs' Mem in Support of Mot. to Dismiss IRP Compl. at 11 (Utah); PV Defs' Mem in Support of Mot. to Dismiss IRP Compl. at 20-21 (South Dakota and Utah).

<sup>103</sup> Utah Code Ann. § 76-10-3109(1)(a) (emphasis added). Although pravastatin Defendants assert that a similar requirement applies under the South Dakota antitrust law, they cite neither statute nor case law to suggest that a similar requirement exists under South Dakota law.

<sup>104</sup> PV EPP Opp. Br. at 28.

<sup>105</sup> See, e.g., CB EPP Opp. Br. at 27-28; see also CB IRP Opp. Br. at 14 ("IRPs concede that no named pharmacy is a citizen or resident of Utah. This claim is brought in a representative capacity.").

<sup>106</sup> Hosp. Auth. of Metro. Gov't of Nashville v. Momenta Pharms., Inc., No. 15-01100, 353 F. Supp. 3d 678, 2018 U.S. Dist. LEXIS 206234, 2018 WL 6378457, at \*11 (M.D. Tenn. Dec. 5, 2018); see also In re Liquid Aluminum Sulfate, 2017 U.S. Dist. LEXIS 115294, 2017 WL 3131977, at \*28 (declining to dismiss the Plaintiffs' Utah antitrust claim where they alleged that "members of the putative classes made purchases in Utah"); In re Asacol, 2016 U.S. Dist. LEXIS 94605, 2016 WL 4083333, at \*13 (same). But see In re Lipitor, 336 F. Supp. 3d at 419 ("[B]ecause there must be at least one named plaintiff who is a Utah citizen or resident in order to establish standing for the putative class, EPPs' claims under the Utah Antitrust Act are dismissed without prejudice."); In re Niaspan, 42 F. Supp. 3d at 759-60 ("at least one named plaintiff must be a citizen or resident of Utah in order to seek classwide relief under the Utah Antitrust Act").

<sup>107</sup> R.I. Gen. Laws § 6-36-7(d).

<sup>108</sup> See Defs.' Mem. in Support of Mot. to Dismiss DV EPP Compl. at 18; Defs.' Mem. in Support of Mot. to Dismiss DV IRP Compl. at 20 n.14; Defs.' Mem. in Support of Mot. to Dismiss DX EPP Compl. at 19; Defs.' Mem. in Support of Mot. to Dismiss DX IRP Compl. at 21.

The Court agrees. Divalproex ER and doxycycline EPPs and IRPs have not cited a decision that would support a conclusion to the contrary. Courts that have considered the question have determined that the Rhode Island statute is prospective, not retroactive.<sup>109</sup> Divalproex ER and doxycycline EPPs and IRPs may not recover for any alleged overcharges incurred before the Rhode Island *Illinois Brick*-repeater statutes took effect, but may proceed with their claims for alleged overcharges incurred on or after July 15, 2013.

## **2. STATE CONSUMER PROTECTION CLAIMS**

Group 1 EPPs' and IRPs' state consumer protection claims rest on the same allegations as the direct purchasers' underlying federal antitrust claims which the Court has already determined sufficient to support plausible antitrust claims. As with Group 1 EPPs' and IRPs' state antitrust claims, Group 1 Defendants argue that many of their state consumer protection claims should be dismissed for failure to state a claim.

Group 1 EPPs respond that the same "detailed and extensive factual allegations" that support their federal antitrust claims also "demonstrat[e] that Defendants engaged in [\*\*51] an unfair, deceptive and unconscionable scheme to fix prices and allocate markets, thereby causing harm to consumers and third-party payers in each state, who paid supracompetitive prices and were deprived of the benefits of free and open competition."<sup>110</sup> Likewise, Group 1 IRPs assert that Defendants' alleged "deceptive conduct regarding pricing is actionable as an unfair or unconscionable trade practice, independent of any antitrust cause of action."<sup>111</sup>

[\*840] Group 1 EPPs and IRPs have the better argument. Their Complaints contain detailed factual allegations that make plausible their claims that Group 1 Defendants engaged in unfair competition and they need not reiterate these facts in their consumer protection law counts.<sup>112</sup> The Court considers Defendants' additional state specific arguments for dismissal of Group 1 EPPs' and IRPs' state consumer protection claims below.

### **a. *Illinois Brick* Does Not Preclude State Consumer Protection Claims**

Group 1 Defendants assert that because the Group 1 EPPs' and IRPs' state consumer protection law claims are just repackaged federal antitrust claims, they cannot be used to circumvent the *Illinois Brick* prohibition on indirect purchaser claims in Alaska, [\*\*52] Florida, Missouri, Montana, New Jersey and South Carolina. They argue that

<sup>109</sup> See *In re Effexor Antitrust Litig.*, 337 F. Supp. 3d 435, 460 (D.N.J. 2018) ("Rhode Island's repealer does not apply retroactively"); *In re Lipitor*, 336 F. Supp. 3d at 419 ("courts have consistently held that the Rhode Island repealer applies prospectively"); *In re Solodyn*, 2015 U.S. Dist. LEXIS 125999, 2015 WL 5458570, at \*15 (finding the Rhode Island repealer law applies prospectively); *In re Aggrenox*, 94 F. Supp. 3d at 253 ("In the absence of evidence of the Rhode Island legislature's intent to the contrary, I conclude that the law applies only prospectively."); *In re Cast Iron*, 2015 U.S. Dist. LEXIS 121620, 2015 WL 5166014, at \*22 (dismissing IPPs' claims brought pursuant to Rhode Island's Antitrust Act, to the extent the "claims alleg[ed] overcharges before July 15, 2013"); *In re Niaspan*, 42 F. Supp. 3d at 759 (finding the Rhode Island repealer statute applies prospectively in the absence of legislative intent to the contrary).

<sup>110</sup> CB EPP Opp. Mem. at 30; DG EPP Opp. Mem. at 35; DV EPP Opp. Mem. at 33; DX EPP Opp. Mem. at 34; EC EPP Opp. Mem. at 31; PV EPP Opp. Mem. at 31.

<sup>111</sup> CB IRP Opp. Mem. at 15; DG IRP Opp. Mem. at 15; DV IRP Opp. Mem. at 16; DX IRP Opp. Mem. at 14; EC IRP Opp. Mem. at 16; PV IRP Opp. Mem. at 17-18.

<sup>112</sup> See *Sergeants Benevolent Ass'n Health & Welfare Fund v. Actavis, PLC*, No. 15-6549, 2018 U.S. Dist. LEXIS 220574, 2018 WL 7197233, at \*35 (S.D.N.Y. Dec. 26, 2018) ("the factual allegations that support the IPP's claims are well-pleaded throughout the Complaint, and it is not necessary that the IPP reiterate each of them when listing its causes of action in the final section of the Complaint"); see also *In re Domestic Drywall Antitrust Litig.*, No. 13-2437, 2016 U.S. Dist. LEXIS 90619, 2016 WL 3769680, at \*11 (E.D. Pa. July 13, 2016) ("To the extent Defendants' one-paragraph [Twombly] argument is an invitation for the Court to comb through all of Plaintiffs' consumer protection claims and determine whether the elements have been adequately pleaded, the Court respectfully declines the invitation.").

EPPs and IRPs cannot simply dress up their antitrust claim as a consumer protection claim. In response, EPPs argue that *Illinois Brick* does not nullify (or even address) state consumer protection claims. IRPs assert that if they had made these claims without alleging any antitrust claim, Defendants would have no argument for dismissal and their consumer protection claims should not be dismissed merely because they are pleaded in the same complaint.

The Court agrees with EPPs and IRPs that Defendants' "repackaging" argument is not enough to require dismissal of EPPs' and IRPs' consumer protection law claims. Because "states remain free to permit recovery by indirect purchasers," Group 1 EPPs and IRPs are not barred from pursuing such a recovery under the various state consumer protection laws so long as their allegations are enough to plead the relevant consumer protection violation.<sup>113</sup>

Further, with respect to EPPs' and IRPs' Florida consumer protection claims, Florida courts have held that the Florida Deceptive and Unfair Trade Practices Act does not have the same indirect purchaser restriction as the state's [\*\*53] *antitrust law*.<sup>114</sup> Accordingly, the Court "decline[s] to dismiss the claims for monopolization and [\*841] attempted monopolization brought under the FDUTPA on *Illinois Brick* grounds."<sup>115</sup> Similarly, *Illinois Brick* does not bar EPPs' or IRPs' claims under the *Alaska Unfair Trade Practices and Consumer Protection Act*,<sup>116</sup> the *Missouri Merchandising Practices Act*,<sup>117</sup> the *Montana Unfair Trade Practices and Consumer Protection Act*,<sup>118</sup> the *New Jersey Consumer Fraud Act*,<sup>119</sup> or the *South Carolina Unfair Trade Practices Act*.<sup>120</sup>

<sup>113</sup> *In re Domestic Drywall*, 2016 U.S. Dist. LEXIS 90619, 2016 WL 3769680, at \*11 (rejecting the Defendants' argument that dismissal of all of the Plaintiffs' state consumer protection claims was warranted because the claims were an attempt "to build a Frankensteinian equivalent of a direct purchaser claim") (citation, internal quotation and alterations omitted); see also *In re Packaged Seafood Prods. Antitrust Litig.*, 242 F. Supp. 3d 1033, 1080 (S.D. Cal. 2017) ("[J]ust because the same course of conduct gives rise to recovery under two distinct statutory provisions does not mean that a bar to recovery under one necessarily applies with equal force to the other.").

<sup>114</sup> See *In re Fla. Microsoft Antitrust Litig.*, No. 99-27340, 2002 WL 31423620, at \*2 (Fla. Cir. Ct. Aug. 26, 2002) ("Indirect purchasers of a monopolist's or price fixer's products, such as Plaintiffs here, may bring suit under the Florida [Deceptive and Unfair Trade Practices Act].").

<sup>115</sup> *In re Suboxone*, 64 F. Supp. 3d at 699 n.23.

<sup>116</sup> *Alaska Stat. Ann. § 45.50.531(a)* ("A person who suffers an ascertainable loss of money or property as a result of another person's act or practice declared unlawful by [Ak. Stat.] 45.50.471 may bring a civil action to recover for each unlawful act or practice three times the actual damages or \$500, whichever is greater. . . Nothing in this subsection prevents a person who brings an action under this subsection from pursuing other remedies available under other law, including common law."); see *Matanuska Maid, Inc. v. Alaska*, 620 P.2d 182, 185 (Ak. 1980) (finding the same conduct could be found to violate both the Alaska antitrust and consumer protection statutes); but see *In re Lidoderm Antitrust Litig.*, 103 F. Supp. 3d 1155, 1163 (N.D. Cal. 2015) (declining to allow an indirect purchaser claim under the Alaska consumer protection law "since no court has affirmatively found to the contrary, and since, under the current status of the law in Alaska, only the attorney general may sue for money damages on behalf of indirect purchasers as a result of *antitrust* violations") (emphasis added).

<sup>117</sup> *Sheet Metal Workers Local 441 Health & Welfare Plan*, 737 F. Supp. 2d at 415 (rejecting the defendants' argument that indirect purchasers were barred from asserting claims under the Missouri consumer protection law); see also *In re Packaged Seafood Prods.*, 242 F. Supp. 3d at 1079 (holding "*Illinois Brick* does not bar indirect-purchaser claims under the MMPA").

<sup>118</sup> *Mont. Code Ann. § 30-14-103* ("Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful"); see *In re New Motor Vehicles*, 350 F. Supp. 2d at 193 ("application of the Montana consumer protection statute is not limited to those who engage directly in consumer transactions").

<sup>119</sup> *N.J. Stat. Ann. § 56:8-1 et seq.*; see *N.J. Stat. Ann. § 56:8-19* ("Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action or assert a counterclaim therefor in any court of competent jurisdiction."). The Court notes that EPPs have now withdrawn their New Jersey Consumer Protection Act Claims. See *supra* n.8. IRPs have not.

### b. State Consumer Protection Statutes Permit Claims for Anticompetitive Conduct

Defendants make a similar argument that the consumer protection laws of Arkansas, the District of Columbia, Florida, Georgia, New Mexico, Rhode Island, and West Virginia do not cover Group 1 EPPs' and IRPs' claims that Defendants engaged in anticompetitive conduct because "those laws do not encompass actions based on allegations of an antitrust conspiracy."<sup>121</sup> Group 1 EPPs and IRPs [\*842] respond that courts have liberally construed these statutes to include conduct that would also be covered by antitrust laws.<sup>122</sup> They [\*\*54] also argue that "these states model their consumer protection statutes on the *Federal Trade Commission ('FTC') Act*, which encompasses claims based on antitrust violations."<sup>123</sup>

Defendants have not made a persuasive argument as to why Group 1 EPPs and IRPs cannot assert consumer protection claims under the laws of these states simply because they also assert antitrust claims.<sup>124</sup> Whether they can ultimately prove a consumer protection claim separate and apart from their antitrust claims is not a question for resolution at this stage of the litigation.

### c. Class Action Bars Under State Consumer Protection Laws

Group 1 Defendants also challenge certain of Group 1 EPPs' and IRPs' claims under the consumer protection laws of Alaska, Georgia, Montana, South Carolina, and Utah, arguing that the relevant state laws do not permit them to proceed with their consumer protection claims in a class action.<sup>125</sup> The Court will consider their challenges with respect to each state law.

<sup>120</sup> [S.C. Code Ann. § 39-5-10, et seq.](#); see [S.C. Code Ann. § 39-5-140](#) ("Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by [the South Carolina Unfair Trade Practices Act] may bring an action individually, but not in a representative capacity, to recover actual damages.").

<sup>121</sup> Defs.' Mem. in Support of Mot. to Dismiss DV IRP Compl. at 25-26; see Defs.' Mem. in Support of Mot. to Dismiss EC EPP Compl. at 20-21; Defs.' Mem. in Support of Mot. to Dismiss PV EPP Compl. at 23-24; Defs.' Mem. in Support of Mot. to Dismiss DV IRP Compl. at 25-26; see also Defs.' Mem. in Support of Mot. to Dismiss DG IRP Compl. at 13-14 (arguing plaintiffs cannot circumvent Florida's limitation on indirect purchaser antitrust claims "by dressing up their antitrust claim as a consumer protection claim").

<sup>122</sup> See, e.g., DG EPP Opp. Mem. at 36-41; DV IRP Opp. Mem. at 18-19.

<sup>123</sup> PV EPP Opp. Mem. at 32; see [15 U.S.C.A. § 45\(a\)\(1\)](#).

<sup>124</sup> See, e.g., [In re Liquid Aluminum Sulfate](#), 2017 U.S. Dist. LEXIS 115294, 2017 WL 3131977, at \*23 (permitting plaintiff to proceed with antitrust claims and claims under the *Florida Deceptive and Unfair Trade Practices Act*); [In re Packaged Seafood Prods.](#), 242 F. Supp. 3d at 1084-85, 1087 (declining to dismiss the plaintiffs' Rhode Island and West Virginia consumer protection law claim on the basis of the defendants' arguments that the statutes do not recognize a cause of action for price-fixing); [In re Chocolate Confectionary](#), 602 F. Supp. 2d at 583 (declining to dismiss the plaintiffs' Arkansas Deceptive Trade Practices Act claim citing the Arkansas Supreme Court's conclusion that liberal construction of the statute was appropriate) (citations omitted); *id. at 586* (finding the plaintiffs had sufficiently pled a claim under the *New Mexico Unfair Practices Act* where they alleged that a "plaintiff had paid approximately 30% more for a product as a result of price fixing"); [Dist. Cablevision Ltd. P'ship v. Bassin](#), 828 A.2d 714, 723 (D.C. Ct. App. 2003) ("Trade practices that violate other laws, . . . also fall within the purview of the" District of Columbia Consumer Protection Procedures Act.); [Ga. Code Ann. § 10-1-391\(a\)](#) (West) ("The purpose . . . shall be to protect consumers and legitimate business enterprises from unfair or deceptive practices in the conduct of any trade or commerce in part or wholly in the state. It is the intent of the General Assembly that such practices be swiftly stopped, and this part shall be *liberally construed* and applied to promote its underlying purposes and policies.") (emphasis added).

<sup>125</sup> CB Defs' Mem in Support of Mot. to Dismiss EPP Compl. at 26 (Alaska, Georgia, Montana, South Carolina, Utah); DG Defs.' Mem. in Support of Mot. to Dismiss EPP Compl. at 24-25 (Georgia, Montana, South Carolina, Utah); DV Defs.' Mem. in Support

First, a class action bar does not require dismissal of Group 1 EPPs' Utah consumer protection claims. The Utah [\*\*843] Consumer protection law "does not prohibit class actions; rather, it provides [\*\*55] that class members may only seek actual, not statutory, damages."<sup>126</sup> Further, Group 1 EPPs and IRPs allege that Defendants have engaged in unfair competition or unfair, unconscionable, or deceptive acts or practices in violation of [Alaska Statute § 45.50.471, et seq.](#), a consumer protection statute that does not include a provision restricting class action claims.<sup>127</sup> Arguing that the Group 1 EPP and IRP Alaska consumer protection claims are subject to a class action bar, Defendants instead cite a decision that relies on a provision of the separate Alaska antitrust statute, [Alaska Statute § 45.50.577\(i\)](#).<sup>128</sup> Group 1 EPPs' and IRPs' Alaska consumer protection claims therefore are not subject to dismissal because of a class action bar.

Further still, Defendants seek to dismiss Group 1 EPPs' and IRPs' Georgia consumer protection claims, citing the class action bar in the [Georgia Fair Business Practices Act](#), which provides that "[a]ny person . . . may bring an action individually, but not in a representative capacity . . .".<sup>129</sup> However, Group 1 EPPs' and IRPs' complaints do not specifically assert claims under the Georgia Fair Business Practices Act.<sup>130</sup> Instead, their complaints allege that "Defendants have engaged in unfair competition or [\*\*56] unfair, unconscionable, or deceptive acts or practices in violation of the [Georgia Uniform Deceptive Trade Practices Act, Georgia Code § 10-1-370, et seq.](#)".<sup>131</sup> That statute does not include the same class action bar as the Georgia Fair Business Practices Act. In the absence of such a bar, the Court will not dismiss Group 1 EPPs' or IRPs' Georgia consumer protection claims on that basis. Nevertheless, the Court notes that unlike the Georgia Fair Business Practices Act, which permits a recovery of damages,<sup>132</sup> the sole remedy available under the Georgia Uniform Deceptive Trade Practices Act is injunctive relief.<sup>133</sup> Accordingly, the Court will dismiss Group 1 EPPs' and IRPs' Georgia Uniform Deceptive Trade Practices Act claims to the extent that they seek monetary relief for such claims.

of Mot. to Dismiss EPP Compl. at 20-21 (Georgia, Montana, South Carolina); DX Defs.' Mem. in Support of Mot. to Dismiss EPP Compl. at 24-25 (Georgia, Montana, South Carolina, Utah); EC Defs.' Mem. in Support of Mot. to Dismiss EPP Compl. at 20 (Georgia, Montana, South Carolina, Utah); PV Defs.' Mem. in Support of Mot. to Dismiss EPP Compl. at 23 (Alaska, Georgia, Montana, South Carolina); CB Defs' Mem in Support of Mot. to Dismiss IRP Compl. at 28 (Alaska, Georgia, South Carolina); DV Defs' Mem in Support of Mot. to Dismiss IRP Compl. at 24-25 (Georgia, South Carolina); DX Defs' Mem in Support of Mot. to Dismiss IRP Compl. at 25 (Georgia, South Carolina); EC Defs' Mem in Support of Mot. to Dismiss IRP Compl. at 13 (Georgia, South Carolina, Utah); PV Defs' Mem in Support of Mot. to Dismiss IRP Compl. at 24 (Alaska, Georgia, South Carolina). Defendants do not raise this argument with respect to digoxin IRP's state consumer protection claims.

<sup>126</sup> DV EPP Opp. Br. at 42 (citing [Utah Code Ann. § 13-11-19\(4\)\(a\)](#) (permitting class actions for "actual damages" caused by certain statutory violations) and [Utah Code Ann. § 13-11-19\(2\)](#) (consumers may recover "but not in a class action" actual or statutory damages "whichever is greater")); see [In re Solodyn](#), 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at \*20 (declining to exclude Utah class members from a class action asserting Utah consumer protection law claims because the "law provides that class members waive statutory damages; it does not bar class actions").

<sup>127</sup> See, e.g. DG EPP Compl. ¶ 256; DG IRP Compl. ¶ 228.

<sup>128</sup> See, e.g. Defs.' Mem. in Support of Mot. to Dismiss DG EPP Compl. at 22.

<sup>129</sup> [Ga. Code Ann. § 10-1-399\(a\)](#). See Defs' Mem. in Support of Mot. to Dismiss DG EPP Compl. at 24 (citing the Georgia Fair Business practices Act and argument that "Georgia does not permit class actions either").

<sup>130</sup> [Ga. Code Ann. § 10-1-390, et seq.](#)

<sup>131</sup> CB EPP Compl. ¶ 295; DG EPP Compl. ¶ 263; DV EPP Compl. ¶ 261; DX EPP Compl. ¶ 295; EC EPP Compl. ¶ 268; PV EPP Compl. ¶ 315; CB IRP Compl. ¶ 287; DG IRP Compl. ¶ 234; DV IRP Compl. ¶ 259; DX IRP Compl. ¶ 323; EC IRP Compl. ¶ 224; PV IRP Compl. ¶ 249.

<sup>132</sup> See [Ga. Code Ann. § 10-1-390, et seq.](#)

<sup>133</sup> See [Ga. Code. Ann. § 10-1-373\(a\); Moore-Davis Motors, Inc. v. Joyner](#), 252 Ga. App. 617, 556 S.E.2d 137, 140 (Ga. Ct. App. 2001); see also Defs.' Mem. in Support of DG EPP MTD at 25 n.15.

Finally, Defendants argue that class action bars preclude Group 1 EPPs' [\*844] and IRPs' South Carolina<sup>134</sup> consumer protection claims and Group 1 EPPs' Montana<sup>135</sup> consumer protection claims. Here, as with Group 1 EPPs' and IRPs' Illinois Antitrust Act claims, the analysis depends on whether the relevant state class action bar provisions are procedural or substantive. Defendants contend that the provisions are substantive because they are "intertwined" [\*\*57] with the substantive rights granted by the statutes.<sup>136</sup> EPPs and IRPs argue that the provisions are procedural — that they affect only how the consumer protection claims are processed.<sup>137</sup> There is no controlling authority or a consensus among the District Courts that have considered the effect of these class action bars, and the Court has determined that the class action bar provisions specifically included in the Montana and South Carolina consumer protection laws reflect a substantive policy choice.<sup>138</sup> Plaintiffs may not pursue these claims as class claims. To the extent that plaintiffs wish to pursue these claims on an individual basis, they may if they have Article III standing to assert the claims.

#### **d. Purely or Primarily Intrastate Conduct**

Group 1 Defendants argue that the consumer protection laws of certain states (Delaware, Florida, Massachusetts, New Hampshire, New York, North Carolina, Vermont) require that Plaintiffs' consumer protection claims arise from purely or primarily intrastate conduct or an instate injury and that Group 1 EPPs and IRPs have not alleged any misconduct that is specific to these states.<sup>139</sup> Group 1 EPPs [\*845] and IRPs respond that [\*\*58] they have alleged that because of Defendants' alleged actions, prices for the Group 1 drugs were elevated, class members made purchases at supracompetitive prices, and competition was suppressed within each state where they assert a

<sup>134</sup> South Carolina's Unfair Trade Practices Act provides that a person damaged by violation of the statute "may bring an action individually, but not in a representative capacity." [S.C. Code Ann. § 39-5-140\(a\)](#).

<sup>135</sup> Consumers may "bring an individual but not a class action" under the Montana Consumer Protection Act. [Mont. Code Ann. § 30-14-133\(1\)](#).

<sup>136</sup> See, e.g. DV Defs.' IRP Reply Br. at 11.

<sup>137</sup> See, e.g. DG EPP Opp. Br. at 44-45.

<sup>138</sup> See [In re Lipitor Antitrust Litig.](#), 336 F. Supp. 3d at 416 (holding the class action bar in the Montana consumer protection act controls in federal court); [In re TD Bank, N.A.](#), 150 F. Supp. 3d 593, 635 (D.S.C. 2015) ("the prohibitions against class actions ingrained in the very text of the [South Carolina Unfair Trade Practices Act] . . . are substantive portions of South Carolina law and are not trumped by [Federal Rule of Civil Procedure 23](#), even in light of the *Shady Grove* decision"); [In re Auto. Parts Antitrust Litig.](#), 29 F. Supp. 3d 982, 1013 (E.D. Mich. 2014) (holding the plaintiffs could not bring their South Carolina Unfair Trade Practices claim on behalf of a class). But see [In re Dealer Mgmt. Sys. Antitrust Litig.](#), No. 18-864, 362 F. Supp. 3d 510, 2019 U.S. Dist. LEXIS 12157, 2019 WL 334340, at \*27 (N.D. Ill. Jan. 25, 2019) (denying a motion to dismiss the Plaintiff's class claims under the South Carolina consumer protection law because the "Defendant has not identified any authority for concluding that the class action bars at issue are so intertwined with a state-created right or remedy as to justify finding that it trumps [Rule 23](#)"); [In re Broiler Chicken](#), 290 F. Supp. 3d at 820-21 (declining to dismiss the plaintiff's Montana and South Carolina consumer protection laws claims on the basis of the statutory class action bars); [In re Packaged Seafood Prods.](#), 242 F. Supp. 3d at 1086 ("the Court concludes that the [South Carolina Unfair Trade Practices Act] class-action bar is a procedural rather than substantive rule").

<sup>139</sup> See Defs.' Mem. in Support of Mot. to Dismiss CB EPP Compl. at 30; Defs.' Mem. in Support of Mot. to Dismiss DG EPP Compl. at 29; Defs.' Mem. in Support of Mot. to Dismiss DV EPP Compl. at 25; Defs.' Mem. in Support of Mot. to Dismiss DX EPP Compl. at 29-30; Defs.' Mem. in Support of Mot. to Dismiss EC EPP Compl. at 29; Defs.' Mem. in Support of Mot. to Dismiss PV EPP Compl. at 22-23; Defs.' Mem. in Support of Mot. to Dismiss CB IRP Compl. at 30; Defs.' Mem. in Support of Mot. to Dismiss DG IRP Compl. at 20; Defs.' Mem. in Support of Mot. to Dismiss DV IRP Compl. at 30-32; Defs.' Mem. in Support of Mot. to Dismiss DX IRP Compl. at 30-32; Defs.' Mem. in Support of Mot. to Dismiss DV IRP Compl. at 30-32. This argument does not appear in Defendants' briefs in support of their motions to dismiss the econazole or pravastatin IRP complaints.

consumer protection claim.<sup>140</sup> The Court agrees with Group 1 EPPs and IRPs that - at this stage of the litigation — their allegations of a broad nationwide-scheme to fix generic drug prices are sufficient to satisfy the intrastate pleading requirements of the state consumer protection laws under which they pursue their claims.<sup>141</sup> Whether the Group 1 EPPs or IRPs will ultimately establish facts sufficient to prove each of their state consumer protection law claims is a question that remains to be addressed later in this litigation.

#### e. Deceptive or Unconscionable Conduct

Group 1 Defendants also argue that EPPs' and IRPs' claims under the consumer protection statutes of various states fail because their complaints do not sufficiently allege fraud or deception. Specifically, they contend that the consumer protection laws of Arkansas, Colorado, Delaware, Florida, Michigan, Minnesota, New **[\*\*59]** Mexico, New York, North Dakota, South Dakota, and Wisconsin require more than an allegation that "Defendants misrepresented to all purchasers during the Class Period that Defendants' [Group 1 drug] prices were competitive and fair."<sup>142</sup> Defendants argue that EPPs' and IRPs' complaints should include allegations of particular "instances where Defendants made such representations."<sup>143</sup> They also argue that "the absence of any well-pled facts in support of deceptive or unconscionable conduct . . . also infects the Complaints' claims pursuant **[\*846]** to the Utah and Virginia consumer protection laws."<sup>144</sup>

Group 1 EPPs respond that to the extent they are required to plead deceptive conduct under any of the cited statutes, they have done so because their Complaints allege "an illegal price-fixing conspiracy among Defendants, hatched in secret and maintained through deception, during which Defendants misleadingly conveyed to Plaintiffs and the market that pricing for Defendants' products was competitive."<sup>145</sup> They also contend that "unconscionable" conduct has been recognized to encompass "a broad swath of activities, including price-fixing conspiracies."<sup>146</sup> Group 1 IRPs respond that they have pled **[\*\*60]** facts in support of a finding that Defendants' conduct was unconscionable, explaining that the drug pricing data referenced in their complaints shows that Defendants

<sup>140</sup> See PV EPP Opp. Br. at 38.

<sup>141</sup> See *In re Domestic Drywall*, 2016 U.S. Dist. LEXIS 90619, 2016 WL 3769680, at \*9 (finding allegations of wholly intrastate commerce are not required under North Carolina consumer protection law); *Sergeants Benevolent Ass'n Health & Welfare Fund*, 2018 U.S. Dist. LEXIS 220574, 2018 WL 7197233, at \*44 (finding plaintiffs' allegations of drug sales "affecting consumers and third party payors across the country, including in Massachusetts" sufficient to satisfy "intrastate" pleading requirements); *Sheet Metal Workers Local 441 Health & Welfare Plan*, 737 F. Supp. 2d at 409 ("[I]ndirect payor plaintiffs may assert a cause of action under the FDUTPA for claims arising in Florida based on reimbursement for purchases of over-priced drugs, even when the alleged injuries did not take place entirely within Florida."); cf. *In re Loestrin 24 FE*, 261 F. Supp. 3d at 361 (holding that it would be more efficient to address questions including whether the plaintiffs had sufficiently alleged intrastate conduct at the class certification, explaining that "[i]t is conceivable, for example, that the Court could deny class certification, which would obviate the need to consider the arguments with respect to some of the states").

The Court also notes that, in at least some instances, Group 1 EPPs and IRPs include allegations specific to the in-state injury that Defendants contend are lacking. See, e.g., DV IRP Opp. Br. at 22-24 (rebutting Defendants' argument that divalproex ER IRPs had not pled a plausible claim under the New York Consumer protection law because their complaint includes an allegation that "Falconer Pharmacy . . . located in Falconer, New York . . . indirectly purchased . . . Defendants' generic Divalproex products") (*citing* PV IRP Compl. ¶ 26)).

<sup>142</sup> See, e.g., Defs.' Mem. in Support of Mot. to Dismiss PV EPP Compl. at 25 (*citing* PV EPP Compl. ¶ 333).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> DG EPP Opp. Br. at 46-47.

<sup>146</sup> *Id.* at 47-48.

consistently offered low prices for the Group 1 drugs before the alleged price increases which, they contend increased despite no change in the product or increase in costs for raw materials, labor or overhead.<sup>147</sup>

At this stage of the litigation, Group 1 EPPs and IRPs have sufficiently alleged that Defendants engaged in deceptive and/or unconscionable conduct to permit their claims to withstand dismissal. First, Group 1 EPPs' and IRPs' consumer protection claims rest on Defendants' alleged unconscionable or deceptive conduct, not on fraud. Therefore, their claims do not require application of the heightened pleading standard of [Rule 9\(b\) of the Federal Rules of Civil Procedure](#). Further, even if [Rule 9\(b\)](#) does apply to the allegations supporting Group 1 EPPs' or IRPs' consumer protection claims, their allegations would be sufficient to withstand dismissal. To satisfy [Rule 9\(b\)](#), plaintiffs "must plead or allege the date, time and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation."<sup>148</sup> Group 1 EPPs' and IRPs' Complaints include detailed [\*\*61] allegations regarding Group 1 Defendants' trade association memberships, their representation on trade association boards, and attendance at industry gatherings the prices of the Group 1 drugs and the timing of price increases along with detailed allegations regarding the prices of the Group 1 Drugs and the timing and size of alleged price increases. The Complaints are sufficiently detailed to "inject precision" into EPPs' and IRPs' consumer protection claims at this stage of the litigation. Whether Group 1 EPPs or IRPs will be able to meet their burden to show deceptive or unconscionable conduct on the developed evidentiary record at summary judgment or trial is a question for another day.

#### **f. Statutory Definition of a "Consumer"**

Group 1 Defendants argue the state consumer protection claims of certain EPPs and IRPs must be dismissed because they do not meet the requirements of statutes that permit suits only by certain types of consumers.<sup>149</sup> They also argue that Group 1 EPPs' and IRPs' claims fail under the [\*847] consumer protection laws of certain states that limit their protections to those who purchased "goods or services primarily for personal, family, or household purposes."<sup>150</sup>

In response, EPPs note that they and the putative class they represent includes *both* individuals and third party payers such as employee welfare benefit funds, labor unions, and private insurers.<sup>151</sup> And, to the extent that they are not individual consumers, EPPs assert that they fall within the relevant state statutes' definitions of a "consumer" in that they

participate in consumer transactions by paying some or all of the prices charged to individual consumers, and, as a result, pay a portion of any overcharges. These purchases are made for the personal purposes of the

<sup>147</sup> PV IRP Opp. Br. at 21.

<sup>148</sup> [In re Avandia Mktg., Sales Practices & Prods. Liab. Litig., No. 09-730, 2013 U.S. Dist. LEXIS 152726, 2013 WL 5761202, at \\*8 \(E.D. Pa. Oct. 23, 2013\)](#).

<sup>149</sup> See, e.g. Defs.' Mem. in Support of Mot. to Dismiss CB EPP Compl. at 32 (arguing that EPPs are not consumers under the meaning of the consumer protection laws of California, Michigan, Vermont, and the District of Columbia); Defs.' Mem. in Support of Mot. to Dismiss CB IRP Compl. at 30 ("IRPs - independent pharmacies that bought generic Clobetasol for resale to consumers — cannot bring claims under the consumer protection laws of California, Michigan, Nevada, North Carolina, and West Virginia . . . because they are not consumers, they did not purchase Clobetasol for consumer purposes, and they are plainly not elderly or disabled persons.").

<sup>150</sup> See, [\*\*62] e.g. Defs.' Mem. in Support of Mot. to Dismiss CB EPP Compl. at 32 (arguing that the consumer protection statutes of the District of Columbia, Hawaii, Missouri, Montana, Nevada, Rhode Island, and West Virginia limit recovery to those who made purchases "primarily for personal, family, or household purposes").

<sup>151</sup> CB EPP Opp. Mem. at 45.

patient. [Third party payors] do not purchase drugs for resale, distribute products or act as intermediaries in the distribution chain.<sup>152</sup>

To the extent that Group 1 Defendants contend that IRPs' North Carolina consumer protection claims should be dismissed, IRPs respond that Defendants have not "cite[d] any authority limiting the statute to consumers who purchased for household purposes only."<sup>153</sup> IRPs also assert that their "California consumer protection claims are validly asserted" because they "did indeed purchase the drugs in question."<sup>154</sup> In addition, IRPs respond to Defendants' "consumer definition" arguments by voluntarily [\*\*63] dismissing their claims under the Michigan and Nevada consumer protection statutes.<sup>155</sup>

Group 1 EPPs and IRPs have plausibly alleged that they are entitled to recover for state consumer protection violations on behalf of at least some of the named plaintiffs and members of the putative class in each of their Complaints. This is enough to permit their California, District of Columbia, Hawaii, Massachusetts, Michigan, Missouri, Montana, Nevada, Rhode Island, and Vermont consumer protection law claims to proceed.<sup>156</sup> Whether

<sup>152</sup> *Id.*

<sup>153</sup> DX IRP Opp. Mem. at 21.

<sup>154</sup> CB IRP Opp. Mem. at 21.

<sup>155</sup> See, e.g. DX IRP Opp. Mem. at 21. Because defendants do not specifically move to dismiss digoxin IRPs' claims based on this argument, see Defs.' Mem. in Support of Mot. to Dismiss DG IRP Compl., the digoxin IRPs' opposition to the motion does not address it and they do not voluntarily dismiss their claims under the Michigan or Nevada consumer protection statutes.

<sup>156</sup> *California:* The relevant statute permits suits by any "person," which includes entities. [Cal. Bus. & Prof. Code §§ 17204, 17201](#). *District of Columbia:* The District's consumer protection act defines a "consumer" as any "person," defined to include entities who purchases "consumer goods or services," so long as the purchase is not "for purposes of resale." [D.C. Code § 28-3901\(a\)](#); see [Adam A. Weschler & Son, Inc. v. Klank, 561 A.2d 1003, 1005 \(D.C. App. 1989\)](#) ("If . . . the purchaser is not engaged in the regular business of purchasing . . . and reselling it, then the transaction will usually fall within the Act."). *Hawaii:* [Hawaii Rev. Stat. § 480-2\(e\)](#) ("[a]ny person may bring an action"); see [Davis v. Four Seasons Hotel Ltd., 122 Haw. 423, 228 P.3d 303, 309 \(Haw. 2010\)](#) ("Most of the committee reports suggest that the 'any person' language is to be construed broadly . . ."). *Massachusetts:* [Mass. Gen. Laws ch. 93A, § 9\(1\)](#) ("Any person, other than a person entitled to bring action under section eleven of this chapter, who has been injured by another person's use or employment of any method, act or practice declared to be unlawful by section two or any rule or regulation issued thereunder . . . may bring an action . . ."); see [In re Pharm. Indus. Average Wholesale Price Litig., 582 F.3d 156, 191 \(1st Cir. 2009\)](#) ("§ 9 affords a private remedy to the individual consumer who suffers a loss as a result of the use of an unfair or deceptive act or practice" as distinct from [§ 11](#), which "grants a cause of action to '[a]ny person engaged in the conduct of any trade or commerce,' which the Massachusetts Supreme Judicial Court ("SJC") has interpreted to mean persons 'acting in a business context'"). *Michigan:* [Mich. Comp. Laws Ann. § 445.902\(d\)](#) ("Person" means an individual, corporation, limited liability company, trust, partnership, incorporated or unincorporated association, or other legal entity); see [Action Auto Glass v. Auto Glass Specialists, 134 F. Supp. 2d 897, 901 \(W.D. Mich. 2001\)](#) ("any plaintiff asserting a claim under the MCPA would have to show that the defendant is in the business of providing consumer goods or services," not that the *plaintiff* purchased goods for consumer use) (emphasis added); see also [John Labatt Ltd. v. Molson Breweries, 853 F. Supp. 965, 970 \(E.D. Mich. 1994\)](#) ("the intent of protecting consumers is well served by allowing suit to be brought by non-consumers who have a significant stake in the events"). *Missouri:* The Missouri Merchandising Practices Act defines a "person" to include entities. [Mo. Ann. Stat. § 407.010\(5\)](#); see also [State v. Polley, 2 S.W.3d 887, 892 \(Mo. Ct. App. 1999\)](#) ("The statute's broad language of 'any person who has suffered any ascertainable loss' contemplates that other parties, besides the direct purchaser or contracting party, who suffer damages resulting from the violator's prohibited conduct under the Act are included among those eligible to receive restitution."). *Montana:* Montana allows claims by any "consumer." [Mont. Code Ann. § 30-14-133\(1\)](#); see [In re New Motor Vehicles, 350 F. Supp. 2d at 193](#) ("application of the Montana consumer protection statute is not limited to those who engage directly in consumer transactions"). *Nevada:* In Nevada, a consumer protection "action may be brought by any person who is a victim of consumer fraud." [Nev. Rev. Stat. Ann. § 41.600](#); see [In re DDAVP Indirect Purchaser Antitrust Litig., 903 F. Supp. 2d 198, 227 \(S.D.N.Y. 2012\)](#) ("while any victim of consumer fraud may bring a civil action, elderly and disabled persons may recover more for each violation"). *Rhode Island:* The [Rhode Island Unfair Trade Practices and Consumer Protection Act](#) permits claims by "[a]ny person who purchases or leases goods or services primarily for personal, family, or household purposes." [R.I. Gen. Laws Ann. § 6-13.1-5.2\(a\)](#); see also [R.I. Gen. Laws Ann. § 6-13.1-1](#)

EPPs and/or IRPs will ultimately be able [\*848] to show that they are "consumers" who made purchases that entitle them to recovery under the relevant state laws is a question for resolution later in this litigation.<sup>157</sup>

The Court will, however, dismiss Group 1 EPPs' and IRPs' claims under the [West Virginia Consumer Credit and Protection Act](#).<sup>158</sup> [\*849] Purchases of generic prescription drugs are the subject of this litigation and in *White v. Wyeth*, the Supreme Court of West Virginia held "that the private cause [\*64] of action afforded consumers under [West Virginia Code § 46A-6-106\(a\)](#) does not extend to prescription drug purchases."<sup>159</sup>

#### **g. Demand Letter Requirement**

Defendants move to dismiss clobetasol, digoxin, divalproex ER, and doxycycline EPPs' Massachusetts Consumer Protection Law claims because they have not alleged compliance with pre-filing demand letter requirements.<sup>160</sup> The relevant statutory provision encourages settlement by means of a "written demand for relief" to be mailed to a defendant before an action is filed.<sup>161</sup> Massachusetts statute's notice requirement — designed to encourage settlement — is procedural and not substantive in nature.<sup>162</sup> The Court declines to dismiss the relevant Massachusetts consumer protection claims on the basis of this argument.

### **3. STATE UNJUST ENRICHMENT CLAIMS**

Group 1 Defendants seek to dismiss certain of Group 1 EPPs' and IRPs' unjust enrichment claims. The doctrine of unjust enrichment "is founded on the principle that a party which receives a benefit under inequitable circumstances should not be permitted to retain the benefit."<sup>163</sup> "Generally speaking, in order to state a claim for unjust

("'Person' means natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity."). At least some of the Group 1 EPPs are alleged to have made such purchases. *Vermont*: As with Rhode Island, at least some of the Group 1 EPPs are alleged to have made purchases of Group 1 Drugs for use as consumers and thus they have stated a plausible claim for relief at this stage of the litigation. See [In re Aggrenox, 2016 U.S. Dist. LEXIS 104647, 2016 WL 4204478, at \\*9](#) (explaining that the Vermont Consumer Fairness Act's "definition of 'consumer' allows businesses to sue as consumers with respect to the products they use as consumers.").

<sup>157</sup> Cf. [In re Liquid Aluminum Sulfate, 2017 U.S. Dist. LEXIS 115294, 2017 WL 3131977, at \\*26](#) ("While this Court is not absolutely certain that IPP will be able to prevail on their [District of Columbia Consumer Protection Procedures Act](#), as they ultimately may be found to not be consumers, that is not the task at hand. IPP Compl[aint], read as true, sufficiently states a claim to proceed.").

<sup>158</sup> [W.Va. Code §§ 46A-6-101-110](#).

<sup>159</sup> [227 W. Va. 131, 705 S.E.2d 828, 838 \(W. Va. 2010\)](#).

<sup>160</sup> Defs.' Mem. in Support of Mot. to Dismiss CB EPP Compl. at 30-31; Defs.' Mem. in Support of Mot. to Dismiss DG EPP Compl. at 19 n.12; Defs.' Mem. in Support of Mot. to Dismiss DV EPP Compl. at 30-31; Defs.' Mem. in Support of Mot. to Dismiss CB EPP Compl. at 32-33. Defendants make a similar argument with respect to clobetasol, digoxin, divalproex ER, and doxycycline EPPs' and clobetasol IRPs' West Virginia Consumer protection law claims. Because the Court will dismiss these claims pursuant to *White v. Wyeth*, it need not consider this argument.

<sup>161</sup> See [Mass. Gen. Law Ch. 93A, § 9](#).

<sup>162</sup> See [Sergeants Benevolent Ass'n Health & Welfare Fund, 2018 U.S. Dist. LEXIS 220574, 2018 WL 7197233, at \\*44](#) (declining to dismiss Massachusetts consumer protection claim on the basis of the plaintiffs' failure to allege compliance with the pre-filing notice requirement, explaining that the provision "appears to operate like a [rule 68](#) offer of judgment, capping damages for defendants who make settlement offers in good faith").

<sup>163</sup> [In re Flonase, 692 F. Supp. 2d at 541](#) (citations omitted).

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enrichment, a plaintiff must allege (1) at plaintiff's expense (2) defendant received [a] benefit **[\*\*65]** (3) under circumstances that would make it unjust for defendant to retain [the] benefit without paying for it."<sup>164</sup> The specific requirements to plead unjust enrichment vary by state.

#### **a. Illinois Brick Does Not Bar Unjust Enrichment Claims**

Group 1 Defendants first argue that EPPs and IRPs cannot assert unjust enrichment claims under the laws of the 25 jurisdictions that have not repudiated *Illinois Brick*'s prohibition against indirect purchaser damages actions.<sup>165</sup> As a result, they contend the Court should dismiss EPPs' and IRPs' unjust enrichment claims **[\*850]** brought under the laws of Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Montana, New Jersey, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Texas, Virginia, Washington, and Wyoming.<sup>166</sup> EPPs respond that, "[w]hile decisions go both ways, the better reasoned decisions permit unjust enrichment claims in non-*Illinois Brick* repealer states."<sup>167</sup> IRPs argue that "[i]n the absence of authority from state courts precluding the common law cause of action, it is incorrect to assume that any state prevents an unjust enrichment claim."<sup>168</sup>

As Group 1 EPPs and IRPs argue, the concerns that motivate *Illinois Brick* — the complexity associated with correctly apportioning recovery among direct purchasers, middlemen, and ultimate consumers,<sup>169</sup> are not implicated in the context of unjust enrichment claims because "the very nature of such claims requires a focus on the gains of the defendants, not the losses of the plaintiffs."<sup>170</sup> "No reason or logic supports a conclusion that a state's adherence to the rule of *Illinois Brick* dispossesses a person not only of a statutory legal remedy for an antitrust violation, but also dispossesses the same person of his right to pursue a common law equitable remedy."<sup>171</sup> Therefore, *Illinois Brick* does not require dismissal of the unjust enrichment claims at this time. Plaintiffs are "entitled to plead causes of action in the alternative. Pursuant to Rule 8(d)(2) of the Federal Rules of Civil Procedure, a party 'may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones."<sup>172</sup>

<sup>164</sup> [In re Suboxone](#), 64 F. Supp. 3d at 703 (citations omitted).

<sup>165</sup> See Defs.' Mem. in Support of Mot. to Dismiss PV EPP Compl. at 30; Defs.' Mem. in Support of Mot. to Dismiss PV IRP Compl. at 31.

<sup>166</sup> See, e.g. **[\*\*66]**, Defs.' Mem. in Support of Mot. to Dismiss DX EPP Compl. at 33; Defs.' Mem. in Support of Mot. to Dismiss PV EPP Compl. at 30; Defs.' Mem. in Support of Mot. to Dismiss DX IRP Compl. at 34-35; Defs.' Mem. in Support of Mot. to Dismiss PV IRP Compl. at 31-32.

<sup>167</sup> PV EPP Opp. Br. at 52.

<sup>168</sup> PV IRP Opp. Br. at 25.

<sup>169</sup> [431 U.S. at 737](#).

<sup>170</sup> DG EPP Opp. Br. at 57 (quoting [Martin v. Ford Motor Co., 292 F.R.D. 252, 280 \(E.D. Pa. 2013\)](#)).

<sup>171</sup> [In re G-Fees Antitrust Litig.](#), 584 F. Supp. 2d 26, 46 (D.D.C. 2008); see also [King Drug Co. of Florence, Inc. v. Cephalon, Inc., 702 F. Supp. 2d 514, 540 \(E.D. Pa. 2010\)](#) ("[U]njust enrichment claims are viable regardless of the applicable state antitrust laws."). But see [In re Packaged Seafood Prods.](#), 242 F. Supp. 3d at 1088-89 ("[I]t would be inequitable to permit relief where the state has clearly made a policy determination that no such relief should lie.").

<sup>172</sup> [In re Liquid Aluminum Sulfate](#), 2017 U.S. Dist. LEXIS 115294, 2017 WL 3131977, at \*29 (quoting [Fed. R. Civ. P. 8\(d\)\(2\)](#)) (further citations omitted).

### **b. Confer a Direct Benefit**

Group 1 Defendants also contend that because Group 1 EPPs' and IRPs' are indirect purchasers, they have not alleged that they conferred a direct [\*\*67] benefit on any Defendant as is necessary to plead an unjust enrichment claim under the laws of Alabama, Arizona, the District of Columbia, Florida, Georgia, Idaho, Iowa, Kansas, Maine, Maryland, Michigan, Missouri, New Jersey, New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Utah.<sup>173</sup>

Group 1 EPPs and IRPs respond that Defendants' "direct benefit" argument fails because, in the unjust enrichment context, [\*851] the term direct refers to a benefit that is not incidental, and not to a requirement that there be privity between the parties.<sup>174</sup> They argue that "the chain of distribution in the pharmaceutical industry is short, direct, and well understood . . . [and p]rice increases can be directly chased throughout this distribution chain."<sup>175</sup> They contend that it is enough that they have alleged "that they overpaid as a result of Defendants' unlawful actions, that Defendants benefited and were enriched from those sales, that the benefits are traceable by overpayments by Plaintiffs and the Damages class, and that it would be inequitable for Defendants to retain those revenues."<sup>176</sup>

Group 1 EPPs and IRPs have pleaded that [\*\*68] they conferred a non-monetary benefit to Defendants — here the act of purchasing the Group 1 drugs or providing funds for the purchase of the Group 1 drugs through reimbursement — in that their actions allowed Defendants to obtain the benefit of increased revenue from the sale of the Group 1 drugs. The EPPs and IRPs have plausibly alleged that their alleged losses from purchasing Group 1 drugs at inflated prices are connected to benefits incurred by Defendants who allegedly conspired to raise the prices of those drugs. "[T]he mere fact that there has been no direct contact between a defendant and the plaintiff does not preclude a finding that the defendant received a direct benefit from that plaintiff."<sup>177</sup> At this stage of the litigation, the connection between the EPPs and IRPs and the Defendants is not so attenuated as to render implausible Group 1 EPPs' or IRPs' claims for unjust enrichment. This conclusion arguably comports with the equitable purpose of an unjust enrichment claim.<sup>178</sup>

### **c. No Adequate Legal Remedy**

Group 1 Defendants also argue that EPPs' and IRPs' Arizona, Minnesota, Montana, New Hampshire, New York, South Dakota, Tennessee, and Utah unjust enrichment claims must be [\*\*69] dismissed because they have not pled that they lack an adequate legal remedy.<sup>179</sup> Group 1 EPPs' and IRPs' complaints allege that they have no adequate remedy at law.<sup>180</sup> At this stage of the litigation, considering:

<sup>173</sup> See, e.g., Defs.' Mem. in Support of Mot. to Dismiss PV EPP Compl. at 31; Defs.' Mem. in Support of Mot. to Dismiss PV IRP Compl. at 32.

<sup>174</sup> See, e.g., PV EPP Opp. Mem. at 54; PV IRP Opp. Mem. at 25.

<sup>175</sup> DG EPP Opp. Mem. at 58 (quoting *Propranolol*, 249 F. Supp. 3d at 725) (citations omitted).

<sup>176</sup> DG EPP Opp. Mem. at 59 (citing DG EPP Compl. ¶ 290) (internal quotation omitted).

<sup>177</sup> *Williams v. Wells Fargo Bank, N.A.*, No. 11-21233, 2011 U.S. Dist. LEXIS 105513, 2011 WL 4368980, at \*9 (S.D. Fla. Sept. 19, 2011).

<sup>178</sup> See *id.* ("It would not serve the principles of justice and equity to preclude an unjust enrichment claim merely because the 'benefit' passed through an intermediary before being conferred on a defendant.").

<sup>179</sup> See, e.g., Defs.' Mem. in Support of Mot. to Dismiss PV EPP Compl. at 33.

<sup>180</sup> See PV EPP Compl. ¶ 357.

Rule 8(d)(2)'s permissiveness of alternative pleading, given the [allegations of no adequate remedy at law in the Complaints], and allowing for all inferences to be drawn in favor of Plaintiffs, the Court cannot rule as a matter of law that Plaintiffs have failed to plausibly suggest that there is an absence of an adequate remedy at law.<sup>181</sup>

The Court will not dismiss these unjust enrichment claims based on Defendant's argument regarding an adequate legal remedy.

#### **[\*852] C. STATUTE OF LIMITATIONS**

To the extent that Defendants seek to dismiss certain of EPPs' and IRPs' claims as being barred by the statute of limitations, their motions are denied. The question of whether any of Plaintiffs' claims are barred by the asserted statute of limitations defenses is more appropriate for resolution at a later stage of the proceedings following more particularized discovery.<sup>182</sup>

### **III. CONCLUSION**

Consistent with the analysis set forth above, the Court will grant Defendants' motions in part and deny them [\*\*\*70] in part. The Court will dismiss the following claims with prejudice: (1) Group 1 EPPs' and IRPs' claims under the Illinois Antitrust Act; (2) divalproex ER and doxycycline EPPs' and IRPs' claims under the Rhode Island antitrust law to the extent they seek to recover damages for alleged overcharges incurred prior to July 15, 2013; (3) Group 1 EPPs' and IRPs' Georgia Uniform Deceptive Trade Practices Act claims to the extent that they seek monetary relief for such claims; and (4) Group 1 EPPs' and IRPs' claims under the West Virginia Consumer Credit and Protection Act. The Court will also dismiss with prejudice Group 1 EPPs' and IRPs' South Carolina consumer protection claims and Group 1 EPPs' Montana consumer protection claims to the extent that they seek to pursue these claims on behalf of a class. They may proceed with the South Carolina and Montana consumer protection claims on an individual basis if they have Article III standing to assert such claims.

In addition, the Court will dismiss Group 1 EPPs' Alabama antitrust claims, Group 1 EPPs' New Jersey Consumer Protection Act claims, and Group 1 IRPs' claims under the Michigan and Nevada consumer protection statutes because they have [\*\*\*71] indicated their intent to withdraw or voluntarily dismiss these claims in response to Defendants' motions.

The Court otherwise concludes that Group 1 EPPs' and IRPs' state law claims are sufficient to withstand dismissal.

An appropriate Order follows.

[EDITOR'S NOTE: The following court-provided text does not appear at this cite in F. Supp. 3d.]

#### **[\*none] ORDER**

AND NOW, this 15th day of February 2019, upon consideration of the Group 1 Defendants' Motions to Dismiss the state law claims brought on behalf of the Group 1 EPPs and IRPs, the responses and replies thereto, and the

<sup>181</sup> [In re Processed Egg Prods. Antitrust Litig.](#), 851 F. Supp. 2d 867, 918 (E.D. Pa. 2012).

<sup>182</sup> See [Fried v. JP Morgan Chase & Co.](#), 850 F.3d 590, 604 (3d Cir. 2017) ("If the bar is not apparent on the face of the complaint, then it may not afford the basis for a dismissal of the complaint under Rule 12(b)(6)." (internal quotation marks, alterations and citation omitted); see also [Schmidt v. Skolas](#), 770 F.3d 241, 249 (3d Cir. 2014) ("Technically, the Federal Rules of Civil Procedure require a defendant to plead an affirmative defense, like a statute of limitations defense, in the answer, not in a motion to dismiss.").

arguments of counsel, and for the reasons set forth in the accompanying Opinion, it is hereby **ORDERED** that the Motions are **GRANTED in part and DENIED in part** as follows:

1. Defendants' motions are **GRANTED** to the extent they seek to dismiss any Illinois state **antitrust law** claims brought by the Group 1 EPPs and IRPs. Group 1 EPPs' and IRPs' claims under the Illinois Antitrust Act are **DISMISSED** with prejudice.
2. Defendants' motions are **GRANTED** to the extent that they seek to dismiss any of Group 1 EPPs' and IRPs' Rhode Island antitrust claims for damages for putative overcharges incurred prior to July 15, 2013. Divalproex ER and doxycycline EPPs' and IRPs' claims under the Rhode Island **antitrust law** alleging overcharges before [\*\*72] July 15, 2013 are **DISMISSED** with prejudice. Group 1 EPPs and IRPs may move forward with respect to their Rhode Island antitrust claims to the extent they allege overcharges incurred from July 15, 2013 forward.
3. Defendants' motions are **GRANTED** to the extent that they seek to dismiss Group 1 EPPs' and IRPs' claims for monetary relief under the Georgia Uniform Deceptive Trade Practices Act. Group 1 EPPs' and IRPs' claims for monetary relief under the Georgia Uniform Deceptive Trade Practices Act are **DISMISSED** with prejudice. Group 1 EPPs and IRPs may pursue claims for injunctive relief only under this law.
4. Defendants' motions are **GRANTED** to the extent that they seek to dismiss Group 1 EPPs' and IRPs' South Carolina consumer protection claims and Group 1 EPPs' Montana consumer protection claims insofar as the claims are brought on behalf of a putative class. Group 1 plaintiffs' claims for class-based relief under the South Carolina and Montana consumer protection laws are **DISMISSED** with prejudice. Group 1 EPPs and IRPs may proceed with their South Carolina and Montana consumer protection claims on an individual basis only, and only to the extent they have Article III standing to assert [\*\*73] such claims.
5. Defendants' motions are **GRANTED** to the extent that they seek to dismiss Group 1 EPPs' and IRPs' claims under the West Virginia Consumer Credit and Protection Act. Group 1 EPPs' and IRPs' West Virginia Consumer Credit and Protection Act Claims are **DISMISSED** with prejudice.
6. In addition, Group 1 EPPs' Alabama antitrust claims, Group 1 EPPs' New Jersey Consumer Protection Act claims, and Group 1 IRPs' claims under the Michigan and Nevada consumer protection statutes are **DISMISSED**, Plaintiffs having stated their intent to withdraw or voluntarily dismiss these claims in response to Defendants' motions.
7. Defendants' motions are **DENIED** in all other respects.

It is so ORDERED.

**BY THE COURT:**

**/s/ Cynthia M. Rufe**

**CYNTHIA M. RUFE, J.**



## In re Insulin Pricing Litig.

United States District Court for the District of New Jersey

February 15, 2019, Decided; February 15, 2019, Filed

Civil Action No. 3:17-cv-0699-BRM-LHG

### **Reporter**

2019 U.S. Dist. LEXIS 25185 \*; 2019 WL 643709

IN RE INSULIN PRICING LITIGATION

**Notice:** NOT FOR PUBLICATION

**Subsequent History:** Dismissed by, in part, Motion denied by, in part [In re Insulin Pricing Litig., 2020 U.S. Dist. LEXIS 29345, 2020 WL 831552 \(D.N.J., Feb. 20, 2020\)](#)

Motion granted by, Dismissed by, Without prejudice, in part [In re Insulin Pricing Litig., 2020 U.S. Dist. LEXIS 173513 \(D.N.J., Sept. 22, 2020\)](#)

**Prior History:** [Barnett. v. Novo Nordisk Inc. \(In re Insulin Pricing Litig.\), 2017 U.S. Dist. LEXIS 150919 \(D.N.J., Sept. 18, 2017\)](#)

## **Core Terms**

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Plaintiffs', prices, purchaser, consumers, indirect, insulin, Defendants', pled, manufacturers, motion to dismiss, benchmark, analog, allegations, inflated, wholesalers, Counts, enterprise, pharmacy, courts, ascertainable loss, misrepresentation, fraudulent, chain, proximate causation, insurers, deceptive, mail, artificially, products, privity

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**Judges:** HON. BRIAN R. MARTINOTTI, UNITED STATES DISTRICT JUDGE.

**Opinion by:** BRIAN R. MARTINOTTI

## Opinion

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### MARTINOTTI, DISTRICT JUDGE

Before this Court is a Motion to Dismiss filed by Defendant Novo Nordisk Inc. ("Novo") and Defendant Sanofi-Aventis U.S. LLC ("Sanofi") (collectively "Defendants") seeking to dismiss the putative plaintiffs' ("Plaintiffs") First Amended Complaint pursuant to [Federal Rules of Civil Procedure 8\(a\)](#), [9\(b\)](#), and [12\(b\)\(6\)](#). (ECF No. 158.)<sup>1</sup>

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<sup>1</sup> Defendants' Motion to Dismiss is separated into two briefs. The first brief addresses Counts One (Violation of RICO), Two (Conspiracy to Violate [RICO](#)), Three (Violation of the [New Jersey Consumer Fraud Act](#) Against Novo), Four (Violation of the

Plaintiffs filed an Opposition to Defendants' Motion to Dismiss. (ECF No. 181.) Defendants filed a Reply Brief to the Plaintiffs' Opposition. (ECF No. 190.) On January 17, 2019, this Court held oral argument on the limited issue of the applicability of the indirect purchaser rule to Plaintiffs' RICO claims, Counts One and [\*8] Two. Plaintiffs' counsel supplemented the record by way of a letter brief to this Court on February 5, 2019. (ECF No. 249.) Defendants replied on February 8, 2019. (ECF No. 251.) For the reasons set forth herein, Defendants' Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART**.

## I. BACKGROUND

### A. Factual Background

The Plaintiffs are sixty-seven individuals, including one "Jane Doe," who filed the Complaint on behalf of themselves and a proposed nationwide class of analog insulin consumers. (Plaintiffs' First Amended Complaint (ECF No. 131) ¶¶ 21-155.) The Plaintiffs bring this action on behalf of themselves and all others similarly situated under Federal Rule of Civil Procedure 23(a) and 23(b)(3). (ECF No. 131 ¶ 280.) The Plaintiffs define their class as

"[a]ll individual persons in the United States and its territories who paid any portion of the purchase price for a prescription of Lantus, Levemir, Novolog, Apidra, and/or Toujeo at a price calculated by reference to a benchmark price, AWP (Average Wholesale Price)<sup>2</sup>, or WAC (Wholesale Acquisition Price) for purposes other than resale."

(*Id.*)

Specifically, the class includes uninsured consumers, consumers in high-deductible health plans, consumers who reach the Medicare Part D donut [\*9] hole, and consumers with high coinsurance rates. (*Id.* ¶ 282.) The Plaintiffs request this Court toll the class period to the "earliest date of the Defendant Drug Manufacturers' initiation of the scheme described herein." (*Id.* ¶ 283.)

Defendants are pharmaceutical companies headquartered in the United States. (*Id.* ¶¶ 157-58.) Defendants research, develop, and manufacture prescription medications. (*Id.*) Defendant Novo ("Novo") makes the "rapid-acting" analog insulin Novolog and the "long-acting" insulin Levemir. (*Id.* ¶ 282 (Table 2).) Novo introduced Novolog to the United States market in 2000 and Levemir in 2005. (*Id.*) Defendant Sanofi ("Sanofi") manufactures the "rapid-acting" insulin Apidra and the "long-acting" insulin Pantus. (*Id.*) Sanofi introduced Lantus to the United States market in 2000 and Apidra in 2004. Novo and Sanofi determine the sale price of their drugs, the AWP or WAC, and subsequently publish list prices for their analog insulins. (*Id.* ¶ 174.)

The distribution of a branded prescription drug, such as the analog insulin at issue in this litigation, involves three transactions. First, a drug manufacturer sells its medication to a wholesaler. (*Id.* ¶¶ 163-164.) Second, the [\*10] wholesaler takes possession of the medication and sells it to a pharmacy. (*Id.* ¶¶ 164, 170 fig. 3.) Third, the pharmacy sells the drug to the consumers. (*Id.* ¶¶ 164, 170 fig. 3.) Health insurers and pharmacy benefit managers ("PBMs")<sup>3</sup>, which many insurers hire to manage their prescription drug benefits, are not directly involved in this distribution chain as they do not take physical possession of the medication. (*Id.* ¶¶ 165-66.)

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New Jersey Consumer Fraud Act Against Sanofi), and Five (Violation of the New Jersey Consumer Fraud Act Against Novo and Sanofi). (ECF No. 158-1.) The second brief focuses on Counts Six through Fifty-Nine, violations of the consumer fraud laws of the various states. (ECF No. 158-2.)

<sup>2</sup> The Plaintiffs frequently use the terms "benchmark price" and "sticker price" to refer to the AWP. (ECF No. 131 ¶¶ 1, 2, 174.)

<sup>3</sup> PBMs are retained by health insurance companies to manage their prescription drug benefits and negotiate, specifically for discounts, with drug companies and pharmacies on behalf of the health insurance companies. (ECF No. 131 ¶ 166.) PBMs do not purchase prescription drugs, nor do they make any payments to manufacturers. (*Id.*) PBMs typically do not take possession of drugs either, however, some PBMs operate mail-order pharmacies and purchase drugs from wholesalers solely in their capacity as a seller to the consumer. (ECF No. 131 ¶¶ 7, 166.)

Three separate payments are involved in the medication distribution chain: from the wholesaler to the manufacturer; from the pharmacy to the wholesaler; and from the consumer, and his or her insurer, if any, to the pharmacy. (*Id.* ¶ 168.) Additionally, there may also be a rebate payment from the manufacturer to the insurer or the insurer's PBM. (*Id.* ¶ 169.)

Wholesalers pay manufacturers based on the manufacturer's publicly reported list price, the WAC. (*Id.* ¶ 176.) The WAC is "the manufacturer's list price for the drug or biological to wholesalers or direct purchasers in the United States, not including prompt pay or other discounts, rebates, or reductions in price[.]" [42 U.S.C. § 1395w-3a\(c\)\(6\)\(B\)](#). Accordingly, wholesalers pay the manufacturer the WAC price minus small percentage discounts [\*11] derived via prompt payment or some other incentive. (ECF No. 131 ¶¶ 169, 176, 181.) Manufacturers are required to report the average price that wholesalers pay for each drug, accounting for any discounts, which is known as the Average Manufacturing Price ("AMP"). See [42 U.S.C. § 1396r-8\(k\)\(1\)](#).

Wholesalers sell to pharmacies at a price negotiated with each individual pharmacy. (ECF No. 131 ¶ 176.) The prices paid by the pharmacies are frequently very close to the WAC, as wholesalers generally pay manufacturers the WAC minus a percentage discount. (*Id.* ¶ 181.)

The consumer's purchase price is determined by his or her pharmacy, and in the case of insured consumers, by the terms of his or her insurance contract. (*Id.* ¶¶ 181, 183-184.) The drug manufacturers do not sell the drugs directly to the consumers, and as such, they do not set the price that the consumer pays for the prescription drug. (*Id.* ¶¶ 163, 171.) If a consumer is uninsured, the pharmacy independently determines the payment price. (*Id.* ¶¶ 182, 285.) If the consumer is insured, the insurance company or its PBM negotiates with the pharmacy to set a price. (*Id.* ¶¶ 166, 170 fig. 3, 171.) The insurer and the consumer each pay a portion of the negotiated [\*12] price, subject to any deductibles or copayment requirements contained in the consumer's contract. (*Id.* ¶¶ 165, 183-184.) Plaintiffs contend that the prices charged by the pharmacies to uninsured consumers, and the prices set by insurers and PBMs for consumers subject to deductible and copayment requirements, are directly related to the AWP, or "benchmark" or "sticker" price. (*Id.* ¶¶ 2, 209.)

Plaintiffs allege that PBMs retain a portion of the rebate and pass the remainder of the cost on to the health insurance company and/or consumer. (*Id.* ¶¶ 4, 201, 204.) Plaintiffs further maintain that some insurers have elected not to pass on manufacturer rebates to consumers (*Id.* ¶ 200), and that as a result, the benchmark price is fraudulent because it does not account for manufacturer rebate payments made to PBMs. (*Id.* ¶¶ 252, 255). Additionally, Plaintiffs assert that spread between the "net price"<sup>4</sup> and the benchmark price constitutes further evidence of a fraudulent scheme. (*Id.* ¶¶ 202, 206.)

Plaintiffs allege that PBM rebates are part of an industry scheme to inflate the price of analog insulin, whereby the three largest PBMs — CVS Health, Express Scripts, and OptumRx — use their leverage to [\*13] create formularies, ranked lists of drugs. (*Id.* ¶¶ 169, 180.) Plaintiffs allege that health insurers "cover all or a portion of their members' drug costs based on whether and where drugs fall on their PBM formularies." (*Id.* ¶ 180.) If a drug is excluded from the formularies, consumers may be required to pay a larger share of the cost, or even the full cost. (*Id.* ¶¶ 193-94.) Plaintiffs assert that the use of formularies gives PBMs wide latitude to extract rebates from manufacturers. (*Id.* ¶ 241.) Accordingly, Plaintiffs contend that Novo and Sanofi compete against one another by offering rebates to PBMs for formulary placements. (*Id.*)

Plaintiffs contend a pricing "scheme" to "widen a secret spread between the manufacturers' published and misleading benchmark prices, and their undisclosed, net selling prices for their analog insulins." (*Id.* ¶ 2.) Plaintiffs assert "PBM profits are tied to the size of the spread between the benchmark price and actual net selling prices," (*Id.* ¶¶ 2, 210) such that manufacturers have an incentive to offer a larger spread to PBMs than those offered by their competitors. (*Id.* ¶ 267). Plaintiffs premise their pricing scheme on two separate theories. First, Plaintiffs [\*14]

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<sup>4</sup> The "net price" refers to the revenue obtained by the manufacturer after subtracting the rebate amounts it negotiates and pays to PBMs. (ECF No. 131 ¶¶ 169, 170 fig. 3.) The net price may fluctuate as it necessarily depends on a particular PBM's negotiation. (ECF No. 131 ¶ 171.)

contend that Defendants "publicly report one price . . . for their analog insulins while secretly offering a far lower price — the net price — to the largest PBMs." (*Id.* ¶ 2.) Plaintiffs argue that because PBMs do not "negotiate discounts or rebates" and instead merely "pad [their] pockets[]," the rebates are illegitimate. (*Id.* ¶¶ 2, 6.) Second, Plaintiffs contend that Defendants misrepresented the benchmark prices as "reasonable approximations of the insulins' real prices." (*Id.* ¶¶ 3, 12-13, 254, 302, 350.) Plaintiffs allege that each of these schemes entails a "pattern" of predicate acts of federal mail and wire fraud in violation of [18 U.S.C. §§ 1341](#) and [1343](#), (*Id.* ¶ 326) and that these violations "have directly and proximately caused the plaintiffs and members of the class to be injured . . . [through] inflated payments based on fictitious benchmark prices for the analog insulins." (*Id.* ¶¶ 20, 266, 336, 341, 354.)

## B. Procedural History

On February 2, 2017, the first complaint was filed in this matter, *Chaires, et. al v. Novo Nordisk, et al.* ("*In re Insulin*"), Civil Action No. 17-699(BRM)(LHG). (ECF No. 1.) Thereafter, several prospective plaintiffs filed complaints in six separate actions: *Barnett, et [\*15] al. v. Novo Nordisk, Inc* ("Barnett"), Civil Action No. 17-1580(BRM)(LHG); *Boss, et al. v. CVS Health Corp.* ("Boss"), Civil Action No. 17-1823(BRM)(LHG); *Christensen, et al. v. Novo Nordisk, Inc., et al.* ("Christensen"), Civil Action No. 17-2678(BRM)(LHG); *Valdes, et al. v. Sanofi-Aventis U.S. LLC, et al.* ("Valdes"), Civil Action No. 17-939(BRM)(LHG); *Carfagno v. Novo Nordisk Inc.* ("Carfagno"), Civil Action No. 17-3407(BRM)(LHG); and *Bentele, et al. v. Eli Lilly & Co.* ("Bentele"), Civil No. 18-11479(BRM)(LHG).

On February 22, 2017, this Court consolidated Valdes into *In re Insulin* absent objection from any parties, pursuant to [Federal Rule of Civil Procedure 42\(a\)](#). (ECF No. 11.) On September 18, 2017, this Court appointed Steve W. Berman, Esq. of Hagens Berman and James E. Cecchi, Esq. of Carella Byrne as interim lead Plaintiffs' counsel pursuant to [Federal Rule of Civil Procedure 23\(g\)](#). (ECF Nos. 71 & 72.) On January 3, 2018, this Court consolidated Carfagno into *In re Insulin* absent objection from any of the parties. (ECF No. 84.) On January 19, 2018, this Court consolidated Barnett, Boss, and Christensen into *In re Insulin*. (ECF No. 89.)

On March 29, 2018, Plaintiffs filed the First Amended Class Action Complaint against Defendants. (ECF No. 131.) On May [\*16] 14, 2018, Defendants filed a Motion to Dismiss Plaintiffs' Complaint (ECF No. 158), comprised of a brief in support of dismissing Counts One through Five of the Complaint (ECF No. 158-1) and a separate brief in support of dismissing Counts Six through Fifty-Nine of the Complaint. (ECF No. 158-2.) On July 5, 2018, Plaintiff filed an Opposition to Defendants' Motion to Dismiss. (ECF No. 181.) On August 20, 2018, Defendants filed a Reply Brief to Plaintiffs' Opposition to the Motion to Dismiss. (ECF No. 190.)

## II. LEGAL STANDARDS

### A. [Rule 12\(b\)\(6\)](#)

In deciding a motion to dismiss pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#), a district court is "required to accept as true all factual allegations in the complaint and draw all inferences in the facts alleged in the light most favorable to the [plaintiff]." *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008). "[A] complaint attacked by a [Rule 12\(b\)\(6\)](#) motion to dismiss does not need detailed factual allegations." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (citations omitted). However, the plaintiff's "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Id.* (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)). A court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan*, 478 U.S. at 286. Instead, [\*17] assuming the factual allegations in the complaint are true, those "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" [Ashcroft v. Iqbal](#), 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing [Twombly](#), 550 U.S. at 570). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for misconduct alleged." *Id.* This "plausibility standard" requires the complaint allege "more than a sheer possibility that a defendant has acted unlawfully," but it "is not akin to a probability requirement." *Id.* (quoting [Twombly](#), 550 U.S. at 556). "Detailed factual allegations" are not required, but "more than an unadorned, the defendant-harmed-me accusation" must be pled; it must include "factual enhancements" and not just conclusory statements or a recitation of the elements of a cause of action. *Id.* (citing [Twombly](#), 550 U.S. at 555, 557).

"Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." [Iqbal](#), 556 U.S. at 679. "[W]here the well-pleaded [\*18] facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—that the pleader is entitled to relief." *Id.* at 679 (quoting [Fed. R. Civ. P. 8\(a\)\(2\)](#)). However, courts are "not compelled to accept 'unsupported conclusions and unwarranted inferences,'" [Baraka v. McGreevey](#), 481 F.3d 187, 195 (3d Cir. 2007) (quoting [Schuylkill Energy Res. Inc. v. Pa. Power & Light Co.](#), 113 F.3d 405, 417 (3d Cir. 1997)), nor "a legal conclusion couched as a factual allegation." [Papasan](#), 478 U.S. at 286.

While, as a general rule, the court may not consider anything beyond the four corners of the complaint on a motion to dismiss pursuant to [Rule 12\(b\)\(6\)](#), the Third Circuit has held that "a court may consider certain narrowly defined types of material without converting the motion to dismiss [to one for summary judgment pursuant to [Rule 56](#)]." [In re Rockefeller Ctr. Props. Sec. Litig.](#), 184 F.3d 280, 287 (3d Cir. 1999). Specifically, courts may consider any "document integral to or explicitly relied upon in the complaint." [In re Burlington Coat Factory Sec. Litig.](#), 114 F.3d 1410, 1426 (3d Cir. 1997) (quoting [Shaw v. Dig. Equip. Corp.](#), 82 F.3d 1194, 1220 (1st Cir. 1996)).

## B. [Rule 9\(b\)](#)

Pursuant to [Federal Rule of Civil Procedure 9\(b\)](#), when alleging fraud, "a party must state with particularity the circumstances constituting fraud or mistake, although intent, knowledge, and other conditions of a person's mind may be alleged generally." [In re Lipitor Antitrust Litig.](#), 868 F.3d 231, 249 (3d Cir. 2017) (citations omitted); see also [U.S. ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC](#), 812 F.3d 294, 307 (3d Cir. 2016) (holding that a plaintiff alleging fraud must . . . support its allegations with all of the essential factual background that would accompany [\*19] the first paragraph of any newspaper story — that is, the who, what, when, where and how of the events at issue") (citations omitted). Accordingly, "a party must plead [its] claim with enough particularity to place defendants on notice of the 'precise misconduct with which they are charged.'" [United States ex rel. Petras v. Simparel, Inc.](#), 857 F.3d 497, 502 (3d Cir. 2017) (quoting [Lum v. Bank of Am.](#), 361 F.3d 217, 223-24 (3d Cir. 2004), abrogated on other grounds by [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

## III. DECISION

### A. RICO Violation Claims

Defendants contend that this Court should dismiss Counts One and Two of Plaintiffs' Complaint, which allege violations of the [Racketeer Influenced and Corrupt Organizations Act](#), 18 U.S.C. §§ 1961-1968 (1970) ("RICO"), asserting that Plaintiffs' claims are barred by the "indirect purchaser rule," do not plead facts amounting to mail or wire fraud, fail to plead a valid RICO enterprise, do not adequately plead proximate causation, and do not adequately plead a RICO conspiracy. (ECF No. 158-1 at 26-54.) Plaintiffs counter that the RICO claims should not be dismissed at this juncture because, *inter alia*, they have adequately pled each element of such violation and Supreme Court and Third Circuit precedent have consistently rejected Defendants' narrow interpretation of the

indirect purchaser rule. (ECF No. 181 at 14-52.) For the reasons set [\*20] forth below, this Court finds that Plaintiffs cannot sustain their RICO causes of action.

To demonstrate a violation of [18 U.S.C. § 1962\(c\)](#), a plaintiff must prove:

"(1) the existence of an enterprise affecting interstate commerce; (2) that the defendant was employed by or associated with the enterprise; (3) that the defendant participated . . . , either directly or indirectly, in the conduct or the affairs of the enterprise; and (4) that he or she participated through a pattern of racketeering activity."

[United States v. Bergrin](#), 650 F.3d 257, 265 (3d Cir. 2011) (quoting [United States v. Irizarry](#), 341 F.3d 273, 285 (3d Cir. 2003)).

Proving a violation of [18 U.S.C. § 1962\(c\)](#) "requires no more than this." [Sedima, S.P.R.L. v. Imrex Co., Inc.](#), 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985).

### i. RICO Elements

First, Defendants contend that Plaintiffs do not plead facts amounting to mail or wire fraud. (ECF No. 158-1 at 30.) Illicit racketeering activity includes "a host of so-called predicate acts, including 'any act which is indictable under . . . [Section 1341](#) [mail fraud].'" [Bridge v. Phoenix Bond & Indem. Co.](#), 553 U.S. 639, 647, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008) (quoting [18 U.S.C. § 1961\(1\)\(B\)](#)). The Third Circuit has traditionally interpreted mail fraud statutes broadly. See [United States v. Martinez](#), 905 F.2d 709, 715 (3d Cir.), cert. denied, 498 U.S. 1017, 111 S. Ct. 591, 112 L. Ed. 2d 595 (1990). Fraud is "measured in a particular case by determining whether the scheme demonstrated a departure from fundamental honesty, moral uprightness, or fair play and candid dealings in the general life of the community." [United States v. Riley](#), 621 F.3d 312, 327 n.19 (3d Cir. 2010) (citation omitted). However, without "a [\*21] specific fraudulent statement" identifying "the time, place, speaker, and content" of the alleged misrepresentation, a civil RICO claim asserting fraud should be dismissed. [Jaye v. Oak Knoll Vill. Condo. Owners Ass'n, Inc.](#), 2016 U.S. Dist. LEXIS 165269, 2016 WL 7013468, at \*15 (D.N.J. Nov. 30, 2016).

Plaintiffs have adequately pled mail and wire fraud. Plaintiffs allege Defendants committed mail and wire fraud by publishing artificially inflated AWPs via mail and interstate wire facilities. (ECF No. 131 ¶¶ 318-25.)<sup>5</sup> Plaintiffs further alleged Defendants knew that AWP is a pricing index and that purchasers pay for analog insulin based on that index. (ECF No. 131 ¶¶ 253-62, 323, 325.) Federal courts have held that excessive inflation of prices on an index, such as the AWPs in this matter, may constitute mail and wire fraud. See [In re Lupron® Mktg. & Sales Practices Litig.](#), 295 F. Supp. 2d 148, 165-68 (D. Mass. 2003); see also [Schmuck v. United States](#), 489 U.S. 705, 710-11, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989). Defendants' reliance on [Langford v. Rite Aid of Alabama, Inc.](#), 231 F.3d 1308, 1313-14 (11th Cir. 2000) and [Bonilla v. Volvo Car Corp.](#), 150 F.3d 62, 71 (1st Cir. 1998) is misplaced. As Plaintiffs highlight in their brief, this is not a matter of nondisclosure. (ECF No. 181 at 19.) Rather, Plaintiffs allege that Defendants committed fraud by "[holding] out their artificially increased AWPs as benchmark prices, fully aware that AWP is a pricing index intended to approximate the true cost of a drug." (*Id.*) Plaintiffs further contend that the AWP had no reasonable relationship to the actual price of [\*22] the drugs, and that Defendants knew of this fraud. (ECF No. 131 ¶¶ 176-178, 254.) Accordingly, Plaintiffs have adequately pled mail and wire fraud.

Second, Defendants contend Plaintiffs failed to plead a valid RICO enterprise. (ECF No. 158-1 at 41.) An essential feature of an association-in-fact enterprise is the sharing of a "common purpose" between the members. [United States v. Boyle](#), 556 U.S. 938, 948, 129 S. Ct. 2237, 173 L. Ed. 2d 1265 (2009). "From the terms of RICO, it is apparent that an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit the enterprise's purpose." *Id. at 946*.<sup>6</sup>

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<sup>5</sup> Specifically, Plaintiffs allege "[t]he Defendant Drug Manufacturers intended that the PBMs would (and did) distribute, through the U.S. mail and interstate wire facilities, promotional and other materials which claimed that rebates saved health care payers and consumers like the plaintiffs and class members money on their prescription needs." (ECF No. 131 ¶ 321(f).)

The Third Circuit has held that Boyle's construction of the term "association-in-fact enterprise" is "capacious," "expansive," and "obviously broad." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 366 (3d Cir. 2010). Additionally, a valid RICO enterprise requires "defendants [to] conduct[] or participat[e] in the conduct of the 'enterprise's affairs,' not just their own affairs." *Reves v. Ernst & Young*, 507 U.S. 170, 185, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993) (quoting *18 U.S.C. § 1962(c)*).

Plaintiffs have adequately pled a valid RICO enterprise. Indeed, Plaintiffs' Complaint alleged a common fraudulent purpose between the Defendants, provided a motive for such purpose, and detailed the alleged relationships between the Defendants. [\*23] (ECF No. 131 ¶¶ 254, 302-09, 334-35.)<sup>7</sup> Moreover, Plaintiffs also point out that the Amended Complaint satisfies the participation prong by virtue of their allegation that Novo and Sanofi both accomplished "something more" that would be unlikely absent collusion: preferred formulary status without real price reductions. (ECF No. 181 at 48-49.)

Defendants' contentions that Plaintiffs have failed to adequately plead a valid RICO enterprise are without merit. Defendants contend that PBMs and manufacturers cannot have a common purpose in the RICO enterprise because they play different roles in the distribution chain (ECF No. 158-1 at 42-43.) However, Defendants' construction of the common fraudulent purpose prong is too narrow, as federal courts have held that allegations of falsely inflated AWPs may "provide a plausible common fraudulent purpose." *In re Pharm. Indus. Average Wholesale Price Litig.*, 307 F. Supp. 2d 196, 206 (D. Mass. 2004). Defendants also argue that Plaintiffs have not adequately pled that Defendants participated in the affairs of the alleged enterprise, contending that the allegations are "entirely consistent with [defendants and the PBMs] each going about their own business." *United Food & Commercial Workers Unions & Emp'r's Midwest Health Benefits Fund v. Walgreen Co.*, 719 F.3d 849, 855 (7th Cir. 2013). On the contrary, Plaintiffs have alleged conduct that would not occur in competition [\*24] for business in a legitimate market. See *id. at 856*. As such, Plaintiffs adequately alleged a valid RICO enterprise.

Third, Defendants contend that Plaintiffs failed to adequately plead proximate causation. A sustainable RICO claim requires proximate causation. *In re Avandia Marketing, Sales Practices & Product Liability Litigation*, 804 F.3d 633, 638 (3d Cir. 2015). "[T]o state a claim under civil RICO, the plaintiff is required to show that a RICO predicate offense 'not only was a but for cause of his injury, but was the proximate cause as well.'" *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 9, 130 S. Ct. 983, 175 L. Ed. 2d 943 (2010) (quoting *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)). If a plaintiff's alleged injuries "could have resulted from factors other than [the defendants'] alleged acts of fraud," there is no proximate causation. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 459, 126 S. Ct. 1991, 164 L. Ed. 2d 720 (2006).

Plaintiffs have adequately plead proximate causation. Although Plaintiffs assert that the costs were passed down to them, they explicitly allege that their injuries would not have occurred "[b]ut for the misrepresentations that the Defendant Drug Manufacturers made regarding the benchmark prices of their analog insulins" as the inflated AWP prices forced the intermediaries to raise their prices so as to not suffer the out-of-pocket overcharges alleged in the suit. (ECF No. 131 ¶¶ 339-40.) Defendants assert that Plaintiffs "cannot show the direct relationship required to establish proximate [\*25] causation," (ECF No. 158-1 at 50), however, the allegation that the cost is borne by the "end payor" is sufficient to establish proximate causation in this context. *In re Pharm. Indus. Average Wholesale*

<sup>6</sup>The Supreme Court has also defined an association-in-enterprise, for RICO purposes, as "a group of persons associated together for a common purpose of engaging in a course of conduct." *United States v. Turkette*, 452 U.S. 576, 583, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981).

<sup>7</sup> Specifically, Plaintiffs allege that "[e]ach manufacturer-PBM Enterprise also shares a common purpose of perpetuating use of insulin benchmark prices as the basis for consumer cost-sharing and out-of-pocket payments in the pharmaceutical industry . . . these corporations would not be able to market large spreads to PBMs in exchange for formulary positions without the use of the inflated benchmark prices as the basis for consumer cost-sharing and out-of-pocket payments in the pharmaceutical industry." (ECF No. 131 ¶ 302.) Plaintiffs further alleged that "[e]ach of the Manufacturer-PBM Insulin Pricing Enterprises has a systemic linkage because there are contractual relationships, financial ties, and continuing coordination of activities between each Defendant Drug Manufacturer and each PBM that is an associate." (ECF No. 131 ¶ 303.)

*Price Litig.*, 295 F. Supp. 2d at 175. Proximate causation in the RICO context requires "some direct relation between the injury asserted and the injurious conduct alleged," *Holmes*, 503 U.S. at 268, and the Amended Complaint makes such allegations.

Finally, Defendants assert that Plaintiffs have not adequately pled a RICO conspiracy. (ECF No. 158-1 at 51.) In order to adequately plead a RICO conspiracy, Plaintiffs must "allege facts suggesting that [the defendants] knowingly agreed to facilitate any illegal scheme." *Mason v. Campbell*, 2016 U.S. Dist. LEXIS 100121, 2016 WL 8716458, at \*6 (E.D. Pa. July 29, 2016) (citing *Twombly*, 550 U.S. at 570). "[E]vidence of parallel conduct by alleged co-conspirators is not sufficient to show an agreement." *In re Ins. Brokerage*, 618 F.3d at 321. Rather, allegations of parallel conduct "must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id.* at 322 (quoting *Twombly*, 550 U.S. at 557).

Plaintiffs have adequately pled a RICO conspiracy. Plaintiffs do not merely allege parallel conduct, but rather assert facts that suggest a preceding agreement. Plaintiffs assert not only that Defendants "agree[d] and conspir[ed] to violate 18 U.S.C. § 1962(c)" (ECF No. [\*26] 131 ¶ 346), but also allege separate conspiracies of pricing enterprises between Novo and Sanofi and each PBM: CVS, Express Scripts, and OptumRx. (ECF No. 131 ¶¶ 310-12.) These allegations clearly suffice for a RICO conspiracy, and as such, Plaintiffs have adequately pled the existence of a RICO conspiracy.

## ii. The Indirect Purchaser Rule

Next, Defendants assert Plaintiffs lack standing to pursue their RICO claim because they are "three levels down the distribution chain" from Defendants and are therefore "classic indirect purchasers" pursuant to the indirect purchaser rule doctrine established by the Supreme Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977) and *Kansas v. UtiliCorp United Inc.*, 497 U.S. 199, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1998). (ECF No. 158-1 at 26-27.) Plaintiffs argue that applying the indirect purchaser rule — an **antitrust law** principle — to RICO claims of fraudulent pricing runs contrary to Supreme Court precedent, and that, in any event, Plaintiffs were directly harmed as they paid prices based on Defendants' fraudulent AWPs, irrespective of the prices paid by intermediaries in the distribution chain. (ECF No. 181 at 31-32.) On January 17, 2019, this Court held oral argument on the limited issue of the applicability of the indirect purchaser rule to Plaintiffs' RICO claims.

The Supreme [\*27] Court developed the indirect purchaser rule in the antitrust context, when it held that Clayton Act plaintiffs may not demonstrate injury by providing evidence only of indirect purchases. *Illinois Brick*, 431 U.S. at 737. The Court warned that allowing indirect purchasers to recover under such a theory would "transform treble-damages actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant." *Id.* at 739. Moreover, the indirect purchaser rule was also intended to prevent defendants from being exposed to "multiple liability" should both indirect and direct purchasers in a distribution chain be permitted to assert claims arising out of a single overcharge. *McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 851 (3d Cir. 1996). Because 18 U.S.C. § 1964(c), RICO's private cause of action, was modeled on the *Clayton Act*, "antitrust standing principles apply equally to allegations of RICO violations." *McCarthy*, 80 F.3d at 855; see also *Holmes*, 503 U.S. at 270-74.

Defendants argue Plaintiffs "do not, and cannot, allege that they purchase analog insulin directly from any defendant," (ECF No. 158-1 at 39), citing the Complaint's allegation that Defendants' products are sold "from manufacturers to wholesaler, wholesaler to retailer (or mail order), and retailer to patient." [\*28] (*Id.*) In support of its argument, Defendants cite this District's decision in *Hale v. Stryker Orthopaedics*, 2009 U.S. Dist. LEXIS 126886, 2009 WL 321579 at \*3 (D.N.J. Feb. 9, 2009), which dismissed a plaintiff's RICO complaint where the plaintiffs did "not plead that they purchased [the products] directly from [the defendants]." The *Hale* court determined that a plaintiffs' co-payment alone does not confer standing upon it as several actors stood in the distribution chain between the plaintiffs and the defendants. *2009 U.S. Dist. LEXIS 126886, [WL] at \*4*.

Although Plaintiffs advocated competently against applying the indirect purchaser rule in this case, this Court is bound by the controlling caselaw and thus concludes Plaintiffs' Complaint has not sufficiently pled allegations to withstand Defendants' indirect purchaser rule challenge. Plaintiffs' Complaint merely alleges that Defendants' artificial price inflation of the AWPs caused them to pay an increased price for analog insulin, yet never alleges that such overpayments were made directly to Defendants. Specifically, Plaintiffs assert:

336. . . . [W]hen a plaintiff or class member fills a prescription for one of the analog insulins, she is responsible for paying all or a portion of the medication's cost. If the plaintiff or class member is uninsured, she must pay 100% [\*29] of the drugs' point-of-sale prices, which are based on the Defendant Drug Manufacturers' benchmark prices. If the plaintiff or class member has a high-deductible health plan, she must pay 100% of the drugs' point-of-sale prices, based on Defendant Drug Manufacturers' benchmark prices, until she satisfies her deductible. If the plaintiff's or class member's health plan contains a coinsurance requirement, she is responsible for paying a percentage of her drugs' point-of-sale prices, based on the Defendants Drug Manufacturers' benchmark prices. And if the plaintiff or class member is a member of a Medicare Part D plan, she is responsible for paying all or a portion of her drugs' point-of-sale prices based on Defendant Drug Manufacturers' benchmark prices, until she reaches her maximum contribution.

337. The amount of each of these cash payments is based on the Defendant Drug Manufacturers' benchmark prices. Therefore, when each Defendant Drug Manufacturer artificially inflated each analog insulin's benchmark price and then used each Manufacturer-PBM Insulin Pricing Enterprises to sell those analog insulins, they also artificially inflate plaintiffs' and class members' out-of-pocket expenses. [\*30]

338. The plaintiffs' and class members' damages are therefore the difference between the defendants' reported benchmark prices and the net prices at which they sell their analog insulins for all plaintiff and class member out-of-pocket expenses. 339. Plaintiffs' injuries, and those of the class members, were proximately caused by the Defendant Drug Manufacturers' racketeering activity. But for the misrepresentations that the Defendant Drug Manufacturers made regarding the benchmark prices of their analog insulins and the scheme that the Manufacturer-PBM Insulin Pricing Enterprises employed, plaintiffs and others similarly situated would have paid less, out-of-pocket, for their analog insulins.

(ECF No. 131 ¶¶ 336-39.)

Plaintiffs' core allegation is that Defendants engaged in a scheme to "artificially inflat[e] the benchmark prices of their analog insulin." (ECF No. 131 at ¶ 20.) However, Plaintiffs concede that they, the consumers, are not the first party to pay for the analog insulin at a purportedly inflated price. Rather, Plaintiffs outline a scheme whereby the analog insulins are sold to wholesalers at prices "based on the benchmark prices that are set by the manufacturers," and are [\*31] subsequently sold to pharmacies, hospitals, and clinics at prices approximating the benchmark prices. (ECF No. 131 at ¶¶ 164, 176.) As such, Plaintiffs are multiple purchasers down the distribution chain from Defendants and are quintessential indirect purchasers for the purposes of the indirect purchaser rule. See *McCarthy*, 80 F.3d at 848 (holding that "only the purchaser immediately downstream from the alleged [RICO violator]" possesses standing to pursue an action).

Plaintiffs contend the indirect purchaser rule does not vitiate their RICO standing as the rule does not apply to RICO claims, and that Defendants' alleged fraud directly injured Plaintiffs as Defendants set the AWPs that ultimately dictated the price paid by the Plaintiffs, thereby conferring upon them RICO standing. (ECF No. 181 at 30-36.) Plaintiffs posit the Complaint explains the process by which Plaintiffs pay out-of-pocket costs, and thus suffer a direct injury based directly on the prices set by Defendants. (ECF No. 131 ¶¶ 260-69.) This Court is not persuaded by Plaintiffs' arguments. In *McCarthy*, the Third Circuit unequivocally held that the indirect purchaser rule applies to RICO claims, stating "the central and dispositive issue [in [\*32] a RICO action] is whether plaintiffs are 'direct purchasers.' If so, they are entitled to pursue . . . their . . . RICO claims." *McCarthy*, 80 F.3d at 855.

At oral argument, Plaintiffs urged this Court to rely on *Avandia*, 804 F.3d at 638, to the extent it conflicts with *McCarthy* with respect to the applicability of the indirect purchaser rule in RICO actions. Though *Avandia* is the more recent Third Circuit decision, the facts of this matter are meaningfully distinguishable such that *Avandia* does not provide persuasive support to Plaintiffs' position. Plaintiffs assert the *Avandia* plaintiffs were "third party payors"

who "did not directly purchase [the product] from the manufacturer . . . but instead reimbursed a pharmacy that purchased [the product] in the chain of distribution." (ECF No. 181 at 35.) Plaintiffs contend that because the "distribution chain did not preclude the RICO claim" and because "the issue was whether the pharmaceutical company's misrepresentations directly caused the health insurers to pay a higher rate than they otherwise would have," its Complaint should be permitted to proceed as it alleges the "same conduct forming the basis of the RICO scheme." (ECF No. 181 at 35-36.) This Court disagrees.

Unlike here, the [\*33] *Avandia* plaintiffs were not seeking recourse pursuant to payments made to third parties based on allegedly fraudulent prices set by a manufacturer. *Avandia* did not concern an identical case of an indirect purchaser. Rather, the *Avandia* plaintiffs' cause of action was couched in the defendants' alleged failure to disclose known health risks of various drugs ultimately included in their formularies, as the court explained:

The conduct that allegedly caused plaintiffs' injuries is the same conduct forming the basis of the RICO scheme alleged in the complaint — the misrepresentation of the heart-related risks of taking Avandia that caused TPPs and PBMs to place Avandia in the formulary. The injury alleged by the TPPs is an economic injury independent of any physical injury suffered by Avandia users. And, as far as we can tell, prescribing physicians did not suffer RICO injury from [the] marketing of Avandia.

*Avandia*, 804 F.3d at 644.

The *Avandia* plaintiffs were third-party payors who included the product, Avandia, in their formulary decisions at favorable rates in *direct reliance* on material misrepresentations made by the defendant, a pharmaceutical company. *Avandia*, 804 F.3d at 636.<sup>8</sup> By contrast, Plaintiffs allege their damages stem from [\*34] artificially inflated AWPs paid by wholesalers and pharmacies *before* the consumers make their purchases from those intermediaries. See *Warren Gen. Hosp. v. Amgen Inc.*, 643 F.3d 77, 95 (3d Cir. 2011) (holding that the indirect purchaser rule applies to prescription drug sales and noting that "[b]ecause of the complicated interplay between market forced, the possibility that the wholesaler was harmed by defendant's actions exists even if the majority of the injury is borne by the indirect purchaser").

At oral argument, Plaintiffs also cited a recent decision from the District of Kansas, *In re EpiPen*, 336 F. Supp. 3d 1256, 1259 (D. Kan. 2018), in further support of its position that the indirect purchaser rule should not bar its RICO claim. (Ps' Ltr. (ECF No. 244).) Plaintiffs contend the *EpiPen* court relied on Supreme Court decisions in *Holmes* and *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008) in declining to extend the indirect purchaser rule to a RICO action with a similar fact pattern. (*Id.*) This Court disagrees with Plaintiffs' assertions. *Holmes* explicitly held that federal jurisprudence interpreting antitrust principles govern RICO claims because Congress modeled RICO's civil action provision on a substantially similar provision in the Clayton Act, stating:

The key to better interpretation lies in some statutory history. We have repeatedly observed, [\*35] see *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 150-51, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987) . . . that Congress modeled § 1964(c) . . . [of RICO after] the federal antitrust laws, § 4 of the Clayton Act . . .

In *Associated General Contractors* . . . we discussed how Congress enacted § 4 in 1914 with language borrowed from § 7 of the *Sherman Act*, passed 24 years earlier. Before 1914, lower federal courts had read § 7 to incorporate common-law principles of proximate causation . . . and as we reasoned, as many lower federal courts had done before us . . . that congressional use of the § 7 language in § 4 presumably carried the intention to adopt 'the judicial gloss that avoided a simple literal interpretation.' . . . Thus, we held that a plaintiff's right to sue under § 4 required a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well.

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<sup>8</sup> Similarly, Plaintiffs' reliance on the Second Circuit's decision in *Desiano v. Warner-Lambert Co.*, 326 F.3d 339 (2d Cir. 2003) is also misplaced. (ECF No. 181 at 36.) *Desiano* concerned an antitrust action to recover alleged overpayments made to a drug manufacturer, however, unlike in this matter, the relief sought included "only the portion of the prescription paid [directly] by the [healthcare providers] and exclude[d] the part paid by the patients, in the form of a 'co-pay.'" *Id. at 345*.

The reasoning applies just as readily to [§ 1964\(c\)](#) [of RICO]. We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in [§ 7](#) of the Sherman Act, and later in the Clayton Act's [§ 4](#). . . . It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them.

[Holmes, 503 U.S. at 267-68.](#)

Nothing [\*36] in [Holmes](#) undercuts the voluminous federal jurisprudence determining that courts may apply the indirect purchaser rule to RICO actions with the same force as under [antitrust law](#).<sup>9</sup> The *EpiPen* court's discussion of *Holmes* merely suggests *Holmes* did not create a bright line applying the indirect purchaser rule to all RICO actions with the same force as in the antitrust context, stating "the Court has 'cautioned our use of the term "direct" should merely be understood as a reference to the proximate cause enquiry that is informed by the concerns set out in the text.'" [EpiPen, 336 F. Supp. 3d at 1324](#) (quoting [Holmes, 503 U.S. at 269 n.15](#)). The court in *EpiPen* continued to note "the Supreme Court has recognized that 'the infinite variety of claims that may arise [under RICO] make it virtually impossible to announce a black-letter rule that will dictate the result in every case' for determining whether an alleged RICO violation was the proximate cause of plaintiff's injuries." [EpiPen, 336 F. Supp. 3d at 1324-25](#) (quoting [Holmes, 503 U.S. at 272 n.20](#)).

Similarly, the Supreme Court's holding in *Bridge* does not preclude the application of the indirect purchaser rule to Plaintiffs' RICO claims. *Bridge* merely held that plaintiffs who are injured "by reason of" a pattern of mail fraud may have RICO standing "even [\*37] if he [or she] has not relied on any misrepresentations." [Bridge, 553 U.S. at 649-50](#). Unlike here, *Bridge* does not concern the case of an indirect purchaser and does not stand for the proposition that plaintiffs multiple levels down the consumer chain may possess RICO standing despite the indirect purchaser rule. The disparity between the holding in *EpiPen* and the Third Circuit decisions is best explained by the conflicting application of the indirect purchaser rule between the Third and Tenth Circuits. The *EpiPen* court readily admitted the Third Circuit recognizes the indirect purchaser rule in the RICO context, whereas the Tenth Circuit does not, explaining:

Because defendants just cite cases from outside the Tenth Circuit to support their argument that indirect purchasers lack RICO standing, the court declines to apply that rule here. Instead, applying the guidance from our Circuit in [Safe Streets Alliance v. Hickenlooper, 859 F.3d 865 \(10th Cir. 2017\)](#), the court already has determined that the class plaintiffs adequately have alleged that defendants' RICO violations proximately caused their injuries.

. . .

And just as importantly, defendants cite no cases from the Tenth Circuit holding that a RICO plaintiff lacks standing to assert a claim for overpaying for [\*38] pharmaceuticals when the plaintiff receives the benefit of the bargain in the form of purchasing effective drugs, even at inflated prices. The court declines to apply the holdings from the District of New Jersey cases here, as defendants urge.

[EpiPen, 336 F. Supp 3d at 1325-26.](#)

Finally, Plaintiffs' contentions that they suffered direct injury as a result of Defendants' artificially inflated AWPs, thereby conferring RICO standing, are also without merit. (ECF No. 181 at 32.) Plaintiffs argue the consumers' place in the chain of distribution is irrelevant because "the plaintiffs pay prices *directly* based on the defendants' fraudulent AWPs *irrespective of the prices other intermediaries within the chain pay.*" (*Id.*) Plaintiffs further assert that Defendants' potential overcharges of intermediaries are inconsequential as "[t]he issue is that the defendant[]

<sup>9</sup> Additionally, this Court disagrees with Plaintiffs' reliance on [Sedima, 479 U.S. at 498-99](#). Although *Sedima* postulates that "RICO is evolving into something quite different from the original conception of its enactors," [id. at 500](#), and even suggests that interpreting its elements in identical fashion to those under [antitrust law](#) may play a role in such evolution, [id. at 498-99](#), it does not at all mention the indirect purchaser rule and certainly provides no analysis tending to suggest a preference that such rule not be applied in the RICO context.

grossly misrepresented the pricing benchmarks used to *directly* set consumer prices." (*Id.*) However, such is still insufficient to overcome the indirect purchaser rule.

The Amended Complaint explicitly describes the distribution chain and flow of revenue therein: first, Defendants sell analog insulin to wholesalers at prices "based on benchmark prices that are set by manufacturers" [\*39] (ECF No. 131 ¶ 176); second, wholesalers earn a margin by selling insulin to pharmacies at approximately the same prices as the benchmarks prices set (ECF No. 131 ¶¶ 164, 167-68); and third, pharmacies earn a margin by charging benchmark-based prices, which are set by bargaining between the pharmacy and PBMs (in the case of insured consumers) or unilaterally by the pharmacy (in the case of uninsured consumers). (ECF No. 131 ¶¶ 179, 181, 201). Notably, Plaintiffs do not allege that Defendants invariably set the direct prices paid by consumers, but instead that those prices are sometimes determined after certain negotiations between intermediaries in the distribution chain who subsequently impose various mark-ups. (*Id.*)

Although Plaintiffs do allege the benchmark prices "directly" affect the price paid by consumers (ECF No. 181 at 32), such would be insufficient to overcome the indirect purchaser rule bar to RICO standing. The indirect purchaser rule still applies even when the alleged improper price inflation is passed to a plaintiff on a "dollar for dollar basis." *McCarthy*, 80 F.3d at 853.<sup>10</sup> The Plaintiffs have merely alleged a pass-through of the inflated price from one of the various intermediaries to the [\*40] consumers. Such allegations cannot overcome an indirect purchaser rule challenge.

The facts of this case closely mirror those of *Hale*. 2009 U.S. Dist. LEXIS 126886, 2009 WL 321579. In *Hale*, plaintiffs asserted RICO violations pursuant to the defendants' alleged artificial price inflation of hip and knee implant devices. 2009 U.S. Dist. LEXIS 126886, [WL] at \*1. As in this matter, the *Hale* plaintiffs failed to allege they directly purchased the subject products from the defendants. 2009 U.S. Dist. LEXIS 126886, [WL] at \*4. Rather, the plaintiffs pled only that they suffered a direct injury evidenced by heightened coinsurance payments passed down to them through the distribution chain. Accordingly, the *Hale* court determined that the plaintiffs lacked RICO standing pursuant to the indirect purchaser rule, stating:

While Plaintiffs argue that they have pled direct injury since they paid artificially-inflated coinsurance payments for their surgeries, Plaintiffs have not alleged that they were direct purchasers of the replacement joints manufactured by Defendants. Between Plaintiffs and Defendants in the chain of distribution stand several actors, including the hospitals performing the joint surgeries and Plaintiffs' insurers. The chain of distribution squarely presents the multiple liability [\*41] and damage apportionment risks discussed in *McCarthy*. Thus, Plaintiffs' co-payment alone does not allow them to stand in the shoes of a direct purchaser for standing purposes.

...

After carefully considering the arguments put forth by both sides, it seems clear that under the facts as pled, Plaintiffs cannot escape the bar of the "direct purchaser" rule. To do so, Plaintiffs would have to plead that they bought their implants directly from Defendants. Since Plaintiffs have not so pled, they lack standing under these facts to bring their RICO claims.

*Id.*

Although Plaintiffs allege injury not only through heightened coinsurance payments, but also via fraudulent AWPs that "directly set consumer prices" (ECF No. 181 at 32), Plaintiffs have failed to plead any direct purchase between themselves and Defendants. The chain of distribution alleged in this matter is fatal to Plaintiff's RICO claim, and as in *Hale*, such distribution chain "squarely presents the multiple liability and damage apportionment risks discussed in *McCarthy*." *Id.* Allowing Plaintiffs' RICO claims to proceed would expose Defendants to liability to Plaintiffs as well

<sup>10</sup> *McCarthy* notes "the fact that the [subject costs] were passed on [from an intermediary] to [the plaintiffs] on a dollar for dollar basis . . . is not dispositive. Indeed, the subcontractors in *Illinois Brick* and the utility companies in *Utilicorp* passed on their costs to the plaintiffs in those respective cases; yet the Supreme Court deemed this fact insufficient to confer standing to the indirect-purchaser plaintiffs in those cases." 80 F.3d at 853.

as to the various direct purchasers, such as the wholesalers [\*42] and PBMs, thereby allowing to persist the exact harm that the indirect purchaser rule seeks to prevent.

Finally, in a February 5, 2019 letter brief (ECF No. 249), Plaintiffs urged this Court to follow a recent decision from this District, [In re Mercedes-Benz Emissions Litig., No. 16-881, 2019 U.S. Dist. LEXIS 16381, 2019 WL 413541 \(D.N.J. Feb. 1, 2019\)](#), in which the court allowed RICO claims to persist despite the fact that the plaintiffs did not directly purchase the product, luxury automobiles, directly from the manufacturers. *Mercedes-Benz* is distinguishable from this case. Although the *Mercedes-Benz* plaintiffs were not direct purchasers, that matter did not concern overpayments made to and by intermediaries, as here. Rather, *Mercedes-Benz* dealt primarily with proximate causation in the RICO context, a separate requirement. The court was not confronted with an indirect purchaser challenge to plaintiffs' standing, it was not briefed on the indirect purchaser rule, and it did not perform an analysis of the indirect purchaser rule whatsoever. [2019 U.S. Dist. LEXIS 16381, \[WL\] at \\*18-26.](#)

Although Plaintiffs have adequately pled the various elements of a RICO claim, they failed to allege that they directly purchased the analog insulin from Defendants. Rather, Plaintiffs claim injury by virtue of inflated prices of their downstream purchase. [\*43] Therefore, Plaintiffs' claims are barred by the indirect purchaser rule, and as such, Plaintiffs lack standing to maintain this action pursuant to RICO. Accordingly, Defendants' Motion to Dismiss Plaintiffs' Amended Complaint is **GRANTED WITHOUT PREJUDICE** as to Counts One and Two.

## **B. New Jersey Consumer Fraud Act**

Defendants contend that this Court should dismiss Counts Three, Four, and Five of the Plaintiffs' Complaint, which allege violations of the NJCFA, asserting that the Plaintiffs' Complaint fails to plead the deceptive practices and unconscionable pricing claims with specificity, does not plead unlawful conduct, and does not allege that Plaintiffs suffered any ascertainable loss. (ECF No. 158-1 at 54-60.) Plaintiffs counter that the Complaint plausibly pleads all necessary elements on an NJCFA claim. (ECF No. 181 at 52-59.) For the reasons set forth below, this Court finds that Plaintiffs have adequately pled an NJCFA claim.

The [New Jersey Consumer Fraud Act, N.J.S.A. § 56:8-1, et seq.](#) ("NJCFA") states, in pertinent part:

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, [\*44] or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice; . . . .

### N.J.S.A. § 56:8-2.

Courts have interpreted this section to require the following three elements to state a cause of action under the NJCFA: "1) unlawful conduct by defendant; 2) an ascertainable loss by plaintiff; and 3) a causal relationship between the unlawful conduct and the ascertainable loss." [Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 964 A.2d 741, 749 \(N.J. 2009\)](#) (citing [Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co., Inc., 192 N.J. 372, 929 A.2d 1076, 1086 \(N.J. 2007\)](#)).

#### **i. Specificity**

Defendants assert Plaintiffs' Complaint does "not identify with specificity how defendants purportedly violated the NJCFA," and that as such, the Complaint lacks the particularity and specificity required by [Rule 9\(b\)](#) to withstand a motion to dismiss. (ECF No. 158-1 at 54.) The heightened pleading standard set forth in [Rule 9\(b\)](#) applies to a plaintiff's NJCFA claim. See [Dewey v. Volkswagen, 558 F. Supp. 2d 505, 524 \(D.N.J. 2008\)](#) (applying [Rule 9\(b\)](#) to a NJCFA and common law fraud claims); see also [Degennaro v. Am. Bankers Ins. Co. of Fla., 2017 U.S. Dist. LEXIS](#)

[96372, 2017 WL 2693881, at \\*5 \(D.N.J. June 22, 2017\)](#). To satisfy the specificity requirement of [Rule 9\(b\)](#), "the pleadings must state what the misrepresentation [\*45] was, what was purchased, when the conduct complained of occurred, by whom the misrepresentation was made, and how the conduct led plaintiff to sustain an ascertainable loss." [Smajlaj v. Campbell Soup Co., 782 F. Supp. 2d 84, 104 \(D.N.J. 2011\)](#).

Plaintiffs' Complaint makes the necessary, specific allegations to withstand Defendants' Motion to Dismiss. The Complaint alleges misrepresentation in that Defendants warranted that the artificially inflated publicly reported benchmark prices of Novolog, Levemir, Apidra, Lantus, and Toujeo were the reasonable approximations of the true cost (ECF No. 131 ¶¶ 359-63, 379-83). Moreover, the Complaint also alleges that Plaintiffs purchased the subject drugs (*Id.* ¶¶ 355, 375), provides allegations concerning when the conduct occurred. (*Id.* ¶¶ 234-37), and asserts that the conduct led Plaintiffs to suffer a loss. (*Id.* ¶¶ 372-73, 392-93, 403-04). Accordingly, the allegations in Plaintiffs' Complaint are pled with sufficient specificity.

## ii. Unlawful Conduct

Defendants assert Plaintiffs' Complaint has "failed to plead any unlawful conduct by defendants" in that it fails "to identify any actions of defendants that were capable of misleading consumers as to analog insulin pricing or rebates" (ECF No. 158-1 at 55), and that [\*46] as such, it cannot withstand this Motion to Dismiss. "The [NJCFA] creates three categories of unlawful practices: affirmative acts, knowing omissions, and violations of state regulations." [Maniscalco v. Brother Int'l Corp. \(USA\), 627 F. Supp. 2d 494, 499 \(D.N.J. 2009\)](#) (quoting [Vukovich v. Haifa, No. 03-737, 2007 U.S. Dist. LEXIS 13344, 2007 WL 655597, \\*9 \(D.N.J. Feb. 28, 2007\)](#) (citing [Cox v. Sears Roebuck & Co., 138 N.J. 2, 647 A.2d 454 \(N.J. 1994\)](#))). Affirmative acts require no showing of intent on behalf of the defendant. See [Fenwick v. Kay Am. Jeep, Inc., 72 N.J. 372, 371 A.2d 13, 16 \(N.J. 1977\)](#). "Thus, a defendant who makes an affirmative misrepresentation is liable even in the absence of knowledge of the falsity of the misrepresentation, negligence or the intent to deceive." [Vukovich, 2007 U.S. Dist. LEXIS 13344, 2007 WL 655597, at \\*9](#) (citation omitted). "In contrast, when the alleged consumer fraud consists of an omission, a plaintiff must show that the defendant acted with knowledge, thereby making intent an essential element of the fraud." *Id.* Notably, unlawful acts expressly regulated by other statutes, regulations, or rules not promulgated under the NJCFA can also give rise to an NJCFA claim. See [Henderson v. Hertz Corp., No. L-6937-03, 2006 N.J. Super. Unpub. LEXIS 2871, 2005 WL 4127090, at \\*5 \(N.J. Super. Ct. App. Div. June 22, 2006\)](#); see also [Lemelledo v. Beneficial Mgmt. Corp. of Am., 150 N.J. 255, 696 A.2d 546, 551-55 \(N.J. 1997\)](#).

Additionally, the NJCFA "prohibit[s] business practices that are unfair or unconscionable *in addition to* practices that are fraudulent, deceptive, or misleading; these terms are defined separately and differently in the text of the statutes and in relevant case law interpreting them." [Cottrell v. Alcon Labs., 874 F.3d 154, 166 \(3d Cir. 2017\)](#) (citations [\*47] omitted). "There is no precise formulation for an 'unconscionable' act that satisfies the statutory standard for an unlawful practice." [D'Agostino v. Maldonado, 216 N.J. 168, 78 A.3d 527, 537 \(N.J. 2013\)](#). Rather, the NJCFA "establishes 'a broad business ethic' applied 'to balance the interest of the consumer public and those of the sellers.'" *Id.* (quoting [Kugler v. Romain, 58 N.J. 522, 279 A.2d 640, 652 \(N.J. 1971\)](#)).

Plaintiffs' Complaint adequately pled unlawful conduct in violation of the NJCFA. New Jersey courts have interpreted NJCFA's reach expansively, and in light of the applicable jurisprudence, Plaintiffs have adequately pled unconscionable conduct. Specifically, the Complaint alleges that Defendants knew, but did not disclose, the benchmark prices it selected for the various drugs it manufactures, and then offered the price spreads to PBMs in exchange for favorable placement on formularies. (ECF No. 131 ¶¶ 360, 380.) Additionally, Plaintiffs adequately pled unfair business practices in their assertions that Defendants' artificially inflated AWPs thereby causing gross overpayments among the most vulnerable members of society. (ECF No. 131 ¶¶ 267-71.) Accordingly, Plaintiffs' Complaint has adequately pled unlawful conduct pursuant to the NJCFA.

## iii. Ascertainable Loss

Defendants contend Plaintiffs' Complaint [\*48] must be dismissed because they have not, and cannot, establish an ascertainable loss, as required in an NJCFA pleading. (ECF No. 158-1 at 57.) An "ascertainable loss" is one that is "quantifiable or measurable." *Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234, 872 A.2d 783, 793 (N.J. 2005). A "plaintiff must suffer a definite, certain and measurable loss, rather than one that is merely theoretical." *Bosland*, 964 A.2d at 749. However, New Jersey courts have found that "if the defendant or a non-party takes action to ensure that plaintiff sustains no out-of-pocket loss or loss of value prior to litigation, then plaintiff's CFA claim may fail." *D'Agostino*, 78 A.2d at 543; see also *Thiedemann*, 872 A.2d at 794 (finding no ascertainable loss when defendant repaired defect in accordance with terms of warranty). Courts support alleged damages based on either an out-of-pocket theory or a benefit of the bargain theory. See *Smajlaj v. Campbell Soup Co.*, 782 F. Supp. 2d 84, 99-103 (D.N.J. 2011). "An out-of-pocket-loss theory will suffice only if the product received was essentially worthless." *Mladenov v. Wegmans Food Mkt., Inc.*, 124 F. Supp. 3d 360, 374 (D.N.J. 2015). "A benefit-of-the-bargain theory requires that the consumer be misled into buying a product that is ultimately worth less than the product that was promised." *Id.* (citation omitted). Additionally, plaintiffs must set forth allegations sufficient to show that those losses are causally connected to defendant's alleged conduct. [\*49] *Bosland*, 964 A.2d at 749.

Plaintiffs have adequately pled an ascertainable loss. Plaintiffs' Complaint fails to plead an ascertainable loss under the "out-of-pocket-loss" theory because it never alleges that the products are "essentially worthless." *Mladenov*, 124 F. Supp. 3d at 374, however, Plaintiffs have adequately pled ascertainable losses pursuant to the "benefit-of-the-bargain theory." A plaintiff alleging an ascertainable loss under the benefit of the bargain theory "states a claim if he or she alleges (1) a reasonable belief about the product induced by a misrepresentation; and (2) that the difference in value between the product promised and the one received can be reasonably quantified." *Smajlaj*, 782 F. Supp. 2d at 99. As such, a plaintiff "must proffer evidence of a loss that is not hypothetical or illusory" and that is 'presented with some certainty demonstrating that it is capable of calculation.' *Id.* (quoting *Thiedemann*, 872 A.2d at 792-93); see also *Hemy v. Perdue Farms, Inc.*, 2011 U.S. Dist. LEXIS 137923, 2011 WL 6002463, at \*18 (D.N.J. Nov. 30, 2011) (holding that the allegation that plaintiff was charged a "premium," by itself, does not support a claim for an ascertainable loss).

Plaintiffs have alleged that they were misled as to the difference between the benchmark prices and the "true prices" of the medications. (ECF No. 131 ¶¶ 359-63, 379-83.) Plaintiffs contend that Defendants [\*50] intentionally and knowingly misrepresented material facts and thereby "inflated" the price of analog insulin to the detriment of the consumers, who "pay for analog insulin based on the medicines' *benchmark* price." (ECF No. 131 ¶¶ 10, 209.) Accordingly, Plaintiffs have adequately pled an ascertainable loss pursuant to the "benefit-of-the-bargain" theory, as they contend that they were "unfairly deprived of the benefit of the bargain" as they paid more than their pro-rata share of the net prices of the subject insulin. (ECF No. 131 ¶¶ 368-70.)

As Plaintiffs have sufficiently pled unlawful conduct with specificity as well as an ascertainable loss, Defendants' Motion to Dismiss Plaintiffs' Amended Complaint is **DENIED** as to Counts Three, Four, and Five.

### C. Plaintiffs' State Law Claims, Generally

Defendants contend that all of Plaintiffs' various state law claims should be dismissed, as Plaintiffs fail to allege fraudulent, unfair, or unconscionable conduct (ECF No. 158-2 at 4-5), all of Plaintiffs' claims are cursory recitations of the statutory elements (*Id.* at 5-6), all the claims fail to plead proximate causation (*Id.* at 6-7), all the claims fail to comply with *Rule 9(b)* (*Id.* at 7-8), and all the claims fail because the Plaintiffs' [\*51] damages are speculative (*Id.* at 8-9). This Court finds Plaintiffs have adequately alleged fraudulent, unfair, or unconscionable conduct, have pled proximate causation, and have satisfied the requirements of *Rule 9(b)*. Additionally, Plaintiffs have also adequately pled an ascertainable loss. (ECF No. 131 ¶ 250.) Accordingly, Defendants' Motion to Dismiss Plaintiffs' Amended Complaint is **DENIED** as to Counts Six through Fifty-Nine.<sup>11</sup>

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<sup>11</sup> Defendants' motion to dismiss each count herein is only denied as to the extent that such counts may be dismissed on other grounds.

## D. Plaintiffs' State Law Claims, Specifically

### i. Article III Standing

Defendants contend that seventeen of the various state law claims asserted against them should be dismissed as they each lack a plaintiff with Article III standing. (ECF No. 158-2 at 9-11.) Specifically, Defendants assert that the Complaint contains seventeen counts under the laws of states in which no named plaintiff resides or is alleged to have made any purchases of the subject insulin analog.<sup>12</sup> (ECF No. 158-2 at 10.) "Plaintiffs have the burden to establish standing." *Winer Family Trust v. Queen*, 503 F.3d 319, 325 (3d Cir. 2007). "[A] plaintiff who raises multiple causes of action 'must demonstrate standing for each claim he seeks to press.'" *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 245 (3d Cir. 2012) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006)). The threshold standing determination may not be postponed to class certification, rather, "class representatives must [\*52] meet Article III standing requirements the moment a complaint is filed." *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 367 (3d Cir. 2015) (citing *Lewis v. Casey*, 518 U.S. 343, 358, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996)).

Consistent with *Neale*, district courts within the Third Circuit and throughout the nation have held that named plaintiffs in a class action "lack standing to bring claims on behalf of putative classes under the laws of states where no named plaintiff is located and where no named plaintiff purchased the product at issue." *In re: Niaspan Antitrust Litig.*, 2015 U.S. Dist. LEXIS 164021, 2015 WL 8150588, at \*3 (E.D. Pa. Dec. 8, 2015). Indeed, the Complaint includes seventeen counts in which no named plaintiff resides in such state, nor is there any allegation of injury in such state. This runs afoul of the Supreme Court's holding in *DaimlerChrysler*, as well as the rules promulgated by courts of this Circuit.

Plaintiffs concede that the Complaint includes several counts for which it lacks a named plaintiff residing in, or claiming injury in, such state. (ECF No. 181 at 63.) Instead, Plaintiffs assert that they do not need to claim an injury in each state to maintain standing, citing the Third Circuit's decision in *In re Prudential Ins. Co.*, 148 F.3d 283 (3d Cir. 1998). Plaintiffs' reliance on *Prudential* is inappropriate. While the court in *Prudential* held that "[o]nce individual standing by the class representative is met, a proper party is before the court" and there [\*53] "remains no further separate class standing requirement in the constitutional sense," *id. at 306-07*, *Prudential* concerned a matter where the class included members alleging injury in all fifty states. Indeed, *Prudential* explicitly noted that the matter was "an appeal from the approval of the settlement of a nationwide class action lawsuit against Prudential Life Insurance company alleging deceptive sales practices *affecting over 8 million claimants throughout the fifty states and the District of Columbia*." *Id. at 289* (emphasis added). As such, any attempt by Plaintiffs to assert that the holding in *Prudential* somehow undermines the Supreme Court's ruling in *DaimlerChrysler* is without merit.

Accordingly, Defendants' Motion to Dismiss Plaintiffs' Amended Complaint is **GRANTED WITHOUT PREJUDICE** as to Counts Seven, Eight, Fourteen, Fifteen, Sixteen, Twenty, Thirty-Nine, Forty-Two, Forty-Three, Forty-Five, Forty-Eight, Forty-Nine, Fifty, Fifty-Five, Fifty-Six, Fifty-Seven, and Fifty-Nine.

### ii. Standing for Claims as to Particular Defendants

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<sup>12</sup> Those counts include: Count Seven (Alabama); Count Eight (Alaska); Count Fourteen (Connecticut) Count Fifteen (Delaware); Count Sixteen (Washington, D.C.); Count Twenty (Hawaii); Count Thirty-Nine (New Hampshire); Count Forty-Two (North Carolina); Count Forty-Three (North Dakota); Count Forty-Five (Oklahoma); Count Forty-Eight (Rhode Island); Count Forty-Nine (South Carolina); Count Fifty (South Dakota); Count Fifty-Five (Virginia); County Fifty-Six (Washington); Count Fifty-Seven (West Virginia); and County Fifty-Nine (Wyoming).

Defendants contend that Plaintiffs lack standing to pursue certain claims against certain defendants because none of them "suffered an injury alleged in a given state from that [\*54] defendant's products." (ECF No. 158-2 at 11.)<sup>13</sup> Plaintiffs counter that all claims raised in the Complaint satisfy [Rule 23](#)'s typicality requirement. (ECF No. 181 at 66-67.) To determine whether a plaintiff is typical of a class, courts consider the attributes of the plaintiff, the class as a whole, and the similarity between the plaintiff and the class. [\*Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 598 \(3d Cir. 2012\)\*](#). The Third Circuit has explained the typicality requirement as follows:

[The analysis involves] three distinct, though related, concerns: (1) the claims of the class representative must be generally the same as those of the class in terms of both (a) the legal theory advances and (b) the factual circumstances underlying that theory; (2) the class representative must not be subject to a defense that is both inapplicable to many members of the class and likely to become a major focus of the litigation; and (3) the interests and incentives of the representative must be sufficiently aligned with those of the class.

#### [\*Schering Plough, 589 F.3d at 599.\*](#)

Although Plaintiffs' claims at issue may satisfy the three typicality prongs, this matter is distinguishable from *Marcus* in that *Marcus* dealt with claims regarding slightly differing products against a *single* defendant. Contrary to Plaintiffs' [\*55] contention, *Marcus* did not hold that plaintiffs who did not purchase a product from a defendant may nevertheless sue that defendant based on their purchase of a different defendant's similar product.<sup>14</sup> [\*Marcus, 687 F.3d at 599.\*](#) Rather, this District has held that claims concerning products that a class-action plaintiff neither purchased nor used cannot stand.<sup>15</sup> See [\*Lieberson v. Johnson & Johnson Consumer Cos., Inc., 865 F. Supp. 2d 529, 537 \(D.N.J. 2011\)\*](#) (holding that "[b]ecause Plaintiff has not alleged that she purchased or used two of the four . . . products at issue here, Plaintiff cannot establish an injury-in-fact with regard to those products); see also *Green v. Green Mountain Coffee Roasters, Inc., 279 F.R.D. 275, 280 (D.N.J. 2011)* (holding that plaintiffs did not have standing to pursue claims concerning products that they "neither purchased nor used"). As Plaintiffs have asserted multiple claims absent allegations of such products being purchased or used in such jurisdictions, such claims cannot withstand this Motion to Dismiss.

Accordingly, Defendants' Motion to Dismiss Plaintiffs' Amended Complaint is **GRANTED WITHOUT PREJUDICE** as to Counts Thirteen, Twenty-Seven, Twenty-Nine, Thirty, Thirty-Four, Thirty-Five, Thirty-Eight, Forty-Seven, and Fifty-One.

### **iii. Statutory Prohibitions on Consumer Class Actions**

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<sup>13</sup> Those counts are, as to Novo: Count Thirteen (Colorado); County Thirty (Massachusetts); Count Thirty-Five (Missouri); and Count Thirty-Eight (Nevada). As to Sanofi, the counts include: Count Twenty-Seven (Louisiana); County Twenty-Nine (Maryland); Count Thirty-Four (Mississippi); Count Forty-Seven (Pennsylvania); and Count Fifty-One (Tennessee).

<sup>14</sup> Similarly, this Court is unpersuaded by Plaintiffs' argument that [\*Riaubia v. Hyundai Motor Am., No. 16-5150, 2017 U.S. Dist. LEXIS 133846, 2017 WL 3602520 \(Aug. 22, 2017\)\*](#) supports its position. Like *Marcus*, *Riaubia* deals with "absent [class] members [who] were allegedly injured by the same non-conforming feature of different models of the same product, manufactured or distributed by the same defendants based on uniform representations." [\*2017 U.S. Dist. LEXIS 133846, \[WL\] at \\*2\*](#) (emphasis added).

<sup>15</sup> This Court notes that, while many decisions from this District have held that claims concerning products that a plaintiff has not alleged to have used nor purchased cannot stand, "[c]ourts in this district are divided on this issue." [\*Neuss v. Rubi Rose, LLC, No. 16-2339, 2017 U.S. Dist. LEXIS 83444, 2017 WL 2367056, at \\*5 \(D.N.J. May 31, 2017\)\*](#). In *Neuss*, this District declined to grant a defendant's motion to dismiss claims against one defendant from plaintiffs who had neither purchased nor used their product, on the basis that (1) the class-action plaintiffs had the same basis for each defect among the different products, (2) the products were closely related, and (3) all of the claims were against only two defendants. *Id.* Unlike in this matter, however, one of the defendants in *Neuss* was a subsidiary and agent of the other. [\*2017 U.S. Dist. LEXIS 83444, \[WL\] at \\*2.\*](#)

Defendants contend [\*56] that eight of the Plaintiffs' claims must be dismissed due to state law statutory prohibitions on consumer class actions in each respective state.<sup>16</sup> (ECF No. 158-2 at 13.) Defendants assert that the Supreme Court's holding in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co*, 559 U.S. 393, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010) compels this Court to apply the class-action bar incorporated in state consumer protection laws. (ECF No. 158-2 at 14.) Plaintiffs argue that the Third Circuit's holding in *Knepper v. Rite Aid Corp.*, 675 F.3d 249 (3d Cir. 2012) interprets *Shady Grove* to preclude applying state class-action bars in the consumer protection context. (ECF No. 181 at 68.)

*Shady Grove* held that the certification of a class-action under *Rule 23* alleging violations of New York law did not violate the Rules Enabling Act, even though New York state law prohibited such a suit from proceeding as a class action. *559 U.S. at 406-09*. *Knepper* noted "[u]nder the plurality's view [in *Shady Grove*], any supposed substantive purpose underlying § 216(b) [the FLSA's provision barring opt-out classes] is irrelevant, and we need only determine whether *Rule 23* 'really regulates procedure,' which the Court has already concluded it does." *675 F.3d at 265*. As such, any supposed, substantive purpose of a state law bar to class-actions is irrelevant, because *Rule 23* "really regulates procedure." *Id.* Therefore, Defendants' [\*57] contention lacks merit.

Accordingly, Defendants' Motion to Dismiss Plaintiffs' Amended Complaint is **DENIED** as to Counts Seven, Eighteen, Twenty-Six, Twenty-Seven, Thirty-Four, Thirty-Six, Forty-Nine, and Fifty-One.<sup>17</sup>

#### iv. Privity

Defendants assert that six of Plaintiffs' claims must be dismissed as the consumer protection laws of such states require privity, which Plaintiffs have failed to plead.<sup>18</sup> (ECF No. 158-2 at 14-15.) Plaintiffs concede that Kentucky law requires privity — thereby agreeing that their claim under Kentucky law should be dismissed — but that no other state law as alleged by Defendant requires privity to maintain a consumer fraud action. (ECF No. 181 at 69-70.)

In support of its contention that privity is required under the *Arizona Consumer Fraud Act*, Ariz. Rev. Stat. § 44-1522, et seq. ("ACFA"), Defendants cite *Sutter Home Winery, Inc. v. Vintage Selections, Ltd.*, 971 F.2d 401 (9th Cir. 1992). The court in *Sutter* held that the ACFA has a "clear intent to protect unwary buyers from unscrupulous sellers" and that where a plaintiff is "not a buyer, nor [a] . . . target of deceptive advertising" it cannot maintain an action under the ACFA. *Id. at 407*. Plaintiffs have asserted that they are both "buyers," although not directly from Defendants, and the target of deceptive pricing. As Arizona jurisprudence [\*58] does not explicitly require *direct* privity of contract between the plaintiff and defendant to maintain a suit under the ACFA, Plaintiffs' Arizona state law claim survives.

In support of its contention that privity is required under the *Idaho Consumer Protection Act*, I.C. § 48-601, et seq. ("ICPA"), Defendants cite *Taylor v. McNichols*, 149 Idaho 826, 243 P.3d 642 (Idaho 2010). *Taylor* held that in order to have standing under the ICPA, "the aggrieved party must have been in a contractual relationship with the party alleged to have acted unfairly or deceptively." *Id. at 662*; see also *Haskin v. Glass*, 102 Idaho 785, 640 P.2d 1186, 1189 (Idaho Ct. App. 1982) (holding "that a claim under the ICPA must be based upon a contract"). However, while a contractual relationship is necessary, courts have not determined whether *direct* privity is required to confer standing under the ICPA. See *In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Practices, & Prods. Liab. Litig.*, 295 F. Supp. 3d 927, 1021-22 (N.D. Cal. 2018) (holding that "[a]rguably, [the ICPA] and *Haskin* simply reflect that a

<sup>16</sup> Those eight counts are: Count Seven (Alabama); Count Eighteen (Georgia); Count Twenty-Six (Kentucky); Count Twenty-Seven (Louisiana); Count Thirty-Four (Mississippi); Count Thirty-Six (Montana); Count Forty-Nine (South Carolina); and Count Fifty-One (Tennessee).

<sup>17</sup> Defendants' motion to dismiss each count herein is only denied as to the extent that such counts may be dismissed on other grounds.

<sup>18</sup> Those six counts are: Count Nine (Arizona); Count Sixteen (Washington, D.C.); Count Twenty-One (Idaho); Count Twenty-Six (Kentucky); Count Thirty (Massachusetts); and Count Fifty-Four (Vermont).

plaintiff's claim must ultimately be founded on a contract; they do not necessarily require that the contract must be one entered into by the plaintiff and defendant directly"); see also *Johnson v. Ford Motor Co., 2015 U.S. Dist. LEXIS 172348, 2015 WL 7571841, at \*10 (S.D. W.Va. Nov. 24, 2015)* (rejecting the assertion that an automobile purchaser could not sue Ford Motor Company under the ICPA because she was not a direct purchaser). Accordingly, as direct privity is not required under Idaho law, Plaintiffs' [\*59] failure to plead such is not fatal to its action.

Finally, Defendants assert that the *Vermont Consumer Fraud Act, Vt. Stat. Ann. Tit. 9, § 2451, et seq.* ("VCFA") requires privity of contract. (ECF No. 158-2 at 15.) In support of this contention, Defendants cite *Otis-Wisher v. Medtronic, Inc., 616 F. App'x 433, 435 (2d Cir. 2015)*, which upheld the dismissal of a claim under the VCFA finding that the plaintiff was not a "consumer" because she was merely prescribed the device by her doctor. *Otis-Wisher* is inapplicable to this matter, as Plaintiffs undoubtedly qualify as consumers. On the contrary, in *Elkins v. Microsoft Corp., 174 Vt. 328, 817 A.2d 9, 20 (Vt. 2002)*, the Vermont Supreme Court held that "consumers can generally sue under [the VCFA] even though they are indirect purchasers of a good or service from the defendant." Thus, direct privity of contract is not required under Vermont law and Plaintiffs may assert its claim under the VCFA.

Accordingly, Defendants' Motion to Dismiss Plaintiffs' Amended Complaint is **GRANTED WITHOUT PREJUDICE** as to Count Twenty-Six and **DENIED** as to Counts Nine, Twenty-One, and Twenty-Four.<sup>19</sup>

#### v. Reliance

Defendants assert that six of Plaintiffs' claims must be dismissed as Plaintiffs failed to adequately plead reliance.<sup>20</sup> (ECF No. 158-2 at 15-16.) These six counts all allege violations of state consumer fraud laws in which reliance [\*60] is a necessary element. On the contrary to Defendants' contention, Plaintiffs adequately pled reliance upon Defendants' alleged misrepresentations, as well as proximate causation to their damages stemming therefrom. (ECF No. 131 ¶¶ 3, 206, 259, 335.) Accordingly, Defendants' Motion to Dismiss Plaintiffs' Amended Complaint is **DENIED** as to Counts Ten, Twelve, Eighteen, Thirty-One, Thirty-Eight, and Forty-Seven.<sup>21</sup>

#### vi. Allegations of Wrongdoing

Defendants assert that five of Plaintiffs' claims must be dismissed as Plaintiffs failed to adequately plead wrongdoing within the state, as required by each respective state consumer fraud law.<sup>22</sup> (ECF No. 158-2 at 16-17.) Plaintiffs contend that Defendants argument is erroneous, as each claim concerns consumers who reside in and purchased insulin in the particular state whose laws they invoke. (ECF No. 181 at 73.) The Court agrees with Plaintiffs.

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<sup>19</sup> This Court did not provide an analysis for its decision to grant Defendants' motion to dismiss Count Twenty-Six, pleading a violation of the *Kentucky Consumer Protection Act*, as Plaintiff conceded that such Act requires direct privity of contract, which its Complaint failed to allege. (ECF No. 181 at 69.) Additionally, this Court also did not provide an analysis of Defendants' privity of contract argument as to Count Sixteen, alleging a violation of the *Washington D.C. Consumer Protection Procedures Act*, or Count Thirty, alleging a violation of the Massachusetts General Law Chapter 93(A), as both counts were previously dismissed without prejudice for lack of standing.

<sup>20</sup> Those six counts are: Count Ten (Arkansas); Count Twelve (California); Count Eighteen (Georgia); Count Thirty-One (Michigan); Count Thirty-Eight (Nevada); and Count Forty-Seven (Pennsylvania).

<sup>21</sup> Defendants' motion to dismiss each count herein is only denied as to the extent that such counts may be dismissed on other grounds.

<sup>22</sup> Those five counts are: Count Twenty-Two (Illinois); Count Thirty-Nine (New Hampshire); Count Forty-One (New York); Count Fifty-One (Tennessee); and Count Fifty-Eight (Wisconsin).

The [Illinois Consumer Fraud and Deceptive Practices Act](#), 815 Ill. Comp. Stat. § 505, *et seq.* ("[ICFA](#)") "applies only to fraudulent transactions that take place 'primarily and substantially' inside Illinois." [Barbara's Sales, Inc. v. Intel Corp., 227 Ill. 2d 45, 879 N.E.2d 910, 921, 316 Ill. Dec. 522 \(Ill. 2007\)](#) (quoting [Avery v. State Farm Mut. Auto Ins. Co., 216 Ill. 2d 100, 835 N.E.2d 801, 852, 296 Ill. Dec. 448 \(Ill. 2005\)](#)). It is evident that the purchase of insulin by a plaintiff within Illinois would satisfy this requirement, and Plaintiffs' Complaint [\*61] pled such. Therefore, Plaintiffs adequately pled wrongdoing under Illinois law.

The [New Hampshire Consumer Protection Act](#), [N.H. Rev. Stat. § 358-A:1, et seq.](#) ("[NHCPA](#)") is construed "to cover a defendant's extra-territorial acts if those acts affect travel or commerce within the state." [Harbour Capital Corp. v. Allied Capital Corp., 2009 U.S. Dist. LEXIS 63041, 2009 WL 2185449, at \\*8-9 \(D.N.H. July 22, 2009\)](#). Defendants may not "injure trade or commerce in New Hampshire but escape liability under [the NHCPA] by remaining outside the state." *Id.* As Plaintiffs have pled extra-territorial acts affecting commerce within New Hampshire, they have sufficiently pled wrongdoing under New Hampshire law.

New York courts hold that in order to allege injury under the [New York General Business Law §§ 349-350](#), the plaintiff must allege that "the transaction in which the consumer is deceived" occurred in New York. [Goshen v. Mut. Life Ins. Co. of New York, 98 N.Y.2d 314, 774 N.E.2d 1190, 1195, 746 N.Y.S.2d 858 \(N.Y. 2002\)](#). In Goshen, the plaintiff "purchased his policy and paid his premiums in Florida, through a Florida insurance agent," and the Court found that "for the purposes of [section 349](#), any deception took place in Florida, not in New York." *Id. at 1196*. On the contrary, Plaintiffs allege that the New York class members purchased the insulin analog in New York, and thus that the deception occurred in New York. Accordingly, Plaintiffs have adequately alleged wrongdoing in New York.

Finally, this Court is satisfied that [\*62] Plaintiffs have adequately pled wrongdoing in both Tennessee and Wisconsin so as to withstand Defendants' Motion to Dismiss. The [Tennessee Consumer Protection Act](#), [Tenn. Code Ann. § 47-18-101, et seq.](#) ("[TCPA](#)") is to "be liberally construed" to "protect consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce in part or wholly within the state." *Id.* at [§ 47-18-102\(2\)](#). Tennessee courts allow plaintiffs discovery "in order to tie its TCPA claims to specific transactions occurring in Tennessee." [Encore Med., L.P. v. Jay Kennedy, D.C., 2013 U.S. Dist. LEXIS 31028, 2013 WL 839838, at \\*32 \(W.D. Pa. Mar. 6, 2013\)](#). Similarly, the Wisconsin Supreme Court has held that the purpose of the [Wisconsin Deceptive Trade Practices Act](#), Wis. Stat. § 110.18 ("[DTPA](#)") "includes protecting Wisconsin residents from untrue, deceptive, or misleading representation made to induce action." [K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc., 2007 WI 70, 301 Wis. 2d 109, 732 N.W.2d 792, 802 \(Wis. 2007\)](#). This necessarily includes transactions that took place in Wisconsin, see, e.g., [In re GM LLC Ignition Switch Litig., 257 F. Supp. 3d 372, 446-60 \(S.D.N.Y. 2017\)](#), which the Complaint pleads. As such, Plaintiffs have sufficiently pled factual allegations asserting wrongdoing in Tennessee and Wisconsin so as to withstand Defendants' Motion to Dismiss.

Accordingly, Defendants' Motion to Dismiss Plaintiffs' Amended Complaint is **DENIED** as to Counts Twenty-Two, Thirty-Nine, Forty-One, and Fifty-One. [\*63]

## vii. Procedural Requirements

Finally, Defendants contend that Plaintiffs' claims under Mississippi law, Count Thirty-Four, and Ohio law, Count Forty-Four, must be dismissed because they fail to meet procedural requirements under respective state laws. (ECF No. 158-2 at 17-18.) As this Court has determined that Plaintiffs lack standing to bring its Mississippi state claim, Count Thirty-Four will not be analyzed again herein.

Defendants assert that this Court must dismiss Plaintiffs' claim pursuant to the [Ohio Consumer Sales Practice Act](#), [Ohio Rev. Code Ann. § 1345.01, et seq.](#) ("[OCSPA](#)") because the statute's section on remedies prohibits a plaintiff from bringing a class action "unless the defendant has notice that conduct substantially similar to its alleged conduct is deceptive or unconscionable as declared by either (1) a rule adopted by the Ohio Attorney General, or (2) an Ohio state court holding." [Chapman v. Tristar Prods., Inc., 2016 U.S. Dist. LEXIS 147474, 2016 WL 6216135, at \\*4 \(N.D. Ohio Oct. 25, 2016\)](#). "Ohio courts are to construe the OCSPA liberally in favor of consumers."

*Id.* Courts interpreting Ohio law have held that the notice argument "is not appropriate at the moment-to-dismiss stage; it belongs at the class certification or summary judgment stages." *Id. at 4* (citing *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 684 F. Supp. 2d 942, 948 (N.D. Ohio 2009)). As such, there are no grounds to dismiss Plaintiffs' [\*64] claims at Ohio law at this juncture. Accordingly, Defendants' Motion to Dismiss Plaintiffs' Amended Complaint is **DENIED** as to Count Forty-Four.

#### IV. CONCLUSION

For the reasons set forth above, Defendants' Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART** as set forth herein and in the accompanying order.

**Date: February 15, 2019**

*/s/ Brian R. Martinotti*

**HON. BRIAN R. MARTINOTTI**

**UNITED STATES DISTRICT JUDGE**

#### ORDER

**THIS MATTER** is opened to the Court by Defendants' Novo Nordisk Inc. (Novo) and Sanofi-Aventis U.S. LLC's ("Sanofi") (collectively "Defendants") Motion to Dismiss the putative plaintiffs' ("Plaintiffs") First Amended Complaint pursuant to *Federal Rules of Civil Procedure 8(a), 9(b),* and *12(b)(6)*. (ECF No. 158.) Having reviewed the submissions filed in connection with the motions and having held oral argument on January 17, 2019, on the limited issue of the applicability of the indirect purchaser rule to Plaintiffs' RICO claims, for the reasons set forth in the accompanying opinion and for good cause shown,

**IT IS** on this 15th day of February 2019,

**ORDERED** that Defendants' Motion to Dismiss is **DENIED** as to Counts Three, Four, Five, Six, Nine, Ten, Eleven, Twelve, Seventeen, Eighteen, Nineteen, Twenty-One, Twenty-Two, Twenty-Three, [\*65] Twenty-Four, Twenty-Five, Twenty-Eight, Thirty-One, Thirty-Two, Thirty-Three, Thirty-Six, Thirty-Seven, Forty, Forty-One, Forty-Four, Forty-Six, Fifty-Two, Fifty-Three, Fifty-Four, and Fifty-Eight; and it is further

**ORDERED** that Defendants' Motion to Dismiss is **GRANTED WITHOUT PREJUDICE** as to Counts One, Two, Seven, Eight, Thirteen, Fourteen, Fifteen, Sixteen, Twenty, Twenty-Six, Twenty-Seven, Twenty-Nine, Thirty, Thirty-Four, Thirty-Five, Thirty-Eight, Thirty-Nine, Forty-Two, Forty-Three, Forty-Five, Forty-Seven, Forty-Eight, Forty-Nine, Fifty, Fifty-One, Fifty-Five, Fifty-Six, Fifty-Seven, and, Fifty-Nine; and it is finally

**ORDERED** that Plaintiffs shall have thirty (30) days from the entry of this Order to file an Amended Complaint consistent with the Court's ruling.

*/s/ Brian R. Martinotti*

**HON. BRIAN R. MARTINOTTI**

**UNITED STATES DISTRICT JUDGE**



## **Washington v. Franciscan Health Sys.**

United States District Court for the Western District of Washington

February 19, 2019, Decided; February 19, 2019, Filed

CASE NO. C17-5690 BHS

### **Reporter**

2019 U.S. Dist. LEXIS 26185 \*; 2019-1 Trade Cas. (CCH) P80,680; 2019 WL 687830

STATE OF WASHINGTON, Plaintiff, v. FRANCISCAN HEALTH SYSTEM d/b/a CHI FRANCISCAN HEALTH; FRANCISCAN MEDICAL GROUP; THE DOCTORS CLINIC, a Professional Corporation; and WESTSOUND ORTHOPAEDICS, P.S., Defendants.

**Prior History:** [Washington v. Franciscan Health Sys., 2018 U.S. Dist. LEXIS 40188 \(W.D. Wash., Mar. 12, 2018\)](#)

## **Core Terms**

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competitor, weakened, rule of reason, affirmative defense, pleadings, Sherman Act, restraint of trade, merger

**Counsel:** [\*1] For State of Washington, Plaintiff: Erica Ann Koscher, Stephen T Fairchild, LEAD ATTORNEYS, ATTORNEY GENERAL'S OFFICE (SEA-FIFTH AVE), SEATTLE, WA.

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For Doctors Clinic The a Professional Corporation, Defendant: David Maas, Douglas C. Ross, DAVIS WRIGHT TREMAINE (SEA), SEATTLE, WA.

For Westsound Orthopaedics PS, Defendant: Deanna R White, FAIN ANDERSON VANDERHOEF ROENDAHL O'HALLORAN SPILLANE, TACOMA, WA; Herbert F Allen, Mitchell D Raup, PRO HAC VICE, POLSINELLI, WASHINGTON, DC; Matthew C Hans, PRO HAC VICE, POLSINELLI PC, ST. LOUIS, MO; Matthew Turetsky, SCHWABE WILLIAMSON & WYATT (SEA), SEATTLE, WA; Scott M O'Halloran, FAIN ANDERSON VANDERHOEF ROENDAHL O'HALLORAN SPILLANE, TACOMA, WA; Thomas McIntyre Triplett, PRO HAC VICE, SCHWABE WILLIAMSON & WYATT, PORTLAND, OR.

**Judges:** BENJAMIN H. [\*2] SETTLE, United States District Judge.

**Opinion by:** BENJAMIN H. SETTLE

## **Opinion**

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### ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

This matter comes before the Court on Plaintiff the State of Washington's ("the State") motion for partial judgment on the pleadings as to the weakened competitor defense. Dkt. 153. The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motion for the reasons stated herein.

## I. PROCEDURAL HISTORY

On August 31, 2017, the State filed a complaint against Franciscan Health System, Franciscan Medical Group (collectively "Franciscan"), The Doctors Clinic ("TDC"), and Westsound Orthopaedics. Dkt. 1. Relevant to the instant motion, the State alleged that a series of agreements between Franciscan and TDC violated [section 1](#) of the [Sherman Act](#), [15 U.S.C. § 1](#). Dkt. 1, ¶¶ 67-68. The State alleged these agreements represented a *per se* violation of [section 1](#), and in the alternative, violated [section 1](#) under the rule of reason. *Id.* ¶¶ 70-74. On March 26, 2018, TDC and Franciscan answered, asserting multiple affirmative defenses. Dkts. 88, 89. Also relevant to the instant motion, on July 24, 2018, the Court granted in part the State's [\*3] motion to strike certain affirmative defenses from TDC and Franciscan's answers. Dkts. 105, 132.

In its July 24th Order, the Court struck the first two sentences of TDC and Franciscan's tenth affirmative defense, which reads:

TDC was as of the date of the transaction with CHI Franciscan a failing company. But for the transaction, TDC would have gone out of business, and its productive assets (including its physicians) would have left the market. Alternatively, even if TDC, or some of its physicians, could have stayed in the market without the transaction, its competitive significance would have been far less than it was before the transactions.

Dkt. 132 at 17 (citing Dkt. 89 at 48). The first two sentences pertain to the affirmative "failing-company defense," which the State argued and the Court agreed is not available for *per se* claims under [section 1](#) of the Sherman Act. Dkt. 132 at 17. The Court reasoned that the failing-company defense "has been applied successfully only in the context" of [section 7](#) of the [Clayton Act](#), [15 U.S.C. § 18](#). *Id.* at 18. The Court distinguished [section 1](#) of the Sherman Act which "examines the existence of an 'unreasonable restraint on trade' under either the rule of reason or *per se* test" from "the substantial [\*4] lessening of competition presented under the Clayton Act." *Id.* The Court further reasoned that "[a]n alleged scheme of horizontal price-fixing, as alleged by the State, falls into the narrow category of arrangements that are *per se* illegal—they are not evaluated in terms of their purpose, aim or effect in the elimination of so-called competitive evils." *Id.* (quoting [United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 228, 60 S. Ct. 811, 84 L. Ed. 1129 \(1940\)](#)). The Court declined to consider the State's motion to strike the second half of the tenth affirmative defense, the "weakened competitor" defense, because the State raised relevant arguments for the first time in reply. Dkt. 132 at 19. However, the Court commented "[a]t first blush, it seems apparent that such a defense is irrelevant in this case for the same reason as the failing-company defense." *Id.*

On November 29, 2018, the State moved for partial judgment on the pleadings as to the TDC and Franciscan's weakened competitor defense. Dkt. 153. On December 10, 2018, TDC and Franciscan responded. Dkt. 159. On December 14, 2018, the State replied. Dkt. 160.

## II. FACTUAL BACKGROUND

In early September 2016, Franciscan and TDC entered into a series of agreements. The State claims that Franciscan and TDC are separate economic [\*5] entities which entered into an agreement to jointly negotiate the prices for the services they provide to the public. The State asserts that these agreements establish a horizontal price-fixing agreement that is *per se* illegal or otherwise constitutes an unreasonable restraint of trade in violation of [section 1](#) of the Sherman Act.

## III. DISCUSSION

### A. Motion for Judgment on the Pleadings

The State has moved for judgment on the pleadings on the weakened competitor affirmative defense advanced by TDC and Franciscan. "After the pleadings are closed—but early enough not to delay trial—a party may move for

judgment on the pleadings." [Fed. R. Civ. P. 12\(c\)](#). The pleadings are closed for purposes of [Rule 12\(c\)](#) once a complaint and answer have been filed. [Doe v. United States, 419 F.3d 1058, 1061 \(9th Cir. 2005\)](#). While an affirmative defense "will usually bar judgment on the pleadings" if it raises issue of fact, [Gen. Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church, 887 F.2d 228, 230 \(9th Cir. 1989\)](#), courts will grant a [Rule 12\(c\)](#) dismissal if "the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law," [Doleman v. Meiji Mut. Life Ins. Co., 727 F.2d 1480, 1482 \(9th Cir. 1984\)](#) (quoting Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1368 (1st ed. 1969)).

Here, TDC and Franciscan present two points of opposition to the State's motion: (1) they believe that in a rule [\*6] of reason analysis, they should be able to affirmatively defend on the basis that TDC was a weakened competitor, and (2) they believe the weakened competitor defense should remain available in the event the State decides to allege their conduct constituted a merger violating [section 1](#) of the Sherman Act. Dkt. 159. The Court will address the second argument first.

## 1. Merger

"[T]he 1950 amendment of Clayton Act [§ 7](#) largely superseded the Sherman Act's role" in prosecution and regulation of anticompetitive mergers. Phillip E. Areeda & Herbert E. Hovenkamp, [Antitrust Law](#) ¶ 902 (4th ed. 2018). The State's complaint alleges a horizontal agreement to restrain trade in violation of [section 1](#) of the Sherman Act. Dkt. 1. It does not allege a merger in violation of [section 1](#). *Id.* While TDC and Franciscan are likely correct that "courts apply the same [Section 7](#) standard and analysis to review merger claims brought under [Section 1](#)," Dkt. 159 at 9 (citing [United States v. Rockford Mem. Corp., 898 F.3d 1278, 1281-83 \(7th Cir.\)](#), cert. denied, 498 U.S. 920, 111 S. Ct. 295, 112 L. Ed. 2d 249 (1990)), if the State wished to allege a merger violation, it would have to amend its complaint. In the event that the Court granted a motion by the State to amend to include a merger theory, TDC and Franciscan could include any relevant affirmative defenses in their answer under [Fed. R. Civ. P. 15\(a\)\(3\)](#).

To [\*7] the extent that TDC and Franciscan argue the State's experts are evaluating the case using analytical concepts inappropriate for a restraint of trade claim under [section 1](#), that argument is beyond the scope of the instant motion, and may be addressed in a motion to exclude.

## 2. The TDC Weakened Competitor Defense

The parties agree that the weakened competitor defense would not apply to a *per se* violation of [section 1](#). Dkt. 160 at 1 (quoting Dkt. 159 at 7) ("TDC and Franciscan admit that a 'weakened competitor defense does not apply to a *per se* claim because no justifications are permitted.'"). Conduct that is not a *per se* violation of [section 1](#) may be analyzed in depth under the rule of reason or under the abbreviated "quick look" analysis. [Cal. Dental Ass'n v. F.T.C., 526 U.S. 756, 770-71, 119 S. Ct. 1604, 143 L. Ed. 2d 935 \(1999\)](#). "[M]ost antitrust claims are analyzed under a 'rule of reason,' according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." [State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 \(1997\)](#). In the rule of reason's burden-shifting analysis:

- (1) The plaintiff bears [\*8] the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market. (2) If the plaintiff meets this burden, the defendant must come forward with evidence of the restraint's procompetitive effects. (3) The plaintiff must then show that any legitimate objectives can be achieved in a substantially less restrictive manner.

*O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1069-70 (9th Cir. 2015)* (quoting *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001)).

The analysis weighs "whether the anticompetitive aspects of the challenged practice outweigh its procompetitive effects," *Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1156 (9th Cir. 2003), but "does not support a defense based on the assumption that competition itself is unreasonable," *Nat'l Soc'y of Prof. Eng'rs. v. United States*, 435 U.S. 679, 696, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978) ("Professional Engineers").

Here, the Court is not asked to decide which analysis may ultimately be appropriate in this case. Rather, the Court must resolve whether, if the agreements between TDC and Franciscan are judged under the rule of reason, an affirmative weakened competitor defense would be legally relevant.

Affirmative defenses offer legal reasons why, accepting the claims as true, the defendant is not liable. *In re Wash. Mut., Inc., Sec., Derivative & ERISA Litigation, No. 08-md-1919MJP, 2011 U.S. Dist. LEXIS 33531, 2011 WL 1158387*, at \*1 (W.D. Wash. Mar. 25, 2011). A defense which seeks to negate an element of a plaintiff's claim or to "demonstrate that [\*9] plaintiff has not met its burden of proof" is not an affirmative defense. *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002).

TDC and Franciscan's argument that they may present information about the weakened competitor defense to aid the Court's "understanding of the alleged conduct's impact on competition under the rule of reason," Dkt. 159 at 10, would not constitute an affirmative defense. The Court agrees with TDC and Franciscan that they may put forward any relevant evidence as part of their burden to show procompetitive effects justifying otherwise anticompetitive conduct if the case is judged under the rule of reason.

However, the Court agrees with the State that TDC and Franciscan have failed to cite any authority contradicting the proposition set out in the Court's July 24th Order, that restraint of trade claims under the Sherman Act are not defeated by affirmative defenses based on the competitive losses of a market participant. Dkt. 132 at 17; Dkt. 160 at 5 ("TDC and Franciscan fail to cite to a single case where a court has applied the weakened competitor defense . . . as an affirmative defense to a restraint of trade claim under the Sherman Act."). Moreover, TDC and Franciscan have not identified the elements of the defense, [\*10] or explained why this defense should be available when the Court has held the apparently similar failing-company defense is inapplicable to section 1 claims. Dkt. 132.

TDC and Franciscan cite four cases in support of the section in their response titled "A Weakened Competitor Defense Is Allowed Under the Rule of Reason." Dkt. 159 at 10-12 (citing *Bd. of Trade of City of Chi. v. United States*, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918); *United States v. General Dynamics Corp.*, 415 U.S. 486, 498, 94 S. Ct. 1186, 39 L. Ed. 2d 530 (1974); *Professional Engineers*, 435 U.S. at 692; *O'Bannon*, 802 F.3d at 1070). However, all arguments in that section assert that the weak financial condition of TDC is relevant to analysis under the rule of reason, not that a discrete weakened competitor affirmative defense exists or applies to claims under section 1. See, e.g., Dkt. 159 at 10 (citing *O'Bannon*, 802 F.3d at 1070) ("The rule of reason focuses on the net effect of the challenged conduct on the relevant market."). None of the cited authorities involve a court's application of an affirmative weakened-competitor defense to a section 1 restraint of trade case, or even discuss how such a defense would be established.

The State relies on *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1150-54 (9th Cir. 2003) in foreclosing the availability of an affirmative weakened competitor defense even under the rule of reason. Dkt. 153 at 8. While TDC and Franciscan distinguish *Freeman* as "a *per se* case not a rule of reason one," Dkt. 159 at 11, the Circuit's reasoning thoroughly analyzes [\*11] the defendant's assertion that the rule of reason should apply to the case in place of *per se* analysis, in order to make room for various procompetitive justifications the defendant presented. *Freeman*, 322 F.3d at 1150-54. While the Circuit does not explicitly discuss an affirmative weakened competitor defense, it explained:

[i]t does not matter that Fallbrook and Valley Center would have operated at a loss in a competitive environment. Their precarious financial situation may have explained their intransigence, but it does not

transform it into a viable defense. *If there is any argument the Sherman Act indisputably forecloses, it is that price fixing is necessary to save companies from losses they would suffer in a competitive market.*

*Id. at 1152 n.24* (emphasis added). The State is correct that this language leaves no opening for an affirmative defense based on competitive weakness in a *section 1* restraint of trade claim.

In sum, if the State prosecutes its claim under the rule of reason, TDC and Franciscan may present evidence relevant to carrying their burden under the rule's burden-shifting framework. However, no relief could be granted under an affirmative weakened competitor defense to a *section 1* restraint of trade claim. Because no relief [\*12] would be available, the State is entitled to judgment on the pleadings.

#### IV. ORDER

Therefore, it is hereby **ORDERED** that the State's motion for judgment on the pleadings as to the TDC weakened competitor defense, Dkt. 135, is **GRANTED**.

Dated this 19th day of February, 2019.

/s/ Benjamin H. Settle

BENJAMIN H. SETTLE

United States District Judge

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## Conn. Fine Wine & Spirits, LLC v. Seagull

United States Court of Appeals for the Second Circuit

February 1, 2018, Argued; February 20, 2019, Decided

Docket No. 17-2003-cv

### **Reporter**

916 F.3d 160 \*; 2019 U.S. App. LEXIS 4918 \*\*; 2019-2 Trade Cas. (CCH) P80,911

CONNECTICUT FINE WINE AND SPIRITS, LLC, d/b/a, TOTAL WINE & MORE, Plaintiff-Appellant, - v. - COMMISSIONER MICHELLE H. SEAGULL, DEPARTMENT OF CONSUMER PROTECTION, JOHN SUCHY, DIRECTOR, DIVISION OF LIQUOR CONTROL, Defendants-Appellees, WINE & SPIRITS WHOLESALERS OF CONNECTICUT, INC., CONNECTICUT BEER WHOLESALERS ASSOCIATION, INC., CONNECTICUT RESTAURANT ASSOCIATION, CONNECTICUT PACKAGE STORES ASSOCIATION, INC., BRESCOME BARTON, INC., Intervenors-Defendants-Appellees.\*

**Subsequent History:** Modified by [Conn. Fine Wine & Spirits, LLC v. Seagull, 2019 U.S. App. LEXIS 22448 \(2d Cir., Feb. 20, 2019\)](#)

**Prior History:** Connecticut Fine Wine and Spirits, d/b/a Total Wine & More ("Total Wine"), challenged certain provisions of Connecticut's Liquor Control Act and related regulations. Total Wine alleged that these provisions were preempted by the [Sherman Act, 15 U.S.C. § 1](#) [\*\*1]. The United States District Court for the District of Connecticut, Janet Hall, J., granted the defendants' motion to dismiss the complaint, holding, *inter alia*, that the post-and-hold provisions and the minimum-retail-price provisions of the Connecticut Liquor Control Act were hybrid restraints on trade, but that Total Wine failed to plead facts that plausibly support the conclusion that those provisions constitute *per se* violations of, and therefore were preempted by, the [Sherman Act](#). The District Court also held that Total Wine did not plausibly allege that the price discrimination provision was a hybrid restraint on trade; therefore, that provision imposes a unilateral restraint on trade that falls outside the scope of the [Sherman Act](#). We agree with the District Court that the post-and-hold, minimum-retail-price, and price-discrimination provisions are not preempted by the [Sherman Act](#). We therefore AFFIRM.

[Conn. Fine Wine & Spirits, LLC v. Harris, 255 F. Supp. 3d 355, 2017 U.S. Dist. LEXIS 86396 \(D. Conn., June 6, 2017\)](#)

## **Core Terms**

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wholesalers, provisions, prices, retailers, Wine, preempted, post-and-hold, liquor, preemption, competitors, anti trust law, unilateral, vertical, district court, minimum-retail-price, decisions, hybrid, rent, alcoholic beverage, *per se* violation, rule of reason, bottle, posted, state statute, authorizes, conspiracy, ordinance, cases, regulatory scheme, price fixing

## **LexisNexis® Headnotes**

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\* The Clerk of Court is respectfully directed to amend the official caption in this case as set forth above.

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

Antitrust & Trade Law > Consumer Protection > General Overview

### **HN1** [] **Sherman Act, Scope**

The preemption inquiry under [15 U.S.C.S. § 1](#) requires courts to apply principles similar to those employed in considering whether any state statute is preempted by a federal statute pursuant to the [Supremacy Clause](#). As in the typical preemption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes. The existence of hypothetical or potential conflict is insufficient to warrant the preemption of the state statute. A state regulatory scheme is not preempted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. A state statute is not preempted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect.

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

Antitrust & Trade Law > Consumer Protection > General Overview

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

### **HN2** [] **Sherman Act, Scope**

A party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy. In other words, for a state statute to be preempted by [15 U.S.C.S. § 1](#), the statute must bring about conduct that would require per se condemnation under [§ 1](#). A state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under [§ 1 of the Sherman Act](#) when the conduct contemplated by the statute is in all cases a per se violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.

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

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

### **HN3** [] **Sherman Act, Scope**

[Sherman Act](#) [15 U.S.C.S. § 1](#) can be violated only by collective action: unreasonable restraints of trade effected by a contract, combination, or conspiracy between separate entities.

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

Antitrust & Trade Law > Consumer Protection > General Overview

#### **[HN4](#)[] Sherman Act, Scope**

A restraint imposed unilaterally by government does not become concerted-action within the meaning of the [15 U.S.C.S. § 1](#) of the [Sherman Act](#) simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy.

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

Antitrust & Trade Law > Consumer Protection > General Overview

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

#### **[HN5](#)[] Sherman Act, Scope**

Not all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of [15 U.S.C.S. § 1](#). Certain restraints may be characterized as hybrid, in that nonmarket mechanisms merely enforce private marketing decisions. Where private actors are thus granted a degree of private regulatory power, the regulatory scheme may be attacked under [§ 1](#).

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

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

Antitrust & Trade Law > Consumer Protection > Consumer Product Safety Act > General Overview

#### **[HN6](#)[] Sherman Act, Scope**

The United States Court of Appeals for the Second Circuit has read [Rice v. Norman Williams Co., 458 U.S. 654 \(1982\)](#), and [Fisher v. City of Berkeley, California, 475 U.S. 260 \(1986\)](#), to constitute the first step in a two-step inquiry to decide whether a statute is preempted by [15 U.S.C.S. § 1](#).

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

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

#### **[HN7](#)[] Price Fixing & Restraints of Trade, Vertical Restraints**

The rule of reason, not the per se, analysis applies to all vertical restraints.

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

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

#### **[HN8](#)[] Price Fixing & Restraints of Trade, Vertical Restraints**

Vertical price restraints are to be judged by the rule of reason. Justifying the doctrinal change, case law explains that it cannot be stated with any degree of confidence that resale price maintenance always or almost always tends to restrict competition and decrease output.

Antitrust & Trade Law > Consumer Protection > General Overview

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

#### **HN9** [+] Antitrust & Trade Law, Consumer Protection

In light of [Leegin Creative Leather Prods., Inc. v. PSKS, Inc.](#), [551 U.S. 877 \(2007\)](#), the holding in [324 Liquor v. Duffy Corp.](#), [479 U.S. 335 \(1987\)](#), that minimum-retail-price provisions constitute a per se violation of antitrust laws in all cases is, necessarily, no longer good law. The need to analyze vertical pricing arrangements under the rule of reason means that [15 U.S.C.S. § 1](#) cannot preempt as per se unlawful even a statute that overtly mandates such arrangements.

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

Governments > State & Territorial Governments > Licenses

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Resale Price Maintenance

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

#### **HN10** [+] Sherman Act, Scope

Connecticut's minimum-retail-price provisions, compelling as they do only vertical pricing arrangements among private actors, are not preempted under [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Resale Price Maintenance

Governments > State & Territorial Governments > Licenses

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

#### **HN11** [+] Vertical Restraints, Resale Price Maintenance

Connecticut's provisions prohibiting price discrimination impose a unilateral restraint. They leave each wholesaler at liberty to choose the price it will charge all retailers for a product while prohibiting each from charging different prices to different retailers. Although limiting a wholesaler's range of motion, these provisions do not grant any private actor a degree of regulatory control over competition. Rather, it is a restraint imposed by government to the exclusion of private control. Such a restraint does not implicate the concerns of concerted activity animating [15 U.S.C.S. § 1](#).

916 F.3d 160, \*160L2019 U.S. App. LEXIS 4918, \*\*1

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

Governments > State & Territorial Governments > Licenses

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Resale Price Maintenance

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

#### **HN12** [blue icon] Sherman Act, Scope

The price restraint worked by [Conn. Gen. Stat. § 30-68k](#) is purely vertical in operation. It limits the ability of a wholesaler that has already charged one retailer a given price to charge another retailer a different price. Therefore, even if this provision could be viewed as a hybrid, rather than a unilateral, price-fixing provision, after Leegin [Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 \(2007\)](#), it would no longer implicate a category of conduct that remains per se unlawful. While its impact may be to harmonize prices at a retail level of beverages sold by a common wholesaler, the provision does not mandate, or even incent, collaboration among horizontal competitors. For this separate reason, it is not preempted by [15 U.S.C.S. § 1](#).

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

Antitrust & Trade Law > Consumer Protection > General Overview

#### **HN13** [blue icon] Sherman Act, Scope

A state regulatory scheme is not preempted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. Rather, a state law could be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.

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

Governments > State & Territorial Governments > Licenses

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Resale Price Maintenance

#### **HN14** [blue icon] Sherman Act, Scope

Given the participation that a post-and-hold law requires of each wholesaler in connection with the posting component, Connecticut's law, viewed as a whole, qualifies as hybrid under judicial precedent. But the United States Court of Appeals for the Second Circuit doubts that such a law mandates or authorizes concerted action among the wholesalers subject to it. Particularly as to the hold component of the law, Connecticut's prohibition on altering prices for a 30-day period is a purely negative restraint. It does not call for any private action, let alone concerted action.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

## **HN15** [Regulated Practices, Price Fixing & Restraints of Trade]

15 U.S.C.S. § 1 of the Sherman Act does not prohibit all unreasonable restraints of trade. It prohibits only restraints effected by a contract, combination, or conspiracy. Therefore, in § 1 cases, the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement. Even conscious parallel acts based on competitors' mutual recognition of shared economic interests are not in themselves unlawful. In other words, under § 1, that conscious parallel conduct can create an equally uncompetitive market to parallel conduct achieved by agreement is of no moment. The gravamen of § 1 is an agreement among competitors.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Resale Price Maintenance

Governments > State & Territorial Governments > Licenses

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

## **HN16** [Vertical Restraints, Resale Price Maintenance]

Under a post-and-hold law, there is a natural explanation, independent of any agreement or coordination among liquor wholesalers, for competitors to arrive at common monthly product prices. Such a law authorizes a wholesaler, during the four days after initial posting, to match a competitor's lower price, with such prices then held for a month. Under these circumstances, the law itself invites and facilitates conscious parallelism in pricing. It puts in public view each competing wholesaler's price quotes. And it authorizes, but it does not oblige, wholesalers during a defined window unilaterally to match (or parallel) a competitor's lower price as the held price for the coming month. Nothing about this arrangement requires, anticipates, or incents communication or collaboration among the competing wholesalers. Quite the contrary: A post-and-hold law like Connecticut's leaves a wholesaler little reason to make contact with a competitor. The separate, unilateral acts by each wholesaler of posting and matching instead are what gives rise to any synchronicity of pricing.

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Jeffrey J. Mirman, John F. **[\*\*3]** Droney, Hinckley, Allen & Snyder, LLP, Hartford, Connecticut, for Intervenor-Defendant-Appellee Brescome Barton, Inc.

**Judges:** Before: POOLER, SACK, Circuit Judges, and ENGELMAYER, \*\* District Judge.

**Opinion by:** PAUL A. ENGELMAYER

## Opinion

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[\*162] PAUL A. ENGELMAYER, *District Judge*:

Connecticut Fine Wine and Spirits, d/b/a Total Wine & More ("Total Wine") appeals from a judgment of the United States District Court for the District of Connecticut (Janet C. Hall, District Judge) dismissing its complaint against the Connecticut Department of Consumer Protection ("DCP") and the Director of the Connecticut Division of Liquor Control ("DLC"). Total Wine claimed that certain statutory and regulatory provisions that govern the distribution and sale of alcoholic beverages in Connecticut, and which often result in common retail-level pricing across the state for particular such beverages, are preempted by federal antitrust law. For the reasons that follow, we hold that these laws are not preempted. We therefore affirm.

## BACKGROUND

### A. Connecticut's Laws Regarding Alcohol Distribution and Sale

Like many other states, Connecticut heavily regulates the distribution and sale of alcoholic beverages within its borders. The state's Liquor Control [\*4] Act prohibits the sale of alcoholic beverages in a manner that fails to comply with that statute. See [Conn. Gen. Stat. § 30-74\(a\)](#).

At issue here are three sets of provisions under Connecticut statutes and regulations that bear on the price at which alcoholic beverages may lawfully be sold: "post-and-hold" provisions; minimum retail pricing provisions; and provisions prohibiting price discrimination and volume discounts.<sup>1</sup> These, in tandem, establish the method by which alcoholic beverage prices are set by the manufacturer, the wholesaler, and the retailer.

The three sets of provisions at issue are as follows:

**Post-and-hold provisions:** Connecticut's "post and hold" provisions require state-licensed manufacturers, wholesalers, and "out-of-state permittees" (together, "wholesalers") to post a "bottle price" and a "case price" each month with the DCP for each alcoholic product that the wholesaler intends to sell during the following month. (For beer, the wholesaler must post a "can price.") Posted prices are then made available to industry participants. During the four days after the posting of the prices, wholesalers may "amend" their posted prices to "match" competitors' lower prices—specifically, "to meet a lower [\*5] price posted by another wholesaler with respect to alcoholic liquor bearing the same brand or trade name." Those amended prices, however, may not be "lower than those [prices] being met." Wholesalers are obligated to "hold" their prices at the posted price (amended or not) for a month. These

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<sup>\*\*</sup> Judge Paul A. Engelmayer, of the United States District Court for the Southern District of New York, sitting by designation.

<sup>1</sup> Total Wine challenges the following provisions: (1) [section 30-63 of the Connecticut General Statutes](#) and section 30-6-B12 of the Regulations of Connecticut State Agencies (referred to here as the "post-and-hold" provisions); (2) [sections 30-68m\(a\)\(1\)](#) and [30-68m\(b\)](#) of the Connecticut General Statutes (the "minimum retail price" provisions); and (3) [sections 30-63\(b\)](#), 30-68(k), and [30-94\(b\)](#) of the Connecticut General Statutes and [section 30-6-A29\(a\) of the Regulation of Connecticut State Agencies](#) (the "price discrimination prohibition" provisions). In the ensuing discussion, the Court reproduces the central provisions.

post-and-hold provisions—variations of which are found in many states—are the heart of the Connecticut regulatory regime that Total Wine challenges.<sup>2</sup>

**[\*163] Minimum-retail-price provisions:** Connecticut's minimum-retail-price provisions require that retailers sell to customers at or above a statutorily defined "[c]ost." "Cost," however, is not defined as the retailer's actual cost. Instead, generally, a retailer's "[c]ost" for a given [\*8] alcoholic beverage, is determined by adding the posted bottle price—as set by the wholesaler—and a markup for shipping and delivery. The post-and-hold provision, because it supplies the central component of the "[c]ost" at which the retailer may sell its product, thus largely dictates the price at which Connecticut retailers must sell their alcoholic products.<sup>3</sup>

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<sup>2</sup> [Section 30-63\(c\) of the Connecticut General Statutes](#) provides:

For alcoholic liquor other than beer, each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department, on a monthly basis, the bottle, can and case price of any brand of goods offered for sale in Connecticut, which price when so posted shall be the controlling price for such manufacturer, wholesaler or out-of-state permittee for the month following such posting. On and after July 1, 2005, for beer, each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department, on a monthly basis, the bottle, can and case price, and the price per keg or barrel or fractional unit thereof for any brand of goods offered for sale in Connecticut which price when so posted shall be the controlling price for [\*6] such brand of goods offered for sale in this state for the month following such posting. Such manufacturer, wholesaler and out-of-state shipper permittee may also post additional prices for such bottle, can, case, keg or barrel or fractional unit thereof for a specified portion of the following month which prices when so posted shall be the controlling prices for such bottle, can, case, keg or barrel or fractional unit thereof for such specified portion of the following month. Notice of all manufacturer, wholesaler and out-of-state shipper permittee prices shall be given to permittee purchasers by direct mail, Internet web site or advertising in a trade publication having circulation among the retail permittees except a wholesaler permittee may give such notice by hand delivery. Price postings with the department setting forth wholesale prices to retailers shall be available for inspection during regular business hours at the offices of the department by manufacturers and wholesalers until three o'clock p.m. of the first business day after the last day for posting prices. A manufacturer or wholesaler may amend such manufacturer's or wholesaler's posted price for any month to meet a [\*7] lower price posted by another manufacturer or wholesaler with respect to alcoholic liquor bearing the same brand or trade name and of like age, vintage, quality and unit container size; provided that any such amended price posting shall be filed before three o'clock p.m. of the fourth business day after the last day for posting prices; and provided further such amended posting shall not set forth prices lower than those being met. Any manufacturer or wholesaler posting an amended price shall, at the time of posting, identify in writing the specific posting being met. On and after July 1, 2005, all wholesaler postings, other than for beer, for the following month shall be provided to retail permittees not later than the twenty-seventh day of the month prior to such posting. All wholesaler postings for beer shall be provided to retail permittees not later than the twentieth day of the month prior to such posting.

<sup>3</sup> [Section 30-68m of the Connecticut General Statutes](#) provides, in pertinent part:

(a) For the purposes of this section:

(1) "Cost" for a retail permittee means (A) for alcoholic liquor other than beer, the posted bottle price from the wholesaler plus any charge for shipping or delivery to the retail permittee's place of business paid by the retail permittee in addition to the posted price, and (B) for beer, the lowest posted price during the month in which the retail permittee is selling plus any charge for shipping or delivery to the retail permittee's place of business paid by the retail permittee in addition to the price originally paid by the retail permittee;

(b) No retail permittee shall sell alcoholic liquor at a price below his or her cost.

Relatedly, [Section 30-68m\(a\)\(3\)](#) defines "bottle price" as:

[the] price per unit of the contents of any case of alcoholic liquor, other than beer [which] shall be arrived at by dividing the case price by the number of units [\*9] or bottles making up such case price and adding to the quotient an amount that is not less than the following: A unit or bottle one-half pint or two hundred milliliters or less, two cents; a unit or bottle more than one-half pint or two hundred milliliters but not more than one pint or five hundred milliliters, four cents; and a unit or bottle greater than one pint or five hundred milliliters, eight cents.

[\*164] Plaintiffs allege that wholesalers will occasionally lower their posted case prices for a given month, without lowering posted bottle prices, during what are called "off-post" months. Although retailers buy almost exclusively by the case, their prices remain fixed by the minimum-retail-price provisions, which are keyed to bottle prices.

**Price discrimination/volume discounts:** Finally, Connecticut bans volume discounts and other forms of price discrimination. Wholesalers must sell a given product to all retailers at the same price. Wholesalers may not offer discounts to retailers who are high-volume purchasers.<sup>4</sup>

While multiple policy [\*\*11] interests have been asserted in support of these provisions, they (particularly the post-and-hold and minimum-retail-price provisions) commonly have been justified as means of guarding against escalating price wars among alcohol retailers that may lead to excessive consumption. See *Slimp v. Dep't of Liquor Control*, 239 Conn. 599, 687 A.2d 123, 129 (Conn. 1996) (noting "legislature's concern that artificial inducements to purchase liquor will result in increased consumption"); *Eder Bros. v. Wine Merchants of Conn., Inc.*, 275 Conn. 363, 880 A.2d 138, 147 (Conn. 2005) (noting that "price wars among retail dealers" for liquor "may induce persons to purchase, and therefore consume, more liquor than they would if higher prices were maintained"); *Eder Bros.*, 880 A.2d at 147-48 (noting that "the cutthroat competition" characteristic of price wars "is apt to induce the retailers to commit such infractions of the law as selling to minors and keeping open after hours in order to withstand the economic pressure"). These provisions (particularly the price-discrimination provision) have also been justified as guarding against favoritism within the liquor industry and protecting smaller retailers. See *Slimp*, 687 A.2d at 129. Unsurprisingly, countervailing arguments have also been made, including ones noting the anticompetitive nature of these price restraints.

## B. Total Wine's Complaint

Total Wine is the largest retailer [\*\*12] of wine and spirits in the United States. Headquartered in Bethesda, Maryland, Total [\*165] Wine, with its affiliates, owns and operates wine and liquor stores in 21 states.

In December 2012, Total Wine opened a retail beverage store in Norwalk, Connecticut, its first such store in the state. Since then, Total Wine has opened additional stores, in Milford, Manchester, and West Hartford, Connecticut.

On August 23, 2016, Total Wine filed suit against Jonathan Harris, the Commissioner of the DCP, and John Suchy, Director of the DLC, in their official capacities.<sup>5</sup> Seeking injunctive and declaratory relief, it brought a facial challenge to the three sets of statutory and regulatory provisions reviewed above governing the distribution and sale of alcoholic beverages in Connecticut: (1) the post-and-hold provisions, (2) the minimum-retail-price provisions, and

<sup>4</sup> *Section 30-68k of the Connecticut General Statutes* provides:

No holder of any wholesaler's permit shall ship, transport or deliver within this state or any territory therein or sell or offer for sale, to a purchaser holding a permit for [\*\*10] the sale of alcoholic liquor for on or off premises consumption, any brand of alcoholic liquor, including cordials, as defined in section 30-1, at a bottle, can or case price higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such wholesaler to any other such purchaser to which the wholesaler sells, offers for sale, ships, transports or delivers that brand of alcoholic liquor within this state.

Similarly, *Section 30-63(b) of the Connecticut General Statutes* provides:

No manufacturer, wholesaler or out-of-state shipper permittee shall discriminate in any manner in price discounts between one permittee and another on sales or purchases of alcoholic liquors bearing the same brand or trade name and of like age, size and quality, nor shall such manufacturer, wholesaler or out-of-state shipper permittee allow in any form any discount, rebate, free goods, allowance or other inducement for the purpose of making sales or purchases. Nothing in this subsection shall be construed to prohibit beer manufacturers, beer wholesalers or beer out-of-state shipper permittees from differentiating in the manner in which their products are packaged on the basis of on-site or off-site consumption.

<sup>5</sup> Michelle H. Seagull replaced Jonathan Harris as Commissioner of the DCP on May 1, 2017.

(3) the price-discrimination and volume-discount-prohibition provisions. Total Wine alleged that these provisions bring about *per se* violations of *§ 1 of the Sherman Antitrust Act, 15 U.S.C. § 1*, and so are preempted by that statute.

Total Wine's claim was that the Connecticut regulatory scheme eliminates incentives for alcoholic beverage wholesalers to compete [\*\*13] on the basis of price and invites wholesalers to maintain prices "substantially above what fair and ordinary market forces would dictate." App. at 19, Compl. ¶ 16. Total Wine further claimed that Connecticut's regulations inhibit meaningful price competition at the retail level.

Specifically, Total Wine claimed, the regulations, in two ways, bring about prices that exceed those that a competitive market would produce.

First, it argued, the post-and-hold provisions—and the opportunity they give wholesalers to match a lower price during the forthcoming month for a given product with no risk of sparking a price war—reduce any wholesaler's incentive to be the first to reduce price. The post-and-hold provisions, Total Wine argued, effectively bring about horizontal price fixing. As it put the point on appeal: "If a wholesaler were to drop its price on a particular product, its competitors would know immediately (from having seen the posted price), and would have four days to match the posted price." Appellant Br. at 8-9. Even if the wholesaler who had been the first to reduce its price still wished to set a price beneath its competitors, Total Wine noted, it would then be required to "hold the lower [\*\*14] price for an entire month—during which it would have no competitive advantage because its competitors would be charging the same price."<sup>6</sup> *Id.* at 9.

Second, Total Wine argued, Connecticut's system precludes retailers from competing on the basis of cost. Fundamentally, Total Wine noted, the minimum-retail-price provision is keyed to a definition of "[c]ost" that turns not on the retailer's actual cost but on the price charged to the retailer by the wholesaler. This, Total Wine argued, prevents a high-volume, lower-average-cost retailer such as itself from attracting customers by offering discounts enabled by its lower-cost structure. This result is exacerbated, Total Wine alleged, by a practice in which wholesalers often engage: They set high minimum bottle prices, and then lower the case prices for the product without making corresponding [\*\*166] reductions to the bottle price. While retailers (who buy almost exclusively by the case) take advantage of the reduced case price and buy larger quantities during months where the case price is lower, this, Total Wine alleged, does not benefit the consumer because retailers are required to sell the product at a margin fixed by the higher minimum bottle price, [\*\*15] which has effectively been set by the wholesaler. In this manner, Total Wine alleged, "wholesalers effectively control both retail price and retailers' profit margins," and retailers like Total Wine that wish to use their business efficiencies to reduce the prices offered to consumers are blocked from doing so. App. at 20, Compl. ¶ 17.

The end result, Total Wine alleged, is a market without meaningful price competition: "Competing wholesalers for the same brands routinely set the same bottle and case prices down to the penny, month after month, with each wholesaler exactly tracking its competitors' . . . case prices." *Id.*, Compl. ¶ 19. In other words, Total Wine argued, the regulatory scheme promotes vertical price fixing. Total Wine's complaint attached data tables reflecting that, over long periods, leading wholesalers often have charged the same amount for each alcoholic beverage product—e.g., Bombay Sapphire, Grey Goose, Jose Cuervo Gold—and have adjusted prices in lockstep. These prices, Total Wine claimed, exceed those which a competitive market would produce: Citing a study, Total Wine alleged that Connecticut's regulatory scheme "result[s] in retail prices for wine and spirits in Connecticut [\*\*16] that are as much as 24% higher than prices offered for identical products in the surrounding states." *Id.*, Compl. ¶ 18.

Finally, Total Wine alleged, the Connecticut regulatory scheme does not entail active supervision by any state agency or instrumentality. Wholesalers post and retailers charge the prices they see fit, it alleged, without any review or intervention by regulators, save where a lawsuit has been brought claiming noncompliance with the state's regulations.

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<sup>6</sup> Total Wine's claim that the Connecticut regulations promote horizontal price fixing was substantially developed in its briefs on the motion to dismiss and further refined on appeal. Its Complaint overwhelmingly focused instead on its claims as to vertical price fixing. We conclude, however, that the Complaint satisfactorily pled both theories.

### C. The Motion to Dismiss

On October 14, 2016, the defendants moved to dismiss. They were supported in this motion by five intervenors, four of which were trade associations and the fifth of which was a liquor distributor.<sup>7</sup>

On June 6, 2017, the district court, following argument, granted the motion to dismiss. See *Conn. Fine Wine & Spirits v. Harris, LLC*, 255 F. Supp. 3d 355 (D. Conn 2017). Analyzing the challenged provisions separately,<sup>8</sup> the district court applied as to each the first step in the two-step framework used to assess claims of preemption by § 1 of the Sherman Act in this Circuit.<sup>9</sup> As a threshold matter, the court inquired [\*167] whether the restraints are unilateral ("imposed by the government . . . to the exclusion of private control") and hence immune from preemption by § 1, or hybrid (imposed by [\*17] both the government and by granting "private actors a degree of regulatory control over competition" and hence capable of preemption. *Id. at 364*. Then, the court inquired whether the challenged provision brought about facially, or *per se*, unlawful restraints on trade, in which case they are preempted, or restraints that are subject to rule of reason scrutiny, in which case they are not. *Id.*

As to the post and hold restraint, the district court held that it is a hybrid restraint, but that the conduct it brings about is not *per se* unlawful, and so is subject to rule of reason analysis. *Id. at 371*. Therefore, it is not preempted. *Id.* The district court relied on *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984), in which we upheld New York State's post-and-hold provision as similarly not preempted.

As to the minimum resale price restraint, the district court held that it too was hybrid, but that it also implicated only the rule of reason, not condemnation *per se*. *Id. at 373*. The district court held that this provision imposed a vertical restraint. And, it noted, recent Supreme Court cases, in particular *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007), have held that courts are to apply rule of reason, not *per se*, analysis to vertical restraints, meaning that this provision is not facially preempted. *Id. at 378*.

Finally, [\*18] the district court held that Connecticut's provisions forbidding price discrimination amounted to a unilateral restraint on trade, imposed solely by the state and not involving private conduct. *Id.* That was because these provisions "simply prohibit[] liquor wholesalers from charging different prices to different retailers," and do not "grant[] private actors a degree of regulatory authority over competition." *Id. at 379*. Thus, it held that these provisions, too, are not preempted. *Id. at 380*.

Accordingly, the district court upheld all challenged aspects of Connecticut's alcoholic beverage regulatory regime.

On June 26, 2017, Connecticut Fine Wine appealed.

## DISCUSSION

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<sup>7</sup> These were: the Wine & Spirit Wholesalers of Connecticut ("WSWC"), the Connecticut Beer Wholesalers Association ("CBWA"), the Connecticut Restaurant Association ("CRA") and the Connecticut Package Stores Association ("CPSA") (collectively, "the trade associations"), as well as Brescome Barton, Inc. ("Brescome" and, with the trade associations, "intervenors").

<sup>8</sup> The district court stated that separate consideration of each challenged provision was required (1) under principles of federalism, (2) because each provision presented distinct analytic issues under principles of antitrust preemption, and (3) because Connecticut's general rule of statutory construction provides that the invalidity of some sections of a statute should not invalidate the statute as a whole. See *Conn. Fine Wine & Spirits*, 255 F. Supp. 3d at 366-67; *Conn. Gen. Stat. § 1-3*.

<sup>9</sup> The district court dismissed Total Wine's claims at the first step of the preemption analysis and neither the defendants nor any of the intervenors have argued that Total Wine's claims should be dismissed at the second step.

This case presents questions of preemption: Does [§ 1 of the Sherman Antitrust Act, 15 U.S.C. § 1](#), which makes illegal "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce," preempt the challenged provisions of Connecticut's Liquor Control Act?

We begin by reviewing the two key precedents that frame the [§ 1](#) preemption inquiry: [Rice v. Norman Williams Co., 458 U.S. 654, 102 S. Ct. 3294, 73 L. Ed. 2d 1042 \(1982\)](#), and [Fisher v. City of Berkeley, California, 475 U.S. 260, 106 S. Ct. 1045, 89 L. Ed. 2d 206 \(1986\)](#). Then, because the analysis differs by provision, we review serially the three sets of challenged provisions. We first address the minimum-resale-price restraint and then the prohibition on price discrimination. [\[\\*\\*19\]](#) We last address the post-and-hold provisions, which are the primary focus of plaintiffs' challenge. None of the provisions, we hold, are preempted.<sup>10</sup>

#### **[\*168] A. Principles of Preemption Under [§ 1](#): Rice and Fisher**

The Supreme Court's decisions in *Rice* and *Fisher* frame the [§ 1](#) preemption inquiry.

##### **1. Rice: The Requirement That the State Law "Mandate or Authorize," or "Place Irresistible Pressure" on Private Parties to Bring About, a *Per Se* Violation of [§ 1](#)**

In *Rice*, the Court held that [HN1](#) the preemption inquiry under [§ 1](#) requires courts to

apply principles similar to those which we employ in considering whether any state statute is pre-empted by a federal statute pursuant to the [Supremacy Clause](#). As in the typical pre-emption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes. The existence of hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute. A state regulatory scheme is not pre-empted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. A state statute is not preempted by the federal antitrust laws simply [\[\\*\\*20\]](#) because the state scheme might have an anticompetitive effect.

[458 U.S. at 659](#) (citations omitted). Rather, the Court held, [HN2](#) "[a] party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy." *Id.* In other words, for a state statute to be preempted by [§ 1](#), the statute must bring about conduct that would require *per se* condemnation under [§ 1](#):

Our decisions in this area instruct us, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under [§ 1](#) of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying [\[\\*\\*21\]](#) a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.

*Id. at 661.*

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<sup>10</sup> While we address the three areas separately here, we have also considered them in tandem. The outcome is the same: considered separately or as a whole, the provisions are not preempted. We therefore do not reach the question of which analysis would have been the right one had the difference been determinative.

Applying these principles, the *Rice* Court upheld the codes at issue: California Alcoholic Beverage Control provisions which prohibited a licensed importer from importing any brand of distilled spirits for which it was not a designated importer. These, the Court explained, would not give rise in all instances to *per se* illegal conduct. [\*Id.\* at 661-62.](#)

## **2. Fisher: The Requirement of Concerted Action**

In *Fisher*, the Court identified a related hurdle that a claim of preemption by § 1 must clear. At issue was a rent stabilization law enacted by the City of Berkeley, California, that placed strict controls on certain classes of real property rented for residential use. The ordinance required landlords to adhere to the prescribed rent ceilings; violators were subject to civil and criminal penalties. [475 U.S. at 262-63](#). A group of landlords sued the [\*169] city, arguing that the ordinance was a traditional—and *per se* invalid—form of fixing prices.

The Supreme Court rejected that argument. [HN3](#) Sherman Act § 1, it noted, can be violated only by collective action: "unreasonable restraints of trade [\*\*22] effected by a 'contract, combination . . . , or conspiracy' between separate entities." [Id. at 266](#) (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)). But, the Court held, Berkeley's unilateral imposition of rent control did not amount to agreement or "concerted action." *Id.* The Court acknowledged that, had the Berkeley landlords banded together to fix rental prices in the absence of an ordinance, their action would have been a *per se* violation of the *Sherman Act*. *Id.* But the fact that the price-fixing ordinance resulted from the city acting unilaterally, not the landlords acting concertedly, saved it from preemption:

[HN4](#) A restraint imposed unilaterally by government does not become concerted-action within the meaning of the *Sherman Act* simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy. Similarly, the mere fact that all competing property owners must comply with the same provisions of the Ordinance is not enough to establish a conspiracy among landlords. Under Berkeley's Ordinance, control over the maximum rent levels of every affected residential [\*\*23] unit has been unilaterally removed from the owners of these properties and given to the Rent Stabilization Board.

*Id. at 267*. In sum, the challenged rent control laws could exist, alongside § 1, because "the rent ceilings imposed by the Ordinance and maintained by the Rent Stabilization Board have been unilaterally imposed by government upon landlords to the exclusion of private control." [Id. at 266](#). As the Court put the point: "There is no meeting of the minds here." [Id. at 267](#).

The Supreme Court in *Fisher* was careful to limit its holding to unilateral action by a government entity. It recognized that a governmentally imposed restraint on trade that enforces private pricing decisions would be a "hybrid restraint" that fulfills the *Sherman Act's* "concerted action" requirement. The Court explained:

[HN5](#) Not all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of § 1. Certain restraints may be characterized as 'hybrid,' in that nonmarket mechanisms merely enforce private marketing decisions. See *Rice*, 458 U.S. at 665 (Stevens, J., concurring in the judgment). Where private actors are thus granted "a degree of private regulatory power," [id. at 666 n.1](#), the regulatory scheme may be attacked under [\*\*24] § 1."

[Id. at 267-68](#).

[HN6](#) We have previously read *Rice* and *Fisher* to constitute the first step in a two-step inquiry to decide whether a statute is preempted by § 1. See, e.g., *Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 223 (2d Cir. 2004).<sup>11</sup>

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<sup>11</sup> In cases in which alcoholic-beverage laws are claimed to be preempted by § 1, states have sometimes additionally defended by asserting state action immunity, which is the second step in our Circuit's two-step preemption inquiry, and immunity derived

### [\*170] B. Connecticut's Minimum-Retail-Price Provisions

The Court applies these principles, first, to the minimum-retail-price provisions. As noted, these provisions (e.g., [Conn. Gen. Stat. § 30-68m](#)) dictate the relationship between the liquor prices set by wholesalers and those set by retailers.

In [324 Liquor v. Duffy Corp.](#), [479 U.S. 335, 107 S. Ct. 720, 93 L. Ed. 2d 667 \(1987\)](#), the Supreme Court considered a similar New York statute, which "impose[d] a regime of resale price maintenance on all New York liquor retailers" and required them to charge at least 112% of the wholesaler's posted bottle price. [Id. at 337, 341](#). The Supreme Court classified the New York statute, under *Fisher*, as a hybrid restraint. [Id. at 345 n.8](#) (describing provisions as having granted "private actors . . . a degree of private regulatory power") (quoting [Fisher, 475 U.S. at 268](#)). Then, applying the *Rice* framework, the Court found the statute was "inconsistent with [§ 1](#)" because it authorized *per se* violations of [§ 1](#) under precedents that, "since the early years of national antitrust enforcement," had so treated resale price maintenance agreements. [Id. at 341](#) (quoting [Monsanto Co. v. Spray-Rite Service Corp.](#), [465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 \(1984\)](#)). Hence, the New York statute was preempted. [Id. at 343](#).

The Supreme Court's [\*25] classification in [324 Liquor](#) of the minimum-retail-price restraints as hybrid, and hence capable of preemption by [§ 1](#), binds the Court here. The New York statute there is substantively identical to the Connecticut statute here. And the hybrid classification in [324 Liquor](#) remains good law. See [Freedom Holdings, 357 F.3d at 223-24](#) (noting that [324 Liquor](#) found a hybrid arrangement based on limited private acts: "the individual determinations of each wholesaler as to what bottle price to post").

The same, however, cannot be said for the Supreme Court's application of *Rice* in [324 Liquor](#). The Court's premise, that the New York statute mandated *per se* violations of [§ 1](#), has been overtaken by a change in [antitrust law](#). In 2007, the Supreme Court, culminating a line of decisions, held that [HN7](#) rule of reason—and not *per se*—analysis applies to all vertical restraints. See [Leegin, 551 U.S. at 882](#). *Leegin* overruled [Dr. Miles Medical. Co. v. John D. Park & Sons Co.](#), [220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 \(1911\)](#), the precedent cited by [324 Liquor](#) as the fount of the doctrine that vertical price fixing arrangements are *per se* illegal. See [324 Liquor, 479 U.S. at 341](#). Henceforth, the Supreme Court stated, [HN8](#) "vertical price restraints are to be judged by the rule of reason." [Leegin, 551 U.S. at 882](#). Justifying the doctrinal change, the Court explained that "it cannot be stated with any degree of [\*26] confidence that resale price maintenance 'always or almost always tend[s] to restrict competition and decrease output,'" [id. at 894](#) (quoting [Bus. Elecs. Corp. v. Sharp Elecs. Corp.](#), [485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 \(1988\)](#)), noting that *Leegin* capped a gradual doctrinal move "away from *Dr. Miles'* strict approach," [id. at 900](#).

[HN9](#) In light of *Leegin*, [324 Liquor](#)'s holding that minimum-retail-price provisions constitute a *per se* violation of antitrust laws in all cases, [479 U.S. at 343](#), is, necessarily, no longer good law. The need to analyze vertical pricing arrangements under the rule of reason means that [§ 1](#) cannot preempt as *per se* unlawful [\*171] even a statute that overtly mandates such arrangements. See [Rice, 458 U.S. at 658](#) ("If the activity addressed by the statute . . . must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with the federal antitrust laws.").

We therefore hold that [HN10](#) Connecticut's minimum-retail-price provisions, compelling as they do only vertical pricing arrangements among private actors, are not preempted under [§ 1](#).<sup>12</sup>

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from the Twenty [First Amendment to the U.S. Constitution](#). Connecticut has not raised such defenses in connection with this appeal.

<sup>12</sup> Total Wine alternatively attempts to characterize minimum-retail-price provisions such as Connecticut's as impelling horizontal price-fixing. For the reasons given by the district court, this characterization is wrong. [Conn. Fine Wine & Spirits, 255 F. Supp. 3d at 375](#).

### C. Connecticut's Provisions Prohibiting Price Discrimination [\*\*27]

The Court next considers Connecticut's provisions prohibiting price discrimination. These provisions, as noted, require that wholesalers sell a given alcoholic product to all retailers at the same price.

For two reasons, we hold that these provisions are not preempted.

First, as the district court recognized, [HN11](#)<sup>14</sup> these provisions impose a unilateral restraint. They leave each wholesaler at liberty to choose the price it will charge all retailers for a product while prohibiting each from charging different prices to different retailers. Although limiting a wholesaler's range of motion, this provision does not grant any private actor "a degree of regulatory control over competition." [Freedom Holdings Inc. v. Cuomo](#), 624 F.3d 38, 50 (2d Cir. 2010). Rather, like the rent cap set by the Berkeley municipality in *Fisher*, it is a restraint "imposed by government . . . to the exclusion of private control." *Id.* (citing [Fisher](#), 475 U.S. at 266). Such a restraint does not implicate the concerns of concerted activity animating [§ 1](#).

Second, [HN12](#)<sup>15</sup> the price restraint worked by [§ 30-68k](#) is purely vertical in operation. It limits the ability of a wholesaler that has already charged one retailer a given price to charge another retailer a different price. Therefore, even if this provision could be viewed as a [\[\\*\\*28\]](#) hybrid, rather than a unilateral, price-fixing provision, after *Leegin*, it would no longer implicate a category of conduct that remains *per se* unlawful. While its impact may be to harmonize prices at a retail level of beverages sold by a common wholesaler, the provision does not mandate—or even incent—collaboration among horizontal competitors. For this separate reason, under [Rice](#), it is not preempted by [§ 1](#).

### D. Connecticut's Post-and-Hold Provisions

The Court finally considers the post-and-hold provisions, described above. On the question whether [§ 1](#) preempts these provisions, the parties primarily dispute whether, as the district court held, [Battipaglia](#), 745 F.2d 166, which rejected a claim that [§ 1](#) preempted a New York liquor-pricing statute, is controlling here.

#### 1. Review of *Battipaglia*

In *Battipaglia*, decided after *Rice* and before *Fisher*, a divided panel of this Court, per Judge Friendly, upheld a New York statute whose price restraint components governing the sale of liquor were strikingly similar to those at issue here. The New York law contained post-and-[\[\\*172\]](#) hold provisions that obliged wholesalers to file monthly price schedules with the state liquor authority by the fifth day of the preceding month, *Id. at 168* (citing N.Y. [\[\\*\\*29\]](#) Alco. Bev. Cont. § 101-b(3)(b)), and authorized wholesalers to amend their filed schedules "to meet lower competing prices and discounts 'provided such amended prices and discounts are not lower and discounts are not greater than those to be met,'" *id.* (quoting N.Y. Alco. Bev. Cont. Law § 101-b(4)). The New York law also contained price-discrimination and minimum-retail-price provisions that constrained sales prices at the retail level. See *id.* (citing N.Y. Alco. Bev. Cont. § 101-b(2)).

In the relevant portion of its analysis,<sup>13</sup> *Battipaglia* held that the challenged post-and-hold provisions were not preempted because they "do not compel any agreement" among wholesalers, but only individual action. [Id. at 170](#). The Court stated: "The schedules required to be filed by the wholesalers are their individual acts." *Id.* And the

<sup>13</sup> *Battipaglia* addressed two other issues not presented here. It discussed—but did not resolve—whether, if the New York law were in conflict with [§ 1](#), it was nonetheless insulated from attack by the "state action" doctrine of [Parker v. Brown](#), 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943). See [Battipaglia](#), 745 F.2d at 176-77. And it addressed whether, if the New York law were in conflict with [§ 1](#), the state's important policy interests warranted deference under § 2 of the Twenty-First Amendment. [Id. at 177-79](#) (holding that, on the case record, such deference was warranted).

*Battipaglia* plaintiffs (a liquor store owner and a wholesaler) had not alleged that "any agreement among the wholesalers" arose as a result of these laws. *Id.*

*Battipaglia* addressed and rejected two arguments the plaintiffs had made for preemption.

First, the Court distinguished *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980), which, like 324 Liquor, had held preempted a state statute that "created a resale price maintenance system for wine." *Battipaglia*, 745 F.2d at 170; see also *id. at 171* (describing California [\*\*30] statute as having forced "all persons at various levels of the chain of distribution . . . to establish identical prices fixed by the brand owner for each brand of wine" and stating that this type of "vertical control" was impermissible under § 1). In contrast, the Court stated, New York's post-and-hold provisions "plainly are not a resale price maintenance scheme." *Id. at 172*. And, the Court again noted, the New York law did not constrain wholesalers, each of which "is completely free to file whatever price schedule he desires." *Id.* As Judge Friendly put the point: "*Midcal* simply did not deal with a statute like New York's which merely requires wholesalers to post and adhere to their own unilaterally determined prices and nothing more." *Id.*

Second, the Court addressed the argument that the post-and-hold law gave rise to a *per se* violation of § 1 because (1) it "forces each wholesaler to inform other wholesaler[s] of its prices and then to adhere for a month to them (or a lowered price meeting that of a competitor filed within three days)" and (2) "if this had been done pursuant to an agreement [among wholesalers], the agreement would have constituted a violation of § 1." *Id.* Rejecting this argument, [\*\*31] the Court reiterated that § 1 "is directed only at joint action and does not prohibit independent business actions and decisions." *Id.* (internal citations omitted).

The Court then paused on the conceptual issue of whether, to be preempted by § 1, a state law must compel an actual [\*173] agreement among competitors. The Court described as "appealing" the reasoning that:

*Section 1* requires an agreement, state compulsion of individual action is the very antithesis of an agreement, and the argument that an agreement could have been inferred if the wholesalers had voluntarily done what they been compelled to do is simply too 'iffy.'

*Id. at 173*.<sup>14</sup> At the same time, the Court acknowledged "some force" to the counterargument: that "a statute compelling conduct which, in its absence, would permit the inference of an agreement unlawful under § 1 is inconsistent with that section." *Id.* In the end, the Court stated, there was no need to resolve this conceptual issue. That was because the New York law did not meet the *Rice* standard for preemption. *Id.*

*Rice*, the Court emphasized, had held that *HN13*[↑] "[a] state regulatory scheme is not pre-empted by the federal antitrust laws simply because in a hypothetical situation [\*\*32] a private party's compliance with the statute might cause him to violate the antitrust laws." *Id. at 174* (quoting *Rice*, 458 U.S. at 659). Rather, under *Rice*, a state law could be "condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute." *Id.* (quoting *Rice*, 458 U.S. at 661). New York's statute did not do that, the Court stated, because the only conduct that it compelled—"the exchange of price information" among competitors—does not "constitute a violation of the antitrust laws in all cases." *Id. at 174*. Such an exchange might or might not signify an agreement among them. See *id. at 175* ("[T]he dissemination of price information is not a *per se* violation of the *Sherman Act*." (quoting *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 113, 95 S. Ct. 2099, 45 L. Ed. 2d 41 (1975) (internal citations omitted)). That the post-and-hold law might result in common wholesaler pricing did not support inferring an agreement either, the Court stated. Absent "plus factors" signifying an agreement, "conscious parallelism" among competitors did not equate to an agreement. *Id.* (citations omitted).

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<sup>14</sup> As support for this view, the Court cited a district court decision finding against preemption and rejecting the argument that "simply because the statute compelled individual actions which, if taken pursuant to an agreement, might have constituted a violation," the statute was preempted. *Id. at 173* (quoting *United States Brewers Asso. v. Healy*, 532 F. Supp. 1312, 1329-30 (*D. Conn.*), *rev'd on other grounds*, 692 F.2d 275 (2d Cir. 1982)), aff'd, 464 U.S. 909, 104 S. Ct. 265, 78 L. Ed. 2d 248 (1983).

The *Battipaglia* Court concluded:

Section 101-b thus does not mandate [\*\*33] or authorize conduct that necessarily constitutes a violation of the antitrust laws in all cases. New York wholesalers can fulfill their obligations under the statute without either conspiring to fix prices or engaging in consciously parallel pricing. So, even more clearly, the New York law does not place irresistible pressure on a private party to violate the antitrust laws in order to comply with it. It requires only that, having announced a price independently chosen by him, the wholesaler shall stay with it for a month.

*Id.* (internal quotation marks omitted).

In dissent, Judge Winter faulted Judge Friendly's majority opinion for dwelling on the "post" component of New York's law and paying too little heed to the law's "hold" component. Were competitors to enter into an agreement to hold their prices [\*174] in place for 30 days, he observed, such a private agreement would be horizontal price fixing and *per se* illegal. See [745 F.2d at 179-80](#) (Winter, J., dissenting). The Fourth and Ninth Circuits, the only two circuit courts to address similar laws, have sided with Judge Winter. Each has emphasized that the statutory requirement of adherence to posted prices, were it adopted by private agreement, would be [\*\*34] *per se* illegal price fixing. See *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874 (9th Cir. 2008) (holding Washington provisions preempted by § 1); [Miller v. Hedlund](#), 813 F.2d 1344 (9th Cir. 1987) (holding Oregon provisions not exempt from § 1 and remanding the case to the district court for a determination whether the Twenty *First Amendment* shielded the challenged regulations); [TFWS, Inc. v. Schaefer](#), 242 F.3d 198, 210 (4th Cir. 2001) (holding Maryland provisions preempted by § 1, while reserving on whether, under the Twenty *First Amendment*, Maryland's regulatory interests with respect to alcohol trumped federal interest under the *Sherman Act*); see also 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 217, at 388-89 & nn.45-53 (4th ed. 2013) (reviewing reported decisions, including lower court decisions in each direction).

## 2. *Battipaglia* Controls Here

We find *Battipaglia* controlling authority here.

Connecticut's post-and-hold provisions are substantially identical to the New York post-and-hold provisions upheld in that case. Total Wine does not contend otherwise. Both sets of provisions required the wholesaler to set and publicly file a price that it is going to charge the retailer; both provided a brief time window in which wholesalers may match a lower price set by a competitor; and both required the wholesaler to hold that price for one month.

Further, as the above discussion reflects, [\*\*35] the Court in *Battipaglia* considered at length the § 1 preemption question in the face of similar arguments to those Total Wine makes here. The Court applied the controlling standards, from *Rice*, to these provisions. The Court held that the post-and-hold provisions did not "mandate or authorize conduct 'that necessarily constitutes a violation of the antitrust laws in all cases'" or "place[ ] irresistible pressure on a private party to violate the antitrust laws in order to comply" with it. *Id. at 175* (quoting *Rice*, 458 U.S. at 661). Those are the questions presented here.

Finally, Total Wine has not identified any later precedent of the Supreme Court or this Court that fairly calls *Battipaglia*'s vitality into question.

Total Wine argues that 324 Liquor and our decision in [Freedom Holdings](#), 357 F.3d at 223 (Winter, J.) are such precedent. A footnote in 324 Liquor suggested that a statute need not bring about an actual agreement between private parties to be preempted by § 1. See [324 Liquor](#), 479 U.S. at 345-46 n.8 (rejecting New York's defense that provisions at issue had not yielded a "contract, combination, or conspiracy in restraint of trade"). *Freedom Holdings* picked up on that footnote to suggest, in a footnote of its own, that "an actual 'contract, combination, or conspiracy' need [\*\*36] not be shown for a state statute to be preempted by the *Sherman Act*." See [357 F.3d at 223 n.17](#) (Winter, J.) (citing [324 Liquor](#), 479 U.S. at 345-46 n.8). Total Wine argues, on account of these statements, that these decisions vitiate *Battipaglia*.

For three reasons, they do not.

[\*175] First, *Freedom Holdings* itself distinguished *Battipaglia* and treated it as good law. *Freedom Holdings* recognized that, although the *Battipaglia* majority had discussed whether a state law must give rise to an actual agreement for § 1 to preempt it, *Battipaglia* ultimately did not resolve nor rule on the basis of that conceptual issue. Rather, *Battipaglia* had relied on its application of the *Rice* standard to New York's post-and-hold provision. See *id.* (recognizing that *Battipaglia* "did not reach the question" whether "a private contract, combination, or conspiracy" must be shown for *Sherman Act* preemption to occur (internal citation omitted)).

Second, to the extent that *Freedom Holdings* and *324 Liquor* opine on whether the state law at issue must give rise to an actual private agreement for there to be preemption, these cases are readily distinguished factually because they involved express or readily implied agreements. *Freedom Holdings* involved an express contract among [\*\*37] horizontal competitors—a "Master Settlement Agreement" among major tobacco manufacturers pursuant to which the challenged New York legislation had been enacted. *Freedom Holdings*, 357 F.3d at 208. Its discussion of whether the state law must give rise to such an agreement was, therefore, *dicta*. See *id. at 224* ("Even if a 'contract' among private parties is required in the first step of preemption analysis, therefore, it exists in the present matter."). As for *324 Liquor*, it addressed vertical restraints affecting a wholesaler-retailer relationship. In that context, the wholesaler and each of its retailers were in privity and necessarily had an agreement to buy from and/or sell to each another. They entered into these agreements against the backdrop (and presumably with the knowledge) of the price-fixing term that state law would supply. In fact, every Supreme Court case to hold state liquor laws preempted by § 1, has done so on the ground that these laws either mandated or authorized forms of then *per se* unlawful vertical price-fixing arrangements between wholesalers and retailers. See, e.g., *Midcal*, 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (California law mandated resale price maintenance among wholesaler and its retailers); *324 Liquor*, 479 U.S. 335, 107 S. Ct. 720, 93 L. Ed. 2d 667 (same as to New York law); [\*\*38] *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 71 S. Ct. 745, 95 L. Ed. 1035, 60 Ohio Law Abs. 81 (1951) (same as to Louisiana law per an interpretation of § 1 as amended by the now-repealed Miller-Tydings Act). Of course, as noted earlier, the application of preemption doctrine to vertical price fixing arrangements has been overtaken by *Leegin*'s removal of vertical restraints from *per se* condemnation.

Third, and finally, two post-*Battipaglia* decisions of the Supreme Court, each involving claims of horizontal price-fixing, lend support to Judge Friendly's reasoning in finding against preemption. One, *Fisher*, discussed earlier, does so by narrowing the scope of state action within § 1's preemptive reach. The other, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), does so by underscoring the limited scope of private conduct capable of *per se* violating § 1.

*Fisher*, as noted, upheld Berkeley's rental-cap ordinance in the face of a § 1 preemption claim that it brought about horizontal price fixing. The Supreme Court recognized that "[h]ad the owners of residential rental property in Berkeley voluntarily banded together to stabilize rents in the city," that concerted activity would have worked a *per se* violation of § 1. *Fisher*, 475 U.S. at 266. But, the Court emphasized, more was required. There needed to be concerted action. "A restraint imposed unilaterally by government does [\*\*39] not become concerted-action [\*176] within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law." *Id. at 267*. "[T]he mere fact that all competing property owners must comply with the same provisions of the Ordinance is not enough to establish a conspiracy among landlords." *Id.*

This requirement is significant here. We do not take issue with the holding of the district court here that, [HN14](#) given the participation that a post-and-hold law requires of each wholesaler in connection with the posting component, Connecticut's law, viewed as a whole, qualifies as hybrid under *Fisher*.<sup>15</sup> But we doubt that such a law mandates or authorizes "concerted action" among the wholesalers subject to it. Particularly as to the "hold" component of the law that was the basis of the *Battipaglia* dissent, Connecticut's prohibition on altering prices for a

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<sup>15</sup> In finding that the statute grants private actors "a degree of private regulatory power" so as to qualify as hybrid, *Fisher*, 475 U.S. at 268, the district court relied on *324 Liquor*, which had held hybrid a resale-price maintenance law with similar price-posting features. See *Conn. Fine Wines & Spirits*, 255 F. Supp. 3d at 369.

30-day period is a purely negative restraint. It does not call for any private action, let alone concerted action. See *Hertz Corp. v. City of New York*, 1 F.3d 121, 127 (2d Cir. 1993) (finding hybrid, but upholding, city statute that "eliminate[d] an element of price competition" among rental-car industry competitors); cf. *Flying J, Inc. v. van Hollen*, 621 F.3d 658, 662–63 (7th Cir. 2010) ("[I]t is only when a state law mandates or authorizes [\*\*40] collusive conduct that it is preempted by federal antitrust law." (citing *Fisher*, 475 U.S. at 265)). *Fisher's* emphasis on the need for concerted action reinforces that Judge Friendly was right both to focus on the posting, rather than the holding, component of New York's post-and-hold law, and to find the law non-preempted.

As to *Twombly*, although it is more commonly cited for its articulation of pleading standards, the Court in its substantive discussion homed in on the discrete evil prohibited by § 1. [HN15](#) [↑] "§ 1 of the Sherman Act does not prohibit [all] unreasonable restraints of trade." *Twombly*, 550 U.S. at 553. It prohibits "only restraints *effected by a contract, combination, or conspiracy*." *Id.* (emphasis added). The Court explained, therefore, that in § 1 cases, "[t]he crucial question is whether the challenged anticompetitive conduct stem[s] from independent decision or from an agreement." *Id.* (internal citations omitted). Even conscious parallel acts based on competitors' mutual recognition of "shared economic interests" are not "in [themselves] unlawful." *Id. at 553–54* (quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)); see also *United States v. Apple, Inc.*, 791 F.3d 290, 315 (2d Cir. 2015) ("[P]arallel behavior that does not result from an agreement is not unlawful even if it is anticompetitive."). In other words, under § 1, that conscious [\*\*41] parallel conduct can create an equally uncompetitive market to parallel conduct achieved by agreement is of no moment. The gravamen of § 1 is an agreement among competitors.

On this basis, *Twombly* upheld the dismissal of a complaint that alleged consciously parallel decisions among recently deregulated telecommunications carriers not to compete in one another's (horizontal) regional markets. The complaint had not alleged actual agreement among the carriers, and its allegations were consistent with "natural" and "unilateral" behavior by each carrier, as each had good reason to appreciate that its self-interest lay [\*177] in forebearing from initiating competition. See *550 U.S. at 564, 566*; see also *id. at 568* ("[The carriers] doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.")

*Twombly's* reasoning resonates here because, [HN16](#) [↑] under a post-and-hold law, there is a "natural" explanation—*independent of any agreement or coordination among liquor wholesalers*—for these competitors to arrive at common monthly [\*\*42] product prices. Such a law authorizes a wholesaler, during the four days after initial posting, to match a competitor's lower price, with such prices then held for a month. Under these circumstances, the law itself invites and facilitates conscious parallelism in pricing. It puts in public view each competing wholesaler's price quotes. And it authorizes, but it does not oblige, wholesalers during a defined window unilaterally to match (or parallel) a competitor's lower price as the "held" price for the coming month. Nothing about this arrangement requires, anticipates, or incents communication or collaboration among the competing wholesalers. Quite the contrary: A post-and-hold law like Connecticut's leaves a wholesaler little reason to make contact with a competitor. The separate, unilateral acts by each wholesaler of posting and matching instead are what gives rise to any synchronicity of pricing. To mirror *Twombly*: "[A] natural explanation for the noncompetition alleged," *id. at 568*, is that the state-regulated wholesalers are independently making pricing decisions within a framework aimed at avoiding price wars that invites them, before being held to a price for a month, to match that of [\*\*43] their competitors. A post-and-hold law, therefore, does not implicate the evil against which § 1 guards: an agreement to unreasonably restrain trade. It would make little sense to preempt a state statute which facilitates parallel conduct that parties can legally undertake on their own under § 1.

Under these circumstances, we do not find reason to conclude that *Battipaglia* has been, *sub silentio*, overruled. If anything, its reasoning has been fortified by intervening decisions like *Fisher* and *Twombly*. *Battipaglia* therefore controls Total Wine's challenge to Connecticut's post-and-hold provisions. See *United States v. Moore*, 949 F.2d 68, 71 (2d Cir. 1991) (prior opinions of a Second Circuit panel bind future panels "in the absence of a change in the law by higher authority" or a ruling by the en banc Court). Any application to revisit *Battipaglia* is beyond this panel's authority. *Battipaglia* remains good—and persuasive—law.

## CONCLUSION

For the reasons above, we affirm the decision below. We hold that the challenged provisions of Connecticut law governing liquor pricing are not preempted by [§ 1](#) of the Sherman Act.

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## Conn. Fine Wine & Spirits, LLC v. Seagull

United States Court of Appeals for the Second Circuit

February 1, 2018, Argued; February 20, 2019, Decided

Docket No. 17-2003-cv

### **Reporter**

932 F.3d 22 \*; 2019 U.S. App. LEXIS 22448 \*\*

CONNECTICUT FINE WINE AND SPIRITS, LLC, d/b/a, TOTAL WINE & MORE, Plaintiff-Appellant, - v. - COMMISSIONER MICHELLE H. SEAGULL, DEPARTMENT OF CONSUMER PROTECTION, JOHN SUCHY, DIRECTOR, DIVISION OF LIQUOR CONTROL, Defendants-Appellees, WINE & SPIRITS WHOLESALERS OF CONNECTICUT, INC., CONNECTICUT BEER WHOLESALERS ASSOCIATION, INC., CONNECTICUT RESTAURANT ASSOCIATION, CONNECTICUT PACKAGE STORES ASSOCIATION, INC., BRESCOME BARTON, INC., Intervenors-Defendants-Appellees.\*

**Subsequent History:** [\*\*1] Amended: July 29, 2019.

Rehearing denied by, En banc [Conn. Fine Wine & Spirits, LLC v. Seagull, 936 F.3d 119, 2019 U.S. App. LEXIS 27000 \(2d Cir. Conn., Sept. 6, 2019\)](#)

**Prior History:** Connecticut Fine Wine and Spirits, d/b/a Total Wine & More ("Total Wine"), challenged certain provisions of *Connecticut's Liquor Control Act* and related regulations. Total Wine alleged that these provisions were preempted by the [Sherman Act, 15 U.S.C. § 1](#). The United States District Court for the District of Connecticut, Janet Hall, J., granted the defendants' motion to dismiss the complaint, holding, *inter alia*, that the post-and-hold provisions and the minimum-retail-price provisions of the Connecticut Liquor Control Act were hybrid restraints on trade, but that Total Wine failed to plead facts that plausibly support the conclusion that those provisions constitute *per se* violations of, and therefore were preempted by, the [Sherman Act](#). The District Court also held that Total Wine did not plausibly allege that the price discrimination provision was a hybrid restraint on trade; therefore, that provision imposes a unilateral restraint on trade that falls outside the scope of the [Sherman Act](#). We agree with the District Court that the post-and-hold, minimum-retail-price, and price-discrimination provisions are not preempted by the [Sherman Act](#). We therefore AFFIRM.

[Conn. Fine Wine & Spirits, LLC v. Seagull, 916 F.3d 160, 2019 U.S. App. LEXIS 4918 \(2d Cir., Feb. 20, 2019\)](#)

[Conn. Fine Wine & Spirits, LLC v. Harris, 255 F. Supp. 3d 355, 2017 U.S. Dist. LEXIS 86396 \(D. Conn., June 6, 2017\)](#)

## **Core Terms**

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wholesalers, provisions, prices, retailers, Wine, preempted, post-and-hold, liquor, preemption, competitors, anti trust law, unilateral, vertical, district court, minimum-retail-price, decisions, hybrid, rent, alcoholic beverage, *per se* violation, rule of reason, bottle, posted, state statute, authorizes, conspiracy, ordinance, cases, regulatory scheme, price fixing

## **LexisNexis® Headnotes**

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\* The Clerk of Court is respectfully directed to amend the official caption in this case as set forth above.

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

Constitutional Law > Supremacy Clause > Federal Preemption

Antitrust & Trade Law > Sherman Act

#### **HN1** [down arrow] **Per Se Rule & Rule of Reason, Per Se Violations**

The preemption inquiry under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), requires courts to apply principles similar to those which the court employ in considering whether any state statute is preempted by a federal statute pursuant to the [Supremacy Clause](#). As in the typical preemption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes. The existence of hypothetical or potential conflict is insufficient to warrant the preemption of the state statute. A state regulatory scheme is not preempted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. A state statute is not preempted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect. In other words, for a state statute to be preempted by [§ 1](#), the statute must bring about conduct that would require per se condemnation under [§ 1](#).

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

Constitutional Law > Supremacy Clause > Federal Preemption

Antitrust & Trade Law > Sherman Act

#### **HN2** [down arrow] **Per Se Rule & Rule of Reason, Per Se Violations**

A state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), when the conduct contemplated by the statute is in all cases a per se violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.

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

Antitrust & Trade Law > Sherman Act

#### **HN3** [down arrow] **Regulated Practices, Price Fixing & Restraints of Trade**

[Section 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), can be violated only by collective action: unreasonable restraints of trade effected by a contract, combination., or conspiracy between separate entities.

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

Antitrust & Trade Law > Sherman Act

#### **[HN4](#) [↓] Regulated Practices, Price Fixing & Restraints of Trade**

A restraint imposed unilaterally by government does not become concerted-action within the meaning of the [Sherman Act](#) simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy.

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

Antitrust & Trade Law > Sherman Act

#### **[HN5](#) [↓] Regulated Practices, Price Fixing & Restraints of Trade**

Not all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#). Certain restraints may be characterized as "hybrid," in that nonmarket mechanisms merely enforce private marketing decisions. Where private actors are thus granted a degree of private regulatory power, the regulatory scheme may be attacked under [§ 1](#).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Constitutional Law > Supremacy Clause > Federal Preemption

Antitrust & Trade Law > Sherman Act

#### **[HN6](#) [↓] Vertical Restraints, Price Fixing**

With respect to the distribution and sale of alcoholic beverages, Connecticut's minimum-retail-price provisions, compelling as they do only vertical pricing arrangements among private actors, are not preempted under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Regulated Practices > Price Discrimination

Constitutional Law > Supremacy Clause > Federal Preemption

Antitrust & Trade Law > Sherman Act

#### **[HN7](#) [↓] Regulated Practices, Price Discrimination**

With respect to the distribution and sale of alcoholic beverages, Connecticut's provisions prohibiting price discrimination are not preempted under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Regulated Practices > Price Discrimination

Constitutional Law > Supremacy Clause > Federal Preemption

Antitrust & Trade Law > Sherman Act

#### **HN8** Regulated Practices, Price Discrimination

The price restraint worked by [Conn. Gen. Stat. Ann. § 30-68k](#) is purely vertical in operation. It limits the ability of a wholesaler that has already charged one retailer a given price to charge another retailer a different price. Therefore, even if this provision could be viewed as a hybrid, rather than a unilateral, price-fixing provision, it would no longer implicate a category of conduct that remains per se unlawful. While its impact may be to harmonize prices at a retail level of beverages sold by a common wholesaler, the provision does not mandate - or even incent - collaboration among horizontal competitors. For this reason, it is not preempted by [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act

Constitutional Law > Supremacy Clause > Federal Preemption

#### **HN9** Antitrust & Trade Law, Sherman Act

A state regulatory scheme is not preempted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. Rather, a state law may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.

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

Antitrust & Trade Law > Sherman Act

#### **HN10** Regulated Practices, Price Fixing & Restraints of Trade

[Section 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), does not prohibit all unreasonable restraints of trade. It prohibits only restraints effected by a contract, combination, or conspiracy. In [§ 1](#) cases, the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement. Even conscious parallel acts based on competitors' mutual recognition of shared economic interests are not in themselves unlawful. In other words, under [§ 1](#), that conscious parallel conduct can create an equally uncompetitive market to parallel conduct achieved by agreement is of no moment. The gravamen of [§ 1](#) is an agreement among competitors.

Governments > Courts > Judicial Precedent

#### **HN11** Courts, Judicial Precedent

Prior opinions of a Second Circuit panel bind future panels in the absence of a change in the law by higher authority or a ruling by the en banc court.

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**Judges:** Before: POOLER, SACK, Circuit Judges, and ENGELMAYER, \*\* District Judge.

**Opinion by:** PAUL A. ENGELMAYER

## Opinion

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[\*24] PAUL A. ENGELMAYER, *District Judge*:

Connecticut Fine Wine and Spirits, d/b/a Total Wine & More ("Total Wine") appeals from a judgment of the United States District Court for the District of Connecticut (Janet C. Hall, District Judge) dismissing its complaint against the Connecticut Department of Consumer Protection ("DCP") and the Director of the Connecticut Division of Liquor Control ("DLC"). Total Wine claimed that certain statutory and regulatory provisions that govern the distribution and sale of alcoholic beverages in Connecticut, and which often result in common retail-level pricing across the state for particular such beverages, are preempted by federal antitrust law. For the reasons that follow, we hold that these laws are not preempted. We therefore affirm.

## BACKGROUND

### A. Connecticut's Laws Regarding Alcohol Distribution and Sale

Like many other states, Connecticut heavily regulates the distribution and sale of alcoholic beverages within its borders. The state's [\*\*4] Liquor Control Act prohibits the sale of alcoholic beverages in a manner that fails to comply with that statute. See Conn. Gen. Stat. § 30-74(a).

At issue here are three sets of provisions under Connecticut statutes and regulations that bear on the price at which alcoholic beverages may lawfully be sold: "post-and-hold" provisions; minimum retail pricing provisions; and provisions prohibiting price discrimination and volume discounts.<sup>1</sup> These, in tandem, establish the method by which alcoholic beverage prices are set by the manufacturer, the wholesaler, and the retailer.

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<sup>\*\*</sup> Judge Paul A. Engelmayer, of the United States District Court for the Southern District of New York, sitting by designation.

<sup>1</sup> Total Wine challenges the following provisions: (1) section 30-63 of the Connecticut General Statutes and section 30-6-B12 of the Regulations of Connecticut State Agencies (referred to here as the "post-and-hold" provisions); (2) sections 30-68m(a)(1) and 30-68m(b) of the Connecticut General Statutes (the "minimum retail price" provisions); and (3) sections 30-63(b), 30-68k, and 30-94(b) of the Connecticut General Statutes and section 30-6-A29(a) of the Regulation of Connecticut State Agencies (the "price discrimination prohibition" provisions). In the ensuing discussion, the Court reproduces the central provisions.

The three sets of provisions at issue are as follows:

**Post-and-hold provisions:** Connecticut's "post and hold" provisions require state-licensed manufacturers, wholesalers, and "out-of-state permittees" (together, "wholesalers") to post a "bottle price" and a "case price" each month with the DCP for each alcoholic product that the wholesaler intends to sell during the following month. (For beer, the wholesaler must post a "can price.") Posted prices are then made available to industry participants. During the four days after the posting of the prices, wholesalers may "amend" their posted prices to "match" competitors' lower prices—specifically, "to [\*\*5] meet a lower price posted by another wholesaler with respect to alcoholic liquor bearing the same brand or trade name." Those amended prices, however, may not be "lower than those [prices] being met." Wholesalers are obligated to "hold" their prices at the posted price (amended or not) for a month. These post-and-hold provisions—variations of which are found in many states—are the heart of the Connecticut [\*25] regulatory regime that Total Wine challenges.<sup>2</sup>

**Minimum-retail-price provisions:** Connecticut's minimum-retail-price provisions require that retailers sell to customers at or above a statutorily defined "[c]ost." "Cost," however, is not defined as the retailer's actual cost. Instead, generally, a retailer's "[c]ost" [\*\*8] for a given alcoholic beverage, is determined by adding the posted bottle price—as set by the wholesaler—and a markup for shipping and delivery. The post-and-hold provision, because it supplies the central component of the "[c]ost" at which the retailer may sell its product, thus largely dictates the price at which Connecticut retailers must sell their alcoholic products.<sup>3</sup>

<sup>2</sup> [Section 30-63\(c\) of the Connecticut General Statutes](#) provides:

For alcoholic liquor other than beer, each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department, on a monthly basis, the bottle, can and case price of any brand of goods offered for sale in Connecticut, which price when so posted shall be the controlling price for such manufacturer, wholesaler or out-of-state permittee for the month following such posting. On and after July 1, 2005, for beer, each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department, on a monthly basis, the bottle, can and case price, and the price per keg or barrel or fractional unit thereof for any brand of goods offered for sale in Connecticut which price when so posted shall be the controlling [\*\*6] price for such brand of goods offered for sale in this state for the month following such posting. Such manufacturer, wholesaler and out-of-state shipper permittee may also post additional prices for such bottle, can, case, keg or barrel or fractional unit thereof for a specified portion of the following month which prices when so posted shall be the controlling prices for such bottle, can, case, keg or barrel or fractional unit thereof for such specified portion of the following month. Notice of all manufacturer, wholesaler and out-of-state shipper permittee prices shall be given to permittee purchasers by direct mail, Internet web site or advertising in a trade publication having circulation among the retail permittees except a wholesaler permittee may give such notice by hand delivery. Price postings with the department setting forth wholesale prices to retailers shall be available for inspection during regular business hours at the offices of the department by manufacturers and wholesalers until three o'clock p.m. of the first business day after the last day for posting prices. A manufacturer or wholesaler may amend such manufacturer's or wholesaler's posted price for any month [\*\*7] to meet a lower price posted by another manufacturer or wholesaler with respect to alcoholic liquor bearing the same brand or trade name and of like age, vintage, quality and unit container size; provided that any such amended price posting shall be filed before three o'clock p.m. of the fourth business day after the last day for posting prices; and provided further such amended posting shall not set forth prices lower than those being met. Any manufacturer or wholesaler posting an amended price shall, at the time of posting, identify in writing the specific posting being met. On and after July 1, 2005, all wholesaler postings, other than for beer, for the following month shall be provided to retail permittees not later than the twenty-seventh day of the month prior to such posting. All wholesaler postings for beer shall be provided to retail permittees not later than the twentieth day of the month prior to such posting.

<sup>3</sup> [Section 30-68m of the Connecticut General Statutes](#) provides, in pertinent part:

(a) For the purposes of this section:

(1) "Cost" for a retail permittee means (A) for alcoholic liquor other than beer, the posted bottle price from the wholesaler plus any charge for shipping or delivery to the retail permittee's place of business paid by the retail permittee in addition to the posted price, and (B) for beer, the lowest posted price during the month in which the retail permittee is selling plus any charge for shipping or delivery to the retail permittee's place of business paid by the retail permittee in addition to the price originally paid by the retail permittee;

[\*26] Plaintiffs allege that wholesalers will occasionally lower their posted case prices for a given month, without lowering posted bottle prices, during what are called "off-post" months. Although retailers buy almost exclusively by the case, their prices remain fixed by the minimum-retail-price provisions, which are keyed to bottle prices.

**Price discrimination/volume discounts:** Finally, Connecticut bans volume discounts and other forms of price discrimination. Wholesalers must sell a given product to all retailers at the same price. Wholesalers may not offer discounts to retailers who are high-volume purchasers.<sup>4</sup>

While multiple [\*\*11] policy interests have been asserted in support of these provisions, they (particularly the post-and-hold and minimum-retail-price provisions) commonly have been justified as means of guarding against escalating price wars among alcohol retailers that may lead to excessive consumption. See [Slimp v. Dep't of Liquor Control, 239 Conn. 599, 687 A.2d 123, 129 \(Conn. 1996\)](#) (noting "legislature's concern that artificial inducements to purchase liquor will result in increased consumption"); [Eder Bros. v. Wine Merchants of Conn., Inc., 880 A.2d 138, 147, 275 Conn. 363 \(Conn. 2005\)](#) (noting that "price wars among retail dealers" for liquor "may induce persons to purchase, and therefore consume, more liquor than they would if higher prices were maintained"); [Eder Bros., 880 A.2d at 147-48](#) (noting that "the cutthroat competition" characteristic of price wars "is apt to induce the retailers to commit such infractions of the law as selling to minors and keeping open after hours in order to withstand the economic pressure"). These provisions (particularly the price-discrimination provision) have also been justified as guarding against favoritism within the liquor industry and protecting smaller retailers. See [Slimp, 687 A.2d at 129](#). Unsurprisingly, countervailing arguments have also been made, including ones noting the anti-competitive nature of these price restraints.

## [\*27] B. Total Wine's Complaint

Total Wine is the largest [\*\*12] retailer of wine and spirits in the United States. Headquartered in Bethesda, Maryland, Total Wine, with its affiliates, owns and operates wine and liquor stores in 21 states.

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(b) No retail permittee shall sell alcoholic liquor at a price below his or her cost.

Relatedly, [Section 30-68m\(a\)\(3\)](#) defines "bottle price" as:

[the] price per unit of the contents of any case of alcoholic liquor, other than beer [which] shall be arrived at by dividing the case price by the number [\*\*9] of units or bottles making up such case price and adding to the quotient an amount that is not less than the following: A unit or bottle one-half pint or two hundred milliliters or less, two cents; a unit or bottle more than one-half pint or two hundred milliliters but not more than one pint or five hundred milliliters, four cents; and a unit or bottle greater than one pint or five hundred milliliters, eight cents.

<sup>4</sup> [Section 30-68k of the Connecticut General Statutes](#) provides:

No holder of any wholesaler's permit shall ship, transport or deliver within this state or any territory therein or sell or offer for sale, to a purchaser holding a permit [\*\*10] for the sale of alcoholic liquor for on or off premises consumption, any brand of alcoholic liquor, including cordials, as defined in section 30-1, at a bottle, can or case price higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such wholesaler to any other such purchaser to which the wholesaler sells, offers for sale, ships, transports or delivers that brand of alcoholic liquor within this state.

Similarly, [Section 30-63\(b\) of the Connecticut General Statutes](#) provides:

No manufacturer, wholesaler or out-of-state shipper permittee shall discriminate in any manner in price discounts between one permittee and another on sales or purchases of alcoholic liquors bearing the same brand or trade name and of like age, size and quality, nor shall such manufacturer, wholesaler or out-of-state shipper permittee allow in any form any discount, rebate, free goods, allowance or other inducement for the purpose of making sales or purchases. Nothing in this subsection shall be construed to prohibit beer manufacturers, beer wholesalers or beer out-of-state shipper permittees from differentiating in the manner in which their products are packaged on the basis of on-site or off-site consumption.

In December 2012, Total Wine opened a retail beverage store in Norwalk, Connecticut, its first such store in the state. Since then, Total Wine has opened additional stores, in Milford, Manchester, and West Hartford, Connecticut.

On August 23, 2016, Total Wine filed suit against Jonathan Harris, the Commissioner of the DCP, and John Suchy, Director of the DLC, in their official capacities.<sup>5</sup> Seeking injunctive and declaratory relief, it brought a facial challenge to the three sets of statutory and regulatory provisions reviewed above governing the distribution and sale of alcoholic beverages in Connecticut: (1) the post-and-hold provisions, (2) the minimum-retail-price provisions, and (3) the price-discrimination and volume-discount-prohibition provisions. Total Wine alleged that these provisions bring about *per se* violations of [§ 1](#) of the Sherman Antitrust Act, [15 U.S.C. § 1](#), and so are preempted by that statute.

Total Wine's claim was that the Connecticut regulatory scheme eliminates incentives for alcoholic beverage wholesalers [\[\\*\\*13\]](#) to compete on the basis of price and invites wholesalers to maintain prices "substantially above what fair and ordinary market forces would dictate." App. at 19, Compl. ¶ 16. Total Wine further claimed that Connecticut's regulations inhibit meaningful price competition at the retail level.

Specifically, Total Wine claimed, the regulations, in two ways, bring about prices that exceed those that a competitive market would produce.

First, it argued, the post-and-hold provisions—and the opportunity they give wholesalers to match a lower price during the forthcoming month for a given product with no risk of sparking a price war—reduce any wholesaler's incentive to be the first to reduce price. The post-and-hold provisions, Total Wine argued, effectively bring about horizontal price fixing. As it put the point on appeal: "If a wholesaler were to drop its price on a particular product, its competitors would know immediately (from having seen the posted price), and would have four days to match the posted price." Appellant Br. at 8-9. Even if the wholesaler who had been the first to reduce its price still wished to set a price beneath its competitors, Total Wine noted, it would then be required to "hold [\[\\*\\*14\]](#) the lower price for an entire month—during which it would have no competitive advantage because its competitors would be charging the same price."<sup>6</sup> *Id.* at 9.

Second, Total Wine argued, Connecticut's system precludes retailers from competing on the basis of cost. Fundamentally, Total Wine noted, the minimum-retail-price provision is keyed to a definition of "[c]ost" that turns not on the retailer's actual cost but on the price charged to the retailer by the wholesaler. This, Total Wine argued, prevents a high-volume, lower-average-cost retailer such as itself from attracting customers by offering discounts enabled by its lower-cost structure. This result is exacerbated, Total Wine alleged, [\[\\*28\]](#) by a practice in which wholesalers often engage: They set high minimum bottle prices, and then lower the case prices for the product without making corresponding reductions to the bottle price. While retailers (who buy almost exclusively by the case) take advantage of the reduced case price and buy larger quantities during months where the case price is lower, this, Total Wine alleged, does not benefit the consumer because retailers are required to sell the product at a margin fixed by the higher minimum bottle [\[\\*\\*15\]](#) price, which has effectively been set by the wholesaler. In this manner, Total Wine alleged, "wholesalers effectively control both retail price and retailers' profit margins," and retailers like Total Wine that wish to use their business efficiencies to reduce the prices offered to consumers are blocked from doing so. App. at 20, Compl. ¶ 17.

The end result, Total Wine alleged, is a market without meaningful price competition: "Competing wholesalers for the same brands routinely set the same bottle and case prices down to the penny, month after month, with each wholesaler exactly tracking its competitors' . . . case prices." *Id.*, Compl. ¶ 19. In other words, Total Wine argued, the regulatory scheme promotes vertical price fixing. Total Wine's complaint attached data tables reflecting that, over long periods, leading wholesalers often have charged the same amount for each alcoholic beverage product—

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<sup>5</sup> Michelle H. Seagull replaced Jonathan Harris as Commissioner of the DCP on May 1, 2017.

<sup>6</sup> Total Wine's claim that the Connecticut regulations promote horizontal price fixing was substantially developed in its briefs on the motion to dismiss and further refined on appeal. Its Complaint overwhelmingly focused instead on its claims as to vertical price fixing. We conclude, however, that the Complaint satisfactorily pled both theories.

e.g., Bombay Sapphire, Grey Goose, Jose Cuervo Gold—and have adjusted prices in lockstep. These prices, Total Wine claimed, exceed those which a competitive market would produce: Citing a study, Total Wine alleged that Connecticut's regulatory scheme "result[s] in retail prices for wine and spirits [\*\*16] in Connecticut that are as much as 24% higher than prices offered for identical products in the surrounding states." *Id.*, Compl. ¶ 18.

Finally, Total Wine alleged, the Connecticut regulatory scheme does not entail active supervision by any state agency or instrumentality. Wholesalers post and retailers charge the prices they see fit, it alleged, without any review or intervention by regulators, save where a lawsuit has been brought claiming noncompliance with the state's regulations.

### C. The Motion to Dismiss

On October 14, 2016, the defendants moved to dismiss. They were supported in this motion by five intervenors, four of which were trade associations and the fifth of which was a liquor distributor.<sup>7</sup>

On June 6, 2017, the district court, following argument, granted the motion to dismiss. See *Conn. Fine Wine & Spirits v. Harris, LLC*, 255 F. Supp. 3d 355 (D. Conn 2017). Analyzing the challenged provisions separately,<sup>8</sup> the district court applied as to each the first step in the two-step framework used to assess claims of preemption by § 1 of the Sherman Act in [\*29] this Circuit.<sup>9</sup> As a threshold matter, the court inquired whether the restraints are unilateral ("imposed by the government . . . to the exclusion of private control") and hence immune from preemption by § 1, or hybrid [\*\*17] (imposed by both the government and by granting "private actors a degree of regulatory control over competition" and hence capable of preemption. *Id. at 364*). Then, the court inquired whether the challenged provision brought about facially, or *per se*, unlawful restraints on trade, in which case they are preempted, or restraints that are subject to rule of reason scrutiny, in which case they are not. *Id.*

As to the post and hold restraint, the district court held that it is a hybrid restraint, but that the conduct it brings about is not *per se* unlawful, and so is subject to rule of reason analysis. *Id. at 371*. Therefore, it is not preempted. *Id.* The district court relied on *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984), in which we upheld New York State's post-and-hold provision as similarly not preempted.

As to the minimum resale price restraint, the district court held that it too was hybrid, but that it also implicated only the rule of reason, not condemnation *per se*. *Id. at 373*. The district court held that this provision imposed a vertical restraint. And, it noted, recent Supreme Court cases, in particular *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007), have held that courts are to apply rule of reason, not *per se*, analysis to vertical restraints, meaning that this provision is not facially preempted. [\*\*18] *Id. at 378*.

Finally, the district court held that Connecticut's provisions forbidding price discrimination amounted to a unilateral restraint on trade, imposed solely by the state and not involving private conduct. *Id.* That was because these provisions "simply prohibit[] liquor wholesalers from charging different prices to different retailers," and do not

<sup>7</sup>These were: the Wine & Spirit Wholesalers of Connecticut ("WSWC"), the Connecticut Beer Wholesalers Association ("CBWA"), the Connecticut Restaurant Association ("CRA") and the Connecticut Package Stores Association ("CPSA") (collectively, "the trade associations"), as well as Brescome Barton, Inc. ("Brescome" and, with the trade associations, "intervenors").

<sup>8</sup>The district court stated that separate consideration of each challenged provision was required (1) under principles of federalism, (2) because each provision presented distinct analytic issues under principles of antitrust preemption, and (3) because Connecticut's general rule of statutory construction provides that the invalidity of some sections of a statute should not invalidate the statute as a whole. See *Conn. Fine Wine & Spirits*, 255 F. Supp. 3d at 366-67; *Conn. Gen. Stat. § 1-3*.

<sup>9</sup>The district court dismissed Total Wine's claims at the first step of the preemption analysis and neither the defendants nor any of the intervenors have argued that Total Wine's claims should be dismissed at the second step.

"grant[] private actors a degree of regulatory authority over competition." *Id. at 379*. Thus, it held that these provisions, too, are not preempted. *Id. at 380*.

Accordingly, the district court upheld all challenged aspects of Connecticut's alcoholic beverage regulatory regime.

On June 26, 2017, Connecticut Fine Wine appealed.

## DISCUSSION

This case presents questions of preemption: Does § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, which makes illegal "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce," preempt the challenged provisions of Connecticut's Liquor Control Act?

We begin by reviewing the two key precedents that frame the § 1 preemption inquiry: *Rice v. Norman Williams Co., 458 U.S. 654, 102 S. Ct. 3294, 73 L. Ed. 2d 1042 (1982)*, and *Fisher v. City of Berkeley, California, 475 U.S. 260, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1986)*. Then, because the analysis differs by provision, we review serially the three sets of challenged provisions. We first address the minimum-resale-price restraint and then the prohibition on [\*\*19] price discrimination. We last address the post-and-hold provisions, which are the primary focus of plaintiffs' challenge. [\*30] None of the provisions, we hold, are preempted.<sup>10</sup>

### A. Principles of Preemption Under § 1: *Rice* and *Fisher*

The Supreme Court's decisions in *Rice* and *Fisher* frame the § 1 preemption inquiry.

#### 1. *Rice*: The Requirement That the State Law "Mandate or Authorize," or "Place Irresistible Pressure" on Private Parties to Bring About, a *Per Se* Violation of § 1

In *Rice*, the Court held that HN1[ the preemption inquiry under § 1 requires courts to

apply principles similar to those which we employ in considering whether any state statute is pre-empted by a federal statute pursuant to the Supremacy Clause. As in the typical pre-emption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes. The existence of hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute. A state regulatory scheme is not pre-empted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. A state statute is not preempted by the federal [\*\*20] antitrust laws simply because the state scheme might have an anticompetitive effect.

458 U.S. at 659 (citations omitted). Rather, the Court held, "[a] party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy." *Id.* In other words, for a state statute to be preempted by § 1, the statute must bring about conduct that would require *per se* condemnation under § 1:

Our decisions in this area instruct us, therefore, that HN2[ a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the

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<sup>10</sup> While we address the three areas separately here, we have also considered them in tandem. The outcome is the same: considered separately or as a whole, the provisions are not preempted. We therefore do not reach the question of which analysis would have been the right one had the difference been determinative.

Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination [\*\*21] of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.

Id. at 661.

Applying these principles, the *Rice* Court upheld the codes at issue: California Alcoholic Beverage Control provisions which prohibited a licensed importer from importing any brand of distilled spirits for which it was not a designated importer. These, the Court explained, would not give rise in all instances to *per se* illegal conduct. Id. at 661-62.

## 2. *Fisher*: The Requirement of Concerted Action

In *Fisher*, the Court identified a related hurdle that a claim of preemption by § 1 [\*31] must clear. At issue was a rent stabilization law enacted by the City of Berkeley, California, that placed strict controls on certain classes of real property rented for residential use. The ordinance required landlords to adhere to the prescribed rent ceilings; violators were subject to civil and criminal penalties. 475 U.S. at 262-63. A group of landlords sued the city, arguing that the ordinance was a traditional—and *per se* invalid—form of fixing prices.

The Supreme Court rejected that argument. HN3[] Sherman Act § 1, it noted, can be violated only by collective action: [\*\*22] "unreasonable restraints of trade effected by a 'contract, combination . . . , or conspiracy' between separate entities." Id. at 266 (quoting Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)). But, the Court held, Berkeley's unilateral imposition of rent control did not amount to agreement or "concerted action." *Id.* The Court acknowledged that, had the Berkeley landlords banded together to fix rental prices in the absence of an ordinance, their action would have been a *per se* violation of the Sherman Act. *Id.* But the fact that the price-fixing ordinance resulted from the city acting unilaterally, not the landlords acting concertedly, saved it from preemption:

HN4[] A restraint imposed unilaterally by government does not become concerted-action within the meaning of the [Sherman Act] simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy. Similarly, the mere fact that all competing property owners must comply with the same provisions of the Ordinance is not enough to establish a conspiracy among landlords. Under Berkeley's Ordinance, control over the maximum rent levels [\*\*23] of every affected residential unit has been unilaterally removed from the owners of these properties and given to the Rent Stabilization Board.

Id. at 267. In sum, the challenged rent control laws could exist, alongside § 1, because "the rent ceilings imposed by the Ordinance and maintained by the Rent Stabilization Board have been unilaterally imposed by government upon landlords to the exclusion of private control." Id. at 266. As the Court put the point: "There is no meeting of the minds here." Id. at 267.

The Supreme Court in *Fisher* was careful to limit its holding to unilateral action by a government entity. It recognized that a governmentally imposed restraint on trade that enforces private pricing decisions would be a "hybrid restraint" that fulfills the Sherman Act's "concerted action" requirement. The Court explained:

HN5[] Not all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of § 1. Certain restraints may be characterized as 'hybrid,' in that nonmarket mechanisms merely enforce private marketing decisions. See Rice, 458 U.S. at 665 (Stevens, J., concurring in the judgment). Where private actors are thus granted "a degree of private regulatory power," id. at 666 n.1, the regulatory [\*\*24] scheme may be attacked under § 1."

*Id.* at 267-68.

We have previously read *Rice* and *Fisher* to constitute the first step in a two-step inquiry to decide whether a statute is preempted by § 1. See, e.g., *Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 223 (2d Cir. 2004).<sup>11</sup>

## B. Connecticut's Minimum-Retail-Price Provisions

The Court applies these principles, first, to the minimum-retail-price provisions. As noted, these provisions (e.g., *Conn. Gen. Stat. § 30-68m*) dictate the relationship between the liquor prices set by wholesalers and those set by retailers.

In *324 Liquor v. Duffy Corp.*, 479 U.S. 335, 107 S. Ct. 720, 93 L. Ed. 2d 667 (1987), the Supreme Court considered a similar New York statute, which "impose[d] a regime of resale price maintenance on all New York liquor retailers" and required them to charge at least 112% of the wholesaler's posted bottle price. *Id. at 337, 341*. The Supreme Court classified the New York statute, under *Fisher*, as a hybrid restraint. *Id. at 345 n.8* (describing provisions as having granted "private actors . . . a degree of private regulatory power") (quoting *Fisher*, 475 U.S. at 268). Then, applying the *Rice* framework, the Court found the statute was "inconsistent with § 1" because it authorized *per se* violations of § 1 under precedents that, "since the early years of national antitrust enforcement," had so treated resale price maintenance agreements. *Id. at 341* (quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)). Hence, the New York statute was preempted. [\*\*25] *Id. at 343*.

The Supreme Court's classification in *324 Liquor* of the minimum-retail-price restraints as hybrid, and hence capable of preemption by § 1, binds the Court here. The New York statute there is substantively identical to the Connecticut statute here. And the hybrid classification in *324 Liquor* remains good law. See *Freedom Holdings*, 357 F.3d at 223-24 (noting that *324 Liquor* found a hybrid arrangement based on limited private acts: "the individual determinations of each wholesaler as to what bottle price to post").

The same, however, cannot be said for the Supreme Court's application of *Rice* in *324 Liquor*. The Court's premise, that the New York statute mandated *per se* violations of § 1, has been overtaken by a change in *antitrust law*. In 2007, the Supreme Court, culminating a line of decisions, held that rule of reason—and not *per se*—analysis applies to all vertical restraints. See *Leegin*, 551 U.S. at 882. *Leegin* overruled *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911), the precedent cited by *324 Liquor* as the fount of the doctrine that vertical price fixing arrangements are *per se* illegal. See *324 Liquor*, 479 U.S. at 341. Henceforth, the Supreme Court stated, "vertical price restraints are to be judged by the rule of reason." *Leegin*, 551 U.S. at 882. Justifying the doctrinal change, the Court explained that "it cannot be stated [\*\*26] with any degree of confidence that resale price maintenance 'always or almost always tend[s] to restrict competition and decrease output,'" *id. at 894* (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)), noting that *Leegin* capped a gradual doctrinal [\*33] move "away from *Dr. Miles'* strict approach," *id. at 900*.

In light of *Leegin*, *324 Liquor*'s holding that minimum-retail-price provisions constitute a *per se* violation of antitrust laws in all cases, 479 U.S. at 343, is, necessarily, no longer good law. The need to analyze vertical pricing arrangements under the rule of reason means that § 1 cannot preempt as *per se* unlawful even a statute that overtly mandates such arrangements. See *Rice*, 458 U.S. at 658 ("If the activity addressed by the statute . . . must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of

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<sup>11</sup> In cases in which alcoholic-beverage laws are claimed to be preempted by § 1, states have sometimes additionally defended by asserting state action immunity, which is the second step in our Circuit's two-step preemption inquiry, and immunity derived from the *Twenty First Amendment to the U.S. Constitution*. Connecticut has not raised such defenses in connection with this appeal.

reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with the federal antitrust laws.").

We therefore hold that [HN6](#) Connecticut's minimum-retail-price provisions, compelling as they do only vertical pricing arrangements among private actors, are not preempted under [§ 1](#).<sup>12</sup>

### C. Connecticut's Provisions Prohibiting [\[\\*\\*27\]](#) Price Discrimination

The Court next considers Connecticut's provisions prohibiting price discrimination. These provisions, as noted, require that wholesalers sell a given alcoholic product to all retailers at the same price.

For two reasons, we hold that these [HN7](#) provisions are not preempted.

First, as the district court recognized, these provisions impose a unilateral restraint. They leave each wholesaler at liberty to choose the price it will charge all retailers for a product while prohibiting each from charging different prices to different retailers. Although limiting a wholesaler's range of motion, this provision does not grant any private actor "a degree of regulatory control over competition." [Freedom Holdings Inc. v. Cuomo](#), 624 F.3d 38, 50 (2d Cir. 2010). Rather, like the rent cap set by the Berkeley municipality in *Fisher*, it is a restraint "imposed by government . . . to the exclusion of private control." *Id.* (citing [Fisher](#), 475 U.S. at 266). Such a restraint does not implicate the concerns of concerted activity animating [§ 1](#).

Second, [HN8](#) the price restraint worked by [§ 30-68k](#) is purely vertical in operation. It limits the ability of a wholesaler that has already charged one retailer a given price to charge another retailer a different price. Therefore, even if this provision [\[\\*\\*28\]](#) could be viewed as a hybrid, rather than a unilateral, price-fixing provision, after *Leegin*, it would no longer implicate a category of conduct that remains *per se* unlawful. While its impact may be to harmonize prices at a retail level of beverages sold by a common wholesaler, the provision does not mandate—or even incent—collaboration among horizontal competitors. For this separate reason, under *Rice*, it is not preempted by [§ 1](#).

### D. Connecticut's Post-and-Hold Provisions

The Court finally considers the post-and-hold provisions, described above. On the question whether [§ 1](#) preempts these provisions, the parties primarily dispute whether, as the district court held, [Battipaglia](#), 745 F.2d 166, which rejected a [\[\\*34\]](#) claim that [§ 1](#) preempted a New York liquor-pricing statute, is controlling here.

#### 1. Review of *Battipaglia*

In *Battipaglia*, decided after *Rice* and before *Fisher*, a divided panel of this Court, per Judge Friendly, upheld a New York statute whose price restraint components governing the sale of liquor were strikingly similar to those at issue here. The New York law contained post-and-hold provisions that obliged wholesalers to file monthly price schedules with the state liquor authority by the fifth day of the preceding [\[\\*\\*29\]](#) month, *Id. at 168* (citing N.Y. Alco. Bev. Cont. § 101-b(3)(b)), and authorized wholesalers to amend their filed schedules "to meet lower competing prices and discounts 'provided such amended prices and discounts are not lower and discounts are not greater than those to be met,'" *id.* (quoting N.Y. Alco. Bev. Cont. Law § 101-b(4)). The New York law also contained price-discrimination and minimum-retail-price provisions that constrained sales prices at the retail level. See *id.* (citing N.Y. Alco. Bev. Cont. § 101-b(2)).

<sup>12</sup> Total Wine alternatively attempts to characterize minimum-retail-price provisions such as Connecticut's as impelling horizontal price-fixing. For the reasons given by the district court, this characterization is wrong. [Conn. Fine Wine & Spirits](#), 255 F. Supp. 3d at 375.

In the relevant portion of its analysis,<sup>13</sup> *Battipaglia* held that the challenged post-and-hold provisions were not preempted. It noted that these provisions "do not compel any agreement" among wholesalers. *Id. at 170*. Rather, the Court stated: "The schedules required to be filed by the wholesalers are their individual acts." *Id.* And the *Battipaglia* plaintiffs (a liquor store owner and a wholesaler) had not alleged that "any agreement among the wholesalers" arose as a result of these laws. *Id.*

*Battipaglia* addressed and rejected two arguments the plaintiffs had made for preemption.

First, the Court distinguished *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980), which, like 324 Liquor, had held preempted a state statute that "created a resale price maintenance system for wine." *Battipaglia*, 745 F.2d at 170; see also [\*\*30] *id. at 171* (describing California statute as having forced "all persons at various levels of the chain of distribution . . . to establish identical prices fixed by the brand owner for each brand of wine" and stating that this type of "vertical control" was impermissible under § 1). In contrast, the Court stated, New York's post-and-hold provisions "plainly are not a resale price maintenance scheme." *Id. at 172*. And, the Court again noted, the New York law did not constrain wholesalers, each of which "is completely free to file whatever price schedule he desires." *Id.* As Judge Friendly put the point: "*Midcal* simply did not deal with a statute like New York's which merely requires wholesalers to post and adhere to their own unilaterally determined prices and nothing more." *Id.*

Second, the Court addressed the argument that the post-and-hold law gave rise to a *per se* violation of § 1 because (1) it "forces each wholesaler to inform other wholesaler[s] of its prices and then to adhere for a month to them (or a lowered price meeting that of a competitor filed within three days)" and (2) "if this had [\*35] been done pursuant to an agreement [among wholesalers], the agreement would have constituted a violation of § 1." *Id.* Rejecting [\*\*31] this argument, the Court reiterated that § 1 "is directed only at joint action and does not prohibit independent business actions and decisions." *Id.* (internal citations omitted).

The Court then paused on the conceptual issue of whether, to be preempted by § 1, a state law must compel an actual agreement among competitors. The Court described as "appealing" the reasoning that:

*Section 1* requires an agreement, state compulsion of individual action is the very antithesis of an agreement, and the argument that an agreement could have been inferred if the wholesalers had voluntarily done what they been compelled to do is simply too 'iffy.'

*Id. at 173*.<sup>14</sup> At the same time, the Court acknowledged "some force" to the counterargument: that "a statute compelling conduct which, in its absence, would permit the inference of an agreement unlawful under § 1 is inconsistent with that section." *Id.* In the end, the Court stated, there was no need to resolve this conceptual issue. That was because the New York law did not meet the *Rice* standard for preemption. *Id.*

*Rice*, the Court emphasized, had held that [HN9](#) "[a] state regulatory scheme is not pre-empted by the federal antitrust laws simply because in a hypothetical [\*\*32] situation a private party's compliance with the statute might cause him to violate the antitrust laws." *Id. at 174* (quoting *Rice*, 458 U.S. at 659). Rather, under *Rice*, a state law could be "condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the

<sup>13</sup> *Battipaglia* addressed two other issues not presented here. It discussed—but did not resolve—whether, if the New York law were in conflict with § 1, it was nonetheless insulated from attack by the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943). See *Battipaglia*, 745 F.2d at 176-77. And it addressed whether, if the New York law were in conflict with § 1, the state's important policy interests warranted deference under § 2 of the Twenty-First Amendment. *Id. at 177-79* (holding that, on the case record, such deference was warranted).

<sup>14</sup> As support for this view, the Court cited a district court decision finding against preemption and rejecting the argument that "simply because the statute compelled individual actions which, if taken pursuant to an agreement, might have constituted a violation," the statute was preempted. *Id. at 173* (quoting *U.S. Brewers Ass'n, Inc. v. Healy*, 532 F. Supp. 1312, 1329-30 (*D. Conn.*), rev'd on other grounds, 692 F.2d 275 (2d Cir. 1982)), aff'd, 464 U.S. 909, 104 S. Ct. 265, 78 L. Ed. 2d 248 (1983)).

antitrust laws in order to comply with the statute." *Id.* (quoting *Rice*, 458 U.S. at 661). New York's statute did not do that, the Court stated, because the only conduct that it compelled—"the exchange of price information" among competitors—does not "constitute a violation of the antitrust laws in all cases." *Id.* at 174. Such an exchange might or might not signify an agreement among them. See *id.* at 175 ("[T]he dissemination of price information is not a per se violation of the *Sherman Act*." (quoting *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 113, 95 S. Ct. 2099, 45 L. Ed. 2d 41 (1975) (internal citations omitted))). That the post-and-hold law might result in common wholesaler pricing did not support inferring an agreement either, the Court stated. Absent "plus factors" signifying an agreement, "conscious parallelism" among competitors did not equate to an agreement. *Id.* (citations omitted).

The *Battipaglia* Court concluded:

Section 101-b thus does [\*\*33] not mandate or authorize conduct that necessarily constitutes a violation of the antitrust laws in all cases. New York wholesalers can fulfill their obligations under the statute without either conspiring to fix prices or engaging in consciously parallel pricing. So, even more clearly, the New York law does not place irresistible pressure on a private party to violate the antitrust laws in order to comply with it. It requires [\*36] only that, having announced a price independently chosen by him, the wholesaler shall stay with it for a month.

*Id.* (internal quotation marks omitted).

In dissent, Judge Winter faulted Judge Friendly's majority opinion for dwelling on the "post" component of New York's law and paying too little heed to the law's "hold" component. Were competitors to enter into an agreement to hold their prices in place for 30 days, he observed, such a private agreement would be horizontal price fixing and *per se* illegal. See *745 F.2d at 179-80* (Winter, J., dissenting). The Fourth and Ninth Circuits, the only two circuit courts to address similar laws, have sided with Judge Winter. Each has emphasized that the statutory requirement of adherence to posted prices, were it adopted by private agreement, [\*\*34] would be *per se* illegal price fixing. See *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874 (9th Cir. 2008) (holding Washington provisions preempted by § 1); *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987) (holding Oregon provisions not exempt from § 1 and remanding the case to the district court for a determination whether the Twenty *First Amendment* shielded the challenged regulations); *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 210 (4th Cir. 2001) (holding Maryland provisions preempted by § 1, while reserving on whether, under the Twenty *First Amendment*, Maryland's regulatory interests with respect to alcohol trumped federal interest under the *Sherman Act*); see also 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 217, at 388-89 & nn.45-53 (4th ed. 2013) (reviewing reported decisions, including lower court decisions in each direction).

## 2. *Battipaglia* Controls Here

We find *Battipaglia* controlling authority here.

Connecticut's post-and-hold provisions are substantially identical to the New York post-and-hold provisions upheld in that case. Total Wine does not contend otherwise. Both sets of provisions required the wholesaler to set and publicly file a price that it is going to charge the retailer; both provided a brief time window in which wholesalers may match a lower price set by a competitor; and both required the wholesaler to hold that price for one month.

Further, as the above discussion [\*\*35] reflects, the Court in *Battipaglia* considered at length the § 1 preemption question in the face of similar arguments to those Total Wine makes here. The Court applied the controlling standards, from *Rice*, to these provisions. The Court held that the post-and-hold provisions did not "mandate or authorize conduct 'that necessarily constitutes a violation of the antitrust laws in all cases'" or "place[ ] irresistible pressure on a private party to violate the antitrust laws in order to comply" with it. *Id.* at 175 (quoting *Rice*, 458 U.S. at 661). Those are the questions presented here.

Finally, Total Wine has not identified any later precedent of the Supreme Court or this Court that fairly calls *Battipaglia*'s vitality into question.

Total Wine argues that *324 Liquor* and our decision in *Freedom Holdings*, 357 F.3d at 223 (Winter, J.) are such precedent. A footnote in *324 Liquor* suggested that a statute need not bring about an actual agreement between private parties to be preempted by § 1. See *324 Liquor*, 479 U.S. at 345-46 n.8 (rejecting New York's defense that provisions at issue had not yielded a "contract, combination, or conspiracy in restraint of trade"). *Freedom Holdings* picked up on that footnote to suggest, in a footnote of its own, that "an actual 'contract, combination, [\*37] or conspiracy' [\*\*36] need not be shown for a state statute to be preempted by the *Sherman Act*." See 357 F.3d at 223 n.17 (Winter, J.) (citing *324 Liquor*, 479 U.S. at 345-46 n.8). Total Wine argues, on account of these statements, that these decisions vitiate *Battipaglia*.

For three reasons, they do not.

First, *Freedom Holdings* itself distinguished *Battipaglia* and treated it as good law. *Freedom Holdings* recognized that, although the *Battipaglia* majority had discussed whether a state law must give rise to an actual agreement for § 1 to preempt it, *Battipaglia* ultimately did not resolve nor rule on the basis of that conceptual issue. Rather, *Battipaglia* had relied on its application of the *Rice* standard to New York's post-and-hold provision. See *id.* (recognizing that *Battipaglia* "did not reach the question" whether "a private contract, combination, or conspiracy" must be shown for *Sherman Act* preemption to occur (internal citation omitted)).

Second, to the extent that *Freedom Holdings* and *324 Liquor* opine on whether the state law at issue must give rise to an actual private agreement for there to be preemption, these cases are readily distinguished factually because they involved express or readily implied agreements. *Freedom Holdings* involved an express contract [\*37] among horizontal competitors—a "Master Settlement Agreement" among major tobacco manufacturers pursuant to which the challenged New York legislation had been enacted. *Freedom Holdings*, 357 F.3d at 208. Its discussion of whether the state law must give rise to such an agreement was, therefore, *dicta*. See *id. at 224* ("Even if a 'contract' among private parties is required in the first step of preemption analysis, therefore, it exists in the present matter."). As for *324 Liquor*, it addressed vertical restraints affecting a wholesaler-retailer relationship. In that context, the wholesaler and each of its retailers were in privity and necessarily had an agreement to buy from and/or sell to each other. They entered into these agreements against the backdrop (and presumably with the knowledge) of the price-fixing term that state law would supply. In fact, every Supreme Court case to hold state liquor laws preempted by § 1, has done so on the ground that these laws either mandated or authorized forms of then *per se* unlawful vertical price-fixing arrangements between wholesalers and retailers. See, e.g., *Midcal*, 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (California law mandated resale price maintenance among wholesaler and its retailers); *324 Liquor*, 479 U.S. 335 (same as to New York [\*\*38] law); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 71 S. Ct. 745, 95 L. Ed. 1035, 60 Ohio Law Abs. 81 (1951) (same as to Louisiana law per an interpretation of § 1 as amended by the now-repealed Miller-Tydings Act). Of course, as noted earlier, the application of preemption doctrine to vertical price fixing arrangements has been overtaken by *Leegin*'s removal of vertical restraints from *per se* condemnation.

Third, and finally, two post-*Battipaglia* decisions of the Supreme Court, each involving claims of horizontal price-fixing, lend support to Judge Friendly's reasoning in finding against preemption. One, *Fisher*, discussed earlier, does so by narrowing the scope of state action within § 1's preemptive reach. The other, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), does so by underscoring the limited scope of private conduct capable of *per se* violating § 1.

*Fisher*, as noted, upheld Berkeley's rental-cap ordinance in the face of a § 1 preemption claim that it brought about horizontal price fixing. The Supreme Court recognized that "[h]ad the owners of residential rental property in Berkeley voluntarily [\*38] banded together to stabilize rents in the city," that concerted activity would have worked a *per se* violation of § 1. *Fisher*, 475 U.S. at 266. But, the Court emphasized, more was required. There needed to be concerted action. "A restraint imposed unilaterally by government [\*\*39] does not become concerted-action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law." *Id. at 267*. "[T]he mere fact that all competing property owners must comply with the same provisions of the Ordinance is not enough to establish a conspiracy among landlords." *Id.*

This requirement is significant here. We do not take issue with the holding of the district court here that, given the participation that a post-and-hold law requires of each wholesaler in connection with the posting component, Connecticut's law, viewed as a whole, qualifies as hybrid under *Fisher*.<sup>15</sup> But we doubt that such a law mandates or authorizes "concerted action" among the wholesalers subject to it. Particularly as to the "hold" component of the law that was the basis of the *Battipaglia* dissent, Connecticut's prohibition on altering prices for a 30-day period is a purely negative restraint. It does not call for any private action, let alone concerted action. See *Hertz Corp. v. City of New York*, 1 F.3d 121, 127 (2d Cir. 1993) (finding hybrid, but upholding, city statute that "eliminate[d] an element of price competition" among rental-car industry competitors); cf. *Flying J. Inc. v. van Hollen*, 621 F.3d 658, 662-63 (7th Cir. 2010) ("[I]t is only when a state law *mandates* or *authorizes* [\*\*40] collusive conduct that it is preempted by federal **antitrust law**." (citing *Fisher*, 475 U.S. at 265)). *Fisher*'s emphasis on the need for concerted action reinforces that Judge Friendly was right both to focus on the posting, rather than the holding, component of New York's post-and-hold law, and to find the law non-preempted.

As to *Twombly*, although it is more commonly cited for its articulation of pleading standards, the Court in its substantive discussion homed in on the discrete evil prohibited by § 1. [HN10](#) "§ 1 of the Sherman Act" does not prohibit [all] unreasonable restraints of trade." *Twombly*, 550 U.S. at 553. It prohibits "only restraints effected by a contract, combination, or conspiracy." *Id.* (emphasis added). The Court explained, therefore, that in § 1 cases, "[t]he crucial question is whether the challenged anticompetitive conduct stem[s] from independent decision or from an agreement." *Id.* (internal citations omitted). Even conscious parallel acts based on competitors' mutual recognition of "shared economic interests" are not "in [themselves] unlawful." *Id. at 553-54* (quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)); see also *United States v. Apple, Inc.*, 791 F.3d 290, 315 (2d Cir. 2015) ("[P]arallel behavior that does not result from an agreement is not unlawful even if it is anticompetitive."). In other words, under § 1, that conscious [\*\*41] parallel conduct can create an equally uncompetitive market to parallel conduct achieved by agreement is of no moment. The gravamen of § 1 is an agreement among competitors.

On this basis, *Twombly* upheld the dismissal of a complaint that alleged consciously parallel decisions among recently [\*39] deregulated telecommunications carriers not to compete in one another's (horizontal) regional markets. The complaint had not alleged actual agreement among the carriers, and its allegations were consistent with "natural" and "unilateral" behavior by each carrier, as each had good reason to appreciate that its self-interest lay in forebearing from initiating competition. See *550 U.S. at 564, 566*; see also *id. at 568* ("[The carriers] doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.")

*Twombly*'s reasoning resonates here because, under a post-and-hold law, there is a "natural" explanation— independent of any agreement or coordination among liquor wholesalers—for these competitors to arrive at common monthly [\*\*42] product prices. Such a law authorizes a wholesaler, during the four days after initial posting, to match a competitor's lower price, with such prices then held for a month. Under these circumstances, the law itself invites and facilitates conscious parallelism in pricing. It puts in public view each competing wholesaler's price quotes. And it authorizes, but it does not oblige, wholesalers during a defined window unilaterally to match (or parallel) a competitor's lower price as the "held" price for the coming month. Nothing about this arrangement requires, anticipates, or incents communication or collaboration among the competing wholesalers. Quite the contrary: A post-and-hold law like Connecticut's leaves a wholesaler little reason to make contact with a competitor. The separate, unilateral acts by each wholesaler of posting and matching instead are what gives rise to any synchronicity of pricing. To mirror *Twombly*: "[A] natural explanation for the noncompetition alleged," *id. at 568*, is that the state-regulated wholesalers are independently making pricing decisions within a framework aimed at avoiding price wars that invites them, before being held to a price for a month, to match that of [\*\*43] their

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<sup>15</sup> In finding that the statute grants private actors "a degree of private regulatory power" so as to qualify as hybrid, *Fisher*, 475 U.S. at 268, the district court relied on 324 Liquor, which had held hybrid a resale-price maintenance law with similar price-posting features. See *Conn. Fine Wine & Spirits*, 255 F. Supp. 3d at 369.

competitors. A post-and-hold law, therefore, does not implicate the evil against which § 1 guards: an agreement to unreasonably restrain trade. It would make little sense to preempt a state statute which facilitates parallel conduct that parties can legally undertake on their own under § 1.

Under these circumstances, we do not find reason to conclude that *Battipaglia* has been, *sub silentio*, overruled. If anything, its reasoning has been fortified by intervening decisions like *Fisher* and *Twombly*. *Battipaglia* therefore controls Total Wine's challenge to Connecticut's post-and-hold provisions. See *United States v. Moore*, 949 F.2d 68, 71 (2d Cir. 1991) ([HN11](#)[]) prior opinions of a Second Circuit panel bind future panels "in the absence of a change in the law by higher authority" or a ruling by the en banc Court). Any application to revisit *Battipaglia* is beyond this panel's authority. *Battipaglia* remains good—and persuasive—law.

## CONCLUSION

For the reasons above, we affirm the decision below. We hold that the challenged provisions of Connecticut law governing liquor pricing are not preempted by *§ 1 of the Sherman Act*.

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## Valassis Communs., Inc. v. News Corp.

United States District Court for the Southern District of New York

February 21, 2019, Decided; February 21, 2019, Filed

17-cv-7378 (PKC)

### **Reporter**

2019 U.S. Dist. LEXIS 27770 \*; 2019-1 Trade Cas. (CCH) P80,700; 2019 WL 802093

VALASSIS COMMUNICATIONS, INC., Plaintiff, -against- NEWS CORPORATION, et al., Defendants.

**Prior History:** [Valassis Communs., Inc. v. News Corp., 2018 U.S. Dist. LEXIS 160234, 2018 WL 4489285 \(S.D.N.Y., Sept. 19, 2018\)](#)

## **Core Terms**

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retailer, pricing, predatory, damages, contracts, antitrust, bidding, price-cost, provider, anticompetitive conduct, summary judgment, critical mass, broth, benchmark, monopoly, competitors, practices, exit, antitrust claim, anticompetitive, inputs, output, tortious interference, sufficient evidence, nonmoving, commissions, calculate, Counts, argues, movant

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For News Corporation, News America Marketing, also known as News America Incorporated also known as News America Marketing Group, also known as News America Marketing FSI L.L.C. also known as News America Marketing FSI, Inc., News America Marketing In-Store Services L.L.C., also known as News America Marketing In-Store Services, Inc., Defendants: Brette M. Tannenbaum, Jeffrey J. Recher, Paul Weiss Rifkind Wharton & Garrison LLP, New York, [\*2] NY; David F. DuMouchel, Butzel Long (Detroit), Detroit, MI; Joseph E. Richotte, BUTZEL LONG, P.C., Bloomfield Hills, MI; Kenneth A. Gallo, Mitchell D Webber, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Robin Luce Herrmann, Butzel Long, Bloomfield, MI; William B. Michael, Paul, Weiss, Rifkind, Wharton and Garrison LLP, New York, NY.

**Judges:** P. Kevin Castel, United States District Judge.

**Opinion by:** P. Kevin Castel

## **Opinion**

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### OPINION AND ORDER

When a consumer enters a supermarket, she may see an instant coupon dispenser on a shelf or a cardboard structure in an aisle promoting a specific product. These types of displays are generically referred to as in-store promotions ("ISPs"). Providers of ISPs pay supermarket retailers for the exclusive right to place ISPs in the retailer's entire chain of stores. Having locked up the chain, the ISP provider then markets its ability to place ISPs to manufacturers and distributors of consumer packaged goods ("CPGs"). CPGs then pay ISP providers to place ISPs for their products into the retailer's stores. In addition to supermarkets (i.e. the "food" segment), similar arrangements are made in the "drug" and "dollar" segments of the ISP market.

One ISP provider, Valassis [<sup>3</sup>] Communications, Inc., brings an assortment of claims, including, monopolization, predatory pricing, and exclusive dealing claims, against the dominant player in the market, News Corporation and its affiliates (collectively, "News").<sup>1</sup>

News now moves for summary judgment dismissing all of Valassis's claims. For reasons that will be explained, that motion will be granted in part and denied in part.

#### THE COMPLAINT AND THE PROCEDURAL HISTORY OF THE ACTION

For most of its life, this action has been pending in the Eastern District of Michigan. Three years and ten months after filing, it was transferred to this district and assigned to the undersigned.

Valassis alleged eight counts of federal antitrust violations and eight counts of state law violations, numbered below according to the complaint. Specifically, Valassis alleged violations of [sections 1](#) and [2](#) of the Sherman Act and [section 3 of the Clayton Act](#): (I) monopolization of the ISP market in violation of [15 U.S.C. § 2](#); (II) predatory pricing in the ISP market in violation of [15 U.S.C. § 2](#); (III) attempted monopolization of the market for free-standing inserts ("FSIs"), a form of coupon distribution, in violation of [15 U.S.C. § 2](#); (IV) exclusive dealing with retailers in the ISP market in violation [<sup>4</sup>] of [15 U.S.C. §§ 1&2](#) and [15 U.S.C. § 14](#); (V) exclusive dealing with CPGs in the ISP market in violation of [15 U.S.C. §§ 1&2](#) and [15 U.S.C. § 14](#); (VI) exclusive dealing with CPGs in the FSI market in violation of [15 U.S.C. §§ 1&2](#) and [15 U.S.C. § 14](#); (VII) bundling in violation of [15 U.S.C. §§ 1&2](#) and [15 U.S.C. § 14](#); and (VIII) tying in violation of [15 U.S.C. § 1](#) and [15 U.S.C. § 14](#). Valassis also alleged state law claims under (IX) the [Michigan Antitrust Reform Act](#), (X) the [California Cartwright Act](#), (XI) the [California Unfair Trade Practices Act](#), (XII) the common law of unfair competition, and (XIII)-(XVI) the common law of tortious interference.

Judge Tarnow, to whom the case was then assigned, dismissed Valassis' bundling and tying claims (Counts VII and VIII) and later transferred the suit to the Southern District of New York. (Docs. 60; 115).

Valassis has confirmed that it is no longer pursuing its FSI-related claims. (Doc. 131; Oct. 20, 2017 Tr. at 4:9-11). The Court accordingly dismisses Counts III, VI, and XI. With respect to the remaining claims, News's motion will be granted with respect to so-called predatory bidding allegations and otherwise denied.

#### THE UNDISPUTED FACTS

The following facts are undisputed except where otherwise noted. The Court has drawn all reasonable inferences in favor of Valassis, as the nonmovant. [<sup>5</sup>] See [Costello v. City of Burlington](#), 632 F.3d 41, 45 (2d Cir. 2011).

Both Valassis and News are in the business of selling ISPs, in-store promotions, to CPGs. (Def. 56.1 ¶ 1; Pl. 56.1 Resp. ¶ 1). ISP providers place such things as shelf signs and coupon machines into retail stores. (*Id.*). To place ISPs into retail stores, ISP providers must obtain contracts with individual retailers. (Pl. 56.1 ¶ 25; Def. 56.1 Resp. ¶ 25). CPGs then purchase these ISPs from the ISP providers and use them to advertise CPG products in the retail stores. (Def. 56.1 ¶ 1; Pl. 56.1 Resp. ¶ 1).

#### News's Alleged Anticompetitive Conduct

<sup>1</sup> The affiliates named as defendants are News America Marketing, News America Marketing FSI L.L.C., and News America Marketing In-Store Services L.L.C.

News entered the ISP market in 1997 and has been the dominant player in the market since its entry. (Pl. 56.1 ¶¶ 24, 31, 35; Def. 56.1 Resp. ¶¶ 24, 31, 35). During the period at issue, News had only one competitor as an ISP provider, Valassis. (*Id.*). Over the course of Valassis's ISP business, Valassis and News competed in the "food," "drug," and "dollar" segments of the ISP market. (Levinsohn Report at Ex. 10).

News engaged in a variety of conduct that Valassis alleges was anticompetitive. This conduct includes entering into long-term contracts with retailers; staggering the expiration dates of those contracts; employing exclusivity provisions; [\*6] employing "wind-down" provisions that allowed News's presence at retailer stores to continue past the contract end date; employing autorenewal provisions; preemptively renewing contracts with retailers before the contracts expired; employing provisions that prohibited retailers from discussing potential contracts with News's competitors; obtaining long-term, exclusive commitments from CPGs; and increasing its guaranteed commissions to retailers to win contracts while Valassis was a market participant (collectively, the "alleged anticompetitive conduct"). (Def. 56.1 ¶ 20; Pl. 56.1 Resp. ¶ 20; Pl. 56.1 ¶¶ 66-69, 70-89, 99-114; Def. 56.1 Resp. ¶¶ 66-69, 70-89, 99-114). News's current CEO has highlighted some of this conduct when discussing News's "proven strategy," noting that News aims to "secure long-term retail deals where the revenue-share remains constant over the term of the agreement[,] . . . [and] stagger the deals to prevent a large percentage of the network from being vulnerable at any specific point in time." (Pl. 56.1 ¶ 51; Def. 56.1 Resp. ¶ 51).<sup>2</sup>

News's exclusive long-term contracts with food retailers averaged 4.5 years in length. (Pl. 56.1 ¶ 72; Def. 56.1 Resp. ¶ [\*7] 72). Some contracts, like those with Ahold, Kroger, and Safeway, ranged from seven to ten years. (Pl. 56.1 ¶¶ 51, 80; Def. 56.1 Resp. ¶¶ 51, 80). These contracts employed exclusivity provisions, which News's Vice President of Sales has described as "the crux of [News's] agreement and payment model." (Pl. 56.1 ¶ 69; Def. 56.1 Resp. ¶ 69). News preemptively renewed contracts with CVS, Kroger, and others as part of what News called "Project Preempt," years before they were set to expire because News "[didn't] want deals to get . . . close to expiration" for fear of losing the contract to Valassis. (Pl. 56.1 ¶¶ 75-78, 81-83, 89, 111-112; Def. 56.1 Resp. ¶¶ 75-78, 81-83, 89, 111-112). News sometimes used these preemptive renewals to effectuate the staggering of end dates on its retailer contracts. (Pl. 56.1 ¶¶ 85, 89; Def. 56.1 Resp. ¶¶ 85, 89). Some retailer contracts never became available during Valassis's tenure, including contracts with Safeway and Kroger, the largest food retailer in the ISP market. (Pl. 56.1 ¶¶ 79, 108-09, 111, 113; Def. 56.1 Resp. ¶¶ 79, 108-09, 111, 113). When retailer contracts did become available, News competed with Valassis for these contracts by increasing [\*8] its guaranteed retailer commissions "to protect [its] store network." (Pl. 56.1 ¶¶ 83, 91-94; Def. 56.1 Resp. ¶¶ 83, 91-94). Further, pursuant to its long-term, exclusive contracts with CPGs, News held CPGs to the number of stores for which they contracted, regardless of whether News lost retailers to Valassis. (Pl. 56.1 ¶¶ 101-04; Def. 56.1 Resp. ¶¶ 101-04).

#### *Valassis's Exit From the ISP Market*

In order to become a viable competitor in the ISP business in the long run, an ISP provider must obtain more than just a few retailers—it must obtain a "critical mass." (Pl. 56.1 ¶ 51; Def. 56.1 Resp. ¶ 51). To achieve such a critical mass, an ISP provider must accumulate a large number of retailers and establish a retailer network that has

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<sup>2</sup> News argues that statements made by News's CEO prior to February 4, 2010 (Pl. 56.1 ¶¶ 43, 51, 85) are inadmissible at trial, and thus should not be considered on summary judgment, as a result of a settlement agreement signed on that date by Valassis and News. In the settlement agreement, Valassis released all then-existing claims against News. (Doc. 244-5). Though the statements by News's CEO were made in 2004 and 2007, Valassis's present claims do not arise from these statements or the conduct described therein. Instead, the statements are offered and considered as some evidence of News's understanding of market dynamics and later intent in adopting market strategies. In an analogous context, the Second Circuit has held that where the statute of limitations for a Title VII employment discrimination claim expired on a certain date, "any discrete acts occurring before that date are not actionable," but a court may still consider those acts as relevant "background evidence." *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 176 (2d Cir. 2005); see also *Domenech v. New York City Employees' Ret. Sys., No. 15-CV-2521 (ILG)*, 2016 U.S. Dist. LEXIS 61175, 2016 WL 2644892, at \*4 (E.D.N.Y. May 9, 2016) ("Although [plaintiff's] attempted termination is not actionable (the plaintiff released that claim as part of a settlement), . . . it is evidence of retaliatory intent.").

nationwide reach; the retailers should be high quality retailers (i.e. retailers that sell a relatively high volume of products and thus have a high "all commodities volume" ("ACV")). (Pl. 56.1 ¶¶ 44-48; Def. 56.1 Resp. ¶¶ 44-48). Without a critical mass of retailers, a new ISP provider will not be able to attract enough CPG spending to generate the revenue needed to contract with more retailers. (Pl. 56.1 ¶ 49; Def. 56.1 Resp. ¶ 49). In discussing News's strategy, [\*9] its current CEO has acknowledged that "[a] big part of being successful with our [CPG] clients is having the critical mass to deliver promotions that move volume." (Pl. 56.1 ¶ 43; Def. 56.1 Resp. ¶ 43). News's liability expert, Kevin Murphy, has similarly opined that an ISP provider with a large retail network has a "natural advantage" when competing with an operator of a smaller network. (Def. 56.1 ¶¶ 5, 21; Pl. 56.1 Resp. ¶¶ 5, 21). In its brief, News acknowledges that "[a]ccess to retailers is a key input for an ISP business." (Def. Brief at 6).

Valassis entered the ISP business in 2010. (Def. 56.1 ¶¶ 2-3; Pl. 56.1 Resp. ¶¶ 2-3). During its tenure, Valassis obtained contracts with retailers that included Supervalu, A&P, Winn-Dixie, Rite Aid, and Family Dollar. (Def. 56.1 ¶ 4; Pl. 56.1 Resp. ¶ 4). Valassis's ISP business was profitable over the first three quarters. (Def. 56.1 ¶ 5; Pl. 56.1 Resp. ¶ 5). However, Valassis was unable to obtain a critical mass of retailers and exited the food ISP segment in 2014 and the drug segment in 2015. (Pl. 56.1 ¶¶ 136-42; Def. 56.1 Resp. ¶¶ 136-42). Valassis now only places signs in Family Dollar. (*Id.*).

Valassis's liability expert, Jeffrey MacKie-Mason, [\*10] opined that News's conduct ensured that no ISP provider was ever able to secure a critical mass of retailers and that but for News's anticompetitive conduct, it is "highly likely" that Valassis would have reached critical mass, remained profitable, and persisted as a viable competitor to News. (Pl. 56.1 ¶¶ 50, 105, 143-47; Def. 56.1 Resp. ¶¶ 50, 105, 143-47). Moreover, News's current CEO has suggested that the goal of News's strategy was to make it more difficult for competitors to obtain a critical mass of retailers. Specifically, he stated that "[News's strategy] means that any competitor who wants to develop critical mass for their network would have to dedicate a lot of money over a considerable amount of time in order to break into the in-store game in any significant way." (Pl. 56.1 ¶ 51; Def. 56.1 Resp. ¶ 51). Additionally, he stated "[News's] strategy serves as a deterrent to other major competitors from joining the In-Store fray—because they know that it will be a long hard fought, drawn out process to develop the critical mass necessary to be successful in this arena." (Pl. 56.1 ¶ 43; Def. 56.1 Resp. ¶ 43).

Valassis's employees have testified that Valassis's lack of critical [\*11] mass led to its inability to succeed as an ISP provider. (Pl. 56.1 ¶¶ 118-19; Def. 56.1 Resp. ¶ 118-19). Valassis's internal surveys indicate that some CPGs did not contract with Valassis because of its limited retailer network and lack of coverage. (Pl. 56.1 ¶¶ 117; Def. 56.1 Resp. ¶¶ 117). Prior to Valassis's entry, News had two other competitors in the ISP business, Floorgraphics and Insignia. (Pl. 56.1 ¶¶ 34, 52, 145; Def. 56.1 Resp. ¶¶ 34, 52, 145). According to MacKie-Mason, both exited the ISP business within a few years of entry because they were also unable to obtain a critical mass of retailers. (*Id.*).

While Valassis was unable to attract CPG revenue due to a lack of critical mass, Valassis's costs increased as a result of competing with News's guaranteed retailer commissions. (Pl. 56.1 ¶¶ 90, 97, 101, 105, 125, 129-136; Def. 56.1 Resp. ¶¶ 90, 97, 101, 105, 125, 129-136). As a result, Valassis eventually began losing money. (Pl. 56.1 ¶¶ 131, 136; Def. 56.1 Resp. ¶¶ 131, 136). Valassis's exit from the market injured its relationship with some CPGs. (Pl. 56.1 ¶ 140; Def. 56.1 Resp. ¶ 140). According to MacKie-Mason, had Valassis persisted, CPGs would have enjoyed lower prices, [\*12] higher quality, more choices, and more innovation. (Pl. 56.1 ¶¶ 148-61; Def. 56.1 Resp. ¶¶ 148-61).

## SUMMARY JUDGMENT STANDARD

Summary judgment "shall" be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." [Rule 56\(a\), Fed. R. Civ. P.](#) A fact is material if it "might affect the outcome of the suit under the governing law." [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 \(1986\)](#). "A dispute regarding a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" [Weinstock v. Columbia Univ., 224 F.3d 33, 41 \(2d Cir. 2000\)](#) (quoting [Anderson, 477 U.S. at 248](#)). On a motion for summary judgment, the court must "construe the facts in the light most favorable to the non-moving party" and "resolve all ambiguities and draw all reasonable inferences against the movant." [Delaney v. Bank of Am. Corp., 766 F.3d 163, 167 \(2d Cir. 2014\)](#).

It is the initial burden of the movant to come forward with evidence sufficient to entitle the movant to relief in its favor as a matter of law. *Vt. Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004). "When the burden of proof at trial would fall on the nonmoving party, it ordinarily is sufficient for the movant to point to a lack of evidence to go to the trier of fact on an essential element of the nonmovant's claim." *Jaramillo v. Weyerhaeuser Co.*, 536 F.3d 140, 145 (2d Cir. 2008). If the moving party meets its burden, "the nonmoving [\*13] party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." *Id.* In raising a triable issue of fact, the non-movant carries only "a limited burden of production," but nevertheless "must 'demonstrate more than some metaphysical doubt as to the material facts,' and come forward with 'specific facts showing that there is a genuine issue for trial.'" *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 84 (2d Cir. 2004) (quoting *Aslanidis v. U.S. Lines, Inc.*, 7 F.3d 1067, 1072 (2d Cir. 1993)). A court "may grant summary judgment only when 'no reasonable trier of fact could find in favor of the nonmoving party.'" *Allen v. Coughlin*, 64 F.3d 77, 79 (2d Cir. 1995) (citation omitted).

"In the context of antitrust cases, summary judgment may be appropriate because protracted litigation chills pro-competitive market forces." *Dial Corp. v. News Corp.*, 165 F. Supp. 3d 25, 29 (S.D.N.Y. 2016) (citing *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 104 (2d Cir. 2002)). "All inferences drawn in favor of the non-movant 'must be reasonable in light of competing inferences of acceptable conduct.'" *Id.* (citing *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 95 (2d Cir. 1995)). DISCUSSION

#### I. Valassis's Federal Antitrust Claims

Valassis asserts that News engaged in a variety of anticompetitive conduct, which ultimately prevented Valassis from obtaining a critical mass of retailers and forced it to exit the ISP business in violation of sections 1 and 2 of the Sherman Act and section 3 of the Clayton Act. News argues that [\*14] this Court should grant summary judgment in its favor on Valassis' federal antitrust claims because Valassis has not presented evidence upon which a reasonable jury could find that Valassis suffered antitrust injury.

Specifically, News argues that it did not engage in predatory pricing as a matter of law and because all of Valassis's damages result from News's alleged predatory pricing, Valassis suffered no antitrust injury and summary judgment is warranted on all of Valassis's federal claims. Viewing the summary judgment record as a whole and drawing every reasonable inference in favor of Valassis as the non-movant, the Court concludes that Valassis has not presented sufficient evidence that News engaged in predatory pricing through its use of retailer commissions and thus dismisses Valassis's standalone predatory pricing claim under section 2 of the Sherman Act (Count II). However, the Court holds that a reasonable trier of fact could find that Valassis suffered antitrust injury as a result of the other alleged anticompetitive conduct. Accordingly, this Court denies News's motion as to the remaining federal antitrust claims.

##### a. The Price-Cost Test Disposes of Valassis's Standalone Claim of [\*15] Predatory Pricing and Bars Consideration of News's Retailer Commissions as Part of a "Monopoly Broth"

In its motion papers, Valassis urges the Court not to analyze News's retailer payments in isolation and to instead consider the payments as "only one part of a broader, mutually reinforcing, exclusionary scheme." (Pl. Br. at 22). Valassis argues that the Court should apply the rule of reason analysis to News's "monopoly broth" of conduct rather than the price-cost test for predatory pricing or bidding as articulated in *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993) and *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007). But Valassis plainly puts forth a standalone claim of "Predatory Pricing in the ISP Market (Retailers)" under section 2 of the Sherman Act (Complaint, Count II). The Court concludes that the price-cost test applies to Valassis's predatory pricing claim and dismisses Count II because Valassis has not presented sufficient evidence to satisfy that test. Moreover, the Court concludes that even with respect to claims where Valassis has asserted a "monopoly broth" of conduct, a pricing or bidding practice cannot properly be considered part of that "broth" unless the practice is predatory under the price-cost test.

##### i. Valassis Has Not Presented Sufficient Evidence to Establish [\*16] That News's Retailer Payments Are Predatory Under the Price-Cost Test

Predatory pricing and predatory bidding claims are analytically similar, and are both governed by the price-cost test. Weyerhaeuser, 549 U.S. at 321. Predatory pricing is a strategy whereby the predator "reduces the sale price of its product (its output) to below cost, hoping to drive competitors out of business," and then when the "competition is vanquished," raises output prices to recoup what it lost. Id. at 318. To succeed on a claim of predatory pricing under section 2 of the Sherman Act, a plaintiff must show that (1) "the prices complained of are below an appropriate measure of [the defendant's] costs" and (2) "the [defendant] had . . . a dangerous probability[] of recouping its investment in below-cost prices." Brooke Grp., 509 U.S. at 223-24.

Predatory "bidding" occurs on the input side of the market rather than the output side.<sup>3</sup> Weyerhaeuser, 549 U.S. at 320. The strategy of a predatory bidder is to purchase inputs at such high prices that "rival buyers cannot survive (or compete as vigorously)" and then when the predatory bidder obtains "monopsony" power (a buyer's monopoly), it will either purchase its inputs at prices "below the competitive level" or increase its prices in the output market to recoup what it [\*17] lost. Id. at 320-21, 321 n.2. To succeed on a claim of predatory bidding, a plaintiff must show that (1) "the alleged predatory bidding led to below-cost pricing of the predator's outputs" and (2) "the defendant has a dangerous probability of recouping the losses incurred in bidding up input prices." Id. at 325.

The price-cost test applies to Count II of Valassis's complaint, the standalone predatory pricing claim. In Count II of its complaint, Valassis alleges that News engaged in "predatory pricing" in violation of section 2 of the Sherman Act by offering cash "guarantees" to certain retailers "for access to the retailers' aisle space . . . in order to prevent the retailers from awarding . . . contracts to Valassis." (Compl't ¶ 350). Valassis further alleges that the guarantees caused News's "incremental cost of . . . ISPs sold to CPGs for placement in those retailers' stores[] to exceed News's revenues generated in the sale of those outputs to CPGs." (Compl't ¶ 351). Valassis does not allege any other exclusionary conduct on the part of News in Count II nor does it purport that the retailer payments were part of any "monopoly broth" or exclusionary scheme in Count II. News's payments to retailers constitute transactions [\*18] for the purchase of inputs by News from retailers—the inputs being access to retailer aisles. (See Def. Brief at 6 ("Access to retailers is a key input for an ISP business.")). As such, Valassis's claim of "predatory pricing" based on these payments is properly analyzed under the price-cost test discussed in Weyerhaeuser for predatory bidding.<sup>4</sup>

Count II must be dismissed because Valassis has not presented evidence which would permit a reasonable jury to conclude that News's retailer guarantees were predatory under the price-cost test. News challenges the sufficiency of Valassis's evidence only with respect to the first prong of the Weyerhaeuser price-cost test. In other words, News challenges whether the retailer payments "led to below-cost pricing of [News's] outputs"—these outputs being the ISPs News sells to CPGs.

Valassis's primary evidence of predatory bidding is the expert opinion of Jeffrey MacKie-Mason. MacKie-Mason opines that News's retailer payments increased when Valassis entered the ISP market and decreased when Valassis left. (MacKie-Mason Report at 96-97). MacKie-Mason chose to focus on the profitability of the [\*19] specific retailer contracts that News won over Valassis in determining whether News's retailer payments were predatory, rather than the effect of retailer payments to News's ISP business as a whole.<sup>5</sup> (MacKie-Mason Rebuttal

<sup>3</sup> "Bidding," in this context, is a short-hand term for the process of purchasing a unit of input. Here, the negotiation and determination of payments by ISP providers to retailers constitute the "bidding," while the prices ISP providers charge CPGs for ISP products are the "pricing."

<sup>4</sup> Valassis argues that Weyerhaeuser is inapposite because Weyerhaeuser "did not concern a defendant that could leverage a monopsony over inputs to secure monopoly over outputs," citing to footnote 2 of the Weyerhaeuser decision. (Pl. Br. at 22-23, 24 n.18). Footnote 2 appears to discuss the second prong of the price-cost test (recoupment), making the observation that monopsonists may recoup their costs after the exit of a rival either by decreasing payments on inputs or increasing prices on outputs. Weyerhaeuser, 549 U.S. at 321 n.2. Nowhere in Weyerhaeuser does the Court indicate that it intended to limit the application of the price-cost test to monopsonists that did not also wield monopoly power in the output market. The Court declines to read Weyerhaeuser so narrowly.

<sup>5</sup> It is undisputed that News's ISP business, as a whole, has been profitable in every year. (Def. 56.1 ¶ 6; Pl. 56.1 Resp. ¶ 6).

Report at 11). He ultimately concludes that News's bids to certain retailers were predatory. To reach this conclusion, he adopts the Ordover-Willig definition of predation, which provides: "Predatory objectives are present if a practice would be unprofitable without the exit it causes, but profitable with the exit. Thus, although a practice may cause a rival's exit, it is predatory only if the practice would not be profitable without the additional monopoly power resulting from the exit." (MacKie-Mason Report at 97).

To determine whether News's retailer payments would be "unprofitable without the exit," MacKie-Mason assumes that the prices News would have charged CPGs for ISP products would have been lower than the prices News actually charged had Valassis not exited the ISP market. (MacKie-Mason Report at 98). He refers to this hypothetical price as the "competitive ISP price." (*Id.*). MacKie-Mason does not quantify what the competitive ISP price is, rather he calculates [\*20] the profitability of each of News's contested retailer contracts in the event that the competitive price is 10%, 15%, 20%, 30%, and 40% below actual ISP prices. (*Id.*). In deposition, MacKie-Mason clarified that he does not opine that News's prices would actually have dropped by 10%-40% had Valassis remained in the market and that he opines only to what News's profitability would have been in the event that the prices dropped 10%-40%. (MacKie-Mason Dep. at 17:7-18:5). Unsurprisingly, the lower that MacKie-Mason assumed the competitive price to be, the more retailer payments turned out to be "predatory" by his calculations. (MacKie-Mason Report at 101-02). Because he renders no opinion as to what the competitive price should be, it is unclear which retailer payments, aside from Kmart, he concludes were actually predatory. (*See id.*).<sup>6</sup>

MacKie-Mason's opinion does not create a genuine dispute of material fact as to whether News employed predatory bidding. To the extent that MacKie-Mason's analysis is an application of the first prong of the price-cost test, he strays from the standard adopted by this Circuit and others.<sup>7</sup> *See, e.g., Northeastern Telephone Co. v. American Telephone & Telegraph Co., 651 F.2d 76, 88 (2d Cir. 1981)* (adopting the Areeda & Turner test); (MacKie-Mason Dep. at [\*21] 188:11-13 (I'm not using Areeda & Turner, no.")). Moreover, his standard is contrary to Weyerhaeuser and the policy considerations underlying it. In Weyerhaeuser, the parties were competing sawmills. *Weyerhaeuser, 549 U.S. at 314-15*. The plaintiff argued that the defendant drove it out of business by "bidding up the price of sawlogs [a necessary input] to a level that prevented [the plaintiff] from being profitable." *Id.* The district court had held that the jury could have reasonably concluded that defendant's conduct was anticompetitive, reasoning in part, as MacKie-Mason does now, that the defendant's conduct "made economic sense only because of its anticipated adverse effect upon competition." *Washington Alder LLC v. Weyerhaeuser Co., No. CV 03-753-PA, 2004 U.S. Dist. LEXIS 15269, 2004 WL 1717650, at \*2 (D. Or. July 27, 2004)* (emphasis added). The Ninth Circuit affirmed. In reversing, the Supreme Court held that the price-cost test, as enunciated in Brooke Group, applied to predatory bidding claims. *Weyerhaeuser, 549 U.S. at 325*. Elaborating on the first prong of the test, the Court noted that "bidding on the buy side must have caused the cost of the relevant output to rise above the revenues generated in the sale of those outputs" and "only higher bidding that leads to below-cost pricing in the relevant output market [\*22] will suffice as a basis for liability for predatory bidding." *Id.*

As the Supreme Court noted, "higher bidding that does not result in below-cost output pricing" may have anticompetitive effects, but such conduct is "beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate procompetitive conduct." *Id.* The Court was explicit in its desire to create a bright-line rule with which competitors could comply when engaging in pricing and bidding practices. The

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<sup>6</sup> MacKie-Mason concludes that the Kmart payment was exclusionary, that the Ingles payment and the Giant Eagle payment were the "next-most likely offers to have been exclusionary," while "the next-most likely" were the 2015 BI-LO/Winn Dixie payment and the 2011 Delhaize payment. (MacKie-Mason Rebuttal Report at 30).

<sup>7</sup> The Second Circuit has adopted what has become known as the Areeda & Turner test. *Irvin Indus., Inc. v. Goodyear Aerospace Corp., 974 F.2d 241, 245 (2d Cir. 1992)*. This test compares the actual prices charged for output against reasonably anticipated average variable cost. *Id.*; *see also Northeastern Telephone Co. v. American Telephone & Telegraph Co., 651 F.2d 76, 88 (2d Cir. 1981)* ("We agree with Areeda and Turner that in the general case at least, the relationship between a firm's prices and its marginal costs provides the best single determinant of predatory pricing. Thus, prices below reasonably anticipated marginal cost will be presumed predatory, while prices above reasonably anticipated marginal cost will be presumed non-predatory. And because marginal cost cannot be determined from conventional accounting methods, we will use average variable cost as its surrogate.") (citations omitted) (footnote omitted).

test put forth by MacKie-Mason to evaluate News's retailer payments injects speculation and complexity into the price-cost test, requiring a competitor to predict what "competitive prices" would look like if a rival were to successfully enter the market before determining the lawfulness of a retailer payment. Such speculation risks chilling legitimate pricing and bidding practices that the Supreme Court has labeled "the very essence of competition." *Id. at 323*. A reasonable jury could not find predatory bidding in light of *Weyerhaeuser*.

Without hypothesizing competitive ISP prices, and instead using actual prices, MacKie-Mason testified that, with the exception of Kmart, [\*23] he did not identify "any retail contracts [to be] predatory before [] adjust[ing] the real-world prices downward." (Pl. 56.1 ¶ 95; Def. 56.1 Resp. ¶ 95; MacKie-Mason Dep. at 39:16-40:1). In his rebuttal report, MacKie-Mason acknowledges that his "analysis of the profitability of News's offers at status quo prices is virtually identical to News's own analysis of the profitability of its offers." (MacKie-Mason Rebuttal Report at 15). News's internal profit and loss analyses ("P&L" reports) were prepared before making a contract proposal to a retailer and projected whether the offer to the retailer would be profitable to News. (Def. 56.1 ¶ 7; Pl. 56.1 Resp. ¶ 7). From 2010 onward, it is undisputed that the P&L reports projected that News expected to make a profit on every offer it made to a retailer, except for Kmart. (Def. 56.1 ¶ 11; Pl. 56.1 Resp. ¶ 11).

On the Kmart contract, Valassis asserts that News's P&L report projected the contract to be unprofitable.<sup>8</sup> Though News disputes the implications of the Kmart P&L, the disagreement does not amount to a genuine dispute of material fact because evidence of below-cost pricing related to "a single bid for a single contract" is not sufficient [\*24] to support a predatory bidding claim. *Astra Media Grp., LLC v. Clear Channel Taxi Media, LLC, 414 F. App'x 334, 336-37 (2d Cir. 2011)* (summary order) (affirming the dismissal of a predatory pricing claim and noting that "[i]n a business environment in which the competing parties have entered into numerous contracts with numerous parties for the provision of rented advertising space, an allegation that one of those contracts provides below-cost prices for services is insufficient to allege predatory pricing").

Valassis also cites to the ultimate profitability of the fourteen contracts that News won over Valassis. Eight of these fourteen contracts turned out to be profitable for News, while the other six turned out to be unprofitable. (MacKie-Mason Report at Ex. 73). The parties' experts agree that in analyzing whether retailer payments were predatory, the proper standard looks to the expected profitability at the time the retailer payment is made, not the ultimate profitability of that contract ex post. (Def. 56.1 ¶ 10; Pl. 56.1 Resp. ¶ 10). Though ex post profitability of a contract is relevant, the fact that a minority of contested contracts ultimately were unprofitable for News, without more, is not sufficient evidence to permit a reasonable jury to find that News engaged [\*25] in predatory bidding. Count II is dismissed.

## ii. The Price-Cost Test Bars Consideration of News's Retailer Payments in a "Monopoly Broth"

Valassis urges that the price-cost test has no bearing where Valassis claims that News's retailer payments were only one ingredient in a "monopoly broth" of misconduct and that the Court should apply the rule of reason to the entire broth regardless of whether the retailer payments comport with the price-cost test. The Court acknowledges the Third Circuit's holding in *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 269 (3d Cir. 2012)* and Judge Pauley's holding in *Dial Corp. v. News Corp., 165 F. Supp. 3d 25, 32 (S.D.N.Y. 2016)*, which Valassis has cited for the proposition that the price-cost test applies only where predatory pricing is not the "clearly predominant mechanism of exclusion."

The Court also acknowledges that in analyzing antitrust claims alleging a variety of anticompetitive conduct, courts must tow the line between two competing considerations. First, the Court must avoid "tightly compartmentalizing the various factual components" of a plaintiff's claims and "wiping the slate clean after scrutiny of each." *City of Groton v. Connecticut Light & Power Co., 662 F.2d 921, 928-29 (2d Cir. 1981)* (quoting *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*). At the same time, it is unlikely

<sup>8</sup> In projecting the profitability of the Kmart contract, News created five scenarios under different sets of projected parameters. (MacKie-Mason Report at 100-01). In two of the scenarios, News projected a loss with incremental profit margins of -138% and -60%. In three of the scenarios, News estimated earning incremental profit margins of 1.1% to 9%. (*Id.*).

that multiple independently lawful acts can come together to create an unlawful monopoly "broth" from which antitrust [\*26] injury can arise. See Pac. Bell Tel. Co. v. Linkline Commc'n, Inc., 555 U.S. 438, 457, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009) (holding "price-squeezing" claims not cognizable under the Sherman Act); see also City of Anaheim v. S. California Edison Co., 955 F.2d 1373, 1376 (9th Cir. 1992) ("[I]f all we are shown is a number of perfectly legal acts, it becomes much more difficult to find overall wrongdoing.").

In Linkline, the defendant was a DSL internet provider that owned infrastructure and facilities needed to provide DSL service to DSL customers. Linkline, 555 U.S. at 442-43. Plaintiffs were competing DSL providers, who leased infrastructure from the defendant. Id. Plaintiffs brought suit alleging that the defendant raised its wholesale prices on infrastructure and lowered its retail prices for DSL services so as to unlawfully "squeeze" plaintiffs' profit margins and force them out of business in violation of section 2 of the Sherman Act. Id. The Supreme Court rejected plaintiffs' price squeezing claim because the claim was merely "an amalgamation of a meritless claim at the retail level"—i.e. a predatory pricing claim where pricing was not below cost—"and a meritless claim at the wholesale level"—i.e. a refusal to deal claim where the defendant had no antitrust duty to deal. Id. at 452. It reasoned that "[i]f there is no duty to deal at the wholesale level and no predatory pricing at the retail level, then [\*27] a firm is certainly not required to price both of these services in a manner that preserves its rivals' profit margins." Id. at 457 ("Two wrong claims do not make one that is right."). Of particular relevance, the Supreme Court noted that "[r]ecognizing a price-squeeze claim where the defendant's retail price remains above cost would invite the precise harm the Court sought to avoid in Brooke Group: Firms might raise retail prices or refrain from aggressive price competition to avoid potential antitrust liability." Id. at 451-52.

In monopoly broth claims, it is not the case that "if there is a fraction of validity to each of [a plaintiff's] claims and the sum of the fractions is one or more, the plaintiffs have proved a violation of section 1 or section 2 of the Sherman Act." City of Groton, 662 F.2d at 928-29. Rather, "[t]he proper inquiry is whether, qualitatively, there is a 'synergistic effect.'" Id. (citing Northeastern Telephone Co. v. American Telephone & Telegraph Co., 651 F.2d 76, 95 n.28 (2d Cir. 1981)). If the evidence underlying each form of alleged anticompetitive conduct is "utterly lacking," there can be no synergistic effect. Northeastern Telephone, 651 F.2d at 95 n.28 (acknowledging the requirement that courts not "tightly compartmentalize" a plaintiff's claims but nonetheless determining that there was no synergistic effect where the plaintiff alleged a variety of exclusionary conduct [\*28] including predatory pricing).

That a defendant's pricing or bidding practices pass muster under the price-cost test does not immunize other anticompetitive conduct. See Dial Corp., 165 F. Supp. 3d at 32; ZF Meritor, 696 F.3d at 269, 278 ("Although the Supreme Court has created a safe harbor for above-cost discounting, it has not established a per se rule of non-liability under the antitrust laws for all contractual practices that involve above-cost pricing. . . . Nothing in the case law suggests, nor would it be sound policy to hold, that above-cost prices render an otherwise unlawful exclusive dealing agreement lawful."); see also Northeastern Telephone, 651 F.2d at 95 (holding that plaintiff failed to prove that five of six types of conduct were anticompetitive, including the defendant's pricing practices, and remanding for a new trial on the sixth alleged method of exclusion). But, in this Court's view, the price-cost test applies even when pricing is not the "predominant method of exclusion."

Though the law prohibits courts from "tightly compartmentalizing" Valassis's individual allegations of anticompetitive conduct and "wiping the slate clean" after evaluation of each, not all actions of an alleged violator may be properly considered by a jury as ingredients in a "monopoly broth." [\*29] This is especially so where, as here, Valassis has alleged that one ingredient in the broth is payments to retailers because such payments are so often "the very essence of competition" that the Supreme Court has created an explicit safe harbor to shield such payments from antitrust liability when they do not lead to below-cost pricing. Weyerhaeuser, 549 U.S. at 323. Competition on the buy side of the market benefits when high but lawful payments are made by ISP providers to retailers. Id. at 324 n.4 ("Higher prices for inputs obviously benefit existing sellers of inputs."). Higher payments by ISP providers permits greater price competition among retailers leading to lower prices for retail consumers.

If the Court were to allow Valassis to present to the jury a monopoly broth claim inclusive of News's retailer payments, no jury instruction the Court could give regarding how to evaluate those payments would prevent "courting intolerable risks of chilling legitimate procompetitive conduct." Id. at 325 (warning of the "risk of chilling

procompetitive behavior with too lax a liability standard" for predatory bidding). Like the price-squeezing claim in Linkline, Valassis's monopoly broth claim, if permitted to include retailer payments that [\*30] do not result in below-cost pricing, "would invite the precise harm the [Supreme Court] sought to avoid in Brooke Group" and Weyerhaeuser. Linkline, 555 U.S. at 451-52. Namely, a rational economic actor would temper its bidding for inputs in order to "avoid potential antitrust liability." Id.

Thus, the Court holds that when a pricing or bidding practice is lawful under the price-cost test, the evidence that the practice is anticompetitive is so "utterly lacking" that there can be no synergistic effect between the practice and other alleged anticompetitive conduct. See Northeastern Telephone, 651 F.2d at 95 n.28. Pricing or bidding practices that are above-cost under Brooke Group or Weyerhaeuser, therefore, cannot properly be considered an ingredient of a plaintiff's monopoly broth claim. Whether the alleged anticompetitive conduct that remains can sustain the claim depends on the strength of the evidence underlying that conduct. See id.

#### b. Valassis Has Presented Sufficient Evidence of Antitrust Injury with Respect to its Remaining Federal Antitrust Claims

News argues that Valassis has failed to show antitrust injury with respect to the remaining federal antitrust claims (Counts I, IV, V) because Valassis's damages expert, James Levinsohn, attributes all of Valassis's [\*31] damages to News's retailer payments. This Court concludes Valassis has presented sufficient evidence of antitrust injury stemming from the alleged anticompetitive conduct other than the retailer payments and, in any case, Levinsohn's testimony and report do not attribute all damages to News's retailer commissions.

##### i. Valassis Has Presented Sufficient Evidence of Antitrust Injury in the Form of Exclusion From the ISP Market

Though Valassis has brought claims under sections 1 and 2 of the Sherman Act and section 3 of Clayton Act, the requirement that plaintiff show antitrust injury applies to each of these claims. This is so because under section 4 of the Clayton Act, a plaintiff has a private right of action to sue for damages that result from a violation of the federal antitrust laws. 15 U.S.C. § 15. Specifically, section 4 provides, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15. To bring suit under § 4, therefore, a private plaintiff must show that a defendant engaged in anticompetitive conduct and that the plaintiff suffered "antitrust [\*32] injury" as a result. Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 339-40, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990). To establish antitrust injury, a plaintiff must show that "the injuries alleged would not have occurred but for [the defendant's] antitrust violation." In re Publ'n Paper Antitrust Litig., 690 F.3d 51, 66 (2d Cir. 2012). The violation "need not be the sole cause of the plaintiffs' alleged injuries." Id. It need only be "a substantial or materially contributing factor in producing that injury." Id. (quotation marks omitted).

Importantly, antitrust injury is not merely "injury causally linked to an illegal presence in the market." Atl. Richfield, 495 U.S. at 334 (citing Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)). Rather, antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Id. A competitor's "[e]xclusion from a market is a conventional form of antitrust injury" because it is "exactly the type [of injury] that antitrust laws were designed to prevent and flows from the competition-reducing aspect of [defendant's] conduct." Higgins v. New York Stock Exch., 755 F. Supp. 113, 116 (S.D.N.Y.), aff'd sub nom. Higgins v. New York Stock Exch., Inc., 942 F.2d 829 (2d Cir. 1991) (citation omitted); Xerox Corp. v. Media Scis. Int'l, Inc., 511 F. Supp. 2d 372, 381-82 (S.D.N.Y. 2007); see also Chadelaine Corp. Secs. & Co. v. Depository Trust & Clearing Corp., No. 05-CV-10711 (SAS), 2006 U.S. Dist. LEXIS 49273, 2006 WL 2020950, \*4 (S.D.N.Y. July 13, 2006) (noting that exclusion from the market amounts to antitrust injury where the exclusion resulted from the defendant's alleged anticompetitive conduct and "decreases [\*33] the number of alternatives available to consumers of [plaintiff's] products"); Full Draw Prods. v. Easton Sports, Inc., 182 F.3d 745, 754 (10th Cir. 1999) ("[W]e find it hard to imagine a closer connection between anticompetitive effect and injury than the destruction of [one of two competitors] and the loss of competition in the . . . market.").

In parsing the antitrust injury requirement, courts have distinguished the fact of injury from the amount of damages. See, e.g., *U.S. Football League v. Nat'l Football League*, 644 F. Supp. 1040, 1052-53 (S.D.N.Y. 1986), aff'd, 842 F.2d 1335 (2d Cir. 1988) (discussing "the distinction between proof of antitrust injury and proof of antitrust damages"); *Jacobi v. Bache & Co.*, 377 F. Supp. 86, 93 (S.D.N.Y. 1974), aff'd, 520 F.2d 1231 (2d Cir. 1975) ("In order to recover in a private antitrust action under § 4 of the Clayton Act, . . . plaintiffs must establish a causal connection between the alleged antitrust violation and some injury to them. This fact of legal injury must be established with certainty, although at this stage the precise amount of damages may remain somewhat speculative.").

Proof of the fact of injury informs the question of the defendant's liability, while proof of amount in damage determines an award. Fact of injury is an essential element of a claim under *section 4* of the Clayton Act. See *U.S. Football League*, 704 F. Supp. at 479 ("The NFL's entire argument in this regard is based on the erroneous assertion that an award of [attorney's] fees for an [\*34] antitrust violation requires proof of some threshold level of 'damages,' in addition to the fact of injury."); *Sciambra v. Graham News*, 892 F.2d 411, 415 (5th Cir. 1990) ("If a plaintiff can demonstrate that the defendant violated the antitrust laws and can establish the fact of damage, the plaintiff has established the defendant's liability for purposes of *section 4* [of the Clayton Act]."); *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 414, 419 (3d Cir. 1993) (same). A plaintiff satisfies his or her burden of proving the fact of injury by proof of "some damage flowing from the [antitrust violation]" and "inquiry beyond this minimum point goes only to the amount and not the fact of damage." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9, 123-24, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969) (citation omitted) (noting that a factfinder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts[,] . . . their tendency to injure plaintiffs' business, . . . [and] the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs").

"If there is sufficient proof of [the] 'amount of damages,' . . . *section 4* entitles the plaintiff to recover threefold this amount;" however, if "there is insufficient proof of the amount of damages, . . . proof of an antitrust violation and the fact of damage is a sufficient [\*35] basis for an award of nominal damages." *Sciambra*, 892 F.2d at 415-16 (citing *U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1376-79 (2d Cir. 1988)).

For the purpose of this motion, News argues that Valassis has not presented sufficient evidence that News's retailer payments were anticompetitive, but does not challenge the sufficiency of the evidence with respect to News's other alleged anticompetitive conduct (News's "contracting practices"). Accordingly, the Court will assume that the contracting practices were anticompetitive in deciding this motion. With respect to Valassis's remaining federal antitrust claims, therefore, the question becomes whether Valassis has presented sufficient evidence from which a reasonable jury could conclude that Valassis has suffered antitrust injury as a result of News's contracting practices.

Valassis's asserted antitrust injury is exclusion from the ISP market, which is a "conventional form of antitrust injury" and "exactly the type [of injury] that antitrust laws were designed to prevent," especially since Valassis was the only competing provider of ISP products. See *Higgins*, 755 F. Supp. at 116; *Xerox Corp.*, 511 F. Supp. 2d at 381-82. A jury could reasonably conclude, based on the evidence and MacKie-Mason's opinion, that News's contracting practices were a "substantial or materially contributing factor" in [\*36] causing Valassis's exit from the market because they prevented Valassis from obtaining a critical mass of retailers. See *In re Publ'n Paper*, 690 F.3d at 66. Specifically, a reasonable fact-finder could conclude that the long-term, staggered, exclusive contracts, and preemptive renewals severely limited the number of retailer contracts that became available during Valassis's tenure and caused large retailers like Kroger and Safeway, which made up a large percentage of participating retailers, to never become available.<sup>9</sup> A reasonable jury could also conclude that Valassis's lack of critical mass and News's long-term CPG commitments deterred CPGs from contracting with Valassis based on MacKie-Mason's expert opinion, Kevin Murphy's opinion, Valassis's internal studies, statements of Valassis employees, and statements made by News's own CEO about the intended impact of News's contracting practices. Ultimately, the

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<sup>9</sup> For scale, MacKie-Mason estimates that Kroger and Safeway represented 34% of the ACV (all commodities volume) of food retailers participating in the ISP market in 2012. (MacKie-Mason Rebuttal Report at 28).

jury could conclude that Valassis's inability to attract CPG revenue materially contributed to its exit from the ISP market to the detriment of CPG customers, who were left with only one ISP provider.

Thus, even if Levinsohn's damages model attributes all of Valassis's damages to News's retailer payments, as News [\*37] argues, Valassis has still presented sufficient evidence to create a genuine issue for trial as to whether it suffered antitrust injury in the form of exclusion from the ISP market as a result of News's contracting practices. As Levinsohn noted in his report and testimony, he assumed liability and opined only on the measure of damages in the event that the jury found that News's combined conduct was anticompetitive. (Def. 56.1 ¶ 13; Pl. 56.1 Resp. ¶ 13). In other words, he assumed the fact of injury and opined only on the amount of damages. News reads too much into Levinsohn's opinion on damages. Levinsohn is neither a judge nor an antitrust lawyer. Any defect in Levinsohn's opinion on the amount of damages does not undermine Valassis's ability to prove the fact of injury. See *Sciambra*, 892 F.2d at 415-16 (citing *U.S. Football League*, 842 F.2d at 1376-79). In any event, as the Court discusses next, Levinsohn does not attribute damages solely to the retailer payments.

ii. Levinsohn's Report and Testimony Do Not Attribute Damages Solely to News's Retailer Payments

In calculating Valassis's damages, Levinsohn assumed that liability had been established based on all of News's alleged anticompetitive conduct. (Def. 56.1 ¶ 13; Pl. 56.1 Resp. ¶ 13). Levinsohn [\*38] estimated damages by comparing the profits that Valassis made in the actual world to profits that Valassis would have made in a "but-for" world where News did not engage in the alleged anticompetitive conduct. (Levinsohn Report at 2). He used a "benchmark" approach to calculate damages. (Def. 56.1 ¶ 14; Pl. 56.1 Resp. ¶ 14). In doing so, he considered the first three quarters of 2010 as his "benchmark" period and the period from quarter three of 2010 through 2016 as the "damages" period. (Levinsohn Report at 19).

In creating the "but-for" world, Levinsohn assumed that the rate at which Valassis won retailer contracts ("win-rate") would equal the win-rate observed during the benchmark period (i.e. 41%); that the average length of a retailer contract would equal 2.5 years; that the total number of available ISP placements in retail stores would equal the number of placements available in the actual world; that 40% of retailer contracts would become available each year; and that costs and operating expenses would equal the costs and expenses observed during the benchmark period. (*Id.* at 20-25, Ex. 10). Based on these assumptions, Levinsohn estimated damages of \$368 million (\$217.6 million in past [\*39] damages from the third quarter of 2010 through 2016 and \$150.6 million in future damages from 2017 through 2021). (*Id.* at 3). Levinsohn's model calculates that, in the but-for world, Valassis would have maintained an ISP profit margin approximately equal to Valassis's profit margin during the benchmark period. (Def. 56.1 ¶ 15-17; Pl. 56.1 Resp. ¶ 15-17).

Levinsohn acknowledges that most of News's alleged anticompetitive conduct existed during his chosen benchmark period and concludes that his damages calculation is conservative as a result. (Levinsohn Report at 3; Levinsohn Dep. at 132: 9-22). For example, during the benchmark period, News used long term, staggered, and exclusive contracts with retailers. (Def. 56.1 ¶ 20; Pl. 56.1 Resp. ¶ 20). But according to Levinsohn, News began increasing its retailer payments after the benchmark period. (Def. 56.1 ¶ 18; Pl. 56.1 Resp. ¶ 18).

During deposition, Levinsohn testified regarding News's alleged anticompetitive retailer payments as follows:

Q: So, the Court looks at this chart and it says that there is no problem with [the increased retailer payments] after 2010, okay? All of the other alleged conduct is the same. You are asked to come up with damages. [\*40] Could you reliably say that Valassis's win rate and the amount that it would pay retailers in the "but for" world after 2010 would be the same as what you observe in the 2010 benchmark? . . .

A: I think I could reliably estimate damages, but that reliable estimate would come out around zero, and let me explain why that is so. . . . [D]uring the benchmark period, the other alleged anticompetitive behavior is for the most part already present, and these commissions are the delta. They are the new thing. And now, if you tell me that the only thing different between the benchmark period I have selected and the damages period, that the differentiating factor just went away, then my intuition says damages would go away."

(Levinsohn Dep. Tr. 178:21-179:21). In his declaration, Levinsohn clarified his deposition testimony as follows:

I understood that I was asked to make no changes to my approach to estimate damages other than to assume that the "differentiating factor" between "the benchmark period I have selected and the damages period" by stipulation "went away." . . . I understood that I was asked to use the same benchmark model that I had employed but to draw on the entire Damages Period [\*41] as my "benchmark" to infer Valassis' but-for profit margin. In other words, I understood that I was asked to assume that profits in the but-for world and the actual world were the same. I responded that Valassis suffers zero damages in that scenario. Given the hypothetical, my response was a truism. . . . To be clear, my opinion has always been, and remains, that Valassis suffered quantifiable damages here, and would have suffered such damages whether or not News' retailer commissions were found by a jury to be anticompetitive. I will so testify at trial, if asked.

(Levinsohn Decl. at p. 5).

News argues that Levinsohn's testimony reveals that all calculated damages flow solely from News's payments to retailers and that no damages are attributable to News's contracting practices. This conclusion does not follow. For one, Levinsohn's deposition testimony is ambiguous, especially in light of his explanation of that testimony. Moreover, an examination of Levinsohn's damages model reveals that the calculated damages do not flow solely from News's increased retailer commissions. For example, in creating his damages model, Levinsohn assumed that the length of the average retailer contract in [\*42] the "but-for" world would be only 2.5 years (as opposed to 4.5 years in the actual world) and that 40% of retailer contracts would become available each year (as opposed to an annual average of 26.6% from 2010 through 2014 in the actual world). (See MacKie-Mason Report at 95; MacKie-Mason Rebuttal Report at 23). These assumptions appear to take into account the effect of News's exclusive, long-term, staggered retailer contracts, its autorenewal provisions, and its preemptive renewals.

Levinsohn's testimony, therefore, does not render Valassis's proof of antitrust injury insufficient such that summary judgment is warranted on Valassis's remaining federal antitrust claims. Whatever modifications Levinsohn needs to make to the model in order to remove the effect of News's retailer commissions is a matter that the Court can address in the future in conjunction with the parties. Thus, News's motion for summary judgment is denied with respect to Valassis's remaining federal antitrust claims (Counts I, IV, V).

## II. Valassis's State Law Antitrust Claims

On the state law antitrust claims, News argues that Count IX, under the Michigan Antitrust Reform Act, and Count X, under the California Cartwright [\*43] Act, fail for the same reasons that it asserts that the federal antitrust Counts fail. News's motion for summary judgment on Counts IX and X is denied to the same extent that this Court has denied News's federal antitrust claims and granted to the same extent. See *Little Caesar Enters. v. Smith*, 895 F. Supp. 884, 898 (E.D. Mich. 1995) ("Michigan antitrust law is identical to federal law."); *Universal Grading Serv. v. eBay, Inc.*, 2012 U.S. Dist. LEXIS 2325, 2012 WL 70644, at \*10 (N.D. Cal. Jan. 9, 2012) ("[I]t is well established that '[i]nterpretation of federal antitrust law is . . . applicable to the Cartwright Act.'").

## III. Valassis's State Law Claims of Unfair Competition and Tortious Interference

Valassis asserts the following five claims under Michigan common law, numbered according to the complaint: (XII) unfair competition, (XIII) tortious interference with CPG contracts, (XIV) tortious interference with CPG business relationships, (XV) tortious interference with retailer contracts, and (XVI) tortious interference with retailer business relationships. News argues that this Court should grant summary judgment on these five claims because Valassis has not presented any evidence of "damages stemming from tortious interference or unfair competition."

As discussed, when the party requesting summary judgment does not bear the burden [\*44] of proof at trial, "it ordinarily is sufficient for the movant to point to a lack of evidence to go to the trier of fact on an essential element of the nonmovant's claim." *Jaramillo v. Weyerhaeuser Co.*, 536 F.3d 140, 145 (2d Cir. 2008). However, "[a] moving defendant's mere assertion that a plaintiff 'has not produced' evidence that could prove its claim fails to show that the plaintiff lacks the necessary evidence, unless defendant also shows that plaintiff was obligated by discovery demand or court order to produce the evidence or that he voluntarily undertook to make the showing." *Nick's Garage, Inc. v. Progressive Cas. Ins. Co.*, 875 F.3d 107, 115 (2d Cir. 2017). "Such a statement fails to show either that there is no genuine dispute as to any material fact or that the defendant is entitled to judgment as a matter of law." *Id.* If the movant does not satisfy its burden of production, then "summary judgment must be denied even if no

opposing evidentiary matter is presented." [Vermont Teddy Bear Co. v. 1-800 Beargram Co., 373 F.3d 241, 244 \(2d Cir. 2004\)](#).

On the common law claims, Counts XII through XVI, News has not met its burden as the movant. In support of its request for summary judgment on all five claims, News dedicates one paragraph in its initial brief and eight lines in its reply brief. None of News's [Local Rule 56.1](#) statement is dedicated to the unfair competition or tortious interference [\*45] claims. In its initial brief, News argues that summary judgment is warranted on the claims because "Valassis has not adduced any evidence to support a finding of damages, let alone liability, for them" and cites two cases for the simple proposition that damages are an element of unfair competition and tortious interference claims. (Def. Brief at 25). News's only support for its assertion, found in its reply brief, is that "Valassis's only evidence of damages fails to calculate damages attributable to the state law claims. . . . Valassis stated [in its Initial Disclosures] that the 'calculation of Valassis's damages will be the subject of expert testimony' . . . Yet the only expert testimony in the record (Levinsohn) does not even purport to measure damages stemming from tortious interference or unfair competition." (Def. Reply at 10).

Valassis's initial disclosure statement does not amount to evidence that Valassis was "obligated by discovery demand or court order to produce" evidence of damages on these claims or that Valassis "voluntarily undertook" to make the showing. See [Nick's Garage, 875 F.3d at 115-16](#). News's assertion that Valassis has presented no evidence of damages is, therefore, akin to the movant's "mere [\*46] assertion" in [Nick's Garage](#), and similarly "fails to show either that there is no genuine dispute as to any material fact or that the defendant is entitled to judgment as a matter of law."

This Court holds that News has not met its burden of showing that it is entitled to judgment as a matter of law on Valassis's state law claims of unfair competition or tortious interference. News's motion is, therefore, denied with respect to these claims. See [Vermont Teddy Bear, 373 F.3d at 244](#).

## CONCLUSION

For the aforementioned reasons, the Court dismisses Counts II, III, VI, and XI and DENIES defendants' summary judgment motion (Doc. 202) with respect to the remaining claims. The Court further concludes that any claim of predatory bidding asserted as part of a surviving claim is foreclosed. The Clerk is directed to terminate the motion.

SO ORDERED.

/s/ P. Kevin Castel

P. Kevin Castel

United States District Judge

Dated: New York, New York

February 21, 2019



## Kaul v. Christie

United States District Court for the District of New Jersey

February 25, 2019, Decided; February 25, 2019, Filed

Civ. No. 16-2364 (KM) (SCM)

### **Reporter**

372 F. Supp. 3d 206 \*; 2019 U.S. Dist. LEXIS 31732 \*\*; 2019 WL 943656

RICHARD ARJUN KAUL, Plaintiff, v. CHRISTOPHER J. CHRISTIE, et al., Defendants.

**Prior History:** [Kaul v. Christie, 2017 U.S. Dist. LEXIS 102007 \(D.N.J., June 30, 2017\)](#)

## **Core Terms**

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allegations, motion to dismiss, conspiracy, parties, surgery, proceedings, disciplinary proceeding, license, extortion, patients, immunity, medical license, defamation, screws, spine, mail, administrative proceeding, abstention, violations, grounds, Counts, state court, training, damages, pled, qualified immunity, res judicata, deprivation, revocation, courts

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For THOMAS PETERSON, Defendant: JEFFREY DANIEL NOONAN, SR., LEAD ATTORNEY, POMEROY, HELLER & LEY, LLC, New Providence, NJ; RICHARD MALAGIERE, Law Offices of Richard Malagiere, P.C., LAW OFFICES OF RICHARD MALAGIERE, P.C., Moonachie, NJ.

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For ERIC D. KATZ, Interested Party: ERIC D. KATZ, LEAD ATTORNEY, MAZIE, SLATER, KATZ & FREEMAN, LLC, ROSELAND, NJ.

**Judges:** KEVIN MCNULTY, United States District Judge.

**Opinion by:** KEVIN MCNULTY

## **Opinion**

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### **[\*215] AMENDED OPINION (amending DE 200)**

#### **KEVIN MCNULTY, U.S.D.J.**

Dr. Richard A. Kaul, an anesthesiologist by training, claims to be a minimally invasive spine surgeon. In March 2014, the New Jersey State Board of Medical Examiners (the "Board") said otherwise. Because his performance of spine surgeries on 11 patients without proper training and experience constituted gross and repeated malpractice, negligence, and incompetence, the Board revoked his medical license. From Dr. Kaul's perspective, the disciplinary proceedings were nothing but a sham. What really happened, [\*\*4] he says, is that a network of politically connected neurosurgeons wanted to make an example of him. His high-quality medical practice was cutting into their margins, and so with the assistance of a cabal of lawyers, hospitals, insurance companies, and media figures, they importuned public officials to banish him from the practice of medicine in New Jersey. And so Dr. Kaul brought this action against some forty-odd defendants.

Now before the court are dozens of motions to dismiss, which in general will be granted. In part, the motions are granted under [Rule 12\(b\)\(1\)](#), on grounds of lack of subject matter jurisdiction. For the most part, however, dismissal is on 12(b)(6) grounds, because the amended complaint fails to allege plausibly any cause of action as to any defendant.

#### **I. BACKGROUND**

The gist of the amended complaint ("AC") is that the entire medical, legal, and political ("medico-legal", in Dr. Kaul's words) community of New Jersey conspired to revoke Dr. Kaul's license. No surprise, then, that Dr. Kaul's list of grievances contained in this 101-page AC is exhaustive. To begin to untangle the thick knot of private citizens, professional organizations, law firms, attorneys, administrators, politicians, **[\*\*5]** and public officials alleged to have been in on the scheme to deprive Dr. Kaul of his license, this introductory section proceeds in five subparts.

Part I.A is a summary of the parties involved and the nature of the allegations against them. Part I.B summarizes the license revocation proceedings. Because it is relevant to res judicata and *Younger* abstention issues, Part I.O describes some actions related to this one. Part I.D concludes this background section with some information about the procedural history and claims asserted in this case.

#### **[\*216] A. The Parties**

As I must, I accept as true Dr. Kaul's allegations for the purpose of these motions to dismiss.<sup>1</sup>

##### **1. Dr. Kaul**

Dr. Maul went to medical school in London and completed his residency here, at Albert Einstein-Montefiore Medical Center in New York. He became a board-certified anesthesiologist. In 2003, the Board suspended Dr. Kaul's license to practice medicine; in 2012, they revoked **[\*\*6]** it entirely and permanently. These incidents, and others, are discussed below, but the takeaway for now is this: The AC claims that the 2012 disciplinary proceedings were the result of a vast conspiracy between the Governor, hospitals, insurance companies, lawyers, and competitors to drive Dr. Maul, a minimally invasive spine surgery pioneer, out of business. (See generally AC)

##### **2. Defendants**

For convenience, I group the defendants into eight categories.

###### **i. The State Defendants**

The New Jersey Attorney General's Office represents these nine defendants in this case:

- The **Board**, which is responsible for licensing and censuring New Jersey doctors. (AC ¶ 35)
- **Christopher J., Christie**, who is the Governor of the State of New Jersey. Allegedly, he was moved to revoke Dr. Maul's medical license by a series of kickback and quid pro quo arrangements with the other defendants. (*Id.* ¶ 3, 54)
- **Jeffrey Chiesa** is the former Attorney General ("AG") of the State of New Jersey. Chiesa was AG when the Board revoked Dr. Maul's license. As to Chiesa, the thrust of the AC is that he allowed the 2012 revocation

<sup>1</sup> Abbreviations to documents I have relied on in deciding these motions to dismiss as follows:

"AC" — Amended Complaint Dr. Richard Arjun Kaul, dated June 9, 2016, ECF No. 57

"ALJ Op." — Initial Decision in the *Matter of the Suspension or Revocation of the License of Richard A. Kaul, M.D.* License No. 25 MA 063281, dated December 13, 2013, Ex. B to the Certification of Deputy Attorney ("DAG") General Shana B. Bellin, ECF No. 128-4

"Order" — Corrected Final Decision and Order in *Matter of the Suspension or Revocation of the License of Richard A. Kaul, M.D.* License No. 25 MA 063281, dated March 24, 2014, Ex. C to the Certification of DAG Bellin, ECF No. 128-5

"State Compl." — Complaint filed by Kaul with the Superior Court of New Jersey, Law Division - Bergen Vicinage, Dkt. No. BER-L-2256, dated March 22, 2013, Ex. G to the Certification of DAG Bellin, ECF No. 128-9

"State Orders" — Orders Dismissing Plaintiff's Complaint in the matter of *Richard A. Kaul, M.D. v. Robert F. Heary, M.D., et al.*, Dkt. No. BER-L-2256-13, dated March 7, 2014, Ex. H to the Certification of DAG Bellin ECF No. 128-10

hearings to unfold unfairly. Particularly distressing to Dr. Maul is Chiesa's failure to investigate [\*\*7] the alteration of unidentified portions of certain transcripts of the administrative proceedings. (*Id.* ¶ 4, 57, 210)

- **Howard Solomon** is the Administrative Law Judge who presided over Dr. Maul's 2012 disciplinary proceedings. Following a 23-day hearing, he issued a 94-page opinion. ALJ Solomon concluded that Dr. Kaul's performance of spine surgeries on 11 patients constituted gross malpractice and recommended that the Board revoke his medical license. An article he read about Dr. Maul in a Bergen County newspaper, the Record, allegedly influenced his decision. [\*217] (See generally ALJ Op.; AC ¶¶ 59-60, 97)
- **William Roeder** is executive director of the Board.<sup>2</sup> (*Id.* ¶ 36)
- **Dr. Steven Lomazow** is a neurologist and was a senior member of the Board in 2012. (*Id.* ¶ 15)
- **Dr. Gregory Przybylski** is a neurologist. He testified as an expert witness for the State in the 2012 disciplinary proceedings, falsely. (*Id.* ¶¶ 28, 85, 160)
- **Dr. Andrew Kaufman**, an anesthesiologist, also testified as an expert witness for the State in those proceedings. At some point, he made false statements that Dr. Maul was not qualified to perform minimally invasive spine surgeries, perhaps during the 2012 disciplinary proceedings. [\*\*8] (ALJ Op. 41-44; AC ¶¶ 34, 67, 85).
- Dr. Maul is also suing the **State of New Jersey**. (AC ¶ 4)

## ii. The Doctor Defendants

The following seven defendants are surgeons (though the AC isn't always clear, I presume they are neurosurgeons) in New Jersey. For the most part, Dr. Maul claims that they are his jealous competitors, and thus stood to benefit from his ruin.

- **Dr. Robert Heary** consulted with one of Dr. Maul's patients and encouraged her to sue Dr. Maul for medical malpractice. (*Id.* ¶ 13, 68)
- **Dr. Frank Moore** is a professor of neurosurgery at Mount Sinai School of Medicine in New York. (*Id.* ¶ 17)<sup>3</sup>
- **Dr. Peter Carmel** is a co-director of neurosurgery at the Neurological Institute of New Jersey in Newark. Dr. Carmel used his authority as President of the American Medical Association ("AMA") to enact legislation that favored neurosurgeons and hospitals and downgrade the value of endoscopic discectomies. (*Id.* IT 18, 72, 80, 92)
- **Dr. William Mitchell** is the attending neurosurgeon at John F. Kennedy Medical Center in Edison, New Jersey. He, too, caused endoscopic discectomies to become less profitable, which reduced Dr. Kaul's revenues. (*Id.* ¶¶ 20, 73)
- **Dr. Thomas Peterson** is also a neurosurgeon and affiliated [\*\*9] in some way with Hackensack University Medical Center ("HUMC"). Dr. Peterson once called Dr. Kaul a "murderer" in front of one of Dr. Kaul's employees. (*Id.* ¶¶ 21, 90, 176)

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<sup>2</sup>The AC does not state specify the capacity in which the State Defendants are being sued. I therefore assume Dr. Kaul intends to advance both official and individual capacity claims against these defendants.

<sup>3</sup>On December 22, 2016, Dr. Kaul moved for a default judgment against Dr. Moore, and then again on May 5, 2017. (ECF Nos. 146, 194) On June 16, 2016, Dr. Moore moved to vacate the clerk's entry of default, dismiss the motion for default judgment, and join the co-defendants' omnibus motion to dismiss. Dr. Moore claims that he was never served the original complaint, filed in the S.D.N.Y., or this amended complaint, an issue that many defendants have raised. (ECF No. 194) Dr. Kaul responded on June 29, 2017. (ECF No. 198) Because there exists good cause, because Dr. Moore has several meritorious defenses to Dr. Kaul's allegations, and because there is no prejudice to Dr. Kaul, who has responded to the omnibus motion, the motion is granted.

- **Dr. Peter Staats** is the President of The American Society of Interventional Pain Physicians ("ASIPP") and the editor of Pain Medicine News. He has "devoted a large percentage [\*218] of career to medical politics." (*Id.* ¶¶ 22, 74)

- **Dr. Marc Cohen** sent a complaint about Dr. Kaul performing spine surgeries to the Board in 2007. (*Id.* ¶¶ 23, 75)

iii. *The Hospital Defendants*

Dr. Kaul's allegations as to these five defendants, hospitals and their presidents, are generally similar, so I group them together. (E.g. AC ¶¶ 118, 147, 176, 205, 235, 260, 293) He claims that these defendants compete with surgical centers, such as the one Dr. Kaul ran, and therefore had reason to divert business from him to themselves.

- **Atlantic Health System** ("AHS") is a healthcare company comprised of number of hospitals, including Morristown Medical Center, Overlook Medical Center, Chilton Medical Center, and Hackettstown Medical Center. Drs. Cohen, Heary, Carmel, Lomazow, and Kaufman "do business" with AHS. (AC ¶ 11)
- **Brian Gragnolati** became the president [\*\*10] of AHS on May 4, 2015. (*Id.* ¶ 42, Def. Ex. V ¶ 14)
- **Hackensack University Medical Center** ("HUMC") is hospital. Drs. Peters and Heary "do business" with HUMC. (*Id.* ¶ 11)
- **Robert Garrett** is the president of HUMC. (*Id.* ¶ 41)
- **University Hospital**, incorrectly pled as Rutgers School of Biomedical and Health Sciences, is a hospital affiliated with Rutgers, The State University of New Jersey. Drs. Heary, Carmel, and Kaufman "do business" with University Hospital. (*Id.* ¶ 12)
- **James Gonzalez** is the president of University Hospital. Gonzalez allegedly failed to take appropriate action after Dr. Kaul sent Gonzalez a letter describing an incident in which Dr. Kaufman defamed him to one of his patients. (*Id.* ¶ 39)

iv. *The Medical Organization Defendants*

The following four medical organizations (plus Dr. Wolfa, the chairman of one) are involved in this case. Dr. Kaul generally attributes the wrongful acts (e.g., improper political influence, lobbying, defamation, etc.) of their members, the Doctor Defendants, to them.

- The **Congress of Neurological Surgeons** ("CNS") is a professional medical society. Drs. Heary, Przyblyski, Carmel, Mitchell, Moore, and Peterson are all members. (*Id.* ¶¶ 30)
- **Christopher [\*\*11] Wolfa** is the chairman of the professional conduct committee at CNS. He allegedly failed to take appropriate action after Dr. Kaul filed an ethics complaint against Dr. Przbylski, who is a CNS member. (*Id.* ¶¶ 31, 70)
- The **American Society of Interventional Pain Physicians** ("ASIPP") is a professional medical society. Dr. Staats is president; Dr. Kaufman is a senior member. (*Id.* ¶¶ 29, 34)
- The **American Medical Association** ("AMA") is a professional medical association. Dr. Carmel was its president in 2011. (*Id.* ¶ 19)
- The **North American Spine Society** ("NASS") is global medical society. Dr. Przyblyski was its president in 2011; Dr. Cohen is a member. (*Id.* ¶¶ 28, 23)

v. *The Insurance Defendants*

The next five defendants allegedly stood to gain from the revocation of Dr. Kaul's [\*219] license, and in some way bore responsibility for it:

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- **Allstate New Jersey Insurance Company** ("Allstate") is the New Jersey subsidiary of Allstate Insurance Company. Allstate owes Dr. Kaul \$10 million for clinical services rendered. (AC ¶¶ 7, 56, 62)
- **Richard Crist** was the CEO of Allstate. (*Id.* ¶ 6, Def. Ex. BB, ECF No. 128-30)
- **Government Employees Insurance Co., GEICO Indemnity Co., GEICO Insurance Company, and GEICO [\*\*12] Casualty Co.** (collectively, "GEICO") provides auto insurance. GEICO used the revocation of Dr. Kaul's license as an excuse not to pay him fees owed. They also advanced legislation that favored it at the expense of surgical centers and interventional pain physicians such as Dr. Kaul. Sometime in 2013, GEICO filed an insurance fraud lawsuit against Dr. Kaul, and conspired with the Media Defendants to publish false stories about him. (*Id.* ¶¶ 9, 61, 98, 153)
- **Berkshire Hathaway** is the parent company GEICO. Dr. Kaul seeks to hold it liable for GEICO's conduct. (*Id.* ¶¶ 9, 62)
- **Warren Buffett** is the chairman and CEO of Berkshire Hathaway, and Dr. Kaul's seeks to hold him liable for GEICO and Berkshire Hathaway's conduct. (*Id.* ¶¶ 44, 63)

vi. The Bank Defendants

These two defendants allegedly illegally foreclosed on a \$1 million loan they had given Dr. Kaul to construct a surgical center.

- **TD Bank, N.A.** is a bank. After obtaining a default judgment against Dr. Kaul, he had to declare bankruptcy. As a result of TD Bank's efforts to enforce that judgment, Dr. Kaul was unable to recover proceeds from the sale of his Manhattan townhouse. Dr. Kaul also says that TD Bank falsely told others in the [\*\*13] banking community that he had committed insurance fraud. (*Id.* ¶¶ 10, 55, 64, 184)
- **Divyesh Kothari** is the Vice President of TD Bank. He used "false pretenses to obstruct . . . the townhouse and force it into foreclosure. (*Id.* ¶ 40, 185)

vii. The Law Firm Defendants

These five law firms and attorneys represented in Dr. Kaul in various capacities. He generally accuses them of ethical misconduct or incompetence, although it is not very clear what legal services or matters are involved.

- **Scarinci Hollenbeck LLC** ("S&H") is a New Jersey law firm, and **Kenneth Hollenbeck** is its Managing Partner. S&H and Hollenbeck attempted to extort \$196,000 in legal fees from Dr. Kaul two weeks before the disciplinary hearing by threatening to withdraw from some representation unless Dr. Kaul paid up.<sup>4</sup> (AC ¶¶ 21, 25, 76, 77, 135)
- **Brach Eichler LLC** is a New Jersey law firm, and **Joseph Gorrell** is a partner there. The firm has close ties to the Governor and, at some point, represented ASIPP. Had Dr. Kaul known either of these facts, he would have retained different counsel for some matter. The remainder of the allegations involving Brach Eichler [\*\*220] and Gorrell are difficult to parse, though the firm seems to have [\*\*14] played an important role in alleged conspiracy.<sup>5</sup> Gorrell "was motived by the promise of increased revenues that he knew would be

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<sup>4</sup> Another lawyer, not Hollenbeck or a member of his firm, but Charles Shaw, Esq., represented Dr. Kaul in the disciplinary proceedings.

<sup>5</sup> Here is an example, which purportedly ties Brach Eichler to ASIPP, Drs. Kaufman and Staats, and the Governor. It is representative of the approach of the AC:

**The American Society of Interventional Pain Physicians** violated [18 U.S.C. § 1961](#) when it permitted its New Jersey chapter to conspire with the defendant governor, defendant state and defendant medical board to unlawfully obtain the plaintiffs property. Defendant Kaufman and Staats are senior board members of the defendant and its [\*\*15] New Jersey chapter. Staats was appointed the defendant's president in 2015 and along with defendant Kaufman competed with the

generated from other physicians seeking legal counsel, in the wake of the commencement of the plaintiff's revocation proceedings.<sup>6</sup> (*Id.* ¶¶ 26, 27, 78, 79 137, 165)

- **Dughi, Hewit & Domalewski, P.C.**, pled as "Dughi Hewitt LLC," is a New Jersey law firm. **Michael Keating** is partner at Dughi Hewit, and he represented Dr. Kaul in an unsuccessful December 2014 bid to reinstate his medical license. Way back when, Governor Christie was a partner at Dughi Hewit. Because of the firm and Keating's cozy relationship to the Governor and participants in the medical and legal community generally, Dr. Kaul claims that Keating and Dughi Hewit deliberately botched or slow-pedaled the reinstatement effort, and then overcharged him.<sup>7</sup> (*Id.* ¶¶ 32, 33, 83. 170, 229, 287)

#### viii. The Media Defendants

Dr. Kaul seeks to hold these final two defendants, a reporter and a newspaper publisher, liable for publishing an allegedly libelous article [\*\*16] in November 2013.

- **Lindy Washburn** is a journalist. She wrote a defamatory "six-thousand-word story" on Dr. Kaul that was published on the front page of The Record on November 17, 2013, just before ALJ Solomon rendered the initial decision to terminate his medical license. The goal was to influence the ALJ's decision. Dr. Kaul specifically takes issue with the statement that he had "an Upper crust British accent," which was intended "to malign the plaintiffs character by associating him with the British Aristocracy, [\*221] towards whom the average American holds hostility, because of the recent War of Independence." She recorded Dr. Kaul without his permission. She also knew that official transcripts of the 2012 disciplinary proceedings were altered but she didn't report that in her story. (*Id.* ¶¶ 37, 89, 153, 175, 204, 234, 259)

- **North Jersey Media, Inc.** ("NJM") owns The Record, and employs Washburn. Its owners, "The Borg Family," have commercial interests which align with the co-defendants, and NJM acted as "a mouthpiece" for the Governor and his defendant donors. The quid pro quo was preferential access to "state government news." (AC ¶¶ 37, 88)

#### B. The Disciplinary Proceedings

As Part [\*\*17] I.A makes clear, the conduct and events at the heart of this dispute occurred during or immediately after disciplinary proceedings that concluded years ago. Here is a summary of those proceedings.

On June 13, 2012, the AG initiated administrative disciplinary proceedings against Dr. Kaul. The charges, in essence, were that Dr. Kaul did not possess the "accepted standard of surgical training, education, and experience to perform spinal surgical procedures" and the "flagrant disregard of his own lack of training and expertise . . .

plaintiff in the same market. Kaufman and Staats both receive patients from and refer patients to the defendant neurosurgeons, and used their positions of power within the defendant's political action committees to give money to the defendant governor. The business partner of defendant Staats was appointed to the defendant medical board by the defendant governor in 2014, in return for the money that the defendant's New Jersey chapter gave to the defendant governor. The money was given to defendant Brach Eichler by way of inflated legal fees, which were then siphoned to the defendant governor through political lobbying firms. The defendant governor rewarded defendant Staats by appointing his partner to the defendant medical board and by using his executive power to revoke the plaintiff's medical license. The plaintiff, in contrast to many of the defendants, never sought political patronage.

(AC ¶ 81)

<sup>6</sup> Gorrell's actions also "contributed to the opiate epidemic that now plagues the state, because patients with spinal pain had had to resort to the use of opiates, consequent to the reduced availability and increased cost of minimally invasive spine surgery." (*Id.* ¶ 109)

<sup>7</sup> Dr. Kaul specifically faults Dughi Hewit for declining to file a motion to disqualify the Deputy Attorney General from his case after Dr. Kaul filed an ethics complaint against her. (*Id.* ¶ 287)

place[d] the public in clear and imminent danger." The AG sought an immediate suspension of Dr. Kaul's medical license.<sup>8</sup> (Def. Ex. A.)

The matter was then referred to the Office of Administrative Law as a contested matter. ALJ Solomon presided over 23 days of hearings, running from April 9, 2013, to June 28, 2013. Drs. Kaufman and Przybylski testified on behalf of the Board. The record closed on October 28, 2013. (ALJ Op. 1-44)

ALJ Solomon issued his initial decision on December 31, 2013. Here are a few of his findings of fact:

2. [Dr. Kaul's] education, training, internships, residencies and fellowships were insufficient to prepare him for surgeries of the spine, **[\*\*18]** whether minimally invasive or open.
3. The CME courses he took were insufficient to provide such education and training. If hands-on training were offered, it was, in most instances, done on cadavers. In others, he was primarily an observer.
4. In addition to his lack of sufficient education and training in spinal surgeries, he did not receive sufficient monitoring by a trained overseer. For instance, he was on his own the first time he inserted a pedicle screw in a live patient, without the presence of any trained monitor.
5. Respondent's treatment included, but was not limited to, inserting pedicle screws into the spinal canal; failing to immediately remove a stimulator after the onset of infection, thereby risking paralysis; using OptiMesh<sup>9</sup> as **[\*222]** an interbody structural device; and performing a staged fusion, as well as other acts as discussed above.
6. Some of his patient consents were unsigned. . . .
9. He used allograft bone in patients who were smokers.<sup>10</sup>
10. He failed to advise patients who were smokers of the risks associated with smoking and allograft bone.
11. He misrepresented his qualifications, not only on his website, but also in discussions with his patients.
12. None of his certifications **[\*\*19]** were recognized by the American Board of Medical Specialties, with the exception of his board-certification in anesthesiology. Non-recognition included his certification by the American Board of Interventional Pain Management.

(ALJ Op. 80-81)

These infractions, the ALO found, went far beyond mere puffery or resume-fudging. To the contrary, over the course of 94 pages, ALJ Solomon detailed the physical and emotional harm Dr. Kaul inflicted on 11 patients who trusted that he was competent to do—and, on several occasions, that he would in fact do—what he told them he could do.

Here is just one example, patient T.Z.:

The next patient called by petitioner was T.Z., a forty-year-old woman. In the latter part of 2009, she began experiencing pain in her neck and back following an automobile accident. A neighbor, who had been a patient of respondent, recommended [Dr. Kaul]. T.Z. then checked respondent's website, where he represented that he was a board-certified minimally invasive spine specialist. T.Z. was under the clear impression that if she decided to treat with him, any surgery, if one were required, would be minimal, and nothing more . . . .

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<sup>8</sup> The AG had been investigating Dr. Kaul since April 2012. A few days before the AG initiating the disciplinary action, on June 7, 2012, Dr. Kaul attempted to enjoin the State and various state agencies from immediately suspending his controlled dangerous substance registration. That complaint was dismissed by the trial court, and then the appeal of that dismissal was dismissed by the Appellate Division in July 2012. (Def. Ex. E, F)

<sup>9</sup> "OptiMesh is a three[-]dimensional mesh bag to contain bone fragments. ' . . . mesh is simply a bag that contains bones and is not capable of maintaining the load of body weight and, therefore, it is not considered to be an appropriate prosthetic device for an interspace.'" (Order 2 n.1)

<sup>10</sup> "Allograft bone is obtained from a cadaver. Autograft bone is harvested from the patient's own body, often from the iliac crest." (Order 17 n.5)

He told her that he was going to insert two screws [\*\*20] and scrape a disc that appeared to be bulging, that the surgery would last approximately forty-five minutes, and would only involve a small incision, about one inch in length. The patient stated that it was her clear understanding was that this was going to be a minor procedure, nothing more, and that she would be discharged the same day, followed by a minimal recovery period of about a week or so. The patient stated that she made it very clear to respondent that she would not agree to anything more significant.

Although she smoked a pack of cigarettes a day, she stated that respondent never mentioned anything about smoking or its risks associated with surgery.

On September 19, 2011, respondent performed a fusion at L3-L4 with the insertion of five screws. . . .

On the date of the surgery, she and her husband arrived at the surgical center early in the morning for what was thought to be a forty-five-minute procedure. Instead, she left the surgery center around 5:00 or 6:00 p.m. Her husband told her that she was in surgery for about six to seven hours. The ride home was excruciating—she was in extreme pain and felt nauseous. . . . Upon arriving home, she could not walk because the pain [\*\*21] was so intense. Her husband called his [\*223] father and together they placed her in a plastic chair and lifted her up the ten to twelve steps into her home. Once she was inside, she was placed in a recliner.

. . .

On December 24, 2011, T.Z. was taken to Pocono Hospital, where she was admitted, because she had severe difficulty walking. The pain and numbness to the inside of her legs and buttocks was worsening. . . . While at Pocono Hospital, she was informed that the entire disc had been removed. She also learned that five screws, instead of two, had been inserted.

From Pocono Hospital, she was transferred by ambulance to Lehigh Valley Hospital . . . . It was then that she learned that respondent was not an orthopedist, as she had initially thought, but an anesthesiologist.

On October 14, 2011, after noticing oozing from one of the incisions left by respondent, she consulted Brian Morse, D.O., who performed nerve testing on her legs. They did not respond. He recommended that she see George Naseef, M.D., an orthopedic surgeon. She saw Dr. Naseef on November 17, 2011, complaining of difficulty in walking, leg numbness, her right ankle giving out (going off to the side), and loss of balance, [\*\*22] particularly on non-flat surfaces . . . Dr. Naseef told her that two screws had penetrated the nerve in her spine and that she needed surgery. . . .

On January 30, 2012, Dr. Naseef performed a revision surgery at Morristown Memorial Hospital.

During these proceedings, T.Z. was asked to display the scars left by respondent. One scar was vertical at the midline of the low back, and measured approximately eight inches. There was also a horizontal scar to the left of the eight-inch scar, which measured about two inches. . . .

As the result of respondent's surgery, she had to use a walker for about six months for balance, which she began using immediately following the surgery. After six months, she used a cane daily, also for balance. For months, her husband had to escort her to the bathroom, where she used a specially raised toilet seat. This lasted for several months. In addition, her feet have become positioned outward. The inner sides of her legs remain numb and she continues to have back pain. She stated that no day is a good day. Her pain starts upon awakening and worsens as the day progresses.

It was noted by the undersigned that when she approached and left the witness stand, she used [\*\*23] a cane and ambulated very slowly. She also brought a pillow to sit on and was sobbing throughout most of her testimony.

Her husband, M.Z., also testified. He accompanied T.Z. to her initial consultation with respondent. He specifically recalled respondent telling them that the procedure would last about forty-five minutes and would involve a three-quarter-inch incision. . . .

He stated that T.Z. is now essentially confined to a recliner. She does not even sleep in bed. . . .

Petitioner called George S. Naseef III, M.D., a board-certified orthopedic surgeon, to testify. Dr. Naseef . . . performed corrective surgery on T.Z. . . .

Dr. Naseef determined that the L-3 screws were not in proper line and the right S-1 screw was in the S-I nerve root, not in the pedicle. Both L-3 screws and the right S-1 screw had perforated the bone and were in the nerve canal. . . .

[\*224] During surgery on January 30, 2012, Dr. Naseef noted that the right and left L-3 screws were in the canal, and the right S-1 screw was grossly malpositioned and in the canal. . . . Once the right S-1 screw was removed, nerve function immediately returned to the patient's leg. . . . He stated that of the five screws inserted, only one [\*\*24] was positioned correctly.<sup>11</sup>

(ALJ Op. 53-57)

Assessing the evidence in the record,<sup>12</sup> ALJ Solomon concluded that the Attorney General "prove[d] [] well beyond a preponderance of the credible evidence" that Dr. Kaul "never should have performed any spinal surgeries, whether they were called minimally invasive or open, given his lack of education and training." "[T]hat he performed such surgeries, without the requisite education and training, and in disregard for the safety of several patients who testified on behalf of petitioner, . . . warrant[sl] nothing less than the revocation of his medical license[,] the ALJ recommended. (ALJ Op. 93)

On March 12, 2014, the Board adopted ALJ Solomon's opinion and order in its entirety. It then considered the appropriate penalty for Dr. Kaul's conduct. Observing that Dr. Kaul, rather than acknowledging wrongdoing or demonstrating contrition after the ALJ's decision [\*25] instead lobbed "broad allegations of altered court transcripts, interference with legal evidence and political influence," the Board struggled to "find any mitigating factors in this matter."<sup>13</sup> Indeed, the Board found Dr. Kaul's lack of remorse "disturbing."<sup>14</sup> (Order 22-23, 25)

The Board also considered that this was not his first offense. About ten years earlier, the Board had suspended Dr. Kaul's medical license based on his failure to disclose in various credentialing applications that he had been convicted of manslaughter for killing a patient in England.<sup>15</sup> Despite [\*225] his failure to be forthright and honest in his dealings with the Board and others, the Board was lenient. The tragic incident in England, it reasoned, appeared to be just a mistake, and with due care similar incidents could be prevented. It therefore "eschewed a more stringent penalty with the hope and expectation that respondent will resolve to practice with the vigilance that he

<sup>11</sup> The Board, in adopting the ALJ's findings of fact as to T.Z., quoted Dr. Naseef directly on this point:

[Dr. Naseef testified that] they were in a place I have never seen before . . . this one completely missed the pedicle and went directly through the lamina and into the vertebral body which putting screws in that is a completed different field. When you are not in bone, it's grossly abnormal."

(Order 18-19)

<sup>12</sup> ALJ Solomon specifically found the "testimony of each and every witness produced by [the Attorney General] . . . extremely credible and compelling" while most of Dr. Kaul's witnesses lacked credibility or opined on irrelevant issues. (ALJ Op. 7879)

<sup>13</sup> Over the objection of Dr. Kaul's counsel, the Attorney General admitted an independent (*i.e.*, not official) transcript from one day of the 23-day hearing. Dr. Kaul had apparently appended the transcript to a letter addressed to President Obama, which he had posted on a personal website. "It shows," the Board concluded, "that Respondent's transcript and the official transcript had only minor insubstantial inconsistencies." (Order 22)

<sup>14</sup> In videos posted to his website, Dr. Kaul claimed that he was "absolutely shocked" by the ALJ's decision and pledged to continue to perform spine surgeries and teach others his methods. The plan, he said, was to open minimally invasive spine surgery clinics in places where people lack access to affordable spine care, such as Africa, Mexico, and Colombia. (*Id.* 22-23)

<sup>15</sup> In March 1999, while practicing medicine in England, a patient for whom Dr. Kaul had administered anesthesia died. About two years later, in February 2001, a jury convicted Dr. Kaul of gross negligence and manslaughter. From September 2000 to May 2001, Dr. Kaul made a number of false or misleading statements about those criminal proceedings, the related disciplinary proceedings, and later, the conviction, in a number of documents submitted to the Board and New Jersey hospitals. (ALJ Op. 90-92)

For example, on April 8, 2011, Dr. Kaul submitted an application for privileges at HUMC. He was asked the following question: "Please indicate if you have been ever been convicted of any criminal offense, excluding minor traffic violations, e.g., passing a stop sign, (if yes, give details on a separate sheet.)" Kaul checked the "NO" box, even though he had been convicted of manslaughter just a few months earlier.

has promised." Under the circumstances, the Board found a two-year suspension to be a sufficient sanction. But "[f]uture transgressions," it warned, "will not be deserving of leniency." (Order 23-24)

Against that backdrop—Dr. Kaul's lack of remorse, **[\*\*26]** his intent to continue to perform spine surgeries, and his failure to "turn over a new leaf to practice medicine responsibly"—the Board adopted the ALJ's recommendation to revoke Dr. Kaul's license, effective February 12, 2014. It further imposed the statutory maximum fine of \$20,000 for each of the 15 counts of malpractice and misconduct charged, as well as attorneys' fees and costs. All told, the Board imposed \$475,422.32 in civil penalties, fees, and costs. (Order 28-29)

Dr. Kaul did not appeal the Board's final decision to the New Jersey Superior Court, Appellate Division.

#### C. Concurrent and Subsequent Litigation

Over the years, Dr. Kaul has sued, and has been sued, in several actions that bear some relation to this one. Two are particularly relevant to these motions to dismiss.

##### 1. *BER-L-2256-13 (suit against doctors)*

A couple weeks before the first ALJ hearing, on March 22, 2013, Dr. Kaul sued Drs. Heary, Moore, Carmel, Przybylski and Mitchell in New Jersey Superior Court, Bergen County. He alleged defamation, commercial disparagement, intentional interference with prospective economic advantage, unfair competition, conspiracy, and aid in the commission of a tort. On March 7, 2014 (about **[\*\*27]** three months after the ALJ's initial decision and five days before the Board's final decision), the complaint was dismissed with prejudice as to Drs. Przybylski, Moore, and Carmel. (State Compl.; State Orders)

##### 2. *UNN-L332-15 (Santos malpractice)*

On September 24, 2015, Ana Santos filed a malpractice complaint against Dr. Kaul in New Jersey Superior Court, Union County. In June 2016, Dr. Kaul filed counterclaims and third-party claims against Governor Christie, the Board, Dr. Staats, and Dr. Carmel alleging the same causes of action asserted here: violations of RICO, the Sherman and *Clayton Acts*, the *Hobbs Act*, mail fraud, wire fraud, honest services fraud, defamation, *section 1983*, *Title VII*, commercial disparagement, intentional interference with prospective economic advantage, and aid in the commission in the tort. That case appears to be ongoing. (Def. Ex. J, ECF No. 128-12)

#### D. This Case

Dr. Kaul filed his original complaint on February 22, 2016, in the United States District Court for the Southern District in New York. Because almost all of the defendants and events giving rise to the complaint were located in New Jersey, on April 19, 2016, Judge Richard Sullivan transferred venue of the case to this Court. **[\*\*28]** (ECF Nos. 1, 19)

**[\*226]** On June 8, 2016, Dr. Kaul Filed the amended complaint, which is the subject of the current motions. It asserts 12 causes of action:

- Count One: Violations of the *Racketeer and Influenced Corruption Act* ("RICO"), *18 U.S.C. § 1961*, against Governor Christie, New Jersey, Chiesa, ALJ Solomon, GEICO, Allstate, Berkshire Hathaway, Buffett, TD Bank, Kothari, Rutgers, Gonzalez, Dr. Heary, Dr. Lomazow, Dr. Przybylski, Dr. Wolfa, Dr. Moore, Dr. Carmel, Dr. Mitchell, Dr. Staats, Dr. Cohen, Scarinci Hollenbeck, Hollenbeck, Brach Eichler, Gorrell, NASS, ASIPP, CNS, Dughi Hewitt, Keating, Dr. Kaufman, the Board, Roeder, NJM, Washburn, HUMC, AHS, Gragnolati, Garrett, Dr. Peterson, and AMA;
- Count Two: Violations of the *Sherman and Clayton Acts*, *15 U.S.C. § 2*, against Governor Christie, New Jersey, Chiesa, ALJ Solomon, GEICO, Allstate, TD Bank, Kothari, Rutgers, Gonzalez, Dr. Heary, Dr. Lomazow, Dr. Przybylski, Dr. Cohen, Hollenbeck, Brach Eichler, Gorrell, NASS, ASIPP, CNS, Dr. Kaufman, the Board, Roeder, NJM, Washburn, HUMC, AHS, Gragnolati, Garrett, and Dr. Peterson;

- **Count Three:** Violations the **Hobbs Act**, [18 U.S.C. § 1951](#), against Governor Christie, New Jersey, Chiesa, ALJ Solomon, GEICO, Allstate, TD Bank, Kothari, Rutgers, **[\*\*29]** Gonzalez, Dr. Heary, Dr. Lomazow, Dr., Przybylski, Dr. Staats, Dr. Cohen, Scarinci Hollenbeck, Hollenbeck, Brach Eichler, Gorrell, NASS, ASIPP, CNS, Dr. Kaufman, the Board, Roeder, NJM, Washburn, HUMC, AHS, Gragnolati, Garrett, and Dr. Peterson;
- **Count Four:** **Mail fraud**, in violation of [18 U.S.C. § 1343](#), Governor Christie, New Jersey, Chiesa, ALJ Solomon, GEICO, Allstate, TD Bank, Kothari, Rutgers, Gonzalez, Dr. Heary, Dr. Lomazow, Dr. Przybylski, Dr. Staats, Dr. Cohen, Scarinci Hollenbeck, Hollenbeck, Brach Eichler, Gorrell, NASS, ASIPP, CNS, Dughi Hewitt, Dr. Kaufman, the Board, Roeder, NJM, Washburn, HUMC, AHS, Gragnolati, Garrett, and Dr. Peterson;
- **Count Five:** **Wire fraud**, in violation of [18 U.S.C. § 1341](#), against the same parties as Count 4;
- **Count Six:** **Honest services fraud**, in violation of [18 U.S.C. § 1346](#), against the same parties as Count 4;
- **Count Seven:** **Defamation**, in violation of [28 U.S.C. § 4101](#), against Governor Christie, New Jersey, Chiesa, Solomon, GEICO, Allstate, TD Bank, Kothari, Rutgers, Gonzalez, Dr. Heary, Dr. Lomazow, Dr. Przybylski, Dr. Staats, Dr. Cohen, NASS, ASIPP, CNS, Dr. Kaufman, the Board, Roeder, NJM, Washburn, AHS, HUMC, Gragnolati, Garrett, and Dr. Peterson;
- **Count Eight:** Violations of the [\*Due Process Clause of Fourteenth Amendment\*](#) under [42 U.S.C. § 1983](#) against Governor **[\*\*30]** Christie, New Jersey, Chiesa, Solomon, GEICO, Allstate, TD Bank, Kothari, Rutgers, Gonzalez, Dr. Heary, Dr. Lomazow, Dr. Przybylski, Dr. Staats, Dr. Cohen, Scarinci Hollenbeck, Hollenbeck, Brach Eichler, Gorrell, NASS, ASIPP, CNS, Dughi Hewit, Dr. Kaufman, the Board, Roeder, NJM, Washburn, AHS, HUMC, Gragnolati, Garrett, and Dr. Peterson;
- **Count Nine:** Violations of [\*Title VII of the Civil Rights Act, 42 U.S.C. 2000e, et. seq.\*](#), **[\*227]** against Governor Christie, New Jersey, Chiesa, Solomon, GEICO, Allstate, Roeder, the Board, and Washburn;
- **Count Ten:** **Commercial disparagement** against Drs. Staats, Carmel, Heary, Przybylski, Mitchell, Cohen and Kaufman;
- **Count Eleven:** **Intentional interference with prospective economic advantage** against Drs. Staats, Carmel, Heary, Przybylski, Mitchell, Cohen and Kaufman; and
- **Count Twelve:** **Aid in the commission of a tort** against all of defendants.

For each count, Dr. Kaul requests the same relief: compensatory, consequential, and punitive damages, attorneys' fees and costs, and anything else that is just and equitable. (AC ¶¶ 92, 119, 148, 177, 206, 236, 261, 294, 308, 315, 318) Elsewhere in the AC, on the next-to-last page, Dr. Kaul asks for "the immediate reinstatement of an unrestricted **[\*\*31]** plenary medical license" and "expunge[ment] [of] the prior revocation of plaintiffs medical license from the public record." (*Id.* p. 101)

On November 23, 2016, defendants moved to dismiss the AC pursuant to [Fed. R. Civ. P. 12\(b\)\(1\)](#) and [12\(b\)\(6\)](#). To streamline motion practice, the defendants submitted an omnibus brief addressing facts and points of law common to all defendants. (ECF No. 128-1) Defendants individually submitted supplementary declarations. (ECF Nos. 128-12 through 32) Generally, the supplementary declarations amplify certain issues raised in the common brief (e.g., the applicability of res judicata or collateral estoppel) or point out issues peculiar to a particular defendant (e.g., lack of service of process or personal jurisdiction).<sup>16</sup> After a couple of false starts (ECF No. 139, 165), on March 20, 2017, Dr. Kaul filed an omnibus opposition brief.<sup>17</sup> (ECF Nos. 166) He also filed supplementary opposition briefs in

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<sup>16</sup> Claiming inadequate service of process, GEICO, Berkshire Hathaway, Buffett, and Crist moved to dismiss pursuant to [Fed. R. Civ. P. 12\(b\)\(4\)](#). Berkshire Hathaway, Buffett, and Crist also move to dismiss for lack of personal jurisdiction pursuant to [Fed. R. Civ. P. 12\(b\)\(2\)](#).

response to number of the defendants' supplemental declarations. (ECF No. 167) On May 3, 2017, Defendants replied, again jointly, with supplementary declarations or briefs. (ECF Nos. 181, 182, 183, 184, 186, 187)

All told, nearly 2,000 pages of briefs, affidavits, and documents have been filed in connection [\*\*32] with these motions to dismiss. Almost half of that total—around 940 pages—consists of a mishmash of unsponsored exhibits submitted by Dr. Kaul. (ECF No. 179)

## II. STANDARDS OF REVIEW

### A. Rule 12(b)(1) Standard

Based on the *Rooker-Feldman* and *Younger* doctrines, all defendants move to dismiss based on lack of subject matter jurisdiction. Certain State Defendants also move to dismiss based on sovereign immunity. A motion to dismiss for lack of subject matter jurisdiction pursuant to *Fed. R. Civ. P. 12(b)(1)* may be raised at any time. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 437-38 (D.N.J. 1999). *Rule 12(b)(1)* challenges are either facial or factual attacks. See 2 James W. Moore, *Moore's Federal Practice* § 12.30[4] (3d ed. 2007). The defendant may facially challenge subject matter jurisdiction [\*228] by arguing that the complaint, on its face, does not allege sufficient grounds to establish subject matter jurisdiction. *Iwanowa*, 67 F. Supp. 2d at 438. Under this standard, a court assumes that the allegations in the complaint are true, and may dismiss the complaint only if it appears to a certainty that the plaintiff will not be able to assert a colorable claim of subject matter jurisdiction. *Id.*

All of the defendants' *Rooker-Feldman*, *Younger*, or immunity arguments are postured as facial challenges to the jurisdictional basis of the complaint. In considering them, the Court [\*\*33] will take the allegations of the complaint as true. See *Gould Elecs., Inc. v. U.S.*, 220 F.3d 169, 178 (3d Cir. 2000).

### B. Rule 12(b)(6) Standard

*Rule 12(b)(6)*, *Fed. R. Civ. P.*, provides for the dismissal of a complaint, in whole or in part, if it fails to state a claim upon which relief can be granted. The defendant, as the moving party, bears the burden of showing that no claim has been stated. *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462, 469 n. 9 (3d Cir. 2011). For the purposes of a motion to dismiss, the facts alleged in the complaint are accepted as true and all reasonable inferences are drawn in favor of the plaintiff. *New Jersey Carpenters & the Trustees Thereof v. Tishman Const. Corp. of New Jersey*, 760 F.3d 297, 302 (3d Cir. 2014).

*Federal Rule of Procedure 8(a)* does not require that a complaint contain detailed factual allegations. Nevertheless, "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Thus, the complaint's factual allegations must be sufficient to raise a plaintiff's right to relief above a speculative level, so that a claim is "plausible on its face." *Id. at 570*; see also *West Run Student Housing Assocs., LLC v. Huntington Nat. Bank*, 712 F.3d 165, 169 (3d Cir. 2013). That facial-plausibility standard is met "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Twombly*, 550 U.S. at 556). While "[t]he plausibility standard is not akin to a 'probability' [\*\*34] requirement' . . . it asks for more than a sheer possibility." *Iqbal*, 556 U.S. at 678.

However, a plaintiff alleging fraud or mistake must meet a heightened pleading standard under *Federal Rule of Civil Procedure 9(b)*. Under *Rule 9(b)*, "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *Fed. R. Civ. P. 9(b)* (emphasis added). As the Third Circuit has explained, "[a] plaintiff alleging fraud must therefore support its allegations with all of the essential factual

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<sup>17</sup> A motion for leave to file a second amended complaint was denied without prejudice in January 2017 for failure to attach a proposed pleading. (ECF No. 156)

background that would accompany the first paragraph of any newspaper story—that is, the who, what, when, where and how of the events at issue." [U.S. ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC, 812 F.3d 294, 307 \(3d Cir. 2016\)](#) (citing [In re Rockefeller Ctr. Props., Inc. Securities Litig., 311 F.3d 198, 217 \(3d Cir. 2002\)](#)) (citation and quotation marks omitted). In other words, a plaintiff may satisfy this requirement by pleading "the date, time and place" of the alleged fraud or deception, or by "otherwise injecting] precision or some measure of substantiation" into the allegation. [Frederico v. Home Depot, 507 F.3d 188, 200 \(3d Cir. 12291 2007\)](#) (citing [Lum v. Bank of Am., 361 F.3d 217, 224 \(3d Cir. 2004\)](#)).

The heightened specificity required by [Rule 9\(b\)](#) extends to the pleading of all claims that "sound in fraud." See [Giercyk v. Nat'l Union Fire Ins. Co. of Pittsburgh, No. 13-6272, 2015 U.S. Dist. LEXIS 162628, 2015 WL 7871165, at \\*2 \(D.N.J. Dec. 4, 2015\); Mladenov v. Wegmans Food Markets, Inc., 124 F. Supp. 3d 360, 372 \(D.N.J. 2015\)](#). This includes Dr. Kaul's claims of mail, wire, and honest services fraud. See [Warden v. McLelland, 288 F.3d 105, 114 \(3d Cir. 2002\)](#).

Where a plaintiff, like Dr. Kaul here, is proceeding *pro se*, the complaint is to be "liberally construed," and, "however inartfully pleaded, [\*\*35] must be held to less stringent standards than formal pleadings drafted by lawyers." [Erickson v. Pardus, 551 U.S. 89, 93-94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 \(2007\)](#). Nevertheless, "pro se litigants still must allege sufficient facts in their complaints to support a claim." [Mala v. Crown Bay Marina, Inc., 704 F.3d 239, 245, 58 V.I. 691 \(3d Cir. 2013\)](#). "While a litigant's *pro se* status requires a court to construe the allegations in the complaint liberally, a litigant is not absolved from complying with *Twombly* and the federal pleading requirements merely because s/he proceeds *pro se*." [Thakar v. Tan, 372 F. App'x 325, 328 \(3d Cir. 2010\)](#) (citation omitted). *Pro se* plaintiffs are also not exempt from meeting the heightened pleading requirements of [Rule 9\(b\)](#) when alleging claims that sound in fraud. See [Kowalsky v. Deutsche Bank Nat'l Trust Co., No. 14-07856 \(CCC\)\(JBC\), 2015 U.S. Dist. LEXIS 133284, 2015 WL 5770523, at \\*9 \(D.N.J. Sept. 30, 2015\)](#).

### C. Extrinsic Materials

In connection with these motions to dismiss, the parties have submitted reams of documents extrinsic to the complaint. Many, especially the documents submitted by Dr. Kaul, cannot be considered without converting these motions to dismiss into summary judgment motions. Others, however, are properly considered on a motion to dismiss, and I do consider them. I refer in particular to the records of the state administrative proceedings and other court records. I stress that I have considered these documents, not to establish contested [\*\*36] factual matters, but to establish the nature and scope of prior proceedings between the parties, and the rulings of the Board and state courts.

Such records<sup>18</sup> are subject to judicial notice:

[O]n a motion to dismiss, we may take judicial notice of another court's opinion—not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity. See [Kramer v. Time Warner Inc., 937 F.2d 767, 774 \(2d Cir. 1991\); United States v. Wood, 925 F.2d 1580, 1582 \(7th Cir. 1991\); see also Funk v. Commissioner, 163 F.2d 796, 800-01 \(3d Cir. 1947\)](#) (whether a court may judicially notice other proceedings depends on what the court is asked to notice and on the circumstances of the instant case).

[S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd., 181 F.3d 410, 426-27 \(3d Cir. 1999\)](#). See generally [Fed. R. Evid. 201](#).

Even setting aside judicial notice, many of these documents, such as the ALJ's initial decision and the Board's final order, are intrinsic to the allegations of the complaint [\*230] and may be considered without converting a facial [Rule 12\(b\)\(1\)](#) challenge into a factual one, or a [Rule 12\(b\)\(6\)](#) motion into one for summary judgment. [Schmidt v.](#)

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<sup>18</sup> As it happens, records of Dr. Kaul's proceedings before the Board are posted on the Board's website. See <http://www.njconsumeraffairs.gov/bme/Pages/actions.aspx>.

Skolas, 770 F.3d 241, 249 (3d Cir. 2014) ("[A] 'document integral to or explicitly relied upon in the complaint' may be considered 'without converting the motion to dismiss into one for summary judgment.'") (quoting In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997)); accord In re Asbestos Products Liability Litigation (No. VI), 822 F.3d 125, 134 n.7 (3d Cir. 2016).

### III. SOME PRELIMINARY ISSUES

I first address a number of threshold, or threshold-ish, issues. Disposing of some **[\*\*37]** preliminaries now will make it easier to discuss and analyze defendant-specific, or merits-oriented, issues later. Because all defendants raise the *Rooker-Feldman* and *Younger* doctrines, I discuss them first. I then turn my attention to a number of facial pleading defects. Section III concludes with an analysis of the potential preclusive effect of certain state court orders.

The upshot of my analysis of these preliminary issues is this: I have jurisdiction to hear this case, and I will not abstain from hearing it. The AC, however, will be dismissed as to Berkshire Hathaway, Buffett, Crist, and Gragnolati for failure to state a claim. Counts Three, Four, Five, Six, Seven, and Nine will also be dismissed as to all defendants for incurable pleading defects. And all claims will be dismissed as to Drs. Moore, Carmel, AMA, and NASS on res judicata and entire controversy grounds.

As to the defendants and claims remaining, in Sections IV and V I will analyze additional jurisdictional, immunity, and merits-based arguments.

#### A. *Rooker-Feldman and Younger Abstention*

All defendants move to dismiss this case pursuant to Fed. R. Civ. P. 12(b)(1) under the *Rooker-Feldman* doctrine, see generally Rooker v. Fidelity Trust Co., 263 U.S. 413, 416, 44 S. Ct. 149, 68 L. Ed. 362 (1923), District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983), or alternatively the federalism-based **[\*\*38]** abstention doctrine of Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971). For the reasons set forth below, I decline to dismiss the AC on either ground.<sup>19</sup>

##### 1. *Rooker-Feldman*

The *Rooker-Feldman* doctrine prohibits federal courts from exercising jurisdiction over "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005). In the Third Circuit, *Rooker-Feldman* bars claims in federal court if: "(1) the federal plaintiff lost in state court; (2) the plaintiff 'complain[s] of injuries caused by [the] state-court judgments'; (3) those judgments were rendered before the federal suit was filed; and (4) the plaintiff is inviting the district court to review and reject the state judgments." Great Western Mining & Mineral Co. v. Fox Rothschild [\*231] LLP, 615 F.3d 159, 166 (3d Cir. 2010).

All defendants argue that the AC is a naked attempt to overturn and re-litigate the Board's Order revoking Dr. Kaul's license. That is correct as far as it goes; the AC, among other things, requests reinstatement of Dr. Kaul's medical license and expungement of the Board's decision from the public record. The problem, however, is that the Order, while a final administrative action, is not **[\*\*39]** a state court judgment. Because Dr. Kaul never appealed the Order

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<sup>19</sup> No party has raised the applicability, or not, of *Colorado River* abstention in light of UNN-L332-15, which involves many of parties and all of the same causes of action in this case. 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976).

to the Appellate Division (though he could have), he is not, and was never, a state court loser. Without a state court judgment, *Rooker-Feldman* cannot apply.<sup>20</sup>

Citing *Ninal v. Evangelista, Civ. Action No. 04-5718, 2005 U.S. Dist. LEXIS 25251, at \*11 (D.N.J. Oct. 21, 2005)*, defendants suggest that administrative determinations that are "judicial in nature" may trigger *Rooker-Feldman*. That is not the law; the *Rooker-Feldman* doctrine is actually much narrower. "The Supreme Court has made clear . . . that the *Rooker-Feldman* doctrine only applies to state judicial proceedings, not administrative or legislative proceedings." *AMTRAK v. Pa. PUC, 342 F.3d 242, 257 (3d Cir. 2003)* (citing *Verizon Md., Inc. v. PSC, 535 U.S. 635, 644 n.3, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002)*); accord *Stone v. N.J. Admin Office of the Courts, 557 Fed. App'x 151, 153 (3d Cir. 2014)* ("*Rooker-Feldman* does not bar review of claims never decided by the courts.") As the Court of Appeals for the Second Circuit has explained:

While the *Rooker-Feldman* doctrine recognizes that the federal district courts may not review decisions by a state's courts, it does not preclude federal district court review of 'executive action, including determinations made by state administrative agencies.' This principle holds true even where the administrative agency acted in an adjudicative capacity, or plaintiff could have sought, but did not seek, review of the agency's determination [\*\*40] in state court.

*Mitchell v. Fishbein, 377 F.3d 157, 165 (2d Cir. 2004)* (citations omitted).<sup>21</sup>

Dr. Raul's failure to avail himself of state court remedies may have other consequences. This action, however, does not require this Court "to exercise appellate jurisdiction over a state-court judgment." *Verizon, 535 U.S. at 644 n.3*. *Rooker-Feldman* does not bar the Court from hearing this case.<sup>22</sup>

#### [\*232] 2. Younger abstention

Defendants' fallback position is that dismissal is appropriate based on the abstention doctrine of *Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)*. *Younger* abstention is a closer call, but I find that abstention is not warranted under the circumstances of this case.

<sup>20</sup> That is also why the Santos case, UNN-L332-15, cannot be the basis of *Rooker-Feldman* dismissal. As far as the Court is aware, there was no final judgment entered in that case as of the time this action was commenced, and there does not appear to have been a final judgment even now.

<sup>21</sup> The only other case cited by defendants, *Harris v. N.Y. State Dep't of Health, 202 F. Supp. 2d 143, 150-51 (S.D.N.Y. 2002)*, involved a doctor who actually appealed the revocation of his medical license to a New York state court.

<sup>22</sup> The Bank defendants argue that *Rooker-Feldman* dismissal is appropriate on grounds unique to them. Around April 2009, TD Bank became the holder of a \$1 million loan that another bank had made Dr. Kaul and his companies. In 2012, he defaulted on that loan; on March 22, 2013, TD Bank obtained a default judgment against Dr. Kaul and his businesses. Attempting to enforce the judgment, the Bank Defendants allegedly "defraud[ed] the plaintiff of his right to sell his Manhattan townhouse" and "used false pretenses to obstruct [] the townhouse and force it into foreclosure." (E.g. AC ¶¶ 184-85) Dr. Kaul, the Bank defendants conclude, is thus a state-court loser complaining of injuries caused by a state-court judgment rendered before this case was filed, which he invites me to review and reject.

Dr. Kaul, however, does not assert claims based on injuries caused by the state court judgment itself, but rather injuries traceable to the Bank Defendants' attempts to enforce that judgment. See, e.g., *B.S. v. Somerset County, 704 F.3d 250, 260 (3d Cir. 2013)* (holding that suits seeking redress for injuries traceable to defendants' actions, rather than the state court orders themselves, are not barred by *Rooker-Feldman*). Nor does Dr. Kaul explicitly ask this court to invalidate the judgment. Post-Exxon, a court must be cautious in applying *Rooker-Feldman* where the federal claims do not directly clash with the state claims, but are merely "intertwined" with them. See, e.g., *Gary v. Braddock Cemetery, 517 F.3d 195, 200 n.5 (3d Cir. 2008)* (advising caution in employing pre-Exxon Third Circuit precedent interpreting *Rooker-Feldman*). The *Rooker-Feldman* doctrine does not apply to the claims against the Bank defendants.

Younger requires federal courts to abstain from interfering with certain pending state proceedings. See [Gonzalez v. Waterfront Comm'n of N.Y. Harbor, 755 F.3d 176, 180 \(3d Cir. 2014\)](#). It applies rarely, "in only three 'exceptional' classes of cases: (1) 'state criminal prosecutions,' (2) 'civil enforcement proceedings,' and (3) 'civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id.* (citing [Sprint Communs., Inc. v. Jacobs, 571 U.S. 69, 134 S. Ct. 584, 588, 187 L. Ed. 2d 505 \(2013\)](#)).

This case undeniably involves a state proceeding falling in the second category: a civil enforcement proceeding. The proceedings that resulted in [\*41] the revocation of Dr. Kaul's license bear hallmarks of a quasi-criminal proceeding. The State, for example, was a party. [Gonzalez, 755 F.3d at 181](#). The proceedings began with an "investigation that 'culminat[ed] in the filing of a formal complaint.' *Id.* And they were initiated by the State "to sanction the federal plaintiff, *i.e.*, the party challenging the state action, for some wrongful act." *Id.* Since the administrative proceedings here were "akin to a criminal prosecution," one prerequisite to Younger abstention is met.

That is just the beginning of the analysis, however. I must also consider the three factors identified in [Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 102 S. Ct. 2515, 73 L. Ed. 2d 116 \(1982\)](#). Condensing somewhat, those factors are that there be (1) an ongoing or pending state or administrative judicial proceeding (2) implicating important state interests (3) in which the plaintiff has an opportunity to raise the issues she seeks to litigate in federal court. [Gonzalez, 755 F.3d at 182-83](#) (citing [Sprint, 134 S. Ct. at 593](#)). For the reasons stated below, factors (1) and (2) are met, but because the administrative proceedings did not afford Dr. Kaul the opportunity to raise most of the issues he seeks to litigate here, factor (3) is not satisfied.

As to the first factor, this case may technically interfere with an ongoing judicial [\*42] proceeding. True, Dr. Kaul never asked a New Jersey state court to review the Board's Order, but that is not required for purposes of *Younger*. As the Third Circuit has held:

[S]tate proceedings remain "pending," within the meaning of *Younger* abstention, . . . where a coercive administrative proceeding has been initiated by the State in a state forum, where adequate state-court judicial review of the administrative determination is available to the federal claimants, and where the [\*233] claimants have chosen not to pursue their state-court judicial remedies, but have instead sought to invalidate the State's judgment by filing a federal action.

[O'Neill v. City of Philadelphia, 32 F. 3d 785, 791 \(3d Cir. 1994\)](#); accord [Zahl v. Harper, 282 F.3d 204, 209 \(3d Cir. 2002\)](#); [Williams v. Gov't of Virgin Islands, No. 2005-97, 2008 U.S. Dist. LEXIS 99648 at \\*1, 3, 50 V.I. 852 \(D.V.I. Dec. 8, 2008\)](#), aff'd sub nom., [360 F. App'x. 297 \(3d Cir.\)](#), cert. denied, 560 U.S. 965, 130 S. Ct. 3445, 177 L. Ed. 2d 324 (2010) (concluding that the requirements of *Younger* had been met in a case involving a doctor attempting to enjoin a medical board that had suspended and revoked the doctor's medical license). Having lost in a coercive administrative proceeding initiated by the State, Dr. Kaul had the right to appeal the Board's final administrative decision to the New Jersey Superior Court, Appellate Division. *E.g.*, N.J. Appellate Ct. R. 2:2-3(a)(2); [In re Polk, 90 N.J. 550, 560, 449 A.2d 7 \(1982\)](#). While he chose not to do so, as far as *Younger* is [\*43] concerned his case is ongoing.

The disciplinary hearings, moreover, clearly were judicial. ALJ Solomon presided over 23 days of hearings in which counsel for Dr. Kaul and the AG submitted evidence, cross-examined witnesses, and filed post-hearing briefs. The ALJ issued a formal, written recommendation. The Board considered and rejected Dr. Kaul's exceptions to ALJ Solomon's recommendation, adopted it, and then held a hearing to consider the appropriate punishment. Although not held in a court of law, these proceedings were quintessentially judicial. Because the disciplinary proceedings are ongoing and judicial in nature, the first *Middlesex* factor is present here.

So too is the second *Middlesex* factor. The proceedings before the Board surely implicate important state interests. New Jersey has a strong interest in regulating the medical profession and censuring physicians who are a danger to public health and safety. *E.g.* [Zahl, 282 F. 3d at 210](#) (recognizing the "obvious" interest states have in regulating the practice of medicine) (collecting cases)). On this factor, no further analysis is required.

The analysis of the third and final *Middlesex* factor—whether Dr. Kaul had an adequate opportunity to assert his [\*\*44] federal claims in the state proceedings—is slightly more complicated. Dr. Kaul no doubt had an opportunity to raise his claims of procedural and substantive due process before the Board (and, had he exercised his right to state court judicial review, before the Appellate Division).<sup>23</sup> Dr. Kaul, however, asserts many other federal claims, some of which could not have been heard before the Board, against persons and entities that were not parties to the administrative proceedings.

Persuasive here is *Prevost v. Twp. of Hazlet*, 159 F. App'x 396 (3d Cir. 2005). There, a police officer in Hazlet, New Jersey, was subjected to disciplinary proceedings and eventually fired. He sued the Township of Hazlet and several of its employees under Section 1983. Even though the administrative disciplinary proceeding remained pending, and the federal case rested on the same facts, the Third Circuit found abstention unwarranted. It emphasized three factors: (1) the only opposing party in the administrative proceeding was the Township, not its employees, who were parties to only the federal proceeding; (2) the only question in the administrative [\*234] proceeding was whether the officer's termination violated state statutes or regulations, not federal law; and (3) in the administrative proceedings, [\*\*45] the officer could not obtain certain injunctive and monetary relief that he could obtain in federal court. *Id. at 398.*

Those *Prevost* considerations apply here as well. The only parties to the disciplinary proceedings were Dr. Kaul and the State, not the entire "medico-legal" community Dr. Kaul attempts to hold liable now. The only questions before the Board were whether Dr. Kaul had committed repeated instances of gross malpractice and professional misconduct. By contrast, the issues here concern allegedly collusive and anticompetitive conduct, and conspiracy to defraud and extort. Some of that alleged conduct, moreover, occurred at the same time as, or even after, the administrative proceedings. And the administrative proceedings would not provide for the punitive and treble damages that Dr. Kaul seeks here.

On balance, then, I do not think that the third *Middlesex* factor is met. Dr. Kaul could not have raised the federal claims central to the AC—specifically the RICO and antitrust claims—in the administrative disciplinary proceedings below; nor could he have obtained anything like the damages he seeks to impose against the multifarious defendants involved in this case. In these peculiar circumstances, [\*\*46] I will not dismiss the AC on *Younger* grounds.

I note in passing a final consideration. "A federal court will consider Younger abstention when the requested equitable relief would constitute federal interference in state judicial or quasi-judicial proceedings." *Marran v. Marran*, 376 F.3d 143, 154 (3d Cir. 2004) (emphasis in original) (quoting *Marks v. Stinson*, 19 F.3d 873, 883 (3d Cir. 1994)). Although, on the next-to-last page of the AC, Dr. Kaul requests an order reinstating his medical license and expunging the Board's Order "from the public record," the overall goal of this *pro se* complaint seems to an award of damages for violations of antitrust and organized crime laws. (AC ¶¶ 92, 119, 148, 177, 206, 236, 261, 294, 308, 315, 318 (requesting compensatory, consequential, and punitive damages). Abstention is most obviously appropriate in cases where a plaintiff asks a federal court to enjoin some state judicial or quasi-judicial proceeding. See, e.g., *Younger*, 401 U.S. at 45.<sup>24</sup> The AC does not directly ask me to do that.

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<sup>23</sup> At least with respect to allegations of altered transcripts, the Board noted that the single instance of such alteration provided by Dr. Kaul contained only "minor insubstantial inconsistencies." (Order 22)

<sup>24</sup> Even if this reference to reinstatement and expungement were construed as a claim for equitable or declaratory relief, the law of this Circuit would mandate a stay, not outright dismissal, of the AC. See, e.g., *Marran*, 376 F.3d at 155.

To look at it another way, consider this. The central insight of *Younger* is that a federal court should not grind important and presumptively lawful state processes to a halt by granting discretionary equitable relief. To do otherwise would unduly interfere in a state's sovereign prerogatives, which is why the "normal thing to do" is to withhold the requested relief and dismiss the case. E.g., *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 359, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989) (Or, where both an injunction and damages are requested, stay the case and let the state proceedings run their course.) In this case, the administrative proceedings, while technically still pending, have essentially concluded. The time for Dr. Kaul to appeal the Board's Order lapsed long ago. The primary objective of AC appears to be to obtain money damages. I am confident that, to the

For these reasons, as well as those detailed above, this case is distinguishable from [\*Williams v. Gov't of the V.I. Bd. of Med. Examiners\*, 360 F. App'x 297 \(3d Cir. 2010](#)). There, the Third Circuit upheld a [\*235] district court's decision to abstain from hearing a case involving a doctor suing a medical board for alleged due process violations and violations [\*47] of the antitrust laws. The board and members of the board were the only parties in that case, and the events giving rise to the plaintiff's federal claims stemmed from conduct that had transpired during the administrative proceedings. The plaintiff also requested emergent relief (which he actually received, a couple of times), a preliminary injunction, and a declaration "that Defendants must adopt reasonable rules and regulations in accordance with Virgin Islands law". Those circumstances, which are not present here, suggest a much stronger case for *Younger* abstention.<sup>25</sup>

So, in short, holding this *pro se* complaint to the appropriate pleading standard and giving all due weight to the Court's "virtually unflagging" obligation to hear and decide cases that fall within its jurisdiction, [\*Sprint, 134 S. Ct. at 584\*](#), I will not abstain from adjudicating the claims of the AC.<sup>26</sup>

#### **B. Berkshire Hathaway, Buffet, Crist, and Gragnolati**

Changing gears, I will clear away four parties who are named as defendants, but against whom no substantive allegations can be found in the AC. These defendants—Berkshire Hathaway, Buffet, Crist, and Gragnolati—will be dismissed from the case.

No allegation is directed towards Crist. (AC ¶ [\*48] 8) As to Berkshire Hathaway, its liability is based solely on the conduct of its subsidiary, GEICO. That, without more, is an insufficient allegation of RICO liability against Berkshire Hathaway. See, e.g., [\*Lorenz v. CSX Corp., 1 F.3d 1406, 1412 \(3d Cir. 1993\)\*](#) ("[T]he plaintiff must plead facts which, if assumed to be true, would clearly show that the parent corporation played a role in the racketeering activity which is distinct from the activities of its subsidiary.") The sole allegation as to Buffet makes little sense, and thus fails to plausibly suggest any wrongdoing (let alone meet the heightened pleading requirements of [\*Rule 9\(b\)\*](#)).<sup>27</sup> Having been the President and CEO of AHS only since May 4, 2015, Gragnolati could not have conspired to revoke Dr. Kaul's license, an event which occurred on February 12, 2014.

For these reasons, Berkshire Hathaway, Buffet, Crist, and Gragnolati's motions to [\*236] dismiss for failure to state a claim are granted.<sup>28</sup>

#### **C. Counts Three, Four, Five, Six, Seven, and Nine**

extent Dr. Kaul intended to plead it, the discretionary equitable relief requested here will not unduly interfere with any state proceedings or objectives.

<sup>25</sup> Same reasoning applies to [\*Zahl v. Harper, 282 F.3d 204 \(3d Cir. 2002\)\*](#), in which a doctor tried to get a district court to enjoin the State from bringing disciplinary proceedings. The Third Circuit ruled that the district court appropriately dismissed the case on abstention grounds.

<sup>26</sup> The Bank Defendants claim that their default judgment against Dr. Kaul injects special jurisdictional considerations as to the claims against them. There is no analysis, however, why that may be the case. Because the Bank Defendants have failed to argue, let alone show, that *Younger* abstention is triggered by its March 22, 2013 default judgment or the subsequent foreclosure proceedings, I will not abstain from hearing the claims as to them.

<sup>27</sup> AC ¶ 63 ("Warren Buffet[t] is the Chairman and CEO of Berkshire Hathaway, which is the parent company of GEICO. The defendant is liable for illegal acts to which there exists a nexus to the aforementioned corporations. The protections of the corporate veil become forfeited when the majority of shareholders are ignorant as to the existence of the illegal acts. The illegal act was the alteration of court transcripts by the defendant state, which deprived the plaintiff of his Constitutional right to due process and which caused damage to the plaintiff's estate and reputation. The defendant violated the Racketeer and Influenced Corruption Act when he conspired by willful ignorance with the defendant Governor to revoke the medical license of the plaintiff.")

<sup>28</sup> Because I dismiss the AC pursuant to [\*Rule 12\(b\)\(6\)\*](#) as to Crist, Berkshire Hathaway, and Buffet, I do not reach these defendants' arguments that dismissal is warranted for lack of sufficient process and personal jurisdiction.

Several causes of action alleged in the AC are obvious non-starters, and I will weed them out now.

Counts Three, Four and Five allege violations of federal mail, wire, and honest services fraud statutes. Count Six alleges violations of the Hobbs Act, which essentially [\*\*49] outlaws certain forms of extortion. Not one of these federal criminal statutes provides a private right of action, express or implied.<sup>29</sup> To the extent the AC purports to assert Counts Three, Four, Five, and Six as independent causes of action, they are dismissed as to all defendants. I will consider them as potential predicate acts on which to base RICO liability, however. See *infra* Part V.A.

Count Seven, which is pleaded as defamation in violation of [28 U.S.C. § 4104](#), is also defective. That statute addresses the recognition of foreign defamation judgments; the cited provision provides a definition for "defamation." Defamation is not a federal statutory cause of action. Count Seven is dismissed as to all defendants.

Count Nine alleges violations of [Title VII of the Civil Rights Act of 1964](#). Title VII prohibits employers from taking adverse employment actions against their employees on the basis of protected characteristics. [42 U.S.C. § 2000e-2\(a\)](#). An "employer" is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person." [\*\*50] [42 U.S.C. § 2000e\(b\)](#). An "employee" is defined as "an individual employed by an employer[.]" [42 U.S.C. § 2000e\(f\)](#). To determine whether a person is an employee of an employer, courts look to common law master-servant agency principles. *E.g., Clackamas Gastroenterology Assocs., P.C. v. Wells*, [538 U.S. 440, 445, 123 S. Ct. 1673, 155 L. Ed. 2d 615 \(2003\)](#). Those principles include:

die hiring party's right to control the manner and means by which the product is accomplished[;] ... the skill required; the source of the instrumentalities and tools; the location of die work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the [\*237] hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

[Pavlik v. In'l Excess Agency, Inc.](#), [417 F. App'x 163, 166 \(3d Cir. 2011\)](#) (quoting [Nationwide Mut. Ins. Co. v. Darden](#), [503 U.S. 318, 323-24, 112 S. Ct. 1344, 117 L. Ed. 2d 581 \(1992\)](#)).

None of these factors are present here, for any of the defendants, anywhere in the AC. No defendant acted as Dr. Kaul's employer. To the contrary, the record suggests that Dr. Kaul was self-employed and ran his own surgical center. There is no employer-employee relationship here that [\*\*51] could give rise to a Title VII violation. Count Nine is therefore dismissed as to all defendants. I will consider, however, that Dr. Kaul may have intended to advance a parallel disparate treatment claim under [section 1983](#). See *infra* Part V.C.3.

#### D. Res Judicata and the Entire Controversy Rule

To round out this section, I consider the argument that some of Dr. Kaul's claims are barred by res judicata and New Jersey's entire controversy rule. Recall that, on March 22, 2013, Dr. Kaul sued Drs. Heary, Moore, Carmel, Przybylski, Mitchell, John Does 1-5, and ABC Associations 1-5 in New Jersey Superior Court (referred herein as "State Complaint" and cited as "State Compl.") As to Drs. Moore, Przybylski, and Carmel, that complaint was

<sup>29</sup> See, e.g., [Jones v. TD Bank](#), [468 F. App'x 93, 94 \(2012\)](#) (no private right of action under the mail fraud statute, [18 U.S.C. § 1341](#)) (citing [Wisdom v. First Midwest Bank](#), [167 F.3d 402, 408 \(8th Cir. 1999\)](#) (collecting cases))), accord [Gross v. Cormack](#), [586 Fed. App'x 899, 901 \(3d Cir. 2014\)](#); [Obianyo v. Tennessee](#), [518 Fed. App'x 71, 73 \(3d Cir. 2013\)](#) (no private right of action under the wire fraud statute, [18 U.S.C. § 1343](#) (citing [Gonzaga Univ. v. Doe](#), [536 U.S. 273, 283-84, 122 S. Ct. 2268, 153 L. Ed. 2d 309 \(2002\)](#)); [Young v. Bishop Estate](#), No. 09-00403 SOM-BMK, 2009 U.S. Dist. LEXIS 103915, at \*28-30 (D. Haw. Nov. 6, 2009) (no private right of action under the honest services fraud statute, [18 U.S.C. § 1346](#)), accord [Marfut v. City of N. Port, Fla.](#), Civ. A. No. 8:08-cv-2006-T-27EAJ, 2009 U.S. Dist. LEXIS 24831 at \*1 (M.D. Fla. March 25, 2009); [Drance v. Simpson Thacher & Bartlett](#), 96 Civ. 5729, 1997 U.S. Dist. LEXIS 11361, at \*18 (S.D.N.Y. Aug. 4, 1997); [Peterson v. Philadelphia Stock Exchange](#), [717 F. Supp. 332, 336 \(E.D. Pa. 1989\)](#) (no private action under the Hobbs Act, [18 U.S.C. § 1951](#)), accord [Stanard v. Nygren](#), [658 F.3d 792, 794 \(7th Cir. 2011\)](#) (noting that a private claim under the Hobbs Act is "obviously frivolous").

dismissed with prejudice on March 7, 2014. That disposition, virtually all defendants argue, precludes all or many of the claims advanced here. To some extent, I agree, but only as to Drs., Carmel, Moore, NASS, and AMA.<sup>30</sup>

Res judicata, though an affirmative defense, may be considered on a [Rule 12\(b\)\(6\)](#) motion where, as here, the necessary facts are apparent on the face of the complaint and other documents properly considered on a motion to dismiss. Whether a state court judgment should have [\[\\*\\*52\]](#) a preclusive effect in a subsequent federal action depends on the law of the state that adjudicated the original action. See [Greenleaf v. Garlock, Inc., 174 F.3d 352, 357 \(3d Cir. 1999\)](#) ("To determine the preclusive effect of [the plaintiff's] prior state action we must look to the law of the adjudicating state."). See also [Allen v. McCurry, 449 U.S. 90, 96, 101 S. Ct. 411, 66 L. Ed. 2d 308 \(1980\)](#) ("Congress has specifically [\[\\*238\]](#) required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so."). Here, that state is New Jersey.

Claim preclusion in the traditional sense tends to be subsumed by New Jersey's "entire controversy" rule. "In New Jersey, the entire controversy doctrine 'is an extremely robust claim preclusion device that requires adversaries to join all possible claims stemming from an event or series of events in one suit.'" [Chrystral v. N.J. Dep't of Law & Pub. Safety, 535 Fed. Appx. 120, 123 \(3d Cir. 2013\)](#) (quoting [Paramount Aviation Corp. v. Agusta, 178 F.3d 132, 135 \(3d Cir. 1999\)](#)). The doctrine precludes, not just claims actually decided by a prior judgment, but *all claims* that a party could and should have joined in a prior case based on the same transaction or occurrence.<sup>31</sup>

We have described the entire controversy doctrine as "New Jersey's specific, and idiosyncratic, application of traditional res judicata principles." [Rycoline Prods., Inc. v. C & W Unlimited, 109 F.3d 883, 886 \(3d Cir. 1997\)](#). A mainstay of New Jersey civil procedure, [\[\\*\\*53\]](#) the doctrine encapsulates the state's longstanding policy judgment that "the adjudication of a legal controversy should occur in one litigation in only one court[.]" [Cogdell v. Hosp. Ctr. at Orange, 116 N.J. 7, 560 A.2d 1169, 1172 \(N.J. 1989\)](#); see also N.J. Const, art. VI, § 3, [4](#) ("[L]egal and equitable relief shall be granted in any cause so that all matters in controversy between the parties may be completely determined."); [Smith v. Red Top Taxicab Corp., 111 N.J.L. 439, 168 A. 796, 797 \(N.J. 1933\)](#) ("No principle of law is more firmly established than that a single or entire cause of action cannot be subdivided into several claims, and separate actions maintained thereon."). . . .

<sup>30</sup> H&S and Hollenbeck advance a res judicata argument based on orders from another action. The facts necessary to perform the appropriate analysis, however, are not apparent from the face of die complaint or other documents properly considered on a motion to dismiss.

On August 25, 2014, H&S obtained a default judgment against Dr. Kaul in die amount of \$97,886.96 for unpaid legal services. Almost two years later, in June 2016, Dr. Kaul filed a motion to vacate the judgment and sought leave to file an answer, counterclaims, and third party complaint. The proposed counterclaims and third party complaint asserted RICO, Hobbs Act, mail fraud, wire fraud, honest services fraud, and violations of constitutional rights against the Governor, the Board, and Drs. Peterson and Heary. On October 6, 2016, the motion to vacate was denied. (Def. Ex. Q)

S&H and Hollenbeck do not identify which order—the August 2014 default judgment or the October 6, 2016 denial of the motion to vacate—they believe carries preclusive effect. Presumably they mean the default judgment; if so, I still cannot discern from the face of the complaint and the appropriate documents the relationship between the \$97,886.96 worth of legal fees Dr. Kaul owed S&H and the \$196,000 S&H allegedly "attempted to extort" from Dr. Kaul weeks before the August 2013 disciplinary hearings. The answer to that question would be best explored on a motion for summary judgment, not to dismiss.

<sup>31</sup> The doctrine rests on considerations of fairness and efficiency:

Under die entire controversy doctrine, a party cannot withhold part of a controversy for separate later litigation even when the withheld component is a separate and independently cognizable cause of action. The doctrine has three purposes: (1) complete and final disposition of cases through avoidance of piecemeal decisions; (2) fairness to parties to an action and to others with a material interest in it; and (3) efficiency and avoidance of waste and delay. See [DiTrolio v. Antiles, 142 N.J. 253, 662 A.2d 494, 502 \(N.J. 1995\)](#). As an equitable doctrine, its application is flexible, with a case-by-case appreciation for fairness to the parties.

Ricketti v. Barry, 775 F.3d 611, 613 (3d Cir. 2014).

There is no requirement that the claim as to which preclusion is sought have been actually asserted [\*\*54] in the prior action. Rather, the necessary relation between the prior and present actions is a transactional one:

In determining whether a subsequent claim should be barred under this doctrine, "the central consideration is whether the claims against the different parties arise from related facts or the same transaction or series of transactions." [citing *DiTrollo v. Antiles, 142 N.J. 253, 268, 662 A.2d 494 (1995)*.] "It is the core set of facts that provides the link between distinct claims against the same parties ... and triggers the requirement that they be determined in one proceeding." *Id. at 267-68, 662 A.2d 494*. There is no requirement that there be a "commonality of legal issues." *Id. at 271, 662 A.2d 494*.

Wadeer v. New Jersey Mfrs. Ins. Co., 220 N.J. 591, 605, 110 A.3d 19, 27 (2015). So the entire controversy doctrine applies in [\*239] federal court "when there was a previous state-court action involving the same transaction." *Bennun v. Rutgers State Univ., 941 F.2d 154, 163 (3d Cir. 1991)*.

The original version of Rule 4:30A applied to both claims and parties. In its amended 1998 version, however, the Rule dropped the words "and parties." It currently reads as follows: "Non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine . . ." N.J. Ct. R. 4:30A (current ver.). See Kent Motor Cars, Inc. v. Reynolds & Reynolds, Co., 207 N.J. 428, 25 A.3d 1027, 1036 (2011) ("Rule 4:30A was amended to limit its scope to mandatory joinder [\*\*55] of claims." (emphasis omitted)); see also Paramount Aviation Corp. v. Agusta, 178 F.3d 132, 135 n.1 (3d Cir. 1999) ("The party joinder aspect of the [entire controversy] doctrine ... has now been eliminated."). There is one caveat; a watered-down version of the party joinder component still arises from another rule, N.J. Ct. R. 4:5-1 (b)(2). See Ricketti v. Barry, 775 F.3d 611, 614 (3d Cir. 2015) (dismissal appropriate "if the noncompliance [with the Rule's requirement of disclosure of all potentially liable parties] was 'inexcusable' and 'the right of the undisclosed party to defend' a successive action was 'substantially prejudiced.'"). Because the privity rule suffices, I do not consider this watered-down party joinder rule.

The entire controversy doctrine as such, then, is no longer a party-joinder rule. It bars claims that were or could have been asserted against the *actual parties* to the prior litigation, or *those in privity* with them: "[T]he doctrine applies not only to actual or potential claims between the parties in the first suit, but also 'extends to all those in privity with the parties involved in the preceding litigation.'" Wisniewski v. Travelers Cas. & Sur. Co., 390 F. App'x 153, 156 (3d Cir. 2010) (quoting McNeil v. Legislative Apportionment Comm'n, 177 N.J. 364, 396, 828 A.2d 840 (2003)).

All of the foregoing boils down to three requirements for application of the entire controversy doctrine:

(1) the judgment in the prior action [is] valid, final, and on the merits; (2) [\*\*56] the parties in the later action [are] identical to or in privity with those in the prior action; and (3) the claim in the later action [ ] grow[s] out of the same transaction or occurrence as the claim in the earlier one.

McNeil, 177 N.J. at 395 (quoting Watkins v. Resorts Int'l Hotel & Casino, Inc., 124 N.J. 398, 412, 591 A.2d 592 (1991)).

Turning to the claims and parties involved in the State Complaint, we immediately see a number of striking similarities to the AC. The thrust of that action was that Drs. Heary, Moore, Carmel, Przybylski, Mitchell, John Does 1-5, and ABC Associations 1-5 conspired to oust Dr. Kaul from competition through defamation, downgrading certain billing codes to make certain procedures performed by Dr. Kaul less profitable, and spurring the State to initiate disciplinary proceedings. (State Compl. ¶¶ 52-110) Indeed, some of the specific factual averments contained in AC seem to have been copied from the State Complaint. There, as here, Dr. Kaul alleged that Dr. Heary "encouraged" one of his patients to file an action with the Board. (Compare State Comp. ¶¶ 53-55 with AC ¶ 68) There, as here, Drs. Przybylski, Carmel, and Mitchell allegedly used the power of their positions at the NASS and AMA to lobby politicians, insurance companies, and professional organizations [\*\*57] to make endoscopic

discectomies less profitable. (*Compare State Comp.* ¶¶ 87-98 [\*240] *with AC* ¶¶ 72, 80, 92, 103) And there, as here, Dr. Przyblyski allegedly testified before some tribunal "to ensure . . . permanent suspension of Dr. Kaul's medical license." (*Compare State Comp.* ¶ 62 *with AC* ¶ 85)

The State Complaint's specific legal claims, too, substantially overlap the claims asserted here. Four are identical: defamation, commercial disparagement, intentional interference with prospective economic advantage, and aid in the commission of a tort. A fifth, violations of New Jersey's **antitrust law**, is now pled under its federal counterpart, the Sherman and Clayton Antitrust Acts.<sup>32</sup> The sixth, a conspiracy claim, is analogous to the claim now pled under the federal RICO law, and involves essentially the same allegations (i.e., conspiracy to defraud, defame, commercially disparage, and unlawfully interfere with legitimate business activities). Because the BER-L-2256-13 case is "a previous state-court action involving the same transaction"—a conspiracy to force Dr. Kaul from the minimally invasive spine surgery market—the necessary connection is present. See, e.g. *Printing Mart-Morristown v. Rosenthal*, 650 F. Supp. 1444, 1447 (D.N.J. 1987) ("[T]he entire controversy doctrine [\*58] applies both to subsequent actions asserting different legal theories and those requesting alternative relief.")

For at least some claims involved here, then, the entire controversy rule facially applies. The real question is as to whom and to which claims.

First, I consider the parties affected. The Doctor Defendants claim that the State Complaint was dismissed with prejudice as to every named defendant, i.e., Drs. Heary, Moore, Carmel, Przyblyski, and Mitchell. Therefore, the Doctor Defendants say, the AC should be dismissed as to each of them. Two of the Medical Organization Defendants, NASS and AMA, claim that dismissal is appropriate, even though they were not named as defendants. The rest of the defendants claim that they should be dismissed as well—especially the remaining Doctor Defendants (Drs. Cohen, Staats, Lomazow, Kaufman, and Peterson) and Medical Organization Defendants (ASSIP, CNS, and Wolfa)—because they are encompassed within the list of Fictitious defendants, John Does 1-5 and ABC Associations 1-5.

Generally, I think these arguments go too far, but the entire controversy rule is clearly appropriate as to Drs. Moore, Carmel, and Przyblyski. Contrary to defendants' [\*59] suggestions, I do not have an order before me clearly dismissing the State Complaint with prejudice as to all named parties. I instead have three orders, each appearing to dismiss the case as to one of the moving defendants. (See State Orders.) Those defendants are Drs. Przyblyski, Carmel, and Moore. As to those three, there is a prior final judgment: "[D]ismissal with prejudice constitutes an adjudication of the merits as fully and completely as if the order had been entered after trial." *Gambocz v. Yelencsics*, 468 F.2d 837, 840 (3d Cir. 1972); see also *N.J. Ct. R. 4:37-2(d)* (dismissal with prejudice "operates as an adjudication on the merits").

I am convinced, though, that the potential preclusive effect of these orders is not limited to Drs. Przyblyski, Carmel, and Moore, but also applies to their privies, AMA and NASS. While not named as defendants in the State Complaint, these two organizational defendants allegedly played some role in the conspiracy to drive [\*241] Dr. Kaul from the market, mostly related to the billing code downgrading scheme. (State Compl. ¶¶ 87-90) The liability of NASS and AMA in both the federal and state actions is alleged to be based on the conduct of Dr. Przyblyski, the president of NASS, and Dr. Carmel, the president of the AMA. NASS [\*60] and AMA are therefore in privity with Drs. Przyblyski and Carmel under the broad definition employed by the State of New Jersey.<sup>33</sup>

<sup>32</sup> New Jersey's Antitrust Act is essentially a replica of the federal Sherman Antitrust Act. See, e.g., N.J. Stat. § 56:9-1, et seq.

<sup>33</sup>

In comparison to federal preclusion principles, New Jersey has adopted a broader definition of "privity." See *Opdycke v. Stout*, 233 F. App'x 125, 129 n. 6 (3d Cir. 2007). "In New Jersey, privity is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata." *Hamburg Music Corp. v. Winter*, No. 04-2738, 2005 U.S. App. LEXIS 21140, 2005 WL 2170010, at \*3 (3d Cir. Sept. 8, 2005) (citation and quotation omitted). Furthermore, New Jersey courts are more likely to find "privity" when a party to the first litigation attempts an end-run around the entire controversy doctrine by either bringing suit under a different name or

372 F. Supp. 3d 206, \*241L 2019 U.S. Dist. LEXIS 31732, \*\*60

So Drs. Przybylski, Carmel, Moore, AMA, and NASS all may benefit from the preclusive effect of the March 2013 Orders dismissing the State Complaint with prejudice. Common sense suggests that the BER-L-2256-13 action has been dismissed entirely, but I have not been given clear evidence that this is so. I therefore deny, without prejudice, the motion to dismiss based on res judicata and entire controversy rule for any remaining defendants.

There is, however, a follow up question: Which *claims* against those five defendants are precluded? I conclude that all claims are barred.

In both actions, the alleged liability of Doctors Carmel and Moore, as well as the two Medical Societies, arises from a scheme to defame, disparage, and otherwise impair Dr. Kaul from competing freely in the marketplace. Prominently featured in both complaints is the scheme to downgrade endoscopic discectomies. While the AC attempts to tie them to other defendants' **[\*\*62]** acts with generalized allegations of conspiracy and collusion, there are no plausible allegations suggesting their involvement in any conspiracy that extends beyond March 2013, when the State Complaint was filed. Those claims therefore could have been joined in the earlier action. Dismissal based on res judicata and the entire controversy doctrine of all of the claims against these defendants is therefore appropriate.

As to Dr. Przybylski, however, things are less certain. The AC addresses events and circumstances that occurred sometime after the filing of the March 2013 State Complaint. Dr. Przybylski allegedly had some role in schemes to defraud, defame, **[\*242]** disparage, and exclude Dr. Kaul from the market, but he also is alleged to have perjured himself during the disciplinary proceedings, which occurred after the State Complaint was filed. That conduct, which occurred during sometime between April and June 2013, is not literally based on same facts or transactions as the State Court Complaint (although it may be related). No party has addressed the circumstances in which the entire controversy rule might bar claims related to a transaction or a series of transactions that had not yet **[\*\*63]** occurred when the first action was filed.<sup>34</sup> I therefore will deny Dr. Przybylski's motion to dismiss the complaint based on the entire controversy rule without prejudice to renewal, if necessary.

#### **IV. JURISDICTION, AMENABILITY TO SUIT, IMMUNITY**

I consider next a second bundle of threshold or quasi-threshold issues: the applicability of *Eleventh Amendment* immunity, whether defendants are "persons" liable under *section 1983*, and whether defendants may benefit from absolute or qualified immunity.

##### **A. The State Defendants: Sovereign Immunity**

naming related entities as defendants. See *Hamburg Music, 2005 U.S. App. LEXIS 21140, 2005 WL 2170010, at \*3* ("Moreover, New Jersey courts are more willing to find that parties are in privity if the plaintiff had a full and fair opportunity to litigate its claims in the first action."); *Radovich v. YA Global Investments, L.P., No. 12-6723, 2013 U.S. Dist. LEXIS 110127, 2013 WL 4012042, at \*5 (D.N.J. Aug. 5, 2013)* (dismissing suit by shareholder-plaintiff and two corporations he controlled when prior suit was brought by a corporation of which the shareholder-plaintiff was majority shareholder); *Andriani v. City of Hoboken, No. 11-6707, 2012 U.S. Dist. LEXIS 137127, 2012 WL 4442664, at \*4 (D.N.J. Sept. 24, 2012)* (Entire Controversy Doctrine applied to police officer Andriani's suit against the municipality, its police department, **[\*\*61]** its police chief, its mayor, and a police captain because all were in privity with other police officers who had previously brought suit against Andriani); *Tagayun v. Citibank, N.A., No. 05-4302, 2006 U.S. Dist. LEXIS 38085, 2006 WL 5100512, at \*1 (D.N.J. June 9, 2006)* (holding attorney to party in the first suit was in privity with that party); see also *Zahl v. Warhaftig, No. 13-1345, 2015 U.S. Dist. LEXIS 32127, 2015 WL 1197095, at \*5-6 (D.N.J. Mar. 16, 2015); Rodsan v. Borough of Tenafly, No. 10-1923, 2011 U.S. Dist. LEXIS 70686, 2011 WL 2621016, at \*13-14 (D.N.J. June 30, 2011).*

*Martucci v. Vitale, No. CIV.A. 14-6311, 2015 U.S. Dist. LEXIS 70177, 2015 WL 3465899, at \*5 (D.N.J. May 29, 2015).*

<sup>34</sup> Without further facts, I will not imply a duty to amend the prior Complaint. The case law seems to indicate that the question turns on when the plaintiff knew about the cause of action. See *Cafferata v. Peyser, 251 N.J. Super 256, 260-61, 597 A.2d 1101 (Super. Ct. App. Div. 1991)*.

The remaining State Defendants—New Jersey, the Governor, the Board, ALJ Solomon, Chiesa, Roeder, and Drs. Przybylski, Lomazow, and Kaufman—move to dismiss the complaint on jurisdictional grounds. All claim that they partake of the State's [Eleventh Amendment](#) sovereign immunity. As to New Jersey and the Board, I agree insofar as Dr. Kaul seeks damages; as to Chiesa, Roeder, Dr. Lomazow, ALJ Solomon, the Governor, I agree insofar as Dr. Kaul has sued them in their official capacities. As to Drs. Kaufman and Przybylski, the briefs lack the appropriate analysis or information for me to rule on the [Eleventh Amendment](#) issue at this time. As to those two defendants, I deny the motion without prejudice to renewal.

This is essentially [\[\\*\\*64\]](#) a suit for damages. As to such suits, the [Eleventh Amendment](#) incorporates a general principle of sovereign immunity that bars citizens from suing any State in federal court. See [Pennhurst State Sch. & Hosp. v. Halderman](#), 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). The [Eleventh Amendment](#), as a bar to suit, is of jurisdictional stature. *Id. at 98* (citing [Hans v. Louisiana](#), 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1900)). That bar applies unless Congress has abrogated it, or the State has waived it, two exceptions that do not apply here.<sup>35</sup> E.g., [Pa Fedn. of Sportsmen's \[\\*243\] Clubs, Inc. v. Hess](#), 297 F.3d 310, 323 (3d Cir. 2002).

In general, [Eleventh Amendment](#) immunity extends to state agencies and state officials in their official capacities. Thus the Court clearly lacks jurisdiction to entertain damages claims against the State of New Jersey. In doubtful cases, the Court will analyze several factors to determine whether an entity is an agency of the State, i.e., whether the State is the real party in interest. See [Fitchik v. New Jersey Transit Rail Operations, Inc.](#), 873 F.2d 655, 659-60 (3d Cir. 1989). As to the Board and the Office of Administrative Law, the appropriate analysis has been performed elsewhere and is not subject to reasonable dispute. E.g., [Zahl v. N.J. Dep't of Law & Pub. Safety, Civ. Action No. 06-3749, 2008 U.S. Dist. LEXIS 24022, \\*60-62 \(D.N.J. Mar. 26, 2008\)](#) (holding that the New Jersey Department of Law and Public Safety, and its subdivisions, the Division of Consumer Affairs and the Board of Medical Examiners, are arms of the state for [Eleventh Amendment](#) purposes); [Rodrigues v. Fort Lee Bd. of Educ.](#), 458 F. App'x 124, 127 (3d Cir. 2011) ("The Office of Administrative Law is a state [\[\\*\\*65\]](#) agency, and is thus immune from suit under the [Eleventh Amendment](#).") (internal citation omitted). I therefore adopt it here without further analysis, and hold that the Board and the Office of Administrative Law enjoy the State's [Eleventh Amendment](#) immunity.

Governor Christie, former AG Chiesa, ALJ Solomon, Roeder, and Dr. Lomazow are state officials sued in their official capacities. As such, they are immune from damages claims on [Eleventh Amendment](#) grounds.<sup>36</sup> It is not so clear that Drs. Kaufman and Przybylski are State officials. It seems the State may be picking up the tab for their defense only because they were state witnesses during the disciplinary proceedings. Their motions to dismiss based on the [Eleventh Amendment](#) will therefore be denied.<sup>37</sup>

I pause here to allude to a recurring issue. The [Eleventh Amendment](#) does not bar a suit for prospective injunctive relief. [Sportsmen's Clubs](#), 297 F.3d at 323. Whether the AC actually requests injunctive relief, however, is something of an open question; as previously noted, each of the twelve counts seeks damages. At one point,

<sup>35</sup> Congress did not abrogate the States' sovereign immunity when it enacted [section 1983](#), e.g., [Quern v. Jordan](#), 440 U.S. 332, 342, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979), the Sherman and Clayton Acts, e.g., [Jackson v. Conn. Dep't of Pub. Health](#), 3:15-CV-750 (CSH), 2016 U.S. Dist. LEXIS 80672, at \*40-42 (D. Conn. June 20, 2016), [Gebman v. State](#), No. 07-cv-1226 (GLS-DRH), 2008 U.S. Dist. LEXIS 46125, at \*11-13, 2008 WL 2433693 (N.D.N.Y. June 12, 2008), or the RICO statute, [Dianese v. Pennsylvania, Civil Action No. 01-2520, 2002 U.S. Dist. LEXIS 10917, at \\*17 \(E.D. Pa. June 19, 2002\)](#). The Third Circuit, and later the Supreme Court, held that Congress could abrogate state sovereign immunity with its [commerce clause](#) powers. See [United States v. Union Gas Co.](#), 832 F.2d 1343, 1356 (3d Cir. 1987), affirmed, 491 U.S. 1, 109 S. Ct. 2273, 105 L. Ed. 2d 1 (1989). That decision, however, was overruled in [Seminole Tribe v. Florida](#), 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996).

<sup>36</sup> They may remain potentially liable as persons in their individual capacities, however. See [Hafer v. Melo](#), 502 U.S. 21, 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991); [Estate of Lagano v. Bergen Cnty. Prosecutor's Office](#), 769 F.3d 850, 856 (3d Cir. 2014).

<sup>37</sup> To the extent they are private citizens, they probably lack "person" status to be sued under [section 1983](#), however. See *infra* Part IV.B.

however, Dr. Kaul requests that I reinstate his medical license and expunge the Board's Order from the public record. Broadly interpreted, this may be a request for an injunction to dissipate some kind of ongoing [\*\*66] harm (i.e., his inability to practice medicine in New Jersey). To the extent any injunctive claim survives the [Eleventh Amendment](#) analysis, however, it will be dismissed for failure to state a claim. See *infra* Part V.

#### B. [Section 1983](#) "Persons"

As to [section 1983](#), Count Eight, there is another issue that is customarily analyzed together with, but is distinct from, [Eleventh Amendment](#) immunity. I refer to the issue of who or what is a suable "person" under [section 1983](#). This issue affects not only the State Defendants, but also everyone else.

[Section 1983](#) provides:

[\*244] Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

As to most of the State Defendants, the "person" analysis is essentially the same as the [Eleventh Amendment](#) analysis. A state and its departments are not considered "persons" amenable to suit under [section 1983](#). [Will v. Michigan Dep't of State Police](#), 491 U.S. 58, 67-70, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). Also barred are [section 1983](#) suits for damages against "governmental entities" [\*\*67] that are considered 'arms of the state' for [Eleventh Amendment](#) purposes, which are "no different from a suit against the State itself." [Id. at 70-71](#). State officials, sued in their official capacities, are likewise not "persons" subject to a damages suit under [section 1983](#). [Will](#), 491 U.S. at 71 n.10; [Kentucky v. Graham](#), 473 U.S. 159, 167 n.14, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985). On the other hand, a state official sued in his or her personal capacity is a "person" amenable to suit under [section 1983](#), and does not enjoy [Eleventh Amendment](#) protection. [Hafer v. Melo](#), 502 U.S. 21, 30-31, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991). That means that an award of damages from an individual defendant, as opposed to the public treasury, is a "permissible remedy in some circumstances." [Scheuer v. Rhodes](#), 416 U.S. 232, 238, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974). And a state official sued in his or her official capacity for prospective injunctive relief is likewise a "person" amenable to suit. [Hafer](#), 502 U.S. at 27.

These principles lead us to a series of now-familiar conclusions. New Jersey, a state, is not a "person" under [section 1983](#). The Board, as an arm of the state, is not a "person" under [section 1983](#). The Governor, ALJ Solomon, Chiesa, Roeder, and Lomazow are not "persons" under [section 1983](#) to the extent they are sued in their official capacities for damages. Accordingly, and with these caveats in mind, defendants' motions to dismiss Count Eight based on lack of 1983 "person" status are granted.

Because they are not state actors, the non-State Defendants also move [\*\*68] to dismiss Count Eight for lack of 1983 "person" status. "To establish a claim under [§ 1983](#), a plaintiff 'must establish that she was deprived of a federal constitutional or statutory right by a state actor.'" [Frierson v. St. Francis Med. Ctr.](#), 525 F. App'x 87, 90 (3d Cir. 2013) (quoting [Kach v. Hose](#), 589 F.3d 626, 646 (3d Cir. 2009)) (emphasis added). Courts thus routinely dismiss [Section 1983](#) claims brought against private parties. I cite just a few recent examples. See [Neuman v. Ocean City Cnty. Democratic Cnty. Comm.](#), Civ. Action No. 16-2701(FLW), 2017 U.S. Dist. LEXIS 12254, at \*10-22 (D.N.J. Jan. 30, 2017) (dismissing [section 1983](#) allegations that political organization conspired to select and to endorse certain candidates); [Dougherty v. Adams-Dougherty](#), No. 15-cv-8541(JBS)(AMD), 2016 U.S. Dist. LEXIS 128725, at \*21-22 (D.N.J. Sept. 21, 2016) (dismissing [section 1983](#) allegations that ex-spouse's family members conspired with courts and police to deprive plaintiff of his rights in divorce proceedings); [Roy v. Cumberland Mut Fire Ins. Co.](#), Civ. Action No. 15-8171 (JBS/AMD), [\*245] 2016 U.S. Dist. LEXIS 109065, at \*5-6 (D.N.J. Aug. 2016) (finding insurance company alleged to have wrongfully denied a claim was not a state actor for purposes of [section 1983](#)).

Now it is true, as Dr. Kaul argues, that in rare circumstances a private party may be found to act for the State. For that to occur, a plaintiff must "show 'a sufficiently close nexus' between the actions of the private party and the State to warrant treating those actions as those of the State." *Munoz v. City of Union City*, 481 F. App'x 754, 761 (3d Cir. 2012) (quoting *Kost v. Kozakiewicz*, 1 F.3d 176, 184 (3d Cir. 1993)). The required nexus may be found where "(1) the private party performed a function typically performed by the state; (2) the private [\*\*69] party acted in concert with the State; or (3) the State has become interdependent with the private party." *Id.* (citing *Kach v. Hose*, 589 F.3d 626, 646 (3d Cir. 2009)). The AC contains no allegations that would establish such a nexus, however. The AC, to be sure, alleges that a number of conspiracies exist, but that is not the same thing as alleging facts sufficient to establish a plausible allegation of conspiracy. E.g., *Coulter v. Allegheny Cnty. Bar. Ass'n*, 496 F. App'x 167, 169 (3d Cir. 2012) (upholding dismissal of *section 1983* claim against attorney, law firm, and bar associations where allegations of conspiracy relied on "vague inferences" and "[b]are assertions of joint action action"). The "conspiratorial relationship[s]" between the State Defendants and non-State Defendants alleged in the AC are amorphous; the alleged "improper connections" between them are loose and speculative. *Id.* (E.g., AC ¶¶ 54, 78, 88) There is no plausible allegation that the non-state defendants acted under the color of state of law.

Thus, I will grant the non-State Defendants' motions to dismiss Count 8 for lack of *section 1983* "person" status.

### C. Absolute and Qualified Immunity

Dismissal of official-capacity claims, however, is not the end of the story. Individuals named as defendants in their personal capacities may assert individual defenses, [\*\*70] such as absolute or qualified immunity.<sup>38</sup> ALJ Solomon claims absolute judicial immunity; many of the State Defendants claim qualified immunity. For the reasons stated herein, I find that ALJ Solomon enjoys absolute immunity, [\*246] and the Governor, Chiesa, Roeder, and Lomazow enjoy qualified immunity.<sup>39</sup>

#### 1. *Absolute Immunity*

ALJ Solomon argues that he enjoys absolute immunity as to all claims for damages. A judicial officer in the performance of his or her duties enjoys absolute immunity from suit. *Mireles v. Waco*, 502 U.S. 9, 12, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991). Absolute judicial immunity applies to all claims, whether official-capacity or personal-capacity, that are based on judicial acts. See *Dongon v. Banar*, 363 F. App'x 153, 155 (3d Cir. 2010) ("[J]udges are entitled to absolute immunity from liability based on actions taken in their official judicial capacity.") (citing *Briscoe v. LaHue*, 460 U.S. 325, 334, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983)). "A judge will not be deprived of immunity because the action [s]he took was in error, was done maliciously, or was in excess of [her] authority . . ." *Stump v.*

<sup>38</sup> These defenses—especially qualified immunity—ordinarily parry alleged violations of constitutional rights; it is somewhat atypical for a public official to shield themselves from violations of federal statutes, such as the RICO or antitrust laws, with absolute or qualified immunity. Nevertheless, there is persuasive authority that absolute and qualified immunity applies to RICO claims, and none of it appears to be disputed. See, e.g., *Cullinan v. Abramson*, 128 F.3d 301, 308-312 (6th Cir. 1997) (applying qualified and absolute immunity to RICO claims); *Van Beek v. Ag-Credit Bonus Ptnrs.*, 316 F. App'x 554, 555-56 (9th Cir. 2008) (applying judicial and prosecutorial immunity to RICO claims); *Parette v. Virden*, 173 F. App'x 534, 536 (8th Cir. 2006) (applying absolute immunity analysis to RICO claims).

As to antitrust claims, there seems to be no authority directly on point. There is no reason to think, however, that the Sherman or Clayton acts abridged the common law immunity from damages suits "for all persons—governmental or otherwise—who were integral parts of the judicial process." *Briscoe, v. Lahue*, 460 U.S. 325, 335-36, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983). And while the qualified immunity analysis has been honed in the context of alleged violations of civil or constitutional rights, there is no obvious reason to think that it cannot be performed in the context of antitrust claims. The debate in any case is academic; the AC fails to state a claim under the antitrust laws, which is essentially the first step in the qualified immunity analysis.

<sup>39</sup> The State does not assert that Drs. Przybylski and Kaufman are absolutely immune for claims arising from their testimony, or that Chiesa is entitled to prosecutorial immunity. I therefore do not reach those issues.

Again, because it is not clear whether Drs. Przybylski or Lomazow are state officials, I do not reach the qualified immunity question as to them. To the extent the motion is denied, it is without prejudice as to them.

Sparkman, 435 U.S. 349, 356-57, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978). The immunity is not vitiated by "allegations of malice or corruption of motive." Gromek v. Maenza, 614 F. App'x 42, 45 (3d Cir. 2015) (quoting Gallas v. Supreme Ct. of Pa., 211 F.3d 760, 768 (3d Cir. 2000)). An ALJ is entitled to absolute immunity. See Raffinee v. Comm'r of Soc. Sec., 367 F. App'x. 379, 381 (3d Cir. 2010) (citing Butz v. Economou, 438 U.S. 478, 514, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978)).

There are two exceptions to absolute judicial immunity: (1) "a judge is not immune from liability for nonjudicial actions" and [\*\*71] (2) "a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." Mireles, 502 U.S. at 11-12. Neither exception applies. All of the allegations against ALJ Solomon focus on conduct that occurred during the course of the disciplinary hearings. He had jurisdiction to preside over those proceedings. See generally, N.J. Stat. Ann. § 52:14B-10. A conclusory, fact-free allegation of bribery or fraud is not sufficient to defeat ALJ Solomon's claim to absolute immunity. As all personal capacity damages claims asserted against him, the AC is dismissed.

## 2. Qualified Immunity

The Governor, Chiesa, Dr. Lomazow and Roeder argue that they enjoy qualified immunity. Such immunity protects government officials from insubstantial claims in order to "shield officials from harassment, distraction, and liability when they perform their duties reasonably." Pearson v. Callahan, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). "When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'" Ashcroft v. al-Kidd, 563 U.S. 731, 743, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) (quoting Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)). To overcome qualified immunity, a plaintiff must plead facts "showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged [\*\*72] conduct." Id. at 735. The Court has discretion to analyze the steps in either order. Pearson, at 236 (partially overruling Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), in that courts are no longer required [\*\*247] to analyze issues (1) and (2) in that order).

For the reasons stated in Part V below, I find that the AC fails to allege sufficient facts to make out a violation of any constitutional right, RICO violation, or violation of the antitrust laws. The first qualified immunity prong is really no different from finding, under the usual Rule 12(b)(6) standard, that the complaint does not sufficiently allege a constitutional or federal statutory cause of action as a matter of law. I therefore incorporate that reasoning here, and dismiss on this alternative ground.

\* \* \* \*

As we approach the merits analysis, it is useful to take stock of what has been decided. The AC is dismissed as to Berkshire Hathaway, Buffett, Crist, and Gragnolati for failure to state a claim. The AC is dismissed as to Carmel, Moore, NASS and AMA on res judicata and entire controversy grounds. Counts Three (Hobbs Act) Four (mail fraud), Five (wire fraud), Six (honest services fraud), Seven (defamation in violation of 28 U.S.C. § 4101), and Nine (Title VII) are dismissed as to all defendants for obvious legal defects. [\*\*73] Count Eight (section 1983) is dismissed as to all non-State Defendants, New Jersey, and the Board for lack of "persons" status. All official capacity damages claims against the State Defendants are dismissed (except for Drs. Kaufman and Przybylski) based on sovereign immunity.<sup>40</sup> All personal capacity damages claims against MO Solomon are dismissed based on absolute immunity. All personal capacity damages against the Governor, Chiesa, Dr. Lomazow, and Roeder will be dismissed on qualified immunity grounds, and for failure to state a claim, see *infra* Part V.

I turn now to the merits of the remaining claims against the remaining the defendants.

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<sup>40</sup> For the purposes of argument going forward, I assume that a plaintiff may obtain injunctive relief under RICO. Curley v. Cumberland Farms Dairy, 728 F. Supp. 1123, 1137-38 (D.N.J. 1989) (concluding that injunctive relief is unavailable under RICO); but see Steamfitters Local Union No. 420 Welfare Fund v. Phillip Morris, 171 F.3d 912, 935 n.20 (3d Cir. 1999) ("This court has yet to decide whether injunctive relief is available for a private party under RICO.").

## V. FAILURE TO STATE A CLAIM

There are three remaining federal claims: violations of RICO, the antitrust laws, and [42 U.S.C. § 1983](#). As to each, the AC fails to state a claim.

### A. RICO

Count One alleges a violation of the RICO Act, [18 U.S.C. § 1961 et seq.](#) Although the AC does not identify which of the four subparts of [section 1962](#) defendants allegedly violated, it appears that a [section 1962\(c\)](#) violation is intended. (E.g., AC ¶ 52) The particular subsection, however, doesn't matter, because the AC in fails to allege a pattern of racketeering acts. Since that is an essential element for any RICO claim,<sup>41</sup> I will dismiss the [\[\\*\\*74\]](#) AC as to all defendants.

[\[\\*248\]](#) I interpret the AC as alleging essentially three predicate acts: fraud, extortion, and conspiracy. As to each, the AC fails to state a claim.

#### 1. *Mail-and-Wire Fraud*

The offense of mail or wire fraud has two essential elements: "[1] a scheme to defraud, and (2) a mailing or wire in furtherance of that scheme." [Annulli v. Panikkar, 200 F.3d 189, 200 n.9 \(3d Cir. 1999\)](#). Use of the mails may be intrastate; use of the wires must be interstate. *Id.* Allegations of either, as predicates for a civil cause of action, must meet the heightened pleading standard of [Rule 9\(b\)](#). [Warden, 288 F.3d at 114](#); [Bonavitacola Elec. Contr., Inc. v. Boro Developers, Inc., 87 F. App'x 227, 231 \(3d Cir. 2003\)](#) ("[T]he 'who, what, when, and where details of the alleged fraud' are required.") (quoting [Allen Neurosurgical Assocs. v. Lehigh Valley Health Network, No. CIV-A-99-4653, 2001 U.S. Dist. LEXIS 284 \(E.D. Pa. Jan. 18, 2011\)](#)).

Honest services fraud is just a variant of wire and mail fraud. "The honest-services statute, [18 U.S.C. § 1346](#), defines the "the term 'scheme or artifice to defraud'" . . . to include "a scheme or artifice to deprive another of the intangible right to honest services." [Skilling v. United States, 561 U.S. 358, 130 S. Ct. 2896, 2908 n.1, 177 L. Ed. 2d 619 \(2010\)](#). Typically, honest services fraud is a bribery or kickback scheme involving a public official, e.g., [United States v. Bryant, 655 F.3d 232 \(3d Cir. 2011\)](#) although it can involve a private fraud scheme, see [Skilling, at 2934 n.45](#).

Here, the AC fails to explain the who, what, when, where, and how of any scheme to defraud. There are many conclusory allegations of kickbacks and bribery [\[\\*\\*75\]](#) (e.g., AC ¶ 54 (Governor Christie "conspired with the other defendants to unlawfully obtain the plaintiff's property . . . through an elaborate scheme of kick backs")); improper influence (e.g., *id.* ¶ 61 (GEICO "has a long history of bribing New Jersey politicians . . . , enable[ing] it to advance legislation favorable to its business agenda)); abuses of power (e.g., *id.* ¶ 69 (Dr. Lomazow, "through members of his family, had commercial ties to insurance companies" and has "abus[ed] his position [on the Board] for political and financial gain")); political patronage, (e.g., *id.* ¶ 81 (Dr. Staats used his position as ASIPP "to give money to" Governor Christie who "rewarded . . . Staats by appointing his partner to the defendant medical board"))); and

<sup>41</sup> Pursuant to [18 U.S.C. § 1964\(c\)](#), by any person injured in her business or property by reason of a violation of [section 1962](#). In order to state a claim under [1964\(c\)](#), a plaintiff must plead "(1) a [section 1962](#) violation and (2) an injury to business or property by reason of such injury." [Lightning Lube, Inc., v. Witco Corp., 4 F.3d 1153, 1187 \(3d Cir. 1993\)](#). To establish a claim under 1962(a), "a plaintiff must allege: (1) that the defendant has received money from a pattern of racketeering activity; (2) invested that money in an enterprise; and (3) that the enterprise affected interstate commerce." [Id. at 1189](#) (citation omitted). Establishing a pattern of racketeering requires allegations of "at least two acts of racketeering activity within a ten-year period." [18 U.S.C. § 1961\(5\)](#). Under [section 1962\(b\)](#), "a plaintiff must show injury from the defendant's acquisition or control of an interest in a RICO enterprise, in addition to injury from the predicate acts" of racketeering. [Lightning Lube, 4 F.3d at 1190](#). To allege a claim under [Section 1962\(c\)](#), a plaintiff must plead conduct of an enterprise through a pattern of racketeering activity. [District 1199P Health & Welfare Plan v. Janssen, L.P., 784 F. Supp. 2d 508, 518-19 \(D.N.J. 2011\)](#) (citation omitted). [Section 1962\(d\)](#) prohibits conspiring to violate sections (a)-(c). [18 U.S.C. § 1962\(d\)](#).

alternation of official transcripts, (e.g., III 210, 211, 220). There is nothing, however, remotely approaching a factual or legal allegation of mail, wire, or honest services fraud.<sup>42</sup>

[\*249] There are, in short, no credible allegations of wire, mail, or honest services fraud pled here.

## 2. *Extortion*

Other crimes that could constitute racketeering activities include extortion under the Hobbs Act, [18 U.S.C. § 1951](#), and extortion chargeable under state law. [18. U.S.C § 1961\(1\)\(A\)](#), [\[\\*76\] \(B\)](#). Under the Hobbs Act, "extortion means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, under color of official right." [18 U.S.C. § 1951\(b\)\(2\)](#).<sup>43</sup> Under New Jersey law a person commits extortion if he or she purposefully threatens to:

- a. Inflict bodily injury on or physically confine or restrain anyone or commit any other criminal offense;
- b. Accuse anyone of an offense or cause charges of an offense to be instituted against any person;
- c. Expose or publicize any secret or any asserted fact, whether true or false, tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute;
- d. Take or withhold action as an official, or cause an official to take or withhold action;
- e. Bring about or continue a strike, boycott or other collective action, if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act;
- f. Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
- g. Inflict any other harm which would not substantially benefit the actor but which is calculated to materially harm [\[\\*77\]](#) another person.

[N.J. Stat. Ann. § 2C:20-5](#). Hobbs Act liability, however, does not depend on whether the state offense is labeled as extortion; any conduct alleged under state law "must be capable of being generically classified as extortionate," i.e., the "obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats." [Scheidler v. NOW, 537 U.S. 393, 409-11, 123 S. Ct. 1057, 154 L. Ed. 2d 991 \(2003\)](#) (quoting [United States. v. Nardello, 393 U.S. 286, 290, 89 S. Ct. 534, 21 L. Ed. 2d 487 \(1969\)](#)).

The AC seems to allege two instances of extortion. The more prominent one is that defendants attempted to extract from Dr. Kaul the \$300,000 in civil penalties and \$175,422.21 in costs imposed by the Board by means of promises to reinstate his license. (E.g., AC ¶¶ 174, 125, 131, 144, 181) That is not extortion in any meaningful or plausible sense, however. Dr. Kaul, of course, did not consent to having to pay the civil penalties and costs imposed by the Board. But he owed them as a result of an official, legally sanctioned process. Imposition of such penalties was no more "extortionate" than is this Court's imposition of fines and penalties. Likewise, conditioning [\[\\*250\]](#) the reinstatement of a license upon payment of a sanction is a common feature of professional discipline, as familiar to attorneys as it is to physicians. It is not entirely [\[\\*78\]](#) clear why the payment (or non-payment, as it seems to be

<sup>42</sup> Nor does the AC very specifically really adequately allege the use of the mails or interstate wires. There are a handful of exceptions. (E.g., AC ¶¶200-206, 208) Nevertheless, the letters or wires element is pled only generally and without reference to the interstate/intrastate distinction. (E.g., ¶ 200 ("Dughi + Hewit, LLC violated [18 U.S.C. § 1341](#) when it schemed to defraud the plaintiff of his property with false representations of the work it had performed and for which the plaintiff had paid it \$7500. The defendant committed wire fraud when it caused these false representations to be transmitted by phone and internet."); ¶ 201 ("Andrew Kaufman violated [18 U.S.C. § 1341](#) when he communicated via phone and the internet that the plaintiff was not qualified to perform minimally invasive spine surgery."). Nor is there is the relation, if any, of the use of wires or mails to the allegedly fraudulent scheme explained. At any rate, the substantive allegations of fraud for each of these allegations are far too thin and non-specific to state a claim for mail, wire, or honest services fraud.

<sup>43</sup> There is also a jurisdictional element; the statute applies to one who "in any way degree obstructs, delays, or affects commerce or the movement of any article or commodity by robbery or extortion . . ." [18 U.S.C. § 1951\(a\)](#). The AC only sometimes alleges that the attempted extortion was an effort to obstruct, delay, or affect commerce. That would be an independent reason to dismiss many of these extortion claims.

the case here) of the penalties would be in any way valuable to most or all of the defendants here. But more fundamentally, there is no factual indication that any wrongful tactic was employed in connection with collection of the penalty.

The second extortion allegation concerns H8LS and Hollenbeck only. The AC alleges that the law firm threatened to withdraw from an unspecified representation if he did not come up with \$196,000 two weeks before certain proceedings.<sup>44</sup> (E.g., ¶¶ 76, 77, 96, 136) Without any pertinent factual allegations, however, it is impossible to conclude that such a threat was plausibly made, and if it was, that it was wrongful.

In sum, no predicate act of extortion is pled.

### 3. Conspiracy

The final potential predicate act, although not clearly pled, might consist of a conspiracy to commit a predicate act. For such an unusual claim, the legal analysis is slightly more involved. Nevertheless, I have no difficulty finding that a conspiracy has not been pled factually.

The general federal conspiracy statute, [18 U.S.C. § 371](#), is not a listed RICO predicate under [section 1961\(1\)\(B\)](#), [\(C\)](#), or [\(D\)](#). Some listed statutory predicate offenses, however, contain their [\[\\*79\]](#) own conspiracy provisions, which may be cited as predicate offenses. Alternatively, [sections 1961\(1\)\(A\)](#) and [\(D\)](#) both possess broad language (i.e., "any act or threat involving" or "any offense involving") in the description of potential indictable offenses. Certain courts, primarily in the Second Circuit, have found that language broad enough to encompass a conspiracy to commit a [section 1961\(1\)\(A\)](#) or [\(D\)](#) offense.

Even under the broad view, conspiracy to commit mail or wire fraud is not a predicate RICO act. See [Volmar Distrib. v. New York Post](#), 825 F. Supp. 1153, 1167 (S.D.N.Y. 1993). The mail and wire fraud statutes do not fall under the general language of [§ 1961\(1\)\(A\)](#) and [\(D\)](#). Rather, [18 U.S.C. §§ 1341](#) and [1343](#) are specifically listed as predicates under [§ 1961\(1\)\(B\)](#). Although mail and wire fraud are subject to their own, dedicated conspiracy provision, [18 U.S.C. § 1349](#), that provision is omitted from the [§ 1961\(1\)\(A\)](#) or [\(D\)](#) list.

The Hobbs Act, [18 U.S.C. § 1951](#), is different. That statute is specifically cited under subsection [1961\(1\)\(B\)](#) as a predicate offense. And embedded within that very statutory provision is the Hobbs Act's own, dedicated conspiracy provision. See [18 U.S.C. § 1951\(a\)](#) (" . . . or conspires to do so . . . ."). Thus, conspiracy to commit extortion in the violation of the Hobbs Act may constitute a predicate act. See [Volmar](#), 825 F. Supp. at 1167 n.23; cf. [Odesser v. Vogel](#), Civil Action No. 85-6931, 1986 U.S. Dist. LEXIS 18085, at \*25 n.17 (E.D. Pa. Nov. 5, 1986).

State law extortion is generically described as a predicate act [\[\\*80\]](#) under [section 1961\(1\)\(A\)](#). As noted above, some courts have found the [1961\(1\)\(A\)](#) language ("any [\[\\*251\]](#) act or threat involving" the enumerated offense) to be broad enough to encompass a conspiracy to commit an offense chargeable under that subsection. See, e.g. [United States v. Ruggiero](#), 726 F.2d 913, 918 (2d Cir.) (murder), cert. denied, 469 U.S. 831, 105 S. Ct. 118, 83 L. Ed. 2d 60 (1984).

Under federal and New Jersey law, the elements of conspiracy are generally same: a conspiracy is an agreement jointly entered into between two or more persons to obtain an unlawful objective. See [N.J. Stat Ann. § 2C:5-2](#); [United States v. Bansal](#), 663 F.3d 634, 669-70 (3d Cir. 2011) (essential elements of conspiracy are "(1) a mutual agreement or understanding, (2) knowingly entered by the defendant, with (3) an intent to jointly commit a crime"). There is a one key distinction, however. Conspiracies under the Hobbs Act do not require allegations of an overt

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<sup>44</sup> It is not clear whether the representation was related to the administrative proceedings. (AC ¶ 76 ("The defendant defrauded the plaintiff of approximately \$200,000 with false representations that it had performed legal work in preparation for the plaintiffs OAL hearing. The defendant then attempted to extort \$196,000 from the plaintiff two weeks before the OAL hearing was meant to commence with the threat that they would abandon the case if the plaintiff did not pay the money within 24 hours of the demand."))

act. *United States v. Salahuddin*, 765 F.3d 329, 340 (3d Cir. 2014). But, under New Jersey law, extortion is a second degree crime, N.J. Stat. Ann. § 2C-20-2(b)(1)(b), and so an overt act must be alleged. *Id.* [§ 2C:5-2\(d\)](#).

Not much, in the end, really turns on these distinctions. The AC is devoid of any credible allegations of conspiracies, agreements, or combinations to extort. As stated above, there are many generalized, sketchy allegations of conspiracy but no concrete factual averments to lend them a hue of plausibility.<sup>45</sup> Without some facts tending to show agreement [[\\*\\*81](#)] and some circumstantial evidence of concerted action, there is simply no way to find a conspiracy to extort in this sea of grievances.

The AC, in sum, fails to state a predicate act, whether of the substantive or conspiracy-to-commit variety. Because there is no racketeering activity, *a priori*, there cannot be a pattern of such activity. That is enough to dispose of the RICO claims. As to all defendants that remain, Count One is dismissed.

#### B. Antitrust Violations

Count Two of the AC alleges violations of federal [antitrust law](#).<sup>46</sup> No such claim, however, is pled plausibly here. The primary defect is the failure to define the relevant market, so I go no further in the analysis, but other defects lurk, and I allude to them briefly.

Contracts, combinations, and conspiracies in restraint of trade are illegal. [[\\*252](#)] [15 U.S.C. § 1](#). To sustain such a claim, the plaintiff must prove:

- (1) that the defendants contracted, combined, or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiff [[\\*\\*82](#)] was injured as a proximate result of that conspiracy.

*Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72, 81-82 (3d Cir. 1977); accord *Howard Hess Dental Laboratories Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 253 (3d Cir. 2010) ("A plaintiff asserting a [Section 1](#) claim . . . must allege four elements: (1) concerted action by the defendants; that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted actions were illegal; and (4) that it was injured as a proximate result of the concerted action.") (citing *Gordon v. Lewistown Hasp.*, 423 F.3d 184, 207 (3d Cir. 2005)).

It is also illegal to monopolize, attempt to monopolize, or conspire to monopolize trade. [15 U.S.C. § 2](#). Claims under Sherman Act [section 2](#) generally come in two flavors: monopoly abuse and attempted monopolization.

<sup>45</sup> I quote three of the conspiracy allegations, which are typical. See, e.g., AC ¶ 74 (alleging that Staats "conspired with the defendant governor, defendant medical board and defendant state in a scheme whose purpose was to revoke the plaintiff's medical license . . . Defendant is regularly in Washington, DC meeting with Congressmen and US Senators, and the defendant society of which he is the President, has an active political donation apparatus. The defendant's business partner was appointed to the defendant medical board by the defendant governor in approximately 2014, and was involved in the attempt by the defendant medical board to extort \$450,000 from plaintiff."); AC 1177 (Hollenbeck "conspired with the defendant governor, defendant state and defendant medical board to extort money from the plaintiff under the color of right, with a threat two weeks before the OAL hearing, that he would withdraw legal services if the plaintiff did not pay \$196,000 within twenty-four hours. The defendant . . . is a member of the New Jersey Republican Party. The defendant has close professional and commercial ties with the defendant governor and defendant attorney general and has given money to the Republican Party. The defendant has offices in both Trenton and Washington, DC."); AC ¶ 125 (alleging that GEICO "conspired with the defendant governor and his executive agencies to impose a \$450,000 'fine' which they attempted to extort from the plaintiff when he made an application for license reinstatement in 2014").

<sup>46</sup> Specifically, the AC pleads violations of [section 2 of the Sherman Act](#), which generally addresses single-firm conduct. Since this is a *pro se* plaintiff, I assume the AC intends to plead [section 1](#) violations as well.

"The offense of monopoly under [§ 2](#) of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

[Queen City Pizza v. Domino's Pizza, 124 F.3d 430, 437 \(3d Cir. 1997\)](#) (quoting [Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596 n. 19, 105 S. Ct. 2847, 86 L. Ed. 2d 467 \(1985\)](#)). An attempted monopolization claim has three elements: "a plaintiff must prove that the defendant (1) engaged in predatory or anticompetitive conduct with (2) specific intent to monopolize and with (3) a dangerous probability of achieving [\*\*83] monopoly power." [Id. at 442](#).

Under either [section 1](#) or [2](#), the plaintiff bears the burden of pleading the relevant geographic and product markets. See [Queen City Pizza, 124 F.3d at 436-37](#). The AC, however, contains virtually no allegations, factual or otherwise, about the relevant market in this case. There seem to be two contenders: generally, "the minimally invasive spine surgery market," and somewhat more specifically, the market for "minimally invasive spinal fusions." (E.g., AC ¶¶ 95, 112) Either way, the AC contains none of the usual and necessary product market allegations. [Queen City Pizza, 124 F.3d at 436](#) ("Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, . . . the relevant market is legally insufficient and a motion to dismiss may be granted.") There is no allegation concerning the relevant geographic market, which seems to include at least New Jersey, but might be larger. For these reasons, the antitrust claims are facially invalid, and therefore will be dismissed.

Even assuming that the AC pled a relevant market, these antitrust claims would still face an uphill battle, if not certain dismissal. As to the [section 1](#) claims, for example, there are no *factual* allegations [\*\*84] establishing one of the canonical *per se* violations (e.g., horizontal price-fixing, horizontal market division, or group boycott), and absolutely no *factual* allegations establishing [\*253] anticompetitive effect.<sup>47</sup> As to the [Section 2](#) claims, there are no *factual* allegations that defendants, however configured, possess substantial market power in the relevant market. These issues aside, there is a more fundamental pitfall: these antitrust claims seem to be based, at least in part, on the allegation that defendants lobbied for "legislation that enabled the defendant hospitals and neurosurgeons to monopolize the minimally invasive spine surgery market." (E.g., AC ¶ 95) That conduct, however, squarely falls within the *Noerr-Pennington* doctrine, which "provides broad immunity from liability to those who petition the government, including administrative agencies and courts, for redress of their grievances." [Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc., 806 F. 3d 162, 179 \(3d Cir. 2015\)](#).<sup>48</sup> Given the undisputed outcome of the disciplinary proceedings, moreover, the sole exception for "sham" litigation has not been adequately alleged. [Id. 180-81](#).

The motions to dismiss Count Two are granted.

### C. [Section 1983](#)

Count Eight alleges violations of [42 U.S.C. § 1983](#). I interpret it to be asserting [\*\*85] violations of Dr. Kaul's due process and equal protection rights. As to each aspect, the AC fails to state a claim.

#### 1. Due Process

<sup>47</sup> E.g., AC ¶ 94 ("The effect of the monopolization has been an increase in the cost of care and a reduction in the availability of clinical services.")

<sup>48</sup> *Noerr-Pennington*, by the way, would probably apply to the RICO claims as well. Cf. [We, Inc., v. City of Philadelphia, 174 F.3d 322, 326-27 \(3d Cir. 1999\)](#) ("This court, along with other courts, has by analogy extended the *Noerr-Pennington* doctrine to offer protection to citizens' petition activities in contexts outside the anti-trust area as well.").

The AC alleges that the disciplinary proceedings violated Dr. Kaul's right to due process. In general, a procedural due process claim requires plaintiff to allege that (1) he was deprived of an individual interest that is encompassed within the *Fourteenth Amendment's* protection of "life, liberty, or property," and (2) the procedures afforded him did not constitute "due process of law." *Hill v. Borough of Kutztown*, 455 F.3d 225, 234 (3d Cir. 2006) (quoting *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000)); accord *Res v. De Jongh*, 638 F.3d 169, 173, 55 V.I. 1251 (3d Cir. 2011).

The individual interest at stake is Dr. Kaul's medical license; the unconstitutional procedure is the disciplinary hearing. I do not doubt that a license to practice medicine is an individual property interest deserving of due process protections. But the state afforded Dr. Kaul the full panoply of due process rights during the disciplinary proceedings. He was represented by counsel. He submitted evidence and was able to cross-examine the State's witnesses. The Board and the ALJ issued reasoned, written opinions, and Dr. Kaul had the opportunity to take exception to or appeal them. The disciplinary proceedings possessed virtually all the usual and expected safeguards, and therefore [\*\*86] the probative value of allegations that additional safeguards could have been provided is very low. E.g., *Matthews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

Indeed, the thrust of the AC seems to involve procedural irregularities, rather than deficiencies in the procedures themselves. Examples include the alleged alteration of transcripts, the ALJ's consideration of extrinsic evidence, and witness perjury. These allegations, as discussed above, are meritless. Not a single pertinent example of transcript alteration can [\*254] be found in the AC, let alone an alteration that would have been material to the outcome of the proceedings. Specifics are likewise lacking for the allegations of false testimony; the allegations are generic ones that could be expressed by any litigant who came out on the losing side of a credibility contest. The AC does allege that the Media Defendants published a hit job of Dr. Kaul. There is no plausible factual allegation, however, that ALJ Solomon knew about or would have been influenced by the article, and his written decision is closely tied to the evidence of record.

In short, no procedural due process violation has been alleged here.

## 2. Substantive Due Process

A closely related claim is that the State Defendants [\*\*87] violated Dr. Kaul's substantive due process rights. That claim, too, fails for lack of any specific, plausible factual allegations in support.

"To establish a substantive due process claim, a plaintiff must prove the particular interest at issue is protected by the substantive *due process clause* and the government's deprivation of that protected interest shocks the conscience? *Chaney v. Street*, 523 F.3d 200, 219 (3d Cir. 2008) (citing *UA Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 400-02 (3d Cir. 2003)).

The substantive due process at issue here is the right to practice medicine. Whether construed broadly as a deprivation of liberty (i.e., the ability to freely choose one's profession) or more narrowly as a deprivation of a property interest (i.e., the license to practice medicine), the deprivation in any case does not "shock the conscience." That standard encompasses "only the most egregious official conduct." *United Artists*, 316 F.3d at 400. New Jersey officials have a strong interest in regulating the medical profession, and, for reasons stated herein, there are no allegations plausibly establishing that use of government power was such as to "shock the conscience." No factual allegations establish that this license revocation, regular on its face, was arbitrary and wanton.

## 3. Equal Protection

The third and final claim (it is pled as a Title VII [\*\*88] violation, but I interpret it as an equal protection claim) alleges that the State Defendants discriminated against Dr. Kaul because he is Indian. "Eighty percent (80%) of revocations are against ethnic minorities," the AC alleges, "while they only account for twenty-five percent (25%) of the physician population." (AC ¶ 297) Dr. Kaul also "recollects that in 2009 he was asked questions about his

race/nationality/ethnicity on his biennial license application, and believes that his Indian nationality was a factor in the defendant governor's consideration to revoke his license." (*Id.* 301) These allegations are insufficient to establish a discrimination claim as a matter of law.

To state a claim under the *Equal Protection Clause*, a plaintiff must allege that (1) he is a member of a protected class; (2) that he was treated differently from similarly situated individuals; and (3) that this disparate treatment was based on his or her membership in the protected class. See *Kasper v. Cnty. of Bucks*, 514 F. App'x 210, 214-15 (3d Cir. 2013) (citing *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3d Cir. 1990)).

The bare allegation that Dr. Kaul "believes" that race or nationality "was a factor" in the revocation of his license is not enough. No specific instances of similarly situated individuals being treated differently are alleged. Even disparate [\*\*89] impact, assuming it has been alleged, is not itself [\*255] sufficient to meet the threshold of intentional, purposeful discrimination. E.g., *Washington v. Davis*, 426 U.S. 229, 248, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976).

Because no violation of a constitutional right has been pled, Count 8, the *section 1983* claim, must be dismissed.

#### D. State Law Claims

For the reasons expressed above, the AC contains no viable federal cause of action. When a court has dismissed all claims over which it had original federal-question jurisdiction, it has the discretion to decline to exercise supplemental jurisdiction over the remaining state law claims. See *28 U.S.C. § 1337(c)*; see also *Hedges v. Musco*, 204 F.3d 109, 123 (3d Cir. 2000) (quoting *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 788 (3d Cir. 1995)). Where, as here, the federal claims are dismissed in the early, *Rule 12(b)(6)* stages of litigation, courts generally decline to exercise supplemental jurisdiction over state claims. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966). Considerations of judicial economy, convenience, fairness, or comity do not weigh in Dr. Kaul's favor. I therefore decline to exercise supplemental jurisdiction over Counts Ten, Eleven, and Twelve.

## VI. CONCLUSION

For the reasons set forth above, the defendants' motions to dismiss are GRANTED in part and DENIED in part, as follows.

1. Because amendment would be futile, the following defendants are DISMISSED WITH PREJUDICE:

- Drs. Carmel, Moore, Przyblyski, [\*\*90] NASS, and AMA, on res judicata and entire controversy grounds;
- New Jersey and the Board on sovereign immunity grounds;
- ALJ Solomon on absolute immunity grounds;
- Governor Christie, former AG Chiesa, ALJ Solomon, Roeder, and Dr. Lomazow on sovereign immunity and qualified immunity grounds;

2. Because amendment would be futile, the following counts are DISMISSED WITH PREJUDICE:

- Counts Three, Four, Five, Six, Seven and Nine as to all defendants, for failure to state a claim upon which relief can be granted pursuant to *Fed. R. Civ. P. 12(b)(6)*;
- Count Eight as to all non-state defendants (except Drs. Przyblyski and Kaufman), for failure to state a claim upon which relief can be granted pursuant to *Fed. R. Civ. P. 12(b)(6)*;

3. As to all defendants not dismissed with prejudice, the following counts are DISMISSED WITHOUT PREJUDICE:

- Counts One, Two, and Eight as to all such defendants, for failure to state a claim upon which relief can be granted pursuant to *Fed. R. Civ. P. 12(b)(6)*;

372 F. Supp. 3d 206, \*2551 2019 U.S. Dist. LEXIS 31732, \*\*90

- Counts Ten, Eleven, and Twelve as to all such defendants, for lack of supplemental jurisdiction.

Although the AC states no claim upon which relief can be granted, this is a first dismissal. Any amended complaint shall be filed within 30 days after the date of this order and opinion. **[\*\*91]**

Dated: February 25, 2019

(unamended version filed June 30, 2017)

/s/ Kevin McNulty

**KEVIN MCNULTY**

**United States District Judge**

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## **Smith-Brown v. Ulta Beauty, Inc.**

United States District Court for the Northern District of Illinois, Eastern Division

February 26, 2019, Decided; February 26, 2019, Filed

No. 18 C 610

### **Reporter**

2019 U.S. Dist. LEXIS 30460 \*; 2019 WL 932022

KIMBERLY LAURA SMITH-BROWN, et al., Plaintiffs, v. ULTA BEAUTY, INC. and ULTA SALON, COSMETICS & FRAGRANCE, INC., Defendant.

**Subsequent History:** Motion granted by, in part, Motion denied by, in part [Smith-Brown v. Ulta Beauty, Inc., 2019 U.S. Dist. LEXIS 108021, 2019 WL 2644243 \(N.D. Ill., June 27, 2019\)](#)

Motion denied by, Class certification denied by, Motion granted by, Motion denied by, As moot [Smith-Brown v. Ulta Beauty, 2020 U.S. Dist. LEXIS 146052 \(N.D. Ill., Aug. 6, 2020\)](#)

## **Core Terms**

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products, notice, plaintiffs', Beauty, defendants', unjust enrichment, pre-suit, allegations, class action, motion to dismiss, deceptive, breach of warranty, consumer, class member, particularity, unfair, business practice, named plaintiff, entities, requirement of notice, courts, seller, infections, purchasing, subsidiary, pleaded, retail, affirmative misrepresentation, adequate remedy at law, breach of contract

**Counsel:** [\*1] For Kimberly Laura Smith-Brown, Individually and on Behalf of All Others Similary Situated, Plaintiff: Carl V. Malmstrom, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Janine L Pollack, LEAD ATTORNEY, PRO HAC VICE, The Sultz Law Group, PC, New York, NY; Lee Shalov, LEAD ATTORNEY, PRO HAC VICE, McLaughlin & Stern LLP, New York, NY; Carlos Mario Jaramillo, PRO HAC VICE, Access Lawyers Group, Pasadena, CA; Jason Giaimo, PRO HAC VICE, McLaughlin & Stern LLP, New York, NY; Wade Wilkinson, PRO HAC VICE, McLaughlin & Stern LLP, New York, NY.

For Colleen Thornton, Allison Sot, Alice Vitiello, Karen Eonta, Jennifer Sacks, Brittany Caffrey, Valarie Hutchison, Robin Okman, Paula M Ogurkiewicz, Quinn Allen, Veronica Sanders, Ilene Anchell, Kristen Jackson, Shasta Swaney, Plaintiffs: Janine L Pollack, PRO HAC VICE, The Sultz Law Group, PC, New York, NY.

For Tammy Walker, Deanna Shaw, Kris Dane, Donna Williams, Cristina Kovacs, Plaintiffs: Thomas A. Zimmerman, Jr., LEAD ATTORNEY, Zimmerman Law Offices, P.C., Chicago, IL; Matthew C. De Re, Sharon Harris, Zimmerman Law Offices, P.c., Chicago, IL; Janine L Pollack, PRO HAC VICE, The Sultz Law Group, PC, New York, NY.

For [\*2] Ulta Beauty, Inc., Ulta Salon, Cosmetics & Fragrance, Inc., Defendants: Craig Christopher Martin, LEAD ATTORNEY, Jenner & Block LLP, Chicago, IL; Amanda S Amert, Matt D. Basil, Paul Benjamin Rietema, Jenner & Block LLP, Chicago, IL.

**Judges:** JORGE L. ALONSO, United States District Judge.

**Opinion by:** JORGE L. ALONSO

## **Opinion**

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**MEMORANDUM OPINION AND ORDER**

Plaintiffs, twenty-two customers of defendants' retail cosmetics stores in eighteen states, bring this putative class action lawsuit, asserting state-law claims of breach of warranty, unjust enrichment, and consumer fraud. Defendants have moved to dismiss. For the following reasons, the motion is granted in part and denied in part.

**I. BACKGROUND**

Defendant Ulta Salon, Cosmetics & Fragrance, Inc. ("Ulta Salon") is a "mass retailer of beauty products," operating retail stores "coast to coast." (2d Am. Compl. ¶¶ 1, 4, ECF No. 91.) It is a wholly owned subsidiary of defendant Ulta Beauty, Inc. ("Ulta Beauty"). Plaintiffs, consumers hailing from eighteen states, purchased cosmetics or beauty products at defendants' stores, only to learn that defendants (collectively, "Ulta") had a practice of reshelfing products that had been used and returned by dissatisfied customers. In some [\*3] cases, plaintiffs noticed shortly after purchase that the products appeared to have been previously used (*Id.* ¶¶ 13, 19-20, 26-27, 33.) In other cases, plaintiffs infer that the products may have been previously used based on the following information about Ulta's business practices.

On January 9, 2018, a former Ulta employee revealed that, when customers returned products after using them, the products were "made to 'look new'—but not sanitized—and put back on the shelf to sell to unsuspecting customers." (*Id.* ¶ 62.) The employee posted her revelations on the microblogging website Twitter, identifying herself by the Twitter handle, "@fatinamxo." She posted pictures of used foundation and lipsticks, which Ulta resold as if new. (*Id.*) She claimed that Ulta even trained its staff members to "restore" products, and managers were careful to keep an eye on products in the "damage bin" to assess whether they could be resold. (*Id.* ¶ 63.) Managers taught employees "how to clean eyeshadow palettes and let it dry [overnight] so it can be repackaged and sold the next day." (*Id.*)

Other Twitter users responded to @fatinamxo's posts by claiming that they too worked at Ulta, and what @fatinamxo reported [\*4] was consistent with their own experience in various places, including California, Washington, Texas, Florida, Michigan, South Carolina, Wisconsin, and Ohio. (*Id.* ¶¶ 66-68.) One of these Twitter users even claimed to have worked at Ulta store number 1221 in Sherman Oaks, California, the same store where plaintiff Kimberly Laura Smith-Brown routinely shopped. (*Id.* ¶ 70.)

@fatinamxo's Twitter revelations created a "social media frenzy" (*id.* ¶ 66), and news outlets began to pick up the story. A former Ulta manager in Ohio told *Business Insider* that "there was often pressure" on managers "to sell used products":

Our bosses constantly told us if it looked like it could be sold, put it back out. The company always had a percentage they wanted you to stay below weekly in what we damaged. We would literally get lectured by our boss on our conference calls if our stores were over.

(*Id.* ¶ 71.) Twitter users corroborated this pressure from management above the store level to reduce damaged product and get as much product as possible back on the shelves after it was returned. (*Id.* ¶ 77.)

The Ohio manager told *Business Insider* that products such as mascara and foundation were simply returned to the [\*5] shelf "because it was difficult to tell if they were used." (*Id.* ¶ 72.) When bottled products such as shampoo or lotions were returned, Ulta employees would clean them, "wipe out the spout and turn the pump cap back down," and then reshelve them. (*Id.*) A former Ulta employee in South Carolina told *Business Insider* that bottled products were put back on the shelf as long as they were at least 80% full when they were returned to Ulta. (*Id.* ¶ 73.)

In the wake of these and other, similar revelations about Ulta on the internet and social media, plaintiffs obtained sworn affidavits from five former Ulta employees—Tammy Geier, Kami Turner, Ella Soto, Laura Hornick, and Michael Fisher—who worked in Ulta stores in Georgia, Tennessee, South Carolina, Florida, and California. (*Id.* ¶ 83.) Fisher, Geier, and Turner, while working as general managers of individual Ulta stores, were trained by

regional management, apparently based on pressure from senior management, on how to restore and repackage used makeup and beauty products in order to reduce "shrink," or inventory going to waste. (*Id.* ¶¶ 84-86.) All five former employees were instructed to use returned products as "testers" in their stores, [\*6] despite the potential to "spread disease and germs to those" who use them. (*Id.* ¶ 87.)

Plaintiffs allege that Ulta's policy of reselling or reusing returned products is "unsanitary and hazardous to the public." (*Id.* ¶ 88.) Many of the plaintiffs allege that they suffered sties, rashes, and irritation due to skin and eye infections after purchasing and using Ulta products. (*Id.* ¶¶ 11-12, 16-18, 23, 25-26, 29-31, 34.) They believe the Ulta products they purchased were, unbeknownst to them, previously used and their use of these unsanitary products caused the infections they suffered.

Plaintiffs seek to represent in this action not only themselves but also (a) a nationwide class consisting of "[a]ll persons in the United States who purchased, other than for resale, beauty products from Ulta Beauty retail locations" (2d Am. Compl. ¶ 93), or alternatively, (b) eighteen state subclasses made up of all persons who purchased Ulta beauty products, other than for resale, in each of the eighteen states plaintiffs represent, namely, Alabama, California, Florida, Georgia, Illinois, Indiana, Maryland, Michigan, Nevada, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Virginia, [\*7] Washington, and Wisconsin.

The Second Amended Complaint consists of twenty-three claims for relief: breach of the implied warranty of merchantability, on behalf of the nationwide class or, alternatively, each state subclass; unjust enrichment, on behalf of the nationwide class or, alternatively, each state subclass; and twenty-one claims under twenty-one separate consumer fraud and deceptive business practices statutes in the various states plaintiffs represent, each claim on behalf of the subclass of persons who purchased Ulta products in the state supplying the governing law.

## II. LEGAL STANDARDS

"A motion under [Rule 12\(b\)\(6\)](#) tests whether the complaint states a claim on which relief may be granted." [Richards v. Mitcheff, 696 F.3d 635, 637 \(7th Cir. 2012\)](#). Under [Rule 8\(a\)\(2\)](#), a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." [Fed. R. Civ. P. 8\(a\)\(2\)](#). The short and plain statement under [Rule 8\(a\)\(2\)](#) must "give the defendant fair notice of what the claim is and the grounds upon which it rests." [Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#) (quoting [Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 \(1957\)](#) (internal quotation altered)).

Under federal notice-pleading standards, a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* Stated differently, "a complaint must contain sufficient [\*8] factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" [Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#) (quoting [Twombly, 550 U.S. at 570](#)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing [Twombly, 550 U.S. at 556](#)). "In reviewing the sufficiency of a complaint under the plausibility standard, [courts must] accept the well-pleaded facts in the complaint as true, but [they] 'need[ ] not accept as true legal conclusions, or threadbare recitals of the elements of a cause of action, supported by mere conclusory statements.'" [Alam v. Miller Brewing Co., 709 F.3d 662, 665-66 \(7th Cir. 2013\)](#) (quoting [Brooks v. Ross, 578 F.3d 574, 581 \(7th Cir. 2009\)](#)).

A party "must state with particularity the circumstances constituting fraud." [Fed. R. Civ. P. 9\(b\)](#). The requirement that fraud be pleaded with particularity "ensures that plaintiffs do their homework before filing suit and protects defendants from baseless suits that tarnish reputations." [Pirelli Armstrong Tire Corp. Retiree Med. Ben. Trust v. Walgreen Co., 631 F.3d 436, 439 \(7th Cir. 2011\)](#). The requirement is not rigid, and what must be alleged will vary, depending on the facts of the case. *Id. at 442*. The heightened pleading standard applies to all *allegations* of fraud (such as a misrepresentations), not merely *claims* labeled fraud. *Id. at 447*.

"[Federal Rule of Civil Procedure 12\(b\)\(1\)](#) authorizes the Court to dismiss any claim for which the [\*9] Court lacks subject-matter jurisdiction, such as lack of standing." [Bohn v. Boiron, Inc., No. 11 C 8704, 2013 U.S. Dist. LEXIS](#)

[107928, 2013 WL 3975126, at \\*2 \(N.D. Ill. Aug. 1, 2013\)](#). In order to establish a justiciable "case or controversy" that provides standing to sue under [Article III, § 2 of the United States Constitution](#), a plaintiff must show the following: (1) he has suffered an injury-in-fact that is both (a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. See [Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. \(TOC\), Inc.](#), 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (citing [Lujan v. Defs. of Wildlife](#), 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). Where a defendant seeks dismissal under [Rule 12\(b\)\(1\)](#) for lack of standing, courts should evaluate the sufficiency of the allegations by "us[ing] *Twombly-Iqbal's* 'plausibility' requirement, which is the same standard used to evaluate facial challenges to claims under [Rule 12\(b\)\(6\)](#)." [Silha v. ACT, Inc.](#), 807 F.3d 169, 174 (7th Cir. 2015). The court takes well-pleaded allegations of the complaint as true unless they are refuted by the defendant in an affidavit. [Tamburo v. Dworkin](#), 601 F.3d 693, 700 (7th Cir. 2010).

### III. STANDING

Defendants challenge plaintiffs' standing in three respects, arguing as follows: (a) plaintiffs lack standing to sue over the purchase of products that were new, not used; (b) plaintiffs lack standing to sue on behalf of class members who did not [\*10] purchase the same beauty products as plaintiffs did; and (c) plaintiffs lack standing to sue on behalf of class members in other states whose claims will be governed by other states' laws.

#### A. Standing—New Products

Defendants argue that plaintiffs have no standing based on any purchase of new, unused products because the purchase of such products did not cause any actual injury. Rather, according to defendants, plaintiffs who purchased new products received exactly what they bargained for.

Plaintiffs generally allege that, during a given time frame, they purchased certain Ulta products that they believed were new at the time, but now believe had been previously used. (See, e.g., 2d Am. Compl. ¶ 15.) Some plaintiffs allege some personalized basis for this belief, generally that they suffered some sort of infection after using an Ulta product (see, e.g., *id.* ¶ 16) or the product showed physical signs of having been used, such as a fingerprint in a jar of lip balm (*id.* ¶ 27) or build-up of mascara on a brush (*id.* ¶ 20), or perhaps both (see, e.g., *id.* ¶ 26.). Other plaintiffs apparently believe that they purchased used products based only on the revelations about Ulta's general business practice [\*11] of reshelfing returned product. None of them specifically claims to have bought new products from Ulta. However, some portions of plaintiff's complaint suggest that the commingling of new and used products on Ulta shelves reduced the value of all Ulta products. (2d Am. Compl. ¶¶ 4, 6-7, 92.) In their opposition brief, plaintiffs argue that even if they received new products, they still received less than they bargained for because, had they known of the risk that they might receive a used product that might cause an infection, they would have paid less or even shopped elsewhere. According to plaintiffs, based on this theory, even purchasers of new Ulta products suffered an injury-in-fact that confers standing.

Plaintiffs rely principally on [In re Aqua Dots Products Liability Litigation](#), 654 F.3d 748, 751 (7th Cir. 2011), in which the Seventh Circuit recognized that plaintiffs who had unknowingly purchased a dangerously defective toy had asserted an injury-in-fact because they claimed to have suffered a "loss [that was] financial: they paid more for the toys than they would have, had they known of the risks the beads posed to children." But, as defendants correctly explain in reply, [Aqua Dots](#) is distinguishable because the defect (the toy beads, if ingested, "metabolize[d] [\*12] into gamma-hydroxybutyric acid (GHB), which can induce nausea, dizziness, drowsiness, agitation, depressed breathing, amnesia, unconsciousness, and death," *id. at 749*) was inherent in the products the plaintiffs purchased; all of the beads posed the same risk of harm, and every purchaser received an inherently dangerous product. In this case, to the extent plaintiffs received new Ulta products, there was no defect or risk of harm in the products they purchased, and therefore no overpayment or injury.

In that respect, this case is similar to [\*Lewert v. P.F. Chang's China Bistro, Inc.\*, 819 F.3d 963, 968 \(7th Cir. 2016\)](#), in which the plaintiffs claimed "that the cost of their meals is an injury because they would not have dined at P.F. Chang's had they known of its poor data security." In *dicta*, the Seventh Circuit was "skeptical" that such a claim described an Article III injury. *Id.* The court distinguished *Aqua Dots*, which acknowledged that plaintiffs who claim they would have shopped elsewhere had they known of a safety risk may suffer a "financial injury," but "only where the product itself was defective or dangerous and consumers claim they would not have bought it . . . had they known of the defect." [\*Lewert\*, 819 F.3d at 968](#). In this case, to the extent plaintiffs or class members purchased [\*13] new products, it was not the "product itself" (*i.e.*, the one with which they walked out of the store) that was "defective or dangerous," and therefore such purchasers have not suffered an injury-in-fact that confers Article III standing. Plaintiffs do not have standing to assert claims arising out of the purchase of new Ulta products.

## B. Standing—Different Products

Defendants argue that plaintiffs lack standing to assert claims based on Ulta products of a kind that they themselves did not purchase. They do not point to any claims of any of the named plaintiffs that they seek to dismiss on this basis; rather, defendants seem to be anticipating that plaintiffs will attempt to represent unnamed class members who purchased certain kinds of Ulta products that the named plaintiffs did not. Plaintiffs argue that they may do so, relying in part on this Court's decision in [\*Ulrich v. Probalance, Inc.\*, No. 16 C 10488, 2017 U.S. Dist. LEXIS 132202, 2017 WL 3581183, at \\*6 \(N.D. Ill. Aug. 18, 2017\)](#) (quoting [\*Wagner v. Gen. Nutrition Corp.\*, No. 16-CV-10961, 2017 U.S. Dist. LEXIS 112106, 2017 WL 3070772, at \\*5 \(N.D. Ill. July 19, 2017\)](#)), in which the Court recognized that a plaintiff may have standing to bring claims on behalf of unnamed class members based on products he did not purchase "so long as the products and the alleged misrepresentations are substantially similar."

Based on the present allegations, the Court doubts whether the issue is [\*14] ripe for resolution at this early stage. Cf. [\*Ulrich\*, 2017 U.S. Dist. LEXIS 132202, 2017 WL 3581183, at \\*6](#) (complaint was unclear about whether named plaintiff purchased "one bottle of each of the four Products or four bottles of one Product"). In this case, the issue is better reserved for the class certification stage. But even if it were ripe, the Court tends to agree with plaintiffs that the named plaintiffs can represent any consumer who purchased one of defendants' products believing it was new, but that was actually used, because in any such case the deceptive conduct and harm are essentially the same, even if the damages might differ. See *id.* ("The alleged misrepresentations are the same, they all relate to the Products' quantity of protein, which 'fill[s] the same function' in each Product and is 'used in the same manner' in each Product, and the protein claims are 'inaccurate' in 'the same manner on every' Product.") (quoting [\*Mednick\*, 2014 U.S. Dist. LEXIS 159687, 2014 WL 6474915, at \\*4](#)). Defendants' motion is denied as to this argument, although they may re-raise the issue at a later stage if the facts support it.

## C. Standing—Class Members in Other States

Defendants argue that plaintiffs lack standing to assert claims on behalf of any class members who may have purchased defendants' products in [\*15] states where no named plaintiffs did, and whose claims will be governed by the laws of those states, because the named plaintiffs "must possess the same interest and suffer the same injury shared by all members of the class [they] represent[]." See [\*In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.\*, No. 09 CV 3690, 2013 U.S. Dist. LEXIS 119962, 2013 WL 4506000, at \\*7-8 \(N.D. Ill. Aug. 23, 2013\)](#) (quoting [\*Keefe v. Wexler\*, 149 F.3d 589, 592-93 \(7th Cir. 1998\)](#)). Plaintiff responds that this argument is premature at this stage because the appropriate time to resolve the issue is at class certification. See [\*Block v. Lifeway Foods, Inc.\*, No. 17 C 1717, 2017 U.S. Dist. LEXIS 143828, 2017 WL 3895565, at \\*7 \(N.D. Ill. Sep. 6, 2017\)](#).

The Court agrees with defendants. Defendants' citation to *Dairy Farmers* is apt, and that decision's reasoning is persuasive. Plaintiffs' only response to *Dairy Farmers* is to attempt to distinguish it as a "multi-district class action composed of separate consolidated actions involving a variety of individualized issues, including tolling of the statute of limitations," but they do not explain—and the Court fails to see—why the distinction matters. In [\*Dairy\*](#)

*Farmers*, 2013 U.S. Dist. LEXIS 119962, 2013 WL 4506000, at \*7-8, see also *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at \*25 (N.D. Ill. Jun. 29, 2015), the Court's analysis was not apparently based on any individualized issues or anything other than the general principle that class representatives and class members must "possess the same interest and suffer the same injury," and the Court fails to see why the same principle does not lead to the same result here.

As for whether [\*16] the issue is premature at the present stage of the case, it is true that courts have taken different approaches, both procedurally and substantively, toward the issue of a named class representative in one state purporting to represent unnamed class members who reside in other states on claims governed by those other states' laws. See *Liston v. King.com, Ltd.*, 254 F. Supp. 3d 989, 998-1002 (N.D. Ill. 2017) (collecting cases and tracing different approaches). The Court need not unravel this conceptual tangle in this case, however, because no matter which perspective one takes, "there is plainly ample reason at this juncture to question whether [plaintiffs] will be able to pursue claims based on statutory causes of action created by states where [plaintiffs] neither lived nor [were] injured." *Id. at 1001*. As the Seventh Circuit has explained, "[n]o class action is proper unless all litigants are governed by the same legal rules," because "[o]therwise the class cannot satisfy the commonality and superiority requirements" of Rule 23. *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015 (7th Cir. 2002). "[S]tate laws about theories such as those presented by our plaintiffs differ, and such differences have led" the Seventh Circuit to hold that "other warranty, fraud, or products liability suits may not proceed" together in a single class that [\*17] extends across state boundaries. See *id.* (citing *Isaacs v. Sprint Corp.*, 261 F.3d 679 (7th Cir. 2001); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995)); *Dolmage v. Combined Ins. Co. of Am.*, No. 14 C 3809, 2017 U.S. Dist. LEXIS 67555, 2017 WL 1754772, at \*5-6 (N.D. Ill. May 3, 2017) (citing *Bridgestone/Firestone*). Where claims must be adjudicated under the differing laws of numerous jurisdictions, it is likely that "a single . . . class is not manageable." *Bridgestone/Firestone*, 288 F.3d at 1018.

To the extent that plaintiffs attempt to assert claims on behalf of class members in states where they do not reside and were not injured, "it would . . . be inappropriate to engage in wide-ranging discovery premised on a prospect as to which there is substantial doubt—namely, [plaintiff's] ability to assert causes of action created by other states for the benefit of other individuals injured in those other states." *Liston*, 254 F. Supp. 3d at 1001-02. Any such claims are dismissed, although plaintiffs may move to amend their complaint if circumstances arise to support it.

#### IV. FAILURE TO STATE A CLAIM

Defendants argue that plaintiffs fail to state a claim because they have not pleaded their claims with particularity in accord with Rule 9(b) and they have used improper group pleading.

##### A. Rule 9(b) and Particularity

Defendants argue that plaintiffs' complaint fails to meet the Rule 9(b) standard because, although plaintiffs' claims depend on their allegation that the practice of reshelving used products was widespread [\*18] at Ulta stores all over the country, they do not identify who set this policy, which products it applied to, which stores in which locations followed it, or when the alleged misrepresentations or omissions were made. Without such details, defendants argue, plaintiffs' claims rest in large part on anonymous or pseudonymous allegations posted on social media networks and declarations from a handful of employees, which are insufficient to make claims of nationwide fraud plausible. Additionally, defendants argue that plaintiffs' allegations offer insufficient detail because many plaintiffs do not identify the particular Ulta store at which they shopped; the products they purchased, apart from generic descriptions such as "lipstick" or "eyeliner"; or precisely when they purchased them, apart from a month or year.

The Court disagrees. First, plaintiffs were not required to plead every detail of how defendants carried out the alleged deception, particularly considering that pleading such details would require inside knowledge of the

defendant business entities' inner workings, which mere customers cannot realistically obtain. Plaintiffs cannot know precise details of how, when, and by whom [\*19] used products were restored and returned to Ulta shelves. See [U.S. ex rel. Ceas v. Chrysler Grp. LLC, No. 12-CV-2870, 2016 U.S. Dist. LEXIS 7923, 2016 WL 6963060, at \\*4 \(N.D. Ill. Jan. 19, 2016\)](#) (quoting [U.S. ex rel. Heath v. AT&T, Inc., 791 F.3d 112, 125, 416 U.S. App. D.C. 289 \(D.D.C. 2015\)](#)) ("The complaint makes clear, in other words, that corporate levers were pulled; identifying precisely who pulled them is not an inexorable requirement of [Rule 9\(b\)](#) in all cases.").

Plaintiffs' allegations of defendants' business practices are based on information and belief. Fraud can be pleaded based on information and belief "so long as (1) the facts constituting the fraud are not accessible to the plaintiff and (2) the plaintiff provides the ground for his suspicions." [Pirelli, 631 F.3d at 443](#) (internal quotation marks omitted). As the Court has already explained, this is a case in which "the facts constituting the fraud are not accessible" to plaintiffs because they cannot know how Ulta stores managed their inventory, as that is a part of defendants' operations that is hidden from public view. Further, plaintiffs have provided the ground for their suspicions: they have pointed to specific accounts by people who claim to have personal knowledge of defendants' business practice of placing used beauty products back on store shelves for resale. Although the accounts in the media and social media are often either anonymous or pseudonymous, they [\*20] are corroborated by the five employee declarations and by the named plaintiffs' allegations of suffering infections after shopping at Ulta and of purchasing Ulta products that physically appeared to have been previously used. Remaining sensitive to "information asymmetries that may prevent a plaintiff from offering more detail," the Court agrees with plaintiffs that they have stated sufficient facts with a sufficient degree of particularity to make the alleged fraud plausible. See [id. at 443](#).

As for defendants' arguments that the named plaintiffs were required to allege additional details about the transactions in which they purchased used Ulta products, the Court agrees with plaintiffs that "[Rule 9\(b\)](#) does not demand that level of granularity or precision, at least in this case." [Hobbs v. Gerber Prods. Co., No. 17 CV 3534, 2018 U.S. Dist. LEXIS 136943, 2018 WL 3861571, at \\*6 \(N.D. Ill. Aug. 14, 2018\)](#). While there is a "good deal of caselaw that speaks of a journalistic-type approach to [[Rule 9\(b\)](#)]s] requirement of pleading 'with particularity,' that locution really does not fit well in dealing with extended fraudulent schemes involving a large volume of transactions—it must be remembered that what [Rule 9\(b\)](#) mandates particularity about are 'the circumstances constituting fraud.'" [U.S. ex rel. Salmeron v. Enter. Recovery Sys., Inc., 464 F. Supp. 2d 766, 768 \(N.D. Ill. 2006\)](#) (Shadur, J.). The deception in this case stems from Ulta's [\*21] behind-the-scenes inventory management, rather than from what happened at the cash register, and plaintiffs have described those behind-the-scenes circumstances with as much particularity as they are able, as outsiders looking in. The details of the transactions in which they purchased Ulta products are closer to an issue of damages, and [Rule 9\(b\)](#) does not require that circumstances relating to damages be pleaded with particularity. [Hobbs, 2018 U.S. Dist. LEXIS 136943, 2018 WL 3861571, at \\*10](#). Defendants' motion to dismiss for failure to comply with [Rule 9\(b\)](#) is denied.

## B. Group Pleading

Defendants argue that plaintiffs' complaint should be dismissed because plaintiffs make no effort to differentiate between Ulta Beauty and Ulta Salon. Plaintiffs refer to defendants collectively as "defendants" or "Ulta," but as plaintiffs themselves recognize, Ulta Beauty is a holding company that conducts operations only through subsidiaries such as Ulta Salon; Ulta Beauty conducts no operations of its own. According to defendants, this is improper group pleading because Ulta Beauty and Ulta Salon "are entitled to know the specific allegations levelled against each of them" (Defs.' Mem. Supp. Mot. Dismiss at 14, ECF No. 100), without having to guess who is accused of doing what. [\*22]

Plaintiffs allege that Ulta Salon was originally incorporated in 1990 with no parent corporation and "total operating authority over its stores." (2d Am. Compl. ¶¶ 35, 37; see Pl.'s Mem. Opp'n at 11, ECF No. 122.) On January 29, 2017, plaintiffs allege, the company reorganized. Ulta Beauty was incorporated as a new company that has "on a consolidated basis, the same assets, businesses, and operations" as Ulta Salon had prior to the reorganization. (2d Am. Compl. ¶ 39.) Thus, Ulta Beauty became the successor to Ulta Salon, "the former publicly-traded company and now a wholly owned subsidiary" of Ulta Beauty. (*Id.*) Plaintiffs note that, in forms it has filed with the Securities and

Exchange Commission, Ulta Beauty has explicitly and intentionally used collective terms such as "we," "us," "Ulta Beauty" or "the Company" to refer to "Ulta Beauty, Inc. and its consolidated subsidiaries." (*Id.*) Further, plaintiffs allege that Ulta Salon "does not appear to have a CEO, Chairman of the Board, or Board of Directors separate from Ulta Beauty, Inc. As a result, there is no separate decisionmaking apparatus for Ulta Salon . . . and the Board of Directors and CEO of Ulta Beauty exert direct control [\*23] over Ulta Salon." (*Id.* ¶ 36.) Additionally, the entities allegedly have the same general counsel and same address. (2d Am. Compl., Ex. F.)

While it is true that "[e]ach defendant is entitled to know what he or she did that is asserted to be wrongful," [Bank of America, N.A. v. Knight, 725 F.3d 815, 818 \(7th Cir. 2013\)](#), defendants have not cited a case in which a court found analogous allegations against two such intertwined business entities to be impermissible group pleading. Plaintiffs have alleged that, less than a year before the date of this lawsuit, and therefore during the time period that the alleged wrongdoing was taking place, which is "at least as long as the relevant statute of limitations periods" (2d Am. Compl. ¶ 4), Ulta Salon reorganized into two companies, which apparently share a CEO and Board of Directors. The Court understands plaintiffs to be accusing both entities of wrongdoing, at different times and potentially at the same time to the extent they operated as one after the reorganization, although plaintiff cannot say at this early stage who pulled which "corporate lever." [Ceas, 2016 U.S. Dist. LEXIS 7923, 2016 WL 6963060, at \\*4](#). By providing facts to describe the reorganization and the resulting shared corporate structure in some detail, they have alleged a plausible basis for asserting [\*24] claims against both entities. See [Rysewyk v. Sears Holdings Corp., No. 15 CV 4519, 2015 U.S. Dist. LEXIS 169124, 2015 WL 9259886, at \\*7 \(N.D. Ill. Dec. 18, 2015\)](#) (plaintiffs stated claim against holding company as well as operating subsidiary because they alleged that holding company participated in "market[ing], sell[ing], and servic[ing]" the offending products "through its retail establishments"). Although plaintiffs' theory of which entity is responsible for which acts may need to be refined as the case progresses, plaintiffs' allegations are sufficient at this early stage to state a claim that survives defendants' motion to dismiss.

### **C. Breach of Warranty Claims and Pre-Suit Notice**

Defendants contend that plaintiffs' breach of warranty claims must be dismissed because plaintiffs did not give defendants the pre-suit notice that the Uniform Commercial Code requires.<sup>1</sup>

#### **1. Pre-suit notice by plaintiff Smith-Brown as to Ulta Salon**

Before plaintiff Smith-Brown filed her initial complaint in this matter, she submitted her pre-suit notice letter only to Ulta Beauty. Defendants argue that the letter did not provide effective notice to Ulta Salon.

Plaintiffs respond that Smith-Brown's letter, although addressed only to Ulta Beauty, nevertheless provided effective notice to Ulta Salon because the two entities share the [\*25] same address, the same general counsel, and the same corporate secretary. According to plaintiffs, Ulta Salon therefore had "actual knowledge" of Smith-Brown's grievance prior to the filing of her complaint, and "lack of pre-litigation notice is excused" when the defendant has "actual knowledge" of the defect. See [Fuchs v. Menard, Inc., No. 17 C 1752, 2017 U.S. Dist. LEXIS 160336, 2017 WL 4339821, at \\*6 \(N.D. Ill. Sep. 29, 2017\)](#).

The Court might agree with plaintiffs' legal reasoning under Illinois law, but Smith-Brown is a citizen of California who allegedly purchased used Ulta products in California, so California law presumably applies to her claims. Plaintiffs have not cited a case in which a court recognized an "actual knowledge" exception to the pre-suit notice requirement under California law. Plaintiffs cite [In re Ford Motor Co. E-350 Van Prod. Liability Litigation \(No. II\), No. CIV03-4558, 2008 U.S. Dist. LEXIS 73690, 2008 WL 4126264, at \\*10-11 \(D.N.J. Sept. 2, 2008\)](#), which considered breach of warranty claims under Alabama, Arkansas, California, and Illinois law, but that case never suggested that

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<sup>1</sup> Defendants also argue that plaintiffs do not state breach of warranty claims as to any new products. The Court need not address this argument because it has already concluded that plaintiffs have no standing to bring any such claims.

there is any "actual knowledge" exception to the pre-suit notice requirement under California law. Instead, it recognized a California exception to the pre-suit notice requirement only for "injured consumers against manufacturers with whom they have not dealt" because [\*26] an injured consumer who is not "steeped in the business practice which justifies the rule" will rarely be savvy enough to "give notice to one with whom he has had no dealings." [2008 U.S. Dist. LEXIS 73690, JWL at \\*10](#) (quoting [Greenman v. Yuba Power Prods., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897, 898 \(Cal. 1963\)](#)). This exception is of no use to Smith-Brown in this case because she is not suing a remote manufacturer "with whom [she has] not dealt"; instead, she is suing the retailer who was the immediate seller of the product that harmed her, so the exception does not apply.

Nevertheless, the Court will not dismiss Smith-Brown's breach of warranty claim at this early stage. As the Court has explained above in Part IV.B. of this opinion, plaintiffs allege that Ulta Beauty and Ulta Salon are intertwined entities that shared directors and officers, as well as a general counsel and address. If plaintiffs' allegations are proved true, it may be that Smith-Brown's pre-suit notice to Ulta Beauty was effective as to Ulta Salon, based on the interconnectedness of the entities. Cf. [Incubadora Mexicana, SA de CV v. Zoetis, Inc., 310 F.R.D. 166, 174 \(E.D. Pa. 2015\)](#), background facts in earlier opinion at [116 F. Supp. 3d 519, 522 \(E.D. Pa. 2015\)](#) (pre-suit notice to subsidiary not effective as to parent company where subsidiary "was to . . . operate as an independent company" and moved its "global headquarters" to another state to "complete[] [\*27] its corporate separation" from parent). Ulta Salon's motion to dismiss Smith-Brown's breach of warranty claim for lack of pre-suit notice is denied.

## **2. Pre-suit notice by other plaintiffs**

Smith-Brown initially filed this case as a lone plaintiff on January 26, 2018. The other plaintiffs only became parties when they joined in the Second Amended Complaint on June 6, 2018. Defendants argue that these other plaintiffs did not provide pre-suit notice prior to the filing of this suit, so their breach of warranty claims must be dismissed.

Plaintiffs respond that the other plaintiffs were not required to submit pre-suit notice before this action was filed; they were merely required to give pre-suit notice before they became parties to it, and each of them did provide pre-suit notice prior to filing the Second Amended Complaint, if not prior to Smith-Brown's original complaint.

The Court agrees with plaintiffs that their notice was sufficient. "The purpose of the pre-suit notice requirement is to give sellers the opportunity to resolve breaches short of litigation." [Ulrich, 2017 U.S. Dist. LEXIS 132202, 2017 WL 3581183, at \\*8](#). In order to do that, they must have notice of "the trouble with a particular product purchased by a particular buyer"; general [\*28] awareness of a certain recurring complaint with the sellers' products is beside the point. [Connick v. Suzuki Motor Co., 174 Ill. 2d 482, 675 N.E.2d 584, 590, 221 Ill. Dec. 389 \(Ill. 1996\)](#); see [id. at 591-92](#) ("As Judge Learned Hand stated . . . : 'The notice of the breach required is not of the facts, which the seller presumably knows quite as well as, if not better than, the buyer, but of *buyer's claim* that they constitute a breach.'") (quoting [Am. Mfg. Co. v. U.S. Shipping Bd. Emergency Fleet Corp., 7 F.2d 565, 566 \(2d Cir. 1925\)](#)). Because the required notice is of a particular buyer's claim that the seller is in breach of warranty, plaintiffs complied with the notice requirement to the extent that they individually provided notice of their claims prior to joining this suit, regardless of whether another plaintiff had already filed suit. Defendants' motion to dismiss is denied as to this basis.

## **3. Pre-suit notice by New Jersey plaintiff Allison Sot**

Defendants argue that New Jersey plaintiff Allison Sot, unlike the other plaintiffs, did not provide notice of her claims prior to joining the Second Amended Complaint, so her breach of warranty claim should be dismissed.

Plaintiffs respond that, under New Jersey law, plaintiffs need not provide pre-suit notice at all; rather, the filing of the complaint is sufficient to permit the seller to redress the buyer's grievance by settling [\*29] the dispute. See [Strzakowski v. Gen. Motors Corp., No. CIV.A. 04-4740, 2005 U.S. Dist. LEXIS 18111, 2005 WL 2001912, at \\*3-4 \(D.N.J. Aug. 16, 2005\)](#). But this relaxed version of the pre-suit notice requirement only applies, if at all, to claims against remote manufacturers, not claims against immediate sellers of defective products. *Id.* Because Sot's claim

is against the immediate seller of the defective beauty products she complains of purchasing, the pre-suit notice requirement applies in full force. Plaintiff Sot's breach of warranty claim is dismissed.

#### D. Unjust Enrichment

Defendants argue that plaintiffs fail to state a claim for unjust enrichment because they have adequate remedies at law and because there is no private cause of action for unjust enrichment under California or New Jersey law.<sup>2</sup>

##### 1. Adequate remedies at law

Defendants argue that unjust enrichment is unavailable where there is an otherwise adequate remedy at law, such as a cause of action for breach of contract. Plaintiffs respond that, under [Rule 8](#), which permits them to plead alternative theories of relief, [Fed. R. Civ. P. 8\(a\)\(3\), \(d\)\(2\)-\(3\)](#), they may plead their unjust enrichment claims in the alternative to their breach of contract and consumer fraud claims. Plaintiffs are correct. See, e.g., [Estate of Stepney v. UMG Recordings, Inc., No. 10 C 8266, 2011 U.S. Dist. LEXIS 56533, 2011 WL 2119130, at \\*3 \(N.D. Ill. May 26, 2011\)](#) ("Although Plaintiffs may not recover under a theory of unjust enrichment where there is [\*30] an adequate remedy at law, Plaintiffs may plead both breach of contract and unjust enrichment in the alternative."); [Sharbaugh v. First Am. Title Ins. Co., No. 07 C 2628, 2007 U.S. Dist. LEXIS 82166, 2007 WL 3307019, at \\*2 \(N.D. Ill. Nov. 2, 2007\)](#) ("[P]laintiff may plead an alternative claim for unjust enrichment, even if he alleges in other counts that the parties have a contract or he has an adequate remedy at law."); see also [Horwitz v. Sonnenschein Nath & Rosenthal LLP, 399 Ill. App. 3d 965, 926 N.E.2d 934, 947, 339 Ill. Dec. 459 \(Ill. App. Ct. 2010\)](#) ("But where a party pleads breach of contract, he also can plead unjust enrichment in the alternative.").

Defendants cite federal and state court decisions in a number of states—California, Florida, Georgia, Indiana, Maryland, Michigan, Nevada, New York, Ohio, and Washington—dismissing unjust enrichment claims because the plaintiffs had an adequate remedy at law. (Defs.' Mem. at 19.) Many of these cases are distinguishable because the complaints did not admit of any possibility that the plaintiffs' allegations were true *and* that they had no adequate remedy at law, but defendants do not establish that that is precisely the case here. They argue that an unjust enrichment claim simply cannot be pleaded alongside a claim for a legal remedy, but as a general matter, under [Rule 8](#), defendants are incorrect, as even courts in some of the jurisdictions they cite have recognized. See, e.g., [\*31] [Napa Overseas, S.A. v. Nextran Corp., No. 16-20862-CIV, 2016 U.S. Dist. LEXIS 90179, 2016 WL 3841677, at \\*5 \(S.D. Fla. July 12, 2016\)](#) ("Nothing prevents Plaintiff from pursuing alternative claims of breach of contract and unjust enrichment in separate counts."); [GlaxoSmithKline LLC v. Beede, No. 1:13-CV-00001, 2014 U.S. Dist. LEXIS 28663, 2014 WL 896724, at \\*7 \(N.D.N.Y. Mar. 6, 2014\)](#) ("Initially, Plaintiff is permitted at this stage of the proceedings to pursue the alternate theories of breach of contract and unjust enrichment."). The basic proposition that unjust enrichment is unavailable to a plaintiff with an adequate remedy at law, by itself, does not require this Court to dismiss plaintiffs' alternative unjust enrichment claim. Defendants' motion is denied as to this basis.

##### 2. California and New Jersey law

Defendants argue that plaintiffs' unjust enrichment claim should be dismissed to the extent it is governed by California or New Jersey law because unjust enrichment is not a stand-alone cause of action under the law of these states.

In similar circumstances, a court of this district has recognized an unjust enrichment claim under California law. See [Carrol v. S.C. Johnsons & Son, Inc., No. 17-CV-05828, 2018 U.S. Dist. LEXIS 57052, 2018 WL 1695421, at \\*5-6](#)

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<sup>2</sup> Defendants also argue that plaintiffs do not state unjust enrichment claims as to any new products, but the Court need not address this argument because it has already concluded that plaintiffs have no standing to bring any such claims.

(N.D. Ill. Mar. 29, 2018). This Court is persuaded by that court's reasoning to follow suit and deny defendants' motion to dismiss plaintiffs' unjust enrichment claim under California law.

As for unjust enrichment under New [\*32] Jersey law, defendants argue that plaintiffs must show not only that defendants received a benefit that it would be unjust to retain, but also that plaintiffs "expected remuneration" from defendants at the time they "performed or conferred a benefit" on defendants. Nelson v. Xacta 3000 Inc., No. 08 C 5426, 2009 U.S. Dist. LEXIS 109580, 2009 WL 4119176, at \*7 (D.N.J. Nov. 24, 2009). According to defendants, plaintiffs have not alleged that they "expected remuneration" at the time they purchased defendants' products. But other New Jersey decisions have phrased the remuneration element differently, instead requiring that the plaintiff "expected remuneration, **or, if the true facts were known to plaintiff, he would have expected remuneration from defendant**, at the time the benefit was conferred." Callano v. Oakwood Park Homes Corp., 91 N.J. Super. 105, 219 A.2d 332, 334-35 (N.J. App. Div. 1966) (emphasis added); see In re NorVergence, Inc., 384 B.R. 315, 361-62 (Bankr. D.N.J. 2008) (denying motion to dismiss unjust enrichment claim brought by plaintiffs who alleged that they signed "leases for significantly overvalued equipment" because "it [was] plausible that if the [plaintiffs] had known the truth about the [equipment] when they entered the equipment lease, then they would have expected remuneration from Nortel who arguably benefited from the arguably overpriced [equipment].") The Court is not persuaded that New Jersey would not recognize plaintiffs' unjust enrichment [\*33] claim. Defendants' motion is denied as to the unjust enrichment claim.

## A. State Deceptive Business Practices Statutes

Defendants argue that plaintiffs' claims fail under certain state consumer fraud and deceptive business practices statutes for the following various reasons.<sup>3</sup>

### 1. California, Florida, Pennsylvania, and Michigan—No Facts About Used Products

Defendants argue that the Florida, Pennsylvania, and Michigan plaintiffs, as well as California plaintiff Robin Okman, fail to state a claim under the deceptive business practices statutes of those states because they state no facts to support or corroborate their belief that they purchased used products. Unlike some of the plaintiffs, defendants argue, these plaintiffs' claims are purely conclusory because they do not allege that they suffered infections from using defendants' products or that the products they purchased were noticeably used.

But the Court is not required to view these particular plaintiffs' allegations in isolation. When their allegations are viewed in light of all the other allegations of the complaint, including the social media revelations, the former employee declarations, and the allegations of the other named plaintiffs [\*34] who suffered infections or bought products that appeared to be used, it is at least plausible that these plaintiffs also received used products. These plaintiffs may ultimately have difficulty proving their claims, but they need not prove them in the complaint; their claims need only be plausible. FKFJ, Inc. v. Vill. of Worth, No. 18 C 2828, 2019 U.S. Dist. LEXIS 9817, 2019 WL 277723, at \*5 (N.D. Ill. Jan. 22, 2019) (citing Iqbal, 556 U.S. at 678). These plaintiffs' claims survive defendants' motion to dismiss.

### 2. Alabama—Pre-Suit Notice

Next, defendants argue that plaintiffs' claim under the Alabama Deceptive Trade Practices Act ("ADTPA") must be dismissed because plaintiffs did not provide adequate pre-suit notice at least fifteen days prior to filing the Second Amended Complaint, as the statute requires. Ala. Code § 8-19-10(e). The Court agrees with defendants. Plaintiffs

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<sup>3</sup> Defendants also argue that plaintiffs' claims fail under the various state statutes to the extent they seek relief for the purchase of new products. The Court need not address this argument because it has already explained that plaintiffs have no standing to assert claims for the purchase of new products.

provided their pre-suit notice letter on May 23, 2018, only fourteen days prior to the filing of the Second Amended Complaint on June 6, 2018. Plaintiffs argue that the Court should excuse their failure to provide timely pre-suit notice because they substantially complied with the fifteen-day requirement by providing notice fourteen days before filing suit and because defendants had actual notice of the issues plaintiffs raised long before May 23, 2018. But plaintiffs cite [\*35] no authority to support giving the ADTPA's fifteen-day requirement a liberal construction or implying a substantial compliance or actual notice exception, nor is the Court aware of any. With only the plain language of the statute for guidance, the Court must apply the statute as written. Plaintiffs' claim under the ADTPA must be dismissed.

### **3. California—"Unfair" conduct**

Defendants argue that plaintiffs' claim under California's Unfair Competition Law ("UCL") must be dismissed because plaintiffs have not alleged any conduct that is "unfair" within the meaning of that statute. According to defendants, the "unfair" conduct that the statute prohibits is the sort of unfair competition that the antitrust laws are meant to protect against. Plaintiffs respond that, while there is a split of authority, some California courts have taken a different approach, instead analyzing whether a challenged business practice is unfair by "weigh[ing] the utility of the defendant's conduct against the gravity of the harm to the alleged victim." [S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 886-87, 85 Cal. Rptr. 2d 301, 316 \(1999\)](#).

Defendants' position is based on [Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527, 543-44 \(Cal. 1999\)](#), in which the California Supreme Court criticized the balancing test plaintiffs proffer as "amorphous," and instead explained that [\*36] "unfair" conduct is that which "threatens an incipient violation of an **antitrust law**, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." However, the court specifically cautioned that its "discussion and this test are limited to [the] context" of "an action by a competitor alleging anticompetitive practices." [Id. at 544 n.12](#). California decisions are split on whether the test differs in consumer actions—like this one—alleging unfairness to the defendant's customers, as opposed to "suits involving unfairness to the defendant's competitors," such as *Cel-Tech*. See [Lozano v. AT & T Wireless Servs., Inc., 504 F.3d 718, 735-36 \(9th Cir. 2007\)](#) (citing cases). Notably, the case plaintiffs cite in support of applying the balancing test, *South Bay Chevrolet v. General Motors Acceptance Corp.*, was decided a month after the California Supreme Court's decision in *Cel-Tech*, and it expressly interpreted that case as limited to the competitor context. [S. Bay, 85 Cal. Rptr. 2d at 309 n.9](#). The Court is not persuaded that plaintiffs' allegations do not fall within a valid theory of unfairness under the UCL. See [Lozano, 504 F.3d at 736](#). Defendants' motion to dismiss is denied as to this claim.

### **4. Wisconsin—Omissions [\*37] Not Actionable**

Defendants argue that plaintiffs' claims fail under the [Wisconsin Deceptive Trade Practices Act](#) ("WDTPA") because omissions are not actionable under that statute.<sup>4</sup> Plaintiffs respond that they are proceeding not on an omission theory but on the theory that defendants affirmatively represented that their products were new by offering them for sale in Ulta stores. But plaintiffs have not cited a case in which any court recognized any such theory under Wisconsin law. The only case plaintiffs cite is distinguishable because, there, the plaintiffs claimed to have been deceived by affirmative misrepresentations of quality on the packaging of the defendants' products. See [Loeb v. Champion Petfoods USA Inc., No. 18-CV-494-JPS, 2018 U.S. Dist. LEXIS 95601, 2018 WL 2745254, at \\*6-7 \(E.D. Wis. June 7, 2018\)](#) (denying motion to dismiss WDTPA claim that dog food was contaminated with heavy metals

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<sup>4</sup> In their opening brief, defendants made a similar argument about the [Indiana Deceptive Consumer Sales Act](#) ("IDCSA"), but in response, plaintiffs explained that that statute has recently been amended and expanded to cover omissions. Defendants apparently concede the point because they do not mention the statute at all in their reply. The Court considers defendants to have waived their argument on this point.

because dog food packaging contained "representations of quality and fitness for [even] human consumption"). In this case, plaintiffs have not pointed to any specific misrepresentations defendants made about whether their products were new or used. Defendants' motion to dismiss is granted as to the WDTPA claim.

### **5. Nevada—No Affirmative Misrepresentations And No Duty To Disclose [\*38]**

Defendants move to dismiss plaintiffs' claims under the [Nevada Deceptive Trade Practices Act](#) ("NDTPA") because they are not grounded in affirmative misrepresentations about Ulta products, and plaintiffs have not identified any special relationship or other circumstance giving defendants a duty to disclose facts about Ulta products to plaintiffs. The NDTPA defines an actionable deceptive trade practice in various ways, see [NRS § 598.0915](#), and all pertinent definitions contain the element of making a false representation of fact. As the Court explained in the preceding subsection of this opinion, plaintiffs have not alleged that defendants made any such affirmative misrepresentation to plaintiffs.

One district court has suggested, in the context of an NDTPA claim, that "the suppression or omission of a material fact is equivalent to a false representation . . . when a party is bound in good faith to disclose that material fact." [Mallory v. McCarthy & Holthus, LLP, No. 2:14-CV-00396, 2015 U.S. Dist. LEXIS 61456, 2015 WL 2185413, at \\*3 \(D. Nev. May 11, 2015\)](#). But the court apparently imported this principle from Nevada's common law of fraud without any authority for applying it to NDTPA claims, and neither in *Mallory* nor in any other case plaintiffs have cited has a court permitted [\*39] a plaintiff to proceed under the NDTPA without pleading that the defendant made specific, affirmative misrepresentations. Applying the plain language of the statute, the Court concludes that plaintiffs must plead an affirmative misrepresentation in order to state a claim under the NDTPA. Defendants' motion to dismiss is granted as to the NDTPA claim.

### **6. South Carolina—Class Action Bar**

Federal courts must apply federal procedural law, including [Rule 23](#), even when they are applying state substantive law, so long as doing so does not "abridge, enlarge or modify any substantive right." [28 U.S.C. § 2072\(b\)](#). Defendants argue that the class claim under the [South Carolina Unfair Trade Practices Act](#) ("SCUTPA") should be dismissed because the SCUTPA expressly prohibits class actions:

- (a) Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by [§ 39-5-20](#) may bring an action individually, ***but not in a representative capacity***, to recover actual damages.

[S.C. Code § 39-5-140](#) (emphasis added). Defendants cite only a single case, [Fejzulai v. Sam's West, Inc., 205 F. Supp. 3d 723, 727-28 \(D.S.C. 2016\)](#). *Fejzulai* reasoned that the SCUTPA's class action bar is part and parcel [\*40] of the substantive right that the SCUTPA confers because it is incorporated into the core provision of the SCUTPA, and the bar therefore applies in any action to enforce that substantive right, whether in federal or state court. *Id.*

Plaintiffs argue that the SCUTPA's class action bar is procedural, not substantive, and [Rule 23](#) "unambiguously authorizes any plaintiff, in any federal civil proceeding, to maintain a class action if the Rule's prerequisites are met," so the Court must apply [Rule 23](#) instead of the SCUTPA's class action bar. See [Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 416-17, 130 S. Ct. 1431, 176 L. Ed. 2d 311 \(2010\)](#) (New York class action bar does not preclude federal courts sitting in diversity from entertaining [Rule 23](#) class actions governed by New York substantive law).

A leading treatise states that "[m]ost courts considering the question have determined that the legislature's placement of a class action prohibition within a specific state consumer protection act (as opposed to a free-standing rule of procedure) does not necessarily mean that the prohibition is a substantive one." 1 *McLaughlin on Class Actions* § 2:47 (15th ed.) (citing [Reed v. Dynamic Pet Prods., No. 15CV0987-WQH-DHB, 2016 U.S. Dist. LEXIS 96206, 2016 WL 3996715, at \\*6 \(S.D. Cal. July 21, 2016\)](#) and [In re Hydroxycut Mktg. & Sales Practices](#)

*Litig.*, 299 F.R.D. 648, 654 (S.D. Cal. 2014); but see *Delgado v. Ocwen Loan Servicing, LLC*, No. 13CV4427, 2017 U.S. Dist. LEXIS 186408, 2017 WL 5201079, at \*10 (E.D.N.Y. Nov. 9, 2017) (reasoning that "the specific inclusion of a class action bar in . . . consumer protection [\*41] laws evinces a desire by the state legislature to limit not only the form of the action but also the remedies available"). This Court agrees with those decisions holding that the fact that a class action bar is included within a consumer protection statute does not make it any more substantive than if it were found instead among the state's rules of procedure. See *Lisk v. Lumber One Wood Preserving, LLC*, 792 F.3d 1331, 1336 (11th Cir. 2015) ("[H]ow a state chooses to organize its statutes affects the analysis not at all. . . . [T]he question whether a federal rule abridges, enlarges, or modifies a substantive right turns on matters of substance—not on the placement of a statute within a state code."). The class action mechanism is merely a way of joining numerous plaintiffs' claims together in order to adjudicate them more efficiently; a law permitting it or prohibiting it is procedural, not substantive, because it does not alter the nature of the claim or the right that gives rise to it. In this vein, one district court, guided by *Shady Grove*, reasoned as follows:

In *Shady Grove*, Justice Scalia explained:

A class action no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, [\*42] instead of separate suits. And like traditional joinder it leaves the parties' legal rights and duties intact and the rules of decision unchanged.

*Shady Grove*, 559 U.S. at 408. Conversely, a rule barring class actions does not prevent individuals who would otherwise be members of the class from bringing their own separate suits or joining in a preexisting lawsuit. The substantive rights of these individuals are not affected. The prohibitions against class actions only affect "how the claims are processed." *Id.* The fact that the class action prohibitions are within the individual state consumer protection acts, as opposed to free-standing rules, does not alter the Court's conclusion.

*Hydroxycut*, 299 F.R.D. at 654 (internal citation altered). The Court finds *Hydroxycut*'s analysis persuasive. Defendants' motion to dismiss is denied as to the SCUTPA claim.

## 7. Georgia—Injunctive Relief

Defendants argue that plaintiffs' *Georgia Uniform Deceptive Trade Practices Act* ("GUDTPA") claims must fail because they do not allege future injury, and the only remedy that the GUDTPA provides is injunctive relief. Plaintiff Veronica Sanders, the only plaintiff who resides in Georgia, alleges that she wants to shop at Ulta again, but is hesitant to do so while she [\*43] knows that, in doing so, she would run the risk of purchasing a product that has been previously used by someone else. (2d Am. Compl. ¶ 25.)

This Court has previously recognized that a plaintiff alleges sufficient facts to assert a claim for injunctive relief in a consumer protection action if she alleges that she faces a "threat of future harm" because "she will be unable to rely on the product's advertising or labeling in the future, and so will not purchase the product although she would like to." *Curran v. Bayer Healthcare LLC*, No. 17 C 7930, 2019 U.S. Dist. LEXIS 15362, 2019 WL 398685, at \*5 (N.D. Ill. Jan. 31, 2019) (citing *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 969-70 (9th Cir. 2018)). Defendants do not explain—nor does the Court see—why plaintiff Sanders's allegations do not similarly state a claim for injunctive relief for similar reasons. The case that plaintiffs cite, *Collins v. Athens Orthopedic Clinic*, 347 Ga. App. 13, 815 S.E.2d 639, 646-47 (Ga. App. Ct. 2018), sheds little light on the question because it concerned a defendant's lax information security practices, which had allowed a hacker to steal plaintiffs' personally identifiable information. Once stolen, such information cannot be stolen again; but a consumer who unwittingly buys previously used beauty products could be victimized again in the same way by the same retailer. *Collins* is distinguishable, and defendants' motion is denied as to this claim.

## **CONCLUSION**

Defendant's motion to dismiss [\*44] [99] is granted in part and denied in part. The motion is granted as to (1) any claims based on the purchase of new products, (2) any claims on behalf of prospective class members residing outside the states represented by the named plaintiffs, (3) plaintiff Sot's breach of warranty claim under New Jersey law, (4) any claim under the Alabama Deceptive Trade Practices Act, (4) any claim under the Wisconsin Deceptive Trade Practices Act, and (6) any claim under the Nevada Deceptive Trade Practices Act. The motion is otherwise denied.

**SO ORDERED.**

**ENTERED: February 26, 2019**

/s/ Jorge L. Alonso

**JORGE L. ALONSO**

**United States District Judge**

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## United States v. AT&T, Inc.

United States Court of Appeals for the District of Columbia Circuit

December 6, 2018, Argued; February 26, 2019, Decided

No. 18-5214

### **Reporter**

916 F.3d 1029 \*; 439 U.S. App. D.C. 388 \*\*; 2019 U.S. App. LEXIS 5561 \*\*\*; 2019-1 Trade Cas. (CCH) P80,685

UNITED STATES OF AMERICA, APPELLANT v. AT&T, INC., ET AL., APPELLEES

**Notice:** THIS OPINION IS SUBJECT TO FORMAL REVISION BEFORE PUBLICATION IN THE FEDERAL REPORTER OR U.S. APP. D.C. REPORTS. USERS ARE REQUESTED TO NOTIFY THE CLERK OF ANY FORMAL ERRORS IN ORDER THAT CORRECTIONS MAY BE MADE BEFORE THE BOUND VOLUMES GO TO PRESS.

**Prior History:** [\*\*\*1] Appeal from the United States District Court for the District of Columbia. (No. 1:17-cv-02511).

[United States v. AT&T Inc., 310 F. Supp. 3d 161, 2018 U.S. Dist. LEXIS 100023 \(D.D.C., June 12, 2018\)](#)

## **Core Terms**

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district court, Broadcasting, merger, distributors, bargaining, negotiations, blackout, leverage, affiliate, programming, consumers, long-term, predicted, video, quantitative, programmer, proposed merger, maximization, vertically, license, merged, real-world, costs, prices, post-merger, subscribers, rival, third-party, networks, arbitration agreement

## **LexisNexis® Headnotes**

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Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

### [HN1](#) [] **Antitrust Statutes, Clayton Act**

[Section 7 of the Clayton Act](#) prohibits mergers where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition. [15 U.S.C. § 18](#). Congress acted out of concern with probabilities, not certainties inasmuch as statutes existed only for dealing with clear-cut menaces to competition. Mergers with a probable anticompetitive effect were to be proscribed by the [Clayton Act](#). It left to the courts the difficult task of assessing probabilities in the commercial marketplace in the interest of halting incipient monopolies and trade restraints outside the scope of the [Sherman Act](#). Therefore, § 7 applies a much more stringent test than does the rule-of-reason analysis under [§ 1 of the Sherman Act](#). Although § 7 requires more than a mere possibility of competitive harm, it does not require proof of certain harm. Instead, the government must show that the proposed merger is likely to substantially lessen competition, which encompasses a concept of reasonable probability.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Mergers & Acquisitions Law > Antitrust > Vertical Acquisitions

## **HN2[] Antitrust Statutes, Clayton Act**

Under the burden-shifting framework, the government must first establish a *prima facie* case that the merger is likely to substantially lessen competition in the relevant market. But unlike horizontal mergers, the government cannot use a short cut to establish a presumption of anticompetitive effect through statistics about the change in market concentration, because vertical mergers produce no immediate change in the relevant market share. Instead, the government must make a fact-specific showing that the proposed merger is likely to be anticompetitive. Once the *prima facie* case is established, the burden shifts to the defendant to present evidence that the *prima facie* case inaccurately predicts the relevant transaction's probable effect on future competition, or to sufficiently discredit the evidence underlying the *prima facie* case. Upon such rebuttal, the burden of producing additional evidence of anticompetitive effects shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

## **HN3[] Standards of Review, Clearly Erroneous Review**

Where the government has presented its challenges to the district court's denial of a permanent injunction, the question for the appellate court is whether the district court's factual findings are clearly erroneous. [Fed. R. Civ. P. 52\(a\)](#). This is a deferential standard. A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. Findings that are plausible in light of the entire record are not clearly erroneous, so where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. A finding may be clearly erroneous when it is illogical or implausible, rests on internally inconsistent reasoning.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Vertical Acquisitions

## **HN4[] Antitrust Statutes, Clayton Act**

Quantitative evidence of price increase is not required in order to prevail on a [§ 7 of the Clayton Act](#) challenge. Vertical mergers can create harms beyond higher prices for consumers, including decreased product quality and reduced innovation.

**Counsel:** Michael F. Murray, Deputy Assistant Attorney General, U.S. Department of Justice, argued the cause for appellant. With him on the briefs were Kristen C. Limarzi, Robert B. Nicholson, Adam D. Chandler, Patrick M. Kuhlmann, Mary Helen Wimberly, and Daniel E. Haar, Attorneys.

Eric F. Citron argued the cause for amici curiae 27 Antitrust Scholars in support of neither party. With him on the brief was Mary Jean Moltenbrey.

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Laurence M. Sandell was on the brief for amicus curiae Cinémoi North America in support of appellant United States of America.

Jeffrey A. Lamken was on the brief for amici curiae Professor William P. Rogerson, et al. in support of appellant.

Jonathan W. Cuneo, Joel Davidow, and Gene Kimmelman were on the brief for amici curiae American Antitrust Institute, et al. in support of appellant.

Jonathan E. Taylor was on the brief for amicus curiae Open Markets Institute in support of plaintiff-appellant and vacatur.

Peter D. Keisler argued the cause for appellees. With him on the brief were Joseph R. Guerra, Richard D. Klingler, Jonathan E. Neucherlein, C. Frederick Beckner III, Kathleen [\*\*\*2] Moriarty Mueller, William R. Drexel, Daniel M. Petrocelli, M. Randall Oppenheimer, Jonathan D. Hacker, Katrina M. Robson, and David L. Lawson. Aaron M. Panner entered an appearance.

Andrew J. Pincus argued the cause for amici curiae 37 Economists, Antitrust Scholars, and Former Government Antitrust Officials in support of appellees. With him on the brief were Mark W. Ryan and Michael B. Wimberly.

Brad D. Schimel, Attorney General, Office of the Attorney General for the State of Wisconsin, Misha Tseytlin, Solicitor General, Jeff Landry, Attorney General, Office of the Attorney General for the State of Louisiana, Elizabeth Baker Murrill, Solicitor General, Hector Balderas, Attorney General, Office of the Attorney General for the State of New Mexico, Tania Maestas, Chief Deputy Attorney General, Mike Hunter, Attorney General, Office of the Attorney General for the State of Oklahoma, Mithun Mansinghani, Solicitor General, Steve Marshall, Attorney General, Office of the Attorney General for the State of Alabama, Robert Tambling, Assistant Attorney General, Christopher M. Carr, Attorney General, Office of the Attorney General for the State of Georgia, Andrew A. Pinson, Solicitor General, Andy [\*\*\*3] Beshear, Attorney General, Office of the Attorney General for the Commonwealth of Kentucky, Sean D. Reyes, Attorney General, Office of the Attorney General for the State of Utah, Tyler R. Green, Solicitor General, Peter F. Kilmartin, Attorney General, Office of the Attorney General for the State of Rhode Island, Michael W. Field, Assistant Attorney General, Alan Wilson, Attorney General, Office of the Attorney General for the State of South Carolina, and James Emory Smith, Jr., Deputy Solicitor General, were on the bipartisan brief for amici curiae the States of Wisconsin, et al. in support of defendants-appellees.

Donald B. Verrilli, Jr., Justin P. Raphael, Peter C. Tolksdorf, Steven P. Lehotsky, and Daryl Joseffer were on the brief for amici curiae The Chamber of Commerce of the United States of America, et al. in support of defendants-appellees.

Thomas M. Johnson, Jr., General Counsel, Federal Communications Commission, David M. Gossett, Deputy General Counsel, Richard K. Welch, Deputy Associate General Counsel, and James M. Carr, Counsel, were on the brief for amicus curiae Federal Communications Commission in support of neither party.

Bruce D. Brown, Katie Townsend, and Gabriel Rottman [\*\*\*4] were on the brief for amicus curiae The Reporters Committee For Freedom of the Press in support of neither party.

**Judges:** Before: ROGERS and WILKINS, Circuit Judges, and SENTELLE, Senior Circuit Judge. Opinion for the court filed by Circuit Judge ROGERS.

**Opinion by:** ROGERS

## Opinion

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[\*\*390] [\*1031] Opinion for the court filed by *Circuit Judge ROGERS*.

ROGERS, *Circuit Judge*: On October 22, 2016, AT&T Inc. announced a proposed merger with Time Warner Inc. The government sued to enjoin this vertical merger under [Section 7 of the Clayton Act, 15 U.S.C. § 18](#), and now appeals the denial of its request for a permanent injunction. [United States v. AT&T Inc., 310 F. Supp. 3d 161, 254 \(D.D.C.](#)

2018). Although it pursued three theories of antitrust violation in the district court, the government on appeal challenges only the district court's findings on its increased leverage theory whereby costs for Turner Broadcasting System's content would increase after the merger, principally through threats of long-term "blackouts" during affiliate negotiations.

At trial, the government presented expert opinion on the likely anticompetitive effects of the proposed merger on the video programming and distribution industry as forecast by economic principles and a quantitative model. It also presented statements by the defendants in administrative [\*\*\*5] proceedings about the anticompetitive effects of a proposed vertical merger in the industry seven years earlier. The defendants responded with an expert's analysis of real-world data for prior vertical mergers in the industry that showed "no statistically significant effect on content prices." The government offered no comparable analysis of data and its expert opinion and modeling predicting such increases failed to take into account Turner Broadcasting System's post-litigation irrevocable offers of no-blackout arbitration agreements, which a government expert acknowledged would require a new model. Evidence also indicated that the industry had become [\*1032] [\*\*391] dynamic in recent years with the emergence, for example, of Netflix and Hulu. In this evidentiary context, the government's objections that the district court misunderstood and misapplied economic principles and clearly erred in rejecting the quantitative model are unpersuasive. Accordingly, we affirm.

## I.

HN1[] Section 7 of the Clayton Act prohibits mergers "where in any line of commerce or in any activity affecting commerce in any section of the country, *the effect of such acquisition may be substantially to lessen competition.*" 15 U.S.C. § 18 (emphasis added). Congress [\*\*\*6] acted out of concern with "probabilities, not certainties" inasmuch as "statutes existed [only] for dealing with clear-cut menaces to competition . . . . Mergers with a probable anticompetitive effect were to be proscribed by [the Clayton Act.]" Brown Shoe Co. v. United States, 370 U.S. 294, 323, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962). It left to the courts the difficult task of assessing probabilities in the commercial marketplace in the interest of "halting 'incipient monopolies and trade restraints outside the scope of the Sherman Act,'" Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 220, 253 U.S. App. D.C. 142 (D.C. Cir. 1986) (quoting Brown Shoe, 370 U.S. at 318 n.32). Therefore, Section 7 "applies a much more stringent test than does the rule-of-reason analysis under section 1 of the Sherman Act." *Id.* Although Section 7 requires more than a "mere possibility" of competitive harm, it does not require proof of certain harm. Brown Shoe, 370 U.S. at 323 n.39. Instead, the government must show that the proposed merger is likely to *substantially* lessen competition, which encompasses a concept of "reasonable probability." *Id.*

Neither the government nor the defendants challenge application of the burden-shifting framework in United States v. Baker Hughes, 908 F.2d 981, 982-83, 285 U.S. App. D.C. 222 (D.C. Cir. 1990), for horizontal mergers that the district court applied to consider the effect of the proposed vertical merger of AT&T and Time Warner on competition. HN2[] Under this framework, the government must first establish a *prima facie* case that [\*\*\*7] the merger is likely to substantially lessen competition in the relevant market. United States v. Anthem, 855 F.3d 345, 349, 428 U.S. App. D.C. 403 (D.C. Cir. 2017). But unlike horizontal mergers, the government cannot use a short cut to establish a presumption of anticompetitive effect through statistics about the change in market concentration, because vertical mergers produce no immediate change in the relevant market share. See Dept. of Justice & Fed. Trade Comm'n, Non-Horizontal Merger Guidelines § 4.0 (June 14, 1984) ("1984 Non-Horizontal Merger Guidelines"). Instead, the government must make a "fact-specific" showing that the proposed merger is "likely to be anticompetitive." Joint Statement on the Burden of Proof at Trial at 3-4. Once the *prima facie* case is established, the burden shifts to the defendant to present evidence that the *prima facie* case "inaccurately predicts the relevant transaction's probable effect on future competition," Anthem, 855 F.3d at 349 (quoting Baker Hughes, 908 F.2d at 991), or to "sufficiently discredit" the evidence underlying the *prima facie* case, *id.* Upon such rebuttal, "the burden of producing additional evidence of anticompetitive effects shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times." Baker Hughes, 908 F.2d at 983.

The relevant market definition is also undisputed by the government [\*\*\*8] and the defendants. (For ease of reference, we refer hereinafter to defendants AT&T Inc., Direct TV Group Holdings, LLC, and Time Warner Inc. as "AT&T.") The district [\*1033] [\*392] court accepted the government's proposal that the product market is the market for multichannel video distribution. Although this market definition excludes distributors of only on-demand content, such as Netflix and Hulu, the district court considered the impact of the increasing presence of these distributors on the multichannel video programming and distribution industry. [AT&T, 310 F. Supp. 3d at 196-97](#). The district court also accepted the government's proposed geographic market, which included over 1,100 local multichannel video distribution markets. [Id. at 197](#). The government did not rely on any particular market for enjoining the proposed merger; one of its experts aggregated the alleged harms in the local markets to derive a total measure of nationwide economic harm. See Proposed Findings of Fact of the United States 13 (May 8, 2018).

**HN3** As the government has presented its challenges to the district court's denial of a permanent injunction, the question for this court is whether the district court's factual findings are clearly erroneous. [Fed. R. Civ. P. 52\(a\)](#); see [FTC v. H.J. Heinz Co., 246 F.3d 708, 713, 345 U.S. App. D.C. 364 \(D.C. Cir. 2001\)](#). This is [\*\*\*9] a deferential standard. [Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 89 S. Ct. 1562, 23 L. Ed. 2d 129 \(1969\)](#). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." [United States v. Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 \(1948\)](#). Findings that are plausible in light of the entire record are not clearly erroneous, [Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 575, 577, 105 S. Ct. 1504, 84 L. Ed. 2d 518 \(1985\)](#), so "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous," [id. at 574](#) (citing [United States v. Yellow Cab Co., 338 U.S. 338, 342, 70 S. Ct. 177, 94 L. Ed. 150 \(1949\)](#)); see also [Cooper v. Harris, 137 S. Ct. 1455, 1465, 197 L. Ed. 2d 837 \(2017\)](#). A finding may be clearly erroneous when it is illogical or implausible, [Anderson, 470 U.S. at 577](#), rests on internally inconsistent reasoning, [Heinz, 246 F.3d at 718](#), or contains errors of economic logic, [FTC v. Advocate Health Care Network, 841 F.3d 460, 464 \(7th Cir. 2016\)](#).

The government contends that it has made the requisite showing of error because the district court's conclusion it had failed to meet its burden of proof "rests on two fundamental errors: the district court discarded the economics of bargaining, and the district court failed to apply the foundational principle of corporate-wide profit maximization." Appellant Br. 29, 37-38. Further, the government contends that the district court used internally inconsistent logic when evaluating industry evidence and clearly erred in rejecting its expert's quantitative model of harm. [\*\*\*10]

In Part II, we provide an overview of the video programming and distribution industry. Then, as relevant to the issues on appeal, we summarize the evidence before the district court and its findings. In Part III, we address the government's challenges to the district court's findings.

## II.

### A.

The video programming and distribution industry traditionally operates in a three-stage chain of production. Studios or networks create content. Then, programmers package content into networks and license those networks to video distributors. Finally, distributors sell bundles of networks to subscribers. For example, a studio may create a television show and sell it to Turner Broadcasting System ("Turner Broadcasting"), [\*1034] [\*393] a programmer, which would package that television show into one of its networks, such as CNN or TNT. Turner Broadcasting would then license its networks to distributors, such as DirecTV or Comcast.

Programmers license their content to distributors through affiliate agreements, and distributors pay "affiliate fees" to programmers. Programmers and distributors engage in what are oftentimes referred to as "affiliate negotiations," which, according to evidence before the district court, [\*\*\*11] can be lengthy and complicated. If a programmer and a distributor fail to reach an agreement, then the distributor will lose the rights to display the programmer's content to its customers. This situation, known as a "blackout" or "going dark," is generally costly for both the programmer,

which loses affiliate fee revenues, and the distributor, which risks losing subscribers. Therefore, blackouts rarely occur, and long-term blackouts are especially rare. The evidence indicated, however, that programmers and distributors often threaten blackouts as a negotiating tactic, and both may perform "go dark" analyses to estimate the potential impact of a blackout in preparation for negotiations.

The evidence before the district court also showed that the industry has been changing in recent years. Multichannel video programming distributors ("MVPDs") offer live television content as well as libraries of licensed content "on demand" to subscribers. So-called "traditional" MVPDs distribute channels to subscribers on cable or by satellite. Recently, "virtual" MVPDs have also emerged. They distribute live videos and on-demand videos to subscribers over the internet and compete with traditional MVPDs [\*\*\*12] for subscribers. Virtual MVPDs, such as DirecTV Now and YouTube TV, have been gaining market share, the evidence showed, because they are easy to use and low-cost, often because they offer subscribers smaller packages of channels, known as "skinny bundles."

In addition, subscription video on demand services ("SVODs") have also emerged on the market. SVODs, such as Netflix, do not offer live video content but have large libraries of content that a viewer may access on demand. SVODs also offer low-cost subscription plans and have been gaining market share recently. Increasingly, cable customers are "cutting the cord" and terminating MVPD service altogether. Often these customers do not exit the entertainment field altogether, but instead switch to SVODs for entertainment service.

Leading SVODs are vertically integrated, which means they create content and also distribute it. Traditional MVPDs typically are not vertically integrated with programmers. In 2009, however, Comcast Corporation ("Comcast") (a distributor and the largest cable company in the United States) announced a \$30 billion merger with NBC Universal, Inc. ("NBCU") (a content creator and programmer), whereby it would control [\*\*\*13] popular video programming that included the NBC broadcast network and the cable networks of NBC Universal, Inc. The government sued to permanently enjoin the merger under [Section 7](#), alleging that Comcast's "majority control of highly valued video programming . . . would prevent rival video-distribution companies from competing against the post-merger entity." [United States v. Comcast, 808 F. Supp. 2d 145, 147 \(D.D.C. 2011\)](#). The district court, with the defendants' agreement and at the government's urging, allowed the merger to proceed subject to certain remedies for the alleged anticompetitive conduct post-merger, including remedies ordered in a related proceeding before the Federal Communications Commission [\*\*394] [\*1035] ("FCC"). *Id.* One remedy in the Comcast-NBCU merger was an agreement by the defendants to submit, at a distributor's option, to "baseball style" arbitration — in which each side makes a final offer and the arbitrator chooses between them — if parties did not reach a renewal agreement. During the arbitration, the distributor would retain access to NBC content, thereby mitigating concerns that Comcast-NBCU may withhold NBC programming during negotiations in order to benefit Comcast's distribution subscriptions. Comcast-NBCU currently operates as a "vertically [\*\*\*14] integrated" programmer and distributor.

Now the government has again sued to halt a proposed vertical merger of a programmer and a distributor in the same industry. On October 22, 2016, AT&T Inc. announced its plan to acquire Time Warner Inc. ("Time Warner") as part of a \$108 billion transaction. AT&T Inc. is a distribution company with two traditional MVPD products: DirecTV and U-verse. DirecTV transmits programming over satellite, while U-verse transmits programming over cable. Time Warner, by contrast, is a content creator and programmer and has three units: Warner Bros., Turner Broadcasting, and Home Box Office Programming ("HBO"). Warner Bros. creates movies, television shows, and other video programs. Turner Broadcasting packages content into various networks, such as TNT, TBS, and CNN, and licenses its networks to third-party MVPDs. HBO is a "premium" network that provides on-demand content to subscribers either directly through HBO Now or through licenses with third-party distributors. The merged firm would operate both AT&T MVPDs (DirecTV and U-verse) and Turner Broadcasting networks (which license to other MVPDs). The government alleged that "the newly combined firm likely [\*\*\*15] would . . . use its control of Time Warner's popular programming as a weapon to harm competition." Compl. 2.

A week after the government filed suit to stop the proposed merger, Turner Broadcasting sent letters to approximately 1,000 distributors "irrevocably offering" to engage in "baseball style" arbitration at any time within a seven-year period, subject to certain conditions not relevant here. According to President of Turner Content Distribution Richard Warren, the offer of arbitration agreements was designed to "address the government's concern that as a result of being . . . commonly owned by AT&T, [Turner Broadcasting] would have an incentive to

drive prices higher and go dark with [its] affiliates," Tr. 1182 (April 3, 2018). In the event of a failure to agree on renewal terms, Turner Broadcasting agreed that the distributor would have the right to continue carrying Turner networks pending arbitration, subject to the same terms and conditions in the distributor's existing contract.

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**B.**

The government's increased leverage theory is that "by combining Time Warner's programming and DirecTV's distribution, the merger would give Time Warner increased bargaining leverage in negotiations [\*\*\*16] with rival distributors, leading to higher, supracompetitive prices for millions of consumers." Appellant Br. 33. Under this theory, Turner Broadcasting's bargaining position in affiliate negotiations will change after the merger due to its relationship with AT&T because the cost of a blackout will be lower. Prior to the merger, if Turner Broadcasting failed to reach a deal with a distributor and engaged in a long-term blackout, then it would lose affiliate fees and advertising revenues. After the merger, some costs of a blackout would be offset because some customers would leave the rival [\*1036] [\*\*395] distributor due to Turner Broadcasting's blackout and a portion of those customers would switch to AT&T distributor services. The merged AT&T-Turner Broadcasting entity would earn a profit margin on these new customers. Because Turner Broadcasting would make a profit from switched customers, the cost of a long-term blackout would decrease after the merger and thereby give it increased bargaining leverage during affiliate negotiations with rival distributors sufficient to enable it to secure higher affiliate fees from distributors, which would result in higher prices for consumers.

To support this [\*\*\*17] theory of competitive harm, the government presented evidence purporting to show the real-world effect of the proposed merger. Specifically, it introduced statements in prior FCC filings by AT&T and DirectTV that vertical integration provides an incentive to increase prices and poses a threat to competition. Various internal documents of the defendants were to the same effect. Third-party competitors, such as cable distributors, testified that the merger would increase Turner Broadcasting's bargaining leverage.

The government also presented the expert opinion of Professor Carl Shapiro on the likely anticompetitive effect of the proposed merger. He opined, based on the economic theory of bargaining — here, the Nash bargaining theory — that Turner Broadcasting's bargaining leverage would increase after the merger because the cost of a long-term blackout would decrease. His quantitative model predicted net price increases to consumers. Specifically, his model predicted increases in fees paid by rival distributors for Turner Broadcasting content and cost savings for AT&T through elimination of double marginalization ("EDM"). The fee increases for rival distributors were based on the expected [\*\*\*18] benefit to AT&T of a Turner Broadcasting blackout after the merger. Professor Shapiro determined the extent to which rival distributors and AT&T would pass on their respective cost increases and cost decreases to consumers. His model predicted: (1) an annual fee increase of \$587 million for rival distributors to license Turner Broadcasting content, and cost savings of \$352 million for AT&T; and (2) an annual net increase of \$286 million in costs passed on to consumers in 2016, with increases in future years.

AT&T responded by pointing to testimony of executives' past experience in affiliate negotiations, and presenting testimony by its experts critiquing Professor Shapiro's opinion and model. It purported to show through its own experts that the government's *prima facie* case inaccurately predicted the proposed merger's probable effect on competition. Professor Dennis Carlton's econometric analysis (also known as a regression analysis, Tr. 2473 (April 12, 2018)), showed that prior instances of vertical integration in the MVPD market had not had a "statistically significant effect on content prices," *id.* at 2477, pointing to data on the Comcast-NBCU merger in 2011 as well as prior vertical integration [\*\*\*19] between News Corp.-DirecTV and Time Warner Cable-Time Warner Inc., which split in 2008 and 2009, respectively. Professor Carlton and Professor Peter Rossi critiqued the "inputs" used by Professor Shapiro in his quantitative model, opining for instance that values he used for subscriber loss rate and diversion rate were not calculated through reliable methods. Professor Carlton also opined that Professor Shapiro's quantitative model overestimated how quickly harm would occur because it failed to consider existing long-term contracts.

Professor Shapiro, in turn, critiqued Professor Carlton's econometric analysis as comparing different types of vertical mergers. Regarding the "inputs" to his [\*1037] [\*\*396] quantitative model, Professor Shapiro conceded that he was unaware the subscriber loss rate percentage he used (from a consultant report for Charter Communications, Inc.) had been changed after the report was presented to Charter executives. He also acknowledged that he had not considered the effects of the arbitration agreements offered by Turner Broadcasting and that to do so would require preparation of a new model. Tr. 2208, 2325 (Apr. 11, 2018).

The district court acknowledged the uncertainty regarding [\*\*\*20] the measure of proof for the government's burden because Section 7 does not require proof of certain harm. AT&T, 310 F. Supp. 3d at 189-90 n.16. The government and AT&T had used various phrases to describe the government's burden, including that it must show an "appreciable danger" of competitive harm, or that it must show that harm is "likely" or "reasonably probable." *Id.* The district court concluded that it need not articulate the differences between these phrases because "even assuming the 'reasonable probability' or 'appreciable danger' formulations govern here . . . [its] conclusions regarding the [g]overnment's failure of proof would remain unchanged." *Id.* Acknowledging also the lack of precedent and the complexity in establishing the correct approach in a Section 7 challenge to a proposed vertical merger, the district court viewed the outcome of the litigation to "turn[] on whether, notwithstanding the proposed merger's conceded procompetitive effects, the [g]overnment has met its burden of establishing, through 'case-specific evidence,' that the merger of AT&T and Time Warner, at this time and in this remarkably dynamic industry, is likely to substantially lessen competition in the manner it predicts." *Id. at 194* (quoting Proposed Conclusions [\*\*\*21] of Law of the United States ¶ 25).

Several amici urge this court to speak definitively on the proper legal standard for evaluating vertical mergers. See Amicus Curiae 27 Antitrust Scholars et al. Br. 10-16; Amicus Curiae Chamber of Commerce et al. Br. 5-8; Amicus Curiae Open Markets Institute Br. 16-20. There is a dearth of modern judicial precedent on vertical mergers and a multiplicity of contemporary viewpoints about how they might optimally be adjudicated and enforced. See, e.g., Amicus Curiae 27 Antitrust Scholars et al. Br. 6-16; Amicus Curiae Chamber of Commerce et al. Br. 17-24. The government's guidelines for non-horizontal mergers were last updated in 1984, over three decades ago. See 1984 Non-Horizontal Merger Guidelines. But there is no need to opine on the proper legal standards for evaluating vertical mergers because, on appeal, neither party challenges the legal standards the district court applied, and no error is apparent in the district court's choices, see Amicus Curiae Open Markets Institute Br. 18-19 (citing cases). See generally Narragansett Indian Tribe v. Nat. Indian Gaming Com'n, 158 F.3d 1335, 1338, 332 U.S. App. D.C. 429 (D.C. Cir. 1998); Michel v. Anderson, 14 F.3d 623, 625, 304 U.S. App. D.C. 325 (D.C. Cir. 1994).

The district court found that the government had "failed to clear the first hurdle of showing that the proposed merger is likely to [\*\*\*22] increase Turner [Broadcasting]'s bargaining leverage in affiliate negotiations." AT&T, 310 F. Supp. 3d at 199. Although acknowledging, as Professor Shapiro had opined, that the Nash bargaining theory could apply in the context of affiliate fee negotiations, the district court found more probative the real-world evidence offered by AT&T than that offered by the government. The econometric analysis of AT&T's expert had examined real-world data from prior instances of vertical integration in the video programming and distribution industry and concluded that "the bulk of [\*1038] [\*\*397] the results show no significant results at all, but many do show a decrease in content prices." *Id. at 216* (quoting Prof. Carlton, Tr. 2477 (April 12, 2018)); see *id. at 207, 218*. The district court also credited the testimony of several industry executives — e.g., Madison Bond, lead negotiator for NBCU, and Coleman Breland and Richard Warren, lead negotiators for Turner Broadcasting — that vertical integration had not affected their affiliate negotiations in the past. By contrast, the testimony from third-party competitors that the merger would increase Turner Broadcasting's bargaining leverage was, the district court found, "speculative, based on unproven assumptions, [\*\*\*23] or unsupported." *Id. at 214*. Although Professor Shapiro's opinion was that the Nash bargaining theory predicted an increase in Turner Broadcasting's post-merger bargaining leverage, leading to an increase in affiliate fees, the district court found, in view of the industry's dynamism in recent years, that Professor Shapiro's opinion (by contrast with Professor Carlton's) had "not been supported by sufficient real-world evidence." *Id. at 224*.

Second, the district court found that Professor Shapiro's quantitative model, which estimated the proposed merger would result in future increases in consumer prices, lacked sufficient reliability and factual credibility to generate

probative predictions of future competitive harm. Relying on critiques by Professor Carlton and Professor Rossi, the district court found errors in the model "inputs," for example, the value used for subscriber loss rate was not calculated through a reliable method. Neither the model nor Professor Shapiro's opinion accounted for the effect of the irrevocably-offered arbitration agreements, which the district court stated would have "real world effects" on negotiations and characterized "as extra icing on a cake already frosted," *id. at 241 n.51*, i.e. [\*\*\*24], another reason the government had not met its first-level burden of proof.

The district court therefore concluded that the government failed to present persuasive evidence that Turner Broadcasting's bargaining leverage would "materially increase" as a result of the merger, *id. at 204*, or that the merger would lead to "any raised costs" for rival distributors or consumers, *id. at 241* (emphasis in original). It therefore did not address the balancing analysis offered by Professor Shapiro's quantitative model, nor the question whether any increased costs would result in a substantial lessening of competition.

### III.

On appeal, the government contends that the district court court (1) misapplied economic principles, (2) used internally inconsistent logic when evaluating industry evidence, and (3) clearly erred in rejecting Professor Shapiro's quantitative model. Undoubtedly the district court made some problematic statements, which the government identifies and this court cannot ignore. And in the probabilistic Section 7 world, uncertainty exists about the future real-world impact of the proposed merger on Turner Broadcasting's post-merger leverage. See Brown Shoe, 370 U.S. at 323. At this point, however, the issue is whether the district court [\*\*\*25] clearly erred in finding that the government failed to clear the first hurdle in meeting its burden of showing that the proposed merger is likely to increase Turner Broadcasting's bargaining leverage.

(1) Application of economic principles. The government contends that in evaluating the evidence in support of its increased leverage theory, the district court erroneously discarded or otherwise misapplied two economic principles — the Nash bargaining [\*1039] [\*\*398] theory and corporate-wide profit maximization.

(a) Nash bargaining theory. The Nash bargaining theory is used to analyze two-party bargaining situations, specifically where both parties are ultimately better off by reaching an agreement. John F. Nash, Jr., *The Bargaining Problem*, 18 *Econometrica* 155 (1950). The theory posits that an important factor affecting the ultimate agreement is each party's relative loss in the event the parties fail to agree: when a party would have a greater loss from failing to reach an agreement, the other party has increased bargaining leverage. Tr. 2193-94 (Shapiro, April 11, 2018). In other words, the relative loss for each party affects bargaining leverage and when a party has more bargaining leverage, that [\*\*\*26] party is more likely to achieve a favorable price in the negotiation.

The district court had to determine whether the economic theory applied to the particular market by considering evidence about the "structure, history, and probable future" of the video programming and distribution industry. United States v. General Dynamics, 415 U.S. 486, 498, 94 S. Ct. 1186, 39 L. Ed. 2d 530 (1974) (internal quotation marks omitted); see also Brown Shoe, 370 U.S. at 321-22 & n.38. As one circuit has put it, "[t]he Nash theorem arrives at a result that follows from a certain set of premises," while the theory "asserts nothing about what situations in the real world fit those premises." VirnetX, Inc., v. Cisco Sys. Inc., 767 F.3d 1308, 1332 (Fed. Cir. 2014). The district court concluded that the government presented insufficient real-world evidence to support the prediction under the Nash bargaining theory of a material increase of Turner Broadcasting's post-merger bargaining leverage in affiliate negotiations by reason of less-costly long-term blackouts. The government's real-world evidence consisted of statements by AT&T Inc. and DirecTV in FCC regulatory filings that vertical integration, such as in the proposed Comcast-NBCU merger, can give distributors an incentive to charge higher affiliate fees and expert opinion and a quantitative model prepared by Professor Shapiro. The expert opinion [\*\*\*27] and model were subject to deficiencies identified by AT&T's experts, some of which Professor Shapiro conceded. By contrast, AT&T's expert's econometric analysis of real-world data showed that content pricing in prior vertical mergers in the industry had not increased as the Nash bargaining theory and the model predicted. Given evidence the industry

was now "remarkably dynamic," the district court credited CEO testimony about the null effect of vertical integration on affiliate negotiations. [AT&T, 310 F. Supp. 3d at 194](#).

In other words, the record shows that the district court accepted the Nash bargaining theory as an economic principle generally but rejected its specific prediction in light of the evidence that the district court credited. The district court explained that its conclusion

does not turn on defendants' protestations that the theory is 'preposterous,' 'ridiculous,' or 'absurd.' . . . [but] instead on [its] evaluation of the shortcomings in the proffered third-party competitor testimony, . . . the testimony about the complex nature of these negotiations and the low likelihood of a long-term Turner [Broadcasting] blackout, . . . and the fact that real-world pricing data and experiences of individuals [\*\*\*28] who have negotiated on behalf of vertically integrated entities all fail to support the [g]overnment's increased-leverage theory.

[Id. at 207](#) (internal citations omitted).

More concerning is the government's contention that the district court misapplied the Nash bargaining theory in a manner that negated its acceptance of the economics of bargaining by erroneously [\[\\*1040\]](#) [\[\\*\\*399\]](#) focusing on whether long-term blackouts would actually occur after the merger, rather than on the changes in stakes of such a blackout for Turner Broadcasting. The government points to the district court's statements that Professor Shapiro's testimony was undermined by evidence that "a blackout would be infeasible." [AT&T, 310 F. Supp. 3d at 223](#). The district court also stated that "there has never been, and is likely never going to be, an actual long-term blackout of Turner [Broadcasting] content." *Id.* The district court noted that "Turner [Broadcasting] would *not be willing* to accept the 'catastrophic' affiliate fee and advertising losses associated with a long-term blackout." [Id. at 223-24 n.35](#) (emphasis in original).

The question posed by the Nash bargaining theory is whether Turner Broadcasting would be more favorably positioned after the merger to assert its leverage in affiliate [\[\\*\\*\\*29\]](#) negotiations whereby the cost of its content would increase. Considered in isolation, the district court's statements could be viewed as addressing the wrong question. Considered as part of the district court's analysis of whether the stakes for Turner Broadcasting would change and if so by how much, the statements address whether the threat of long-term blackouts would be credible, as posited by the government's increased leverage theory. The district court found that after the merger the stakes for Turner Broadcasting would change only slightly, so its threat of a long-term blackout "will only be somewhat less incredible." [Id. at 224](#) (quoting Professor Shapiro); see generally [Brown Shoe, 370 U.S. at 328-29](#). Recognizing Professor Shapiro applied the Nash bargaining theory in opining that "if a party's alternative to striking a deal improves, that party is more willing and able to push harder for a better deal because it faces less downside risk if the deal implodes," [AT&T, 310 F. Supp. 3d at 223 n.35](#), the district court rejected the assumption underlying the government's theory that Turner Broadcasting would gain increased leverage from this slight change in stakes. It relied on testimony that the small change in bargaining position from a less costly [\[\\*\\*\\*30\]](#) blackout would not cause Turner Broadcasting to take more risks, specifically noting the Time Warner CEO's analogy of the cost difference between having a 1,000-pound weight fall on Turner Broadcasting and a 950-pound weight fall on it — the difference being unlikely to change the risk Turner Broadcasting would be willing to take. [Id. at 224 n.36](#) (Jeff Bewkes, Time Warner CEO, Tr. 3121 (April 18, 2018)).

The district court's statements identified by the government, then, do not indicate that the district court misunderstood or misapplied the Nash bargaining theory but rather, upon considering whether in the context of a dynamic market where a similar merger had not resulted in a "statistically significant increase in content costs," the district court concluded that the theory inaccurately predicted the post-merger increase in content costs during affiliate negotiations.

Of course, it was not enough for the government merely to prove that after the merger the costs of a long-term blackout would change for Turner Broadcasting. Its theory is that Turner Broadcasting's bargaining leverage would increase sufficiently to enable it to charge higher prices for its content. The district court's focus on the [\[\\*\\*\\*31\]](#) slight change in the cost of a long-term blackout in finding Turner Broadcasting's bargaining leverage would not

meaningfully change aligns with determining whether the government's evidence established that a change in the post-merger stakes for Turner Broadcasting would likely allow it to extract higher prices during affiliate negotiations. The district court reasoned that because long-term blackouts are very [\*1041] [\*\*400] costly and would therefore be infeasible for Turner Broadcasting even after the merger, there was insufficient evidence that "a post-merger Turner [Broadcasting] would, or even could, drive up prices by *threatening* distributors with long-term blackouts." *Id. at 223* (emphasis in original). In finding the government failed to "prov[e] that Turner [Broadcasting]'s post-merger negotiating position would materially increase based on its ownership by AT&T," *id. at 204*, the district court reached a fact-specific conclusion based on real-world evidence that, contrary to the Nash bargaining theory and government expert opinion on increased content costs, the post-merger cost of a long-term blackout would not sufficiently change to enable Turner Broadcasting to secure higher affiliate fees. Witnesses such [\*\*\*32] as a Turner Broadcasting president Coleman Brelan, AT&T executive John Stankey, and Time Warner CEO Jeff Bewkes, whom the district court credited, testified that after the merger blackouts would remain too costly to risk and that any change in that cost would not affect negotiations as the government's theory predicted.

Not to be overlooked, the district court also credited the efficacy of Turner Broadcasting's "irrevocable" offer of arbitration agreements with a no-blackout guarantee. It characterized the no-blackout agreements as "extra icing on a cake already frosted." *AT&T, 310 F. Supp. 3d at 241 n.51*. In crediting Professor Carlton's econometric analysis, the district court explained that it was appropriate to consider the analysis of the Comcast-NBCU merger because the Comcast-NBCU merger was similar to the proposed merger — a vertical merger in the video programming and distribution industry. There the government had recognized, "'especially in vertical mergers, that conduct remedies,' such as the ones proposed [in the *Comcast* case], 'can be a very useful tool to address the competitive problems while preserving competition and allowing efficiencies' that 'may result from the transaction.'" *AT&T, 310 F. Supp. 3d at 169 n.3* (quoting Hr'g Tr. [\*\*\*33] 15:16-21 (July 27, 2011), *Comcast, 808 F. Supp. 2d 145*). Like there, the district court concluded the Turner arbitration agreements would have "real-world effect." *Id. at 217-18 n.30*.

The post-merger arbitration agreements would prevent the blackout of Turner Broadcasting content while arbitration is pending. *AT&T, 310 F. Supp. 3d at 217*. As mentioned, Turner Broadcasting "irrevocably offer[ed]" approximately 1,000 distributors agreements to engage in baseball style arbitration in the event the parties fail to reach a renewal agreement, and the offered agreement guarantees no blackout of Turner Broadcasting content once arbitration is invoked. AT&T's counsel represented the no-blackout commitment is "legally enforceable," Oral Arg. Tr. 53:7-8, and AT&T "will honor" the arbitration agreement offers, Oral Arg. Tr. 55:2, 61:22-25, 62:1-10. Consequently, the government's challenges to the district court's treatment of its economic theories becomes largely irrelevant, at least during the seven-year period. Counsel for Amici Curiae 27 Antitrust Scholars explained that arbitration agreements make the Nash bargaining model premised on two-party negotiations "substantially more complicated," Oral Arg. Tr. 50:10, and Professor Shapiro acknowledged that taking the arbitration [\*\*\*34] agreements into account would require "a completely different model." Tr. 2325 (April 11, 2018).

Further, the government's contention that the district court failed to properly weigh the probative force of the defendants' statements in FCC filings is unavailing. During licensing and rulemaking proceedings before the FCC, DirecTV stated "a standard economic model" (i.e., the Nash bargaining theory) predicts that [\*1042] [\*\*401] the proposed Comcast-NBCU merger "would significantly increase the prices other MVPDs pay for NBCU programming," and two years later stated, similar to AT&T Inc. comments, that "vertically integrated MVPDs have an incentive to charge higher license fees for programming that is particularly effective in gaining MVPD subscribers than do non-vertically integrated MVPDs."<sup>1</sup> The district court took judicial notice of these statements pursuant to *Federal Rule of Evidence 201*, explaining it was "hesitant" to assign significant evidentiary value to the prior regulatory filings because AT&T and DirecTV made the statements acting as competitors whose positions would be

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<sup>1</sup> *In re Matter of Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc., for Consent to Assign Licenses or Transfer Control of Licensees*, MB Docket No. 10-56, Reply Comments of DirecTV, Inc., 4 (Aug. 19, 2010); *In re Matter of Revision of the Commission's Program Access Rules et al.*, MB Docket No. 12-68 et al., Comments of DirecTV, LLC 19 (June 22, 2012); *In re Matter of Revision of the Commission's Program Access Rules et al.*, MB Docket No. 12-68 et al., Comments of AT&T Inc. 22 (June 22, 2012); *In re Matter of Revision of the Commission's Program Access Rules et al.*, MB Docket No. 12-68 et al., Reply Comments of AT&T Inc. 2 (July 23, 2012).

affected by FCC review. [AT&T, 310 F. Supp. 3d at 206](#). FCC rules require all regulated parties — whether applicants seeking to transfer licenses in connection with a proposed merger [\*\*\*35] or competitors who oppose the merger — to provide only "[t]ruthful and accurate statements to the Commission" in adjudicatory proceedings. [47 C.F.R. § 1.17](#); see FCC Amicus Curiae Br. 3. The statements were admissible as party admissions pursuant to [Federal Rule of Evidence 801\(d\)\(2\)](#), see [Talavera v. Shah, 638 F.3d 303, 309, 395 U.S. App. D.C. 7 \(D.C. Cir. 2011\)](#), yet even as admissions, the district court had to evaluate their persuasive force in the circumstances before it, and the district court did. See [VirnetX, 767 F.3d at 1332](#); cf. [General Dynamics, 415 U.S. at 498](#); [Owens v. Republic of Sudan, 864 F.3d 751, 790, 431 U.S. App. D.C. 163 \(D.C. Cir. 2017\)](#).

The district court accepted the FCC statements as probative of the proposition that the Nash bargaining theory could apply in the context of affiliate fee negotiations. But it concluded generic statements that vertical integration "can" allow an entity to gain an unfair advantage over rivals were "informed by the state of the market at the time . . . and the particular inputs to the models presented to the FCC." [AT&T, 310 F. Supp. 3d at 206](#). As such the FCC [\*\*\*36] statements were "not particularly probative of whether [the proposed merger] could do the same with its programming in today's more competitive marketplace," with the rising presence of virtual MVPDs and SVODs, like Netflix and Hulu. [Id. at 206-07](#); see also [id. at 173](#). The district court also noted that many of the statements in the FCC regulatory filings related to whether a vertically integrated programmer would withhold content, which Professor Shapiro opined would not occur here because it would be profitable for the merged firm to continue to license Turner programming. [Id. at 206](#); see also [id. at 201](#); Tr. 2218, 2293. Once the district court credited AT&T's expert's opinion based on an econometric analysis that the similar Comcast-NBCU merger had not had a "statistically significant effect on content costs," [id. at 218](#), the district court could understand that the defendants' admissions at the time of the Comcast-NBCU merger offered little probative support for the government's increased leverage theory.

Thus, even viewing the statements to the FCC as supportive of the government, the district court's finding of the efficacy of Turner Broadcasting's irrevocable offers of no-blackout arbitration agreements means [\*1043] [\*\*402] the merger is unlikely [\*\*\*37] to afford Turner Broadcasting increased bargaining leverage.

(b) Corporate-wide profit maximization. Still, the government maintains that the reliance on past negotiation experience indicates that the district court misunderstood, and failed to apply, the principle of corporate-wide profit maximization by treating the principle as a question of fact, when "[t]he assumption of profit maximization is 'crucial' in predicting business behavior." Appellant Br. 50 (citation omitted). This principle posits that a business with multiple divisions will seek to maximize its total profits. It was adopted as a principle of [antitrust law](#) in [Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 \(1984\)](#), holding that a parent and a wholly-owned subsidiary are not capable of conspiracy against each other under [Section 1 of the Sherman Antitrust Act](#). Companies with multiple divisions must be viewed as a single actor, and each division will act to pursue the common interests of the whole corporation. See [id. at 770](#).

The district court never cited *Copperweld* in its opinion, which is troubling given the government's competitive harm theories and expert evidence based on economic principles. But the government's position that the district court never accepted this economic principle [\*\*\*38] overlooks that it did "accept Professor Shapiro's (and the Government's) argument that generally, 'a firm with multiple divisions will act to maximize profits across them.'" [AT&T, 310 F. Supp. 3d at 222](#) (citations omitted). And it ignores that if the merged firm was unable to exert the leverage required by the government's increased leverage theory, then inquiring (as the district court did of Professor Shapiro) about an independent basis to conclude that the firm did have such leverage is not a rejection of the corporate-wide profit maximization principle.

The government maintains that the district court's misapplication of the principle of corporate-wide profit maximization is evident from its statement the evidence suggests "vertically integrated corporations have previously determined that the best way to increase company wide profits is for the programming and distribution components to separately maximize their respective revenues." [Id. at 222-23](#). Stating that the programming and distribution divisions would "separately maximize their respective revenues" is contrary to the maximization principle to the extent separate units would act against the merged entity's common interest. See [Copperweld, 467 U.S. at 770](#). At

this point in its opinion, however, [\*\*\*39] the district court was explaining why "that profit-maximization principle is *not* inconsistent with testimony that the identity of a programmer's owner has not affected affiliate negotiations in real-world instances of vertical integration." *Id. at 222*. The district court can be viewed as conveying its understanding that Turner Broadcasting's interest in spreading its content among distributors, not imposing long-term blackouts, would redound to the merged firm's financial benefit, not that Turner Broadcasting would act in a manner contrary to the merged firm's financial benefit. Industry executives testified that "the identity of a programmer's owner has not affected affiliate negotiations in real-world instances of vertical integration," *AT&T, 310 F. Supp. 3d at 222*. For instance, the Chair of Content Distribution at NBC Universal testified that at Comcast-NBCU, he "never once took into account the interest of Comcast cable in trying to negotiate a carriage agreement" for NBC Universal. Tr. 2014 (Madison Bond, NBC Universal, Chairman of Content Distribution (April 10, 2018)); see also Tr. 1129 (Coleman Breland, Turner [\*1044] [\*\*403] Broadcasting President (April 2, 2018)).

To the extent the government maintains this testimony is irreconcilable [\*\*\*40] with the legal principle of corporate-wide profit maximization, it gives no credence to the district court's focus on "the best way to increase company wide profits," referring to the merged firm. *AT&T, 310 F. Supp. 3d at 222*. In other words, the district court was explaining that real-world evidence reflected the profit-maximization principle. Even if the district court could have made clearer that it understood the principle was not a question of fact, the government does not explain how considering how that is done in a particular industry is contrary to the principle of corporate-wide profit maximization.

Nor is the conclusion that the merged firm would not be able to maximize its profits by raising prices during negotiations inconsistent with the principle of corporate-wide profit maximization. Based on the record evidence, the district court could plausibly understand that the proposed merger would not enable the merged entity to exert increased bargaining leverage by means of long-term blackouts and, therefore, would not affect affiliate fee negotiations to raise content costs. See *Anderson, 470 U.S. at 575, 577*. Finding the distributor division's interest would not affect Turner Broadcasting's negotiations with other distributors is [\*\*\*41] consistent with the evidence that when a programmer and distributor merge, it is still in the best interests of the merged entity as a profit maximizer to license programming broadly to other distributors. Tr. 1129 (Breland (April 2, 2018)). That is, instead of withholding content in an attempt to benefit the merged entity, programmers will seek to license their content to other distributors. In this instance, the district court concluded the principle and the real world "fit." Moreover, AT&T's view that the government's claims of fundamental economic errors are ultimately irrelevant in light of Turner Broadcasting's irrevocable arbitration/no blackout commitment is not implausible.

Similarly, contrary to the government's position, the district court's findings about post-merger negotiating are not internally inconsistent with its finding on the cost savings of the merger. The district court found, and the government agreed, that the merger would result in cost savings as a result of EDM. Pre-merger, both Turner Broadcasting and AT&T earned margins over cost before their products reached consumers: Turner Broadcasting earned a profit margin when it licensed content to AT&T, and AT&T [\*\*\*42] earned a profit margin when it sold content to consumers. Post-merger, Turner Broadcasting would not earn a profit margin when licensing content to AT&T because the merged entity would eliminate that cost and, according to Professor Shapiro, pass on some of those cost savings to consumers in order to attract additional subscribers. For there to be EDM savings, Professor Shapiro opined, the merged firm must act on its unified interest across divisions. Thus, Turner Broadcasting, instead of maximizing its own revenue, would license its programming to AT&T for a lower price. The government did not contest AT&T's position that a merged entity can maximize its own profits by eliminating cost even if it has no ability to secure higher prices from other companies during negotiations. At most, the government challenged the sufficiency of the evidence for finding the merged entity would not be able to increase prices for Turner Broadcasting content. Reply Br. 13-14. But there is record evidence to support finding that AT&T would be able to eliminate its own costs without gaining the ability to raise Turner Broadcasting content prices.

[\*1045] [\*\*404] (2) Inconsistent reasoning in evaluating trial testimony [\*\*\*43]. The government further maintains that the district court used internally inconsistent reasoning when evaluating testimony from witnesses in the industry.

At trial, third-party distributors and executives from Comcast-NBCU and Time Warner testified about negotiations in the video programming and distribution industry. Third-party distributors testified about their concerns, and their reasons, that Turner Broadcasting would gain increased bargaining leverage as a result of the proposed merger. Comcast-NBCU and Time Warner executives testified that the interests of an affiliated distributor did not affect negotiations in their prior experiences negotiating on behalf of vertically integrated companies. The district court concluded that the third-party distributor testimony "fail[ed] to provide meaningful, reliable support for the [g]overnment's increased leverage theory," [AT&T, 310 F. Supp. 3d at 211](#), while the executives' testimony "undermine[d] the persuasiveness of the [g]overnment's proof," [id. at 219](#). The district court declined to credit the third-party distributors' testimony because "there is a threat that [third-party distributor] testimony reflects self-interest," [id. at 211](#), yet dismissed the suggestion that testimony from [\\*\\*\\*44](#) the Time Warner executives should be discounted as potentially biased due to self-interest, [id. at 219](#).

The government contends this reasoning was inconsistent because self-interest existed on both sides of the issue of whether the proposed merger would have anticompetitive effects. Even so, the potential for self-interest was not the only reason the district court found third-party distributor testimony of little probative value. Much of the third-party competitor testimony, the district court found, "consisted of speculative concerns," [id. at 212](#), and did not contain any analysis or factual basis to support key assumptions, such as how Turner Broadcasting's bargaining leverage would change and how many subscribers distributors would lose in a blackout. By contrast, the Time Warner executives' testimony did "not involve promises or speculations about the employees' future, post-merger behavior" and instead recounted "what these executives previously experienced when working within a vertically integrated company." [Id. at 219](#). Their testimony was uniform among all testifying witnesses and corroborated by that of a Comcast-NBCU executive — a competitor of AT&T. To the extent the government also maintains the district [\\*\\*\\*45](#) court improperly discounted the third-party distributor testimony because it contradicted Professor Shapiro's opinion that Turner Broadcasting would not actually withhold content from other distributors, any error in that regard does not demonstrate the district court clearly erred in discounting their testimony for the independent reasons that it rested on speculative, future predictions and lacked adequate factual support.

(3) Rejection of Professor Shapiro's quantitative model. Finally, the government contends that the district court clearly erred in rejecting Professor Shapiro's quantitative bargaining model. Specifically, that the district court erred in finding insufficient evidence to support Professor Shapiro's calculations of fee increases for rival distributors and in finding no proof of any price increase to consumers.

Preliminarily, [HN4](#)<sup>↑</sup> the court does not hold that quantitative evidence of price increase is required in order to prevail on a Section 7 challenge. Vertical mergers can create harms beyond higher prices for consumers, including decreased product quality and reduced innovation. See Amicus Curiae Open Markets Institute Br. 4-12. Indeed, the Supreme Court upheld the Federal Trade [\\*\\*\\*46](#) Commission's Section 7 [\[\\*1046\]](#) [\[\\*\\*405\]](#) challenge to Ford Motor Company's proposed vertical merger with a major spark plug manufacturer without quantitative evidence about price increases. [Ford Motor Co. v. United States, 405 U.S. 562, 567-69, 578, 92 S. Ct. 1142, 31 L. Ed. 2d 492 \(1972\)](#). Here, however, the government did not present its challenge to the AT&T-Time Warner merger in terms of creating non-price related harms in the video programming and distribution industry, and we turn to the government's challenges to the district court's handling of the quantitative evidence regarding the proposed merger's predicted effect on consumer price.

Professor Shapiro presented a quantitative model that predicted an annual net increase of \$286 million being passed on to consumers in 2016, with increasing costs in future years. This figure was based on the model's predictions of an annual fee increase of \$587 million for rival distributors to license Turner Broadcasting content and cost savings of \$352 million for AT&T. The district court accepted Professor Shapiro's testimony about the \$352 million cost savings from the merger. But it found that insufficient evidence supported the inputs and assumptions used to estimate the annual costs increases for rival distributors, crediting criticisms by Professor Carlton and [\\*\\*\\*47](#) Professor Rossi. Indeed, the district court found that the quantitative model as presented through Professor Shapiro's opinion testimony did not provide an adequate basis to conclude that the merger will lead to "any" raised costs for distributors or consumers, "much less consumer harms that outweigh the conceded \$350 million in annual cost savings to AT&T's customers." [AT&T, 310 F. Supp. 3d at 241](#) (emphasis in original).

Whatever errors the district court may have made in evaluating the inputs for Professor Shapiro's quantitative model, the model did not take into account long-term contracts, which would constrain Turner Broadcasting's ability to raise content prices for distributors. The district court found that the real-world effects of Turner Broadcasting's existing contracts would be "significant" until 2021 and that it would be difficult to predict price increases farther into the future, particularly given that the industry is continually changing and experiencing increasing competition. This failure, the district court found, resulted in overestimation of how quickly the harms would occur. Professor Shapiro acknowledged that predictions farther into the future, after the long-term contracts expire, are [\*\*\*48] more difficult. Tr. 2317 (April 11, 2018). Neither Professor Shapiro's opinion testimony nor his quantitative model considered the effect of the post-litigation offer of arbitration agreements, something he acknowledged would require a new model. And the video programming and distribution industry had experienced "ever-increasing competitiveness" in recent years. [AT&T, 310 F. Supp. 3d at 241](#). Taken together, the government's clear-error contention therefore fails.

It is true that the district court misstated that the government had not proven that any price increases would "outweigh the conceded \$350 million in annual cost saving to AT&T's customers." *Id.* Professor Shapiro testified that the merger would result in \$352 million cost savings to AT&T and that not all those savings would be passed on to consumers. The \$352 million, therefore, was not cost savings to consumers but to AT&T. But the district court did not weigh increased prices for consumers against cost savings for consumers, and instead found that the government had not shown at the first level that the merger was likely to lead to any price increases for consumers because of the failure to show that costs for rival MVPDs would increase as a result [\*\*\*49] of Turner Broadcasting's increased leverage in affiliate [\*1047] [\*\*406] negotiations after the merger. Counsel for the government and AT&T agree the error regarding the consumer savings value alone would not require remand because the district court's opinion was not based on balancing any price increases against cost savings to consumers. Oral Arg. Tr. 36-37, 57:1-13. Consequently, because the government failed to meet its burden of proof under its increased leverage theory at the first level, the error regarding cost savings was harmless error, see [Czekalski v. LaHood, 589 F.3d 449, 453, 389 U.S. App. D.C. 17 \(D.C. Cir. 2009\); Fed. R. Civ. P. 61.](#)

Accordingly, because the district court did not abuse its discretion in denying injunctive relief, see [Anthem, 855 F.3d at 352-53](#), we affirm the district court's order denying a permanent injunction of the merger.

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## **Neagle v. Goldman Sachs Grp., Inc.**

United States District Court for the District of Oregon

March 1, 2019, Decided; March 1, 2019, Filed

Case No. 6:18-cv-00754-MC

### **Reporter**

2019 U.S. Dist. LEXIS 36517 \*; 2020-2 Trade Cas. (CCH) P81,375

MELVIN RAY NEAGLE, Plaintiff, v. THE GOLDMAN SACHS GROUP, INC, a Delaware Corporation d/b/a MTGLQ INVESTORS, L.P., a Delaware Limited Partnership; OCWEN FINANCIAL CORP., a Florida Corporation; OCWEN MORTGAGE SERVICING, INC. a U.S. Virgin Islands Corporation; OCWEN LOAN SERVICING, LLC, a Delaware Limited Liability Company; ALTISOURCE SOLUTIONS, INCL, a Delaware Corporation, Defendants.

**Subsequent History:** Affirmed by [Neagle v. Altisource Sols., Inc., 2020 U.S. App. LEXIS 28494 \(9th Cir. Or., Sept. 9, 2020\)](#)

## **Core Terms**

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alleges, mortgage, borrowers, servicer, third-party, inflated, default-related, conspiracy, competitors, Lender, nonbank, market power, trust deed, antitrust, subprime, pricing, notice, default, assigned, fails, mortgage loan, loans, relevant market, Sherman Act, seller, notice provision, fees and costs, market share, tied product, alleged conspiracy

**Counsel:** [\*1] For Melvin Ray Neagle, Plaintiff: William L. Ghiorso, The Ghiorso Law Firm, Salem, OR.

For Altisource Solutions, Inc., a Delaware Corporation, Defendant: Darin M. Sands, LEAD ATTORNEY, Lane Powell, PC, Portland, OR; Taylor Washburn, LEAD ATTORNEY, PRO HAC VICE, Lane Powell PC, Seattle, WA.

For Ocwen Loan Servicing, LLC, a Delaware Limited Liability Company, Ocwen Mortgage Servicing, Inc., a U.S. Virgin Islands Corporation, Ocwen Financial Corp., a Florida Corporation, Defendants: Jan T. Chilton, LEAD ATTORNEY, PRO HAC VICE, Severson & Werson, APC, San Francisco, CA; Charles T. Meyer, Severson & Werson APC, Irvine, CA.

For MTGLQ Investors, L.P., a Delaware Limited Partnership, Defendant: David J. Elkanich, Nellie Q. Barnard, LEAD ATTORNEYS, Holland & Knight, LLP, Portland, OR.

**Judges:** Michael McShane, United States District Judge.

**Opinion by:** Michael McShane

## **Opinion**

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### OPINION AND ORDER

MCSHANE, Judge:

As observed by the First Circuit over a decade ago, "[s]ome antitrust cases are intrinsically hopeless because . . . they merely dress up in antitrust garb what is, at best, a business tort or contract violation." [Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 69 \(2004\)](#). The same can be said of allegations

based on the *Racketeer Influenced and Corrupt Organizations Act* 18 U.S.C. § 1962 et seq ("RICO"). [\*2] Here, in the course of alleging that his deed of trust did not allow certain third-party default-related service fees, plaintiff Melvin Neagle dresses up his complaint in both antitrust and RICO garb. While Neagle's complaint is long on pages and conclusory allegations, it is short on specific factual detail as to how these defendants violated antitrust or RICO laws while servicing Neagle's loan. Although he relies heavily on a Consent Order agreed to between his loan servicer and New York state regulators, none of the acts described in that case involve acts Neagle alleges the servicer did here. Because Neagle fails to state an antitrust, RICO, or financial elder abuse claim, defendants' motions to dismiss are granted.

## BACKGROUND<sup>1</sup>

Neagle purchases foreclosed homes at auction and rents them or sells them later for a profit. The Ocwen defendants engage in mortgage loan servicing. Ocwen Loan Servicing, LLC is a wholly owned subsidiary of Ocwen Mortgaging Servicing, Inc., which in turn is a wholly owned subsidiary of Ocwen Financial Corporation. "Founded in 1988 by William C. Erbey, Ocwen quickly became the largest non-bank loan servicer in the United States, and the fourth-largest servicer [\*3] of mortgages generally." Second Am. Compl. (SAC) ¶ 14. "As a non-bank mortgage loan servicer, Ocwen is responsible for the collection and remittance of principal and interest payments, the administration of escrow accounts, the collection of insurance claims, the management of loans that are in default, and foreclosures." SAC ¶ 19.

In 2009, defendant Altisource Solutions, Inc. "was spun off from Ocwen and became a completely independent company. Altisource is now the exclusive entity that provides Ocwen with third-party services relating to Ocwen's practices in the nonbank mortgage loan servicing market pursuant to a series of exclusive dealing arrangements, with a specific focus on subprime loans."<sup>2</sup> SAC ¶ 15. Defendant MTQLP Investors, L.P. "primarily performs mortgage liquidation[.]" SAC ¶ 16.

Neagle sets out the history of loans and the loan servicing industry, including in the aftermath of the housing market crash. Traditionally, banks serviced loans themselves and had a financial interest in the repayment of the loan. After the crash, servicing loans became unprofitable for banks. "Today, banks are reluctant to enter the market as a competitor of Ocwen, which has allowed Ocwen to [\*4] dominate as a non-bank mortgage loan servicer that specializes in subprime loans." SAC ¶ 22. Nonbank servicers like Ocwen have "a cost advantage relative to bank servicers in handling nonperforming loans. That cost advantage stemmed from both their specialization in this type of servicing and from their ability to harness technological innovations in order to reduce costs." SAC ¶ 22.

Ocwen is paid in contractual monthly servicing fees by the owner of the loan, often under a pooling and servicing agreement (PSA) with investors or noteholders. "Ocwen and other loan servicers assess fees on borrowers' accounts for services provided by third-parties, or for Ocwen's servicing itself. The fees and costs include, among other things, broker's price opinion ("BPO") fees, appraisal fees, title search fees, various 'technology' fees, late fees, escrow fees, and other ancillary fees." SAC ¶ 24. While a bank who services its own loans is concerned with interest profit, "Ocwen's primary concern as a loan servicer is to generate as much revenue as possible from fees and costs assessed against the mortgage accounts that it services." SAC ¶ 25.

After the housing market crash, Ocwen rapidly grew its business, [\*5] going from \$360 million in revenues in 2010 to \$2.2 billion in revenues in 2014. SAC ¶ 27. Much of Ocwen's growth came from "massive acquisitions:"

Due to the massive amounts of acquisitions by Ocwen, coupled with the reluctance of financial institutions to enter the servicing market as a competitor, Ocwen rapidly expanded as a nonbank loan servicer that

<sup>1</sup> At the motion to dismiss stage, I accept the allegations of the non-moving party, here Neagle, as true.

<sup>2</sup> As discussed below, there is nothing sinister about these "exclusive dealing arrangements." The Services Agreement is a fairly standard contract one finds whenever one company agrees to provide set goods or services to another company over a given time period. As discussed below, Neagle fails to allege this agreement results in a substantial foreclosure of the market for third-party default-related services market.

specialized in subprime loans. But the end of 2014, Ocwen serviced over 50% of all subprime mortgage loans in the nation.

SAC ¶ 29 (internal citation omitted).

"Ocwen developed technology services to reduce the cost of servicing loans, including software programs designed to manage homeowners' loan accounts and assess fees pursuant to protocols and policies designed by the executives at Ocwen." SAC ¶ 30. "In August of 2009, Ocwen spun-off its technology platforms business into a separate company, Altisource." SAC ¶ 31. Ocwen's Chairman of the Board, who owned 13% of Ocwen's stock, took the same position at Altisource. "Other key executives shared positions with Altisource as well." SAC ¶ 31.

"Ocwen contracted with Altisource to purchase mortgage and technology services under service agreements that extend through 2025. Ocwen quickly became [\*6] Altisource's largest customer, accounting for over 80% of Altisource's total revenue in 2014." SAC ¶ 32. "Altisource's revenues more than tripled between 2010 and 2014." SAC ¶ 52.

The close relationship between Ocwen and Altisource (and other "closely affiliated" companies) led to an investigation by the New York Department of Financial Services." See SAC ¶ 34 (quoting letter from regulators stating an "ongoing review of Ocwen's mortgage servicing practices has uncovered a number of potential conflicts of interest between Ocwen and other public companies with which Ocwen is closely affiliated."). Regulators questioned whether Ocwen had an "arms-length business relationship" with the affiliated companies and were "concerned that this tangled web of conflicts could create incentives that harm borrowers and push homeowners unduly into foreclosure." SAC ¶ 34. Quoting the regulators, Neagle alleges the servicing industry "presents the extraordinary circumstance where there is effectively no customer to select a vendor for ancillary services" and "Ocwen's use of related companies to provide such services raises concerns about whether such transactions are priced fairly and conducted at arms-length." [\*7] SAC ¶ 37.

At some point, Ocwen began serving Neagle's loan. "As a loan servicer, Ocwen's interactions with a borrower are governed by a mortgage contract." SAC ¶ 39. These contracts consist of the note and deed of trust and, at least with loans serviced by Ocwen, are generally identical as they follow the Fannie Mae template.

Neagle's deed of trust provides that in the event of a default, the lender will "pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property." Deed of Trust ¶ 9; ECF No. 57-1.<sup>3</sup> "Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower[.]" Deed of Trust ¶ 9. Neagle alleges that nothing in the deed of trust discloses "that the loan servicer or lender will engage in self-dealing or will mark-up the actual cost of those third party services to make a profit from the borrower's delinquency." SAC ¶ 42. This undisclosed mark-up is the focus of Neagle's claims:

Pursuant to the conspiracy, Ocwen directs Altisource to order and coordinate default-related services, and [\*8] Altisource places orders for such services with third-party vendors. The third-party vendors charge Altisource for the performance of the default related services, who then marks up the price, in numerous instances by 100% or more, and passes it along to Ocwen. Thereafter, Ocwen willfully accepts the inflated charge from Altisource, and bills the marked-up fees and costs to the borrower, increasing the balance owed.

SAC ¶ 45.

The inflated fees drive borrowers further into default. "In the present case, Plaintiff had incurred well over \$14,000.00 in debt as a result of artificially inflated fees and costs." SAC ¶ 70. At some point, Neagle defaulted on his loan. In April 2012, OneWest Bank FSB filed a foreclosure action against Neagle. SAC ¶ 80. On June 13, 2013, Ocwen purchased the mortgage servicing rights to Neagle's loan as part of a deal to purchase servicing rights on \$78 billion in unpaid principal loans. SAC ¶ 81. In October 2013, OneWest Bank FSB assigned the beneficial

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<sup>3</sup> The parties agree the Court may take judicial notice of the deed of trust.

interest in Neagle's deed of trust to Ocwen, who moved to substitute itself into the foreclosure action. On March 3, 2016, Ocwen assigned its rights to MTQLQ. SAC ¶ 94.<sup>4</sup>

## STANDARDS

To survive a motion to dismiss under [\*9] [Fed. R. Civ. P. 12\(b\)\(6\)](#), a complaint must contain sufficient factual matter that "state[s] a claim to relief that is plausible on its face." [Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#). A claim is plausible on its face when the factual allegations allow the court to infer the defendant's liability based on the alleged conduct. [Ashcroft v. Iqbal, 556 U.S. 662, 663, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#). The factual allegations must present more than "the mere possibility of misconduct." [Id. at 678.](#)

While considering a motion to dismiss, the court must accept all allegations of material fact as true and construe those facts in the light most favorable to the non-movant. [Burget v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 \(9th Cir. 2000\)](#). But the court is "not bound to accept as true a legal conclusion couched as a factual allegation." [Twombly, 550 U.S. at 555](#). If the complaint is dismissed, leave to amend should be granted unless "the pleading could not possibly be cured by the allegation of other facts." [Doe v. United States, 58 F.3d 494, 497 \(9th Cir. 1995\)](#).

## DISCUSSION

Neagle alleges the conspiracy to pass inflated fees to borrowers violated the Sherman Act, RICO, and constitutes Financial Elder Abuse under Oregon law in violation of [ORS § 124.100](#). As discussed below, Neagle fails to state a valid claim for any of his five claims. Ocwen and MTGLQ also argue dismissal is appropriate because Neagle failed to comply with the notice and cure provision of his deed of trust before filing this [\*10] action. I agree and begin with that argument.

### 1. NOTICE AND CURE PROVISION

Neagle's deed of trust states, "The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender." ¶ 13. Ocwen and MTGLQ are assigns of the lender. See SAC ¶¶ 78, 79, 82, 94 (alleging the original lender assigned the deed to OneWest Bank, FSB, who assigned the deed to Ocwen, who assigned the deed to MTGLQ). Section 20 of Neagle's deed of trust provides:

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of [Section 15](#)) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action.

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<sup>4</sup> Neagle includes a history of the foreclosure proceedings, with multiple reinstatements of the action followed by later orders vacating the earlier orders. Neagle alleges MTQLQ intentionally violated the automatic stay after Neagle filed for bankruptcy and then instructed the sheriff to sell Neagle's property after the foreclosure was dismissed. SAC ¶¶ 87-97. But those actions are not part of the alleged conspiracy, and the parties agree that Neagle still owns the property. At this stage, these allegations are not particularly relevant to Nagle's claims alleging defendants conspired to violate antitrust and RICO laws by inflating the fees charged to Nagle for default related services. As discussed below, these allegations are only relevant to Neagle's financial elder abuse claim.

Neagle did not allege that he provided Ocwen or MTGLQ with notice and opportunity to cure but argues [\*11] the provision does not apply because: (1) neither Ocwen nor MTQLQ is the "Lender;" (2) his claims are statutory, not contractual; and (3) notice here would be futile.

The Ninth Circuit considered, and rejected, the same arguments Neagle raises when affirming the dismissal, on notice and cure grounds, of a borrower's Fair Debt Collections Practices Act (FDCPA) claim against a loan servicer (also *Ocwen*).<sup>5</sup> *Giotta v. Ocwen Loan Serv., LLC*, 706 Fed. Appx. 421, 422-23 (2017) (unpublished). Though I am not bound by the unpublished *Giotta* opinion, I am not prevented from being persuaded by its logic. *Giotta* is directly on point and its reasoning is as sound as it is concise.

The borrowers there challenged the district court's dismissal of their FDCPA claim for failing to provide their loan servicer with notice and the opportunity to cure. Although the district court in *Giotta* relied on a written loan modification, the Ninth Circuit looked to the deed of trust. The notice provision there is identical to the notice provision here. In its brief discussion that applies equally well here, the Ninth Circuit explained:

1. The Notice Provision's text covers this action. The Notice Provision clearly applies to: (1) "any judicial action . . . that arises from the other [\*12] party's actions pursuant to this Security Instrument;" or (2) "any judicial action . . . that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument." The Giottas were in default on their mortgage. Therefore, the Deed of Trust authorized property inspections and valuations to protect the Lender's interest in the property and to pass the fees for those services on to the borrower: "Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees." In this case, the Giottas allege that Ocwen violated the FDCPA when it billed the Giottas for those fees without disclosing the profit structure of the third-party entity that conducted the services. Accordingly, the instant suit is a "judicial action . . . that arises from the other party's actions pursuant to this Security Instrument."
2. The Notice Provision requires notice to Ocwen. Per its text, the Notice Provision applies only to the "Lender." However, the [\*13] Deed of Trust explicitly provides that "[t]he covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successor and assigns of Lender." Further, it specifically notified the Giottas that the note may be sold. Although Ocwen is not the "Lender" as defined in the Deed of Trust, it is an assign. Per the record, OneWestBank assigned the servicing rights on the Giottas' mortgage to Ocwen . . . . Providing notice before filing an action is a benefit (as opposed to a binding covenant or agreement), because it gives the Lender prior notice and an opportunity to take corrective action before litigation is formally commenced. Therefore, as an assign of the Lender, the Notice Provision is a "benefit" of the "covenants and agreements" in the Deed of Trust, inuring to Ocwen.

706 Fed. Appx. at 422 (all but final alteration in original).

The reasoning in *Giotta* is persuasive. Neagle alleges that Ocwen and MTGLQ were (at least) assigns of the Lender. See SAC ¶¶ 78, 79, 82, 94. Neagle's claims arise from Ocwen and MTGLQ's actions pursuant to the deed of trust; i.e., servicing the loan and charging Neagle "fees for services performed in connection with [Neagle's] default . [\*14] . . . including property inspection and valuation fees." Deed of Trust ¶ 14.

Neagle argues that because his claims arise from statute and not contract, the notice provision does not apply. *Giotta* considered, and rejected, that argument. 706 Fed. Appx. at 422-23 (concluding notice provision did not

<sup>5</sup> Although *Giotta* did not address whether notice there would be futile, Neagle's futility argument is, itself, futile. Neagle alleges defendants caused his debt to increase by over \$14,000. SAC ¶ 70. Although Ocwen no longer services Neagle's loan, it could have decided to simply cut a check for that amount directly to Neagle. Alternatively, MTGLQ may have concluded reducing the amount of Neagle's debt is appropriate. Guessing what Ocwen or MTGLQ would have done had Neagle provided notice is purely speculative.

contravene the purpose of the FDCPA and "thus does not impermissibly abrogate" the statute). Although Neagle does not bring a FDCPA claim, the notice provision does not abrogate any of the claims he does bring.

The purpose of the Sherman Act is "to protect trade and commerce against unlawful restraints and monopolies." *Miranda v. Selig*, 860 F.3d 1237, 1240 (9th Cir. 2017) (quoting Sherman Act, ch. 647, 26 Stat. 209 (1890)). RICO's purpose is to prohibit racketeering activity. *Reves v. Ernst & Young*, 507 U.S. 170, 181-82, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993). ORS 124.110 seeks to prevent financial abuse of a vulnerable person via a wrongful taking of money or property. *Schmidt v. Noonkester*, 287 Ore. App. 48, 50 n.1, 401 P.3d 266 (2017). As in Giotta, "the Notice Provision does not contravene the statute[s'] purposes and, thus does not impermissibly abrogate the [statutes]." *706 Fed. Appx. At 422-23*; see also *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1170 (9th Cir. 2006) (noting party may generally waive statutory protection if waiver does not "contravene[] the statutory policy.") (quoting *New York v. Hill*, 528 U.S. 110, 116, 120 S. Ct. 659, 145 L. Ed. 2d 560 (2000)).

As Neagle does not allege he provided Ocwen or MTGLQ with notice and the opportunity to cure the alleged violations, [\*15] his claims against those defendants are dismissed. Because Altisource does not argue the notice provision applies to it, and because I assume Neagle could allege notice in an amended complaint, I turn to the merits of Neagle's claims.

## 2. ANTITRUST CLAIMS

Neagle brings antitrust claims under [sections 1](#) and [2](#) of the Sherman Act, [15 U.S.C. §§ 1, 2](#).<sup>6</sup> [Section 1](#) of the Sherman Act restricts unreasonable restraints on trade perpetrated by distinct entities acting in concert, whether via, "contract, combination . . . or conspiracy." See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984) (quoting [15 U.S.C. § 1](#)).

To successfully bring a claim under [section 1](#) of the Sherman Act, a plaintiff must prove three elements: (1) an agreement, conspiracy, or combination among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition; and (3) which actually causes injury to competition, beyond the impact on the claimant, within a field of commerce in which the claimant is engaged (i.e., "antitrust injury").

*McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811 (9th Cir. 1988) (internal citations omitted).

[Section 2](#) of the Sherman Act functions as a restraint against the tendency in capitalistic economies for single firms to seek and maintain monopoly power over a specific market. See *Verizon Commc'n Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004). [Section 2](#) prohibits monopolies as well as attempts or [\*16] conspiracies to form monopolies. *Image Tech. Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir. 1997); [15 U.S.C. § 2](#). Firms with monopoly power can set prices far above where the rational forces of supply and demand in a competitive marketplace would have them, to the detriment of both consumers and the economy as a whole. See *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995).

The enforcement mechanisms of [section 2](#) of the Sherman Act restricts the ability of firms to acquire monopoly power via illegal, anticompetitive actions, but are not meant to prevent a firm from acquiring an increased share of a specific market via legitimate business practices. See *Verizon Commc'n Inc.*, 540 U.S. at 407. To state a claim under [section 2](#), Neagle must allege the defendants "(1) possessed monopoly power in the relevant market, (2) willfully acquired or maintained that power through exclusionary conduct and (3) caused antitrust injury." *MetroNet Services Corp. v. Qwest Corp.*, 383 F.3d 1124, 1130 (9th Cir. 2004). "Monopoly power" under [section 2](#) is a higher standard than that of "market power" required under [section 1](#). *Image Tech. Services, Inc.* 125 F.3d at 1206.

While the specific elements required under [section 1](#) and [section 2](#) differ, those differences are immaterial when, as here, Neagle's antitrust claims fail on a fundamental level. Under either section, Neagle "must allege both that a

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<sup>6</sup> Neagle also seeks treble damages and an injunction under the Clayton Act, [15 U.S.C. §§ 15, 26](#).

'relevant market' exists and that the defendant has power within that market." [\*Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1044 \(9th Cir. 2008\)\*](#). The relevant market consists of a product market that "must encompass [\*17] the product at issue as well as all economic substitutes for the product." *Id. at 1045*. Dismissal is appropriate "if the complaint's 'relevant market' definition is facially unsustainable." *Id.*

Neagle alleges Ocwen operates in the "nonbank subprime mortgage loan servicing" market. Reply, 34; ECF No. 63. Neagle's first problem regarding the alleged relevant market is that nowhere in the complaint does he allege his mortgage is a subprime mortgage. More significantly, Neagle fails to allege facts demonstrating the "nonbank subprime mortgage loan servicing market" actually exists for antitrust purposes. While "nonbank subprime mortgage loan servicing" is certainly a product, Neagle fails to allege why obvious "economic substitutes for the product" are not included in the relevant market. Neagle alleges that banks also service mortgages. SAC ¶ 21. And while subprime mortgages must be serviced, so must prime mortgages. Both bank and nonbank prime servicers are obvious potential competitors to nonbank subprime servicers.

The complaint tacitly acknowledges this potential crossover competition. Neagle specifically alleges that Ocwen also services prime, or "conventional" mortgages. SAC ¶ 28. As of the [\*18] end of 2013, prime mortgages, along with "government insured" mortgages made up the majority of Ocwen's servicing portfolio. SAC ¶ 28. "For antitrust purposes, defining the product market involves identification of the field of competition: the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business." [\*Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1374 \(9th Cir. 1989\)\*](#).

Attempting to justify the proposed submarket, Neagle alleges "The market for servicing subprime mortgage loans is a market in which Ocwen specializes due to the high cost and inability of banks or prime-servicers to meet Ocwen's level of cost reduction." SAC ¶ 105. But "the scope of the relevant market is not governed by the presence of a price differential between competing products." [\*Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc., 512 F.2d 1264, 1274 \(9th Cir. 1975\)\*](#) (noting Supreme Court concluded the flexible wrapping market included cellophane, glassine, and grease-proof papers despite the fact that cellophane was two or three times more expensive than the others). Although Neagle alleges nonbank subprime mortgage loan servicers collect payments, administer escrow accounts, collect insurance claims, and manage loans in default and foreclosure, SAC ¶ 19, he omits obvious competitors from [\*19] his proposed submarket. It seems clear those competitors, who currently compete with Ocwen in the prime market, would perform those same tasks for the right price. Neagle's proposed nonbank subprime mortgage loan servicing market is "facially unsustainable." [\*Newcal Indus., Inc., 513 F.3d at 1045\*](#).

Altisource's proposed market fares no better. Neagle alleges Altisource's relevant market is the third-party default-related services market. SAC ¶ 106. Neagle expends little effort demonstrating that the default-related services market and the non-default related mortgage services market are in fact separate relevant markets. But even looking beyond that deficiency, Neagle must also allege "that the defendant has power within that market." [\*Newcal Indus., Inc., 513 F.3d at 1044\*](#). Regarding Altisource's market power, Neagle alleges:

Altisource generated over 80% of all of its revenue from Ocwen. Altisource's business focuses on providing third-party services for defaulted borrowers. As such, Altisource was able to exploit Ocwen's market share of over 50% of all subprime loans in the nation so that Altisource could rapidly expand its volume in the default related services market, more than tripling its revenue by 2014, completely insulating Altisource from competition [\*20] in its market and resulting in a substantial foreclosure of competitors.

SAC ¶ 106.

But alleging Altisource grew rapidly and received 80% of its revenue from Ocwen (who had a market share of over 50% in its own, separate and distinct relevant market), does little to establish Altisource had market power in the default-related services market. As noted by Altisource, "A roadside farm may advertise 'locally-grown blueberries,' and derive 100% of its revenue from the sale of such blueberries, but these facts are irrelevant to whether 'locally-grown blueberries' constitutes a distinct antitrust product market, and offers no basis to conclude that the farm

stand exercises market power within that market." Reply, 5-6 n.5. Neagle's response to Altisource's market power argument is puzzling:

The SAC alleges market power as well. [SAC] ¶ 6. Altisource's market share can be aggregated with Ocwen's market share due to the SAC's allegation of a conspiracy between the two parties. See *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1437 (9th Cir. 1995) ("The aggregation of market shares of rivals is justified if the rivals are alleged to have conspired to monopolize." The combined market share of Ocwen and Altisource is well above 50% of all defaulted borrowers serviced [\*21] by nonbank mortgage loan servicers, and is sufficient "as a matter of law to support a finding of market power." See *Rebel*, 51 F.3d at 1438 (ARCO's market share of 44 percent is sufficient as a matter of law to support a finding of market power.").

Resp. 10-11; ECF No. 64 (emphasis added) (footnote omitted).

*Rebel* dealt with an alleged conspiracy to fix prices at competing Las Vegas gas stations. *51 F.3d at 1437*. If Altisource and Ocwen were rivals, it would certainly apply. But although Altisource and Ocwen are alleged conspirators, they are not competitors. They are two independent companies, SAC ¶ 15, operating in two different distinct markets. Considering the SAC does not make even a cursory description of the alleged default-related services market, Neagle fails to allege Altisource has market power within it.

As Neagle fails to allege a relevant market for Ocwen and fails to allege that Altisource has market power in the default-related services market, he fails to state a claim under section 1 or 2 of the Sherman Act. *Newcal Indus., Inc.*, 513 F.3d at 1045. Because additional deficiencies in Neagle's antitrust claims demonstrate leave to amend would be futile, I briefly touch on some of the other deficiencies in the SAC.

A rather large hurdle for Neagle is that, [\*22] at least as to the impact on the nonbank subprime loan servicing market, the alleged conspiracy simply does not make sense. Neagle alleges:

Ocwen and Altisource entered into an agreement to circumvent the borrower protections in a mortgage contract in order to continue profiting in a market that would otherwise drive Ocwen out. As a nonbank loan servicer, Ocwen's main source of profit comes from fees and costs generated by third-party services, not the interest on the loan.

SAC § 43.

The first sentence is largely conclusive, essentially just adding the specific defendant names into language found in any antitrust treatise outlining a general antitrust conspiracy. At first glance, it certainly sounds impressive, especially as it alleges that absent the conspiracy, Ocwen would be driven out of the relevant market.

The second sentence details how Ocwen makes a profit: "from fees and costs generated by third-party services." But the reader then remembers that Ocwen does not mark up the alleged overcharge Altisource bills it for third party services. As Ocwen merely passes along the alleged overcharge to the borrower, the very best it can ever hope for is to be reimbursed at some later point for the [\*23] overcharge it earlier paid Altisource. In other words, Ocwen merely hopes to eventually break even from this conspiracy. There is no profit "from fees and costs generated by third-party services" for Ocwen in the alleged conspiracy. Every penny of profit from this alleged conspiracy flows to Altisource, not Ocwen. Therefore, the alleged conspiracy does not allow Ocwen to "continue profiting in [the non-bank subprime mortgage servicing] market that would otherwise drive Ocwen out."<sup>7</sup>

Additionally, Neagle fails to allege Ocwen and Altisource reached an agreement or conspired to restrain trade.<sup>8</sup> Neagle points to the fact that the founder and Chairman of Ocwen is also the Chairman of Altisource and "[o]ther key executives shared positions with Altisource as well," SAC ¶ 31; the Consent Order Ocwen agreed to with New

<sup>7</sup> While the alleged conspiracy would benefit Altisource in the "third party default related services" market, as described above, Neagle fails to provide any allegations as to Altisource's market power in that market.

<sup>8</sup> Neagle does not make even a half-hearted attempt at connecting MTGLQ to this conspiracy. As described below, the only specific factual allegations as to MTGLQ are that it now owns the mortgage and it filed a court document asking the Sheriff to conduct a foreclosure sale of Neagle's home.

York regulators; and a Services Agreement between Ocwen and Altisource. None, however, actually point to an agreement to unlawfully restrain trade.

Much like any contract where one company agrees to provide certain services or goods for a set time to another company, the Services Agreement sets out the price Ocwen will pay Altisource for the services Altisource provides. Neagle [\*24] notes the agreement designates the services "Fixed Price Project" and argues that this is direct evidence of price fixing. But the Services Agreement is a standard contract, not evidence of an agreement to illegally restrain trade. "Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." [Broad. Music, Inc. v. Columbia Broad. Sys., Inc.](#), 441 U.S. 1, 9, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979). While it clearly sets a "fixed price" for certain services, the Services Agreement also states, "The parties intend that any such fees reflect the market rate for comparable services." ¶ 4(a).

Additionally, the Services Agreement is not an unlawful exclusive dealing agreement. As shown above, Neagle provides no allegations concerning Altisource's share of the third-party default-related services market. Absent that, Neagle cannot demonstrate the Services Agreement forecloses competition in a substantial share of that market. [ZF Meritor, LLC v. Eaton Corp.](#), 696 F.3d 254, 286 (3rd Cir. 2012). Perhaps recognizing his inability to allege Altisource's market share and power in the third-party default-related services market, Neagle points to the existence of a "Services Letter," which Neagle apparently has never seen but [\*25] which he argues "likely contains terms concerning market share and volume." Resp. 30; ECF No. 63. Perhaps that letter exists somewhere, and perhaps it contains information that would be helpful to Neagle now. But it is not before the court at this time, and Neagle fails to demonstrate the agreement would foreclose substantial competition in the market for third-party default-related services market.

The Consent Order likewise fails to help Neagle. That document merely shows New York regulators were concerned about conflicts of interest between Ocwen and other public companies who had the same Chairman. The Consent Order states the Chairman "participated in the approval of a number of transactions between the two companies or from which Altisource received some benefit, including the renewal of Ocwen's forced placed insurance program in early 2014." ECF No. 66-2, ¶ 21. Additionally, "In certain circumstances, [an Altisource subsidiary] has charged more for its services to Ocwen than to other customers—charges which are then passed on to borrowers and investors." ECF No. 66-2, ¶ 22. Hubzu, the subsidiary mentioned in the Consent Order, performed online auctions for Ocwen (via Altisource). [\*26] The SAC does not mention Hubzu and Neagle does not allege that his home was the subject of an online auction. The Consent Order is silent as to property preservation fees, BPOs, title examination or search fees, appraisals, property inspections, or escrow account related fees. In other words, the Consent Order is silent as to any conflict of interest regarding any services Neagle alleges were charged here.<sup>9</sup>

"[T]o allege an agreement between antitrust co-conspirators, the complaint must allege facts such as a 'specific time, place, or person involved in the alleged conspiracies' to give a defendant seeking to respond to allegations of a conspiracy an idea of where to begin." [Kendall v. Visa U.S.A., Inc.](#), 518 F.3d 1042, 1047 (9th Cir. 2008). The Services Agreement to "fix prices" is the closest Neagle comes to alleging an actual agreement. But that standard business contract does not unreasonably restrain trade. See [NCAA v. Bd. of Regents](#), 468 U.S. 85, 98, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984) (noting that "every contract is a restraint of trade, and as we have repeatedly recognized, the Sherman Act was intended to prohibit only unreasonable restraints of trade."). This is a far cry from conspiracy cases where the plaintiffs allege not only the opportunity to collude (as Neagle does), but also support those allegations with specific [\*27] factual allegations of multiple meetings between senior executives of different companies who entered express agreements to achieve a common goal in violation of antitrust laws (as Neagle does not). See [In re Lithium Ion Batteries Antitrust Litig.](#), 2014 U.S. Dist. LEXIS 7516, 2014 WL 309192, at \*3 (N.D. Cal. 2014) ("Plaintiffs allege particular meetings, particular attendees, particular times and places, and the content of particular conversations" and documents memorializing the meetings); [In re High-Tech Emp. Antitrust Litig.](#), 856

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<sup>9</sup> As discussed below, Neagle's allegation regarding lender-placed insurance fails to support his claims as that claim was released as part of the class settlement.

[F. Supp. 2d 1103, 1118-19 \(N.D. Cal. 2012\)](#) (complaint "details the actors, effect, victims, location and timing of the six bilateral agreements [not to poach employees from one another]," quotes one CEO discussing the alleged conspiracy with another CEO, and noted a DOJ investigation found the agreements "per se unlawful" and defendants agreed the DOJ "stated a federal antitrust claim."). Other than the benign Services Agreement, Neagle does not state who entered into an agreement (other than the companies generally), or where or when defendants entered into an agreement to unlawfully restrain trade.

Additionally, Neagels' five specific alleged violations—of a horizontal agreement, an unreasonable resale price maintenance agreement, a tying arrangement, an unreasonable exclusive dealing arrangement, and discriminatory pricing—fare no better. Some [\*28] of Neagle's responsive arguments are bizarre, turning antitrust theory on its head. Perhaps the best example is Neagle's argument regarding how predatory pricing supports his discriminatory pricing theory:

Loan servicers like Ocwen compete by reducing their costs, resulting in a greater profit margin for the loan servicer. To drive competitors out of the market, Ocwen conspires with Altisource to inflate third-party services sold to Ocwen under its Services Agreement, something competing loan servicers cannot do. Therefore, Ocwen suffers a loss that is identical to the loss suffered by a monopolist that sells its products below its cost. See [Solyndra, 62 F. Supp. 3d. at 1040](#) ("In a typical predatory-pricing scheme, the predator reduces the sale price of its product (its output) to below cost, hoping to drive competitors out of business."). Ocwen just willingly pays higher prices instead.

While the common below-cost predatory pricing scheme forecloses competition by selling services at a price that competitors cannot sustain, Ocwen and Altisource's inflated predatory pricing scheme provides a profit margin that competitors cannot obtain. See ECF No. 47 ¶ 102(5). The effect is identical: the exclusion of competitors from [\*29] the market.

As long as Plaintiff has alleged predatory pricing that can result in the exclusion of competitors, Plaintiff's allegations are "sufficient to avoid dismissal" under section one of the Sherman Act.

Resp. 32-33; ECF No. 63.

The "output" here are default-related services. Altisource, not Ocwen, benefits from the inflated pricing. Unlike a true predatory pricing scheme, which trades short term losses for less competition (and greater profits) later, Altisource's own short term profits will not drive its competitors out of business. Altisource merely rakes in more profits than its competitors in the default-related services market. After all, a conspiracy "to charge higher than competitive prices" would tend to benefit Altisource's competitors in the default-related services market. [Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 582-83, 106 S. Ct. 1348, 89 L. Ed. 2d 538 \(1986\)](#). And even assuming Ocwen is eventually reimbursed for the higher prices it willingly pays Altisource, the best it can hope for is to break even. The scheme to willfully overpay makes Ocwen less competitive in its market, where loan servicers "compete by reducing their costs, resulting in a greater profit margin for the loan servicer." Ocwen's competitors in the nonbank subprime mortgage loan servicing [\*30] market are not harmed by the inflated profits Altisource makes in the default-related services market. In addition to not making economic sense, Neagle's "inflated predatory pricing scheme" fails to demonstrate any competitors would be excluded from either relevant market.

Neagle's attempt at salvaging his tying theory also fails.

A tying arrangement is a device used by a seller with market power in one product market to extend its market power to a distinct product market. To accomplish this objective, the seller conditions the sale of one product (the tying product) on the buyer's purchase of a second product (the tied product). Tying arrangements are forbidden on the theory that, if the seller has market power over the tying product, the seller can leverage this market power through tying arrangements to exclude other sellers of the tied product.

The Supreme Court has developed a unique per se rule for illegal tying arrangements. For a tying claim to suffer per se condemnation, a plaintiff must prove: (1) that the defendant tied together the sale of two distinct products or services; (2) that the defendant possesses enough economic power in the tying product market to

coerce its customers [\*31] into purchasing the tied product; and (3) that the tying arrangement affects a not insubstantial volume of commerce in the tied product market.

*Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 912-13 (9th Cir. 2008) (internal citations, quotations, and footnotes omitted).

Neagle argues Ocwen used its market power in the nonbank subprime mortgage serving market to force Neagle to purchase the inflated third-party default-related services. There are multiple fatal flaws with this theory. First, in this alleged scheme, the buyer of the tying product (the owner of the mortgage) never buys the tied product (third-party default-related services). Neagle therefore can never establish that Ocwen used its market power in the loan servicing market to coerce the owner of the mortgage to purchase third-party default-related services.

Second, Ocwen does not sell third-party default-related services, it buys them (allegedly at an inflated price) from Altisource and then passes those charges on to the borrower. Tying arrangements are prohibited because the seller of the tying product "can leverage this market power through tying arrangements to exclude other sellers of the tied product." *Cascade Health Solutions*, 515 F.3d at 912. The seller of the tying product needs an unlawful advantage (market power in the [\*32] tying market) to protect its tied product from competition. Here, Altisource, the seller of the tied product, does not even participate in the tying market and has no leverage to force the buyer of the tying product to also purchase third-party default-related services.

Third, Neagle cannot prove a tying arrangement where he is not a purchaser in either the tying or the tied market. Because Neagle did not purchase either product, he could not have influenced competition in either market. Neagle never wanted to purchase any default-related services. To the extent Neagle argues he may bring a tying claim as an "indirect purchaser" of default-related services, his argument is barred by the zero foreclosure doctrine. "Zero foreclosure exists where the tied product is completely unwanted by the buyer." *Blough v. Holland Realty, Inc.*, 574 F.3d 1084, 1089 (9th Cir. 2009). "[W]hen a purchaser is 'forced' to buy a product he would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed." *Id.* (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)).

Moving past the flawed tying theory, Neagle fails to allege a horizontal conspiracy [\*33] to inflate "charges incurred by horizontally situated and independent third-party default related services providers enlisted by Altisource," SAC ¶ 102(1) because he fails to allege the third-party providers conspired to fix the prices charged to Altisource. Because there is no allegation the third-party service providers agreed on fix prices, Neagle fails to establish the "rim" of the conspiracy. *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1192 (9th Cir. 2015) ("the rim of the wheel, which consists of horizontal agreements among the spokes" is an element of a hub-and-spoke conspiracy). Altisource's mere act of charging Ocwen more than it paid the third-party service providers does not support Neagle's claim because that mark-up "suggests a rational business decision, not a conspiracy." *Kendall*, 518 F.3d at 1049. After all, a middleman who does not mark up the price it charges from the price it paid will not stay in business for long.

Neagle similarly fails to demonstrate defendants entered into "an illegal resale price maintenance agreement which requires servicers to charge borrowers for fees and default related services in an amount that is no less than the inflated price required by Altisource." SAC ¶ 102(2). While the Services Agreement provides the fixed price Ocwen [\*34] will pay Altisource for certain third-party services, Neagle fails to point to any agreement between the two concerning a price Ocwen must charge the borrower. That Ocwen does not charge the borrower less than what it paid to Altisource is not evidence of an "illegal resale price maintenance agreement."

Neagle's attempted monopolization claim suffers from many of the same fatal deficiencies noted above. Additionally, consumers<sup>10</sup> such as Neagle "lack standing to bring a claim for attempted monopolization." *Simpson v.*

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<sup>10</sup> Neagle is, at best, an indirect consumer of third-party default-related services. He is not a consumer, even indirectly, of nonbank subprime mortgage loan services.

US West Communications, Inc., 957 F. Supp. 201, 205 (D. Or. 1997). The competitor, not the consumer, is the party with antitrust standing to bring a claim of attempted monopolization. In re Air Passenger Reservation Sys., 727 F. Supp. 564, 570 (C.D. Cal. 1989) (citing P. Areeda & H. Hovencamp, Antitrust Law ¶¶ 340.2b & 337.1 (1988 Supplement)). After all, while supracompetitive rates are a result of a monopoly, higher rates absent a monopoly are invitations for new competitors to enter the market, not exclusionary acts. *Id.* Thus, higher prices paid by consumers in an attempted monopolization, as Neagle alleges here, are not injuries the antitrust laws were designed to prevent.

The fundamental defects in Neagle's pleadings, the tacit acknowledgment that absent a Services Letter that he has never seen he cannot allege Altisource's [\*35] market share, and Neagle's bizarre arguments (including his "inflated predatory pricing" argument) convince the court that no amount of repleading will save Neagle's antitrust claims.

### 3. RICO CLAIMS

"To state a claim under § 1962(c), a plaintiff must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Sanford v. MemberWorks, Inc., 625 F.3d 550, 557 (9th Cir. 2010) (quoting Odom v. Microsoft Corp., 486 F.3d 541, 547 (9th Cir. 2007)).

The parties agree that because Neagle bases his RICO claims on mail and wire fraud, those claims must satisfy rule 9(b)'s heightened pleading standards for claims sounding in fraud. To state a claim for wire or mail fraud, Neagle must allege: "(1) formation of a scheme or artifice to defraud; (2) use of the United States mails or wires, or causing such a use, in furtherance of the scheme; and (3) specific intent to deceive or defraud." Sanford v. MemberWorks, Inc., 625 F.3d 550, 557 (9th Cir. 2010). Neagle must state with particularity "the factual circumstances of the fraud itself." *Id.* (quoting Odom, 486 F.3d at 554).

What the SAC lacks in specific factual allegations, it makes up for in length. Throughout the 43-page SAC and nearly 100 pages of briefings in opposition to the motions to dismiss, Neagle repeatedly takes a lot of space to say remarkably little about how these defendants conspired to defraud him in the course of servicing [\*36] his mortgage.

Neagle alleges few specific instances where Ocwen and closely affiliated companies conspired to inflate fees. Neagle points to the Consent Order between Ocwen and New York regulators, where those parties agreed:

In certain circumstances, [Altisource subsidiary] Hubzu has charged more for its services to Ocwen than to other customers—charges which are then passed on to borrowers and investors. Moreover, Ocwen engages Altisource Portfolio subsidiary REALHome Services and Solutions, Inc. as its default real estate agency for short sales and investor-owned properties, even though this agency principally employs out-of-state agents who do not perform the onsite work that local agents perform, at the same cost to borrowers and investors.

Consent Order ¶ 22; ECF No. 66-2; SAC ¶50.

While that is a specific factual allegation, Neagle does not allege Hubzu provided, let alone charged Ocwen for, any services performed on Neagle's loan. Similarly, Neagle does not allege REALHome charged Ocwen for any services on his loan. Neither Hubzu nor REALHome are mentioned in the SAC, and Neagle does not allege any defendant conducted a short sale.

Neagle also points to a scheme to overcharge for [\*37] lender-placed insurance. SAC ¶¶ 53-58. In this lone specific factual allegation of an inflated fee Ocwen actually charged him, Neagle alleges:

Ocwen imposed a lender-placed insurance policy obtained from SWBC onto Plaintiff in July of 2014. The master policy number of the insurance policy was NP098022301. Consistent with the agreement to artificially inflate the charge of this policy, Altisource received inflated fees and costs that were ultimately charged to Plaintiff through Ocwen's agreement with SWBC, and SWBC's agreement with Altisource.

SAC ¶ 57.

This allegation appears to meet rule 9(b)'s requirement that Neagle must allege the who, what, where, and when concerning the alleged fraud. Neagle, however, released any claims regarding lender-placed insurance as part of

the class action settlement in *Lee v. Ocwen Loan Servicing, LLC*, S.D. Fla. No. 0:14-cv-60649-JG.<sup>11</sup> Ocwen Req. Judicial Notice, Ex. C; ECF No. 57-3. The *Lee* settlement released all claims from borrowers charged by Ocwen under a lender-placed insurance policy from January 1, 2008 through January 23, 2015. [\*Lee, 2015 U.S. Dist. LEXIS 121998, 2015 WL 544813, at \\*3 \(Sept. 14, 2015\)\*](#). Class members released any claims that could have been brought in the class action, or that relate or pertain in any way to Ocwen's [\*38] issuance of lender-placed insurance policies during the settlement class period. Ocwen Req. Judicial Notice, Ex. C, ¶ 2(a), (b). Among other claims, class members released any claims of "kickbacks" or "tying" arrangements between Ocwen and lender-placed insurance. ¶ 2(b). The lender-placed insurance allegation therefore does not actually support Neagle's claims.

Neagle's generalized allegations fall well short of establishing the who, what, when and where necessary to meet the heightened pleading requirements for a fraud claim. Conspicuously absent is any allegation of Ocwen charging Neagle a specific, inflated fee on a specific date:

66. Another fee or cost that is significantly marked-up includes title examination and/or title search fees. Title related fees assessed by Ocwen and charged to borrowers and Plaintiff are significantly marked-up, at times exceeding \$800. Moreover, fees and costs incurred by hiring "property preservation" vendors are commonly marked up. Plaintiff was excessively charged for "property preservation" fees by Ocwen and subsequent loan servicers of Plaintiff's mortgage loan. Plaintiff was also charged for escrow fees related to property taxes and for the [\*39] balance of tax payments forwarded by Ocwen into escrow, despite having made payments for property taxes himself.

67. The above described costs and fees are not exclusive. Ocwen and subsequent servicers participating with Ocwen and the conspiracy between Ocwen and Altisource charged marked up fees related to several other types of third party services and mortgage insurance for lender placed insurance.

\* \* \* \*

84. During the relevant period, Ocwen assessed inflated fees and costs to Plaintiff's mortgage balance which included, *inter alia*, (1) property preservation fees, which were repeatedly and excessively charged to Plaintiff's account, sometimes with multiple unexplained "property preservation" charges during one monthly period; (2) broker price opinion fees, which despite costing approximately \$30,<sup>12</sup> were charged to Plaintiff for anywhere from \$80 to \$100; (3) title examination and title search fees; (4) lender-placed insurance costs and fees; (5) appraisals; (6) property inspections; and (7) escrow account related fees, among other things.

\* \* \* \*

86. Ocwen alone maintains a complete accounting of all fees assessed and paid, and the details of each and every fee assessed and paid cannot [\*40] be alleged with complete precision without access to Ocwen's records. Plaintiff has attempted to obtain these records from Ocwen and its successors, but has routinely been denied access to this information.

SAC.

Neagle need not allege with complete precision "the details of each and every fee assessed and paid," but he needs to allege at least one to state a claim for mail or wire fraud. Neagle's RICO claims do not rely only on the inflated charge, but on the fact that defendants used the mails and wires to further their scheme to defraud him. [\*Sanford, 625 F.3d at 557.\*](#) In a general manner, Neagle alleges the defendants used mailings or calls to perpetuate the scheme:

134. Furthermore, to lull homeowners into a sense of trust and dissuade them from challenging Ocwen's unlawful charges, Ocwen concealed the scheme from borrowers by telling them, in statements and other documents, that such fees are in accordance with the terms of their mortgage.

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<sup>11</sup> Negale does not dispute that the final judgment in *Lee* is subject to judicial notice.

<sup>12</sup> Earlier in the SAC, Neagle alleges that Ocwen paid agents \$45 to \$50 for a BPO 10 years earlier, in 2004. SAC ¶ 65.

135. The mortgage invoices, loan statements, or proofs of claims provided to borrowers disguised the fact that the default-related service fees assessed on homeowners' accounts were marked-up. By disguising the true nature of amounts purportedly owed in communications [\*41] to borrowers, the Ocwen Enterprise made false statements using the internet, telephone, facsimile, United States mail, and other interstate commercial carriers.

SAC.

But other than the lender-placed insurance allegation (which Neagle cannot rely on), Neagle includes no specifics at all as to when any defendant used the mails or wires to defraud him. Neagle does not, for example, allege he received a mortgage statement on a specific date, sent from a specific defendant, that included a specific fraudulent charge. "[T]o avoid dismissal for inadequacy under [Rule 9\(b\)](#), [the] complaint would need to state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." [Sanford, 625 F.3d. at 558](#). Neagle's response concedes he cannot plead his fraud claims with specificity: "The above-described allegations concern the 'time' and 'place' of the fraudulent activities because Plaintiff alleges the period of time that Ocwen serviced Plaintiff's loan, and the 'nature' of the fraudulent activities are alleged by the category of fees that were charged to Plaintiff's account."<sup>13</sup> Resp. 42-43; ECF No. 63. But merely alleging that Ocwen serviced his loan for 2.5 years and [\*42] the alleged fraud happened at some point during that time period will not do. Pleading the specifics of an alleged scheme, without alleging the specific times and places of the "factual circumstances of the fraud itself[,]" fails to rise to [rule 9\(b\)](#)'s heightened pleading standards. [Sanford, 625 F.3d at 557-58](#) (where it is reasonable that plaintiff would have personal knowledge of the relevant facts, plaintiff must plead specific time and place in addition to outlining the general scheme).

Neagle argues [Weiner v. Ocwen Fin. Corp., 2015 U.S. Dist. LEXIS 99156, 2015 WL 4599427 \(E.D. Cal.\)](#) "is nearly identical to the allegations in this case." Resp. 43. For two reasons, *Weiner*, a case involving essentially the same allegations as to Ocwen's alleged scheme to defraud borrowers, does not help Neagle. First, *Weiner* brought his claims as part of a class action. Second, *Weiner* alleged two specific BPO fees and one title search, and for each instance, *Weiner* included the specific amount Ocwen billed him, the amount he should have been billed, and the exact dates Ocwen assessed the fees on his mortgage account. [2015 U.S. Dist. LEXIS 99156, \[WL\] at \\*7-8](#). As noted, Neagle does not include any specific allegations. As Neagle does not specifically allege a single false representation any defendant sent him using the mails or wires, his RICO claims are dismissed. [\*43] As Neagle fails to state a RICO violation, his RICO conspiracy claim fails. [Sanford, 625 F.3d at 559](#).

#### 4. FINANCIAL ELDER ABUSE

"A statutory claim for financial abuse has four elements: there must be (1) a taking or appropriation (2) of money or property (3) that belongs to an elderly or incapacitated person, and (4) the taking must be wrongful." [Church v. Woods, 190 Ore. App. 112, 117, 77 P.3d 1150 \(2003\)](#). "Conduct generally is wrongful if it is carried out in pursuit of an improper motive or by improper means . . . . Improper means, for example, include violence, threats, intimidation, deceit, misrepresentation, bribery, unfounded litigation, defamation and disparaging falsehood." [Id. at 118](#) (internal quotation marks omitted).

Neagle alleges the "Defendants wrongfully took and withheld the property of Plaintiff by charging unlawfully inflated fees, costs, mortgage insurance premiums, and escrow fees, among other things, and by foreclosing on plaintiff's mortgage and selling plaintiff's home, without good cause and in bad faith." SAC ¶ 151. As for the allegedly inflated fees, the fact that Ocwen added those to Neagle's debt does not qualify as a "taking" under the statute. "[ORS chapter 124](#) does not define 'takes' or 'taking.' The ordinary meaning of 'take' is 'to transfer into one's own keeping [\*44] [or to] enter into or arrange for possession, ownership, or use of[.]"' *Id.* (quoting *Webster's Third New Int'l Dictionary* 2330 (unabridged ed 1993) (alterations in original)). Neagle does not allege he ever paid one of the disputed fees (that he fails to state with specificity). Adding to the amount of Neagle's debt is not a taking or appropriation of Neagle's money or property.

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<sup>13</sup> Ocwen points out that during the mandatory conferral process before filing motions, Neagle's attorney conceded he could not plead additional specific factual allegations. ECF No. 68, 40.

Neagle alleges that Ocwen initiated unfounded litigation, i.e., foreclosure proceedings. Even assuming "unfounded litigation" satisfies the "wrongful element" of financial elder abuse, Neagle must still meet the "taking" element. *Schmidt v. Noonkester, 287 Ore. App. 48, 54-55, 401 P.3d 266 (2017)*. In *Schmidt*, plaintiffs brought a baseless fraud claim against the elderly defendant. The court concluded that "the alleged damages incurred by the defendant—the time, effort, stress, and expense incurred in defending against plaintiffs' fraud claim—do not involve a transfer of defendant's money or property into plaintiffs' own keeping." *Id. 287 Ore. App. at 55*.

Neagle alleges that on May 3, 2016, Ocwen assigned all rights to Neagle's property to MTGLQ. SAC ¶ 94. At that time, the foreclosure proceedings were ongoing, and there had been no sale of Neagle's property. Therefore, even assuming the foreclosure [\*45] proceedings were "unfounded litigation" and therefore "wrongful," Neagle fails to allege Ocwen conducted an "unlawful taking" of his property.<sup>14</sup>

The only specific factual allegations as to MTGLQ in the 43-page complaint are: (1) on May 3, 2016, Ocwen assigned its rights in Neagle's property to MTGLQ; (2) "MTGLQ simultaneously filed a Praecept for Writ of Execution, instructing the Linn County Sheriff to sell Plaintiff's property at public auction;" and (3) the Sheriff "sold Plaintiff's home and property to MTLGQ on July 19, 2016." SAC ¶ 95. But these allegations do not demonstrate MTLGQ was aware of the conspiracy to inflate fees for third-party default-related services between Ocwen and Altisource.<sup>15</sup>

Throughout the SAC, the defendants are often mashed together, which Neagle apparently believes is sufficient because he labels this a "conspiracy." To take but one example:

In this complaint, whenever reference is made to any act, deed, or conduct of any one of the above-mentioned defendants, committed in connection with the combination and conspiracy alleged herein, the allegation means the defendants collectively, or the defendant or defendants that are the subject of the relevant allegation [\*46] collectively, and each defendant engaged in the act, deed, or conduct by or through one or more of their officers, directors, agents, employees, coconspirators, or representatives, each of whom was actively engaged in the management, direction, control, or transaction of the ordinary business and affairs of defendants individually and collectively, and the combination and conspiracy itself.

SAC ¶ 17.

For the purpose of a motion to dismiss, the entire paragraph above says absolutely nothing. Unlike Altisource, which Neagle alleges is closely connected to Ocwen through the common Chairman and other senior executives, there are no allegations linking MTGLQ to Ocwen or Altisource. The only alleged connection between MTGLQ and either other defendant is, "On or about May 3, 2016, Ocwen filed an Assignment of Judgment purporting to assign all right[s], title, and interest in Plaintiff's property, including the rights as judgment creditor for Plaintiff's property, to MTGLQ Investors, L.P." SAC ¶ 94. There is no allegation that MTGLQ knew of the allegedly inflated fees, or even knew that Neagle challenged the fees.<sup>16</sup> Neagle alleges defaulting on his mortgage. SAC ¶ 3. Other than generally alleging [\*47] that the three defendants acted "collectively," there is no allegation that MTGLQ knew the foreclosure proceedings were "wrongful."

Additionally, in his response, Neagle admits that even assuming the foreclosure proceedings were "wrongful," there was no "taking" of Neagle's property:

The order that reinstated the case in which MTGLQ filed its Praecept for Writ of Execution was entered during a valid automatic bankruptcy stay. [SAC ¶ 92] A bankruptcy stay applies to "any act . . . to exercise control over property of the estate," *11 U.S.C.A. § 362(a)(3)*, including "the commencement . . . of a judicial, administrative,

<sup>14</sup> Other than the general allegations of a conspiracy between the defendants, there are no allegations that Altisource ever took, wrongfully or otherwise, any money or property of Neagle's.

<sup>15</sup> The Court does not intend to imply that Neagle has, in fact, adequately pleaded a conspiracy between Ocwen and Altisource. I merely point out that the SAC is hopelessly deficient in connecting MTGLQ to the alleged conspiracy.

<sup>16</sup> As noted, Neagle did not allege he gave any defendant notice and opportunity to cure before filing this action.

or other action." *Id.* (a)(1). Unless a party obtains relief from a bankruptcy court, "violations of the stay are void." *In re Schwartz*, 954 F.2d 569, 573 (9th Cir. 1992). Therefore, Ocwen's order reinstating the case in which MTGLQ filed its Praeipe for Writ of Execution was "void." *Id.* It logically follows that MTGLQ's filing were void, which is why the sale was rescinded.

Resp. 14; ECF No. 65.

Intentionally or not, Neagle leaves out the final logical step: a void foreclosure sale that is quickly rescinded "do[es] not involve a transfer of [Neagle's] money or property into [MTGLQ's] 'own keeping'." *Schmidt*, 287 Ore. App. at 54-55. To be clear, Neagle does not allege that [\*48] after the void sale, MTGLQ moved into the property and changed the locks. Quite the opposite, Neagle alleges that somehow the void Praeipe for Writ of Execution resulted in a sale occurring by operation of law under *ORS § 18.936*, which provides that a judgment creditor like Altisource "may instruct the sheriff to accept any bid that matches the amount of the judgment creditor's bid." Especially when Neagle alleges the Praeipe for Writ of Execution was itself void, a void sale under *§ 18.936(3)* is not a "taking" under *ORS 124.110*.

## CONCLUSION

Naegle chose to frame this action challenging the reasonableness of servicing fees charged under his mortgage contract as a conspiracy to violate antitrust and RICO laws. In reading the complaint and Neagle's responses, one continually pictures Neagle attempting to force a square peg into a round hole. I do not mean to imply that I approve of the scheme alleged here. I merely say that Neagle does not state a claim for antitrust or RICO violations. Nor does Neagle state a claim for financial elder abuse. As Neagle did not comply with the notice and cure provision of his deed of trust, his claims are dismissed. Because it is clear leave to amend would be futile, Neagle's claims are [\*49] dismissed with prejudice.

IT IS SO ORDERED.

DATED this 1st day of March, 2019.

/s/ Michael McShane

Michael McShane

United States District Judge

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## **Quality Auto Painting Ctr. of Roselle v. State Farm Indem. Co.**

United States Court of Appeals for the Eleventh Circuit

March 4, 2019, Decided

No. 15-14160, No. 15-14162, No. 15-14178, No. 15-14179, No. 15-14180

### **Reporter**

917 F.3d 1249 \*; 2019 U.S. App. LEXIS 6488 \*\*; 2019-1 Trade Cas. (CCH) P80,686; 27 Fla. L. Weekly Fed. C 1731

QUALITY AUTO PAINTING CENTER OF ROSELLE, INC., Traded as Prestige Auto Body, Plaintiff-Appellant, versus STATE FARM INDEMNITY COMPANY, STATE FARM GUARANTY INSURANCE COMPANY, et al., Defendants-Appellees.ULTIMATE COLLISION REPAIR, INC., Plaintiff-Appellant, versus STATE FARM INDEMNITY COMPANY, STATE FARM GUARANTY INSURANCE COMPANY, et al., Defendants-Appellees.CAMPBELL COUNTY AUTO BODY, INC., Plaintiff-Appellant, versus STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM FIRE & CASUALTY COMPANY, et al., Defendants-Appellees.LEE PAPPAS BODY SHOP, INC., DAVID C. BROSIUS, d.b.a. Martins Auto Body Works, Inc., ART WALKER AUTO SERVICES, INC., WHITEFORD COLLISION AND REFINISHING, INC., Plaintiffs-Appellants, versus STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM FIRE & CASUALTY COMPANY, et al, Defendants-Appellees.CONCORD AUTO BODY, INC., Plaintiff-Appellant, versus STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM FIRE & CASUALTY COMPANY, et al, Defendants-Appellees.

**Prior History:** [\*\*1] Appeals from the United States District Court for the Middle District of Florida. D.C. Docket Nos. 6:14-md-02557-GAP-TBS, 6:14-cv-06012-GAP-TBS, D.C. Docket Nos. 6:14-md-02557-GAP-TBS, 6:14-cv-06013-GAP-TBS, D.C. Docket Nos. 6:14-md-02557-GAP-TBS, 6:14-cv-06018-GAP-TBS, D.C. Docket Nos. 6:14-md-02557-GAP-TBS, 6:14-cv-06019-GAP-TBS, D.C. Docket Nos. 6:14-md-02557-GAP-TBS, 6:15-cv-06022-GAP-TBS.

[A & E Auto Body, Inc. v. 21st Century Centennial Ins. Co., 120 F. Supp. 3d 1352, 2015 U.S. Dist. LEXIS 114291 \(M.D. Fla., Aug. 17, 2015\)](#)

**Disposition:** AFFIRMED in PART, VACATED in PART, and REMANDED.

### **Core Terms**

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body shop, insurers, insurance company, Shops', allegations, prices, repair, conspiracy, complaints, rates, price-fixing, reimbursement, antitrust, district court, market rate, costs, tortious interference, collusion, cartel, factors, input, repair shop, practices, tactics, databases, cheating, Sherman Act, self-interest, suggests, factual allegations

### **LexisNexis® Headnotes**

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917 F.3d 1249, \*1249 (2019 U.S. App. LEXIS 6488, \*\*1

Civil Procedure &gt; ... &gt; Defenses, Demurrers &amp; Objections &gt; Motions to Dismiss &gt; Failure to State Claim

Civil Procedure &gt; ... &gt; Pleadings &gt; Complaints &gt; Requirements for Complaint

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

Appellate courts review a district court's dismissal of a complaint with prejudice for failure to state a claim de novo. While they accept the factual allegations in the complaint as true, construing them in the light most favorable to the plaintiff, the allegations must state a claim for relief that is plausible, not merely possible. Under this standard, threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.

Antitrust &amp; Trade Law &gt; Sherman Act &gt; Scope

Antitrust &amp; Trade Law &gt; ... &gt; Monopolies &amp; Monopolization &gt; Conspiracy to Monopolize &gt; Sherman Act

**HN2** [down arrow] **Antitrust & Trade Law, Sherman Act**

Section One of the Sherman Act, under which both the price-fixing and boycotting claims are brought, provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. 15 U.S.C.S. § 1. In addition to that bare bones recital of prohibited behavior, the U.S. Supreme Court has long concluded that Congress intended only to prohibit "unreasonable" restraints on trade. Thus, § 1 prohibits (1) conspiracies that (2) unreasonably (3) restrain interstate or foreign trade.

Antitrust &amp; Trade Law &gt; Sherman Act &gt; Scope

Civil Procedure &gt; ... &gt; Pleadings &gt; Complaints &gt; Requirements for Complaint

Antitrust &amp; Trade Law &gt; ... &gt; Monopolies &amp; Monopolization &gt; Conspiracy to Monopolize &gt; Sherman Act

**HN3** [down arrow] **Antitrust & Trade Law, Sherman Act**

Where the plaintiffs are required to allege facts plausibly suggesting a conspiracy, the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express. The U.S. Supreme Court in *Twombly* was confronted with the antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act. In applying the general standards applicable under Fed. R. Civ. P. 8 to a § 1 of the Sherman Act claim, the Supreme Court held that stating such a claim requires a complaint with enough factual matter, taken as true, to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

Antitrust &amp; Trade Law &gt; Sherman Act &gt; Scope

Civil Procedure &gt; ... &gt; Pleadings &gt; Complaints &gt; Requirements for Complaint

Antitrust &amp; Trade Law &gt; ... &gt; Monopolies &amp; Monopolization &gt; Conspiracy to Monopolize &gt; Sherman Act

**HN4** [down arrow] **Antitrust & Trade Law, Sherman Act**

Proof of a [§ 1 of the Sherman Act, 15 U.S.C.S. § 1](#), conspiracy must include evidence tending to exclude the possibility of independent action. Conspiracy evidence must tend to rule out the possibility that the defendants were acting independently.

Antitrust & Trade Law > Sherman Act > Scope

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

#### [HN5](#) Antitrust & Trade Law, Sherman Act

Evidence of conscious parallelism alone does not permit an inference of conspiracy unless the plaintiff either establishes that, assuming there is no conspiracy, each defendant engaging in the parallel action acted contrary to its economic self-interest, or offers other plus factors tending to establish that the defendants were in a collusive agreement to fix prices or otherwise restrain trade in violation of [§ 1 of the Sherman Act, 15 U.S.C.S. § 1](#). These plus factors remove a plaintiff's evidence from the realm of equipoise and render that evidence more probative of conspiracy than of conscious parallelism.

Antitrust & Trade Law > Sherman Act > Scope

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

#### [HN6](#) Antitrust & Trade Law, Sherman Act

Conclusory allegations of agreement or conspiracy are insufficient. An allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a [§ 1 of the Sherman Act, 15 U.S.C.S. § 1](#), claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action. The plaintiff has the obligation to provide more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

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

#### [HN7](#) Motions to Dismiss, Failure to State Claim

On a motion to dismiss for failure to state a claim, it is only the factual allegations contained therein which courts must accept as true.

Antitrust & Trade Law > Sherman Act > Scope

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

**HN8** [blue download icon] Antitrust & Trade Law, Sherman Act

Following the example set by a competitor, without agreeing to do so in advance, is textbook "price leadership" — a practice we have repeatedly stated is insufficient to establish the existence of an agreement. It is well settled that evidence of conscious parallelism alone does not permit an inference of conspiracy for a [§ 1 of the Sherman Act, 15 U.S.C.S. § 1](#), claim, unless the plaintiff either establishes that each defendant engaging in the parallel action acted contrary to its economic self-interest, or offers other plus factors tending to establish that the defendants were not engaging merely in oligopolistic price maintenance or price leadership but rather in a collusive agreement to fix prices. Consciously parallel behavior by oligopolists does not in itself support an inference of agreement, of a meeting of the minds, any more strongly than it supports an inference of legal price maintenance or leadership.

Antitrust & Trade Law > Sherman Act > Scope

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

**HN9** [blue download icon] Antitrust & Trade Law, Sherman Act

Mere interdependent parallelism does not establish contract, combination, or conspiracy required by [Sherman Act § 1, 15 U.S.C.S. § 1](#). Even conscious parallelism,' a common reaction of firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions is not in itself unlawful.

Antitrust & Trade Law > Sherman Act > Scope

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

**HN10** [blue download icon] Antitrust & Trade Law, Sherman Act

Courts have recognized a company's actions that were against its self-interest can constitute a plus factor for a [§ 1 of the Sherman Act, 15 U.S.C.S. § 1](#). Courts and commentators have further observed that this plus factor often restates interdependence in the context of alleged price-fixing.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

**HN11** [blue download icon] Horizontal Refusals to Deal, Sherman Act

A group boycott is included within the [Sherman Act's](#) prohibition of any unreasonable contract, combination, or conspiracy in the restraint of interstate trade or commerce. [15 U.S.C.S. §§ 1, 1013\(b\)](#). A boycott consists of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target. The ultimate target of the agreement can be either a competitor or a customer of some or all of the boycotters who is being denied access to desired goods or services because of a refusal to accede to particular terms set by some or all of the boycotters. For boycotting to be per se illegal, it must involve horizontal agreements among direct competitors. In other words, a conspiracy to boycott claim requires as a prerequisite sufficient allegations of an agreement or conspiracy. The crucial, antecedent question is whether the alleged actions stem from independent actions or from prior agreement.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

#### **HN12** [+] **Types of Contracts, Quasi Contracts**

For a party to prevail under the theory of unjust enrichment, they must prove three elements: (1) benefit conferred upon defendant at plaintiff's expense; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention of benefit without payment for its value.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

#### **HN13** [+] **Types of Contracts, Quasi Contracts**

To state a cause action for quantum meruit, plaintiffs are required to allege, among other elements, that they expected to get paid or that they reasonably expected to be compensated.

**Counsel:** For QUALITY AUTO PAINTING CENTER OF ROSELLE, INC., Traded as Prestige Auto Body, Plaintiff - Appellant (15-14160): Mark L. Shurtleff, Shurtleff Law Firm, Salt Lake City, UT; Joshua S. Bauchner, Ansell Grimm & Aaron, Clifton, NJ; John Arthur Eaves Jr., Eaves Law Firm, LLC, Jackson, MS.

For State Farm Indemnity Company, State Farm Guaranty Insurance Company, Defendants - Appellees (15-14160): Elizabeth Helmer, Michael P. Kenny, Alston & Bird, LLP, Atlanta, GA; Johanna W. Clark, Carlton Fields Jorden Burt, PA, Orlando, FL; Hal Kemp Litchford, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, FL; Michael L. McCluggage, Eimer Stahl LLP, Chicago, IL.

For Progressive Freedom Insurance Company, Defendant - Appellee (15-14160): Jeffrey S. Cashdan, Claire [\*\*2] Carothers Oates, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, Michael R. Nelson, Francis X. Nolan IV, Eversheds Sutherland (US) LLP, New York, NY; Hal Kemp Litchford, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, FL.

For Allstate New Jersey Insurance Company, Defendant - Appellee (15-14160): Lori J. Caldwell, Rumberger Kirk & Caldwell, PA, Orlando, FL; Richard L. Fenton, Mark L. Hanover, Dentons US, LLP, Chicago, IL; Bonnie Lau, Dentons US LLP, San Francisco, CA; Hal Kemp Litchford, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, FL.

For Nationwide Mutual Insurance Company, Defendant - Appellee (15-14160): Michael Hiram Carpenter, Carpenter Lipps & Leland, LLP, Columbus, OH.

For United Services Automobile Association, Defendant - Appellee (15-14160): Hal Kemp Litchford, Kyle Allen Diamantas, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, FL; Amelia W. Koch, Baker Donelson, PC, New Orleans, LA.

For Hanover Insurance Company, Defendant - Appellee (15-14160): Seth A. Schmeeckle, Marjorie Salazar, Lugembuhl Wheaton Peck Rankin & Hubbard, New Orleans, LA.

For 21st Century Centennial Insurance Company, 21st Century Assurance Company, Defendants - Appellees [\*\*3] (15-14160): Eric Hochstadt, David L. Yohai, Weil Gotshal & Manges, LLP, New York, NY.

For 21st Century Pinnacle Insurance, Defendant - Appellee (15-14160): Eric Hochstadt, David L. Yohai, Weil Gotshal & Manges, LLP, New York, NY.

For Geico Casualty Company, Geico Indemnity Company, Defendant - Appellees (15-14160): Dan W. Goldfine, Ian M. Fischer, Joshua Grabel, Jamie L. Halavais, Lewis Roca Rothgerber Christie, LLP, Phoenix, AZ; Leah Ward Sears, Smith Gambrell & Russell, LLP, Atlanta, GA.

For Government Employees Insurance Company, Defendant - Appellee (15-14160): Dan W. Goldfine, Ian M. Fischer, Joshua Grabel, Jamie L. Halavais, Lewis Roca Rothgerber Christie, LLP, Phoenix, AZ.

For Liberty Mutual Fire Insurance Company, Liberty Mutual Mid-Atlantic Insurance Company, Liberty Insurance Company, Lm Insurance Corporation, Defendant - Appellees (15-14160): Michael Edward Mumford, Baker & Hostetler, LLP, Cleveland, OH.

For USAA Casualty Insurance Company, USAA General Indemnity Company, Defendant - Appellees (15-14160): Kyle Allen Diamantas, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, FL; Amelia W. Koch, Baker Donelson, PC, New Orleans, LA.

For Allstate New Jersey Insurance Company, [\*\*4] Defendant - Appellee (15-14160): Richard L. Fenton, Dentons US, LLP, Chicago, IL.

For Allstate New Jersey Property And Casualty Insurance Company, Defendant - Appellee (15-14160): Richard L. Fenton, Dentons US, LLP, Chicago, IL; Lori J. Caldwell, Rumberger Kirk & Caldwell, PA, Orlando, FL.

For Hartford Insurance Company of The Midwest, Hartford Underwriters Insurance Company, Hartford Fire Insurance Company, Defendant - Appellees (15-14160): Thomas G. Rohback, Axinn Veltrop & Harkrider, LLP, Hartford, CT.

For Washington Legal Foundation, Amicus Curiae (15-14160): Cory L. Andrews, Washington Legal Foundation, Washington, DC.

For Service (15-14160): Eric Hochstadt, John P. Mastando III, Weil Gotshal & Manges, LLP, New York, NY; David John Barthel, Michael Beekhuizen, Michael Hiram Carpenter, Carpenter Lipps & Leland, LLP, Columbus, OH; Mark J. Botti, Squire Patton Boggs (US) LLP, Washington, DC; Kyle Allen Diamantas, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, FL; Ian M. Fischer, Dan W. Goldfine, Joshua Grabel, Jamie L. Halavais, Lewis Roca Rothgerber Christie, LLP, Phoenix, AZ; Steven F. Griffith Jr., Amelia W. Koch, Baker Donelson, PC, New Orleans, LA; Michael Edward Mumford, [\*\*5] Ernest Eugene Vargo, Baker & Hostetler, LLP, Cleveland, OH; Thomas G. Rohback, Axinn Veltrop & Harkrider, LLP, Hartford, CT.

For Chamber of Commerce of The United States of America Adam, Amicus Curiae (15-14160): Granich Unikowsky, Jenner & Block, LLP, Washington, DC.

For Ultimate Collision Repair, Inc., Plaintiff - Appellant (15-14162): Mark L. Shurtleff, Shurtleff Law Firm, Salt Lake City, UT; Joshua S. Bauchner, Ansell Grimm & Aaron, Clifton, NJ; John Arthur Eaves Jr., Eaves Law Firm, LLC, Jackson, MS.

For State Farm Indemnity Company, State Farm Guaranty Insurance Company, Defendant - Appellees (15-14162): Johanna W. Clark, Carlton Fields Jorden Burt, PA, Orlando, FL; Elizabeth Helmer, Michael P. Kenny, Alston & Bird, LLP, Atlanta, GA; Hal Kemp Litchford, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, FL; Michael L. McCluggage, Eimer Stahl LLP, Chicago, IL.

For Progressive Freedom Insurance Company, Progressive Garden State Insurance Company, Defendant - Appellees (15-14162): Jeffrey S. Cashdan, Christine Alice Hopkinson, Claire Carothers Oates, King & Spalding, LLP, Atlanta, GA; Michael R. Nelson, Kymberly Kochis, Francis X. Nolan IV, Eversheds Sutherland (US) LLP, New York, [\*\*6] NY; Hal Kemp Litchford, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, FL.

For Allstate New Jersey Insurance Company, Defendant - Appellee (15-14162): Lori J. Caldwell, Rumberger Kirk & Caldwell, PA, Orlando, FL; Richard L. Fenton, Mark L. Hanover, Dentons US, LLP, Chicago, IL; Bonnie Lau, Dentons US LLP, San Francisco, CA; Hal Kemp Litchford, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, FL.

For Nationwide Mutual Insurance Company, Defendant - Appellee (15-14162): Michael Hiram Carpenter, Carpenter Lipps & Leland, LLP, Columbus, OH.

For United Services Automobile Association, Defendant - Appellee (15-14162): Hal Kemp Litchford, Kyle Allen Diamantas, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, FL; Amelia W. Koch, Baker Donelson, PC, New Orleans, LA.

For Hartford Insurance Company of The Midwest, Defendant - Appellee (15-14162): Thomas G. Rohback, Axinn Veltrop & Harkrider, LLP, Hartford, CT.

For 21st Century Centennial Insurance Company, 21st Century Assurance Company, 21st Century Pinnacle Insurance, Defendant - Appellees (15-14162): Eric Hochstadt, John P. Mastando III, David L. Yohai, Weil Gotshal & Manges, LLP, New York, NY.

For Geico Casualty Company, [\*\*7] Geico Indemnity Company, Government Employees Insurance Company, Defendants - Appellees (15-14162): Dan W. Goldfine, Ian M. Fischer, Joshua Grabel, Jamie L. Halavais, Lewis Roca Rothgerber Christie, LLP, Phoenix, AZ.

For USAA Casualty Insurance Company, USAA General Indemnity Company, Defendants - Appellees (15-14162): Kyle Allen Diamantas, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, FL; Amelia W. Koch, Baker Donelson, PC, New Orleans, LA.

For Allstate New Jersey Insurance Company, Defendant - Appellee (15-14162): Richard L. Fenton, Dentons US, LLP, Chicago, IL.

For Allstate New Jersey Property And Casualty Insurance Company, Defendant - Appellee (15-14162): Richard L. Fenton, Dentons US, LLP, Chicago, IL; Lori J. Caldwell, Rumberger Kirk & Caldwell, PA, Orlando, FL.

For Liberty Mutual Fire Insurance Company, Liberty Mutual Mid-Atlantic Insurance Company, Liberty Insurance Corporation, Lm Insurance Corporation, Defendants - Appellees (15-14162): Michael Edward Mumford, Ernest Eugene Vargo, Baker & Hostetler, LLP, Cleveland, OH.

For Hanover Insurance Company, Defendant - Appellee (15-14162): Seth A. Schmeeckle, Marjorie Salazar, Lugenbuhl Wheaton Peck Rankin & Hubbard, New [\*\*8] Orleans, LA.

For Hartford Underwriters Insurance Company, Hartford Fire Insurance Company, Defendants - Appellees (15-14162): Thomas G. Rohback, Axinn Veltrop & Harkrider, LLP, Hartford, CT.

For Campbell County Auto Body, Inc., Plaintiff - Appellant (15-14178): Mark L. Shurtleff, Shurtleff Law Firm, Salt Lake City, UT; Van Bunch, Eric David Zard, Bonnett Fairbourn Friedman & Balint, PC, Phoenix, AZ; John Arthur Eaves Jr., Eaves Law Firm, LLC, Jackson, MS; David A. Futscher, Parry Deering Futscher & Sparks, PSC, Covington, KY.

For State Farm Mutual Automobile Insurance Company, State Farm Fire & Casualty Company, Defendants - Appellees (15-14178): Johanna W. Clark, Carlton Fields Jorden Burt, PA, Orlando, FL; Elizabeth Helmer, Michael P. Kenny, Tiffany Lynne Powers, Alston & Bird, LLP, Atlanta, GA; David T. Klapheke, Boehl Stopher & Graves - Louisville KY, Louisville, KY; Hal Kemp Litchford, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, FL; Michael L. McCluggage, Eimer Stahl LLP, Chicago, IL.

For Liberty Mutual Insurance Company, Liberty Mutual Fire Insurance Company, Safeco Insurance Company of America, Defendants - Appellees (15-14178): Michael Edward Mumford, Ernest Eugene Vargo, [\*\*9] Baker & Hostetler, LLP, Cleveland, OH; Joseph Edward Ezzie, Baker & Hostetler, LLP, Columbus, OH; Hal Kemp Litchford, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, FL; Michael Scott McIntyre, Baker & Hostetler, LLP, Cincinnati, OH.

For United Services Automobile Association, Defendant - Appellee (15-14178): Hal Kemp Litchford, Kyle Allen Diamantas, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, FL; Amelia W. Koch, Baker Donelson, PC, New Orleans, LA.

For Progressive Casualty Insurance Company, Defendant - Appellee (15-14178): Jeffrey S. Cashdan, King & Spalding, LLP, Atlanta, GA.

For Progressive Advanced Insurance Company, Defendant - Appellee (15-14178): Jeffrey S. Cashdan, King & Spalding, LLP, Atlanta, GA; Michael R. Nelson, Eversheds Sutherland (US) LLP, The Grace Bldg, New York, NY.

For Geico Casualty Company, Defendant - Appellee (15-14178): Dan W. Goldfine, Ian M. Fischer, Joshua Grabel, Lewis Roca Rothgerber Christie, LLP, Phoenix, AZ.

For Auto-Owners Insurance Company, Defendant - Appellee (15-14178): Lori M. McAllister, Dykema Gossett, PLLC, Lansing, MI.

For Nationwide Affinity Insurance Company of America, Nationwide Mutual Insurance Company, Nationwide Insurance [\*\*10] Company of America, Defendants - Appellees (15-14178): Michael Hiram Carpenter, Carpenter Lipps & Leland, LLP, Columbus, OH.

For USAA Casualty Insurance Company, USAA General Indemnity Company, Defendants - Appellees (15-14178): Kyle Allen Diamantas, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, FL; Amelia W. Koch, Baker Donelson, PC, New Orleans, LA.

For The Travelers Home And Marine Insurance Company, Travelers Property Casualty Company of America, Travelers Casualty And Surety Company of America, Travelers Casualty Insurance Company of America, Defendants - Appellees (15-14178): Timothy J. Rooney, Winston & Strawn, LLP, Chicago, IL.

For Allstate Fire And Casualty Insurance Company, Allstate Indemnity Company, Allstate Insurance Company, Defendants - Appellees (15-14178): Richard L. Fenton, Dentons US, LLP, Chicago, IL; Lori J. Caldwell, Rumberger Kirk & Caldwell, PA, Orlando, FL.

For Allstate Property & Casualty Insurance Company, Defendant - Appellee (15-14178): Richard L. Fenton, Dentons US, LLP, Chicago, IL; Lori J. Caldwell, Rumberger Kirk & Caldwell, PA, Orlando, FL.

For State Automobile Mutual Insurance Company, State Auto Property And Casualty Insurance Company, Defendants [\*\*11] - Appellees (15-14178): Michael Edward Mumford, Baker & Hostetler, LLP, Cleveland, OH.

For Geico General Insurance Company, Geico Indemnity Company, Government Employees Insurance Company, Defendants - Appellees (15-14178): Ian M. Fischer, Lewis Roca Rothgerber Christie, LLP, Phoenix, AZ; Joshua Grabel, Jamie L. Halavais, Lewis Roca Rothgerber Christie, LLP, Phoenix, AZ.

For Shelter General Insurance Company, Shelter Mutual Insurance Company, Defendants - Appellees (15-14178): Robert Bradley Best, Jonathan Stuart Masters, Holcomb Dunbar Watts Best Masters & Golmon, PA, Oxford, MS.

For The Cincinnati Insurance Company, Defendant - Appellee (15-14178): Matthew C. Blickensderfer, Frost Brown & Todd, LLC, Cincinnati, OH.

For Grange Property & Casualty Insurance Company, Grange Mutual Casualty Company, Defendants - Appellees (15-14178): Joseph Edward Ezzie, Michael Edward Mumford, Baker & Hostetler, LLP, Cleveland, OH.

For Safe Auto Insurance Company, Defendant - Appellee (15-14178): Robert L. Steinmetz, Gwin Steinmetz & Baird, PLLC, Louisville, KY.

For Metropolitan Property And Casualty Insurance Company, Metropolitan Direct Property And Casualty Insurance Company, Metropolitan Casualty Insurance [\*\*12] Company, Defendants - Appellees (15-14178): Paul Bruce Converse, Steptoe & Johnson, LLP, Phoenix, AZ.

For The Travelers Indemnity Company of Connecticut, Defendant - Appellee (15-14178): Timothy J. Rooney, Winston & Strawn, LLP, Chicago, IL.

For Progressive Preferred Insurance Company, Progressive Direct Insurance Company, Defendants - Appellees (15-14178): Jeffrey S. Cashdan, King & Spalding, LLP, Atlanta, GA.

For Lee Pappas Body Shop, Inc., David C. Brosius, d.b.a. (15-14179): Martins Auto Body Works, inc., Art Walker Auto Services, Inc., Whiteford Collision And Refinishing, Inc., Plaintiffs - Appellants (15-14179): Mark L. Shurtleff, Shurtleff Law Firm, Salt Lake City, UT; John Arthur Eaves Jr., Eaves Law Firm, LLC, Jackson, MS; Peter Andrew Miller, Miller Legal, LLC, Charlottesville, VA.

For State Farm Mutual Automobile Insurance Company, State Farm Fire & Casualty Company, Defendants - Appellees (15-14179): Elizabeth Helmer, Michael P. Kenny, Alston & Bird, LLP, Atlanta, GA; Johanna W. Clark, Carlton Fields Jorden Burt, PA, Orlando, FL; Hal Kemp Litchford, Baker Donelson Bearman Caldwell & Berkowitz,

PC, Orlando, FL; Michael L. McCluggage, Eimer Stahl LLP, Chicago, IL; Tiffany Lynne [\*\*13] Powers, Alston & Bird, LLP, Atlanta, GA.

For United Services Automobile Association, USAA Casualty Insurance Company, USAA General Indemnity Company, Defendants - Appellees (15-14179): Hal Kemp Litchford, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, FL; Kyle Allen Diamantas, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith Jr., Baker Donelson, PC, New Orleans, LA; Amelia W. Koch, Baker Donelson, PC, New Orleans, LA.

For Nationwide Mutual Insurance Company, Nationwide Property & Casualty Insurance Company, Nationwide General Insurance Company, Nationwide Mutual Fire Insurance Company, Harleysville Preferred Insurance Company, Defendants - Appellees (15-14179): Michael Hiram Carpenter, Carpenter Lipps & Leland, LLP, Columbus, OH.

For Hartford Property And Casualty Insurance Company, Defendant - Appellee (15-14179): Thomas G. Rohback, Axinn Veltrop & Harkrider, LLP, Hartford, CT.

For 21st Century Centennial Insurance Company, 21st Century Assurance Company, Defendants - Appellees (15-14179): Eric Hochstadt, John P. Mastando III, David L. Yohai, Weil Gotshal & Manges, LLP, New York, NY.

For Government Employees Insurance Company, Geico General Insurance [\*\*14] Company, Defendants - Appellees (15-14179): Dan W. Goldfine, Ian M. Fischer, Joshua Grabel, Jamie L. Halavais, Lewis Roca Rothgerber Christie, LLP, Phoenix, AZ.

For United Services Automobile Association, USAA Casualty Insurance Company, USAA General Indemnity Company, Defendants - Appellees (15-14179): Kyle Allen Diamantas, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, FL.

For Allstate Fire And Casualty Insurance Company, Allstate Indemnity Company, Allstate Insurance Company, Defendants - Appellees (15-14179): Richard L. Fenton, Dentons US, LLP, Chicago, IL; Lori J. Caldwell, Rumberger Kirk & Caldwell, PA, Orlando, FL.

For Allstate Property & Casualty Insurance Company, Esurance Property & Casualty Insurance Company, Esurance Insurance Company, Defendants - Appellees (15-14179): Richard L. Fenton, Dentons US, LLP, Chicago, IL; Lori J. Caldwell, Rumberger Kirk & Caldwell, PA, Orlando, FL.

For Lm Insurance Corporation, Lm General Insurance Company, Defendants - Appellees (15-14179): Michael Edward Mumford, Ernest Eugene Vargo, Baker & Hostetler, LLP, Cleveland, OH.

For Elephant Insurance Company, Defendant - Appellee (15-14179): John P. Hutchins, Baker & Hostetler, LLP, Atlanta, [\*\*15] GA; Robert Francis Reklaitis, LeClairRyan, Washington, DC.

For Aig Property Casualty Company, Defendant - Appellee (15-14179): Michael B. de Leeuw, Cozen O'Connor, New York, NY.

For Dairyland Insurance Company, Defendant - Appellee (15-14179): Edward Keenan Cottrell, Smith Gambrell & Russell, LLP, Jacksonville, FL.

For Geico Indemnity Company, Geico Casualty Company, Defendants - Appellees (15-14179): Ian M. Fischer, Joshua Grabel, Jamie L. Halavais, Lewis Roca Rothgerber Christie, LLP, Phoenix, AZ.

For Alfa Vision Insurance Corporation, Alfa Specialty Insurance Corporation, Defendants - Appellees (15-14179): Elizabeth S. Skilling, Harman Claytor Corrigan & Wellman, Glen Allen, VA.

For Travelers Home And Marine Insurance Company, Travelers Property Casualty Insurance Company, Travelers Commercial Insurance Company, Travelers Property Casualty Company of America, Travco Insurance Company, Defendants - Appellees (15-14179): Timothy J. Rooney, Winston & Strawn, LLP, Chicago, IL.

For Virginia Farm Bureau Town And Country Insurance Company, Defendant - Appellee (15-14179): Kenneth F. Hardt, Sinnott Nuckols & Logan, PC, Midlothian, VA.

For Donegal Mutual Insurance Company, Defendant - Appellee [\*\*16] (15-14179): Thomas A. French, Barley Snyder LLP, Harrisburg, PA.

For Erie Insurance Exchange, Defendant - Appellee (15-14179): Jeffery D. Ubersax, Jones Day, Cleveland, OH.

For Safe Auto Insurance Company, Defendant - Appellee (15-14179): Robert L. Steinmetz, Gwin Steinmetz & Baird, PLLC, Louisville, KY.

For Washington Legal Foundation (15-14179): Cory L. Andrews, Washington Legal Foundation, Washington, DC.

For Concord Auto Body, Inc, Plaintiff - Appellant (15-14180): Mark L. Shurtleff, Shurtleff Law Firm, Salt Lake City, UT; John Arthur Eaves Jr., Eaves Law Firm, LLC, Jackson, MS; Tonna K. Farrar, Bonnett Fairbourn Friedman & Balint, PC, Phoenix, AZ.

For State Farm Mutual Automobile Insurance Company, State Farm Fire & Casualty Company, Defendants - Appellees (15-14180): Elizabeth Helmer, Michael P. Kenny, Alston & Bird, LLP, Atlanta, GA; Johanna W. Clark, Carlton Fields Jorden Burt, PA, Orlando, FL; Hal Kemp Litchford, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, FL; Michael L. McCluggage, Eimer Stahl LLP, Chicago, IL; Daniel Wilke, Wilke & Wilke, PC, St Louis, MO.

For American Family Mutual Insurance Company, Defendant - Appellee (15-14180): Michael S. McCarthy, Heather [\*\*17] Carson Perkins, Faegre Baker Daniels, LLP, Denver, CO; Ryan Hurley, Sarah Jenkins, Kathy L. Osborn, Faegre Baker Daniels, LLP, Indianapolis, IN; Hal Kemp Litchford, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, FL.

For Shelter Mutual Insurance Company, Defendant - Appellee (15-14180): Robert Bradley Best, Jonathan Stuart Masters, Hal K. Best, Holcomb Dunbar Watts Best Masters & Golmon, PA, Oxford, MS; Hal Kemp Litchford, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, FL.

For Farmers Insurance Company, Defendant - Appellee (15-14180): Eric Hochstadt, John P. Mastando III, David L. Yohai, Weil Gotshal & Manges, LLP, New York, NY; Hal Kemp Litchford, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, FL.

For Nationwide Affinity Insurance Company of America, Nationwide Insurance Company of America, Allied Property & Casualty Insurance Company, Defendants - Appellees (15-14180): Michael Hiram Carpenter, Carpenter Lipps & Leland, LLP, Columbus, OH.

For USAA Casualty Insurance Company, USAA General Indemnity Company, Defendants - Appellees (15-14180): Hal Kemp Litchford, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, FL; Amelia W. Koch, Baker Donelson, [\*\*18] PC, New Orleans, LA.

For United Services Automobile Association, Defendant - Appellee (15-14180): Hal Kemp Litchford, Kyle Allen Diamantas, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, FL; Amelia W. Koch, Baker Donelson, PC, New Orleans, LA.

For Progressive Advanced Insurance Company, Progressive Direct Insurance Company, Progressive Northwestern Insurance Company, Progressive Casualty Insurance Company, Defendants - Appellees (15-14180): Jeffrey S. Cashdan, King & Spalding, LLP, Atlanta, GA; Michael R. Nelson, Eversheds Sutherland (US)LLP, New York, NY.

For Progressive Preferred Insurance Company, Defendant - Appellee Michael R. Nelson, Eversheds Sutherland (US)LLP, New York, NY.

For Geico Casualty Company, Geico General Insurance Company, Defendants - Appellees (15-14180): Dan W. Goldfine, Ian M. Fischer, Joshua Grabel, Jamie L. Halavais, Lewis Roca Rothgerber Christie, LLP, Phoenix, AZ.

For Geico Indemnity Company, Government Employees Insurance Company, Defendants - Appellees (15-14180): Dan W. Goldfine, Ian M. Fischer, Joshua Grabel, Jamie L. Halavais, Lewis Roca Rothgerber Christie, LLP, Phoenix, AZ.

For USAA Casualty Insurance Company, USAA General Indemnity Company, Defendants [\*\*19] - Appellees (15-14180): Kyle Allen Diamantas, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, FL.

For Liberty Mutual Fire Insurance Company, Lm General Insurance Company, Safeco Insurance Company of Illinois, Defendants - Appellees (15-14180): Michael Edward Mumford, Ernest Eugene Vargo, Baker & Hostetler, LLP, Cleveland, OH.

For Allstate Fire And Casualty Insurance Company, Allstate Insurance Company, Allstate Property & Casualty Insurance Company, Esurance Property & Casualty Insurance Company, Defendants - Appellees (15-14180): Richard L. Fenton, Dentons US, LLP, Chicago, IL; Lori J. Caldwell, Rumberger Kirk & Caldwell, PA, Orlando, FL.

For The Travelers Home And Marine Insurance Company, Defendant - Appellee (15-14180): Timothy J. Rooney, Winston & Strawn, LLP, Chicago, IL.

For Safe Auto Insurance Company, Defendant - Appellee (15-14180): Robert L. Steinmetz, Gwin Steinmetz & Baird, PLLC, Louisville, KY.

For Farm Bureau Town & Country Insurance Company of Missouri, Defendant - Appellee (15-14180): Steven Howard Schwartz, Brown & James, PC, Louis, MO.

For Service (15-14180): Michael Edward Mumford, Ernest Eugene Vargo, Baker & Hostetler, LLP, Cleveland, OH; David John Barthel, **[\*\*20]** Michael Beekhuizen, Carpenter Lipps & Leland, LLP, Columbus, OH; Norman K. Beck, Timothy J. Rooney, Winston & Strawn, LLP, Chicago, IL; Laura E. Besvinick, Stroock Stroock & Lavan, LLP, Miami, FL; Mark J. Botti, Squire Patton Boggs (US) LLP, Washington, DC; Lori J. Caldwell, Rumberger Kirk & Caldwell, PA, Orlando, FL; Kyle Allen Diamantas, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, FL; Deborah C. Druley, Dentons US LLP - MO, Saint Louis, MO; Richard L. Fenton, Mark L. Hanover, Dentons US, LLP, Chicago, IL; Katherine Baber Fezzi, Steven Howard Schwartz, Brown & James, PC, St Louis, MO; Ian M. Fischer, Dan W. Goldfine, Joshua Grabel, Jamie L. Halavais, Lewis Roca Rothgerber Christie, LLP, Phoenix, AZ; Steven F. Griffith Jr., Amelia W. Koch, Baker Donelson, PC, New Orleans, LA; Christine Alice Hopkinson, Claire Carothers Oates, King & Spalding, LLP; Atlanta, GA; Kymberly Kochis, Francis X. Nolan IV, Eversheds Sutherland (US)LLP, New York, NY.

For Washington Legal Foundation (15-14180): Cory L. Andrews, Washington Legal Foundation, Washington, DC.

**Judges:** Before ED CARNES, Chief Judge, TJOFLAT, WILSON, WILLIAM PRYOR, MARTIN, JORDAN, NEWSOM, BRANCH, and ANDERSON,\* Circuit Judges. \*\* JORDAN, **[\*\*21]** Circuit Judge, joined by MARTIN, Circuit Judge, concurring. WILSON, Circuit Judge, dissenting in part.

**Opinion by:** ANDERSON

## Opinion

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**[\*1256]** ANDERSON, Circuit Judge:

This antitrust case requires us to apply the standards announced in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), to determine whether the allegations of the five complaints before us are sufficient to "nudge[] their claims across the line from conceivable **[\*1257]** to plausible," *id. at 570, 127 S. Ct. at 1974*, so as to state a claim under § 1 of the Sherman Act. Plaintiff-Appellant automobile repair shops (the "Body Shops") claim that the Defendant-Appellee Insurance Companies colluded to lower repair prices by improperly pressuring the shops to lower prices and by threatening to boycott those who do not comply. The Body Shops claim a per se price-fixing conspiracy and a per se conspiracy to boycott. They also bring several state law claims.

### I. BACKGROUND

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\* Senior Judge R. Lanier Anderson elected to participate in this decision pursuant to 28 U.S.C. § 46(c).

\*\* Judges Marcus, Rosenbaum, and Jill Pryor are recused. Judge Britt Grant joined the Court on August 7, 2018, and did not participate in these en banc proceedings.

The cost of repairing a damaged vehicle is primarily based on labor and material costs. Repair shops can consult estimating guides to assist in calculating their labor rates but there is no standard way of determining a shop's labor rate. Within the category of labor costs, variables such as overhead, shop size and capacity, repair volume, and expertise affect each shop's rate. Market **[\*\*22]** considerations, such as the prevailing labor rates within the geographic area of the shop, can dominate that cost. Material costs are driven by the cost of repairing or replacing damaged parts. Parts can be sourced from the original manufacturer, an aftermarket company, a salvage yard, or a parts refurbisher. Alfred M. Thomas & Michael Jund, Collision Repair and Refinishing: A Foundation Course for Technicians 7 (2014).

The Body Shops are a group of professional automobile repair companies that provide collision repair services to individuals insured by the Insurance Companies. Accepting the factual allegations in the complaint<sup>1</sup> as true and construing them in the light most favorable to the plaintiff—as required by the Fed. R. Civ. P. 12(b)(6) posture of this case—the Body Shops derive seventy to ninety-five percent of their revenue from customers who pay via insurance and the Insurance Companies account for sixty-five to eighty-five percent of the insurance market in each of the relevant states. The Body Shops broadly allege that the Insurance Companies—with Defendant-Appellee State Farm as their leader—have combined or conspired to depress the amounts they pay for auto repairs performed on behalf of their **[\*\*23]** insureds. According to the Body Shops, the Insurance Companies accomplish this in a number of ways.

First, the Body Shops allege that each of the Insurance Companies use a formal agreement system called "direct repair programs" or "DRPs."<sup>2</sup> In exchange for entering into a DRP, the several Insurance Companies each agrees to list a shop as a "preferred provider" for its insureds which, at least in theory, generates increased business for the shop. In return, the shop agrees to certain concessions regarding, among other things, the "market rate" at which they are entitled to be reimbursed for labor costs. State Farm sets its market rate using an electronic survey of the shops in a particular geographic area and advises the Body Shops that they will pay no more than the market rate. In addition, the other Insurance Companies advise the Body Shops that **[\*1258]** they will pay no more than State Farm. The Body Shops allege, primarily, that the survey is methodologically unsound,<sup>3</sup> that State Farm manipulates the survey to achieve an artificial rate, that State Farm will contact a shop and demand that they lower their rates, that State Farm will threaten—and effectuate—removal **[\*\*24]** from the "preferred providers" list if a shop attempts to raise its rate, and that State Farm attempts to prohibit discussions among repair shops about their rates on the theory that such discussions constitute illegal price-fixing. The Body Shops allege that the market rate is enforced even against those shops which are not signatories to a DRP.<sup>4</sup>

Additionally, the Body Shops allege that the Insurance Companies have combined or conspired to depress the amounts they pay for replacement parts on damaged vehicles. According to the Body Shops, the Insurance Companies refuse to pay for "original equipment manufacturer" parts, which—because they are designed by the car manufacturer to fit the precise make and model of the damaged car—are more expensive. Rather, the Body Shops are required to use either "aftermarket" parts designed by third-parties or "salvaged" parts from other wrecked

<sup>1</sup> Because this appeal is a consolidation of five separate cases, there are five separate complaints in the record. The parties agree that the five complaints are "nearly identical," En Banc Br. of Body Shops, at 6 n.1, and that the complaint in the lead case, Quality Auto Painting Center v. State Farm, No. 15-14160, is representative. Accordingly, unless otherwise noted, citations to a complaint in this opinion are to paragraphs of that complaint.

<sup>2</sup> Each of the Insurance Companies who use DRPs has a unique name for their specific program. However, the term "DRP" appears to be widely used in the industry and, in any event, the parties here appear to prefer its usage when describing these programs generally.

<sup>3</sup> The survey sets the market rate just slightly above the rate offered by the median "technician or work bay" in the relevant area when those rates are listed from lowest to highest. The Body Shops assert that this is an invalid means of determining the rate because it does not take into account the variances in shop size, skill of technicians, and other quality variables, and that State Farm alters the shops' labor rates arbitrarily.

<sup>4</sup> None of the Body Shops here are currently a party to a DRP, and only one has apparently ever been. That relationship ended approximately one year before this action was filed.

vehicles. These parts require extra time to install—which the Insurance Companies do not pay for—and cannot be guaranteed as safe by the Body Shops. The Insurance Companies also allegedly: utilize industry-standard databases<sup>5</sup> — which identify "target" costs for certain repairs—only when financially advantageous [\*\*25] to them; often refuse to pay for necessary repairs; routinely refuse to reimburse the cost of certain materials; mandate participation in their parts procurement process; and force discount programs on the Body Shops. The Body Shops argue that these actions constitute a per se price-fixing violation of the Sherman Act.

Lastly, the Body Shops allege that the Insurance Companies engage in a practice known as "steering," in which they discourage their insureds from patronizing a noncompliant repair shop through "misrepresentation, insinuation, and casting aspersions." These practices allegedly include telling insureds that a particular repair shop: is not on the preferred provider list; has had quality control issues; charges more than other shops in the area (and that they will not pay the excess amount); takes longer than other shops (and that they will not pay for additional car rental days); and does not perform work that can be guaranteed by the Insurance Companies, even though the Insurance Companies never guarantee any repair work. The Body Shops argue that the Insurance Companies conspire with respect to such steering, constituting a per se group boycott.

[\*1259] The Body Shops filed [\*\*26] approximately twenty-two similar lawsuits in federal district courts throughout the country.<sup>6</sup> The Judicial Panel on Multidistrict Litigation transferred all of the actions to the Middle District of Florida (Judge Presnell) where the "lead case," A&E Auto Body, Inc. v. 21st Century Centennial Insurance Co., No. 6:14-cv-310, was already pending. Of the twenty-two actions: two—the lead case and one other—were dismissed with prejudice<sup>7</sup> and not appealed; four were dismissed and are currently on appeal; and two were dismissed by the district court and then also had their appeals dismissed for lack of prosecution. Of the remaining fourteen, five are the subject of this appeal.

As relevant to this appeal, the Body Shops alleged two violations of federal law under the Sherman Act, 15 U.S.C. § 1, for price-fixing and group boycotting. They also alleged three causes of action under the laws of the state in which the suits were filed for unjust enrichment, quantum meruit, and tortious interference<sup>8</sup> (collectively, the "State Law Claims").<sup>9</sup> The Insurance Companies moved to dismiss all fourteen cases, the Body Shops filed a consolidated

<sup>5</sup> According to the complaint, there are three leading collision repair estimating databases—ADP, CCC, and Mitchell—which "provide software and average costs associated with particularized types of repairs to create estimates." Compl. ¶¶ 65-66. The databases generate estimates that include "the ordinary and customary repairs, repair time (labor) and materials to return a vehicle to its pre-accident condition," and are considered reliable starting points. Id. at ¶ 66.

<sup>6</sup> The parties' filings and the district court's orders are less than clear about the total number of cases involved in this multidistrict litigation. It appears that there were, at one point, twenty-four independent causes of action with regard to this litigation: the twenty-two discussed above; a RICO class action that was filed in Illinois, was transferred to the Middle District of Florida, and is still currently pending; and a state consumer protection action filed by the State of Louisiana in Louisiana state court, removed to federal court in Louisiana by the Insurance Companies, transferred to the Middle District of Florida, and then remanded to Louisiana state court by the district court.

<sup>7</sup> The initial complaint in the lead case was dismissed without prejudice "on the grounds that it was a prohibited 'shotgun' pleading, that it failed to properly set forth the basis for [the district court's] jurisdiction, that it failed to identify which parties had ongoing contracts with one another, and that all of the allegations of wrongdoing were attributed, collectively, to every [Insurance Company], even where such collective attribution made no sense." A&E Auto Body, 2015 U.S. Dist. LEXIS 127531, 2015 WL 5604786, at \*1 (M.D. Fla. Sept. 23, 2015). The Body Shops filed an amended complaint and the district court dismissed one claim with prejudice and the remainder of the claims without prejudice once again. Id. Finally, the district court dismissed all the claims from the second amended complaint with prejudice, noting that "[d]espite becoming much wordier, the Plaintiffs' pleadings have not come remotely close to satisfying the minimum pleading requirements as to any of the claims asserted."

2015 U.S. Dist. LEXIS 127531, [WL] at \*12.

<sup>8</sup> In New Jersey the correct label for this cause of action is "tortious interference with prospective economic advantage;" in Kentucky and Missouri it is "tortious interference with business relations;" and in Virginia it is "tortious interference with a business relationship."

response to which the Insurance Companies replied, and the district court referred [\*\*27] the matter to a magistrate judge for a report and recommendation.

Pursuant to that referral, the magistrate judge entered a fifty-nine page Report and Recommendation (the "R&R"), which concluded that the relevant claims should be dismissed without prejudice. The Body Shops then filed an Omnibus Objection to the R&R (the "Objection"), wherein they challenged the magistrate judge's conclusions with respect to some of their claims. The district court overruled the Body Shops' objections to the R&R, adopted the [\*1260] R&R, and dismissed all of the relevant claims without prejudice (the "Dismissal Order").<sup>10</sup> Rather than file amended complaints, the Body Shops appealed the district court's decision with respect to five of the initial actions—two that were filed in New Jersey and one each from Kentucky, Missouri, and Virginia. Those five actions were consolidated on appeal. A divided panel of this Court reversed the district court's decision, holding that the Body Shops had alleged sufficient allegations to survive a motion to dismiss on all of the claims. That decision was vacated when this Court voted to hear the case en banc.<sup>11</sup>

## II. ISSUES ON APPEAL

The parties were instructed to brief the en banc [\*\*28] court on the following issues:

- 1) Can a per se illegal price-fixing agreement or conspiracy between and among the several defendant-Insurance Companies plausibly be inferred from the allegations of the complaints in the several cases before this Court.
- 2) Can a per se illegal agreement or conspiracy between and among the several defendant-Insurance Companies to boycott the plaintiffs' Body Shops plausibly be inferred from the allegations of the complaints in the several cases before this Court.

The parties also briefed the state law issues involving the three state law claims—unjust enrichment, quantum meruit, and tortious interference. We address first the federal antitrust claims, including the alleged price-fixing conspiracy and the alleged group boycott, and then the state law claims.

## III. STANDARD OF REVIEW

**HN1** [↑] We review a district court's dismissal of a complaint with prejudice for failure to state a claim de novo. *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1288 (11th Cir. 2010). While we accept the factual allegations in the complaint as true, construing them in the light most favorable to the plaintiff, the allegations must state a claim for relief that is plausible, not merely possible. *Twombly*, 550 U.S. at 570, 127 S. Ct. at 1974; *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). Under this standard, "[t]hreadbare recitals of the elements [\*\*29] of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949.

## IV. FEDERAL ANTITRUST CLAIMS

### A. The Legal Landscape

**HN2** [↑] Section One of the Sherman Act, under which both the price-fixing and boycotting claims are brought, provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. In addition to

<sup>9</sup>The Body Shops alleged additional violations of state law founded on theories of quasi-estoppel, equitable estoppel, conversion, state antitrust statutes, and state consumer protection statutes—all of which were dismissed. The Body Shops did not challenge the dismissal of those claims and they are thus abandoned on appeal. See *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 n.6 (11th Cir. 1989) (holding that issues not raised on appeal are deemed waived).

<sup>10</sup>An identical R&R, Objection, and Dismissal Order was filed in each of the cases present on appeal.

<sup>11</sup>We recognize the tremendous effort that the district court expended in handling a multidistrict litigation of this scale.

that bare bones recital of prohibited behavior, the Supreme Court has long concluded that Congress intended only to prohibit "unreasonable" restraints on trade. See, e.g., *Arizona v. Maricopa Cty. Med. Soc.*, 457 U.S. 332, 343, 102 S. Ct. 2466, 2472-73, 73 L. Ed. 2d 48 (1982). Thus, § 1 prohibits (1) conspiracies that (2) unreasonably (3) restrain interstate or foreign trade. *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'n's, Inc.*, 376 F.3d 1065, 1071 (11th Cir. 2004). Only the first element is at issue on this appeal.<sup>12</sup>

[\*1261] Therefore, HN3↑ because the Body Shops are required to allege facts plausibly suggesting a conspiracy, "the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express." *Twombly*, 550 U.S. at 554, 127 S. Ct. at 1964. As in this case, the Supreme Court in *Twombly* was confronted with "the antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the [\*\*30] Sherman Act." *Id. at 555-56, 127 S. Ct. at 1964*. In applying the general standards applicable under *Fed. R. Civ. P. 8* to a § 1 claim, the Supreme Court held that "stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Id. at 556, 127 S. Ct. at 1965*. The Court recognized that "[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id. at 556, 127 S. Ct. at 1965*. The Court held:

While a showing of parallel "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement," it falls short of "conclusively establishing agreement or . . . itself constituting a Sherman Act offense." *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 at 540-541, 74 S. Ct. 257, 98 L. Ed. 273 [(1954)]. Even "conscious parallelism," a common reaction of "firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions" is "not in itself unlawful." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227, 113 S. Ct. 2578, 125 L.Ed.2d 168 (1993); see 6 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 1433a, p. 236 (2d ed. 2003) (hereinafter Areeda & Hovenkamp) ("The courts are nearly unanimous in saying that mere interdependent [\*\*31] parallelism does not establish the contract, combination, or conspiracy required by Sherman Act § 1) . . .

The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. . . . HN4↑ [P]roof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action . . . [C]onspiracy evidence must tend to rule out the possibility that the defendants were acting independently.

*Id. at 553-54, 127 S. Ct. at 1964* (alterations in original removed).

Even before *Twombly*, "it [was] well settled in this circuit that HN5↑ evidence of conscious parallelism alone does not permit an inference of conspiracy unless the plaintiff either establishes that, assuming there is no conspiracy, each defendant engaging in the parallel action acted contrary to its economic self-interest, or offers other 'plus factors' tending to establish that the defendants were . . . in a collusive agreement to [\*1262] fix prices or otherwise restrain trade." *City of Tuscaloosa v. Harcros Chems.*, 158 F.3d 548, 571 (11th Cir. 1999) (internal quotations, changes, and footnotes omitted). As this Court has [\*\*32] noted, these plus factors "remove [a plaintiff's] evidence from the realm of equipoise and render that evidence more probative of conspiracy than of conscious parallelism." *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1301 (11th Cir. 2003).

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<sup>12</sup> Regarding the second element, certain behaviors have been held to be so "plainly anticompetitive," *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692, 98 S. Ct. 1355, 1365, 55 L. Ed. 2d 637 (1978), and to so often "lack . . . any redeeming virtue," *North Pacific Railway Co. v. United States*, 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 (1958), that they are conclusively presumed to be unreasonable, *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8, 99 S. Ct. 1551, 1557, 60 L. Ed. 2d 1 (1979). Horizontal price-fixing and group boycotts—the two alleged violations here—often, if not always, fall into this category of "per se" violations. In light of our disposition, we need not address Geico's argument that the per se analysis should not apply to the context of insurance companies reimbursing their insureds for the companies' obligation to pay a body shop for vehicle repairs.

**HN6** Conclusory allegations of agreement or conspiracy are insufficient. As the Court held in Twombly:

[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

550 U.S. at 556-57, 127 S. Ct. at 1966. The plaintiff has the obligation to provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. at 555, 127 S. Ct. at 1964-65.

We address first the Body Shops' claim of horizontal price-fixing conspiracy, and then turn to their claim of horizontal boycotting conspiracy. As noted above, both claims require that the Plaintiffs allege facts supporting an agreement or conspiracy among the **[[\*\*33]]** Insurance Companies.

#### B. Horizontal Price-Fixing Conspiracy

At the outset, we address an issue regarding the complaints. The first is merely an observation of the time-worn principle that **HN7** it is only the factual allegations contained therein which we must accept as true. The Body Shops' appellate briefing takes undue liberties in construing the inferences that can be fairly read from their pleadings. The district court dismissed these claims without prejudice and, therefore, the Body Shops had an opportunity to amend their complaints to include any additional allegations that may have been omitted from their initial pleadings. Having chosen not to do so, they are not permitted to simply "insert" new allegations through their appellate briefing. These gaps—between the allegations of the complaints and the allegations of the appellate briefing—are discussed, where relevant, below.<sup>13</sup>

The Body Shops identify several purported plus factors that they contend—in conjunction with their allegations of parallel **[[\*1263]]** conduct—warrant an inference of a per se horizontal price-fixing conspiracy. We discuss each<sup>14</sup> of their purported plus factors in turn.<sup>15</sup>

<sup>13</sup> In the briefing instructions for the en banc briefs, the Body Shops were instructed to "identify the allegations [of the complaints] from which such an agreement or conspiracy can plausibly be inferred and discuss whether any asserted inference of agreement or conspiracy is 'just as much in line with a wide swath of rational competitive business strategy prompted by common perceptions of the market . . . or whether such inference is supported by allegations tending to rule out the possibility that the defendants were acting independently.'" Reluctantly, we cannot conclude that the en banc brief of the Body Shops complied with that directive. Although their brief lists numerous statements that it asserts are "specific allegations of conduct that probably do not result from . . . independent responses to common stimuli," many have no tendency to suggest an advance agreement among the insurance companies, and are thus simply irrelevant. As indicated in this opinion, others reflect facts that are simply not pled in the complaints and not reasonably inferred from the actual allegations. We also discuss in this opinion those allegations with respect to actions just as much in line with a wide swath of rational competitive business strategy and thus cannot qualify as the plus factors required for a viable claim.

<sup>14</sup> Two can be rejected outright. The Body Shops argue that they asserted "specific allegations of conduct that indicate the sort of restricted freedom of action and sense of obligation that one generally associates with agreement." However, despite arguing in their brief that representatives from non-State Farm Defendants have stated that they are restricted from altering the purported market rate unless authorized by State Farm, that allegation is nowhere to be found in the complaints. Quite the contrary, the only relevant specific allegation of fact is that the non-State Farm Insurance Companies advise the Plaintiffs that they will pay no more than State Farm pays—i.e., mere price leadership as discussed below.

The Body Shops also argue that the conspiracy is shown by the presence of a common motive, namely desire to maximize profits. However, under this logic, most businesses with similar pricing would be deemed in cahoots with each other because that is the goal of most corporations. This plus factor is more properly invoked in contexts where the motive is unique and specific to the alleged conspirators. See, e.g., *Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 647 (10th

### 1. Uniformity of Price

The [\*\*34] Body Shops argue in their brief that the Insurance Companies' conduct does "not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties" because they have "adopt[ed] a uniform price despite variables that would ordinarily result in divergent prices." This asserted plus factor consists of two components. First, the defendants must have adopted a uniform price. This component, however, is suggestive only of parallel conduct and, without more, will not justify invoking the plus factor. Accordingly, the uniform price must exist "despite variables that would ordinarily result in divergent pricing." The second component is an indicator of the agreement that makes collusion more plausible than conscious parallelism, thus moving the needle off of equipoise.

The sources on which the Body Shops rely make clear the necessity of both components. In *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 713, 68 S. Ct. 793, 809, 92 L. Ed. 1010, 44 F.T.C. 1460 (1948), the Supreme Court inferred an agreement where "for many years, with rare exceptions, cement has been offered for sale in every given locality at identical prices and terms by all producers." But the record evidence in that case established that "[t]housands [\*\*35] of secret sealed bids ha[d] been received by public agencies which corresponded in prices of cement down to a fractional part of a penny." *333 U.S. at 713, 68 S. Ct. at 809*. Likewise, the Body Shops quote a leading antitrust treatise for the idea that an agreement may be present if rivals establish identical prices, but they fail to grapple with the caveat [\*1264] that this is only true where there are "simultaneous identical bids on a made-to-order product not readily assembled from standard and conventionally priced items." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1434b (3d ed. 2012).<sup>16</sup> Thus, while this so-called convergent pricing certainly is—or at least could be—a plus factor, it should only be invoked where we should otherwise expect divergent pricing. Considered in the appropriate light, the differences between the instant case and the case on which the Body Shops rely are substantial.

First, the focus in *Cement Institute* on "secret," "sealed," and "simultaneous" bids is crucial precisely because that is what takes the situation beyond that of mere conscious parallelism: competitors cannot consciously parallel one another if they only learn of the other's price after they have established [\*\*36] their own. Perhaps sensing this, the Body Shops' brief argues that all of the Insurance Companies employ the same, identical "market rate" which State Farm does not make public. As an initial matter, alleging that State Farm does not publicly disclose the market rate and arguing that it is a secret are two very different things. The fact that State Farm does not issue a press release with the market rate does not foreclose the possibility that it is publicly known. This is a crucial distinction.

There are no factual allegations that the market rate is a secret. Indeed, nowhere in the complaints do the Body Shops suggest that the labor rate is a secret. Quite the opposite, the complaints reveal that State Farm must necessarily tell the rate to every repair shop in a given geographic area.

Even if it were possible to share the market rate with the Body Shops while, at the same time, keeping it a secret from the other Insurance Companies, there are no allegations at all that the other Insurance Companies knew what it was in advance. Indeed, rather than allege that all of the Insurance Companies simultaneously approached the

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*Cir. 1987*) (company exerted influence on municipality in favor of monopolist as part of agreement to avoid monopolist challenging it in another market); see also Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1434c, at 276-77 (4th ed. 2017), ¶ 1434c, at 276-77 (discussing how motivation can, in some cases, merely restate interdependence).

<sup>15</sup> In considering each plus factor, we are cognizant of the Supreme Court's admonition that antitrust plaintiffs receive "the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S. Ct. 1404, 1410, 8 L. Ed. 2d 777 (1962). At the same time, it is undoubtedly our responsibility "to evaluate the evidence proffered by the plaintiffs not to ascertain its credibility, but instead to determine whether that evidence, if credited, 'tends to' establish a conspiracy more than it indicates conscious parallelism." *Williamson Oil*, 346 F.3d at 1301.

<sup>16</sup> Both *Twombly* and the Appellants quote from earlier editions of Areeda and Hovenkamp's *Antitrust Law*. However, we use the fourth edition of that treatise.

Body Shops with an identical market rate (which might possibly [\*\*37] indicate that they had communicated in advance), the complaints allege that the other Insurance Companies simply conform to State Farm's rate—whatever that may be. Compl. ¶ 62 ("Defendants . . . specifically advised the Plaintiff they will pay no more than State Farm pays for labor."); Compl. ¶ 115 ("[D]efendants [state] that they will conform to State Farm's payment structure."). [HN8](#)<sup>17</sup> Following the example set by a competitor, without agreeing to do so in advance, is textbook "price leadership"—a practice we have repeatedly stated is insufficient to establish the existence of an agreement. See, e.g., [Williamson Oil, 346 F.3d at 1301-03](#) ("It is well settled in this circuit that evidence of conscious parallelism alone does not permit an inference of conspiracy unless the plaintiff either establishes that . . . each defendant engaging in the parallel action acted contrary to its economic self-interest, or offers other 'plus factors' tending to establish that the defendants were not engaging merely in oligopolistic price maintenance or price leadership but rather in a collusive agreement to fix prices") (internal punctuation and citations omitted); [City of Tuscaloosa, 158 F.3d at 571](#) ("[C]onsciously parallel behavior by oligopolists does not in itself support [\*\*38] an inference of agreement, of 'a meeting of the minds,' any more strongly than it supports an inference of legal price maintenance or leadership."). Price leadership is comprehensively described in the leading antitrust treatise:

[\*1265] The first firm in a five-firm oligopoly, Alpha, may be eager to lower its price somewhat in order to expand its sales. However, it knows that the other four firms would probably respond to a price cut by reducing their prices to maintain their previous market shares. Unless Alpha believes that it can conceal its price reduction for a time or otherwise gain a substantial advantage from being the first to move, the price reduction would merely reduce Alpha's profits and the profits of the other firms as well.

Such "oligopolistic rationality" cannot only forestall rivalrous price reductions, it can also provide for price increases through, for example, price leadership. If the price had for some reason been less than X [the price a monopolist would charge to maximize profits], firm Beta might announce its decision to raise its price to X effective immediately, or in several days, or next season. The other four firms may each choose to follow Beta's lead; if they [\*\*39] do not increase their prices to Beta's level, Beta may be forced to reduce its price to their level. Because each of the other firms knows this, each will consider whether it is better off when all are charging the old price or price X. They will obviously choose X when they believe that it will maximize industry profits.

Phillip E. Areeda & Herbert Hovenkamp, [\*\*Antitrust Law\*\*](#) ¶ 1429b (4th ed. 2017).<sup>17</sup> With respect to interdependent parallelism like price leadership, the treatise notes: "The courts are nearly unanimous in saying that [HN9](#)<sup>17</sup> mere interdependent parallelism does not establish contract, combination, or conspiracy required by Sherman Act §1." *Id.* ¶ 1433a. This follows from the Supreme Court's holding in [Twombly](#): "Even 'conscious parallelism,' a common reaction of firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions is not in itself unlawful." [550 U.S. at 553-54, 127 S. Ct. at 1964](#) (internal quotations and punctuation omitted).

Further distinguishing our case is the fact that auto body repairs are not the type of "made-to-order product not readily assembled from standard and conventionally priced items" where we expect to see divergent [\*\*40] pricing. On the contrary, the "products" here—cars—are so readily assembled from standard parts that their assembly-line manufacturing set the standard for other industries. That the Body Shops are repairing those cars, rather than assembling them for the first time, does not make the parts used to do so any less standard. And they are so conventionally priced that, as discussed below, the Body Shops believe that the Insurance Companies should not be allowed to deviate from third-party databases that set standardized prices. Indeed, these industry databases not only indicate standardized pricing for parts, but they also estimate repair time (labor) for particular types of repairs which are ordinary and customary repairs. Thus, while convergent pricing where it should otherwise not be expected can undoubtedly serve as a plus factor, none of the indicators to which courts and commentators have traditionally looked to support such a factor—or at least none to which the Body Shops have pointed and none that we can perceive—are present here.

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<sup>17</sup> Hereinafter cited as Areeda and Hovenkamp.

The Body Shops have not pointed to any plausible reason that one should expect that prices in this market— involving standardized automobile parts and [\*\*41] repairs—would be divergent. Quite the contrary, the Body Shops argue that the Insurance Companies should comply with several databases [\*1266] that exist for the sole purpose of establishing standardized pricing. That is, the fact that the Body Shops insist that the Insurance Companies should comply with the prices published in these three separate databases demonstrates that such prices are standardized, and that one should expect convergent prices—not divergent prices.

In short, the instant case bears none of the traditional hallmarks of a situation in which uniform pricing is present in an industry where we would otherwise not expect it. Nor are any of the other reasons offered by the Body Shops suggestive of an environment in which we would expect to see divergent pricing. And without an expectation of divergent pricing, all that remains is an allegation of uniform pricing, which is indicative only of parallel conduct. Although the complaints repeatedly allege that the insurance companies have agreed and conspired with respect to price, these allegations have no basis in the facts actually alleged. They are merely conclusions and therefore are an insufficient basis on which to infer a prior [\*\*42] agreement. [Twombly, 550 U.S. at 557, 127 S. Ct. at 1966](#) ("[A] conclusory allegation of agreement at some unidentified point does not supply the facts adequate to show illegality.").

In this case, the Body Shops' own allegations put a nail in their coffin. Their own allegations explain why there is uniformity in price—the other Insurance Companies simply tell body shops that they will pay no more than State Farm. This is a rational and legitimate business strategy and one which involves clearly legal price leadership. Accordingly, we reject this plus factor as an indicator of the necessary agreement.

## 2. Uniformity of Tactics

As its second plus factor, the Body Shops argue that the Insurance Companies have engaged in uniform practices suggestive of an agreement. Several courts have found a plus factor where there is a similarity of language, terms, or conditions used by the alleged co-conspirators that would be improbable absent collusion. See, e.g., [De Jong Packing Co. v. U.S. Dep't of Agric., 618 F.2d 1329, 1332-34 \(9th Cir. 1980\)](#). Although the Body Shops' briefing describes the Insurance Companies' tactics as "the same," "identical," and part of a "script[]," the Body Shops' briefing is betrayed by their complaints, which introduce the relevant tactics as follows:

Through various methods, the [Insurance Companies] [\*\*43] have, independently and in concert, instituted numerous methods of coercing the [Body Shops] into accepting less than actual and/or market costs for materials and supplies expended in completing repairs.

Compl. ¶ 63. There is nothing in those allegations to suggest that the Insurance Companies' tactics are uniform or that they use a script.<sup>18</sup> None of the actual allegations of the complaints suggest that language used by the several Insurance Companies was the "same" or "identical" or like a "script." Indeed in none of the five complaints do the words "same," "identical" or "script" appear in reference to the tactics used. Nor is there any other actual allegation that suggests some uniform practice that is somehow idiosyncratic and not to be expected as within the "wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." [Twombly, 550 U.S. at 554, 127 S. Ct. at \[\\*1267\] 1964](#). Not only is there no allegation of identical or similar language, the language actually used in the complaints suggests just the opposite. As noted, ¶ 63 alleges "[t]hrough various means" and ¶ 64 alleges "[s]ome of these methods"—i.e., phrases that do not suggest that all or a substantial group of the Insurance [\*\*44] Companies engage in all or most of the methods in strikingly similar ways.

The Body Shops argue that the Insurance Companies have engaged in uniform tactics in that they require the Body Shops: to repair faulty parts rather than install replacement parts; to install used or recycled parts; and to offer

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<sup>18</sup> As for what else can be said about that allegation, the fact that the Body Shops concede that some of the alleged actions occurred "independently" is certainly noteworthy. And the allegation of concerted action is merely conclusory.

discounts and concessions. Even if there were considerable uniformity with respect to the Insurance Companies' use of such methods, that would be suggestive of an agreement only if such usage would not plausibly arise from "independent responses to common stimuli." See *Twombly*, 550 U.S. at 556 n.4, 127 S. Ct. at 1965 n.4 (quoting Areeda and Hovenkamp ¶ 1425). All of these purported "highly uniform" tactics are easily explained by the most common of corporate stimuli: a desire to increase profits. And while some methods of increasing profits could be so idiosyncratic as to be unlikely to arise in the absence of an agreement, this is plainly not the case here. None of these tactics could even be fairly described as novel, let alone idiosyncratic, so as to support an inference of an agreement. It can hardly be denied that repairing (rather than replacing) damaged parts, installing recycled (rather than new) parts, and requiring discounts [\*\*45] are among the most common and time-worn methods of increasing corporate profits in any industry, let alone in an industry where parts and labor reimbursements are the primary business expenditures, and where the parts are standardized and most repairs are "ordinary and customary" with industry wide databases that provide standardized estimates.<sup>19</sup> *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1189 (9th Cir. 2015) ("But plaintiffs' plus factors are no more consistent with an illegal agreement than with rational and competitive business strategies, independently adopted by firms acting within an interdependent market."). Thus, even if we assume considerable uniformity among the Insurance Companies with respect to requiring where possible the repair of parts (rather than using new), requiring the use of recycled parts (rather than new), and requiring discounts, there would be no basis for inferring a prior agreement because each insurance company would rationally and independently want to do precisely that. That is, independent action is at least as plausible as concerted action pursuant to prior agreement; thus nothing "tends to exclude the possibility of independent action," *Twombly*, 550 U.S. at 553-54, 126 S. Ct. at 1964, or "remove[s] . . . [this case] from the realm of equipoise and render[s] [\*\*46] [this case] more probative of conspiracy than of conscious parallelism," *Williamson Oil*, 346 F.3d at 1301. Indeed, this is especially true in this case where the complaints repeatedly allege that the several companies say they will "conform to State Farm's payment structure." Compl. ¶ 115.

A complaint merely alleging several common and obvious industry practices should not proceed directly past a motion to dismiss and into the expensive and settlement-inducing quagmire of antitrust discovery. The Supreme Court has described precisely this problem:

[\*1268] [E]ven if [defendants committed all the acts] in all the ways the plaintiffs allege, there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway; so natural, in fact, that if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a § 1 violation against almost any group of competing businesses would be a sure thing.

*Twombly*, 550 U.S. at 566, 127 S. Ct. at 1971 (citation omitted).

The Body Shops' briefing suggests that the Insurance Companies' tactics are highly uniform when even the complaint does not allege that. Although the Body Shops do allege uniformity of actions, no facts are actually alleged in support of this conclusion. [\*\*47] Therefore, the allegation is merely conclusory and insufficient. *Id. at 557*, 127 S. Ct. at 1966. The Body Shops do not explain which of the challenged activities occurred "in concert" and which occurred "independently." And no facts are actually alleged suggesting concerted action pursuant to a prior agreement. The Body Shops rely upon several alleged tactics which are clearly common, obvious, and mainstream. An inference of prior agreement does not arise from the mere fact that several Insurance Companies adopt policies favoring use of cheaper parts and offering discounts to Insurance Companies. The Body Shops' position is inconsistent with Supreme Court precedent, especially with *Twombly*, as well as Eleventh Circuit precedent.

Long before *Twombly* clearly established what an antitrust plaintiff had to plead in order to warrant an inference of prior agreement or conspiracy for purposes of a viable claim under § 1 of the Sherman Act, both the D.C. Circuit in *Proctor v. State Farm Mutual Automobile Insurance Co.*, 675 F.2d 308, 218 U.S. App. D.C. 289 (D.C. Cir. 1982), and the Seventh Circuit in *Quality Auto Body, Inc. v. Allstate Insurance Co.*, 660 F.2d 1195 (7th Cir. 1981),<sup>20</sup> held in

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<sup>19</sup> As noted above, there are no actual allegations that the Insurance Companies use identical language conveying their instructions to body shops to use recycled parts, etc., nor any other actual allegation of fact suggesting that some uniform practice is somehow idiosyncratic so as to give rise to an inference of advance agreement.

a summary judgment context that parallel conduct of insurance companies in dealing with automobile repair shops (parallel conduct the same or very similar to that alleged in the instant case) was in the self-interest of each [\*\*48] insurance company and thus did not give rise to an inference of prior agreement or concerted action necessary to prove a horizontal price-fixing conspiracy. The D.C. Circuit held:

There is some evidence of parallel behavior by appellees. Construing this evidence in the light most favorable to appellants, it suggests that upon occasion certain appellees used the same labor rate in writing estimates, that they had similar arrangements with repair shops that agreed to do volume work at the low rates used in their estimates, that they conducted surveys of repair shops to determine the average rate charged by shops in particular areas, and that they tended to resist price increases by repair shops. However, these alleged parallel practices, without more, cannot create an inference or a conspiracy among appellees where, as here, the practices are in the economic self-interest of each of the individual appellees. The practices are as consistent with independent as with concerted actions. Unless an insurance company is willing to pay whatever price is charged at any given repair shop, it stands to reason that it would conduct surveys to determine the rates charged by repair shops. It is equally [\*\*49] understandable that a company would, in an effort to control costs, resist price increases and write estimates using the lowest rates acceptable to a sufficient number of quality garages. [\*1269] It also makes economic sense for an insurance company to make arrangements with certain repair shops that agree to do work at the rates used by the company in writing estimates in exchange for volume referrals by the company.

[675 F.2d at 334](#); see also [Workman v. State Farm Mut. Auto. Ins. Co., 520 F.Supp. 610, 621 \(N.D. Cal. 1981\)](#) (holding, in the same context of insurance companies dealing with automobile repair shops, that parallel conduct very similar to that alleged in the instant case alone does not create an inference of impermissible conspiracy because "[s]uch conduct is in the economic self-interest of each individual insurance company"). All three of these cases so held on the basis of such parallel conduct alone, without the additional nail-in-the-coffin of our plaintiffs' case—i.e., the follow-the-leader practices in our case which conclusively explain why the Insurance Companies here engage in such parallel conduct. As discussed above, it is clearly established that such follow-the-leader practices are legal and do not, by themselves, give rise to an inference of prior agreement. [\*\*50] In other words, our case is not only controlled by [Twombly](#) but our case is [a fortiori](#) from the three cited cases in this same context of an insurance company's dealings with automobile repair shops.

For the foregoing reasons, both of the Body Shops' first two purported plus factors—identity of price and identity of tactics—are mere parallel conduct and do not support their attempt to allege the necessary agreement or conspiracy.

### 3. Contrary to Economic Interest

The Body Shops' brief suggests that the Insurance Companies' adherence to State Farm's artificial "market rate" and other payment structures is in contradiction to the industry databases, and by implication is against their economic self-interest. [HN10](#)[<sup>20</sup>] Courts have recognized a company's actions that were against its self-interest can constitute a plus factor. See, e.g., [In re Flat Glass Antitrust Litigation, 385 F.3d 350, 360 \(3d. Cir. 2004\)](#). Courts and commentators have further observed that this plus factor often restates interdependence in the context of alleged price-fixing. [Id. at 361](#); see also Areeda & Hovenkamp, [supra](#) ¶ 1434c1.

This argument exists only by implication because the Body Shops merely entitle the section of their brief "contrary to []economic self-interest." However, they do not explain how the fact that the other Insurance [\*\*51] Companies follow the lead of State Farm rather than adhering to the industry databases is against their own self-interest. Nothing in the complaints indicates to us that the actions of the Insurance Companies are against their economic interests. The pages in the complaint cited in the brief do not illuminate the argument either. Moreover, it is hard to

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<sup>20</sup> By coincidence, the Illinois Body Shop in this Seventh Circuit case has a name very similar to that of the New Jersey Quality Auto Shop in the instant case.

imagine how choosing the least costly method of repair, thereby reducing the reimbursement, is contrary to an insurance company's economic self-interest. Thus, we reject this suggested plus factor.

#### *4. Opportunity to Exchange Information*

The Body Shops also assert in their brief that they alleged that the Insurance Companies "have exchanged or have had the opportunity to exchange information relative to the conspiracy." Appellants' En Banc Br. at 27.<sup>21</sup> However, the argument they make in their brief to support their assertion is: "identical labor rates, [\*1270] identical refusal to compensate for the same processes and procedures, identical false excuses for such refusal, uniform adherence to the refusal to alter labor rates until State Farm does is indicative of shared information and agreement overall and agreement on the language to be used in [\*\*52] refusing payment for repair services (a 'script')."Id. In other words, they argue that because the Insurance Companies acted in identical ways, they must have been meeting and exchanging information.

There are two problems with this argument. First, the complaints make no factual allegations that the Insurance Companies either exchanged information, employed identical tactics, followed a script, or declined to pay for the same repairs. Second, even if the actual allegations did indicate considerable uniformity of price and uniformity of tactics, there would be no inference that this was the result of exchange of information for the same reasons discussed above. That is, even if there were considerable uniformity in requiring, for example, repair of parts (not replacement), use of recycled parts (not new), and requiring discounts, such actions just as plausibly result from independent resort to common and rational business practices as from exchange of information. And, as noted above, this is especially true in light of repeated allegations in the complaints that the several Insurance Companies say they will "conform to State Farm's payment structure." Compl. ¶ 115.<sup>22</sup>

<sup>21</sup> Although the Body Shops assert in their brief that the Insurance Companies share with each other the identity of problem body shops and other information, the actual complaints make no such allegations.

<sup>22</sup> To the extent that the Body Shops point to their statement in the complaint that "members of the insurance industry meet regularly to discuss such matters in and amongst themselves," Compl. ¶ 115, this statement is so vague as to be useless as support for a conspiracy. The Supreme Court in *Twombly* advised that plaintiffs' pleading of meetings between defendants needs to provide some degree of detail about the meetings in order to satisfy *Rule 8*'s notice requirements. *550 U.S. at 565 n.10, 127 S. Ct. at 1970 n.10*. The Court faulted the plaintiff in *Twombly* for not providing any details about when, where or with whom in particular the meetings took place. *Id.*; <sup>21</sup> see also *id. at 567 n.12, 127 S. Ct. at 1971 n.12* (suggesting that membership in a trade association is not significant). Referring to *Twombly* and its footnote 10, Areeda and Hovenkamp opine: "In sum, a conceded 'opportunity' to conspire was completely insufficient absent additional allegations about when and where such opportunity occurred, and about which of the defendants' employees participated." *Areeda & Hovenkamp, supra*, ¶ 1417b. Indeed, the treatise concludes:

Even if "opportunity" were defined narrowly and limited to proven interfirm contacts, deeming opportunity to be *prima facie* proof of conspiracy would lead to widespread condemnation of procompetitive collaborations. Once competitors assemble for a lawful activity, they would be presumptive conspirators . . . on every parallel action subsequently occurring. Because parallel pricing is common even in competitive markets, juries would be entitled to infer that competitors had agreed on prices, and price agreements are condemned absolutely. Thus, the effect of holding opportunity sufficient would be to discourage all trade associations, industry gatherings, or joint ventures. Thereby to imperil reasonable and procompetitive collaborations would be inconsistent both with the purposes of the antitrust laws and with well-established Supreme Court permission for many kinds of collaboration among competitors. Mere conspiratorial opportunity is routinely and correctly held insufficient to support a conspiracy finding.

*Id.* Accord *Almanza v. United Airlines, Inc.*, 851 F.3d 1060, 1071 (11th Cir. 2017) (applying the *Twombly* standard, and holding "Defendants' participation in trade associations . . . do not show a meeting of the minds"); *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1295 (11th Cir. 2010) ("[I]t was well-settled before *Twombly* that participation in trade organizations provides no indication of conspiracy").

### *5. Conclusion with respect to Horizontal Price-Fixing Conspiracy*

In sum, the Body Shops have alleged only parallel conduct, and have not **[\*\*54]** alleged **[\*1271]** any facts supporting plus factors that would tip the scale from equipoise towards conspiracy sufficiently to prevent dismissal of this count. Accordingly, we affirm the district court's dismissal of this claim.

#### C. Group Boycott

**HN11** A group boycott is included within the Sherman Act's prohibition of any unreasonable contract, combination, or conspiracy in the restraint of interstate trade or commerce. [15 U.S.C. §§ 1, 1013\(b\); St. Paul Fire & Marine Ins. v. Barry, 438 U.S. 531, 541, 98 S. Ct. 2923, 2929, 57 L. Ed. 2d 932 \(1978\)](#). A boycott consists of "pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target." [Barry, 438 U.S. at 541, 98 S. Ct. at 2930](#). The "ultimate target" of the agreement can be either a competitor or "a customer of some or all of the [boycotters] who is being denied access to desired goods or services because of a refusal to accede to particular terms set by some or all of the [boycotters]." [Id. at 543, 98 S. Ct. at 2931](#). For boycotting to be *per se* illegal, it must involve "horizontal agreements among direct competitors." [NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135, 119 S. Ct. 493, 498, 142 L. Ed. 2d 510 \(1998\)](#). In other words, as with the price-fixing claim of the Body Shops, their conspiracy to boycott claim requires as a prerequisite sufficient allegations of an agreement or conspiracy. Again the crucial, antecedent question is whether the alleged actions of the **[\*\*55]** Insurance Companies stem from independent actions or from prior agreement.

The boycott allegations in this case are even weaker than the allegations of price-fixing. Neither the "steering" allegations nor the "boycott" section of the complaint allege even in conclusory fashion that there was an agreement to do so. And even if we incorporate the conclusory allegations of an agreement from the price-fixing sections of the complaint, the instant complaint would still fall short of even the "few stray statements [that] speak directly of agreement" which the Supreme Court has held are insufficient. [Twombly, 550 U.S. at 564, 127 S. Ct. at 1970](#).

The Body Shops have asserted in their appellate briefing facts that are simply unsupportable on this record. Indeed, although the Body Shops have argued on appeal that "[a]ll of the Defendants utilize the same script containing identical false and misleading steering statements," both the word "script" and the word "identical" are conspicuously absent from the complaints. Quite the contrary, in the only factual allegations with regard to steering insureds away from their shops, the Body Shops allege that:

Examples of this practice include telling insureds and/or claimants that a particular chosen **[\*\*56]** shop is not on the preferred provider list, that quality issues have arisen with that particular shop, that complaints have been received about that particular shop from other consumers, that the shop charges more than any other shop in the area and these additional costs will have to be paid by the consumer, that repairs at the disfavored shop will take much longer than at other, preferred shops and the consumer will be responsible for rental car fees beyond a certain date, and that the Defendant cannot guarantee the work of that shop as it can at other shops.

Compl. ¶ 83. From this, it is argued in the Body Shops' brief that the Insurance Companies have engaged in "identical" tactics.

There is nothing in these allegations that would suggest action in concert or "rule out the possibility that the defendants were acting independently." [Twombly, 550 U.S. at 553-54, 127 S. Ct. at 1964](#). There is no allegation that all or most of the Insurance Companies used most or all of the foregoing excuses in urging insureds **[\*1272]** against patronizing a shop. There is no allegation that the several companies used the same language. There is no allegation suggesting any other uniformity that would be unexpected or idiosyncratic.

Moreover, even if there were **[\*\*57]** considerable uniformity with respect to those reasons that an insured should not use a particular shop, there could hardly be reasons more expected or more commonly used than those alleged by the Body Shops. That the shop is not on the preferred provider list, that there are quality issues, that it charges

more, and/or that it takes longer are reasons that any company would be expected to use in an effort to persuade an insured not to use a particular shop. The alleged boycotting methods are not so idiosyncratic that they suggest conspiracy. To the contrary, they are methods that would logically be employed by any insurer to dissuade its insureds from using a disfavored shop. In other words, even a considerable uniformity with respect to the use of these reasons would fall well within the "wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." [\*Id. at 554, 127 S. Ct. at 1964.\*](#)

For the same reasons that it forecloses the Body Shops' price-fixing claim, [\*Twombly\*](#) forecloses the Body Shops' group boycott claims; their allegations allege only parallel conduct which is insufficient to create an inference of prior agreement or conspiracy. The Seventh Circuit in [\*\*\[\\*\\*58\] \*Quality Auto, 660 F.2d at 1206,\*\*\*](#) and the Northern District of California in [\*Workman, 520 F. Supp. at 623,\*](#) rejected similar group boycott claims in this same context involving parallel conduct on the part of several insurance companies in their dealings with automobile repair shops.

For the foregoing reasons, we affirm the district court's dismissal of the Body Shops' group boycott claims.

## V. THE STATE LAW CLAIMS

The Body Shops bring three state law claims for unjust enrichment, quantum meruit, and tortious interference. We address each in turn.

### A. Unjust Enrichment Claims

The Plaintiffs in all four states bring claims of unjust enrichment against these Defendants. Under the laws of the four states relevant here—Kentucky, Missouri, New Jersey, and Virginia—the elements of the cause of action include: (1) the plaintiff conferred a benefit on the defendant; (2) the defendant was aware thereof; and (3) it would be unjust to permit the defendant to retain the benefit.<sup>23</sup> [\*\*\[\\*1273\]\*\*](#) The gist of the Plaintiffs' claims is that the several Body Shops conferred a benefit on the several Insurance Companies, the latter were aware thereof, and allowing the Defendants to retain the benefit without full payment would be unjust.

Fatal to these unjust enrichment [\*\*\[\\*\\*59\]\*\*](#) claims is the fact that each of the five complaints alleges that each Insurance Company advised the Body Shops that it would pay no more than State Farm. Because the Plaintiff in each complaint knew before it undertook the repair that each Defendant-Insurance Company would pay no more than State Farm would pay, it clearly was not unjust for the Insurance Company to pay only that amount and no more. Without satisfying the unjust element, the cause of action fails even if we assume the other elements can be satisfied.

<sup>23</sup> See [\*Jones v. Sparks, 297 S.W.3d 73, 78 \(Ky. Ct. App. 2009\)\*](#) ([HN12](#))  "For a party to prevail under the theory of unjust enrichment, they must prove three elements: (1) benefit conferred upon defendant at plaintiff's expense; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention of benefit without payment for its value."); [\*Binkley v. Am. Equity Mortg., Inc., 447 S.W.3d 194, 199 \(Mo. 2014\)\*](#) ("An unjust enrichment claim requires a showing that: (1) the plaintiff conferred a benefit on the defendant; (2) the defendant appreciated the benefit; and (3) the defendant accepted and retained the benefit under inequitable and/or unjust circumstances") (quotation omitted); [\*VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 641 A.2d 519, 526 \(N.J. 1994\)\*](#) ("To establish unjust enrichment, a plaintiff must show both that defendant received a benefit and that retention of that benefit without payment would be unjust."); [\*Schmidt v. Household Fin. Corp., II, 276 Va. 108, 661 S.E.2d 834, 838 \(Va. 2008\)\*](#) ("To state a cause of action for unjust enrichment, [a plaintiff has] to allege that: (1) he conferred a benefit on [the defendant]; (2) [defendant] knew of the benefit and should reasonably have expected to repay [plaintiff]; and (3) [defendant] accepted or retained the benefit without paying for its value."). Although the Virginia rule statement does not expressly require that retention of the benefit be unjust, such a requirement is routinely read into the elements by Virginia courts. See, e.g., [\*R.M. Harrison Mech. Corp. v. Decker Indus., Inc., 75 Va. Cir. 404, 2008 WL 10669311, at \\*3 \(2008\)\*](#) ("The circumstances of the acceptance or retention of the benefit must render it inequitable for the defendant not to compensate the plaintiff.").

The Body Shops' only response to this fatal flaw is that they could not turn away sixty to ninety-five percent of the available repair business,<sup>24</sup> and therefore their contract to accept the amount State Farm would pay was an invalid contract. However, the Body Shops cite no law—in any of the four states—to the effect that market power alone is sufficient to invalidate a contract voluntarily entered into. Our independent research has also uncovered no such case. Moreover, we have already concluded that the Body Shops have failed to allege facts warranting an inference that the Insurance Companies agreed to or engaged in a conspiracy. Thus, the Body Shops' premise of market **[\*\*60]** power may also collapse in any event.

We conclude that the Body Shops' unjust enrichment claims are wholly without merit.

#### B. Quantum Meruit Claims

The Body Shops in four of the five complaints<sup>25</sup> before us also bring quantum meruit claims arising under the laws of Kentucky, New Jersey, and Virginia. [HN13↑](#) To state a cause action for quantum meruit, the Body Shops were required to allege, among other elements, that the circumstances reasonably notified the Insurance Companies that the Body Shops expected to get paid (Virginia and Kentucky) or that they reasonably expected to be compensated (New Jersey).<sup>26</sup> They cannot do so here.

As discussed above, the Body Shops specifically alleged that each of the Insurance Companies informed them that they would pay no more than State Farm. The Body Shops then undertook the repairs. Having fully informed the Body Shops of what they were willing to pay, the circumstances could have only reasonably informed the Insurance Companies that the Body Shops expected to be paid the amount State Farm would pay. This is fatal to the Virginia and Kentucky claims. Likewise, having been fully informed that the Insurance Companies would only pay the amount State Farm would **[\*\*61]** pay, the Body Shops could not have reasonably expected to receive more than that amount. This is fatal to the New Jersey claim.

**[\*1274]** The Body Shops have cited no authority—and our independent research has uncovered none—to support their position that they can contract to repair the car for a specified amount, do the repair, and then sue, claiming that they should be paid more. The only analogous case law our research has uncovered suggests just the opposite of the Body Shops' position: when a plaintiff has a reasonable expectation of some amount, they cannot reasonably expect to receive additional compensation and therefore cannot bring suit to recover it.<sup>27</sup>

We conclude that the quantum meruit claims of the Body Shops in the four complaints are wholly without merit.

#### C. Tortious Inference Claims

Although we have concluded—as did the district court—that the unjust enrichment and quantum meruit claims of the Body Shops are wholly without merit, the situation with respect to their tortious interference claims is more

<sup>24</sup> Aside from this allegation relating to market power, the Body Shops have alleged no concrete facts that might give rise to an inference of force.

<sup>25</sup> The Missouri complaint does not include a cause of action for quantum meruit.

<sup>26</sup> See [Raymond, Colesar, Glaspy & Huss, P. C. v. Allied Capital Corp., 961 F.2d 489, 491 \(4th Cir. 1992\)](#) (applying Virginia law); [JP White, LLC v. Poe Cos., LLC, 2011 Ky. App. Unpub. LEXIS 392, 2011 WL 1706751, at \\*5 \(Ky. Ct. App. May 6, 2011\)](#); [Weichert Co. Realtors v. Ryan, 128 N.J. 427, 608 A.2d 280, 285 \(N.J. 1992\)](#).

<sup>27</sup> See, e.g., [Hindsight Sols., LLC v. Citigroup Inc., 53 F. Supp. 3d 747, 776 \(S.D.N.Y. 2014\)](#) (unjust enrichment claim failed because plaintiff could not have reasonably expected to receive additional compensation); [Rodriguez v. Ready Pac Produce, 2014 U.S. Dist. LEXIS 64139, 2014 WL 1875261, at \\*3 \(D.N.J. May 9, 2014\)](#) (dismissing unjust enrichment claim where plaintiff "would have no reasonable expectation to receive additional compensation for hours worked in excess of a particular amount per week").

complicated. The district court expressly adopted and approved the magistrate judge's dismissal of the tortious interference claims as a violation of the group pleading doctrine. [\*\*62] The district court held:

Consistent with this Court's prior orders, a general allegation that some unidentified Defendants—or all Defendants—interfered with some unidentified customers of some unnamed plaintiff does not satisfy the pleading standard of [\*Ashcroft v. Iqbal\*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#). Because the Plaintiffs' allegations are too vague to satisfy [\*Rule 8\(a\)\*](#), Judge Smith recommends dismissal of all the tortious interference claims. (June 3 Report at 39).

Doc. 222 at 7. Although the district court invoked [\*Iqbal\*](#), we understand its ruling to be based on a very narrow group pleading rationale, rather than a standard-issue [\*Twombly-Iqbal\*](#) determination of the plausibility of the tortious interference claims in light of the well-pleaded factual allegations.<sup>28</sup> The gist of the problem with group pleading—as the magistrate judge noted earlier on page 9 of that same June 3 report—is the failure to give fair notice to each named defendant of the claims against it. For example, a complaint may fail to provide fair notice of the claims by failing to specify which defendants interfered with which plaintiffs. [\*Weiland v. Palm Beach Cty. Sheriff's Office\*, 792 F.3d 1313, 1323 \(11th Cir. 2015\)](#). Because the district court rested its dismissal of the tortious interference claims on this narrow group pleading rationale, and because [\*\*63] we think the district court will be well situated to determine the status of these claims on [\*1275] remand, we need not address the merits of the tortious interference claims or even the general contours of the doctrine of group pleading. We also do not address the relationship between that doctrine and the [\*Twombly-Iqbal\*](#) plausibility pleading standard or, for that matter, whether the allegations of tortious interference meet the plausibility standard. We address only the above-quoted narrow basis on which the district court relied.

We cannot agree with the district court that the instant five complaints' failure to name a plaintiff, to identify specific defendants, or to identify specific customers in the allegations relating to tortious interference deprived the Defendants of fair notice. Contrary to the suggestion of the district court, there is no problem with respect to "some unnamed plaintiff." In four of these five cases, there is only one plaintiff and thus it is absolutely clear that the person or entity interfered with is the single named plaintiff in each complaint. Although the fifth case<sup>29</sup> involves four named plaintiffs, they are four body shops located in close proximity [\*\*64] to each other in Virginia Beach and Suffolk, Virginia. It is amply clear in this fifth complaint that [\*each\*](#) Defendant-Insurance Company is alleged to have tortiously interfered with each of these four Virginia body shops. The allegations provide fair notice that each of the Plaintiffs is claiming that each of the named Defendants is tortiously interfering in the manner alleged with the named Plaintiff in each of the four single-plaintiff complaints and with the four named Plaintiffs in the fifth case.<sup>30</sup>

We are also unpersuaded by the district court's concern that the allegations in the complaints concern "some unidentified Defendants—or all Defendants." The substance of the alleged tortious interference is as follows. As alleged in ¶¶ 107-08 of the representative Quality Auto complaint, each complaint alleges that the named Insurance Companies—by means of a campaign of misrepresentation of facts about poor quality, etc.—have repeatedly steered their insureds away from each named Plaintiff to punish that Plaintiff for complaints about or refusal to submit to the price ceilings and other practices imposed by the named Defendants. [\*65] Although these

<sup>28</sup> We note that, in a report and recommendation adopted by the district judge in dismissing another complaint in this multidistrict litigation, the magistrate judge concluded that the allegations adequately alleged the elements of Tennessee tortious interference and did state a plausible claim if taken as true, but determined that the complaint "suffer[ed] from a different problem"—i.e., the group pleading issue. [\*Brewer Body Shop v. State Farm Mut. Ins. Co.\*, 101 F. Supp. 3d 1256, 1265-66 \(M.D. Fla. 2015\)](#). We take and mean to imply no position on the correctness of that plausibility holding. We mention it only to observe that the magistrate judge seems to have considered the group pleading "problem" as a separate matter from a run-of-the-mill [\*Twombly-Iqbal\*](#) analysis.

<sup>29</sup> The fifth case, [\*Pappas Body Shop, Inc., v. State Farm Mutual Automobile Insurance Co.\*](#), No. 15-14179, has four listed plaintiffs.

<sup>30</sup> Counting the named Insurance Companies in the same corporate family as a single defendant, as the district court did earlier in its opinion, Doc. 222 at 4, there are between twelve and twenty named defendants in the five complaints.

allegations are aimed generally at "the Defendants," each complaint stipulates that, "[w]here the term 'Defendants' is used within this Complaint, 'Defendants' is intended to and does mean each and every Defendant named in the caption above." In other words, the named Defendants<sup>31</sup> in each complaint had fair notice that "each and every" one of them is alleged to have improperly steered its own insureds away from the named Body Shops in each complaint because that Body Shop was not compliant with that Insurance Company's preferred reimbursement rate and other cost-saving practices.

Thus, of the potential deficits identified by the district court—i.e., general allegations about "unidentified Defendants," "unidentified customers," and "unnamed plaintiff[s]"—the only possible defect remaining is the failure to identify specific insureds/potential customers who were thus steered. We cannot conclude that the Body Shops' failure to identify particular potential customers who were steered away constitutes a failure to give each defendant fair notice of the claim against it. It is not [\*1276] the potential customer who is the target of the alleged tortious interference; it is the targeted [\*\*66] Body Shop. A potential customer may—but very well may not—tell the Body Shop that he or she was steered away. On the other hand, each Insurance Company, or its claims adjusters, will know whether the company engages in such a practice, and will know whether each named Plaintiff in the five complaints was noncompliant with that company's preferred practices and, most important, whether its insureds were steered away from that Plaintiff Body Shop.

In sum, we are not persuaded by the district court's grounds for concluding that the allegations of tortious interference in each of these five cases violated the group pleading doctrine, i.e., failed to give fair notice to each defendant of the claim being made against it. Accordingly, we vacate the judgment of the district court only with respect to the tortious interference claims in each of these five cases, and we remand for further proceedings. We note that in vacating the judgment of the district court with respect to the tortious interference claim, we have ruled only on the district court's stated group pleading rationale. We note also, because the federal antitrust claims have been eliminated from the case, the district court may well [\*\*67] decide to exercise its discretion to decline to exercise pendent jurisdiction of these state law tortious interference claims, pursuant to [28 U.S.C. § 1367](#).<sup>32</sup>

## VI. CONCLUSION

We affirm the judgment of the district court dismissing all of the claims except the tortious interference claims, which we vacate and remand for further proceedings not inconsistent with this opinion.

AFFIRMED in PART, VACATED in PART, and REMANDED.

**Concur by:** JORDAN

## Concur

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JORDAN, Circuit Judge, joined by MARTIN, Circuit Judge, concurring:

I concur in Parts II, III, and V of the court's opinion. And given the pleading standards that the Supreme Court has put in place for antitrust cases, see [Bell Atlantic Corp. v. Twombly](#), 550 U.S. 544, 553-70, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), and the complaint's failure to include important factual allegations on which the plaintiffs now rely, I concur in the judgment as to Parts I and IV.

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<sup>31</sup> The named Insurance Companies in each of the five complaints are not identical.

<sup>32</sup> We note that declining to exercise pendent jurisdiction is only one of the various options available to the district court on remand. We emphasize that we vacate the judgment of the district court with respect to the tortious interference claims only on the above described basis—i.e., our rejection of the narrow theory of group pleading upon which the district court relied. We decline to address other possible theories on the basis of which that judgment might have been affirmed (whether on the basis of the merits or other pleading deficiencies, including even other possible group pleading theories).

I have some concerns about a court relying on its own independent research with respect to facts on the ground, particularly in a motion to dismiss context. I am not convinced that we should be citing to a book on collision repairs, see Maj. Op. at 5, to understand how the auto repair industry actually operates. This is not the sort of adjudicative fact—a fact which is "relevant to a determination of the claims presented [\[\\*\\*68\]](#) in a case," *Dippin' Dots, Inc. v. Frosty Bites Dist.*, [369 F.3d 1197, 1204 \(11th Cir. 2004\)](#)—which can be judicially noticed under [Rule 201 of the Federal Rules of Evidence](#).

The taking of judicial notice is "a highly limited process" because it "bypasses the safeguards which are involved with the usual process of proving facts by competent evidence in district court." *Shahar v. Bowers*, [120 F.3d 211, 214 \(11th Cir. 1997\)](#) (en banc). In my view, how the auto repair industry works is not a matter that "can [\[\\*1277\]](#) be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." [Rule 201\(b\)\(2\)](#). Cf. *A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, [166 F.3d 191, 196 \(3d Cir. 1999\)](#) (denying motion to take judicial notice that swimwear and lingerie are separate industries because "it requires a factual determination [which is] inappropriate for judicial notice").

**Dissent by:** WILSON (In Part)

## Dissent

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WILSON, Circuit Judge, dissenting in part:

Anticompetitive exercises of buyer market power often go unpunished.<sup>1</sup> Not because the antitrust laws and existing antitrust jurisprudence cannot address them, but because it is often counterintuitive. To the average non-efficiency minded observer, condemning a practice that results in low prices seems like bad policy. But low prices do not tell the whole story. **Antitrust law**—with its goal to enable optimal market output through competition—demands a closer look. It is in that context that this case asks us to determine [\[\\*\\*69\]](#) when an antitrust complaint alleging an anticompetitive exercise of collective buyer market power can survive a motion to dismiss.

At this early stage, the law requires us to view the complaint as a whole, accept all the allegations as true,<sup>2</sup> draw all reasonable inferences in favor of the body shops, and only then decide whether the allegations, taken together, plausibly suggest an agreement. See *Bell Atl. Corp. v. Twombly*, [550 U.S. 544, 558, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#). Following that directive, and viewed in the proper economic context, the body shops' allegations state a price-fixing claim under the Sherman Act.<sup>3</sup>

The majority portrays this as an easy case for condemning an antitrust action under *Twombly*, finding a lack of so-called "plus factors" required to allege a plausible agreement under Sherman Act [§ 1](#). And if the law and facts were as simple as described by the majority, I would be inclined to agree. But the majority's narrow view of *Twombly*

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<sup>1</sup> See generally Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, [94 Notre Dame L. Rev. 583, 628-36 \(2018\)](#).

<sup>2</sup> Relatedly, *Twombly* instructs us to resist reasoning backwards from our own version of the facts or knowledge of the industry at issue. See Maj. Op. at 5 (citing Alfred M. Thomas & Michael Jund, *Collision Repair and Refinishing: A Foundation Course for Technicians* 7 (2014)); Maj. Op. at 22 ("[T]he 'products' here—cars—are so readily assembled from standard parts that their assembly line manufacturing set the standard for other industries."); Maj. Op. at 27 (noting that for the auto insurance industry, "parts and labor reimbursements are the primary business expenditures"). Imagine the already difficult job of a district court analyzing an antitrust complaint if that was *Twombly*'s directive: not just to analyze the facts alleged in the complaint in front of it, but to embark on its own independent fact-finding mission to determine whether other facts might exist that discredit those we must accept as true.

<sup>3</sup> The majority correctly concludes that the group boycott allegations are too conclusory to state a claim. I dissent only on the price-fixing claim. See Maj. Op. at Part IV (B).

does not represent the balance the Supreme Court struck between the cost of antitrust discovery and the burden on antitrust plaintiffs—the "group of private attorneys general," [\*\*70] [Illinois Brick Co. v. Illinois, 431 U.S. 720, 746, 97 S. Ct. 2061, 52 L. Ed. 2d 707 \(1977\)](#)—tasked with enforcing the antitrust laws.

I. The Basic Economics of Buyer Cartels The body shops plausibly allege an agreement when viewed in the context of

*buyer*, rather than seller, cartels. The difference has confused many courts. See Phillip E. Areeda & Herbert Hovenkamp, [Antitrust Law](#) ¶ 350b (4th ed. 2017) ("Clearly mistaken is the occasional court that thinks low buying prices procompetitive [\*1278] regardless of the restraints on competition that lead to such prices . . . . The suppliers' loss also constitutes antitrust injury, for it reflects the rationale for condemning buying cartels—namely, suppression of competition among buyers, reduced upstream and downstream output, and distortion of prices."); [W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 103-04 \(3d Cir. 2010\)](#) (reversing district court and rejecting its reliance on the argument that "low reimbursement rates translate into low premiums for subscribers" because "[s]uch shortchanging poses competitive threats similar to those posed by conspiracies among buyers to fix prices").

Buyer cartels cause "suboptimal output, reduced quality, allocative inefficiencies, and (given the reductions in output) higher prices for consumers in the long run." [W. Penn, 627 F.3d at 104](#). An oligopsony market is one in which a cartel of relatively [\*\*71] few buyers has significant market power in the buying market. Compared to a competitive market, oligopsony generates infracompetitive<sup>4</sup> input prices and a smaller quantity of the input demanded. See generally Areeda & Hovenkamp, *supra*, ¶¶ 2002, 2011. Using body shop labor as an example, a simplified causal chain goes like this: A group of auto insurers form a cartel and collectively agree on the maximum price they will pay for body shop labor. The cartel collectively dominates the market for the *purchase* of body shop labor. The cartel also collectively dominates the market for the *sale* of auto insurance. There are no substitute "inputs" for auto body shop labor—the ability to sell auto insurance depends on the ability of each insurer to purchase auto body labor. The colluding insurers pay a lower price for body shop labor, which, given the simple mechanics of supply (production) and demand (price), drives down the quantity of auto body shop labor produced. In other words, in response to the artificially low market price of labor, auto body shops produce fewer units (hours) of body shop labor. The first anticompetitive effect, then, is below-market body shop labor output.

With fewer units of body shop labor now [\*\*72] on the market, insurers have fewer units available to purchase. Because the insurers purchase fewer units of body shop labor, they have fewer units to incorporate into their final "product"—auto insurance. Assuming the colluding insurers have collective market power in the selling market—the market for auto insurance—the necessary result is that insurers must either: (1) decrease the number of "units" of labor included in each insurance policy (say by decreasing the quality or number of repairs so that each repair requires fewer labor hours); or (2) include the same number of units of labor in insurance policies and sell fewer insurance policies, which would require a price increase. The second anticompetitive effect, then, is on *consumers of auto insurance*: lower quality auto insurance (insurance that covers lower quality or fewer repairs) and increased prices for the same quality insurance.

The upshot is that the colluding auto insurers can increase profits by purchasing their inputs (body shop labor and repair parts) at a price below the competitive level and selling their output product (auto insurance) at a price above the competitive level.<sup>5</sup>

<sup>4</sup> Infracompetitive means below the competitive level—that is, a price below marginal cost.

<sup>5</sup> Because the auto body shops allege a per se illegal agreement among the auto body insurers to fix prices, they are not required adequately to allege anticompetitive harm. Even so, the anticompetitive effects of monopsony power are well-documented, both in the context of horizontal cartel agreements and horizontal mergers. See, e.g., [Todd v. Exxon Corp., 275 F.3d 191 \(2d Cir. 2001\)](#) (Sotomayor, J.) (holding employees' allegations of information exchanges and oligopsonistic market sufficient to state claim of wage suppression conspiracy); [Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010 \(10th Cir. 1998\)](#) (condemning agreement among colleges to limit salaries of basketball coaches); [United States v. Anthem, Inc., 855 F.3d 345, 378, 428 U.S. App. D.C. 403 \(D.C. Cir. 2017\)](#) (Kavanaugh, J., dissenting) (disagreeing on the availability of efficiency defense to

[\*1279] With this framework in mind, [\*\*\*73] it is easy to see why insurers have a motive to form an agreement. Every colluding insurer is better off, at least in the short run, if they all comply with the agreement: the insurers can only continue to purchase inputs at infracompetitive levels if the other insurers do not cheat on the agreement and purchase more units, driving up the market rate. But every insurer also has an incentive to cheat. If one insurer purchases more hours of body shop labor, it can sell either higher quality insurance (insurance that covers more or higher quality repairs) or it can sell more units of insurance. "The individual cartel member experiences the full benefit of [purchasing more inputs] but only a portion of the burden of the [increase] in the market price, which is shared by all cartel members . . . . [I]f everyone cheats without limit, the market moves back to the competitive price." Areeda & Hovenkamp, *supra*, ¶ 2002d.

## II. The *Twombly* Standard

We review motions to dismiss de novo. *Jacobs v. Tempur-Pedic Intern., Inc.*, 626 F.3d 1327, 1332 (11th Cir. 2010). To state a claim under Sherman Act § 1, a complaint must contain "allegations plausibly suggesting (not merely consistent with) agreement." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).<sup>6</sup> "Plausibility is the key," and the well-pleaded allegations "must nudge the claim across the line [\*\*\*74] from conceivable to plausible." *Jacobs*, 626 F.3d at 1333 (internal quotation marks and citations omitted). "But no part of the *Twombly-Iqbal* pleading standard requires a plaintiff to provide evidence for the factual allegations in a complaint before they are entitled to the assumption of truth at the motion-to-dismiss stage." *Hi-Tech Pharms., Inc. v. HBS Int'l Corp.*, 910 F.3d 1186, 1197 (11th Cir. 2018) (internal quotation marks omitted). "And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of [\*1280] those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (internal quotation marks omitted).

## III. Allegations Plausibly Suggesting an Agreement

Because price fixers typically conceal their conspiracies, courts may infer an agreement from circumstantial evidence. See *id. at 553*. To survive a motion to dismiss, the plaintiff must allege "parallel conduct" plus "further factual enhancement." *Id. at 557*. These so-called "plus factors" serve as proxies for direct evidence of an agreement. We have never prescribed a rigid set of factors or the weight of any particular factor. Instead, "any showing that tends to exclude the possibility of independent action can qualify as a plus factor." *Williamson Oil Co. v. Phillip Morris U.S.A.*, 346 F.3d 1287, 1301 (11th Cir. 2003) (emphasis added) (internal [\*\*\*75] quotation marks omitted). The importance of any factor rests on its tendency to show that the defendants' behavior is plausibly consistent with a pricefixing conspiracy, as opposed to a rational and competitive business strategy, independently adopted by competing firms. See *id.*

### A. Consciously Parallel Conduct

merger of two health insurers but recognizing that if the merged insurer "would obtain provider rates that are below competitive levels because of its exercise of unlawful monopsony power against providers, that could be a problem, and perhaps a fatal one for this merger"); *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85 (3d Cir. 2010) (sustaining complaint that hospital system and health insurer conspired to suppress reimbursement rates paid to healthcare providers).

<sup>6</sup> Given the majority's extensive reliance on *Twombly*'s antitrust holding, it is worth noting how the antitrust allegations here are unlike those in *Twombly*. The complaint in *Twombly* alleged that four dominant telephone companies agreed not to compete by dividing the market into exclusive selling territories. *Twombly*, 550 U.S. at 551. The totality of the allegations to support an agreement were that: the four phone companies did not expand into one another's territories, each defendant excluded other companies from their respective territories, and the CEO of one of the telephone companies had once stated that expanding to its rivals' territories "might be a good way to turn a quick dollar but that doesn't make it right." *Id. at 550*. "[P]rice fixing is a very different practice, producing different kinds of signals, from the market division scheme alleged in *Twombly*. Most importantly, parallel lockstep pricing requires interdependence, while simultaneous failure to enter one another's markets creates no such inference . . . . By contrast, the *Twombly* complaint, which alleged little more than a parallel failure to enter one another's markets, did no more than describe behavior that was equally consistent with collusion and competition." Areeda & Hovenkamp, *supra*, ¶ 1434c2.

The complaints are replete with factual allegations showing consciously parallel conduct, including perhaps the quintessential example of it: all the defendants routinely and uniformly refused to pay more than State Farm. The insurers also uniformly: used the same formula for reimbursing paint jobs, refused to reimburse body shops for a specific set of repairs, and refused to reimburse shops for new or higher quality parts.<sup>7</sup>

## B. Plus Factors

"An allegation of parallel conduct . . . gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of entitlement to relief." [Twombly, 550 U.S. at 557](#) (internal quotation marks omitted). With the allegations already "close to stating a claim," *id.*, we must decide **[\*1281]** whether the body shops allege plus factors sufficient to nudge their allegations **[\*\*76]** of conspiracy into a plausible entitlement to relief. The majority thinks they did not. But viewed as a whole, the body shops have done enough to proceed to discovery.

### 1. Plus Factor: Customary Indications of Traditional Conspiracy

A widely accepted plus factor is allegations showing customary indications of a traditional conspiracy. See Areeda & Hovenkamp, *supra*, ¶ 1434b. Conduct that "does not result from chance, coincidence, independent responses to common stimuli, or mere interdependence" falls into this category. *Id.* at ¶ 1425. This conduct includes allegations suggesting the defendants adopted uniform prices and practices despite variables that would ordinarily, absent an agreement, cause those prices and practices to diverge. See *id.* In other words, conduct that conflicts with "what that defendant's legitimate economic self-interest would be under the assumption that it acted alone." [City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 570 n.33 \(11th Cir. 1998\)](#).

#### *i. Uniform Pricing Behavior*

"[T]he fact that competitors have knowingly charged identical prices is a neutral fact *in the absence* of evidence which would lead one to expect that the prices would have been different if truly independent decisions had been made." *Id. at 571* (emphasis added) (internal quotation marks omitted) (reversing **[\*\*77]** the district court's grant of summary judgment for defendants on price-fixing claim). There are allegations in the complaints at issue plausibly suggesting prices would be different absent an agreement.<sup>8</sup>

<sup>7</sup> In discussing uniformity of tactics, the majority notes: "Not only is there no allegation of identical or similar language, the language actually used in the complaints suggests just the opposite. As noted, ¶ 63 alleges '[t]hrough various means' and ¶ 64 alleges '[s]ome of these methods'—i.e. phrases that do not suggest that all or a substantial group of the Insurance Companies engage in all or most of the methods in strikingly similar ways." Maj. Op. at 26. That portion of the complaint says: "Through various methods, the Defendants have, independently and in concert, instituted numerous methods of coercing the Plaintiff into accepting less than actual and/or market costs for materials and supplies," and then the next paragraph lists "[s]ome of these methods." Compl. ¶¶ 63, 64. These two sections could reasonably be read to mean the Defendants have all instituted *various methods of coercing* the body shops—rather than the majority's reading that each of the Defendants instituted varying methods. While far from an object of clarity, if we view this section as a whole, the majority's reading is implausible. This paragraph begins the section titled "Suppression of Repair and Material Costs." The rest of the section describes the "various methods," and clarifies that "the Defendants" engage in those methods. See, e.g., Compl. ¶ 65 ("In addition to the above, the Defendants have repeatedly and intentionally failed to abide by industry standards for auto repairs."); Compl. ¶ 67 (noting that "the Defendants will refuse to allow the body shop to perform required procedures and processes"); Compl. ¶ 68 ("A non-exhaustive list of procedures and processes the Defendants refuse to pay and/or pay in full is attached hereto as Exhibit '3.'"). "As we have explained, a court reviewing a motion to dismiss must draw all reasonable inferences from the factual allegations in a plaintiff's complaint in the plaintiff's favor." [Bailey v. Wheeler, 843 F.3d 473, 482 \(11th Cir. 2016\)](#).

<sup>8</sup> The majority finds it significant that this case does not contain the precise market factors that made convergent pricing suspect in prior cases—the "secret," "sealed," and "simultaneous" bids that suggested the identical prices in [FTC v. Cement Inst., 333 U.S. 683, 713, 68 S. Ct. 793, 92 L. Ed. 1010, 44 F.T.C. 1460 \(1948\)](#), were the product of collusion. See Maj. Op. at 18-23. While the Supreme Court used these factors to show the dubious provenance of the prices in *Cement Institute*, they certainly are not the only way—or, in the seventy years since the Supreme Court's decision in that case, the typical way—to do so. *But see* Maj.

First, all the insurers charge the same rate as State Farm without independent market information or verification of State Farm's calculation of labor rates. Second, the insurers all use State Farm's geographic market definitions for determining the labor rate, without determining whether the insurer may have different relationships with the shops surveyed in that area. Third, *State Farm's rate is not in fact the market rate*: State Farm arbitrarily calculates and unilaterally modifies it to reach an infracompetitive figure. The body shops allege that each insurer uniformly conformed to this identical arbitrary and infracompetitive [\*1282] market rate without conducting their own surveys of the body shops they use or drawing their own market boundaries using the location of their insureds or their DRP shops. Each insurer, then, is not merely responding to "common stimuli" in the market. See [\*Twombly, 550 U.S. at 556 n.4\*](#) (quoting Areeda & Hovenkamp, *supra*, ¶ 1425).

Why would an insurer blindly accept a rate [\*78] determined arbitrarily by one of its competitors and divorced from the true competitive rate? Collusion—and with it the assurance that other competitors will do the same—might not be the only possible answer, but it is a plausible one. See, e.g., [\*Lifewatch Servs. Inc. v. Highmark Inc., 902 F.3d 323, 333-35 \(3d Cir. 2018\)\*](#) (finding plus factor where insurers adopted a model policy's approach to reimbursement of certain medical device with "near total uniformity" and reasoning that it was improbable "that the same coverage decision would be reached by nearly all the [insurers] independently" because some other insurers, independent medical review boards, and some medical studies concluded the device was medically necessary or met the standard of care); [\*In re Text Messaging Antitrust Litig., 630 F.3d 622, 628 \(7th Cir. 2010\)\*](#) (finding a plus factor where all defendants adopted a "uniform pricing structure" that raised prices in the face of falling costs, suggesting it was the "sort of restricted freedom of action and sense of obligation that one generally associates with agreement" (internal quotation marks omitted)); cf. [\*Proctor v. State Farm Mut. Auto. Ins. Co., 675 F.2d 308, 334, 218 U.S. App. D.C. 289 \(D.C. Cir. 1982\)\*](#) (noting that "[u]nless an insurance company is willing to pay whatever price is charged at any given repair shop, it stands to reason that it would conduct surveys to determine the rates charged by repair shops," [\*79] after discussing evidence that the defendant insurers conducted their own *independent surveys* of body shop rates, which *sometimes* led to the same rate).

Another element of the insurers' pricing behavior makes it competitively suspect. While the majority correctly states that requiring discounts is "among the most common and time-worn methods of increasing corporate profits," Maj. Op. at 27, uniformly adhering to a rate that drives the input price *below cost* is neither common nor consistent with rational independent business activity. The uniform "market rate" is below cost—including "artificially created less-than-market labor rates" and "less than actual and/or market costs for materials and supplies."<sup>9</sup> The insurers have uniformly and persistently kept the labor rate at this infracompetitive level, even in the face of rising input costs and an awareness that the price was below the body shops' costs. The body shops allege that "multiple body shops have attempted to raise their labor rates and advised State Farm of such." Compl. ¶59. But State Farm tells each body shop, falsely, that "they are the only one to demand a higher labor rate." Compl. ¶ 59.

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Op. at 19 ("[T]he Body Shops quote a leading antitrust treatise for the idea that an agreement may be present if rivals establish identical prices, but they fail to grapple with the caveat that this is *only true* where there are 'simultaneous identical bids on a made-to-order product not readily assembled from standard and conventionally priced items.'" (emphasis added) (quoting Areeda & Hovenkamp, *supra*, ¶ 1434b)). Just after the portion quoted by the majority, the same treatise gives a host of other examples that may amount to "parallelism that is too close for coincidence and beyond explanation by mere recognized interdependence" including "conspiratorial opportunity, unexplained meetings, furtive behavior, discussions and information exchanges, ambiguous participant admissions, solicitations of agreement, sham bids, threats of common action directed against a potential victim, identical bids, refusals to bid, proved conspiracy or competition in other markets or times." Areeda & Hovenkamp, *supra*, ¶ 1434b. The allegations here make other cases better analogues. See, e.g., [\*In re Text Messaging Antitrust Litig., 630 F.3d 622 \(7th Cir. 2010\)\*](#).

<sup>9</sup> See Compl. ¶ 61 ("net effect of this tactic is to allow State Farm to manipulate the 'market rate' and artificially suppress the labor rate"; Compl. ¶ 62 ("These Defendants have agreed to join forces with State Farm, the dominant market holder, and each other to coerce the Plaintiff into accepting the artificially created less-than-market labor rates"; Compl. ¶ 63 ("Defendants have, independently and in concert, instituted numerous methods of coercing the plaintiff into accepting less than actual and/or market costs for materials and supplies")); Compl. ¶ 64 ("requiring discounts and/or concessions, even when doing so requires the shop to operate at a loss"); Compl. ¶ 71 (Defendants universally used formula for reimbursing paint repairs "which compensates the shops for only half the actual cost on average").

[\*1283] In a buyers' cartel, uniform infracompetitive [\*\*\*80] input prices in the face of rising input costs plausibly suggests an agreement among buyers. Cf. *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 572-73 (11th Cir. 1998) (holding in the context of a sellers' cartel that parallel increased prices despite falling costs, high incumbency rates, and awareness of other sellers' prices plausibly suggest conspiracy not to compete on price); Areeda & Hovenkamp, *supra*, ¶ 1434d3 (citing *City of Tuscaloosa* favorably for this plus factor); *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360-61 (3d Cir. 2004) (finding, in the context of a sellers' cartel, "[e]vidence that the defendant acted contrary to its interests means evidence of conduct that would be irrational assuming that the defendant operated in a competitive market. In a competitive industry, for example, a firm would cut its price with the hope of increasing its market share if its competitors were setting prices above marginal costs."); *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 324 (2d Cir. 2010) (finding a plus factor where defendants raised price above competitive market price despite falling costs, and uniformly included contract term that industry commentator said was unprofitable, reasoning that "some form of agreement among defendants would have been needed to render the enterprises profitable"); *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 628 (7th Cir. 2010) (Posner, J.) (finding a plus factor where allegations included that "in the face of steeply falling costs, [\*\*\*81] the defendants increased their prices . . . because falling costs increase a seller's profit margin at the existing price, motivating him, in the absence of agreement, to reduce his price slightly in order to take business from his competitors, and certainly not to increase his price").

The economic basis for this conclusion is well established. Recall the incentives created in a cartel. Every insurer is better off if they all comply with the agreement: the insurers can only continue to purchase inputs at infracompetitive levels if the other insurers do not cheat on the agreement by purchasing more hours of body shop labor and driving up the market rate. But every insurer also has an incentive to cheat. If one insurer purchases more hours of body shop labor, it can steal business from its rivals by selling either higher quality insurance (insurance that covers more or higher quality repairs) or more units of insurance. "The individual cartel member experiences the full benefit of [purchasing more inputs] but only a portion of the burden of the [increase] in the market price, which is shared by all cartel members . . . . [I]f everyone cheats without limit, the market moves back to the [\*\*\*82] competitive price." Areeda & Hovenkamp, *supra*, ¶ 2002d; see also *id.* at ¶ 1434c2 (noting that *In re Text Messaging* relied on "sound economic theory about collusion and the behaviors that are very difficult to explain in its absence"). Sustained infracompetitive input prices requires agreement among purchasers, and, as a result, allegations of infracompetitive input rates in an oligopsonistic purchasing market at least constitute a plus factor that, along with the other allegations plausibly suggests collusion.<sup>10</sup>

#### **[\*1284] ii. Uniform Refusal to Follow Industry Standards and Uniform Quality**

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<sup>10</sup> To argue that the identical prices here are not cause for concern, the majority cites the Seventh Circuit's decision in *Quality Auto Body, Inc. v. Allstate Insurance Co.*, 660 F.2d 1195 (7th Cir. 1981). *Quality Auto Body* was an appeal from the grant of summary judgment for the insurers. The plaintiff body shop conducted significant discovery, including each insurer's rates, depositions of their executives, and the results of State Farm's surveys. See *Quality Auto Body*, 660 F.2d at 1200 ("The uncontested affidavits and deposition testimony submitted by defendants establish that each company has unilaterally developed its own claim-handling procedures."). The Seventh Circuit found that, contrary to the plaintiff's complaint, the evidence after discovery revealed that the labor rates used by the insurers were variable and that each insurer "uses a different method for determining the lowest prevailing competitive rate." *Id.* The complaint that apparently warranted discovery merely alleged that the insurers followed a "common formula" for calculating rates. *Id.* Similarly, in the other case the majority cites for this proposition, *Proctor v. State Farm Mutual Automobile Insurance Co.*, 675 F.2d 308, 316, 218 U.S. App. D.C. 289 (D.C. Cir. 1982), the D.C. Circuit similarly reviewed an order granting summary judgment. Noting this important distinction, the court reasoned that "[i]n considering whether to grant summary judgment in this case the District Court relied . . . on the length of time . . . and the ample opportunities for discovery that the appellants had to 'unearth evidence to support their allegations.'" *Proctor*, 675 F.2d at 316 (internal quotation marks and citations omitted). The results of discovery—all the body shops here seek—from a pair of cases in the 1980s can hardly undercut the allegations we must accept as true at the motion to dismiss stage. And if the body shops here are similarly unsuccessful at uncovering evidence of a conspiracy during discovery, they too would lose at summary judgment.

First, the insurers uniformly require repair shops to use used or imitation parts, even where new or OEM parts are necessary to put the vehicle in preaccident condition. Second, the insurers refuse to reimburse for repairs that, in the "shop's professional opinion" are required for a safe and quality repair. Third, the insurers unvaryingly refuse to reimburse the body shops for the same list of repairs and services, even where a listed repair or service is necessary to return a given vehicle to pre-accident condition.<sup>11</sup> Fourth, the insurers refuse to comply with industry standards, including three separate independent [\*\*83] auto collision repair databases. The databases include the "ordinary and customary repairs, repair time (labor) and materials necessary to return a vehicle to its pre-accident condition." Both the insurers and body shops agree that the databases are the industry standard. State Farm even assured at least one state insurance regulator that it would begin to abide by the databases, but still does not.

This behavior is at least plausibly inconsistent with rational business behavior—that is, inconsistent with the normal incentive to compete with rivals on a profitable aspect of quality to gain market share. See [\*Starr v. Sony BMG Music Entm't, 592 F.3d 314, 327 \(2d Cir. 2010\)\*](#) ("[I]t would not be in each individual defendant's self-interest to sell [a product] at prices, and with [certain contract terms], that were so unpopular as to ensure that 'nobody in their right mind' would want to purchase [it], unless the defendant's rivals were doing the same."). For example, the "Defendants' conduct runs counter to the millions of dollars insurers spend to gain or maintain market share by advertising 'new car replacement' and 'accident forgiveness' policy terms." Compl. ¶ 118; see also Compl. ¶ 117 (noting "the incentives insurers have to gain market share [\*\*84] by advertising themselves as the insurer that does not cut corners on safety and quality of repair work").

These allegations plausibly suggest an agreement. See [\*Lifewatch Servs., 902 F.3d at 334-35\*](#) (holding defendant insurers' identical refusal to reimburse a product [\*1285] that "many sophisticated third parties," including physicians and state medical review boards, agreed was medically necessary was a plus factor); [\*Evergreen Partnering Grp., Inc. v. Pactiv Corp., 720 F.3d 33, 49-51 \(1st Cir. 2013\)\*](#) (finding a plus factor where defendants acted against their independent interests by uniformly refusing to adopt a policy "standard in the industry" and would have "resulted in a higher volume of customer sales due to the attractiveness of potential savings and environmental benefits").

## 2. Plus Factor: Meeting Often to Discuss Prices

Merely belonging to an industry trade association does not in itself constitute a plus factor. [\*Am. Dental Ass'n v. Cigna Corp., 605 F.3d 1283, 1295-96 \(11th Cir. 2010\)\*](#). "But we expect competitors to meet together *only minimally* and to *assemble publicly* for relatively *open meetings* conducted with a particular and *justifiable purpose* in mind. To the extent that rivals move away from this model, their activity becomes less consistent with normal competition and more consistent with a conspiracy to suppress it." Areeda & Hovenkamp, *supra*, ¶ 1417b (emphasis added). The body shops allege [\*\*85] that insurance industry meetings happen "approximately once a month," are *closed* to non-members, and that a State Farm representative admitted it would discuss with other insurers whether to begin using third-party reimbursement metrics to set rates.<sup>12</sup> Compl. ¶ 74 (emphasis added).

<sup>11</sup> The majority's assertion that "the complaints make no factual allegations that the Insurance Companies . . . declined to pay for the same repairs" is simply not true. See Compl. ¶ 68 ("A non-exhaustive list of procedures and processes the Defendants refuse to pay and/or pay in full is attached hereto as Exhibit '3.'"); Exhibit 3 (listing repairs); Compl. ¶ 67 ("In many instances, the Defendants will refuse to allow the body shop to perform required procedures and processes, thereby requiring body shops to perform less-than-quality work or suffer a financial loss on a given repair.").

<sup>12</sup> Compl. ¶ 74 (State Farm "assured those present, and the Department of Insurance representative that it would begin abiding by those database estimates and stated it would raise the matter at its insurance industry meetings, held locally approximately once a month"); Compl. ¶ 75 ("The [auto body shop] association representative present for the meeting, John Mosley, invited State Farm to attend those [auto body shop] Association meetings if State Farm would permit members of the Association to attend the insurance meetings. Mr. Simpkins [the State Farm representative] refused."). The majority opinion ignores these allegations, instead pointing to the summary paragraph that notes "members of the insurance industry meet regularly to discuss such matters in and amongst themselves." Compl. ¶ 115. The majority, disregarding the other related allegations—and thus failing to follow *Twombly*'s directive to view the complaint as a whole—argues that "this statement is so vague as to be useless as support for a conspiracy." Maj. Op. at 33 n.22.

State Farm's promise to raise the reimbursement issue at the industry meeting suggests that State Farm sought the acceptance of the trade association before adopting database estimates as the method of calculating reimbursement, and that decisions about the system of calculating rates are made collectively, not unilaterally by each insurer. These allegations plausibly suggest a conspiracy to suppress competition rather than independent and rational "follow the leader" activity. See [\*1286] [Osborn v. Visa Inc., 797 F.3d 1057, 1067, 418 U.S. App. D.C. 193 \(D.C. Cir. 2015\)](#) ("But the Plaintiffs here have done much more than allege 'mere membership.' They have alleged that the member banks used the bankcard associations to adopt and enforce a supracompetitive pricing regime for ATM access fees."); [In re Text Messaging Antitrust Litig., 630 F.3d 622, 628 \(7th Cir. 2010\)](#) (holding plaintiffs plausibly stated a claim for conspiracy when complaint alleged that "defendants belonged to trade association and exchanged price information directly at association meetings"); [\*\*86] [Evergreen Partnering Grp., Inc. v. Pactiv Corp., 720 F.3d 33, 47-48 \(1st Cir. 2013\)](#) (finding plus factor where complaint alleged that defendants attended an industry meeting where two dominant defendants "put forward their position that [adopting a certain policy] was not an option," and the court "could infer that their prominent place in the organization would place some pressure on the other producer defendants to conform with their position"); [Lifewatch Servs. Inc. v. Highmark Inc., 902 F.3d 323, 334 \(3d Cir. 2018\)](#) (finding plus factor where insurers met several times a year to set model policy terms on the reimbursement of a particular medical device, and the insurers uniformly followed the model policy even though it was not binding them).

The body shops raise more suspicion about these industry meetings by giving an example of how the insurance industry has used similar meetings to suppress competition in this precise way in the past. Allegations of "opportunities for abuse" are "not to be ignored when the opportunity is proved to have been utilized in the past." See [Am. Tobacco Co. v. United States, 328 U.S. 781, 796, 66 S. Ct. 1125, 90 L. Ed. 1575 \(1946\)](#) (emphasis added); cf. [Williamson Oil Co. v. Phillip Morris U.S.A., 346 F.3d 1287 \(11th Cir. 2003\)](#) (refusing to allow evidence of the defendants' industry's history of antitrust violations at the summary judgment stage because the class had failed to direct it to any precedent holding a history of violations suggests a present violation); [\*\*87] Areeda & Hovenkamp, *supra*, ¶1432b (criticizing *Williamson Oil* because "whether a history of past collusion is relevant to likelihood of current collusion is a question of fact, not of law"). The body shops allege—and attach a 1963 consent decree to the complaints to show—that in the past, the auto insurance industry has used trade associations to fix auto body repair costs, including auto body labor, using the same methods alleged here. Compl. ¶¶ 87-89; Exhibit 4 (listing various auto insurer trade associations as defendants).

### 3. Facilitating Factor: Market Structure

Several of our sister circuits have held that allegations showing a market susceptible to collusion, while not alone sufficient, can nudge other factual allegations tending to show an agreement across the line to plausibility. See, e.g., [In re Text Messaging Antitrust Litig., 630 F.3d 622, 627-28 \(7th Cir. 2010\)](#) ("Parallel behavior of a sort anomalous in a competitive market is thus a symptom of price fixing, though standing alone it is not proof of it; and an industry structure that facilitates collusion constitutes supporting evidence of collusion."); [SD3, LLC v. Black & Decker \(U.S.\) Inc., 801 F.3d 412 \(4th Cir. 2015\)](#); [Evergreen Partnering Grp., Inc. v. Pactiv Corp., 720 F.3d 33, 48 \(1st Cir. 2013\)](#); [Starr v. Sony BMG Music Entm't, 592 F.3d 314, 323 \(2d Cir. 2010\)](#); [In re Flat Glass Antitrust Litig., 385 F.3d 350, 360-61 \(3d Cir. 2004\)](#) (considering market structure a plus factor for summary judgment analysis pre-*Twombly*). Market structure susceptible to collusion is not independently a plus [\*\*88] factor, but it can place other allegations "in a context that raises a suggestion of preceding agreement." [Twombly, 550 U.S. at 557 n.4](#); see

The complaint does not specifically allege whether other defendants attend the "insurance industry meetings" in question. We do know that "the Insurance Companies account for sixty-five to eighty-five percent of the insurance market in each of the relevant states." Maj. Op. at 6. It is a reasonable inference that at least some participate in "insurance industry meetings." But regardless, State Farm's admission is important because it suggests State Farm seeks approval from other insurance industry members on its rate setting mechanism. That admission—made in front of several witnesses—alone suggests the rate that the insurers uniformly follow is not derived independently by State Farm with the other insurers simply following its lead. See Compl. ¶ 114 (referring to the "concert of action among the Defendants and co-conspirators to control and suppress automobile damage repair costs"); Compl. ¶ 115 ("Evidence of this conspiracy or combination includes, but is not limited to, admission before witnesses that members of the insurance industry meet regularly to discuss such matters in and amongst themselves").

generally Areeda & Hovenkamp, *supra*, ¶¶ 2002f(1)-(8) (listing [\*1287] factors that make a market susceptible to collusion including: a small number of firms with large aggregate market share; a fungible service, considered in the context of standardization efforts; few avenues for non-price competition; and high elasticity of supply).

The complaint suggests that at least some of these market factors are present. First, accounting for those entities with common headquarters,<sup>13</sup> roughly a dozen insurers control between 70 and 95 percent of the body shops' revenue. See *Todd v. Exxon*, 275 F.3d 191, 210 (2d Cir. 2001) (Sotomayor, J.) (finding fourteen defendants that employed 80-90% of industry's workforce sufficient). Second, the as the majority seems to recognize, Maj. Op. at 23, the insurers have implemented standardization mechanisms that make comparing their inputs easier—including establishing a quality standard by uniformly refusing to reimburse for the same repairs. See Areeda & Hovenkamp, *supra*, ¶ 1435b ("[A]greed steps might be taken to reduce the product or transactional variety that impedes rivals' ability to . . . compare transactions, or to detect 'cheating' from parallel [\*\*89] uniformity" such as "agreements standardizing the product . . . or creating formulas for the computation of freight rates or other elements of price"); *Todd*, 275 F.3d at 210 (finding jobs at various firms fungible because "the sophisticated techniques employed by defendants to account for the differences among jobs" made coordinating price possible). Finally, labor is the quintessential example of inelastic supply because "an hour not worked today can never be recovered." *Todd*, 275 F.3d at 211. A plaintiff alleging a per se antitrust violation need not allege anticompetitive harm in a precisely defined market like a plaintiff proceeding under the rule of reason. See *Arizona v. Maricopa Cty. Med. Soc.*, 457 U.S. 332, 347, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982) ("We have not wavered in our enforcement of the per se rule against price-fixing."); Areeda & Hovenkamp, *supra*, ¶ 307d2 ("If the claim is made under the per se rule, proof of a relevant market and power are not required by the substantive law and thus need not be pled."). But what we do know from the complaint suggests this market could be susceptible to collusion. While certainly not a plus factor on its own, the market structure facilitates the plausibility of an agreement.

#### 4. Facilitating Factor: Exchange of Price Information

Because it allows firms to detect cheating and easily set [\*\*90] rates, the apparent exchange of price information between the insurers also facilitates collusion and can also nudge other allegations into plausible claims of an agreement. See Areeda & Hovenkamp, *supra*, ¶ 1435a. First, all the insurers charged the same "market rate" as State Farm. Second, only State Farm collects market information from the body shops used to determine that rate. Third, State Farm's rate is artificial, arbitrarily adjusted, and not otherwise derived from actual market information that would be available to all insurers, seemingly ruling out the possibility that each insurer is simply responding to common market stimuli to set its rate. Fourth, the other insurers do not verify the accuracy or validity of State Farm's rate with the body shops. Fifth, the body shops are prohibited from discussing their individual labor rates with each other. And finally, State Farm admitted to discussing a method for setting [\*1288] reimbursement rates at industry meetings.

These allegations lead to two possible explanations. Either the other insurers blindly accept the *body shops' recitation* of *State Farm's rate* without confirming or otherwise discussing that rate with State Farm, or State Farm shares its rate with [\*\*91] the other insurers. The latter is at least a reasonable inference from the allegations in the complaint. This apparent exchange and use of rate information nudges the allegations of an agreement closer to plausibility. See *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 369 (3d Cir. 2004).

Like standardization, the exchange of rate information is also a facilitating practice because it makes it easier to detect cheating. If an insurer decided to cheat on the agreement by offering a higher price to body shops and purchasing more units of body shop labor, it might drive the actual market rate above State Farm's artificial "market rate." The body shops allege that State Farm collects shop-wide and market-wide rate data and speaks with body shops that report rates it unilaterally considers too high. State Farm's survey could reveal the rate increase occasioned by the cheating insurer, and its conversations with body shops could reveal the offender. See *In re Text Messaging Antitrust Litig.*, 630 F.3d 622 (7th Cir. 2010) (market structure that enables cartel members "to be able to

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<sup>13</sup> For example, the lead complaint lists the headquarters of "GEICO Casualty Company," "Government Employees Insurance Company," and "GEICO Indemnity Company" as the same address in Chevy Chase, Maryland. Compl. ¶¶ 9-11.

detect 'cheating'" facilitates collusion). Again, the exchange of rate information alone does not constitute a plus factor, but it is a well-accepted facilitating practice that can tip other plus factors into suggesting a plausible agreement. [\*\*92]

#### IV. Conclusion

None of this is to suggest that any of these plus factors or facilitating factors, standing alone, would allow the plaintiff in another case to survive a motion to dismiss. The plus factor inquiry is wholistic. We cannot analyze each possible plus factor in isolation, accept or reject it, and move on to the next. Instead, we view all the possible plus factors and the allegations that support them in their proper economic context. And only then we decide, whether, viewed as a whole, there is enough to "nudge the claim across the line from conceivable to plausible." [Jacobs, 626 F.3d at 1333](#) (internal quotation marks and citations omitted).

Antitrust laws are often underenforced against anticompetitive exercises of buyer market power. And yet, under the majority's interpretation of the *Twombly* standard, never has it been harder for an antitrust plaintiff to proceed to discovery. "The plaintiffs have conducted no discovery. Discovery may reveal the smoking gun or bring to light additional circumstantial evidence that further tilts the balance in favor of liability." [In re Text Messaging Antitrust Litig., 630 F.3d 622, 629 \(7th Cir. 2010\)](#). Discovery might uncover, for example, that the insurers agreed at industry meetings to use the same market rate, same reimbursement [\*\*93] formulas, and same standards of quality. It might reveal exchanges of rate information, attempts to punish cheating insurers, or communications between insurers about successfully maintaining infracompetitive labor rates. And it might not. But "[a]ll that we conclude at this early stage in the litigation is that the . . . complaint provides a sufficiently plausible case of price fixing to warrant allowing the plaintiffs to proceed to discovery." *Id.* Because the majority incorrectly reaches the opposite conclusion, I respectfully dissent.

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End of Document

## Mulvey v. Am. Airlines Inc.

United States District Court for the District of Columbia

March 6, 2019, Decided; March 6, 2019, Filed

Civil Action No. 18-3119 (CKK)

**Reporter**

2019 U.S. Dist. LEXIS 35824 \*; 2019 WL 1060877

AARON MULVEY and CAROLYN MULVEY, Plaintiffs, v. AMERICAN AIRLINES INC., et al., Defendants.

### **Core Terms**

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antitrust, amended complaint, Plaintiffs', Airlines, motion to dismiss, allegations, injury in fact, Defendants', Air, incorporates, settlement, concrete, airline ticket, pro se, prices

**Counsel:** [\*1] For AMERICAN AIRLINES INC., Defendant: Benjamin G. Bradshaw, LEAD ATTORNEY, O'MELVENY&MYERS, LLP, Washington, DC; Katrina M. Robson, O'MELVENY&MYERS LLP, Washington, DC.

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For SOUTHWEST AIRLINES CO., Defendant: Alden Lewis Atkins, LEAD ATTORNEY, VINSON&ELKINS LLP, Washington, DC; Roberta D. Liebenberg, LEAD ATTORNEY, FINE, KAPLAN AND BLACK R.P.C., Philadelphia, PA.

**Judges:** COLLEEN KOLLAR-KOTELLY, UNITED STATES DISTRICT JUDGE.

**Opinion by:** COLLEEN KOLLAR-KOTELLY

### **Opinion**

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#### **MEMORANDUM OPINION**

This lawsuit involves claims by *pro se* Plaintiffs Aaron and Carolyn Mulvey that Defendants American Airlines Inc. ("America"), Delta Air Lines Inc. ("Delta"), Southwest Airlines Co. ("Southwest"), and United Airlines, Inc. ("United") violated the [Sherman Act, 15 U.S.C. §§ 1, 3](#), by "artificially inflating prices and conspiring with one another to commit fraud on the plaintiffs."<sup>1</sup> Complaint, ECF No. 1, ¶ 2; see Pls.' First Amended Complaint, ECF No. 19 (incorporating by reference the allegations of the Complaint). Pending before this Court is Defendants American Airlines, Inc. and Delta Air Lines Inc's [9] Motion to Dismiss, which alleges that [\*2] Plaintiffs lack standing under Article III and antitrust laws. Upon consideration of the pleadings,<sup>2</sup> the relevant legal authorities, and the record as it

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<sup>1</sup> Plaintiffs are both attorneys.

<sup>2</sup> The Court's consideration has focused on the following documents:

- Plaintiffs' Complaint, ECF No. 1 ("Pls.' Compl.");

currently stands, the Court GRANTS Defendants American Airlines, Inc. and Delta Air Lines Inc's [9] Motion to Dismiss and dismisses without prejudice Plaintiffs' claims against these two Defendants.

## I. BACKGROUND

Plaintiffs' case was transferred to this Court based upon American, Delta and United "fil[ing] a Notice of Potential Tag-Along Action with the Judicial Panel on Multidistrict Litigation ("JPML")." Joint Stipulation Extending Time [\*3] to Respond to Complaint, ECF No. 4 (extending the time for Defendants American and Delta to respond to the Complaint); see *In Re Domestic Airline Travel Antitrust Litigation*, 15mc1404 (CKK). In the underlying MDL action referenced above, Defendants Southwest and American have entered into Settlement Agreements with the Plaintiffs' Class Counsel, and notification of the settlements was provided to putative class members. According to Plaintiffs' Class Counsel, an opt-out request was received from the Plaintiffs in this case, Aaron and Carolyn Mulvey, and accordingly, these Plaintiffs are not part of the settlement class in the underlying MDL action.

On January 25, 2019, Defendants American and Delta filed their [9] Motion to Dismiss, On January 31, 2019, this Court issued an Order notifying the *pro se* Plaintiffs that they had until February 25, 2019 to respond to the [9] Motion to Dismiss, and furthermore, that such response should include "either an Amended Complaint, or a precise statement of the nature of the claims they are making in their Complaint and the legal grounds in order to assist the Court and parties in determining f[Plaintiffs'] claims." Order, ECF No. 16. Plaintiffs [\*4] responded to the Motion to Dismiss by filing a two-page First Amended Complaint, which was accepted by this Court for filing on March 4, 2019, despite several procedural deficiencies including Plaintiffs' failure to include a certificate of service, failure to request leave to amend pursuant to [Fed. R. Civ. P. 15 \(a\)\(2\)](#), and the questionable timeliness of the filing, which was received in the Clerk's Office on February 26, 2019.<sup>3</sup> That First Amended Complaint incorporates by reference the allegations in Plaintiffs' original Complaint, and it adds the following paragraph:

Plaintiffs hereby supplement Plaintiff's Original Complaint and additionally allege that they do have Article III and Antitrust standing. Specifically, the Plaintiffs purchased airline tickets from both Delta Airlines Co. and American Airlines, Inc. and have in turn suffered concrete harm. While the plaintiffs frequently travel on Southwest Airlines, the plaintiffs purchased airfare from defendants Delta Airlines Co. and American Airlines, Inc. and have in turn been harmed. These allegations in supplement to the plaintiffs' original complaint filed at cause number 3:18-cv-3038, in the Northern District of Texas, establish that the Plaintiff has [\*5] both Article III standing and Antitrust standing.

Plaintiffs' First Amended Complaint, ECF No. 19, at 1-2. Defendants filed their [18] Reply in Support of their Motion to Dismiss or, in the Alternative, Motion to Dismiss the First Amended Complaint.

## II. LEGAL STANDARD

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- Motion to Dismiss by Plaintiffs American Airlines, Inc. and Delta Air Lines Inc. ("Defs.' Mot."), ECF No. 9, the Memorandum in Support of the Motion to Dismiss, ECF No. 9-1 ("Defs' Memo."), and the Errata to that Motion, ECF No. 10 (correcting the signature pages);
  - Plaintiffs' First Amended Complaint, ECF No. 19 (which incorporates by reference their Complaint) ("Pls' First Am. Compl."); and
  - Defendants' Reply in Support of their Motion to Dismiss or, in the Alternative, Motion to Dismiss the First Amended Complaint, ECF No. 18 (Defs.' Reply").

In an exercise of its discretion, the Court finds that holding oral argument in this action would not be of assistance in rendering a decision. See LCvR 7(f).

<sup>3</sup> This Court's Order Establishing Procedures, ECF No. 14, at ¶ 7(A) states that "Motions for extensions of time **must be filed at least four (4) business days prior to the first affected deadline.**"

When a motion to dismiss is filed, a federal court is required to ensure that it has "the 'statutory or constitutional power to adjudicate [the] case[.]'" [Morrow v. United States, 723 F. Supp. 2d 71, 77 \(D.D.C. 2010\)](#) (quoting [Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 \(1998\)](#)). "Federal courts are courts of limited jurisdiction" and can adjudicate only those cases or controversies entrusted to them by the Constitution or an Act of Congress. [Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 \(1994\)](#). "In an attempt to give meaning to Article III's case-or-controversy requirement, the courts have developed a series of principles termed 'justiciability doctrines,'" including the doctrines of standing and ripeness. [Nat'l Treasury Employees Union v. United States, 101 F.3d 1423, 1427, 322 U.S. App. D.C. 135 \(D.C. Cir. 1996\)](#) (citing [Allen v. Wright, 468 U.S. 737, 750, 104 S. Ct. 3315, 82 L. Ed. 2d 556 \(1984\)](#)).

## A. Standing Under Article III

"Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" [Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471, 102 S. Ct. 752, 70 L. Ed. 2d 700 \(1982\)](#). A case or controversy exists only if the plaintiff has standing, which is a "predicate to any exercise of [the Court's] jurisdiction." [Dominguez v. UAL Corp., 666 F.3d 1359, 1361, 399 U.S. App. D.C. 92 \(D.C. Cir. 2012\)](#). Because standing is a [\*6] "threshold jurisdictional requirement," a court may not assume that a plaintiff has standing to proceed to evaluate a case on its merits. [Bauer v. Marmara, 774 F.3d 1026, 1031, 413 U.S. App. D.C. 338 \(D.C. Cir. 2014\)](#). A plaintiff "bears the burden of showing that he has standing for each type of relief sought." [Summers v. Earth Island Inst., 555 U.S. 488, 493, 129 S. Ct. 1142, 173 L. Ed. 2d 1 \(2009\)](#). If standing "is lacking, then the dispute is not a proper case or controversy, [and] the courts have no business deciding it or expounding the law in the course of doing so." [Dominguez, 666 F.3d at 1361](#) (alteration in original, quotation omitted). "[E]very federal court has a special obligation to satisfy itself of its own jurisdiction before addressing the merits of any dispute." [Dominguez, 666 F.3d at 1362](#) (quotation omitted).

To establish constitutional standing, a plaintiff bears the burden of demonstrating that it "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." [Spokeo, Inc. v. Robins, U.S. , 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 \(2016\)](#), as revised (May 24, 2016) (citing [Lujan, 504 U.S. at 560-61 \(1992\)](#)); [Andrx Pharms., Inc. v. Biovail Corp. Int'l, 256 F.3d 799, 806 & n.9, 347 U.S. App. D.C. 178 \(D.C. Cir. 2001\)](#) ("As in any civil action for damages, the plaintiff in a private antitrust lawsuit must show that the defendant's illegal conduct caused its injury . . . The plaintiff's first step is to plead an injury-in-fact.") At the pleading stage, this requires Plaintiff to "clearly [\*7] . . . allege facts demonstrating' each element." [Spokeo, 136 S. Ct. at 1547](#) (quoting [Warth v. Seldin, 422 U.S. 490, 518, 95 S. Ct. 2197, 45 L. Ed. 2d 343 \(1975\)](#)). Plaintiff cannot "rely on a bare legal conclusion" to establish an injury-in-fact. [Maya v. Centex Corp., 658 F.3d 1060, 1068 \(9th Cir. 2011\)](#); see [Martin-Trigona v. Fed. Reserve Bd., 509 F.2d 363, 367, 166 U.S. App. D.C. 30 \(D.C. Cir. 1974\)](#) (in determining standing, conclusory statements are insufficient allegations of an injury in fact).

### 1. Injury in Fact

The critical question in this case centers around injury in fact, which is the "[f]irst and foremost" element of standing. [Spokeo, 136 S. Ct. at 1547](#) (quoting [Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103, 118 S. Ct. 1003, 140 L. Ed. 2d 210 \(1998\)](#) (alteration in original)). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" [Id. at 1548](#) (quoting [Lujan, 504 U.S. at 560](#)). "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" [Id.](#) (quoting [Lujan, 504 U.S. at 560 n.1](#)). For an injury to be "concrete," it "must be 'de facto'; that is, it must actually exist." [Id.](#) (quoting Black's Law Dictionary 479 (9th ed. 2009)). "Concrete" is not "necessarily synonymous with 'tangible,'" and can include the "risk of real harm." [Id. at 1549](#).

Plaintiffs in the instant case have failed to meet their burden in establishing that they have met the minimum requirements of standing because they have not established [\*8] an injury in fact. In their First Amended Complaint, they allege generally that they purchased tickets from Defendant airlines, but they do not allege that the tickets were for domestic flights, at artificially inflated prices, or during the relevant period. Absent facts establishing that "plaintiffs purchased [the relevant] services from defendants" and thereby "paid the alleged[ly]" unlawful prices, the Complaint lacks "basic facts to support an inference that each plaintiff was harmed." [Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co., 926 F. Supp. 2d 36, 43 \(D.D.C. 2013\)](#). Standing "is not dispensed in gross," and the fact that other consumers purchased airline tickets is irrelevant to the Mulveys' lawsuit because "each plaintiff must demonstrate that it has suffered injury in order to establish standing." *Id.* (quotation omitted); see [In re Opana ER Antitrust Litig., 2016 U.S. Dist. LEXIS 23319, 2016 WL 738596, at \\*4-5 \(N.D. Ill. Feb. 25, 2016\)](#) (assessing whether opt-out plaintiffs independently had Article III standing). To permit a deviation from the "threshold" standing requirements would open the doors to a "seemingly unlimited number" of non-purchaser plaintiffs who "could assert a virtually unlimited" number of claims, [Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864, 867-68 \(10th Cir. 1981\)](#) (finding no standing for "nonpurchasers"). For the reasons set out *infra*, the Court accordingly finds that Plaintiffs lack Article III standing.

## B. Antitrust [\*9] Standing

In a private action for alleged antitrust violations, "a plaintiff must go beyond showing that it meets the Article III standing requirements of injury, causation, and redressability; it must also demonstrate 'antitrust standing.'" [Novell, Inc. v. Microsoft Corp., 505 F. 3d 302, 310 \(4th Cir. 2007\)](#). "Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action." [Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 535 n. 31, 103 S. Ct. 897, 74 L. Ed. 2d 723 \(1983\)](#). Antitrust standing requires *inter alia*: 1) an injury that the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful; (2) direct and non-speculative damages to plaintiffs' business or property; and (3) proper plaintiff status, which ensures that other parties are not better situated to sue. [Adams v. Pan Am. World Airways, Inc., 828 F.2d 24, 26-27, 264 U.S. App. D.C. 174 \(D.C. Cir. 1987\)](#); see [Andrx., 256 F.3d at 806; Nat'l ATM Council, Inc. v. Visa Inc., 922 F. Supp. 2d 73, 81 \(D.D.C. 2013\)](#). "[A]ntitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement [it] must [be] dismiss[ed] as a matter of law." [NicSand, Inc. v. 3M Co., 507 F.3d 442, 450 \(6th Cir. 2007\)](#) (en banc). Antitrust standing is limited to "proper parties" in recognition that under **antitrust law**, "defendants who may have violated a provision of the antitrust" [\*10] statutes are not liable to every person who can persuade a jury that he suffered a loss in some manner 'that might conceivably be traced' to the conduct of the defendants." [Reading Indus., Inc. v. Kennecott Copper Corp., 631 F.2d 10, 12 \(2d Cir. 1980\)](#) (citation omitted); [NicSand, 507 F.3d at 449-50](#) (This type of standing is the "glue that cements each suit with the purposes of the antitrust laws," and it "prevents abuses" of those laws.)

Because the Mulveys do not allege a purchase of any airline tickets during the relevant time frame, they do not have antitrust standing. See [Norris v. Hearst Tr., 500 F.3d 454, 466](#) (5th Cir. 2007) ("Plaintiffs [who] are neither consumers [purchasers of a relevant product] nor competitors in a relevant market" have not "suffered antitrust injury."); see also [Klein v. Am. Land Title Ass'n, 560 F. App'x 1, 1-2 \(D.C. Cir. 2014\)](#) (affirming dismissal for lack of antitrust standing when plaintiff "neither purchased nor was insured by" the relevant product). Furthermore, even Plaintiffs' allegations that they purchased tickets from Delta and American, without any additional information about such tickets, is not enough to give them antitrust standing. "[W]ithout knowing which specific products" Plaintiffs purchase, "it is impossible to determine" whether any alleged "increase in their price is the type of injury that furthers the object of the alleged conspiracy to [\*11] fix prices" or otherwise was caused by Defendants' alleged conduct. [In re Magnesium Oxide Antitrust Litig., 2011 U.S. Dist. LEXIS 121373, 2011 WL 5008090, at \\*7 \(D.N.J. Oct. 20, 2011\)](#); see [Johnson v. Comm'n on Presidential Debates, 869 F.3d 976, 983, 432 U.S. App. D.C. 392 \(D.C. Cir. 2017\)](#) (An "inability to define a commercial market in which [plaintiffs] operate" undermines antitrust standing and requires dismissal.)

### III. DISCUSSION

In their Reply, Defendants American and Delta address the sufficiency of the Plaintiffs' allegations in their First Amended Complaint, which incorporates by reference their Complaint. As a preliminary matter, Defendants note that an "attorney proceeding *pro se* is 'presumed to have knowledge of the legal system,' and '[a]s a result, he is not entitled to the same level of solicitude often afforded non-attorney litigants proceeding without legal representation.'" *Lovitky v. Trump*, 308 F. Supp. 3d 250, 254 (D.D.C. 2018) (Kollar-Kotelly, J.) (quoting *Lempert v. Power*, 45 F. Supp. 3d 79, 81 n.2 (D.D.C. 2014) (Kollar-Kotelly, J.)). Accordingly, *pro se* attorneys "need less protection from the court," and their "*pro se* status will not weigh in favor of denying the defendants' motions to dismiss." *Richards v. Duke Univ.*, 480 F. Supp. 2d 222, 234-35 (D.D.C. 2007), aff'd, 2007 U.S. App. LEXIS 30275, 2007 WL 4589770 (D.C. Cir. Aug. 27, 2007). Defendants assert further that Plaintiffs' First Amended Complaint should not be construed as an opposition to Defendants' motion to dismiss because a "plaintiff may not amend [its] complaint by the briefs in opposition to a motion to dismiss." *Middlebrooks v. Godwin Corp.*, 722 F. Supp. 2d 82, 87 n.4 (D.D.C. 2010), aff'd, 424 F. App'x 10 (D.C. Cir. 2011). Furthermore, Plaintiffs were [\*12] instructed by this Court to "include in their response to Defendants' Motion to Dismiss either an Amended Complaint, or a precise statement of the nature of the claims they are making . . . and the legal grounds" for those claims. January 31, 2019 Order, ECF No 16 (emphasis added). This Order did not anticipate Plaintiffs' filing of an amended complaint with nothing more.

Defendants argue that Plaintiffs' First Amended Complaint is both procedurally and substantively deficient. Beginning with the procedural violations, Defendants explain that "Plaintiffs emailed American and Delta an Amended Complaint on February 21, 2019 — and indicated that they would mail the same document" but that does not constitute the requisite timely filing with the clerk or the judge. See *Fed. R. Civ. P. 5(d)(2)*; Local Civil Rule 5.1(a). In this case, the First Amended Complaint was mailed to the Clerk's Office (without including a certificate of service), and it was postmarked February 21, 2019, and date stamped February 26, 2019, which was one day after the deadline set by this Court. Because there was only a one-day delay, and it was postmarked February 21, 2019, and a copy was previously emailed to American and Delta, this Court shall not dismiss [\*13] Plaintiffs' First Amended Complaint on grounds that it is untimely and did not include a certificate of service. Nor shall this Court dismiss Plaintiffs First Amended Complaint on grounds that Plaintiffs did not request leave of Court to amend their Complaint, pursuant to *Fed. R. Civ. P. 15 (a)(1)*, as it is arguable perhaps that the Court's January 31, 2019 Order granted Plaintiffs advance permission to amend their Complaint.

Putting aside the procedural deficiencies of the Plaintiffs' Amended Complaint, this Court finds that the allegations contained in the First Amended Complaint do not sufficiently indicate that Plaintiffs have an actionable claim against Defendants American and Delta. Plaintiffs state merely that they have "purchased airline tickets from both Delta Airlines Co and American Airlines Inc. and have in turn suffered concrete harm." First Amended Complaint, ECF No. 19, at 1. Plaintiffs do not indicate however that the airline tickets were for a "domestic flight, at artificially inflated prices, during the relevant period." Defs' Reply, ECF No. 18, at 8-9. Accordingly, because Plaintiffs' First Amended Complaint lacks basic facts supporting an inference that each plaintiff was harmed, it fails [\*14] to satisfy "threshold" standing requirements. *Oxbow*, 926 F. Supp. 2d at 43; see *GEICO Corp. v. Autoliv, Inc.*, 345 F. Supp. 3d 799, 818-19, 827-28 (E.D. Mich. 2018) (dismissing for lack of Article III and antitrust standing when an opt-out plaintiff failed to allege purchases causing injury). Moreover, Plaintiffs' assertion that they "suffered concrete harm" is simply a "conclusory statement[] [or] legal conclusion[]," which is "insufficient to state a plausible basis for standing." *Williams v. Lew*, 819 F.3d 466, 472, 422 U.S. App. D.C. 119 (D.C. Cir. 2016) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 663, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). Similarly, Plaintiffs lack antitrust standing because they "advance [no] plausible allegations regarding any purchase in *any* market for air transportation." Defs.' Mem., ECF No. 9-1, at 6. See *National ATM Council v. Visa Inc.* 922 F. Supp. 2d 73, 86 (D.D.C. 2013) (in a case alleging conspiracy to impose ATM access fees, even where plaintiffs were able to allege the payment of at least one ATM fee and show that they were consumers of the relevant product at issue, they did not have antitrust standing because they did not plausibly allege that they conducted transactions at the specifically impacted ATMs, and that "mean[t] that there [was] no link between the alleged harm to competition and the plaintiff's pocketbook.") The fact that other consumers may have antitrust standing as part of the class is irrelevant, because the Mulveys opted out of the settlement. See *GEICO*, 345 F. Supp. 3d at 827-28 & n. 5 [\*15] (It is "wholly immaterial" that other purported

class members "have been included in settlement classes in the multidistrict litigation without having to make [a] showing [of antitrust standing]" where Plaintiff opted out of participating in the settlement and is pursuing his own claims.); see also *Stills v. Dairy Farmers of Am, Inc.* 276 F. Supp. 3d 195, 203-04 (D. Vt. 2017) ("Unless or until [opt-out] Plaintiffs can allege they suffered discernible injuries as a result of Defendants' alleged [antitrust violation], they lack antitrust standing.") Accordingly, Plaintiffs lack both Article III and antitrust standing, and their First Amended Complaint, which incorporates by reference their Complaint, shall be dismissed.

### **III. CONCLUSION**

For the foregoing reasons, the Court GRANTS Defendants' [9] Motion to Dismiss because of Plaintiffs' lack of standing. The Court shall DISMISS WITHOUT PREJUDICE Plaintiffs' First Amended Complaint (incorporating by reference their Complaint) against Defendants American Airlines Inc. and Delta Air Lines Inc. An appropriate Order accompanies this Memorandum Opinion.

/s/ COLLEEN KOLLAR-KOTELLY

UNITED STATES DISTRICT JUDGE

### **ORDER**

For the reasons stated in the accompanying Memorandum Opinion, it is this 6th day of March 2019,

ORDERED that Defendants [\*16] American Airlines, Inc. and Delta Air Lines, Inc.'s [9] Motion to Dismiss is GRANTED. The Court DISMISSES WITHOUT PREJUDICE Plaintiffs' First Amended Complaint (which incorporates by reference their Complaint) against Defendants American Airlines Inc. and Delta Air Lines Inc.

**This is a final appealable Order.**

/s/ COLLEEN KOLLAR-KOTELLY

UNITED STATES DISTRICT JUDGE

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End of Document



## Colo. Real Estate Comm'n v. Vizzi

Court of Appeals of Colorado, Division Five

March 7, 2019, Decided

Court of Appeals No. 17CA2388

**Reporter**

2019 COA 33 \*; 488 P.3d 470 \*\*; 2019 Colo. App. LEXIS 313 \*\*\*; 2019-1 Trade Cas. (CCH) P80,711; 2019 WL 1087016

Colorado Real Estate Commission, Petitioner-Appellee, v. John J. Vizzi, Respondent-Appellant.

**Subsequent History:** Writ of certiorari denied [\*Vizzi v. Colo. Real Estate Comm'n, 2019 Colo. LEXIS 1041 \(Colo., Oct. 7, 2019\)\*](#)

**Prior History:** [\*\*\*1] Colorado Real Estate Commission. Case No. RC 2015-0013.

**Disposition:** ORDER AFFIRMED.

## **Core Terms**

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transaction-broker, broker, real estate broker, obligations, contracts, anti trust law, statutory duty, provisions, default, censure, argues, discipline, anticompetitive conduct, due process right, supervision, disclosure, mandatory, parties, terms, licensed real estate broker, mandatory duty, undertake, Assembly, violates, modify, buyer

## **LexisNexis® Headnotes**

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Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

### **[HN1](#)[] Standards of Review, Arbitrary & Capricious Standard of Review**

The appellate court must sustain an agency's decision unless it is arbitrary or capricious, unsupported by the evidence, or contrary to law.

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

Governments > Legislation > Interpretation

### **[HN2](#)[] Standards of Review, De Novo Review**

Statutory interpretation presents a question of law reviewed de novo.

Governments > Legislation > Interpretation

### **HN3** Legislation, Interpretation

It is the court's function to interpret statutes. [Colo. Rev. Stat. § 24-4-106\(7\)\(d\)](#).

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

### **HN4** Standards of Review, Deference to Agency Statutory Interpretation

Judicial deference to an agency's interpretation of its governing statute is appropriate when the statute is subject to different reasonable interpretations and the issue comes within the administrative agency's special expertise.

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

### **HN5** Standards of Review, De Novo Review

The appellate court's review of statutory provisions is de novo.

Governments > Legislation > Interpretation

### **HN6** Legislation, Interpretation

When interpreting a statute, the court's primary purpose is to ascertain and give effect to the General Assembly's intent. The court starts by examining the plain meaning of the statutory language. The court gives consistent effect to all parts of the statute and construe each provision in harmony with the overall statutory design. The court's construction must avoid or resolve potential conflicts and give effect to all legislative acts, if possible.

Real Property Law > Brokers > Discipline, Licensing & Regulation

### **HN7** Brokers, Discipline, Licensing & Regulation

Colorado law provides that a licensed real estate broker must act either as a single agent or as a transaction-broker in providing real estate services. Colo. Rev. Stat. § 12-61-803(1) (2018). A single agent represents one party to a real estate transaction. Colo. Rev. Stat. § 12-61-802(4) (2018). Such an agent's duties include exercising reasonable skill and care, presenting all offers in a timely manner, and disclosing known adverse material facts to the other party in a transaction. Colo. Rev. Stat. §§ 12-61-804 to 12-61-805 (2018). Colo. Rev. Stat. § 12-61-803(2) makes transaction-broker the default role for a real estate broker who has not entered into a single-agency written agreement with the represented party. Transaction-brokers assist with a transaction but are not agents for any party. Colo. Rev. Stat. § 12-61-807(1). Though transaction-brokers share certain statutory duties that single agents have, such as the duty to present all offers in a timely manner, Colo. Rev. Stat. § 12-61-807(2)(b)(I), their role is more limited than that of a single agent. Colo. Rev. Stat. § 12-61-803(1) requires a transaction-broker to disclose the general duties and obligations arising from that relationship" to the seller and the buyer pursuant to Colo. Rev. Stat. § 12-61-808 (2018).

Real Property Law > Brokers > Discipline, Licensing & Regulation

### **HN8** Brokers, Discipline, Licensing & Regulation

In Colo. Rev. Stat. § 12-61-802(6), the legislature's use of the words "throughout" and "and" indicates that it intended a transaction-broker to assist in the entire transaction and to undertake each of the listed activities.

Real Property Law > Brokers > Discipline, Licensing & Regulation

#### **HN9** **Legislation, Interpretation**

Absent a clear indication of contrary legislative intent, the word "shall" in a statute generally indicates that the legislature intended the listed provisions to be mandatory.

Real Property Law > Brokers > Discipline, Licensing & Regulation

#### **HN10** **Brokers, Discipline, Licensing & Regulation**

The provisions of the transaction-broker statutes indicate that the term "shall" in Colo. Rev. Stat. § 12-61-807(2) specifies mandatory duties.

Real Property Law > Brokers > Discipline, Licensing & Regulation

#### **HN11** **Brokers, Discipline, Licensing & Regulation**

The duties listed in Colo. Rev. Stat. § 12-61-807(2)(a)-(d) are numerous and broad. They are consistent with the wide array of activities contemplated in the definition of a transaction-broker in Colo. Rev. Stat. § 12-61-802(6). Further, the consistency between the statutory definition of a transaction-broker and the statutory duties that a transaction-broker "shall" have parallels the statutory definition of a single agent and the statutory duties that a single agent "shall" have. Colo. Rev. Stat. § 12-61-802(4); Colo. Rev. Stat. § 12-61-805. A court construes these sections in light of each other.

Real Property Law > Brokers > Discipline, Licensing & Regulation

#### **HN12** **Brokers, Discipline, Licensing & Regulation**

The legislature intended the services enumerated in Colo. Rev. Stat. § 12-61-807 to be mandatory.

Real Property Law > Brokers > Discipline, Licensing & Regulation

#### **HN13** **Brokers, Discipline, Licensing & Regulation**

Colo. Rev. Stat. § 12-61-808(2)(a)(III) — addressing when a transaction-broker undertakes any obligations or responsibilities different from those set forth in Colo. Rev. Stat. § 12-61-807 — does not refer specifically to the mandatory duties listed in Colo. Rev. Stat. § 12-61-807(2).

Real Property Law > Brokers > Discipline, Licensing & Regulation

#### **HN14** **Brokers, Discipline, Licensing & Regulation**

2019 COA 33, \*33L488 P.3d 470, \*\*470L2019 Colo. App. LEXIS 313, \*\*\*1

The "different from" language of Colo. Rev. Stat. § 12-61-808 is construed to refer to three provisions of Colo. Rev. Stat. § 12-61-807: subsection (3), (4) and (5).

Real Property Law > Brokers > Discipline, Licensing & Regulation

**HN15** [+] **Brokers, Discipline, Licensing & Regulation**

Colo. Rev. Stat. § 12-61-808(2)(a)(III) provides that if responsibilities different from those listed in Colo. Rev. Stat. § 12-61-807 are engaged in, such obligations or responsibilities shall be disclosed.

Real Property Law > Brokers > Discipline, Licensing & Regulation

**HN16** [+] **Brokers, Discipline, Licensing & Regulation**

The provisions of Colo. Rev. Stat. § 12-61-808 do not permit a broker to contract away any of the required statutory duties.

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

**HN17** [+] **Exemptions & Immunities, Parker State Action Doctrine**

The U.S. Supreme Court in Parker interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity. A state legislature may delegate the power to regulate a profession to a state agency on which a controlling number of decision-makers are active market participants in that profession, and, in some cases, the actions of that state agency will be immune to federal antitrust law.

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

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

To determine whether a state agency's actions are considered the actions of the state in its sovereign capacity and thus shielded from federal antitrust law, the court applies the two-part test set forth in Midcal. Under the Midcal test, a state agency's allegedly anticompetitive conduct will be shielded by state-action immunity from federal antitrust law if, first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of the anticompetitive conduct. Midcal's clear articulation requirement is satisfied where the displacement of competition is the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals. Midcal's active supervision requirement demands realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests. The active supervision requirement also mandates that the State exercise ultimate control over the challenged anticompetitive conduct.

Real Property Law > Brokers > Discipline, Licensing & Regulation

**HN19** [+] **Brokers, Discipline, Licensing & Regulation**

By setting out mandatory duties, Colo. Rev. Stat. § 12-61-807(2) precludes transaction-brokers from providing real estate services that are more limited than those required by statute.

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

#### **HN20[] Standards of Review, Abuse of Discretion**

The appellate court reviews discovery rulings for an abuse of discretion.

Real Property Law > Brokers > Discipline, Licensing & Regulation

#### **HN21[] Brokers, Discipline, Licensing & Regulation**

As long as the record as a whole provides sufficient evidence that the penalty is not manifestly excessive in relation to the misconduct and the public need, the penalty will be upheld.

## **Headnotes/Summary**

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### **Headnotes**

**Administrative Law — Professions and Occupations — Real Estate Brokers and Salespersons — Brokerage Relationships — Transaction-brokers**

## **Syllabus**

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A division of the court of appeals considers whether a licensed real estate broker can contract away his statutorily required obligations as a transaction-broker under section 12-61-807(2), C.R.S. 2018. Interpreting section 12-61-807(2) and related provisions, the division determines that a transaction-broker's statutory duties are mandatory and cannot be contracted away.

The division also concludes that the Colorado Real Estate Commission's discipline of the appellant broker for failing to perform his statutory duties fell within the Commission's statutory authority and did not violate federal antitrust laws. The division determines that the Commission's decision not to disclose the identity of the informant who brought appellant's actions to the Commission's attention did not violate appellant's due process rights.

Accordingly, the division affirms the Commission's final order disciplining appellant for failing to comply with the mandatory duties of a transaction-broker under section 12-61-807(2).

**Counsel:** Philip J. Weiser, Attorney General, Gina M. Simonson, First **[\*\*2]** Assistant Attorney General, Natalie L. Powell, Assistant Attorney General, Gina M. Cannan, Assistant Attorney General, Denver, Colorado, for Petitioner-Appellee.

Montgomery Little & Soran, PC, Nathan G. Osborn, Christopher T. Carry, Greenwood Village, Colorado, for Respondent-Appellant.

**Judges:** Opinion by JUDGE TERRY. J. Jones and Nieto\*, JJ., concur.

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\* Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2018.

Opinion by: TERRY

## Opinion

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[\*\*473] [\*P1] Can a licensed real estate broker contract away his statutory obligations as a transaction-broker under section 12-61-807(2), C.R.S. 2018? We answer "no" to this question, and therefore affirm the final agency order of the Colorado Real Estate Commission disciplining a licensed real estate broker, John J. Vizzi, for failing to fulfill those statutory obligations. We also conclude that the Commission's enforcement of that statute against Vizzi does not violate federal antitrust laws. As a result, we affirm the Commission's order.

### I. Factual Background

[\*P2] Vizzi entered into contracts in 2013 and 2014 with three clients to provide unbundled real estate brokerage services in exchange for a flat fee. In one instance, he contracted only to list the client's property on the Multiple Listing Services (MLS) list. In two other instances, he contracted only to provide a yard sign, a lock [\*\*\*3] box, and centralized showing services, and to list the properties on the MLS.

[\*P3] After an anonymous informant notified the Commission of Vizzi's practices, it investigated. As a result, the Commission charged Vizzi with failing to fulfill his statutory duties under section 12-61-807(2) and sought to discipline him.

[\*P4] An Administrative Law Judge (ALJ) heard the case. She concluded that the duties listed in section 12-61-807(2) are mandatory and that Vizzi had not fulfilled them in any of the three transactions at issue. She therefore disciplined Vizzi under section 12-61-113(1)(k), C.R.S. 2018, requiring him to take twelve hours of continuing education and levying a fine of \$2000 plus the statutory surcharge. Although the Commission had sought public censure, the ALJ did not impose it.

[\*P5] Vizzi filed exceptions to the ALJ's decision with the Commission. After hearing oral argument on the exceptions, the Commission issued a final agency order.

[\*P6] The Commission adopted the ALJ's findings of fact and conclusions of law. It agreed with the ALJ's ruling that Vizzi was required to provide to his clients all of the services listed in section 12-61-807(2), and that he violated the provisions of section 12-61-113(1)(k) and (n) by entering into contracts [\*\*474] that essentially disclaimed any responsibility to provide statutorily [\*\*\*4] required services.

[\*P7] The Commission modified the discipline imposed on Vizzi to include public censure. In doing so, the Commission relied on its issuance of a December 2010 position statement that said, in part: "A broker is not allowed to solely perform 'additional' services which require a real estate broker's license . . . without providing the minimum duties required by single agency or transaction brokerage." Dep't of Regulatory Agencies, Div. of Real Estate, CP-36 Commission Position on Minimum Service Requirements, <https://perma.cc/6UZE-DY2T>. Because the position statement was issued before Vizzi entered into the contracts at issue, the Commission concluded that he "should have known that the listing contracts he prepared in 2013 and 2014 were improper."

### II. Contentions Raised on Appeal

[\*P8] Vizzi maintains that he was permitted by statute to contract out of many of the duties imposed on transaction-brokers under section 12-61-807(2), and that the contracts in question successfully accomplished that goal.

[\*P9] Invoking the United States Supreme Court's decision in [\*N.C. State Bd. of Dental Exam'rs v. FTC\*, 574 U.S. 135 S. Ct. 1101, 191 L. Ed. 2d 35 \(2015\)](#), Vizzi asserts that the Commission's enforcement action against him violates federal antitrust law.

[\*P10] He argues that the Commission violated his [\*\*\*5] due process rights by declining to disclose the identity of the person who notified the Commission of Vizzi's actions in the questioned transactions.

[\*P11] And he contends that the Commission exceeded its statutory authority and thus violated his due process rights when it disciplined him more harshly than did the ALJ, and that its decision to do so was arbitrary and capricious.

[\*P12] For the reasons discussed below, we reject these contentions.

### III. Legal Standards

[\*P13] [HN1](#) We must sustain the Commission's decision unless it is arbitrary or capricious, unsupported by the evidence, or contrary to law. [Coffman v. Colo. Common Cause, 102 P.3d 999, 1005 \(Colo. 2004\)](#); see also [§ 24-4-106\(7\)\(a\), C.R.S. 2018](#) (On review of agency action, "[i]f the court finds no error, it shall affirm the agency action.").

[\*P14] The issues in this appeal are governed by state statute. [HN2](#) Statutory interpretation presents a question of law we review de novo. [Gessler v. Colo. Common Cause, 2014 CO 44, ¶ 7, 327 P.3d 232](#). [HN3](#) It is our function to interpret statutes. [§ 24-4-106\(7\)\(d\)](#) ("In all cases under review, the court shall determine all questions of law and interpret the statutory and constitutional provisions involved."); [El Paso Cty. Bd. of Equalization v. Craddock, 850 P.2d 702, 705 \(Colo. 1993\)](#) ("An administrative agency's construction [of a statute] should be given appropriate deference but is not binding on the court.").

[\*P15] [HN4](#) Judicial deference to an agency's interpretation of [\*\*\*6] its governing statute is appropriate when the statute is subject to different reasonable interpretations and the issue comes within the administrative agency's special expertise. [Huddleston v. Grand Cty. Bd. of Equalization, 913 P.2d 15, 17 \(Colo. 1996\)](#).

[\*P16] [HN5](#) Our review of statutory provisions is de novo. [Cowen v. People, 2018 CO 96, ¶ 11, 431 P.3d 215](#). [HN6](#) When interpreting a statute, our primary purpose is to ascertain and give effect to the General Assembly's intent. *Id.* We start by examining the plain meaning of the statutory language. *Id.* We give consistent effect to all parts of the statute and construe each provision in harmony with the overall statutory design. *Id.*, ¶ 13. Our construction must avoid or resolve potential conflicts and give effect to all legislative acts, if possible. *Id.*

### IV. Roles of Licensed Real Estate Brokers

[\*P17] Vizzi is licensed as a real estate broker, and it is uncontested that, in entering [\*\*475] into the contracts in issue, he acted as a transaction-broker.

[\*P18] As pertinent here, "real estate broker" is defined as "any person . . . who, in consideration of compensation by fee, commission, salary, or anything of value . . . engages in . . . [l]isting, offering, attempting, or agreeing to list real estate, or interest therein, or improvements affixed thereon for sale, exchange, rent, or lease[.]" [\*\*\*7] § 12-61-101(2)(a)(V), C.R.S. 2018.

[\*P19] [HN7](#) Colorado law provides that a licensed real estate broker must act either as a single agent or as a transaction-broker in providing real estate services. § 12-61-803(1), C.R.S. 2018.

[\*P20] A single agent represents one party to a real estate transaction. § 12-61-802(4), C.R.S. 2018. Such an agent's duties include exercising reasonable skill and care, presenting all offers in a timely manner, and disclosing known adverse material facts to the other party in a transaction. §§ 12-61-804 to -805, C.R.S. 2018.

[\*P21] Section 12-61-803(2) makes transaction-broker the default role for a real estate broker who has not entered into a single-agency written agreement with the represented party.

[\*P22] Transaction-brokers assist with a transaction but are not agents for any party. § 12-61-807(1). Though transaction-brokers share certain statutory duties that single agents have, such as the duty to present all offers in a timely manner, § 12-61-807(2)(b)(I), their role is more limited than that of a single agent.

[\*P23] Section 12-61-803(1) requires a transaction-broker to disclose the "general duties and obligations arising from that relationship" to the seller and the buyer pursuant to section 12-61-808, C.R.S. 2018.

#### A. Mandatory Duties or Default Duties?

[\*P24] The statutory duties of transaction brokers are detailed in sections 12-61-807 to -808.

[\*P25] Vizzi interprets sections 12-61-807 and -808 together to mean that section 12-61-807(2) sets forth only default duties — [\*\*\*8] not mandatory duties — for transaction-brokers. We disagree.

[\*P26] Section 12-61-802(6) defines "transaction-broker" as "a broker who assists one or more parties *throughout* a contemplated real estate transaction with communication, interposition, advisement, negotiation, contract terms, *and* the closing of such real estate transaction without being an agent or advocate for the interests of any party to such transaction." (Emphasis added.) [HN8](#)<sup>↑</sup> The legislature's use of the words "throughout" and "and" indicates that it intended a transaction-broker to assist in the entire transaction and to undertake each of the listed activities.

[\*P27] Section 12-61-807(2) sets out the duties of a transaction-broker. It provides that "[a] transaction-broker *shall* have the following obligations and responsibilities . . . ." *Id.* (emphasis added). [HN9](#)<sup>↑</sup> Absent a clear indication of contrary legislative intent, the word "shall" in a statute generally indicates that the legislature intended the listed provisions to be mandatory. See [DiMarco v. Dep't of Revenue, Motor Vehicles Div., 857 P.2d 1349, 1352 \(1993\)](#); cf. [People v. Back, 2013 COA 114, ¶ 25, 412 P.3d 565](#) (concluding that, while the generally accepted meaning of "shall" is that it is mandatory, it can also mean "should" or "may" depending on legislative intent).

[\*P28] [HN10](#)<sup>↑</sup> The provisions of the transaction-broker statutes indicate that the term [\*\*\*9] "shall" in section 12-61-807(2) specifies mandatory duties. It would be illogical and would frustrate the legislature's intent to interpret the word "shall" as merely permissive, given the lengthy list of "obligations" in subsection (2) of the statute, including the requirement that a transaction-broker "comply with *all* requirements of this article and any rules promulgated pursuant to this article." § 12-61-807(2)(c) (emphasis added).

[\*P29] [HN11](#)<sup>↑</sup> The duties listed in section 12-61-807(2)(a)-(d) are numerous and broad. They are consistent with the wide array of activities contemplated in the definition of a transaction-broker in section 12-61-802(6). Further, the consistency between the statutory definition of a transaction-broker and the statutory duties that a transaction-broker [\[\\*\\*476\]](#) "shall" have parallels the statutory definition of a single agent and the statutory duties that a single agent "shall" have. See § 12-61-802(4) (defining "single agent" as "a broker who is engaged by and represents only one party in a real estate transaction"); § 12-61-805 (using the word "shall" to describe the duties of a single agent). We construe these sections in light of each other. See [Krol v. CF & I Steel, 2013 COA 32, ¶ 15, 307 P.3d 1116](#) (reviewing court must give consistent, harmonious, and sensible effect to all language of a statute).

[\*P30] The General Assembly declared its intent in [\*\*\*10] creating this statutory scheme as follows:

The general assembly finds, determines, and declares that the public will best be served through a better understanding of the public's legal and working relationships with real estate brokers and by being able to engage any such real estate broker on terms and under conditions that the public and the real estate broker find acceptable. *This includes engaging a broker as a single agent or transaction-broker.* Individual members of the public should not be exposed to liability for acts or omissions of real estate brokers that have not been approved, directed, or ratified by such individuals. Further, *the public should be advised of the general duties, obligations, and responsibilities of the real estate broker they engage.*

§ 12-61-801(1), C.R.S. 2018 (emphasis added).

[\*P31] Though the legislature emphasized the importance of the public's ability to engage real estate brokers on terms that both the public and real estate brokers "find acceptable," it also limited that ability. There are only two roles for which the public can engage a real estate broker: single agent or transaction-broker. See § 12-61-803(1).

[\*P32] The statutes do not say that the public can engage a real estate broker to provide [\*\*\*11] unbundled brokerage services, or in any manner that the broker and customer might find mutually acceptable.

[\*P33] Vizzi argues that the duties listed in section 12-61-807 are mere "defaults," and that a broker can contract for the performance of only certain limited duties. We are not persuaded. If the transaction-broker duties in section 12-61-807 — and the parallel single agent duties in section 12-61-805 — were mere defaults, a transaction-broker or a single agent would be able to contract out of the required statutory duties and, in essence, cease acting as a transaction-broker or single agent as defined by statute.

[\*P34] The ALJ found that in entering into certain contracts he drafted, Vizzi "intended not to act as a transaction-broker," and manifested that intent by inserting language into the contracts disclaiming the duties of such a broker. We will not disturb those findings because they are supported by the record.

[\*P35] Allowing Vizzi to disclaim the role of transaction-broker would contravene the statutory scheme. See § 12-61-801. The relevant statutes were drafted to create the role of transaction-broker and distinguish it from the role of single agent, and not to enable licensed real estate professionals to avoid the statutorily required duties of [\*\*\*12] a transaction-broker. See [Hoff & Leigh, Inc. v. Byler, 62 P.3d 1077, 1078 \(Colo. App. 2002\)](#) (discussing the legislative history and purpose of sections 12-61-801 to -810); see also §§ 12-61-801, -803.

#### B. Section 12-61-808(2)(a)(III)

[\*P36] In arguing that the section 12-61-807(2) duties are merely defaults, and are not strictly required, Vizzi points to section 12-61-808(2)(a)(III), which covers the disclosure of contractual obligations that transaction-brokers undertake.

[\*P37] Section 12-61-808(2)(a)(III) provides, "[i]f the transaction-broker undertakes any obligations or responsibilities *in addition to or different from* those set forth in section 12-61-807, such obligations or responsibilities *shall be disclosed* in a writing which shall be signed by the involved parties." (Emphasis added.)

[\*P38] Vizzi points us to [Wolford v. Pinnacol Assurance, 107 P.3d 947, 951 \(Colo. 2005\)](#), which says that courts should interpret statutes to avoid rendering words redundant or superfluous. Based on this proposition, he argues that the Commission's interpretation that he could not modify the duties set out in [\*\*477] section 12-61-807 would impermissibly render superfluous the phrase "different from" in section 12-61-808(2)(a)(III). According to Vizzi, section 12-61-808(2)(a)(II) *modifies* section 12-61-807(2) to allow an agent to enter into an agreement to provide fewer services than those enumerated in section 12-61-807. This interpretation is not supported by the statute.

[\*P39] Could the legislature have intended to allow a transaction-broker to contract his way out of having to perform the required duties [\*\*\*13] that the legislature — with great specificity — enumerated in section 12-61-807(2)? Such a reading is highly implausible.

[\*P40] We acknowledge that the "different from" language in section 12-61-808(2)(a)(III) distinguishes that statute from the language of section 12-61-803, which defines relationships between brokers and the public. Section 12-61-803(5) says, "[n]othing contained in this section shall prohibit the public from entering into written contracts with any broker which contain duties, obligations, or responsibilities which are *in addition* to those specified in this part 8." (Emphasis added.)

[\*P41] But we do not interpret the "different from" language in section 12-61-808(2)(a)(III) as permitting a transaction-broker to contract to provide fewer services than those listed in section 12-61-807. Instead, [HN12](#)<sup>↑</sup> the legislature intended the services enumerated in section 12-61-807 to be mandatory. We reach this conclusion for the following reasons.

[\*P42] As the Commission argues, [HN13](#)<sup>↑</sup> section 12-61-808(2)(a)(III) — addressing when a transaction-broker "undertakes any obligations or responsibilities . . . different from those set forth in section 12-61-807" — does not refer specifically to the mandatory duties listed in section 12-61-807(2). Thus, contrary to Vizzi's argument, section 12-61-808(2)(a)(III) would not allow a broker to contract out of mandatory statutory duties.

[\*P43] Instead, [HN14](#) we construe the "different from" language of section 12-61-808 to refer [\*\*\*14] to three provisions of section 12-61-807: subsection (3) ("information shall not be disclosed by a transaction-broker without the informed consent of all parties"); subsection (4) (a "transaction-broker has no duty to conduct an independent inspection of the property" or "to independently verify the accuracy or completeness of statements made by the seller, landlord, or independent inspectors"); and subsection (5) (a "transaction broker has no duty to conduct an independent investigation of the buyer's or tenant's financial condition or to verify the accuracy or completeness of any statement made by the buyer or tenant").

[\*P44] Thus, the parties may alter those default provisions by requiring the broker to take on duties *in addition* to those listed. See § 12-61-803(5) ("Nothing contained in this section shall prohibit the public from entering into written contracts with any broker which contain duties, obligations, or responsibilities which are in addition to those specified in this part 8.").

[\*P45] For example, subsection (3) would *allow* certain information to be disclosed by a transaction-broker if all parties provide informed consent. If — but only if — such consent is given, the transaction-broker can deviate from the default statutory duty of *nondisclosure* for the following [\*\*\*15] matters detailed in that subsection:

*The following information shall not be disclosed by a transaction-broker without the informed consent of all parties:*

- (a) That a buyer or tenant is willing to pay more than the purchase price or lease rate offered for the property;
- (b) That a seller or landlord is willing to accept less than the asking price or lease rate for the property;
- (c) What the motivating factors are for any party buying, selling, or leasing the property;
- (d) That a seller, buyer, landlord, or tenant will agree to financing terms other than those offered;
  
- (e) Any facts or suspicions regarding circumstances which may psychologically impact or stigmatize any real property pursuant to [section 38-35.5-101, C.R.S.](#); or
  
- (f) Any material information about the other party unless disclosure is required by law or failure to disclose such information [\[\\*\\*478\]](#) would constitute fraud or dishonest dealing.

§ 12-61-807(3)(a)-(f) (emphasis added).

[\*P46] If the transaction-broker entered into an agreement that *allowed disclosure* of any of the matters listed above, the broker would, indeed, be permissibly contracting to "undertake[] any obligation[] or responsibilities . . . different from" the default responsibility of nondisclosure of those matters "set forth [\[\\*\\*\\*16\]](#) in section 12-61-807." § 12-61-808(2)(a)(III).

[\*P47] Moreover, section 12-61-808 deals not with a broker's *duties*, but only with required *disclosures*. As a result, an interpretation of section 12-61-808 as somehow modifying the required duties set forth in section 12-61-807 would frustrate the legislature's intent.

[\*P48] And [HN15](#) section 12-61-808(2)(a)(III) provides that if responsibilities different from those listed in 12-61-807 are engaged in, "such *obligations or responsibilities shall be disclosed.*" (Emphasis added.) The italicized language would make no sense if the broker's statutory obligations or responsibilities were being eliminated. It only makes sense if obligations or responsibilities are being added to those required by statutes.

[\*P49] As the ALJ and the Commission noted, Vizzi's interpretation would also lead to absurd results, by, for example, allowing him to contract out of the statutory mandate to comply with "any applicable federal, state, or local laws, rules, regulations, or ordinances including fair housing and civil rights statutes or regulations." See § 12-61-807(2)(d); see also [Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1 \(2001\)](#) (Legislatures do not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions."); [Asphalt Specialties Co. v. City of Commerce City, 218 P.3d 741, 746 \(Colo. App. 2009\)](#) (A court "will not construe statutes or ordinances in such a manner as to frustrate their purposes or lead to an absurd [\[\\*\\*17\]](#) or unreasonable result.").

[\*P50] We conclude that [HN16](#)<sup>↑</sup> the provisions of section 12-61-808 do not permit a broker to contract away any of the required statutory duties.

#### V. Support for Commission's Determination

[\*P51] In light of our construction of the statutory provisions discussed above, we conclude that the record supports the Commission's adoption of the ALJ's findings that Vizzi violated sections 12-61-113(1)(k), 12-61-113(1)(n), and 12-61-803(1), and we therefore uphold the Commission's determination to discipline Vizzi.

#### VI. Federal Antitrust Law

[\*P52] Citing [N.C. State Bd. of Dental Exam'rs, 574 U.S. , 135 S. Ct. 1101, 191 L. Ed. 2d 35](#), Vizzi argues here, as he did below, that the Commission's policy prohibiting the provision of limited real estate services violates federal antitrust law. According to Vizzi, "the Commission's enforcement of 'minimum services' does not stem from formal rulemaking or statute" but merely from an "unenforceable position statement," apparently referencing the Commission's "Position on Minimum Service Requirements." See Dep't of Regulatory Agencies, Div. of Real Estate, CP-36 Commission Position on Minimum Service Requirements. He argues that the Commission is "dominated by market participants — three real estate brokers and two representatives of the public at large," and that, under *Dental Examiners*, the Commission's [\*P52] policy violates federal antitrust laws. We consider and reject these arguments.

##### A. Legal Standards

[\*P53] [HN17](#)<sup>↑</sup> The Supreme Court in [Parker v. Brown, 317 U.S. 341, 350-51, 63 S. Ct. 307, 87 L. Ed. 315 \(1943\)](#), "interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity." [Dental Examiners, 574 U.S. at , 135 S. Ct. at 1110](#). A state legislature may delegate the power to regulate a profession to a state agency on which a controlling number of decision-makers are active market participants in that profession, and, in some cases, the actions of that state agency will be immune to federal antitrust law. See [id. at , 135 S. Ct. at 1111](#).

[\*P54] [HN18](#)<sup>↑</sup> To determine whether such a state agency's actions are considered the actions [\*P54] of the state in its sovereign capacity and thus shielded from federal antitrust law, we apply the two-part test set forth in [California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 100, 100 S. Ct. 937, 63 L. Ed. 2d 233 \(1980\)](#). [Dental Examiners, 574 U.S. at , 135 S. Ct. at 1111-12](#). Under the *Midcal* test, a state agency's allegedly anticompetitive conduct will be shielded by state-action immunity from federal antitrust law if, "first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct." [Dental Examiners, 574 U.S. at , 135 S. Ct. at 1112](#) (quoting [Fed. Trade Comm'n v. Ticor Title Ins. Co., 504 U.S. 621, 631, 112 S. Ct. 2169, 119 L. Ed. 2d 410 \(1992\)](#)).

[\*P55] *Midcal*'s clear articulation requirement is satisfied "where the displacement of competition [is] the inherent, [\*P55] logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." [Fed. Trade Comm'n v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 229, 133 S. Ct. 1003, 185 L. Ed. 2d 43 \(2013\)](#). *Midcal*'s active supervision requirement demands "realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." [Patrick v. Burget, 486 U.S. 94, 101, 108 S. Ct. 1658, 100 L. Ed. 2d 83 \(1988\)](#). The active supervision requirement also mandates that "the State exercise ultimate control over the challenged anticompetitive conduct." *Id.*

##### B. Analysis

[\*P56] We conclude that the Commission's enforcement of the section 12-61-807(2) duties against Vizzi satisfies both the clear articulation and active supervision requirements described in *Midcal*. Such enforcement lies within the bounds of the state's statutory scheme and is properly considered state sovereign action, shielded from federal antitrust law.

[\*P57] The "clear articulation" prong is met by section 12-61-802(6), which defines "transaction-broker"; section 12-61-801, which sets out the General Assembly's policy goals in regulating transaction-brokers; and section 12-61-807, which sets out mandatory obligations for transaction-brokers. Notably, [HN19](#)<sup>↑</sup> by setting out mandatory duties, section 12-61-807(2) precludes transaction-brokers [\*\*\*20] from providing real estate services that are more limited than those required by statute. We thus conclude that the General Assembly has "foreseen and implicitly endorsed" the prohibition of practices engaged in by Vizzi here. See [Phoebe Putney Health Sys., 568 U.S. at 229](#).

[\*P58] The "active supervision" prong is met by section 12-61-101(2)(a), which defines what constitutes the practice of a real estate broker, and section 12-61-113, which authorizes the Commission to investigate and censure licensed real estate brokers for violations of state license laws. Together, these sections give a "realistic assurance" that the Commission, in disciplining Vizzi for violating the section 12-61-807(2) duties, acted within its statutory purview and thus to promote state policy. See [Burget, 486 U.S. at 100](#).

[\*P59] In *Dental Examiners*, the Supreme Court based its decision on a lack of proof indicating that the state legislature intended North Carolina's Board of Dental Examiners to have oversight of tooth whitening, [574 U.S. at \\_\\_, 135 S. Ct. at 1116](#), and the Court's concern that the Board's action may have been motivated by anti-competitive animus, *id. at \_\_, 135 S. Ct. at 1114* ("When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest.").

[\*P60] The considerations that motivated the [\*\*\*21] Supreme Court's decision in that case are not present here.

[\*P61] First, Vizzi's actions fell within the Commission's statutory purview. It was uncontested that Vizzi's actions, such as posting properties on the MLS, constituted the practice of a real estate broker. It was also uncontested that the Commission's statutory purview is the regulation of the practice of real estate brokers. In contrast, in *Dental* [\*\*\*480] *Examiners*, it was unclear whether tooth whitening constituted the practice of dentistry and, thus, whether tooth whitening fell within the statutory purview of North Carolina's Board of Dental Examiners.

[\*P62] Second, unlike in *Dental Examiners*, there is no support in the record for the notion that the Commission's enforcement actions were motivated by anticompetitive animus.

[\*P63] Thus, *Dental Examiners* is simply inapposite.

[\*P64] For two reasons, we reject Vizzi's conclusory argument that "the Commission's position conflicts with the Department of Justice's interpretation of Colorado law." First, we see no reason why, even if Vizzi's contention is true, any such interpretation of Colorado law would be binding on us. Second, Vizzi does not explain this contention and instead cites only the written exceptions [\*\*\*22] he filed to the Commission's decision. See [People v. Diefenderfer, 784 P.2d 741, 752 \(Colo. 1989\)](#) (it is the duty of counsel for the appealing party to inform the reviewing court as to the specific errors relied on, as well as the grounds, supporting facts, and authorities therefor).

[\*P65] We thus conclude that Vizzi has not established a violation of federal antitrust law.

## VII. Anonymous Complainant

[\*P66] Vizzi next maintains that the ALJ violated his due process rights by denying his motion to compel disclosure of the identity of the anonymous complainant. We are not persuaded.

[\*P67] [HN20](#)<sup>↑</sup> We review discovery rulings for an abuse of discretion. [Silva v. Basin W., Inc., 47 P.3d 1184, 1188 \(Colo. 2002\)](#).

[\*P68] Vizzi has not shown how the complainant's identity was relevant to his ability to defend against the Commission's charges. Vizzi was given notice of all of the Commission's witnesses and exhibits — the totality of evidence which supported the charges against him. Cf. [Copley v. Robinson, 224 P.3d 431, 436 \(Colo. App. 2009\)](#) (resident's due process rights were violated where he was denied a gun permit on a basis unknown to him at the time of his hearing).

[\*P69] The ALJ's initial decision and the Commission's final judgment stated the grounds, law, and reasoning for their respective decisions, which did not rely on anything extraneous to the record. Cf. *id.* (resident's due process [\*P69] rights were violated where sheriff's summary denial of his gun permit stated no grounds, facts, law, or reasoning to support the denial of the permit). We thus conclude that the Commission did not err in upholding the ALJ's denial of Vizzi's motion to compel disclosure of the anonymous complainant. See *In re Dist. Court, 256 P.3d 687, 691 (Colo. 2011)*.

### VIII. Imposition of Public Censure

[\*P70] Vizzi argues that the Commission exceeded its statutory authority and thus violated his due process rights when it imposed public censure after the ALJ had imposed only a fine and continuing education. Alternatively, he argues that the Commission's decision to impose public censure, given the ALJ's choice not to, was arbitrary and capricious. We disagree with these contentions.

[\*P71] In *Colorado Real Estate Commission v. Hanegan*, 947 P.2d 933, 935-36 (Colo. 1997), the Colorado Supreme Court upheld the Commission's imposition of public censure of a real estate broker after an ALJ, in his initial decision, had imposed only a fine. The *Hanegan* court concluded that, [HN21](#) "[a]s long as the record as a whole provides sufficient evidence that the penalty is not manifestly excessive in relation to the misconduct and the public need, the penalty will be upheld." *Id. at 937*. There, the sanctioned broker was one of only a few brokers to fail to take a required [\*P71] eight-hour course. *Id. at 934*.

[\*P72] Vizzi violated his statutory duties multiple times after the Commission's December 2010 position statement put him on notice that the listing contracts he prepared in 2013 and 2014 were improper.

[\*P73] Applying *Hanegan*, we conclude that the Commission acted within its statutory authority by imposing a sanction beyond that [\*P73] imposed by the ALJ, and that the Commission's sanction bore some relation to Vizzi's misconduct and to the needs of the public. See *id. at 936-37*; see also § 24-4-105(15)(b), C.R.S. 2018 (granting Commission authority to "affirm, set aside, or modify the order or any sanction or relief entered therein, in conformity with the facts and the law").

[\*P74] We reach this conclusion even though the Commission did not file exceptions to the ALJ's initial decision, because Vizzi's sanction was still an issue presented by the record. See § 24-4-105(15)(a) (For administrative appeals, the scope of review is "within the scope of the issues presented on the record."); cf. *Cornell v. State of Colo. Bd. of Pharmacy*, 813 P.2d 771, 772-73 (Colo. App. 1990) (where the Colorado State Board of Pharmacy increased the disciplinary sanction on a pharmacist after the ALJ's initial decision, it did not exceed its jurisdiction, even though the agency did not file exceptions).

[\*P75] And the public censure penalty was sought in [\*P75] the original charge against Vizzi. Thus, he had a full and fair opportunity to argue about the appropriateness of this penalty.

### IX. Conclusion

[\*P76] The order is affirmed.

JUDGE J. JONES and JUDGE NIETO concur.



## *In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.*

United States District Court for the Northern District of California

March 8, 2019, Decided; March 8, 2019, Filed

No. 14-md-02541 CW

### **Reporter**

375 F. Supp. 3d 1058 \*; 2019 U.S. Dist. LEXIS 44512 \*\*; 2019-1 Trade Cas. (CCH) P80,695; 2019 WL 1593939

IN RE: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION

**Subsequent History:** Affirmed by [\*Alston v. NCAA \(In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.\)\*, 958 F.3d 1239, 2020 U.S. App. LEXIS 15789, 2020 WL 2519475 \(9th Cir. Cal., May 18, 2020\)](#)

Motion granted by, Transferred by, Costs and fees proceeding at [\*In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig., 2020 U.S. App. LEXIS 19880 \(9th Cir. Cal., June 25, 2020\)\*](#)

Clarified by [\*In re Ncaa Ath. Grant-In-Aid Cap Antitrust Litig., 2020 U.S. Dist. LEXIS 253537 \(N.D. Cal., Dec. 30, 2020\)\*](#)

**Prior History:** [\*Jenkins v. NCAA \(In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.\), 311 F.R.D. 532, 2015 U.S. Dist. LEXIS 163878 \(N.D. Cal., Dec. 4, 2015\)\*](#)

## **Core Terms**

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student-athletes, limits, amateurism, athletic, benefits, consumer demand, schools, awards, grant-in-aid, attendance, basketball, sports, football, education-related, conferences, procompetitive, effects, compensation and benefits, professional sports, caps, Bylaw, rule of reason, unrelated, anticompetitive, graduation, unlimited, consumers, top, restrictive alternative, relevant market

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375 F. Supp. 3d 1058, \*1058L 2019 U.S. Dist. LEXIS 44512, \*\*2

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**Judges:** Claudia Wilken, United States District Judge.

**Opinion by:** Claudia Wilken

## Opinion

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### [\*1061] FINDINGS OF FACT AND CONCLUSIONS OF LAW

#### INTRODUCTION

Plaintiffs are current and former student-athletes who played men's Division I Football Bowl Subdivision (FBS) football and men's and women's Division I basketball during the relevant period. Defendants [\*1062] are the National Collegiate Athletic Association (NCAA) and eleven of its conferences<sup>1</sup> that participate in FBS football and Division I basketball.

Plaintiffs challenge the current, interconnected set of NCAA rules that limit the compensation they may receive in exchange for their athletic services. Plaintiffs contend that these limits on compensation, which are set and enforced by agreement of Defendants, violate federal antitrust law, because Plaintiffs would receive greater compensation in exchange for their athletic services in the absence of [\*\*19] these artificial limits.

Defendants respond that the limits are procompetitive for two reasons. First, the limits help preserve the demand for college sports because consumers value amateurism as Defendants define it. Second, the rules promote integration of student-athletes into their academic communities, which in turn improves the college education they receive in exchange for their services.

The Court resolved certain of the issues relevant to Plaintiffs' claims on summary judgment, and presided over a non-jury trial on the remaining issues.

The Court finds and concludes that Defendants agreed to and did restrain trade in the relevant market, affecting interstate commerce, and that the challenged limits on student-athlete compensation produce significant anticompetitive effects. The Court further finds that the only procompetitive effect that Defendants established, namely preventing unlimited cash payments, unrelated to education, similar to those observed in professional sports, can be achieved through less restrictive means. Specifically, the Court finds that an alternative compensation scheme that would allow limits on the grant-in-aid scholarships at not less than the cost of [\*\*20] attendance and limits on compensation and benefits unrelated to education, but that would generally prohibit the NCAA from limiting education-related benefits, would be virtually as effective as the challenged rules in achieving the only procompetitive effect that Defendants have shown here. The only education-related compensation that the NCAA could limit under this alternative would be academic or graduation awards or incentives, provided in cash or

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<sup>1</sup> Conference Defendants are: Pac-12 Conference (Pac-12), The Big Ten Conference, Inc. (Big Ten), The Big 12 Conference, Inc. (Big 12), Southeastern Conference (SEC), and The Atlantic Coast Conference (ACC) (collectively, the Power Five Conferences); American Athletic Conference (AAC), Conference USA, Inc., Mid-American Conference (MAC), Mountain West Conference, Sun Belt Conference, and Western Athletic Conference (WAC).

cash-equivalent. The limit imposed by the NCAA could not be less than its current or future caps on athletics participation awards.

Based on the findings of fact and conclusions of law set forth below, the Court will enter separately a permanent injunction barring the restraints that the Court finds to be overly and unnecessarily restrictive.

## FINDINGS OF FACT<sup>2</sup>

### I. Background

The NCAA, then known as the Intercollegiate Athletic Association (IAA), was founded in 1905 to regulate college football. Today, the NCAA and its members collectively issue rules that govern many [\*1063] aspects of athletic competitions among NCAA member schools. Joint Stipulation of Facts (Stip. Facts) ¶ 1, Docket No. 1098.

The NCAA comprises three Divisions. Id. ¶ 2. Of the NCAA's [\*21] eleven hundred schools, approximately three hundred and fifty schools compete in Division I. Id. ¶ 5. Division I itself is divided, for the purposes of football competition, into two subdivisions, one of which is the FBS. Id. ¶ 6. There are thirty-two conferences in Division I. Id. ¶ 7. Conferences may enact and enforce conference-specific rules, but these must be consistent with the NCAA's own rules. Id.

The NCAA rules governing participation in Division I generally are enacted by the Division I Board of Directors. Id. ¶¶ 11, 12. The rules that Plaintiffs challenge here govern a small subset of the conduct that the NCAA regulates.

The NCAA generates approximately one billion dollars in revenues each year. See Defs.' Ex. 0532 (D0532); Pls.' Ex. 0030 (P0030). Its revenues have increased consistently over the years. See P0030. Most of the NCAA's revenues are derived from the Division I men's basketball post-season tournament known as March Madness, and the media and marketing rights relating to it. Trial Transcript (Tr.) (McNeely) at 2134; D0532 at 0006. The total value of the current multi-year media contracts for March Madness, which extend to 2032, is \$19.6 billion. See P0045 at 0001-02. Each year, the NCAA distributes about [\*22] half of its revenues to conferences. Joint Ex. 0021 (J0021); P0030.

Division I conferences negotiate their own contracts and generate their own revenues from regular-season basketball and regular-and post-season FBS football. See, e.g., Dr. Daniel Rascher Direct Testimony Declaration ¶¶ 169-172, Docket No. 865-3. The FBS conferences have a multi-year media contract with ESPN for the College Football Playoff, the total value of which is \$5.64 billion. See P0045 at 0006-07. The five conferences with the largest revenues, known as the Power Five Conferences, each generate hundreds of millions of dollars in revenues per year, in addition to the money that the NCAA distributes to them. See P0031; P0032; P0033; P0036; see also P0037 (showing that SEC made more than \$409 million in revenues from television contracts alone in 2017, with its total conference revenues exceeding \$650 million that year). The revenues of the Power Five have increased over time and are projected to continue to increase. See P0031; P0032; P0033; P0036; P0037. Conferences distribute most of their revenues to their member schools.

Among the areas that the NCAA regulates are the compensation and benefits that can be afforded [\*23] to student-athletes. The 1906 bylaws of the IAA, as the NCAA was originally known, expressly prohibited student-athletes from receiving any compensation whatsoever, even athletics scholarships, in exchange for their participation in college sports. In 1956, the NCAA enacted a new set of rules permitting schools to award athletics scholarships, known as "grants-in-aid," to student-athletes. Stip. Facts ¶ 25, Docket No. 1098. These rules imposed a limit on the size of the grant-in-aid that schools were permitted to offer. Id. The limit precluded student-athletes from receiving any financial aid beyond that needed for commonly accepted educational expenses, which were tuition, fees, room and board, books, and cash for incidental expenses such as laundry.

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<sup>2</sup> Defendants moved to strike portions of Plaintiffs' closing brief, Docket No. 1125, on the ground that they improperly rely on expert testimony to support substantive assertions of fact. The Court will resolve this motion by way of a separate order. The findings of fact in this order do not rely on evidence that is inadmissible.

In 1976, the cash for incidental expenses was disallowed by way of an amendment to the definition of the grant-in-aid that limited the scope of commonly accepted educational expenses to include only "tuition and fees, room and board and required course-related books." Stip. Facts ¶ 26, [[\\*1064](#)] Docket No. 1098. Cash for incidental expenses related to school attendance, such as laundry, supplies, and transportation, was not included in the grant-in-aid [[\\*\\*24](#)] limit. This definition of a grant-in-aid remained in place until August 2015. See Stip. Facts ¶ 10, Docket No. 1093.

On August 7, 2014, the NCAA adopted a new legislative process for the Power Five, which is referred to as the Autonomy structure.<sup>3</sup> It allows those five conferences collectively to adopt legislation in specific areas, which include limits on grants-in-aid. Soon afterward, in January 2015, the Power Five voted to increase the overall limit on grants-in-aid, from the limit then in place, to a higher limit based on the cost of attendance at each school. See [O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1054-55 \(9th Cir. 2015\)](#) (O'Bannon II), cert. denied, 137 S. Ct. 277, 196 L. Ed. 2d 33 (2016). This became effective on August 1, 2015. The revised "full grant-in-aid" comprises 'tuition and fees, room and board, books and other expenses related to attendance at the institution up to the cost of attendance[.]" Division I Bylaw 15.02.6; Stip. Facts ¶ 10, Docket No. 1093. Cost of attendance is calculated by each school in accordance with federal regulations. J1517 at 0002; Stip. Facts 9191 3-6, Docket No. 1093. It is generally several thousand dollars higher than the prior grant-in-aid limit because it includes cash for incidental expenses related to the cost of attendance. See Stip. [[\\*\\*25](#)] Facts ¶ 5, Docket No. 1093.

Compensation and benefits in addition to the full grant-in-aid, some related and some unrelated to education, are also allowed and regulated by the NCAA. These include benefits the NCAA denominates "incidental to athletics participation," as well as money from the NCAA's Student Assistance Fund and Academic Enhancement Fund, government grants, and payments from outside entities. Other compensation is generally prohibited.

In 2009, a group of Division I male basketball and FBS football student-athletes brought an antitrust class action against the NCAA and its licensees to challenge the association's rules preventing them from being paid by schools or other entities for the sale of licenses to use their names, images, and/or likenesses (NIL) in videogames, live game telecasts, and other footage.<sup>4</sup> See [O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 962-63 \(N.D. Cal. 2014\)](#) (O'Bannon I), aff'd in part, vacated in part, [802 F.3d 1049 \(9th Cir. 2015\)](#). The rules challenged by the O'Bannon plaintiffs related to the release, use, and licensing of NIL. The then-applicable maximum limit on the grant-in-aid was discussed and implicated in the relief ordered by the Court, but the plaintiffs did not specifically challenge it in O'Bannon I. Some of the rules challenged [[\\*\\*26](#)] in the present case were challenged in O'Bannon; others were not.

This Court held in O'Bannon I that the NCAA rules challenged there violated [Section 1 of the Sherman Act, 15 U.S.C. § 1](#). [[\\*1065](#)] Id. at 963. The Court found that the plaintiffs met their burden to show that the NCAA had fixed the price of the student-athletes' NIL rights, which had significant anticompetitive effects in the relevant market. Id. at 971-73, 988-93. On the question of procompetitive justifications of the restraints, the Court found that the NCAA's challenged restrictions on student-athlete compensation played "a limited role in driving consumer demand for FBS football and Division I basketball-related products." Id. at 1001. The Court also found that the challenged rules might facilitate the integration of student-athletes with their academic communities. Id. at 1003.

The O'Bannon plaintiffs proposed alternatives they asserted were less restrictive than the NCAA rules they challenged. This Court found that two of these proposed alternatives, which relied specifically on the use of revenue

<sup>3</sup> See NCAA Constitution, Article 5.3.2.1.2; Stip. Facts ¶ 17, Docket No. 1098.

<sup>4</sup> The class in O'Bannon was defined as including "[a]ll current and former student-athletes residing in the United States who compete on, or competed on, an NCAA Division I (formerly known as 'University Division' before 1973) college or university men's basketball team or on an NCAA Football Bowl Subdivision (formerly known as Division I-A until 2006) men's football team and whose images, likenesses and/or names may be, or have been, included or could have been included (by virtue of their appearance in a team roster) in game footage or in videogames licensed or sold by Defendants, their co-conspirators, or their licensees." [O'Bannon II, 802 F.3d at 1055-56](#).

derived from NIL licensing, constituted "less restrictive means of achieving" the challenged rules' limited procompetitive effects. *Id. at 982-84; 1004-07.*

Accordingly, this Court issued an injunction barring **[\*\*27]** the NCAA from enforcing any rules that would prohibit its member schools and conferences from offering their FBS football and men's Division I basketball recruits compensation for the use of the: NIL in addition to a full grant-in-aid as then defined. The Court permitted the NCAA to implement rules capping the amount of compensation that could be paid to student-athletes while they are enrolled in school as long as the amount of the cap was not lower than the cost of attendance for students at that school. *Id. at 1007-08.* The Court also required the NCAA to allow member school to deposit a limited share of NIL licensing revenue in trust for their student-athletes. *Id. at 1008.* The Ninth Circuit affirmed the liability finding and the remedy prohibiting the NCAA from limiting payment of a share of NIL revenues to less than the cost of attendance. It vacated the remedy allowing a trust fund payment. *O'Bannon II, 802 F.3d at 1074-79.* By the time the *O'Bannon* injunction went into effect, the NCAA had already increased, through the Autonomy structure, the grant-in-aid limit to the cost-of-attendance amount for all Division I student-athletes, regardless of NIL use or revenue.

Plaintiffs in the present case are student-athletes who played Division **[\*\*28]** I FBS football and men's and women's basketball between March 5, 2014, and the present.<sup>5</sup> Order Granting Motion for *Rule 23(b)(2)* Class Certification (Class Cert. Order) at 1, Docket No. 305. The Court certified three injunctive relief classes in the consolidated action under *Federal Rule of Civil Procedure 23(b)(2)*, each consisting of student-athletes who would be offered or receive a full grant-in-aid during the pendency of this action.<sup>6</sup> *Id.* at 4-5, 31.

#### **[\*1066] II. Agreement in Restraint of Trade Affecting Interstate Commerce**

On summary judgment, the Court found that the existence of an agreement (i.e., a contract, combination, or conspiracy) restraining trade and affecting interstate commerce was undisputed. Defendants did not contest evidence showing that (1) the compensation limits that Plaintiffs challenge are enacted by agreement of Defendants and other NCAA members through the NCAA's legislative process and are embodied in NCAA rules published in the NCAA Division I Manual; (2) Defendants enforce these rules by requiring all NCAA members to comply with them, and by punishing violations; (3) the challenged rules affect interstate commerce, because they regulate transactions between Plaintiffs and their schools **[\*\*29]** in multiple states nation-wide; and (4) these transactions are commercial because they regulate an essential component of Division I basketball and FBS football. Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment (Summary Judgment Order) at 15, Docket No. 804.

The Court also found on summary judgment that the challenged NCAA rules restrain trade in that they limit the compensation that student-athletes may receive for their athletic services. These limits cap athletics-based grants-in-aid at the cost of attendance, but they also allow and fix the prices of numerous and varied additional benefits and compensation on top of a grant-in-aid that have a monetary value above the cost of attendance.<sup>7</sup> Some of

<sup>5</sup> The first of the actions that became a part of this consolidated case, *Alston v. NCAA*, Case No. 14-cv-01011, was filed on March 5, 2014. Additional actions were filed in that year and in 2015. The United States Judicial Panel on Multidistrict Litigation transferred actions filed in other districts to this Court pursuant to *28 U.S.C. § 1407*. Plaintiffs in all of the actions, except *Jenkins v. NCAA*, Case No. 14-cv-02758, filed a consolidated amended complaint. Docket No. 60.

<sup>6</sup> The Division I FBS Football Class is defined as "[a]ny and all NCAA Division I Football Bowl Subdivision ("FBS") football players who, at any time from the date of the Complaint through the date of the final judgment, or the date of the resolution of any appeals therefrom, whichever is later, received or will receive a written offer for a full grant-in-aid as defined in NCAA Bylaw 15.02.5, or who received or will receive such a full grant-in-aid." Class Cert. Order at 5, Docket No. 305. The Division I Men's Basketball Class and the Division I Women's Basketball Class are defined similarly. *Id.* In the *Jenkins* action, the Court certified the men's football and basketball classes; women's basketball class certification was not sought in that case. *Id.*

<sup>7</sup> The rules that Plaintiffs challenge here are listed and described in Plaintiffs' Opening Statement at 13-15 and Appendices A-C, Docket No. 068-3.

these rules regulate compensation that relates to education; others regulate compensation incidental to athletics participation and unrelated to education, including monetary awards that reward performance in athletics. The compensation limits are artificially set through an exercise of Defendants' monopsony power, and Plaintiffs would receive more compensation in exchange for their athletic services in the absence of the challenged limits. This Court had made **[\*\*30]** similar findings in O'Bannon I, which were affirmed on appeal in *O'Bannon II, O'Bannon I, 7 F. Supp. 3d at 971-73; O'Bannon II, 802 F.3d at 1064-69*. Horizontal price-fixing among competitors is usually a per se violation of antitrust law. However, because "a certain degree of cooperation" is necessary to market athletics competition, the Court applies the Rule of Reason. See *O'Bannon II, 802 F.3d at 1069* (citation and internal quotation marks omitted).

### III. Rule of Reason: Market Definition

The Court's first step in applying the Rule of Reason is to determine the relevant market. On summary judgment, at the request of both parties and in the absence of a genuine issue of material fact, the Court adopted the market definition from the O'Bannon case.<sup>8</sup> The relevant **[\*1067]** market there was that for a college education combined with athletics, or, alternatively, the market for the student-athletes' athletic services. See Summary Judgment Order at 18, Docket No. 804. In O'Bannon I, the Court had found that the plaintiffs' antitrust claims could be analyzed as a monopoly or, alternatively, as a monopsony. 7 F. Supp. 3d at 991. Under the theory of monopsony, sometimes referred to as a buyers' cartel, schools were characterized as buyers and student-athletes as sellers in a market for recruits' athletic services and licensing **[\*\*31]** rights. Id. The NCAA did not challenge the market definitions on appeal and the Ninth Circuit adopted them. *O'Bannon II, 802 F.3d at 1070*.

At trial in this case, Plaintiffs based their claims on a theory of monopsony only. Dr. Rascher, Plaintiffs' economics expert, defined the relevant market here as comprising national markets for Plaintiffs' labor in the form of athletic services in men's and women's Division I basketball and FBS football, wherein each class member participates in his or her sport-specific market. See Rascher Report ¶¶ 30-130, 148-85. In these markets, the class-member recruits sell their athletic services to the schools that participate in Division I basketball and FBS football in exchange for grants-in-aid and other benefits and compensation permitted by NCAA rules. Dr. Rascher found that Defendants have monopsony power in all of these markets and exercise that power to cap artificially the compensation offered to recruits. Id. ¶ 37.

Dr. Rascher's definition of these markets is based on economic analyses similar to those performed in the O'Bannon case. His analyses here are predicated on updated data and take into account women's Division I basketball, which was not **[\*\*32]** at issue in O'Bannon. Id. ¶¶ 148-53. Dr. Rascher's economic analyses show that the most talented athletes are concentrated in the respective markets for Division I basketball and FBS football; possible alternatives, such as the National Association of Intercollegiate Athletics (NAIA) or the National Christian College Athletic Association (NCCAA), have not proved to be viable substitutes; none of the major professional sports leagues in class members' sports provide competitive options for most college-aged talent; high barriers to entry into the market preclude any viable alternatives emerging for class members' athletic services; and the geographic scope of the markets is nationwide. Id. ¶¶ 154-85. In sum, class members cannot obtain the same combination of a college education, high-level television exposure, and opportunities to enter professional sports other than from Division I schools.

### IV. Rule of Reason: Anticompetitive Effects

<sup>8</sup> After the Court had entered summary judgment on market definition, Defendants argued that the Court should have considered or adopted an alternative market definition that their economics expert, Dr. Kenneth Elzinga, discussed in his report, namely a "multi-sided market for college education in the United States" in which colleges operate as multi-sided platforms that balance their pricing to numerous constituencies. Elzinga Report at 26-28; see also Order Reaffirming Exclusion of Certain Expert Testimony by Dr. Elzinga at 9, Docket No. 1018. The Court rejected this argument on the ground that it was untimely, because Defendants did not offer any alternative definition of the relevant market or point to any admissible evidence to raise a genuine issue of material fact with respect to market definition during summary judgment proceedings; and on the ground that Dr. Elzinga's expert opinions about a multi-sided relevant market were unreliable and inadmissible. See generally id.

On summary judgment, the Court found that the challenged restraints produce significant anticompetitive effects in the relevant market. The absence of a genuine dispute with respect to the existence of an agreement among Defendants that is intended to, **[\*\*33]** and does, limit student-athlete compensation in the relevant market, is in and of itself sufficient to find that this agreement has a strong potential for significant anticompetitive effects. Plaintiffs offered evidence of significant anticompetitive effects, however, which Defendants did not meaningfully dispute. The Court had also found significant anticompetitive **[\*1068]** effects with respect to the rules challenged in *O'Bannon I*, which the Ninth Circuit affirmed in *O'Bannon II*. *O'Bannon I*, 7 F. Supp. at 973, 993; *O'Bannon II*, 802 F.3d at 1057-58, 1070-72.

The economic analyses of Plaintiffs' experts established that the challenged rules have the effect of artificially compressing and capping student-athlete compensation and reducing competition for student-athlete recruits by limiting the compensation offered in exchange for their athletic services. The compensation that student-athletes receive under the challenged rules does not correlate meaningfully with the value of their athletic services, based on indicators of their talent.<sup>9</sup> This is consistent with the absence of rigorous competition among schools with respect to student-athlete compensation. In a market free of the challenged restraints, competition among schools would increase in terms of the compensation they would **[\*\*34]** offer to recruits, and student-athlete compensation would be higher as a result. Student-athletes would receive offers that would more closely match the value of their athletic services. See Lazear Report ¶¶ 11-50.

Plaintiffs' experts' analyses also show that Defendants are able to artificially compress and limit student-athlete compensation as described above because they possess monopsony power in the relevant market. See Rascher Report ¶¶ 30-130, 148-85; id. ¶ 37 ("Defendants and their co-conspirators have monopsony power in all three markets - that is, they have the power to collectively depress input prices without fear of loss of revenue in excess of the immediate cost savings"). Because of the absence of viable alternatives to Division I basketball and FBS football, and because of reduced competition among conferences due to the challenged compensation limits, the market for recruits in these sports is highly or perfectly concentrated under the current NCAA compensation limits. By contrast, if each conference were free to set its own compensation limits in competition with other conferences, the market concentration would decrease from highly or perfectly concentrated, to "moderately **[\*\*35]** concentrated" for FBS football and "unconcentrated" for Division I basketball. Rascher Report ¶¶ 155-57.

This evidence shows that student-athletes are harmed by the challenged compensation limits, because these rules deprive them of compensation they would receive in the absence of the restraints.

At trial, Plaintiffs offered additional proof of the anticompetitive effects of the NCAA's limits on compensation. It shows that changes had been made, starting in August 2014, to the amounts and types of permissible student-athlete compensation. The changes were caused, in part, by the desire of the Power Five, those conferences with the highest revenues in Division I, to divert some of their relatively significant resources away from expenditures that only indirectly benefit student-athletes (such as expenditures on opulent athletic facilities and multi-million dollar coaches' salaries) and toward student-athlete compensation. See, e.g., P0056 at 0001-02; Rascher Direct Testimony Declaration ¶ 212. Dr. Harvey Perlman, chancellor of the University of Nebraska, agreed with the statement that, "[i]n short, we recruit by shifting funds from regulated benefits for student athletes to unregulated **[\*\*36]** frills[.]" Perlman Deposition Transcript (Dep. Tr.) at 60-61.

**[\*1069]** In a presentation in 2013, the presidents and chancellors of the Power Five had asked the Division I Board of Directors for autonomy in a variety of subject areas, for the following reasons: (1) the recognition of criticisms and accusations "of exploiting student athletes for our own financial gain"; (2) the desire to avoid "unintended consequences" if "ill-advised reforms are imposed" as a result of these criticisms; (3) a wish to move away from efforts to "create a level playing field," because "[t]oo often, our efforts to improve the lives of student athletes have been deflected because of cost implications that are manageable by our institutions but not by institutions with less resources"; and (4) a sense that efforts to "level the playing field" led the Power Five to "spend these resources in

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<sup>9</sup> Dr. Edward Lazear, Plaintiffs' economics expert on summary judgment, relied on ratings of talent based on a system for rating athletes by 247sports.com. Lazear Report ¶ 29.

almost any way we want EXCEPT to improve support for student athletes." P0056 at 0001-02. This is evidence that these conferences were prevented from making the increases in student-athlete compensation that they would have made absent the anticompetitive effects of the challenged restraints.

After the new Autonomy structure [\*\*37] became effective on August 7, 2014, in January 2015, the Power Five voted to increase the overall limit on grant-in-aid athletics scholarships from the limit in place at the time of the O'Bannon I trial to the higher, cost-of-attendance limit, effective on August 1, 2015.<sup>10</sup> The Power Five also created new forms of permissible compensation for student-athletes, and expanded the scope of previously permissible benefits or compensation. These changes permitted student-athletes to borrow against their future professional earnings to purchase loss-of-value insurance (Division I Bylaw 12.1.2.4.4); expanded reimbursement or payment of travel expenses for certain family members to attend certain events (Division I Bylaw 16.6.1.1); provided unlimited food (Division I Bylaw 16.5.2.5); and required schools to pay for medical care for athletics-related injuries for at least two years after graduation (Division I Bylaw 16.4.1).

Although the Power Five's Autonomy legislative enactments have resulted in greater compensation for student-athletes, such compensation is still capped by overarching NCAA limits that prevent the Power Five and all NCAA members [\*\*38] from expanding compensation beyond a point determined by the NCAA through its traditional rulemaking process.<sup>11</sup>

[\*1070] In light of the foregoing, the Court finds that Defendants, through the NCAA, have monopsony power to restrain student-athlete compensation in any way and at any time they wish, without any meaningful risk of diminishing their market dominance. This is because the NCAA's Division I essentially is the relevant market for elite college football and basketball. And, because elite student-athletes lack any viable alternatives to Division I, they are forced to accept, to the extent they want to attend college and play sports at an elite level after high school, whatever compensation is offered to them by Division I schools, regardless of whether any such compensation is an accurate reflection of the competitive value of their athletic services. Moreover, the compensation that class members receive under the challenged rules is not commensurate with the value that they create for Division I basketball and FBS football; this value is reflected in the extraordinary revenues that Defendants derive from these sports.

The challenged rules thus have severe anticompetitive effects [\*\*39] and student-athlete are harmed as a result of the challenged rules, because the rules deprive them of compensation that they would otherwise receive for their athletic services.

#### V. Rule of Reason: Asserted Justifications for the Challenged Restraints<sup>12</sup>

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<sup>10</sup> This Court issued its O'Bannon I injunction on August 8, 2014, to take effect on August 1, 2015. Case No. 09-cv-3329, Docket Nos. 292, 298. On July 31, 2015, the Ninth Circuit stayed the injunction. Case No. 09-cv-3329, Docket No. 418. On September 30, 2015, while the injunction was stayed, the Ninth Circuit issued its opinion affirming in part this Court's decision; the judgment became effective on December 28, 2015, when the Ninth Circuit issued its mandate. See O'Bannon II, 802 F.3d at 1079; Case No. 09-CV-3329, Docket Nos. 437, 463. Thus, the Autonomy structure change to the full grant-in-aid limit became effective before the injunctive relief ordered by this Court in O'Bannon I ever went into effect. The Autonomy structure change differs from the relief ordered in O'Bannon; it permits grants-in-aid up to the cost of attendance for any Division I athlete (in any sport) and is not limited to compensation for the use or licensing of NIL. By contrast, the relief ordered in O'Bannon I, in relevant part, prohibited the NCAA from precluding its members from compensating Division I men's basketball and FBS football student-athletes for the licensing or use of their NIL, at an amount lower than the cost of attendance. Compare Division I Bylaw 15.02.6 "Full Grant-in-Aid" with Case No. 09-cv-3329, Docket No. 292 (injunction).

<sup>11</sup> See, e.g., Trial Tr. (Lennon) at 1618 (the Power Five's ability to modify athletics financial aid caps is limited by NCAA Bylaw 15.01.6); id. at 1620 (the Power Five's ability to award expenses and benefits is limited by NCAA Bylaw 12.1.2.1.4); id. at 1629 (the NCAA Board of Directors has the authority to override Autonomy legislation).

<sup>12</sup> Two additional pro-competitive justifications had been offered previously: increased output and competitive balance. These were rejected by the Court on summary judgment. They also were rejected in O'Bannon I and the NCAA did not address them on appeal, so the rejection was accepted in O'Bannon II. See Summary Judgment Order at 23 n.7, Docket No. 804; see also

#### A. Consumer Demand for Amateurism

Defendants argue that the challenged compensation limits are procompetitive because "amateurism is a key part of demand for college sports" and "consumers value amateurism." Defs.' Closing Brief at 7, 10, Docket No. 1128. The corollary is that if consumers did not believe that student-athletes were amateurs, they would watch fewer games and revenues would decrease as a result. Defendants rely on the notion that it is the "principle" of amateurism that drives consumer demand, and that the challenged restraints are procompetitive because they "implement" or "effectuate" that principle. *Id.* at 37. They did not offer evidence to establish that the challenged compensation rules, in and of themselves, have any direct connection to consumer demand.

Defendants nowhere define the nature of the amateurism they claim consumers insist upon. Defendants offer no stand-alone definition of amateurism **[\*\*40]** either in the NCAA rules or in argument. The "Principle of Amateurism," as described in the current version of the NCAA's constitution, uses the word "amateurs" to describe the amateurism principle, and is thus circular. It does not mention compensation or payment. The constitution says, "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises." NCAA Constitution Article 2.9. No connection between the "Principle of Amateurism" and the challenged compensation limits is evident. Mike Slive, who served as commissioner of the SEC, one of the Power Five, **[\*1071]** from 2002 to 2015, testified that amateurism is "just a concept that I don't even know what it means. I really don't." Slive Dep. Tr. at 23, 45. He repeated, "You know, the term amateur I've never been clear on what is meant either by in your question or otherwise, what is really meant by amateurism[.]" *Id.* at 43.

The definition of amateurism that Defendants point to **[\*\*41]** is one that cannot be found in the Division I manual. Defendants and their witnesses often describe amateurism by reference to what they say it is not: namely, amateurism is not "pay for play." See, e.g., Defs.' Closing Brief at 36 n.214, Docket No. 1128 ("Amateurism is, by definition, 'not paying' the participants."); Trial Tr. (Lennon) at 1275-77 (justifying challenged compensation limits on the ground that they prevent "pay for play"). Defendants do not explain the origin or meaning of the term "pay for play." The NCAA constitution and the Division I Bylaws do not define, or even mention, "pay for play."

The concept of "pay" is addressed only in certain bylaws that govern student-athlete compensation and eligibility. In these bylaws, "pay" is defined only indirectly; it is defined by listing a variety of forms of compensation that could be considered pay, and indicating that each form of compensation constitutes prohibited "pay," unless it falls within one of many exceptions or is otherwise permitted by the NCAA. Thus, whether any form of compensation constitutes "pay" in violation of NCAA rules cannot be determined except by studying all of the relevant bylaws and all of their exceptions **[\*\*42]** and cross-references. Erik Price, the Pac 12's Rule 30(b)(6) witness, testified, "Well, I think the NCAA, the way Bylaw 12 is written is a series of things that you cannot do, and by then still remain an amateur. It doesn't exactly have a beautiful definition of [amateurism]." Pac 12 Rule 30(b)(6) witness (Erik Price) Dep. Tr. at 60; see Division I Bylaw 12.1.2 (listing items that would cause a student-athlete to lose "amateur status" and eligibility for intercollegiate competition); Division I Bylaw 12.1.2(a) (prohibiting a student-athlete from using his or her athletic skills "for pay in any form" in his or her sport); but see Division I Bylaw 12.1.2.4 ("Exceptions to Amateurism Rule").

"Pay" under NCAA rules does not necessarily track the plain meaning of the word, whereby something of monetary value is provided in exchange for something else. Indeed, a review of the bylaws shows that many forms of payment, often in unrestricted cash, from schools and other sources, are allowed by the NCAA as "not pay," and thus as not inconsistent with amateurism. Much of this permissible compensation appears on its face to be akin to "pay" under the plain meaning of the word. In some instances it is provided to student-athletes **[\*\*43]** in exchange for their athletic performance, making it similar to what a reasonable person could consider to be "pay for play."

As noted, the NCAA allows grants-in-aid up to the cost of attendance, which are intended to pay for the student-athletes' education-related expenses. It also allows monetary awards it describes as "incidental to athletics

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O'Bannon II, 802 F.3d at 1072. Some testimony offered by Defendants at this trial seemed aimed at resurrecting these justifications. The Court will not consider these arguments again.

participation" on top of a grant-in-aid, which reward participation or achievement in athletics, such as qualifying for a bowl game in FBS football. See Division I Bylaw 16.1.4.1 and Figures 16-1, 16-2, 16-3; Trial Tr. (Lennon) at 1275. These performance awards, which are not related to education and can be provided on top of a full cost-of-attendance grant-in-aid, are allowed at several hundred dollars for each award, but the rules permit student-athletes to qualify for multiple of these awards, meaning that they could receive several thousand dollars in cash-equivalent [**\*1072**] compensation if they perform well enough in their sport. See Rascher Direct Testimony Declaration ¶¶ 72, 205; Dr. Kenneth Elzinga Direct Testimony Declaration ¶¶ 95-96, Docket No. 883-1 (a student-athlete on a team that won a national championship could receive \$5,600 total [**\*\*44**] in athletics participation awards when combined); Hostetter Dep. Tr. at 207. These awards can be provided to student-athletes in the form of Visa gift cards that can be used like cash.<sup>13</sup> See Hostetter Dep. Tr. at 224-27. Robert Bowlsby, the Big 12 Conference's Rule 30(b)(6) witness, explained that "these things [gift cards] were all previously geared towards being mementos of the . . . games" and "it's . . . taken . . . another turn, and the gift cards are representative of that." Big 12 Conference Rule 30(b)(6) witness (Robert Bowlsby) Dep. Tr. at 160. On their face, athletics participation awards seem to violate other Division I bylaws, including those that prohibit cash or cash-equivalent payment or compensation that incentivizes athletic performance (Division I Bylaws 12.1.2.1.4.1 and 12.1.2.1.5); nevertheless, these awards do not constitute a prohibited form of payment or compensation only because the NCAA has chosen to permit them.

Without affecting their status as amateurs, Division I student-athletes can also receive money from their schools, from monies provided by the NCAA each year through the conferences, by way of the Student Assistance Fund (SAF) and the Academic Enhancement [**\*\*45**] Fund (AEF), on top of a full cost-of-attendance grant-in-aid.<sup>14</sup> In 2018, the NCAA made available for distribution more than \$84 million in SAF money, and more than \$48 million in AEF money. This money is disbursed by schools to assist student-athletes in meeting financial needs, improve their welfare or academic support, or recognize academic achievement.<sup>15</sup> Division I Revenue [**\*1073**] Distribution Plan, J0021 at 0004, 0014. It can be provided in cash or as a benefit, and it is not limited to education-related expenses. The schools are not constrained in the amount of these funds they can disburse to an individual student-athlete;

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<sup>13</sup> At the time of O'Bannon I, student-athletes could receive performance awards in the form of store-specific gift cards but can now receive these awards in the form of Visa gift cards. See Hostetter Dep. Tr. at 224-27. Performance awards also can be provided in the form of "gift suites," which involve allowing student-athletes access to a location where they can select from a variety of gifts. See Elzinga Direct Testimony Declaration ¶ 95. Gifts available through gift suites include prepaid debit cards from stores such as Best Buy, iPad minis, speakers, watches, and headphones. See, e.g., James Dep. Tr. at 168 (received a watch and a \$452 Best Buy gift card at gift suite, which he used to buy his mother a television); Jemerigbe Dep. Tr. at 206 (received iPad mini, iTunes gift card, headphones, and speaker through gift suites).

<sup>14</sup> Division I Bylaw 16.11.1.8 ("A student-athlete may receive money from the NCAA Student Assistance Fund."); Division I Bylaw 15.01.6.1 ("The receipt of money from the NCAA Student Assistance Fund for student-athletes is not included in determining the permissible amount of financial aid that a member institution may award to a student-athlete.").

<sup>15</sup> The Division I Bylaws address only the uses of SAF monies that are impermissible. Neither schools nor conferences report to the NCAA detailed information (i.e., by student-athlete or by expense) to show how SAF funds were allocated; conferences report to the NCAA only amounts and types of uses of SAF monies in the aggregate. Trial Tr. (Lennon) at 1634-35. SAF monies have been used for expenses related to education, including postgraduate scholarships; fees for internship programs; international student fees, taxes, and insurance; school supplies and electronics (such as laptops, cameras, tablets); graduate school application fees; graduate school exam fees; tutoring; and academic achievement or graduation awards. J0002 at 0010; J0020 at 0001; P0043 at 0001; J0019 at 0001. SAF monies also have been used for benefits that are not related to education, such as loss-of-value insurance premiums, Trial Tr. (Lennon) at 1340; medical expenses; professional program testing; career assessments; travel expenses for both the student-athlete and family members; clothing; magazine subscriptions; and grocery reimbursement. J0002 at 0010; J0020 at 0001. AEF monies have been used for education-related benefits, such as academic achievement or graduation awards; summer school; fifth-or sixth-year aid; tutoring; academic support services; international student fees and taxes; professional program testing; and supplies (expendable or educational). J0021 at 0004-05. They have also been used for benefits that are not related to education, such as insurance premiums; medical, dental, or vision expenses (not covered by another insurance program); clothing; travel; and capital improvements/equipment. Id.; Stip. Facts ¶ 15, Docket No. 1094.

they are limited only in the aggregate by the amount that the NCAA distributes through these funds each year. Since 2015, SAF disbursements to individual student-athletes has reached to the tens of thousands of dollars above a full cost-of-attendance grant-in-aid,<sup>16</sup> and in some cases, \$50,000 for premiums for loss-of-value insurance against the loss of future professional earnings, Trial Tr. (Lennon) at 1340.

Schools can also make thirty-dollar per diem payments to student-athletes for un-itemized incidental expenses while they are travelling for certain events. Division [\*\*46] I Bylaw 16.8.1.1. Schools can pay travel expenses for certain family members to attend certain events. Division I Bylaw 16.6.1. In January 2015, without changing any bylaws, the NCAA began to pay up to \$3,000 for family members of student-athletes who reach the Final Four but do not advance to the basketball championships, and up to \$4,000 to attend the basketball championships. See P0148. Also in January 2015, the College Football Playoff committee began to pay up to \$3,000 for each competing athlete's family members to travel to that event. Id.

Cost-of-attendance grants-in-aid themselves provide cash for expenses, as well as providing tuition, room, board, and books at no cost to the student-athlete. Any athletics aid in excess of the fixed expenses of tuition, room, board and books is provided to the student-athlete in the form of a cash stipend. The cash stipend can total several thousand dollars for some students. Defendants do not monitor how student-athletes spend their stipend. NCAA Rule 30(b)(6) witness (Kevin Lennon) Dep. Tr. at 35, 37; Hostetter Dep. Tr. at 85-86. Schools may provide full cost-of-attendance grants-in-aid to student-athletes who have already received federal Pell grants, [\*\*47] which also are calculated to cover the cost of attendance. Any athletics aid in excess of tuition, room, board, and books, therefore, pays student-athletes a second time for the same cost-of-attendance expenses that the Pell grant is intended to cover.<sup>17</sup>

[\*1074] Each school may award two post-eligibility graduate school scholarships per year of \$10,000 each that can be used at any institution (Senior Scholar Awards). Division I Bylaw 16.1.4.1.1. This is an exception to the NCAA's prohibition on post-eligibility financial aid to attend graduate school at a different institution. Defendants have not provided any cogent explanation for why the NCAA generally prohibits financial aid for graduate school at another institution, or for why the Senior Scholar Awards are limited in quantity and amount. The record suggests that these limitations are arbitrary. For example, when asked whether increasing the current limit on Senior Scholar Awards from two students per school to five students per school would render the awards inconsistent with amateurism, the NCAA's Rule 30(b)(6) witness, Kevin Lennon, provided no meaningful response other than to justify the current limit on the basis that the membership decided [\*\*48] that limiting the awards to two students per school constituted a "reasonable cap." Trial Tr. (Lennon) at 1551-53. Lennon agreed that if the membership wanted to increase the awards "from two to three . . . they'd certainly be permitted to raise that[.]" Lennon Rule 30(b)(6) Dep. Tr. at 179.

In addition to the payments in excess of cost of attendance allowed from schools to student-athletes described above, the NCAA has allowed, and in recent years increased, payments that student-athletes may receive from outside entities without being found ineligible to play. For example, since 2015, international student-athletes have been allowed to receive unlimited payment from their national Olympic governing body in exchange for their performance at certain international competitions. And student-athletes continue to receive unlimited funds from the

<sup>16</sup> See P0104 (showing SAF payments above the cost of attendance (COA) provided to in-state students at Ohio State University, with the highest above-COA payment being \$14,740); P0105 (showing SAF payments above COA provided to out-of-state students at Ohio State University, with the highest above-COA payment being \$49,015); P0106 (showing SAF payments above COA at nineteen schools, with the highest above-COA payment being \$61,000); Rascher Direct Testimony Declaration ¶¶ 75, 78-81; Trial Tr. (Lennon) at 1338-40; Trial Tr. (Rascher) at 111.

<sup>17</sup> Division I Bylaw 15.1.1. Pell grants are awarded by the government based on financial need measured by the difference between a student's ability to pay and the cost of attendance. The maximum amount of a Pell grant is \$6,000. Noll Direct Testimony Declaration ¶¶ 78-79. When a student-athlete receives athletics aid permitted by the NCAA in addition to a Pell grant, the athletics aid may exceed the student's need as determined by federal regulations. See J1518 at 0001-02. This is an exception to the general practice that requires schools to adjust nonfederal aid awards to ensure that the total aid does not exceed a student's financial need. Id.

U.S. Olympic Committee for their performance in the Olympics; this also is not "pay." NCAA Rule 30(b)(6) witness (Mark Lewis) Dep. Tr. at 50-51 (a swimmer received \$115,000 for participating in the Olympics, permissible under NCAA rules).

A given student-athlete is permitted to receive, in combination, all of the foregoing compensation and benefits for which he or she qualifies, **[\*\*49]** on top of a full cost-of-attendance grant-in-aid, regardless of what the total amount of such compensation may turn out to be. Yet this compensation, some of which is unrelated to education and some of which is provided in cash or a cash-equivalent, is not considered to be "pay" and student-athletes who receive it remain amateurs.

These payments and benefits are, without a doubt, justifiable and well-deserved. They are relevant to the analysis of Defendants' consumer-demand procompetitive justification for two reasons. First, the rules that permit, limit, or forbid student-athlete compensation and benefits do not follow any coherent definition of amateurism, including Defendants' proffered definition of no "pay for play," or even "pay." The only common thread underlying all forms and amounts of currently permissible compensation is that the NCAA has decided to allow it.

Second, whatever understanding consumers have of amateurism, they enjoy watching sports played by student-athletes who receive compensation and benefits such as these, because this compensation has been paid and increased while college athletics has become and remains exceedingly popular and revenue-producing. This belies **[\*\*50]** Defendants' position that the challenged current restrictions on student-athlete compensation are necessary to preserve consumer demand. Indeed, as discussed in more detail below, increases in compensation since 2015 have not reduced consumer demand, suggesting that **[\*1075]** all of the current limits on student-athlete compensation are not necessary to preserve consumer demand.

Defendants' only economics expert on the issue of consumer demand, Dr. Elzinga, failed to show that the challenged compensation limits are necessary to preserve consumer demand. First, Dr. Elzinga's opinions on consumer demand are unreliable. He did not study any standard measures of consumer demand, such as revenues, ticket sales, or ratings. See Trial Tr. (Noll) at 285-287. The "narrative" evidence that formed the primary basis of his demand analysis was not representative. Trial Tr. (Elzinga) at 477-78, 445-47 (acknowledging that his economic analysis did not include interviews of fans, coaches, student-athletes, broadcasters, or conference commissioners). Instead, he interviewed people connected with the NCAA and its schools, who were chosen for him by defense counsel. Id. at 446-47.

Second, Dr. Elzinga's analysis of consumer demand **[\*\*51]** is not relevant because he failed to study the effect of changes to student-athlete compensation on consumer demand. Dr. Elzinga explained his failure to study this issue by opining that "no test of the effect of amateurism" is possible "because there is no period during which the NCAA did not have and enforce amateurism standards." See Elzinga Direct Testimony Declaration ¶ 20. Dr. Elzinga also posits that studying the effects on consumer demand of changes to compensation would be unnecessary in any event because the principle of amateurism has been "materially consistent over the years." Id. ¶ 23. He explains that "[t]he central tenet of amateurism is not a specific dollar amount (as in \$X = amateur, but \$X +□ = professional)," rather, it is whether

student-athletes are "being paid to play." Id. ¶¶ 14, 34-35; see also id. ¶ 14 ("[T]he difference between amateurism and professionalism isn't captured in some wooden and mechanical way by the number of dollars a student-athlete receives. True student-athletes are amateurs in the sense that they are not being paid to play.") (emphasis omitted). The record directly undercuts the premises of Dr. Elzinga's analysis. Dr. Elzinga's assertion **[\*\*52]** that there is "no period" during which the NCAA did not "have and enforce amateurism standards" is contradicted by undisputed facts, which show that "NCAA did not have any rule-making or enforcement authority over its members until the 1950s." Stip. Facts ¶ 23, Docket No. 1098. And, as discussed above in the Background section, the NCAA's implementation of amateurism has changed materially on multiple occasions throughout its history.<sup>18</sup>

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<sup>18</sup> In addition to the changes described in the Background section above, the fact that the NCAA currently permits student-athletes to receive the other forms of compensation discussed in this section in addition to a full grant-in-aid scholarship, such as

Further, Dr. Elzinga's contention that amateurism does not depend on a specific dollar amount is contradicted by the NCAA. The NCAA's Rule 30(b)(6) witness, Kevin Lennon, testified that specific dollar limits on student-athlete compensation incidental to athletics participation, such as performance awards, are set precisely for the purpose of distinguishing between permissible compensation and "pay for play." Trial Tr. (Lennon) at 1275. In other words, the amounts are set for the purpose of distinguishing between amateurism and non-amateurism. Dollar amounts (and changes to such amounts), therefore, cannot be said to be irrelevant [\*1076] to the analysis of this procompetitive justification. As described above, such amounts can reach the hundreds and thousands of dollars. [\*\*53]

For these reasons, the Court is not convinced by Dr. Elzinga's testimony.

The only economic analysis in the record that specifically speaks to the effects of compensation amounts on consumer demand is that by Dr. Rascher. Dr. Rascher analyzed two natural experiments to determine whether increases in student-athlete compensation would have an impact on consumer demand. He concluded that increased student-athlete compensation does not negatively affect consumer demand for Division I basketball and FBS football. The Court finds Dr. Rascher's analysis and opinions to be reliable and persuasive.

The first natural experiment involved comparing consumer demand before and after the increase to the grant-in-aid limit to the cost of attendance, which was voted on in January 2015 and implemented in August 2015. As explained earlier, this change to the grant-in-aid limit, on its own, resulted in a significant increase in permissible compensation per student-athlete, because it allowed grants-in-aid to provide cash for expenses that previously could not be covered, such as supplies and transportation. Rascher Direct Testimony Declaration ¶¶ 52, 54; Noll Direct Testimony Declaration ¶ 12. Some schools [\*\*54] adjusted their cost-of-attendance calculations so that the value of a full cost-of-attendance grant-in-aid would be greater. See, e.g., Trial Tr. (Lennon) at 1365 ("some" schools' financial aid offices "revisited their calculation[s]" regarding the cost of attendance after the increase of the grant-in-aid limit to cost of attendance). Moreover, because the NCAA rule that permits schools to award full grants-in-aid to student-athletes in addition to a Pell grant was not adjusted after the change to the grant-in-aid limit in 2015, the amount of cash provided above the cost of attendance increased even more for student-athletes who are awarded both a Pell grant and a full grant-in-aid scholarship. See Noll Direct Testimony Declaration ¶¶ 78-79.

Dr. Rascher's conclusions are also supported by the fact that the NCAA has increased its SAF and AEF distributions since 2015. See P0039 at 0001; D0695 at 0001. As noted, a student-athlete can receive unlimited money through the school, from the NCAA's SAF and AEF, on top of a full cost-of-attendance grant-in-aid. Since 2015, SAF cash to individual students has reached to the tens of thousands of dollars above a full cost-of-attendance grant-in-aid. [\*\*55] See P0104; P0105; P0106; Rascher Direct Testimony Declaration ¶¶ 75, 78-81. The schools are not constrained in terms of the amount of these funds they can disburse to an individual student-athlete. Stip. Facts ¶¶ 3-12, Docket No. 1094.

Thus, Dr. Rascher found that total permissible student-athlete compensation has increased since August 2015, resulting in thousands of class members receiving significant benefits and compensation on top of full cost-of-attendance grants-in-aid since Q'Bannon I was decided. Rascher Direct Testimony Declaration ¶ 52.<sup>19</sup> This has had no negative impact on consumer demand; to the contrary, Dr. Rascher found that NCAA, conference, and school revenues from Division I basketball and FBS football have increased since 2015. Rascher Direct Testimony Declaration ¶¶ 45, 47, 52, 54-55; P0139, P0030, P0032-P0039; P0048, P0049; P0137. The revenues [\*1077] of the schools in the Power Five alone for basketball and FBS football increased from a very large amount in 2014-2015 disclosed under seal, to an even larger amount in 2015-16. Rascher Direct Testimony Declaration ¶ 47; see also P0045; J0017 at 0012-13 (showing that generated revenues have increased since 2014 for schools in [\*\*56] the Power Five and other schools not in the Power Five). Revenues are one of the best economic measures of consumer demand. Rascher Direct Testimony Declaration ¶ 51.

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compensation "incidental to athletics participation, including performance awards, also distinguishes today's concept of the amateur student-athlete from that in effect in earlier years.

<sup>19</sup> Again, this is not intended to suggest that student-athletes should not receive these payments, but that the increases in compensation described above have not negatively affected consumer demand.

Dr. Rascher acknowledged that some of the media revenues he examined are derived from multi-year contracts that were executed before 2015 and have escalating clauses (i.e., the payments under the contracts will increase each year for their duration without the need to renegotiate). Trial Tr. (Rascher) at 32. Nonetheless, some of the most valuable and longest-term contracts were executed after 2015.<sup>20</sup> This supports the finding that consumer demand was not negatively affected after more student-athlete compensation became permissible in 2015. Dr. Rascher also testified that multi-year contracts that were executed before 2015 show that the increase in student-athlete compensation in 2015 did not negatively impact consumer demand given that these contracts were not renegotiated after the compensation change in 2015.<sup>21</sup> Trial Tr. (Rascher) at 32.

The second natural experiment is based on the University of Nebraska Post-Eligibility Opportunities (PEO) program, which was created after the O'Bannon trial [\*\*57] and allows post-eligibility aid from the university, on top of a grant-in-aid, of up to \$7,500 for education-related endeavors, including graduate school, as well as study abroad, or an internship. Perlman Dep. Tr. 127-28. This natural experiment shows two things. First, at least one school has the desire to offer post-eligibility benefits such [\*1078] as these provided on top of a grant-in-aid. Second, there is no evidence that the creation of this program has reduced consumer demand for Nebraska sports or Division I basketball or FBS football in general. The evidence is to the contrary: Nebraska's chancellor testified that this program is consistent with amateurism because it advances "the kinds of activities that higher education are involved with" and that Nebraska's "Athletic Director talks about it at every opportunity, public and private[.]" Perlman Dep. Tr. at 127-28; see also Trial Tr. (Rascher) 19-20; Rascher Direct Testimony Declaration ¶¶ 206-07; Trial Tr. (Elzinga) at 434-37.

Dr. Rascher's analysis and opinions, therefore, support a finding that, because the described increases to student-athlete compensation did not lead to a decrease in consumer demand, similar future increases [\*\*58] in compensation would not reduce demand.

Some defense witnesses corroborated Dr. Rascher's conclusions. See, e.g., NCAA Rule 30(b)(6) witness (Mark Lewis) Dep. Tr. at 112 (negotiated media contracts for NCAA, testified that increase of grant-in-aid limit to cost of attendance did not affect consumer demand for FBS football and Division I basketball); Big 12 Rule 30(b)(6) witness (Robert Bowlsby) Dep. Tr. at 67-68 (he is not aware of "any impact on revenue" based on "greater meals and snacks," and "with respect to Big 12 members' ability to provide cost of attendance scholarships").

Defendants try to show that consumer demand is dependent on maintaining current restrictions on student-athlete compensation by presenting the opinions of a survey expert, Dr. Bruce Isaacson, who concluded that "amateurism"

<sup>20</sup> For example, in 2016, the NCAA extended its agreement with CBS/Turner for the March Madness tournament; the previous contract was to run through 2024. The 2016 extension increased substantially the average annual fees owed to the NCAA relative to the prior iteration of the contract. D0532 at 0023; Rascher Direct ¶ 47; P0045 at 0001-02. The total value of the 2016 extension, which covers eight years, from 2024 to 2032, is \$8.8 billion. P0045 at 0002. The prior iteration, which covers fourteen years, from 2010 to 2024, is valued at \$10.8 billion. P0045 at 0001. Additionally, the 2016 extension is through 2032; witnesses who have experience negotiating media contracts in the context of college sports have described this as a major extension on the ground that contracts of greater potential value to broadcasters are typically executed for a longer timeframe. See Trial Tr. (Aresco) at 1009 (characterizing the 2016 extension as a "major extension"); id. at 998 (in the context of media contracts in college sports, "[t]he more attractive the product, the longer [the networks would] want to go" with the length of a contract).

<sup>21</sup> Some defense witnesses speculated that networks or sponsors could choose to renegotiate broadcast rights fees under provisions for "changed circumstances" if they believed that Division I basketball and FBS football changed from amateur to professional. See, e.g., NCAA Rule 30(b)(6) witness (Mark Lewis) Dep. Tr. at 247. This testimony, however, is not supported. Defendants have not pointed to any instance in which networks or sponsors have chosen to renegotiate licensing rights fees as a result of changes in student-athlete compensation or otherwise, and the record shows no renegotiations or fees adjustments after the grant-in-aid limit was increased to cost of attendance on August 1, 2015. See, e.g., Big 12 Rule 30(b)(6) witness (Robert Bowlsby) Dep. Tr. at 121, 125-28. No evidence was presented that student-athlete compensation or amateurism have even been discussed with media partners in this context, suggesting that these issues are not of concern to media partners and that renegotiation based on these issues is unlikely. See, e.g., Conference USA Rule 30(b)(6) witness (Judy McLeod) Dep. Tr. 149-50; Big 12 Rule 30(b)(6) witness (Robert Bowlsby) Dep. Tr. 125-28.

is an "important" factor in consumers' decision to watch or attend college sports, and is an "important reason for the popularity of college sports." Dr. Bruce Isaacson Direct Testimony Declaration ¶¶ 24, 26, 160, 13, Docket No. 883-3. Dr. Isaacson surveyed 1,086 consumers of college football and basketball, *id.* ¶¶ 111, 114, on-line to determine the reasons why they watch college sports. One of the reasons that [\*\*59] respondents could select was that student-athletes are "amateurs and/or not paid." He also asked whether consumers would favor or oppose certain compensation scenarios.

Dr. Isaacson's survey results and the inferences he draws from them do not establish or reliably indicate that a relationship exists between the challenged compensation limits and consumer demand for Division I basketball and FBS football.

First, the Court is not persuaded that the selection by some respondents of the "amateurs and/or not paid" option as a reason for viewing college sports sheds any light on the question of whether the challenged compensation limits, or increases in them, would cause those respondents to view fewer college sports events. Dr. Isaacson did not define "amateurs" or "not paid" in his survey, or determine what either of those terms meant to respondents. Trial Tr. (Isaacson) at 1907-09. Worse, the use of the phrase "amateurs and/or not paid" renders the responses hopelessly ambiguous. (emphasis added). The phrase includes the response "amateurs or not paid," implying that a respondent could believe that an athlete could be an amateur though not unpaid. Dr. Isaacson "intend[ed] [the terms] to [\*\*60] be synonymous" but admits that he provided no indication to respondents in his survey that they were so intended. *Id.* at 1908-09.

Even so, Dr. Isaacson's conclusion that "amateurism" is an "important" factor in consumers' decision to watch or attend college sports is an overstatement, because only 31.7% selected the "amateur and/or not paid" option as a reason why they watch or attend college sports, meaning [\*1079] that the great majority of respondents, 68.3%, gave other reasons. Isaacson Direct Testimony Declaration 153, 24, 26; Trial Tr. (Isaacson) at 1903-04. More respondents selected the options "I like it when certain colleges win or lose" and "my friends or family watch games, or attend games in person" than the "amateurs and/or not paid" option (which was the third most common selection). This suggests that these more-frequently selected reasons are more "important" factors for viewing college sports than "amateurism and/or not paid." Moreover, the respondents who selected the "amateurs and/or not paid" option selected an average of more than four other reasons they watch college sports. Trial Tr. (Isaacson) at 1902.

Second, Dr. Isaacson did not show that opposition or support for the hypothetical [\*\*61] compensation scenarios he asked about would serve as a reliable indicator of how consumers would actually behave if the scenarios were implemented. Trial Tr. (Isaacson) at 1893; Dr. Hal Poret Direct Testimony Declaration ¶ 28. Dr. Isaacson tested four compensation scenarios: (1) academic incentive payment; (2) graduation incentive payment; (3) off-season expenses; and (4) unlimited payments. Isaacson Direct Testimony Declaration ¶ 126. He also tested a fifth "control" scenario that was not related to compensation. *Id.* ¶ 130. Dr. Isaacson's survey did not ask whether respondents would view fewer or more Division I basketball and FBS football events if additional compensation were provided to student-athletes. Dr. Isaacson acknowledged that measuring consumer preferences is "not the same thing" as measuring future consumer behavior, and that he did not do any work to measure any relationship between the two.<sup>22</sup> See Trial Tr. (Isaacson) at 1894-96; see also *id.* (testified at his deposition that his "survey does not attempt to measure future behavior"); see also Poret Direct Testimony Declaration ¶ 28 and Poret Rebuttal Testimony ¶¶ 2-3 (opposition to a scenario does not translate to a change [\*\*62] in behavior if the scenario were implemented).<sup>23</sup>

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<sup>22</sup> The NCAA offered in O'Bannon a survey by Dr. J. Michael Dennis that did ask respondents about their future behaviors. This survey suffered from other defects. See O'Bannon I, 7 F. Supp. 3d at 975-76; O'Bannon II, 802 F.3d at 1059.

<sup>23</sup> Moreover, Dr. Isaacson acknowledged that he was "not providing an opinion on whether or not opposition to a particular benefit relates to amateurism. I'm going to leave that to you and the NCAA and the conferences." See Trial Tr. (Isaacson) at 1912.

By contrast, Plaintiffs' survey expert, Dr. Hal Poret, did attempt to measure the potential impact on future consumer behavior of providing additional compensation.<sup>24</sup> He conducted a survey of 2,696 people who watch or attend college basketball or football to assess the extent to which certain scenarios involving increased compensation, if permitted by conferences and schools, would cause them to watch or attend these sports events more or less often. Poret Direct Testimony Declaration ¶¶ 4, 17 and n.2, 18. Unlike Dr. Isaacson, Dr. Poret specifically asked respondents to indicate whether scenarios whereby compensation provided by conferences or schools would include some compensation that is not currently permitted or is currently limited would affect their viewership [\*1080] or attendance and, if so, to indicate the extent. *Id.* ¶¶ 44-47. Dr. Poret tested scenarios involving (1) a healthcare fund; (2) an academic incentive payment of up to \$10,000 per school year; (3) a one-time graduation incentive payment of up to \$10,000; (4) a post-eligibility undergraduate scholarship; (5) a work-study payment; (6) off-season expenses; (7) a graduate [\*63] school scholarship for the cost of attendance; and (8) a post-eligibility study abroad scholarship. Poret Direct Testimony Declaration ¶ 24. Dr. Poret concluded, based on the survey responses, that viewership and attendance would not be negatively impacted if the scenarios he tested were implemented individually. *Id.* ¶ 59; Trial Tr. (Poret) at 1792, 1795. Dr. Poret's survey, therefore, supports the finding that the current limits on student-athlete compensation, to the extent they relate to the scenarios that he tested, are not necessary to preserve consumer demand.

Defendants presented no evidence that NCAA bylaws limiting compensation are enacted based on any analysis of consumer demand.<sup>25</sup> Limits on student-athlete compensation and benefits are set through "a deliberative process" of NCAA members, Trial Tr. (Lennon) at 1309, and are based on the "delicate balancing that the membership . . . engage[s] in," Trial Tr. (Lennon) at 1552. That deliberative process and delicate balancing do not appear to include considering any possible effects on consumer demand. Indeed, Lennon, who has worked for the NCAA for more than thirty years, testified that he does not recall any instance in which [\*64] any study on consumer demand was considered by the NCAA membership when making rules about compensation. Trial Tr. (Lennon) at 1550-51. Lennon did not offer much insight as to what the NCAA membership does consider when it decides where to set a compensation cap, and the explanations that he did provide suggest that the caps are set arbitrarily.

Defendants also rely on the testimony of lay witnesses to try to establish a connection between the compensation limits and consumer demand. These lay witnesses presented their own personal opinions and those of unidentified other people with whom they \* 3 \* \* \* have spoken. This testimony posits that consumers oppose increasing compensation to student-athletes and support what the witnesses described as amateurism. The witnesses imply that these consumers would watch fewer games if they did not believe that student-athletes were amateurs. But there is no way to know what that concept means to the consumers these witnesses reported on.

Some lay defense witnesses testified that, absent the challenged NCAA limits in their current form, conferences would set limits, or not, based upon different values and resources, and that could diminish [\*65] the consumer appeal of national tournaments or rivalries or lead to conference realignment. See, e.g., Trial Tr. (Scott) at 1141-1143. But, at present, there is wide variation among conferences and their members in Division I in terms of the compensation they permit their student-athletes to receive [\*1081] within the current NCAA limits.<sup>26</sup> Further,

<sup>24</sup> The Court finds that Dr. Poret's survey results and the conclusions he draws therefrom regarding future consumption of Division I basketball and FBS football are based on a methodology that is sufficiently reliable. Dr. Poret showed that his use of controls and other aspects of his survey's design allowed him to assess reliably the potential impact on future consumer behavior of implementing the scenarios he tested. Poret Rebuttal Testimony ¶¶ 12-26; Trial Tr. (Poret) at 1713-16; 1725-26; 1729; 1781-82; 1784.

<sup>25</sup> Some witnesses referred to studies conducted by third parties at the request and for the use of conferences. See Trial Tr. (Scott) at 1167, 1153-57; D0541 (third-party study commissioned by the Pac-12, dated January 2014); Trial Tr. (Scott) 1149-53, 1172; D0683 (third-party study commissioned by the Big Ten, dated September 21, 2009); Trial Tr. (Smith) at 1412-18; D0239 (third-party study commissioned by the Big Ten, dated June 3, 2008). There is no evidence that these or any other studies were considered by the NCAA when enacting any bylaws limiting compensation. These studies were admitted for a limited purpose and not for the truth of the matter asserted therein because their contents constitute hearsay within hearsay.

resources, budgets, revenues, and performance among schools and conferences that continue to play each other in Division I already vary significantly, and the disparities that exist are longstanding.<sup>27</sup> There is no evidence that this lack of uniformity detracted from the popularity of national tournaments or rivalries. Rascher Direct Testimony Declaration ¶¶ 97-98. The variety in compensation models and resources across schools and conferences may, in fact, promote the popularity of national tournaments. See Trial Tr. (Elzinga) at 546 (agreeing that a "david/goliath story" is appealing to consumers in the national NCAA men's basketball tournament, March Madness, because it provides "differentiation" due to the schools' varying economic models and strengths); id. at 483.<sup>28</sup> Moreover, this testimony is further undermined by the fact that other rules that assist in [\*\*66] promoting equity among conferences, such as the limits on total scholarships, are not being challenged in this litigation and would not be modified through any of the proposed alternatives.<sup>29</sup>

Further, even if modifications to the NCAA's current compensation scheme resulted in some conferences realigning their membership because of differences in values, the argument that this would harm college sports as a product is unconvincing. Changes in conference membership have happened frequently in the last two decades. See Trial Tr. (Elzinga) at 485-87 (it is a "well-established fact" that "dozens and dozens of teams have" changed conferences over the years and conference changes "have increased in the past two decades"); Stip. Facts ¶ 10, Docket No. 1098.

The record does not support a finding that media or other commercial agreements would be renegotiated or terminated if conferences realigned. Some of the conference media agreements in the record contain clauses that permit the networks to renegotiate fees or terminate the agreement in the event that certain schools leave the conference. There is no [\*1082] evidence that any agreement was renegotiated or terminated in the past as [\*\*67] a result of realignment. Instead, when the Big East experienced a significant realignment and ultimately became the AAC in July 2013, ESPN did not terminate its contract with the Big East/AAC; in fact, the existence of this contract was described as one of the reasons why the Big East/AAC was able to "recover" from the realignment. Trial Tr. (Aresco) at 1023, 1048; J1509 at 0003-05.

Defense lay witnesses also testified that consumer demand for Division I basketball and FBS football is driven by consumers' perception that student-athletes are, in fact, students. See, e.g., Bowlsby Dep. Tr. at 12-13 ("This really isn't about amateurs or not amateurs. This is . . . about the concept of student athlete."); NCAA Rule 30(b)(6) witness (Mark Lewis) Dep. Tr. at 166 (he would draw the line to limit pay in the context of consumer demand as follows: "the line is if it's now not about . . . going to school, but now it's about paying somebody to play a sport"); Trial Tr. (Blank) at 954, 869 (fans of college sports "love seeing their fellow students out there playing"); Trial Tr. (Blank) at 949-50 (viewership of college sports is based on student-athletes being "students at the university"); Trial

<sup>26</sup> For example, the Ivy League does not offer any athletics-based scholarships. Military academies offer no athletics scholarships but pay their students as salaried employees. Some conferences, like the Big 12, require their members to offer athletics scholarships up to the maximum allowed by the NCAA. Some schools in other conferences cap athletics-related compensation at the cost of attendance (in other words, these schools do not permit students to, for example, receive a full cost-of-attendance grant-in-aid on top of a Pell grant). Rascher Direct Testimony Declaration ¶¶ 41, 96; Big 12 Handbook J0005 at 0017.

<sup>27</sup> See e.g., Trial Tr. (Aresco) at 1054-55 (disparities in revenue and branding opportunities currently exist between conferences, and schools with fewer resources still play schools with greater resources); Bowlsby Dep. Tr. at 38-39 (agreeing that the concept of "competitive equity is largely a mirage" because "in reality, there hadn't been much balance in the past"); Slive Dep. Tr. at 39 ("the effort to ensure a level playing field was an unattainable concept").

<sup>28</sup> See also Lynn Holzman Dep. Tr. 129-30 (NCAA Vice President for Women's Basketball, testifying that under current NCAA rules for March Madness, "institutions with different resources, institutions that provide athletic scholarships and some that don't end up being matched up and play against one another. So if there's an institution that permissibly is providing a benefit or something to student-athletes, under the current construct of the championship, an institution that does not provide the same thing, in my opinion, would be okay for them to play one another").

<sup>29</sup> See Trial Tr. (Aresco) at 1025-26 (the "larger schools" cannot "take 200 of the best student athletes" because "there are scholarship limits, 85 per school. And that was imposed in 1992. And it was to enhance the competition in college football").

Tr. (Smith) [\*\*68] at 1411-12 (same); Trial Tr. (Smith) at 1394-95, 1407-08 (the "collegiate fan is more aligned to the educational experience that college sports provide"). Michael Aresco, the commissioner of the AAC who previously worked for CBS and ESPN, noted that the programming of televised college sports focuses on "the college experience," which includes the campus, academics, and community service. See Trial Tr. (Aresco) at 1032. This testimony does not establish that the challenged rules have a connection to consumer demand, however, because student-athletes would continue to be students in the absence of the challenged rules. Fellow students, alumni, and neighbors of the schools would continue to identify with them.

The Court does credit the importance to consumer demand of maintaining a distinction between college sports and professional sports. In addition to the fact that college sports are played by students actually attending the college, student-athletes are not paid the very large salaries that characterize the professional sports leagues that many student-athletes aspire to, the National Basketball Association and the National Football League.

Some lay witnesses, particularly those who [\*\*69] have professional experience with third-party networks such as CBS or ESPN, testified that the value of media rights contracts has a relationship to the popularity of college sports as being distinguishable from professional sports. Trial Tr. (Aresco) at 1004, 1032-35; see also NCAA Rule 30(b)(6) witness (Mark Lewis) Dep. Tr. at 65-66 ("the people that are our fans who create that consumer demand would feel differently if college sports looked like professional sports"); id. at 99 ("if the college game looks to be professional sports, less people will watch it" and "there won't be the same demand" and "revenue will decline").

The Court credits this testimony and finds that some of the challenged compensation limits may have some effect in preserving consumer demand to the extent that they serve to support the distinction between college sports and professional sports. That distinction cannot be based on student-athletes not receiving any compensation and benefits on top of a grant-in-aid; this is because student-athletes currently can receive thousands or tens of thousands of dollars in such compensation, related and unrelated to education, while remaining NCAA amateurs. Accordingly, it follows [\*1083] that the [\*\*70] distinction between college and professional sports arises because student-athletes do not receive unlimited payments unrelated to education, akin to salaries seen in professional sports leagues.

Rules that prevent unlimited payments such as those observed in professional sports leagues, therefore, are procompetitive when compared to having no such restrictions. Such rules include those challenged that are necessary to limit compensation and benefits unrelated to education. The same is true with respect to the challenged limit on grants-in-aid; because the difference between the fixed costs of tuition, room, board, and books and the cost of attendance is paid to student-athletes in cash, removing the limit on the grant-in-aid could result in unlimited cash payments.

However, rules that limit or prohibit non-cash education-related benefits do not serve to foster consumer demand by maintaining a distinction between college and professional sports. The value of such benefits, like a scholarship for post-eligibility graduate school tuition, is inherently limited to its actual value, and could not be confused with a professional athlete's salary. Further, the relationship of the benefits [\*\*71] to education would serve to emphasize that the recipients are students, and not professional athletes. A subset of these education-related rules, namely those that limit cash or cash-equivalent benefits, such as academic or graduation awards or incentives, have a procompetitive effect to the extent that they prevent unlimited cash payments similar to those observed in professional sports. As will be discussed in more detail below in the section on less restrictive alternatives, the current challenged rules that limit education-related benefits and compensation are more restrictive than necessary to accomplish this procompetitive effect.

## B. Integration

Defendants' second remaining procompetitive justification is that the challenged limits promote the integration of student-athletes with their academic communities, which improves the college education student-athletes receive.<sup>30</sup>

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<sup>30</sup>in this context, Defendants also argue that academic integration itself plays a role in preserving consumer demand for college sports. This is merely a restatement of the argument that the challenged limits preserve consumer demand because consumers

within this rubric, Defendants present evidence that student-athletes benefit from receiving a college education, that the challenged limits help to incentivize academics and that the limits help integrate student-athletes into their academic communities where otherwise a "wedge" might be created.

Defendants have **[\*\*72]** not shown that the challenged rules have an effect on improving or promoting integration. While the evidence shows that student-athletes benefit from receiving a college education, it does not support the notion that any such benefits arise out of, or are caused by, the challenged compensation limits.

Defendants rely on the expert testimony of Dr. James Heckman to support the proposition that student-athletes benefit from their college education. Plaintiffs quarrel with Dr. Heckman's methodology,<sup>31</sup> but accepting his opinion that student-athletes **[\*1084]** benefit from attending college, this opinion says nothing about whether the challenged compensation rules cause the benefits that he observed. Indeed, Dr. Heckman conceded as much at trial. See Trial Tr. (Heckman) at 564-66. Dr. Heckman also conceded that additional compensation could improve outcomes for student-athletes, which contradicts the notion that the challenged compensation limits have a positive effect on student-athlete outcomes. Trial Tr. (Heckman) at 597 (if a student-athlete received "another \$10,000" then the "student is clearly better off. No question about it").

Defendants also proffer lay witness testimony on the benefits of **[\*\*73]** college education. None of this shows a connection between the challenged compensation limits and the benefits of the education. Some student-athletes testified that they gained skills and learning opportunities, but they did not attribute these benefits to the caps on their grant-in-aid athletic scholarships. See, e.g., Trial Tr. (Hartman) at 825-27.

Dr. Heckman's opinion that student-athletes would be incentivized to spend time on athletics to the detriment of academics if they received additional compensation is undermined by evidence suggesting that additional compensation can have a positive impact on academic achievement. See, e.g., NCAA Research: Trends in Graduation Success Rates and Federal Graduation Rates at NCAA Division I Institutions (Nov. 2017), J0018 at 0026-29; see also Trial Tr. (Petr) 1884-85 (showing that graduation rates for student-athletes in Division I basketball and FBS football have increased since 2015, when permissible athletics-related compensation increased).

Defendants point to policies that assist with student-athletes' involvement in academics and other aspects of university life, but these policies are not related to the challenged compensation limits. **[\*\*74]** See, e.g., Trial Tr. (Blank) at 887-89 (student-athletes at Wisconsin are not limited in their selection of major or to athlete-only dorms, and are permitted to miss only a certain number of classes in a season); Trial Tr. (Smith) at 1398-99 (Ohio State requires student-athletes to live on campus for two years); Trial Tr. (Hatch) at 1997 (same at Notre Dame); Division I Bylaw 17.1 (governing required time off); Emmert Dep. Tr. at 209-15 (proposals to reduce athletics time demands).

Defendants next contend that the challenged rules help prevent a "wedge" between student-athletes and other students that could result if student-athletes received compensation that was not available to ordinary students. Defendants again rely on Dr. Heckman, who opined that academic achievement incentives would isolate student-athletes "from the rest of the student body" and affect the "camaraderie in these various institutions." Trial Tr. (Heckman) at 631-33. Defendants also point to testimony, by university administrators and former student-athletes, that additional compensation for student-athletes would create tensions and resentment between student-athletes and non-athletes, as well as among student-athletes **[\*\*75]** to the extent that any additional compensation is not provided equally. See, e.g., Trial Tr. (Hatch) at 2000-01; Trial Tr. (Smith) at 1409-10; Jemerigbe Dep. Tr. at 294-95.

This testimony is outweighed by the fact that income disparities inevitably exist as a result of family background or wealth derived from other sources. See e.g. Trial Tr. (Blank) at 920-21 (Wisconsin students come from different

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value amateurism. Indeed, the evidence that Defendants offer to support both of these arguments overlaps. The Court considers this argument to be part of the consumer demand justification.

<sup>31</sup> Dr. Heckman's analysis was based on data whose temporal scope did not capture the class period in this litigation, and did not include any information about whether the student-athletes actually received an athletics scholarship (and if so, the amount of such scholarship) or any of the other types of compensation that are at issue in this case.

socioeconomic backgrounds). Moreover, levels of student-athlete compensation vary already. The [\*1085] amount of a cost-of-attendance grant-in-aid is calculated by each school with the discretion to adjust it on an individual-student basis. J1517 at 0002; Stip. Facts ¶¶ 3-6, Docket No. 1093; NCAA Rule 30(b)(6) witness (Mark Lewis) Dep. Tr. at 164. Another reason why compensation can vary among student-athletes is that the NCAA permits them to receive their grant-in-aid on top of federal Pell grants, which the government awards to some but not all student-athletes. Also variable is the payment of SAF and AEF benefits, which are not limited on an individual-student basis, and the awards incidental to athletics participation, including performance awards paid in Visa gift cards. Athletes who perform well in the [\*\*76] Olympics can receive unlimited compensation for their performance; such compensation has reached six figures. NCAA Rule 30(b)(6) witness (Mark Lewis) Dep. Tr. at 50-51. And athletes in certain sports, such as tennis, can receive up to \$10,000 in prize money per year prior to enrolling in college and still compete as amateurs. See Division I Bylaw 12.1.2.4.2.1. At least for some, these disparities are not problematic. See, e.g., Trial Tr. (Jenkins) at 735-736 (he did not resent a football teammate who received more than a million dollars from a baseball professional league as a recruitment bonus).

In O'Bannon I, the Court found that the challenged limits may help integrate student-athletes with their academic communities by preventing a wedge, which may improve their college education. See 7 F. Supp. 3d at 980-81. The Ninth Circuit affirmed that finding, although it noted that on appeal the NCAA focused its argument regarding procompetitive justifications entirely on the amateurism justification. O'Bannon II, 802 F.3d at 1072. Nonetheless, support for the Court's finding with respect to integration in O'Bannon I was weak, and it is weaker now. Evidence was presented at this trial that did not exist at the time of the O'Bannon trial showing that the [\*\*77] challenged rules are not necessary to prevent a wedge between student-athletes and other students. This is the natural experiment resulting from the increase to the cost of attendance for grants-in-aid. As discussed above, since 2015, student-athletes have been allowed to receive thousands of dollars in increased compensation and benefits from full cost-of-attendance grants-in-aid and other payments. Rascher Direct Testimony Declaration ¶¶ 52, 54, 75, 78-81; Noll Direct Testimony Declaration ¶ 12; P0104; P0105; P0106. Yet, there is no evidence that, since 2015, student-athletes have experienced more separation. The NCAA's Rule 30(b)(6) witness, Kevin Lennon, has acknowledged that there is no evidence that the recent increase in student-athlete compensation has created a wedge. Trial Tr. (Lennon) at 1355-58 (agreeing that there is no evidence that increased compensation that student-athletes have received because of the increase of the grant-in-aid limit to cost of attendance and because of benefits that became permissible or expanded recently, such as premiums for loss-of-value insurance against loss of future professional wages, unlimited food, and travel expenses for family members for certain [\*\*78] events, has created a wedge).

In fact, the challenged limits may serve to increase separation among students, not decrease or prevent it. According to Dr. Perlman, the University of Nebraska chancellor, the challenged compensation limits result in schools spending their recruitment resources on "unregulated frills" in facilities that benefit student-athletes exclusively, which promotes separation. See, e.g., Perlman Dep. Tr. at 60-61; see also Bilas Dep. Tr. at 105-06 (Kentucky's "opulent" facility for basketball players "functions [\*1086] to segregate them from the normal student population"); Emmert Dep. Tr. at 24-29 (expenditures on training facilities, stadiums, and student-athlete living quarters are not limited by NCAA). Limits on compensation may constrain student-athletes' financial ability to engage in social activities with other students. See, e.g., Trial Tr. (Alston) at 680 (additional compensation would have permitted him to "mingle" more with non-athletes). Accordingly, the evidence here does not support the notion that the challenged rules promote integration by preventing a wedge.

Finally, Defendants proffer Dr. Heckman's opinion that a "substantial change" to what he terms the [\*\*79] "Collegiate Model" would alter the incentives of "participants/stakeholders in the college sports world," and would result in a "new equilibrium." Heckman Direct Testimony Declaration ¶ 14. This opinion does not appear to be related to the integration theory. Further, Dr. Heckman did not conduct any empirical, econometric, or quantitative analysis to distinguish "substantial" changes from those that are not; when asked at trial to describe exactly what would qualify as a "large" or "substantial" change, he referred to dollar amounts that "have been put out in the literature" or that others had mentioned during trial, but he declined to adopt any such numbers as what he believes, based on his own work, is "large" or "substantial." Trial Tr. (Heckman) at 607-11.

Because Defendants have not met their burden to show that the challenged limits are procompetitive due to an effect on promoting integration, by preventing a wedge or otherwise, the Court finds that Defendants have not shown that the challenged rules are justified based on this theory.

#### VI. Rule of Reason: Alternatives to the Challenged Restraints

The Court finds that the current rules, read together, are more restrictive than necessary **[\*\*80]** to prevent demand-reducing unlimited compensation indistinguishable from that observed in professional sports. Plaintiffs propose three alternatives to the challenged restraints as less restrictive.

First, they propose an alternative that would prohibit the NCAA from placing any limits on compensation or benefits, whether or not related to education, given in exchange for athletic services. This would permit individual conferences to set limits on such compensation or benefits.

Second, they propose an alternative that would allow the NCAA to continue limiting the compensation or benefits given in exchange for athletic services except for (1) benefits that are related to education, and (2) the seventeen benefits incidental to athletics participation that the NCAA currently allows and caps. These are listed in Plaintiffs' Opening Statement, Appendix C, Docket No. 868-3. While these could no longer be capped by the NCAA, limits on these two types of compensation and benefits could nonetheless be maintained or set by individual conferences.

Third, Plaintiffs propose an alternative that would allow the NCAA to continue to limit the compensation or benefits given in exchange for athletic services, **[\*\*81]** but would not allow NCAA limits on compensation and benefits related to education. Again, limits on education-related benefits could be set by individual conferences.

For all of the proposed alternatives, any permissible limits could be enforced by the NCAA, the conferences, or the schools. Schools, of course, could continue to set their own limits on their offers.

#### **[\*1087] A. First and Second Proposed Alternatives**

The Court finds that Plaintiffs' first proposed alternative, which would eliminate all NCAA limits on compensation, would not be as effective as the current rules in preserving consumer demand for Division I basketball and FBS football; that alternative leaves open the possibility that at least some conferences would allow their schools to offer student-athletes unlimited cash payments that are unrelated to education. Such payments could be akin to those observed in professional sports leagues. Payments of that nature could diminish the popularity of college sports as a product distinct from professional sports. The Court notes that Plaintiffs' survey expert Dr. Poret did not test a proposed scenario of cash compensation greater than \$10,000 in value.

Plaintiffs and their experts strenuously **[\*\*82]** argue and opine, perhaps correctly, that if this alternative were adopted, conference officials, as rational economic actors, would not act contrary to their members' aggregate economic interests, and would not choose to pay amounts of cash compensation unrelated to education that would be demand-reducing for Division I sports. Whether by survey or trial and error, these actors would eventually discover the level of cash compensation to student-athletes that would encourage competition for recruits but would not reduce the demand for their product. Be that as it may, the inevitable trial-and-error phase could result in miscalculations by one or more conferences as to levels of cash pay that would not reduce demand for the product, and this could produce unintended consequences.

It is to be hoped that gradual change will be instructive. If it were persuaded to do so, the NCAA could conduct market research and allow gradual increases in cash compensation to student-athletes to determine an amount that would not be demand-reducing.

Plaintiffs' second proposed alternative likewise would not be as effective in achieving the procompetitive effect of the challenged rules to the extent that **[\*\*83]** it would remove the NCAA caps on athletics participation awards and other compensation and benefits that are unrelated to education. It would prohibit NCAA caps on cash or cash-equivalent awards or incentives. Without such limits, conferences could suddenly decide to allow the award of any

sum of cash to some or all student-athletes. This could lead to unlimited cash payments and the same effect as the first alternative.

#### B. Third Proposed Alternative as Modified: Prohibiting Limits on Most Education-Related Payments

The Court finds that a less restrictive alternative to the current set of challenged NCAA limits would be to (1) allow the NCAA to continue to limit grants-in-aid at not less than the cost of attendance; (2) allow the association to continue to limit compensation and benefits unrelated to education; (3) enjoin NCAA limits on most compensation and benefits that are related to education, but allow it to limit education-related academic or graduation awards and incentives, as long as the limits are not lower than its limits on athletic performance awards now or in the future. This is Plaintiffs' third proposed alternative, as modified by the Court. It would be less restrictive **[\*\*84]** than the current compensation rules, allowing for additional compensation and benefits related to education. It would therefore be less harmful to competition in the relevant market, but would not provide a vehicle for unlimited cash payments, unrelated to education.

**[\*1088]** The types of education-related benefits that could not be capped by the NCAA would include those that it currently prohibits or limits in some fashion. These include computers, science equipment, musical instruments and other items not currently included in the cost of attendance calculation but nonetheless related to the pursuit of various academic studies. Also included would be post-eligibility scholarships to complete undergraduate or graduate degrees at any school; scholarships to attend vocational school; expenses for pre- and post-eligibility tutoring; expenses related to studying abroad that are not covered by the cost of attendance; and paid post-eligibility internships. See Trial Tr. (Lennon) at 1559-1565, 1571-72; NCAA Rule 30(b)(6) witness (Kevin Lennon) Dep. Tr. 195-213; Division I Bylaw 13.2.1.1(k). There may be other education-related benefits that the NCAA, in an exercise of its good faith judgment, would allow. Payment **[\*\*85]** for these benefits would be limited to their actual value and could be provided in kind. For that reason, they would not be a vehicle for potentially unlimited cash payments.

A subset of education-related benefits, namely, cash academic or graduation awards and incentives, if not capped by the NCAA, could potentially be unlimited and allow for payments indistinguishable from those received in professional sports. Accordingly, limits on these awards or incentives may have the procompetitive effect of preventing professional-style unlimited cash payments. This alternative would allow the NCAA to place a limit on such awards, as long as the limit is not less than the maximum amount of compensation that an individual student-athlete could receive in an academic school year in participation, championship, or special achievement awards (combined) under Division I Bylaw, Article 16, and listed in Figures 16-1, 16-2, and 16-3 of the Division I Manual, J0024 at 0249-50. (These figures list the current caps.) If the NCAA increased the current athletics participation awards limit just described, any limits on academic or graduation awards and incentives must be increased so that they are never less than the **[\*\*86]** new athletics participation awards limit. Allowing the NCAA to cap education-related awards and incentives at the athletics participation awards limit, which is an amount that has been shown not to decrease consumer demand and not to be inconsistent with the NCAA's understanding of amateurism, would enable the NCAA to prevent unlimited cash, demand-reducing payments. On the other hand, the NCAA could decide to set higher limits, or no limits at all, for academic or graduation awards and incentives.

Individual conferences could vote to set or maintain limits on education-related benefits that the NCAA will not be allowed to cap. Conferences could also set limits on academic and graduation awards and incentives. This would not have an anticompetitive effect because no individual conference dominates nearly the entire market, like the NCAA does. Rascher Direct Testimony Declaration ¶¶ 160-61. Market concentration would be reduced in the absence of NCAA caps limiting education-related compensation and benefits described above. Thus, the third alternative would be less restrictive than maintaining the current NCAA compensation scheme. Id. ¶¶ 162, 175.

NCAA's latitude to superintend college **[\*\*87]** sports would not be greatly impacted. This alternative would affect only a small fraction of the NCAA's rulemaking jurisdiction, namely rules that limit education-related compensation and benefits.

The third alternative as modified would be virtually as effective as the current rules in achieving the effect on the preservation [**\*1089**] of consumer demand for Division I basketball and FBS football that the Court found here, and its implementation would not require significant increased costs.

#### 1. Virtually as Effective

As discussed above, according to Defendants' own witnesses, consumer demand for Division I basketball and FBS football is driven largely by consumers' perception that student-athletes are, in fact, students. Providing additional, even uncapped, education-related compensation and benefits to student-athletes would not affect student-athletes' status as students. These benefits are, by definition, related to education and thus would be consistent with the values propounded by the NCAA. The Principle of Amateurism in its constitution, quoted above, holds that amateur student-athletes should be motivated primarily by education. Education-related compensation and benefits would enhance [**\*\*88**] the student-athletes' connection to academics. See, e.g., Perlman Dep. Tr. at 126-27 ("I think if you're paying them to play athletics, I think it is inconsistent with the idea of what a student athlete is. I don't think it's inconsistent to provide them with benefits that relate to the educational enterprise"); MAC Rule 30(b)(6) witness (Jon Steinbrecher) Dep. Tr. at 189 (compensation above cost of attendance is not problematic because "the key point" is "linking what we're doing to the pursuit of the educational opportunities of the individual involved"); Renfro Dep. Tr. at 84 ("I personally don't see the offer of a post graduate grant in aid as something that violates the concept of amateurism[.]"); Bowlsby Dep. Tr. at 13-14 (an inducement to stay in school an extra year or to graduate "is worthy of consideration").

Other evidence shows that providing additional education-related compensation would not negatively impact consumer demand. See, e.g., NCAA Rule 30(b)(6) witness (Mark Lewis) Dep. Tr. at 269-70 (changes to the NCAA rules regarding compensation and benefits that have occurred in the last five years have not had "any adverse impact on consumer demand" because "they're all tied to education"). Prohibitions [**\*\*89**] or limitations on such benefits have not been shown to be necessary to preserve the distinction between college and professional sports in that the benefits are inherently limited in value and nature and can be provided in kind, not cash; accordingly, they could not be confused with professional-style unlimited cash payments. The natural experiments, discussed above, show that recent increases in student-athlete compensation, related and even unrelated to education, have not decreased consumer demand for Division I basketball or FBS football. Dr. Hal Poret's survey also supports this finding. One of the scenarios he tested was offering scholarships to complete an undergraduate or graduate degree at any institution, which he found would not negatively impact consumer demand. Poret Direct Testimony Declaration ¶¶ 17, 19-24, 26, 59, 131. Dr. Isaacson's survey does not speak to the possible effects of implementing this alternative, because he did not test any analogous scenarios.

The academic and graduation awards and incentives that would be allowed with a cap in the same amount as current caps on athletic performance awards likewise will be virtually as effective as the current compensation [**\*\*90**] scheme. The amount will not be demand-reducing because it will be in the same amount that is allowed for athletic performance awards, which are deemed to be consistent with amateurism and the preservation of the distinction between college and professional sports. And because they are education-related, they will further the perception of the student-athletes as students.

[**\*1090**] Thus, this alternative set of rules will be as effective as the current set of challenged rules in preserving consumer demand. It will also allow the NCAA to maintain the distinction between college student-athletes playing for educational benefits and professional athletes playing for large cash salaries unrelated to education. The education-related amounts that could be expended under this alternative would be either inherently limited by the actual value of the benefit, or limited by the NCAA at a level that has been shown not to be demand-reducing or inconsistent with amateurism. The NCAA will be permitted to continue to cap grants-in-aid at not less than the cost of attendance. The association will remain free to bar or limit compensation and benefits that are unrelated to education, including cash or cash-equivalent [**\*\*91**] awards for athletic performance. Conferences individually will be free to limit any benefits that the NCAA could not.

#### 2. No Significant Increased Costs

The Court finds that the implementation of this third alternative as modified would not result in significant increased costs. To the contrary, because this alternative would result in the elimination of NCAA caps on most education-related benefits, it would eliminate the need to expend resources on compliance and enforcement in connection with such caps. The NCAA engages in rule-making, interpretation, investigations, and enforcement of its rules.<sup>32</sup> It could employ its systems and resources to the extent it chooses to limit cash or cash-equivalent academic or graduation awards and incentives.

Individual conferences would not be required to enact their own rules to limit any education-related benefits that the NCAA would not be able to cap. Even so, the Court finds no evidence that the costs that could be incurred to do so, if any, would be significant. Conferences are required to be "legislative bod[ies]," Division I Constitution Article 3.3.1.1, and thus, they already can and do enact their own rules. The scope of the benefits that could not be capped by the [\*\*92] NCAA under this alternative would be those related to education, which is a small fraction of the conduct that the NCAA currently regulates and enforces. Any new rulemaking activities by the conferences would be correspondingly limited.

Conferences are also required by the NCAA to have compliance programs and are involved in ensuring compliance with both NCAA and conference rules by their members. The changes contemplated here would not add to their enforcement burden. Conferences also may require their members to enforce both conference and NCAA rules. See, e.g., The Big 10 Handbook at J0006 at 0013 (providing that it "shall be the responsibility of each member university" to "adhere to and enforce all Conference Rules and Agreements, and the NCAA Constitution, Bylaws and Regulations and their respective interpretations"). Thus, schools currently engage in compliance efforts, including investigations, and enforcement of NCAA and conference [\*1091] rules relating to student-athlete compensation and eligibility.<sup>33</sup> Schools also currently interpret NCAA rules. P0146 at 0002. Implementing this alternative will impose little or no additional burden on the schools.

Some defense witnesses testified [\*\*93] that eliminating all of the challenged NCAA limits would result in new costs to the conferences and schools. See, e.g., Trial Tr. (Scott) 1180; Trial Tr. (Smith) at 1520-23. The Court finds that this testimony lacks specificity or support and thus is speculative. Other evidence also outweighs or undermines it.<sup>34</sup> Additionally, this testimony hypothesized the removal of all NCAA compensation limits, which diminishes its relevance in the context of implementing the third alternative as modified, whereby only a subset of the challenged rules will be affected.<sup>35</sup>

Finally, to the extent that new enforcement costs at the conference or school levels are incurred, the NCAA could shift to its members some of the resources it now spends on enforcement, so there would be no net new costs. Trial

<sup>32</sup> Starting in August 2019, as a result of the findings and recommendations of the Commission on College Basketball chaired by Dr. Condoleezza Rice, see P0060, the NCAA will add a body composed of "both external investigators with no school or conference affiliations and select NCAA enforcement staff" to adjudicate independently cases involving potential violations of NCAA rules that are deemed "complex." Stip. Facts ¶ 9, Docket No. 1098 (internal quotation marks omitted). Examples of complex cases include alleged violations of core NCAA values such as prioritizing academics and the well-being of college athletes. Id. The perceived need for this new enforcement mechanism is unrelated to the changes mandated here, but this mechanism could certainly be used to police them.

<sup>33</sup> The NCAA requires all of its members to comply with and enforce its rules. See, e.g., Division I Constitution Article 1.3.2 (requiring member institutions to "apply and enforce" NCAA legislation about eligibility, financial aid, and recruiting, among other matters); Division I Constitution Article 2.1 (requiring member schools to maintain "institutional control").

<sup>34</sup> For example, Larry Scott testified that in the absence of NCAA compensation limits, there would be "significant additional infrastructure and expense" at the Pac-12 relating to "rule development." Trial Tr. (Scott) at 1136-37. But other evidence shows that the Pac-12 already has a system in place for passing and amending bylaws relating to student-athlete financial aid and otherwise. See Pac-12 Handbook, J0010 at 0008, 0014, 0015, 0017-18.

<sup>35</sup> Defendants contend in their opening statement that adopting any of Plaintiffs' proposed alternatives would result in conference realignment, which would entail increased costs. As discussed above, conference realignment is common and the evidence does not support a finding that adopting the third alternative would result in conference realignment.

Tr. (Scott) at 1240 (suggesting that any new costs at the conference and school levels could be offset by such distributions). In sum, the Court finds that any new costs of implementing this alternative would not rise to the level of "significant."

The Court notes that it asked Defendants several times, during the closing argument hearing held on December 18, 2018, and previously, to propose, based on their **[\*\*94]** superior knowledge of the NCAA and its members and their functions, adjustments to the challenged rules or to Plaintiffs' proposed less restrictive alternatives that would be more workable from their perspective. They offered none.

## CONCLUSIONS OF LAW

### I. Legal Standard under *Section 1 of the Sherman Act*

*Section 1 of the Sherman Act* makes it unlawful to form a "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States[.]" 15 U.S.C. § 1. "To establish a claim under *Section 1 of the Sherman Act*, Plaintiffs must show 1) that there was a contract, combination, or conspiracy; 2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and 3) that the restraint affected interstate commerce." Cnty. of Tuolumne v. Sonora Cnty. Hosp., 236 F.3d 1148, 1155 (9th Cir. 2001) (citation and internal quotation marks omitted).

Here, Plaintiffs challenge the NCAA rules that generally (1) cap at the cost of **[\*1092]** attendance grants-in-aid they may receive for their athletic services, and (2) limit the additional compensation and benefits that they can receive in addition to a grant-in-aid athletic scholarship, which have a monetary value above the cost of attendance. Plaintiffs contend that Defendants **[\*\*95]** enact these limits by exercising their monopsony power by way of price-fixing agreements that are made and enforced through the NCAA's bylaws. Plaintiffs contend that they would receive more compensation in exchange for their athletic services in the absence of these limits.

As discussed in the findings of fact above, on summary judgment the Court found no genuine dispute of material fact as to the existence of an agreement among Defendants in restraint of trade that affects interstate commerce, which satisfies the first and third elements of a *Section 1* claim. Specifically, Defendants did not meaningfully dispute evidence showing that (1) the compensation limits that Plaintiffs challenge are enacted by agreement of Defendants through the NCAA's legislative process and are embodied in NCAA rules published in the NCAA Division I Manual; (2) Defendants enforce these rules by requiring all NCAA members to comply with them, and by punishing violations; (3) these rules affect interstate commerce, because they regulate transactions between Plaintiffs and their schools with respect to Plaintiffs' athletic services in multiple states nation-wide; and (4) these transactions are commercial because they **[\*\*96]** regulate an essential component of Division I basketball and FBS football. Summary Judgment Order at 15, Docket No. 804; see also O'Bannon II, 802 F.3d at 1065-66 (holding that the NCAA's compensation rules are restraints of trade that regulate "commercial transaction[s]").

As to the remaining element of a *Section 1* claim, which requires a showing that the challenged restraints are unreasonable under either the per se rule or the Rule of Reason, the Court held on summary judgment that the NCAA's regulations "must be tested under a rule-of-reason analysis" as opposed to under the per se rule. Summary Judgment Order at 15, Docket No. 804; see also O'Bannon II, 802 F.3d at 1053 (holding that "the NCAA's amateurism rules . . . must be analyzed under the Rule of Reason").

Horizontal price-fixing agreements, those among competitors, like the challenged rules in this case, "are ordinarily condemned as a matter of law under an 'illegal per se' approach because the probability that these practices are anticompetitive is so high . . . . In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it is found." Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984) (Board of Regents) (citation omitted). But where, as here, a "certain degree of cooperation" is **[\*\*97]** necessary to market college sports, the Rule of Reason is appropriate. O'Bannon II, 802 F.3d at 1069 (quoting Board of Regents, 468 U.S. at 117) (internal quotation marks omitted).

### II. Issue or Claim Preclusion

As a threshold matter, Defendants argue that Plaintiffs have not shown that this case is not precluded by the Ninth Circuit's ruling in O'Bannon II. The Court denied Defendants' motion for summary judgment that this action is barred by O'Bannon II under the doctrines of res judicata<sup>36</sup> and collateral estoppel.<sup>37</sup> See [**\*1093**] Summary Judgment Order at 9-15, Docket No. 804. Defendants invite the Court to revisit these issues, arguing that Plaintiffs must, but have failed to, show that a new antitrust violation occurred since O'Bannon I or that there has been any material change in the factual basis for O'Bannon II.

It is not Plaintiffs' burden to show that this action is not precluded; instead, the burden of proving preclusion is on Defendants. See *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 627 n.4 (9th Cir. 1988) (res judicata); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1050-51 (9th Cir. 2008) (collateral estoppel). Defendants failed to satisfy this burden on summary judgment, and they have offered nothing new to warrant altering the Court's summary judgment holding on this issue.

In its Summary Judgment Order, the Court found that material differences between this action and the O'Bannon [**\*\*981**] case prevent a finding that this action is precluded by that case. These include (1) that class members in the two actions are not in complete privity; and (2) that the conduct and rules challenged, the rights implicated, and the evidence presented and available were not the same in both actions.<sup>38</sup>

The class in O'Bannon did not include, as does one of the classes here, female student-athletes. The class in O'Bannon was not limited to student-athletes in receipt of an offer for a full grant-in-aid athletic scholarship; it included male Division I basketball and FBS football student-athletes whose NIL were used or could have been used in game footage or videogames licensed or sold by the NCAA and its licensees, regardless of whether they received any scholarship money. *O'Bannon II*, 802 F.3d at 1055-56. By contrast, the classes in this case include student-athletes who were offered or received a full grant-in-aid athletic scholarship. No use of their NIL was necessary; therefore, these classes are not limited to student-athletes whose NIL were used or licensed. Additionally, the classes in this case are limited to student-athletes who received an offer for a full grant-in-aid from March 5, 2014, to the date of final [**\*\*99**] judgment in this action; few of the male class members in this case would have been O'Bannon class members because most would have been recruited after the O'Bannon I trial, which ended in August 2014.

The crux of the O'Bannon case was the right to student-athletes' NIL. The plaintiffs sought relief as a result of price-fixing [**\*1094**] conduct by the NCAA and its licensing partners that prevented them from benefiting financially, through compensation from their schools or from outside sources, from the use and licensing of their NIL. The class members in O'Bannon were required to release the rights to their NIL, the use and licensing of which had monetary value, to the NCAA as a condition of eligibility to play in Division I basketball and FBS football; this was the case regardless of whether they received a grant-in-aid. The rules challenged in O'Bannon related to NIL rights and their

<sup>36</sup> Res judicata prohibits the re-litigation of any claims that were raised or could have been raised in a prior action. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1077-78 (9th Cir. 2003). Three elements must be present for res judicata to apply: (1) an identity of claims; (2) a final judgment on the merits; and (3) the same parties or their privies. *Id. at 1077*.

<sup>37</sup> Collateral estoppel "prevents a party from relitigating an issue decided in a previous action if four requirements are met: '(1) there was a full and fair opportunity to litigate the issue in the previous action; (2) the issue was actually litigated in that action; (3) the issue was lost as a result of a final judgment in that action; and (4) the person against whom collateral estoppel is asserted in the present action was a party or in privity with a party in the previous action.'" *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1050 (9th Cir. 2008) (citation omitted).

<sup>38</sup> See *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982) (citation omitted) (holding that a single cause of action for the purpose of applying res judicata exists in successive lawsuits, if, among other things, both actions "involve infringement of the same right," and "substantially the same evidence" was presented in both actions); *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 953 (9th Cir. 2002) (holding that collateral estoppel cannot be applied where the facts of the prior action are merely "similar" to the ones in the second case) (citation and internal quotation marks omitted).

commercialization by the NCAA and its licensees, to the exclusion of student-athletes.<sup>39</sup> See *O'Bannon II*, 802 F.3d at 1055 ("The gravamen of O'Bannon's complaint was that the NCAA's amateurism rules, insofar as they prevented student-athletes from being compensated for the use of their NIL, were an illegal restraint of trade under [\*\*100] *Section 1 of the Sherman Act, 15 U.S.C. § 1.*"); *id. at 1072* (concluding that "the NCAA's compensation rules fix the price of one component (NIL rights) of the bundle that schools provide to recruits"). The plaintiffs in *O'Bannon* did not challenge the limit on a full grant-in-aid athletic scholarship, although the limit was implicated in the less restrictive alternative that the plaintiffs proposed and that this Court adopted.

In this case, by contrast, Plaintiffs seek relief from price-fixing conduct by the NCAA, Conference Defendants, and other NCAA members that prevents them from receiving compensation and benefits from their schools in excess of certain limits in exchange for their athletic services. The conduct at issue here is not connected to NIL rights. The rules challenged in this case, in addition to the limit on a grant-in-aid, include those that limit other compensation and benefits that student-athletes can receive on top of a full cost-of-attendance grant-in-aid. See Pls.' Opening Statement at 13-15 and Appendices A-C, Docket No. 868-3, for a list of the challenged rules. They include those that limit compensation and benefits related to education, such as scholarships for undergraduate or graduate study [\*\*101] at other institutions. They also include rules that limit compensation and benefits incidental to athletics participation but are unrelated to education, such as performance awards and travel expenses for student-athletes' family members. These rules were not challenged in *O'Bannon*. Accordingly, neither these rules nor the compensation and benefits that can be provided pursuant to them were comprehensively addressed in that case.

Some of the rules challenged in this case did not exist or have materially changed since the *O'Bannon* trial, those relating to reimbursement for travel expenses for family members, student-athletes borrowing against their future earnings to purchase loss-of-value insurance, and payments to international student-athletes from their home countries.

While some NCAA rules were challenged in both cases, these are core rules that address eligibility and compensation in general terms.<sup>40</sup> This overlap is a consequence [\*1095] of the interconnected nature of NCAA bylaws, and does not indicate that the two actions overlap in terms of the specific and distinct conduct being challenged, or the rights affected. The fact that the limit on the grant-in-aid is addressed in both cases also [\*\*102] does not preclude this action. The NCAA changed this limit before the Court's injunction in *O'Bannon* went into effect, and the NCAA's changed rule differs from the less restrictive alternative that the Court found in *O'Bannon I* with respect to the student-athletes who would receive the relief and the source and type of the compensation that would cover the difference between the prior grant-in-aid limit and the cost of attendance.

Moreover, since *O'Bannon*, there have been material increases in permissible compensation above the cost of attendance that is not related to education. These increases are relevant to the question of whether restrictions on student-athlete compensation are necessary to preserve consumer demand for college sports as distinct from professional sports. These include the payment by schools from SAF monies of \$50,000 premiums for loss-of-value insurance against the loss of future professional earnings in case of injury in college. In January 2015, the NCAA began to pay up to \$3,000 for family members of student-athletes to attend the Final Four games and up to \$4,000 to attend basketball championships; the College Football Playoff committee began to pay up to \$3,000 [\*\*103] for each competing athlete's family members to travel to that event. Student-athletes previously could receive performance awards in the form of store-specific gift cards but can now receive these awards, in capped amounts, in the form of Visa gift cards that can be used anywhere that accepts Visa. Schools can now provide unlimited food to student-athletes.

<sup>39</sup> See *O'Bannon I*, Case No. 09-cv-3329, Pls.' Trial Brief at 4, Docket No. 172 (listing challenged rules); Case No. 09-cv-1967, Third Am. Consolidated Complaint \$359, Docket No. 832 (same).

<sup>40</sup> For example, challenged rules that are common to both cases include Division I Bylaw 13.2.1 (prohibiting benefits and financial aid not permitted by the NCAA); Division I Bylaw 16.02.5 (prohibiting funds, awards, or benefits not permitted by the NCAA); and Division I Bylaw 12.1.2.1 (listing prohibited forms of "pay"). These rules must be read in conjunction with rules that address compensation and benefits in more specific terms and in more specific contexts.

Defendants note that some of the forms of compensation and benefits addressed in this case, such as Pell grants, benefits from the SAF, and store-specific gift cards, were mentioned or can be found in the record in O'Bannon. This fact is not sufficient to support Defendants' claim preclusion argument.

Because student-athlete compensation has expanded since O'Bannon, Defendants also argue that no new actionable conduct or material change in the factual basis of O'Bannon has occurred since O'Bannon I to justify a conclusion that this action is not precluded. This argument misses the point. It is the fact that the prices of student-athlete compensation are fixed, as opposed to the amount at which these prices are fixed, that renders the agreements at issue anticompetitive. See O'Bannon II, 802 F.3d at 1071 ("It is no excuse that the prices fixed are themselves reasonable.") [\*\*104] (quoting Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647, 100 S. Ct. 1925, 64 L. Ed. 2d 580 (1980)) (internal quotation marks omitted). Defendants do not dispute that the challenged rules embody agreements among competitors that fix the prices of student-athlete compensation. Accordingly, the Court cannot dismiss Defendants' "anticompetitive price-fixing agreement as benign," see id., simply because they contend that the fixed prices are more reasonable than they used to be. See Associated Press v. United States, 326 U.S. 1, 16 n.15, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945) ("[T]he Sherman Act cannot be evaded by good motives.") (citation and internal quotation marks omitted).

The material factual differences discussed above defeat Defendants' preclusion arguments and warrant examining the conduct challenged in this case under the Rule of Reason. See Oltz v. St. Peter's Cnty. Hosp., 861 F.2d 1440, 1449 (9th Cir. 1988) ("The rule of reason requires an [\*\*1096] evaluation of each challenged restraint in light of the special circumstances involved. That the analysis will differ from case to case is the essence of the rule.") (citation omitted). Whether the challenged price-fixing conduct here is justified by a procompetitive effect must be proved, and not presumed. See O'Bannon II, 802 F.3d at 1063-64.

In sum, because Plaintiffs raise new antitrust challenges to conduct affecting a different class, in a different time period, relating to rules and forms of compensation that are [\*\*105] not the same as those challenged in O'Bannon, the claims in this case are not precluded by O'Bannon II.

### III. The Rule of Reason

The Rule of Reason is intended for the analysis of "agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." Natl Soc. of Prof'l Eng's v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978). "[T]he purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry." Id.; see also Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977) ("Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.").

Several Ninth Circuit opinions have articulated burden-shifting schemes to apply the Rule of Reason. "Under the rule of reason burden-shifting scheme, plaintiffs first must 'delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly.'" Cnty. of Tuolumne, 236 F.3d at 1150 (citation omitted). Second, if the plaintiffs make that showing, the burden then shifts [\*\*106] to the defendants to offer evidence that a legitimate procompetitive effect is produced by the challenged behavior. Id. Third, if the defendants do so, the burden then shifts back to the plaintiffs to demonstrate that there are less restrictive alternatives to the challenged conduct. Id. Finally, if the plaintiffs fail "to meet their burden of advancing viable less restrictive alternatives," the court then will "reach the balancing stage," wherein the court "must balance the harms and benefits" of the challenged conduct to determine whether it is "reasonable." Id. at 1160 (citing Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 1507b).

### IV. Rule of Reason: Market Definition

Plaintiffs first must show that the challenged conduct has significant anticompetitive effects in the relevant market. "Proof that defendant's activities had an impact upon competition in the relevant market is 'an absolutely essential

element of the rule of reason case."*Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors*, 786 F.2d 1400, 1405 (9th Cir. 1986) (citation omitted). The term "relevant market" in this context "encompasses notions of geography as well as product use, quality, and description. The geographic market extends to the area [\*\*107] of effective competition . . . where buyers can turn for alternative sources of supply. The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand." *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) (citation and internal quotation marks omitted).

[\*1097] As discussed in the findings of fact, Plaintiffs produced sufficient evidence on summary judgment to establish the existence of a relevant market comprising national markets for Plaintiffs' labor in the form of athletic services in men's and women's Division I basketball and FBS football, wherein each class member participates in his or her sport-specific market. In these markets, the class members sell their athletic services to the schools that participate in Division I basketball and FBS football in exchange for grants-in-aid and other compensation and benefits permitted by NCAA rules on top of grants-in-aid. Because of the absence of any viable substitutes for Division I basketball and FBS football, Defendants hold monopsony power in all of these markets and exercise that power to cap artificially the compensation offered to recruits. This is reflected in the high degree of concentration found in the relevant [\*\*108] market. Class members cannot obtain the same combination of a college education, high-level television exposure, and opportunities to enter professional sports other than from Division I schools. See *O'Bannon I*, 7 F. Supp. 3d at 965-68, 991-93 (finding relevant market wherein Division I basketball and FBS football schools compete to recruit elite football and basketball players); *O'Bannon II*, 802 F.3d at 1056-57, 1070 (affirming relevant market found in *O'Bannon I* on the ground that the NCAA did not "take issue with the way that the district court defined" the relevant market).

During summary judgment proceedings, Defendants did not request that the Court adopt an alternative market definition, or point to any admissible evidence to create a genuine issue of material of fact with respect to market definition. Although Defendants argued later that this Court should have considered or adopted a multi-sided market definition, the Court rejected these arguments on the ground that they were untimely, and on the ground that the only evidence to support the belated multi-sided market definition was inadmissible in any event. See generally Order Reaffirming Exclusion of Certain Expert Testimony by Dr. Elzinga, Docket No. 1018.

#### V. Rule of Reason: Anticompetitive Effects

The [\*\*109] requisite showing of significant anticompetitive effects calls for evidence that "the activity is the type that restrains trade and that the restraint is likely to be of significant magnitude." *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991). This can be done by showing that "the defendant plays enough of a role" in the relevant market "to impair competition significantly," or by showing that the challenged restraint "has actually produced significant anti-competitive effects," such as by restricting output or fixing a price. Id.; *Board of Regents, 468 U.S. at 109* ("[W]hen there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.'") (citation omitted).

Because Defendants have near complete dominance of, and exercise monopsony power in, the relevant market, and because it is undisputed that the challenged restraints suppress competition and fix the price of student-athletes' services, the Court has found that the anticompetitive effects of the challenged rules are severe. On summary judgment, the Court found no genuine issue of material fact that the challenged rules cause significant anticompetitive effects in the relevant market. Plaintiffs produced [\*\*110] sufficient evidence on summary judgment and at trial to show that the challenged rules amount to overt [\*1098] horizontal price-fixing among competitors, because they essentially eliminate price competition as to one key aspect of the recruitment of student-athletes in Division I basketball and FBS football, namely the price of the services of student-athletes. See *Board of Regents, 468 U.S. at 100* (noting that horizontal price-fixing agreements have a "high" probability of resulting in anticompetitive effects and are "ordinarily condemned as a matter of law" under an illegal per se approach).

This evidence also established that the challenged rules harm class members, because the rules deprive them of compensation they would receive in the absence of the restraints. See *O'Bannon II*, 802 F.3d at 1071 (holding that NCAA compensation rules have anticompetitive effects because they "extinguish" one form of competition among

schools seeking to land recruits and deprive student-athletes of compensation they would receive absent the rules) (citation and internal quotation marks omitted).

#### VI. Rule of Reason: Asserted Justifications for the Challenged Restraints

Because Plaintiffs have established that the challenged rules restrain competition and have severe anticompetitive [\*\*111] effects, the burden shifts to Defendants to show that the challenged price-fixing conduct "brings about some procompetitive effect in order to justify it under the antitrust laws." *O'Bannon II, 802 F.3d at 1073* (emphasis omitted).

The only two asserted procompetitive justifications for the challenged rules that survived summary judgment<sup>41</sup> are (1) that the challenged rules promote amateurism, which in turn enhances consumer demand for Division I basketball and FBS football; and (2) that the challenged rules promote integration of student-athletes with their academic communities, which in turn improves the quality of the college education that student-athletes receive for their athletic services.

##### A. Consumer Demand for Amateurism

Defendants first contend that the challenged rules are procompetitive because they promote the principle of amateurism, which enhances consumer demand. Defendants argue that consumers value amateurism, and that consumer demand for Division I basketball and FBS football would deteriorate if student-athletes received more compensation. To support their contentions, Defendants rely on the expert opinions of Dr. Elzinga and Dr. Isaacson, and lay testimony by various NCAA, conference, [\*\*112] and school administrators regarding the preferences of viewers of college sports.

As a threshold matter, it is important to recognize that the challenged limits on compensation cannot be deemed procompetitive simply because they promote or are consistent with amateurism. To be procompetitive, the challenged rules must have some procompetitive effect on the relevant market.

Although their theory is that the challenged rules promote amateurism, Defendants did not offer an affirmative definition of amateurism. While Defendants place great emphasis on the Principle of Amateurism, which is described in the Division I constitution, the principle does not mention or address compensation; nor does it prohibit or even discourage compensation. [\*1099] Accordingly, no link appears between this principle and the challenged compensation limits.

Defendants argue that amateurism can be defined based on what it is not, namely, amateurism is not "pay for play." But the concept of "pay for play" does not help define amateurism because this term itself is undefined.

Defendants have not pointed to any NCAA bylaws that define amateurism, pay for play, or pay. In the bylaws, "pay" is defined only indirectly, by way [\*\*113] of a list of forms of compensation that the NCAA permits and does not permit. A reading of these bylaws discloses no principled, articulable difference between amateurism and not amateurism, or "pay for play" and not "pay for play." The only thing that can be inferred is that compensation constitutes "pay for play" or "pay" if the NCAA has decided to forbid it, and compensation is not "pay for play" or "pay" if the NCAA has decided to permit it.

The NCAA permits grants-in-aid up to the cost of attendance. In addition, student-athletes can receive cash or cash-equivalent compensation that exceeds the cost of attendance by thousands of dollars. The NCAA permits schools and conferences to pay student-athletes awards for their performance in their sport, which can be paid in cash-equivalent Visa cards; student-athletes who reach high levels of competition can receive up to \$5,600 in such awards in a school year. Because these awards are directly correlated with athletic performance, they appear, on

<sup>41</sup> The Court will not consider arguments relating to procompetitive justifications that it rejected on summary judgment. See Summary Judgment Order at 23 n.7, Docket No. 804; see also *O'Bannon II 802 F.3d at 1072* (affirming the district court's rejection of competitive balance and increased output procompetitive justifications because the NCAA "offered no meaningful argument that those findings were clearly erroneous").

their face, to be "pay for play," and thus, inconsistent with amateurism as Defendants and their witnesses describe that term. Yet, they are allowed. Also permissible are SAF payments in the [\*\*114] thousands of dollars for varying purposes, including for \$50,000 premiums for loss-of-value insurance against future loss of professional wages.

The NCAA permits schools to provide per diem payments to student-athletes for un-itemized expenses. It also permits schools to pay for family members' travel expenses to attend certain events; separately, the NCAA and the College Football Playoff committee have paid thousands of dollars for family members to travel to the Final Four, as well as the basketball and FBS championships. The NCAA allows outside organizations to provide payments to certain student-athletes for their performance; in the case of student-athletes who do well in the Olympics or in international competitions, the payments that can be provided under current NCAA rules are unlimited.

Some of the compensation and benefits above the cost of attendance that the NCAA currently permits are related to education. For example, the NCAA permits schools to provide student-athletes with funding for post-eligibility graduate school at any institution, although this is capped at \$10,000 per student, two students per school, per year. These are the Senior Scholar Awards. It also permits [\*\*115] schools to pay, with SAF funds, for education-related items and expenses, such as laptops and pre-eligibility tutoring, that are not covered by the cost of attendance.

An individual student-athlete could receive all of the aforementioned forms of compensation, in combination, without losing his or her status as an amateur or eligibility to play in Division I sports. When combined, this compensation can total thousands and even tens of thousands of dollars above a full cost-of-attendance grant-in-aid. Again, the Court does not mean to imply that these payments should not be made. The point is that student-athletes' receipt of this compensation in excess of the cost of attendance, some of which is related to education and some of which is not, has not led to a reduction in [\*1100] consumer demand for college sports as a distinct product, which continues apace.

Defendants' only economics expert on consumer demand, Dr. Elzinga, did not even attempt to examine whether a relationship exists between compensation and consumer demand. He opines that this analysis is not possible because amateurism has always existed and the NCAA has always enforced it; he also opines that any such analysis would be unnecessary [\*\*116] in any event because amateurism is not about whether student-athletes receive specific dollar amounts in compensation, but is instead about whether they are paid to play, which is a concept that he does not define. Dr. Elzinga's opinions and assumptions are contrary to the record, which shows that the NCAA has not always enforced amateurism rules; that amateurism, and amounts of permissible student-athlete compensation, have changed materially over time; and that the amounts of compensation that student-athletes receive are very relevant to the determination of whether a student-athlete is an NCAA amateur or not, because the NCAA's limits on certain forms of compensation are set based on specific dollar amounts for that very purpose. Accordingly, the Court found Dr. Elzinga's opinions to be unconvincing.

Defendants attempted to establish a connection between student-athlete compensation and consumer demand by way of the opinions of their survey expert, Dr. Isaacson. His opinions, however, do not establish or suggest that a relationship exists between the challenged rules and consumer demand.

The only economic analysis in the record that addresses the impact of changes to student-athlete [\*\*117] compensation on consumer demand, that of Dr. Rascher, shows that recent increases in student-athlete compensation, related and unrelated to education, have not decreased consumer demand. Dr. Rascher concluded, in fact, that revenues, which are an indicator of demand, at the NCAA, conference, and school levels have increased since 2015, when class members' permissible compensation increased significantly as a result of the change to the grant-in-aid limit that year and the expansion or creation of other benefits that schools can provide on top of a full grant-in-aid. Accordingly, Dr. Rascher's findings suggest that additional increases in compensation would not reduce consumer demand.

Dr. Rascher's conclusions are corroborated by other evidence, including the opinions of Plaintiffs' survey expert, Dr. Poret, and some testimony from defense witnesses.

Dr. Poret specifically tested whether providing certain forms of additional compensation to student-athletes would affect future viewership or attendance of basketball and football. He concluded that viewership and attendance would not be negatively impacted if the scenarios he tested were implemented individually.

If limits on student-athlete [\*\*118] compensation were necessary to maintain consumer demand, one would expect to see increases in compensation leading to decreases in consumer demand. The evidence described above shows that actual increases in compensation have not decreased demand, and it suggests that future increases in compensation likewise would not do so.

The challenged compensation limits do not appear to be set by the NCAA based on considerations of consumer demand. The NCAA's Rule 30(b)(6) witness, Kevin Lennon, testified that he does not recall any instance in his more than thirty years with the organization in which a study on consumer demand was considered by the [\*1101] NCAA membership when making rules about compensation.

Defendants rely on lay witness testimony to try to establish a connection between the challenged compensation rules and consumer demand. Most of this testimony is predicated on personal opinion and conversations with unidentified fans of college sports with whom witnesses have spoken. Some of these witnesses testified that the challenged rules prevent conferences from setting different rules on student-athlete compensation based on their different values and resources; these witnesses posited that changing the [\*\*119] challenged rules could negatively impact the consumer appeal of national tournaments and rivalries, or could result in conference realignment, all of which could negatively affect consumer demand for college sports. But this testimony is unsupported by the weight of the evidence, which shows that significant variance already exists among conferences in terms of student-athlete compensation schemes, resources, and performance, and that conference realignment has been frequent. None of this has negatively affected consumer demand or revenues.

Some witnesses testified that consumers enjoy college sports because of the difference between college sports and professional sports. Much of this difference is based on the fact that student-athletes are students playing for their school. But this does not in itself establish any connection between consumer demand and the challenged rules. Indeed, student-athletes would remain students even if their compensation were not limited by the challenged rules. See O'Bannon II, 802 F.3d at 1073 (concluding that the opportunity to earn a higher education "would still be available to student-athletes if they were paid some compensation in addition to their athletic scholarships. Nothing [\*\*120] in the plaintiffs' prayer for compensation would make student-athletes something other than students and thereby impair their ability to become student-athletes").

Other distinctions between college and professional sports are the amounts and types of compensation players receive. The distinction, currently, cannot be based on student-athletes receiving no compensation or benefits above the cost of attendance and professionals receiving large cash salaries, sometimes in the millions of dollars. This is because student-athletes already receive moderate amounts in compensation and benefits on top of a grant-in-aid without affecting the distinction between college and professional sports. Instead, the Court found that a distinction between college and professional sports arises from the fact that student-athletes do not receive unlimited cash payments, especially those unrelated to education, like those seen in professional sports leagues.

Accordingly, the Court found that, when compared with having no limits on compensation, some of the challenged compensation rules may have an effect on preserving consumer demand for college sports as distinct from professional sports to the extent that [\*\*121] they prevent unlimited cash payments unrelated to education such as those seen in professional sports leagues. As will be discussed in more detail in the next section, however, not all of the challenged rules in their current form are necessary to achieve this procompetitive effect, and there is a less restrictive alternative to the set of current challenged compensation restrictions.

The challenged compensation limits can be divided into three categories: (1) the limit on the grant-in-aid at not less than the cost of attendance; (2) compensation and benefits unrelated to education paid on top of a grant-in-aid; (3) compensation and benefits related to education provided on top of a grant-in-aid.

[\*1102] The Court found that the challenged limits in the first and second categories are procompetitive relative to having no limits, to the extent that they help maintain consumer demand for college sports as a distinct product by preventing unlimited cash payments unrelated to education.

As for the limits in the third category, only some have been shown to be procompetitive, namely limits on academic or graduation awards and incentives that are provided in cash or cash-equivalents. These [\*122] could become a vehicle for unlimited payments. The Court found that limits or prohibitions on most other benefits related to education that can be provided on top of a grant-in-aid, such as those that limit tutoring, graduate school tuition, and paid internships, have not been shown to have an effect on enhancing consumer demand for college sports as a distinct product, because these limits are not necessary to prevent unlimited cash compensation unrelated to education. Educational benefits limited or prohibited by these rules are distinct from professional-level compensation because they have a connection to education, are paid to students, their value is inherently limited to their actual cost, and they can be provided in kind, not in cash. Defendants have offered no cogent explanation for why limits or prohibitions on these education-related benefits are necessary to preserve consumer demand. Some evidence instead suggests that the challenged limits on education-related compensation are arbitrary.<sup>42</sup> Accordingly, because no procompetitive justification for limiting these education-related benefits has been shown, limits on these benefits cannot be included in a less restrictive alternative. [\*123]

#### B. Integration

Defendants contend that the challenged rules have a procompetitive effect because they promote the integration of student-athletes into their academic communities. Defendants posit that this integration improves the college education that student-athletes receive for their athletic services.

For this proffered justification to be viable, Defendants would have to establish (1) that the challenged rules promote integration, and (2) that integration has a procompetitive effect in the relevant market. As detailed in the findings of fact, Defendants did not meet their burden to show that the challenged rules have an effect on promoting integration. That alone defeats integration as a procompetitive justification.

The evidence shows that student-athletes benefit in various ways from the college education they receive, but Defendants have not shown that such benefits arise out of the challenged compensation limits. Most of the benefits that student-athletes can gain from attending college are caused, instead, by the education itself and by other rules and policies, such as those relating to academic eligibility requirements, tutoring, academic support, living conditions, and the [\*124] scheduling of athletic practice and events. None of these rules and policies, which appear to be the driving force behind the integration that Defendants describe, are challenged here. Accordingly, student-athletes would still [\*1103] enjoy the benefits caused by the latter rules and policies even if the challenged compensation limits were changed.

Defendants' expert, Dr. Heckman, conceded that additional compensation could improve outcomes for student-athletes, belying the notion that the challenged compensation limits, as they currently stand, are necessary to achieve positive student-athlete outcomes. Additionally, other evidence shows that student-athlete achievement, as measured by graduation rates, has increased since 2015, when permissible athletics-related compensation increased. This also suggests that the challenged compensation limits are not necessary to improve student-athlete academic outcomes. This evidence also undermines Dr. Heckman's opinion that student-athletes would be incentivized to spend time on athletics to the detriment of academics if they received additional compensation.

Defendants also rely on testimony positing that additional compensation for student-athletes [\*125] would create a "wedge" between student-athletes and non-athletes, and even among student-athletes if any additional

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<sup>42</sup> For example, when asked whether increasing the current limit on Senior Scholar Awards from two students per school to five students per school would render the awards inconsistent with amateurism, the NCAA's Rule 30(b)(6) witness, Kevin Lennon, provided no meaningful response other than to justify the current limit on the basis that the membership decided that limiting the awards to two students per school constituted a reasonable cap. Trial Tr. (Lennon) at 1551-53. It could be raised from two to three. Lennon Rule 30(b)(6) Dep. Tr. at 179.

compensation provided were not distributed equally. The NCAA advanced the same theory in *O'Bannon I*. See [7 F. Supp. 3d at 980-81](#). There, this Court found that certain limited restrictions on student-athlete compensation "may help" prevent a wedge between student-athletes and others on campus, [see id. at 980](#), and the Ninth Circuit affirmed that finding, although it noted that, on appeal, the NCAA focused all of its arguments regarding a procompetitive justification on its amateurism theory. [O'Bannon II, 802 F.3d at 1059-60, 1072](#).

Here, the evidence that Defendants cite in support of their "wedge" theory is even weaker than that presented in *O'Bannon I*, and it also is directly contradicted by evidence that was not available at the time of *O'Bannon I*. This shows that student-athlete compensation increased since 2015 and this greater compensation, which can reach thousands or tens of thousands of dollars above a full cost-of-attendance grant-in-aid, has not resulted in increased separation between student-athletes and other students. This evidence distinguishes the factual record here regarding the "wedge" theory from the record in [O'Bannon I, \\*\\*1261](#), and it justifies a different conclusion with respect to the "wedge" theory and integration as a procompetitive justification. Divisions among students exist and are inevitable as a result of factors that are unrelated to the challenged rules. Further, the challenged rules may create or exacerbate a wedge because they result in some schools spending money that would otherwise go to student-athlete compensation on frills, like extravagant, athletes-only facilities.

Because Defendants failed to show that the challenged rules have an effect on promoting integration, Defendants' integration justification fails.

## VII. Rule of Reason: Alternatives to the Challenged Restraints

Defendants have sufficiently shown a procompetitive effect of some aspects of the challenged compensation scheme.<sup>43</sup> These are the cost-of-attendance limit on the grant-in-aid, the limits on compensation and benefits unrelated to education, and the limits on cash or cash-equivalent education-related awards and incentives for academic achievement or graduation. The procompetitive effect of these caps is [\[\\*1104\]](#) preventing unlimited, professional-level cash payments, unrelated to education, that could blur the distinction between college [\[\\*\\*127\]](#) sports and professional sports and thereby negatively affect consumer demand for Division I basketball and FBS football. Defendants, however, have not shown a procompetitive justification for caps on education-related benefits that are inherently limited by their actual cost and that can be provided in kind, not in cash, such as rules that limit scholarships for graduate school.

The burden shifts to Plaintiffs to show that there are substantially less restrictive alternative rules that would achieve the same procompetitive effect as the challenged set of rules.

Where a restraint "is patently and inexplicably stricter than is necessary to accomplish" demonstrated procompetitive objectives, "an antitrust court can and should invalidate it and order it replaced with a less restrictive alternative." [O'Bannon II, 802 F.3d at 1075](#) (emphasis omitted). To be viable, a less restrictive alternative must be "virtually as effective" in serving the established procompetitive effect of the challenged restraints, and its implementation must be achieved "without significantly increased cost." [See id. at 1074, 1076 n.19](#) (citation and internal quotation marks omitted). In the context of NCAA rules limiting student-athlete compensation, a court must afford [\[\\*\\*128\]](#) the NCAA "ample latitude" to superintend college athletics, and may not "use **antitrust law** to make marginal adjustments to broadly reasonable market restraints." [Id. at 1074-75](#) (citation and internal quotation marks omitted).

As discussed in the findings of fact, there is a less restrictive alternative to the set of challenged rules that meets these requirements. Under these alternative rules, the NCAA can continue to cap the grant-in-aid at not less than the cost of attendance. The NCAA can also continue to limit compensation and benefits, paid in addition to the cost of attendance, that are unrelated to education. The association can continue to limit academic or graduation awards or incentives, provided in cash or cash-equivalent on top of a grant-in-aid, as long as the limit is not less than the athletics participation awards limit.<sup>44</sup> a lower cap is not necessary to preserve consumer demand because athletics

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<sup>43</sup> Because Defendants have not shown that the challenged rules can be justified on the ground that they promote integration, the Court does not consider whether any proffered less restrictive alternatives would promote integration.

participation awards, at the current caps, have not been demand-reducing. In fact, the NCAA considers these amounts consistent with amateurism. While the NCAA could reduce the athletics participation awards limit in the future, it may not reduce academic or graduation awards or incentives to **[\*\*129]** amounts lower than the current athletics participation awards limit. The NCAA may increase athletics participation awards in the future, but it must increase any limits on academic or graduation awards and incentives so that such limits are never lower than the limit on athletics participation awards.

Defendants have not shown a procompetitive effect for NCAA rules that restrict inherently limited, non-cash, education-related benefits provided on top of a grant-in-aid. Accordingly, such limits are not included in the less restrictive alternative rules. The types of inherently limited education-related benefits that are uncapped as part of this alternative include those **[\*1105]** that currently are prohibited or limited in some fashion by the NCAA. These are listed in the findings of fact.

As discussed in the findings of fact, this alternative would be virtually as effective as the challenged set of rules in preserving the same contribution to consumer demand for Division I basketball and FBS football, as a product distinct from professional sports, that the current NCAA compensation scheme achieves. This is because this alternative expands education-related compensation and benefits only, and **[\*\*130]** it does so in a way that would not result in unlimited cash payments, untethered to education, similar to those observed in professional sports.

This alternative also would not require significant new costs to implement, because it eliminates NCAA caps on education-related benefits. This will eliminate the need to expend resources on compliance and enforcement in connection with such caps. To the extent that the NCAA, conferences, or schools choose to regulate compensation in any way that is permissible under this alternative, they could employ existing rule-making, interpretation, and enforcement structures to do so. The NCAA could assist conferences and schools in that undertaking, by reallocating the resources it uses to enforce or interpret the NCAA caps that this alternative eliminates, or otherwise.

The alternative adopted here is consistent with the teachings of *O'Bannon II*. As noted above, in that case, the Ninth Circuit affirmed this Court's conclusion that the NCAA's compensation limits relating to the use or licensing of NIL violated the Sherman Act, and affirmed its order that the NCAA could not cap compensation for student-athletes' NIL at an amount lower than the cost of **[\*\*131]** attendance. The circuit court reasoned that (1) the evidence in that case did not "suggest[] that consumers of college sports would become less interested in those sports" if this compensation were provided because it "would be going to cover [student-athletes'] 'legitimate costs' to attend school;" and (2) the additional compensation "would have virtually no impact on amateurism" as the NCAA defined the concept in that case. *O'Bannon II*, 802 F.3d at 1074-75. "By the NCAA's own standards, student-athletes remain amateurs as long as any money paid to them goes to cover legitimate educational expenses." *Id. at 1075*. The circuit court, however, vacated this Court's order that the NCAA could not limit the schools' compensation in trust to student-athletes for their NIL at an amount lower than \$5,000 per year. The majority found that this Court erred in allowing student-athletes to be paid cash untethered to their education expenses, even if such payment was deferred, because that alternative would not be "virtually as effective as the NCAA's current amateur-status rule." *Id. at 1074*.

The non-cash education-related benefits allowed here, like the compensation approved by the court of appeal in *O'Bannon II*, will go to cover legitimate education-related **[\*\*132]** costs. As in *O'Bannon II*, there is no evidence here suggesting that uncapping non-cash education-related benefits would negatively affect consumers' interest in Division I basketball and FBS football. According to defense witnesses, consumer demand for Division I basketball and FBS football as distinct from professional sports is driven by consumers' perception that student-athletes are students. See *Board of Regents*, 468 U.S. at 101-02 (noting that "[t]he identification of this 'product' [college

<sup>44</sup> As discussed in the findings of fact, the athletics participation awards limit is the maximum amount of compensation that an individual student-athlete could receive in an academic school year in participation, championship, or special achievement awards (combined) under Division I Bylaw, Article 16, and listed in Figures 16-1, 16-2, and 16-3 of the 2018-2019 Division I Manual, J0024.

football] with an academic tradition differentiates [it]" from professional sports). Additional education-related benefits, if anything, would serve to enhance student-athletes' connection to [\*1106] academics. The natural experiments discussed in the findings of fact, as well as the testimony of Plaintiffs' survey expert, Dr. Poret, and some testimony by defense witnesses, also show that increasing education-related compensation and benefits would not reduce consumer demand for Division I basketball or FBS football. Defendants and their witnesses agree that the types and amounts of compensation that the NCAA currently permits schools to provide to student-athletes on top of a grant-in-aid are consistent with what they describe as [\*\*133] amateurism. Some of this currently permissible compensation on top of a grant-in-aid, which can reach thousands and even tens of thousands of dollars above the cost of attendance, is related to education, and some is not. It follows that allowing limited non-cash education-related benefits on top of a grant-in-aid is not inconsistent with what Defendants describe as amateurism.

Nor is there evidence here that allowing limited academic awards would negatively affect consumers' interest in Division I basketball or FBS football. The NCAA will be permitted to limit academic and graduation awards and incentives that are provided in cash or a cash-equivalent to a level that the record shows is not demand-reducing or inconsistent with NCAA amateurism, namely the level at which athletics participation awards, which are provided in cash-equivalents, are capped by the NCAA. The NCAA also will be permitted to continue to limit grants-in-aid at not less than the cost of attendance and limit compensation and benefits unrelated to education.

Defendants rely heavily on the following language from O'Bannon II: "The Rule of Reason requires that the NCAA permit its schools to provide up to the cost of [\*\*134] attendance to their student athletes. It does not require more." Id. at 1079. But this language from O'Bannon II cannot be read to preemptively bar any Rule of Reason challenge to any NCAA rule that restricts or prohibits student-athlete compensation. Such a broad reading would be inconsistent with the circuit court's statement elsewhere in the opinion that, under the Rule of Reason, the validity of each rule "must be proved, not presumed." Id. at 1064.

Further, this statement was made in the context of the majority's disapproval of allowing deferred cash payments above the cost of attendance and "untethered to educational expenses." Id. at 1078. Based on the evidence in that case, the majority held that paying student-athletes any amount of cash above the cost of attendance, if unrelated to education, would "vitiate their amateur status," id. at 1077, whereas including additional compensation in a grant-in-aid up to the cost of attendance would not.

New evidence presented in this case shows that payments above the cost of attendance do not vitiate student-athletes' NCAA amateur status, even when such payments are made in cash-equivalents, are unrelated to education, and can amount to thousands and even tens of thousands of dollars. [\*\*135] The NCAA permits student-athletes to receive, above the cost of attendance, cash-equivalent payments for their athletic performance directly from their schools and conferences, the cumulative value of which could reach \$5,600 in an academic school year. This evidence was not before the Ninth Circuit in O'Bannon II. Moreover, the NCAA also currently permits a variety of other payments above the cost of attendance that have no tether to education, such as payments of \$50,000 premiums for loss-of-value insurance against loss of future professional wages, thousands of dollars of SAF and AEF monies that can be used in a wide variety of ways, and thousands of dollars of travel expenses for family members. [\*1107] Defense witnesses have testified that these payments are not inconsistent with amateurism. The economic analyses discussed above show that consumer demand has not been negatively affected.

The concern described in O'Bannon II that, if the line of paying cash, non-education-related compensation were crossed, there would be "no defined stopping point," id. at 1078-79, is inapplicable here. The alternative being adopted would remove NCAA caps on education-related benefits only. These benefits are inherently [\*\*136] limited to their actual value, such as graduate school tuition. Cash or cash-equivalent academic and graduation awards and incentives would be limited to the NCAA-approved amounts of athletics participation awards. Thus, the alternative rules being adopted here do have a stopping point, and that stopping point falls within amateurism as Defendants described it in this case.

Under these less restrictive rules, the NCAA would retain the right to define these education-related benefits and to regulate how schools provide them to student-athletes. For example, the NCAA could require schools to pay the cost of such benefits directly to the educational institution or provider from which the student-athletes will obtain the benefits. In the case of education-related supplies, such as computers and science equipment, the NCAA could require schools to pay for these items directly or to reimburse student-athletes for these expenses if adequate proof of purchase is shown.

The adoption of this alternative set of rules also would not significantly impact the NCAA's ability to superintend college sports, because only a small fraction of the conduct that the NCAA regulates would be affected. The NCAA [\*\*137] will otherwise remain free to manage college sports as it wishes.

These alternative rules are less restrictive than the current compensation rules, and therefore less harmful to competition in the relevant market. They will result in increased competition among NCAA members and increased education-related compensation for student-athletes.

### VIII. Balancing

As discussed above, the Court has found and concluded that Plaintiffs have shown a less restrictive alternative to the challenged rules. Accordingly, the Court can impose its remedy without weighing the anticompetitive effects of the challenged restraints against their procompetitive benefits as a final balancing consideration.

Several Ninth Circuit cases describe the balancing inquiry as being necessary as a final consideration only if the court finds no viable less restrictive alternative. For example, in County of Tuolumne, the Ninth Circuit explained that where "plaintiffs have failed to meet their burden of advancing viable less restrictive alternatives," a court then "reach[es] the balancing stage," where it "must balance the harms and benefits of the [challenged restraints] to determine whether they are reasonable." [236 F.3d at 1160](#) (citing Areeda [\*\*138] ¶ 1507b at 397). Similarly, in Bhan, the circuit court described the Rule-of-Reason inquiry as involving four steps, and noted that, after the third step in which a plaintiff must "try to show that any legitimate objectives can be achieved in a substantially less restrictive manner," "[f]inally, the court must weigh the harms and benefits to determine if the behavior is reasonable on balance." [929 F.2d at 1413](#) (citing Areeda ¶ 1502 at 371-72).

An argument can be made that balancing should be done at an earlier stage, and in the Ninth Circuit, the Rule of Reason inquiry has been described in varying ways. In Tanaka, the circuit court described [\*1108] it as involving three steps but also noted that a "restraint violates the rule of reason if the restraint's harm to competition outweighs its procompetitive effects." [252 F.3d at 1063](#). In Paladin Assocs., Inc. v. Mont. Power Co., the circuit court described the Rule of Reason inquiry as "determin[ing] whether the anticompetitive aspects of the challenged practice outweigh its procompetitive effects," without mentioning any burden-shifting steps. [328 F.3d 1145, 1156 \(9th Cir. 2003\)](#). In Am. Ad Mgmt., Inc. v. GTE Corp., the court ruled, "The fact finder must balance the restraint and any justifications or pro-competitive [\*\*139] effects of the restraint in order to determine whether the restraint is unreasonable." [92 F.3d 781, 791 \(9th Cir. 1996\)](#) (citation, internal quotation marks, and emphasis omitted).

Some Supreme Court cases have described the Rule of Reason inquiry without mentioning a burden-shifting framework at all. See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc., [551 U.S. 877, 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 \(2007\)](#) (under the rule of reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition") (citation and internal quotation marks omitted).

Thus, Supreme Court and Ninth Circuit cases have used various formulations of the Rule of Reason: three steps followed by balancing, four steps including balancing, balancing at the second step, or eschewing a burden-shifting test with defined steps altogether. None of these cases has endorsed or required the use of any particular formulation over any other.

The Court is not persuaded by Defendants' contention that the mention of a three-step test by the Supreme Court in Ohio v. American Express Co., [138 S. Ct. 2274, 2284, 201 L. Ed. 2d 678 \(2018\)](#) (analyzing challenged restraints

under the Rule of Reason using "a three-step, burden-shifting framework") and by the Ninth Circuit in [O'Bannon II, 802 F.3d at 1060](#) (referring to the "third and final" step), means that the [\\*\\*140](#) Rule of Reason analysis can end without balancing if a viable less restrictive alternative is not shown. Neither the Supreme Court nor the Ninth Circuit has so held. In [O'Bannon II](#), the Ninth Circuit found a less restrictive alternative was viable; accordingly, balancing as a final consideration was not necessary in that case. [See 802 F.3d at 1070](#). The Supreme Court's rule-of-reason analysis in [American Express](#) did not reach the balancing stage either, because the plaintiffs had not satisfied their burden to show that the conduct at issue had anticompetitive effects.

As can be observed in many citations above, the Supreme Court and the Ninth Circuit frequently rely on the treatises and other writings of Phillip E. Areeda and Herbert Hovenkamp in cases involving the Sherman Act. [See, e.g., American Express, 138 S. Ct. at 2284](#) (citing Areeda & Hovenkamp). These scholars have noted that a three-step burden-shifting framework and balancing "are hardly the same thing" because "the sequence of evidentiary steps, with its shifting burdens, is an attempt to avoid general balancing." [See Areeda & Hovenkamp ¶ 1507d](#). Their view is that balancing is appropriate as a final consideration where no viable less restrictive alternative has been established. [\\*\\*141](#) [See id.](#) ("A better way to view balancing is as a last resort when the defendant has offered a procompetitive explanation for a *prima facie* anticompetitive restraint, but no less restrictive alternative has been shown .... The court must then determine whether the anticompetitive effects made in the *prima facie* case are sufficiently offset by the proffered defense.").

[\[\\*1109\]](#) If no balancing were required at any point in the analysis, an egregious restraint with a minor procompetitive effect would have to be allowed to continue, merely because a qualifying less restrictive alternative was not shown. In this case, however, the Court has found a viable less restrictive alternative and will enter its injunction accordingly.

## IX. Summary of Liability Determinations

For the reasons set forth above, the Court finds and concludes that the challenged rules, in their current form, unreasonably restrain trade in violation of [Section 1 of the Sherman Act](#). The challenged rules constitute horizontal price-fixing agreements enacted and enforced with monopsony power. This essentially eliminates price competition as to one key aspect of the recruitment of student-athletes in Division I basketball and FBS football, namely [\\*\\*142](#) the labor that goes into these sports. As such, the challenged rules harm student-athletes by depriving them of compensation they otherwise would receive for their athletic services.

Defendants failed to show that the challenged rules have an effect on promoting integration of student-athletes and their academic communities. While Defendants have shown that limiting student-athlete compensation has some effect in preserving consumer demand for Division I basketball and FBS football as compared with no limit, Plaintiffs have shown that not all of the challenged rules are necessary to achieve this effect and that a less restrictive alternative set of rules would be virtually as effective as the set of challenged rules, without requiring significant costs to implement. The less restrictive alternative would remove limitations on most education-related benefits provided on top of a grant-in-aid, while allowing the NCAA to limit cash or cash-equivalent awards or incentives for academic achievement or graduation to the same extent it limits athletics awards. Limits on compensation and benefits that are not related to education and a limit on the grant-in-aid at not less than the cost of attendance [\\*\\*143](#) would remain.

## X. Remedy

The [Sherman Act](#) grants the power to district courts to "prevent and restrain violations" of [Section 1, 15 U.S.C. § 4](#). In accordance with the viable less restrictive alternative discussed above, the NCAA may continue to limit the grant-in-aid at not less than the cost of attendance, and to limit compensation and benefits that are unrelated to education provided on top of a grant-in-aid. The NCAA may also limit academic or graduation awards or incentives, provided in cash or cash-equivalent, as long as the limit imposed by the NCAA is not less than the athletics participation awards limit.

Current NCAA limits on other education-related benefits that can be provided on top of a grant-in-aid are invalidated. The NCAA may not limit these benefits in the future.

Each conference will continue to be able to limit any compensation or benefits, including the education-related benefits that the NCAA will not be permitted to cap, as long as it does so independently from other conferences. Schools will remain free to set limits on their own offers to student-athletes.

The NCAA will retain the right to define, in an exercise of discretion and good faith, education-related benefits and to regulate how [\*\*144] schools provide them to student-athletes. The NCAA may also assist conferences and schools in enforcing any conference rules limiting educational benefits.

[\*1110] The Court will herewith issue an injunction, which will take effect in ninety days but will be stayed pending the issuance of a mandate if a notice of appeal is timely filed. The Court will retain jurisdiction over the enforcement and amendment of the injunction.

#### CONCLUSION

There is a great disparity between the extraordinary revenue that Defendants garner from Division I basketball and FBS football, and the modest benefits that class members receive in exchange for their participation in these sports relative to the value of their athletic services and the contributions they make. Class members contribute their elite talent and time, they limit their educational options, and they risk their long-term health to create enormous financial value for Defendants.

Restricting non-cash education-related benefits and academic awards that can be provided on top of a grant-in-aid has not been proven to be necessary to preserving consumer demand for Division I basketball and FBS football as a product distinct from professional sports. Allowing [\*\*145] each conference and its member schools to provide additional education-related benefits without NCAA caps and prohibitions, as well as academic awards, will help ameliorate their anticompetitive effects and may provide some of the compensation student-athletes would have received absent Defendants' agreement to restrain trade.

The clerk shall enter judgment in favor of the Plaintiff class. Plaintiffs shall recover their costs from Defendants. The parties shall not file any post-trial motions based on arguments that have already been made.

IT IS SO ORDERED.

Dated: March 8, 2019

/s/ Claudia Wilken

Claudia Wilken

United States District Judge



## Kerwin v. Parx Casino

United States District Court for the Eastern District of Pennsylvania

March 8, 2019, Decided; March 8, 2019, Filed

C.A. NO. 17-CV-5582

### **Reporter**

2019 U.S. Dist. LEXIS 37418 \*; 2019-1 Trade Cas. (CCH) P80,710; 2019 WL 1098949

RYAN KERWIN v. PARX CASINO, et al.

**Subsequent History:** Appeal dismissed by, in part [\*Kerwin v. Parx Casino, 2019 U.S. App. LEXIS 29940 \(3d Cir., Sept. 10, 2019\)\*](#)

Affirmed by [\*Kerwin v. Parx Casino, 2020 U.S. App. LEXIS 8557 \(3d Cir. Pa., Mar. 18, 2020\)\*](#)

## **Core Terms**

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Casino, alleges, MMA, promoted, amended complaint, conspiracy, venues, email, martial arts, mixed, terms, competitors, Defendants', centers, boxing, host, direct evidence, facilities, horizontal, Marketing, employees, Fighting, boycott, motion to dismiss, antitrust suit, defense motion, parent company, group boycott, conclusory, unilateral

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**Judges:** SCHMEHL, J.

**Opinion by:** SCHMEHL

## Opinion

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### **MEMORANDUM**

**SCHMEHL, J. /s/ JLS**

Plaintiff, a mixed martial arts promoter, brought this *pro se* antitrust action, claiming that three Pennsylvania casinos and certain of their parent companies, management companies and employees conspired to engage in a horizontal group boycott of Plaintiff's mixed martial arts events as punishment for Plaintiff having filed a previous antitrust suit against two other local casinos. Plaintiff claims that the defendants' alleged actions violate [Section 1 of the Sherman Act, 15 U.S.C. § 1](#). Plaintiff also alleges that the defendants' actions are in violation of the essential facilities doctrine under [Sections 1](#) and [2](#) of the Sherman Act. Following the filing of motions to dismiss by multiple defendants for failure to state a claim, Plaintiff filed a motion for leave to file an Amended Complaint (ECF 41). The Court granted the motion as unopposed (ECF 52). Plaintiff subsequently filed an Amended Complaint (ECF 54). Presently before the Court are five motions to dismiss the Amended Complaint by various defendants. For the reasons that follow, the motions are granted.

Plaintiff is the owner of a mixed martial arts ("MMA") promotion company known as Xtreme Caged Combat ("XCC"). [\*3] (Am. Compl., ECF 54 at ¶ 3). Plaintiff alleges that he has promoted MMA events longer than any promoter in the history of Pennsylvania and that XCC has been in existence for over eight years. (*Id.* at ¶¶ 3-4).

The Amended Complaint alleges that: Defendant Parx Casino is a casino with an attached event center located in Bethlehem, Pa; Defendant Greenwood Gaming & Entertainment, LLC is the parent company of Parx Casino; Defendant Helmut Perzi is the Director of Entertainment at Parx Casino; Defendant SugarHouse Casino is a casino with an attached event center located in Philadelphia, Pa.; Defendant SugarHouse HSP Gaming LP is the parent company of SugarHouse Casino; Defendant SugarHouse HSP Gaming Prop Mazz is the parent company of SugarHouse HSP Gaming LP; Defendant Rush Street Gaming is the managing company which runs and oversees the operation of the Sugarhouse Casino; Defendant Linda Powers is the Vice President of Marketing at SugarHouse Casino; Defendant Julia Spieler is the Catering Sales Manager at SugarHouse Casino; Defendant Erika Joy Erb is the Director of Marketing at SugarHouse Casino; Defendant Jules Vorndran is the Vice President of & Casino Operations at SugarHouse Casino; [\*4] Defendant Sands Casino is a casino with an attached event center located in Bethlehem, Pennsylvania; Defendant Sands Bethlehem Event Center is the event center that is attached to the Sands Casino; Defendant Sands Bethlehem Event Center; Defendant SMG Worldwide Entertainment & Convention Venue Management is the facility management company that oversees the daily operations of Sands Event Center; Defendant James Hines is the General Manager of Sands Bethlehem Event Center. (ECF 54 at ¶¶ 5-26). .

According to Plaintiff's Amended Complaint, some time prior to the filing of the instant matter, Plaintiff filed an antitrust suit in this Court against Valley Forge Casino, Harrah's Casino, Cage Fighting Championships, and Xtreme Fight Events, among others, alleging claims of attempted monopolization, refusal to deal, and essential facility doctrine violations under the Sherman Act and the [Clayton Act](#). (*Id.* at ¶¶ 35-36). Specifically, Plaintiff alleges "an illegal monopoly over the production of mixed martial arts events in all of the casinos in Pennsylvania who had the ability to host such events." (*Id.* at ¶ 37). The casinos involved in the [\*5] monopoly were Valley Forge Casino and Harrah's Casino. (*Id.*) Plaintiff alleges that said monopoly "was procured by David Feldman (formerly of Xtreme Fight Events and Cage Fury Fighting Champions) who had gained serious influence over these casinos through various bribes paid to casino officials." (*Id.* at ¶ 38.) The parties reached a settlement and, as part of the settlement, Plaintiff agreed not to promote his MMA events at either the Valley Forge Casino or Harrah's Casino. (*Id.* at ¶ 40).

Plaintiff now alleges that the three casinos named as Defendants in this matter, are "acting in concert with one another, are now boycotting plaintiff from being able to promote his mixed martial arts events at all of their casinos as punishment for filing the antitrust suit he filed against Harrah's Casino and Valley Forge Casino." (*Id.* at ¶ 42). Plaintiff alleges that the relevant product market is the "market of mixed martial arts events." (*Id.* at ¶ 27). He

alleges that the relevant geographic market is the "Eastern Pennsylvania Region that surrounds the Essential Casino Venues in question. This region is comprised of King of Prussia, Chester, Philadelphia, Bensalem and Bethlehem, Pennsylvania as [\*6] well as the nearby areas surrounding these same counties." (*Id.* at ¶¶ 30-31).

With regard to Defendant Sands Casino, Plaintiff alleges that the former Director of Entertainment at Sands Casino and Event Center, Matt Salkowski, allowed Plaintiff access to hold his MMA events on two separate occasions at the Sands' event center even after Plaintiff had filed his initial antitrust suit. (*Id.* at ¶ 44). Plaintiff alleges that Salkowski was forced to resign the day after Plaintiff held the second event. (*Id.* at ¶ 51). After Salkowski resigned, he was replaced by defendant James Hines. (*Id.* at ¶ 53). Two months after he promoted his second event at the Sands, Plaintiff spoke with Hines about doing more mixed martial arts events there. (*Id.* at ¶ 54). Hines agreed to allow Plaintiff to hold future events at the Sands' event center but offered Plaintiff unfavorable terms and conditions. (*Id.* at ¶¶ 55-57). Plaintiff alleges that Hines' intent was to make it unprofitable for Plaintiff to promote an event at the Sands which would force Plaintiff to decline the offer without the Sands having to explicitly deny Plaintiff access. Plaintiff alleges that he had no choice, but to reject the unfavorable [\*7] terms. (*Id.*)

Plaintiff alleges that no other MMA events have taken place at Sands Casino since Plaintiff's second event because the Sands drove up the rental fees so high that doing an event there would be unprofitable. (*Id.* at ¶ 57). Although Plaintiff alleges that the increase in rental fees was done to keep Plaintiff out of the Sands, he alleges at the same time that "no competing promotions have agreed to such inflated terms either." (*Id.*) Plaintiff alleges that boxing events promoted by David Feldman are still taking place at the Sands on much better terms than were offered Plaintiff. (*Id.* at ¶ 60).

With regard to defendant SugarHouse Casino, Plaintiff alleges that on October 27, 2015, he contacted the Casino about conducting his MMA events at the Sugarhouse event center, which was scheduled to open in March 2016. (*Id.* at ¶ 61). After speaking with defendants Julia Spieler and Erika Joy Erb, both of whom seemed very interested in Plaintiff's MMA events, Plaintiff submitted a written proposal. (*Id.* at ¶ 63). After receiving Plaintiff's proposal, Erb spoke with the Vice President of Marketing at SugarHouse Casino, defendant, Linda Powers. (*Id.* at ¶ 65). On November 6, 2015, Erb sent [\*8] Plaintiff an email informing him that, after speaking with Powers, it was determined that the "timing is just not right" and that Plaintiff should check back in June, 2016 to discuss holding an event at the event center in the fall of 2016. (*Id.*) On May 9, 2016, Erb informed Plaintiff that SugarHouse had no interest in committing to any dates for XCC holding a MMA event in the fall of 2016. (*Id.* at ¶ 69).

SugarHouse scheduled a boxing event with Hard Hitting Promotions to take place at the event center on August 26, 2016. (*Id.* at ¶ 70). On July 20, 2016, Helen Locura from XCC emailed Erb about XCC holding its own boxing event at the Center. (*Id.* at ¶ 71). After the exchange of a series of emails, Erb informed Locuro by email dated July 29, 2016 that "[w]e are still testing out our involvement with boxing events and are not ready to commit to anymore at this time. We will reach out once we internally discuss our future involvement with the sport. Thanks!" (*Id.* at ¶ 73). Although Erb had told Plaintiff that SugarHouse was not ready to commit to hosting any more boxing matches, SugarHouse apparently had already scheduled a second boxing event with Hard Hitting Promotions for October 28, [\*9] 2016. (*Id.* at ¶ 78).

At this point, Plaintiff contacted the ring announcer for SugarHouse and XCC, Pat Fattore, who offered to speak with the Vice President of Marketing & Casino Operations at SugarHouse, defendant Jules Vorndran. (*Id.* at ¶¶ 81-82). Fattore informed Plaintiff that Vorndran had told him that SugarHouse "would be delighted to have [XCC] do its events at the casino." (*Id.* at ¶ 83). Fattore provided Plaintiff with Vorndran's cell phone number. (*Id.*) On September 1, 2016, Plaintiff called Vorndran who informed Plaintiff that he "would be delighted to have XCC do its events there" and offered to give Plaintiff a tour of the facility and contractual details on September 5 or September 6, 2016. (*Id.* at ¶ 85).

About an hour later, however, Vorndran called Plaintiff and left a message on Plaintiff's voicemail to the effect that he had spoken to "Linda" and that the SugarHouse would not be interested in having any MMA event until sometime after January 1, 2017. (*Id.* at ¶ 86). Plaintiff called Vorndran and was told that the events center was completely booked for the remainder of 2016, that Plaintiff could not come to see the events center and that there

would be no contractual [\*10] discussions for an event in 2017. (*Id.* at ¶ 88). Plaintiff alleges that "Linda" is defendant Linda Powers, the Vice-President of Marketing at SugarHouse. (*Id.* at ¶ 89).

After speaking with Vorndran, Plaintiff sent an email to Spieler and Erb on September 1, 2016 informing them of his intention to sue SugarHouse. (*Id.* at ¶ 90). The email further stated that "[y]ou are obviously well aware of the previous suit so all of us know this not a bluff." (*Id.*) Plaintiff alleges that Erb called Plaintiff and the following conversation ensued:

**Plaintiff:** Hello.

**Erika:** Hi Ryan, this is Erika. You don't need to speak, you can just listen. First of all, I have much more important things to worry about then responding to your email.... Now, no matter what you say or do, Sugarhouse is never going to let you in here. If it wasnt for you we would have had mma events here long ago. You filed that lawsuit, now live with it. Now have a nice day. (Immediately hung up.)

(*Id.* at ¶ 92). Plaintiff alleges that SugarHouse has continued to allow Hard Hitting Promotions as well as David Feldman to promote boxing events at the casino. (*Id.* at ¶ 95).

With regard to Parx Casino, Plaintiff alleges that he emailed defendant [\*11] Helmut Perzi, the Director of Entertainment for Parx Casino, on May 6, 2017 regarding the possibility of XCC holding MMA events at the Casino's event center, which was scheduled to open in the near future. (*Id.* at ¶101). Plaintiff spoke with Perzi by phone on May 22, 2017. (*Id.* at ¶ 106). Following the conversation, Plaintiff emailed Perzi offering to beat the offer of any other MMA promoter and to guarantee attendance. (*Id.* at ¶ 107). Over the next two months, Perzi emailed Plaintiff to tell him that the Parx Casino was "reviewing its options." (*Id.* at ¶¶ 108-111). Plaintiff met with defendant Perzi on August 1, 2017 to discuss the terms and conditions of a possible relationship between XCC and Parx Casino. (*Id.* at ¶¶120-121). Perzi's offer to Plaintiff included a \$3,000 rental fee and the requirement that Plaintiff provide 100 free tickets to the Casino. (*Id.* at ¶ 121). Plaintiff not only agreed to the proposal, but offered to actually supply the casino with 200 free tickets. (*Id.* at ¶ 123). In response, Perzi sent Plaintiff an email which stated, *inter alia*, "[a]ll of our decisions are not always about the best financials, but with whom we are comfortable working with and we find [\*12] synergy with to be successful together." (*Id.* at ¶ 124). Ultimately, defendant Perzi contacted Plaintiff on November 14, 2017 and informed him that Parx Casino was deciding between two other companies for MMA events at the Casino. (*Id.* at ¶¶ 128-129).

Plaintiff further alleges that "[Rob] Haydak and [Cage Fury Fighting Charnpionships] will now move forward with doing their mma events at Parx Casino's event center." (*Id.* at ¶ 131). According to Plaintiff, Mr. Haydak informed him, during an October 28, 2016 meeting at the Borgata Casino, that CFFC had already agreed to terms with Parx Casino for CFFC to promote MMA events at Parx Casino. (*Id.* at ¶¶ 112-113).

Plaintiff alleges that "[a]llowing a competing mma promotion to do their mma events at the Defendant Casinos, while simultaneously refusing to allow Plaintiff to do his events there, will result in Plaintiff going out of business." (*Id.* at ¶ 137). Plaintiff further alleges that "[i]f Plaintiff is put out of business by the Defendant Casino's horizontal group boycott, it will result in the remaining Mixed Martial Arts promotion [sic] who has the ability to do events at the Casinos obtaining market power and monopolistic control over [\*13] mixed martial arts in the Eastern Pennsylvania region." (*Id.* at 138).

## STANDARD OF REVIEW

The motion to dismiss standard under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) is set forth in [Ashcroft v. Iqbal](#), 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). After *Iqbal*, it is clear that "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice" to defeat a [Rule 12\(b\)\(6\)](#) motion to dismiss. *Id.* at 663; see also [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." [Ethylpharm S.A. France v. Abbott Labs.](#), 707 F.3d 223, 231 n.14 (3d Cir.

2013) (citing *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 262 n.27 (3d Cir. 2010)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

Applying the principles of *Iqbal* and *Twombly*, our Court of Appeals in *Santiago v. Warminster Twp.*, 629 F.3d 121 (3d Cir. 2010), set forth a three-part analysis that a district court in this Circuit must conduct in evaluating whether allegations in a complaint survive a 12(b)(6) motion to dismiss: First, the court must "take note of the elements a plaintiff must plead to state a claim." Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." Finally, "where there are well-pleaded [\*14] factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." *Id. at 130* (quoting *Iqbal*, 556 U.S. at 675, 679). "This means that our inquiry is normally broken into three parts: (1) identifying the elements of the claim, (2) reviewing the complaint to strike conclusory allegations, and then (3) looking at the well-pleaded components of the complaint and evaluating whether all of the elements identified in part one of the inquiry are sufficiently alleged." *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011).

A complaint must do more than allege a plaintiff's entitlement to relief, it must "show" such an entitlement with its facts. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (citing *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 234-35 (3d Cir. 2008)). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not 'shown' — 'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679. The "plausibility" determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

## DISCUSSION

In Count One of the Amended Complaint which asserts a claim against the defendants for horizontal group boycott, Plaintiff makes the following allegations:

140. Parx Casino, Sugarhouse Casino [\*15] and Sands Casino and Event Center, control facilities that host events in plaintiff's product market and regional market that he requires access to in order to remain a viable competitor in his commercial industry.

141. Parx Casino, Sugarhouse Casino, Sands Casino and Event Center, their owners, and Defendants James Hines, Helmut Perzi, Erika Joy Erb, Julia Spieler, Jules Vorn Oran and Linda Powers collectively entered into a conspiracy to boycott plaintiff and his mixed martial arts promotion Xtreme Caged Combat from being permitted the ability to promote his mma events inside the casino defendant's venues.

142. Parx Casino, SugarHouse Casino and Sands Casino and Event Center, as well as their owners and employees, are direct competitors with one another, and the conspiracy entered into between these parties is horizontal.

143. This horizontal conspiracy is a per se antitrust violation.

144. Parx Casino, Sugarhouse Casino and Sands Casino and Event Center, and their owners and employees, have no legitimate business reason for not allowing plaintiff and XCC the ability to promote his mma events at their casino venues and under fair and reasonable terms.

145. Parx Casino, Sugarhouse Casino [\*16] and Sands Casino and Event Center's, and their owners and employees, refusal to allow plaintiff access into the casino venues to do his mma events and under fair and reasonable terms has no purpose except to stifle competition.

146. Parx Casino, Sugarhouse Casino and Sands Casino and Event Center, and their owners and employees, had a unity of purpose and a common design and understanding amongst and between one another to boycott plaintiff and his MMA promotion form the casino venues as punishment for filing his antitrust suit against Harrah's and Valley Forge Casino.

(ECF 54 at ¶¶ 141-142; 144-146).

Section 1 of the Sherman Act prohibits "every contract, combination . . . , or conspiracy" that unreasonably restrains trade. 15 U.S.C. § 1. All three of these terms essentially mean that Plaintiff has to plead an agreement or "some form of concerted action..., in other words, a unity of purpose or a common design and understanding or a meeting of minds or a conscious commitment to a common scheme . . ." In re Ins. Brokerage Antitrust Litig., 618 F. 3d 300, 315 (3d Cir. 2010) (citations and internal quotation marks omitted). "Unilateral activity by a defendant, no matter the motivation, cannot give rise to a [S]ection 1 violation." InterVest, Inc. v. Bloomberg, L.P., 340 F. 3d 144, 159 (3d Cir. 2003).

"To adequately plead an agreement, a plaintiff [\*17] must plead either direct evidence of an agreement or circumstantial evidence." Burtsch v. Milberg Factors, Inc. 662 F. 3d 212, 225 (3d Cir. 2011). Direct evidence of a conspiracy is "evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted." Ins. Brokerage, 618 F.3d at 324 n. 23.

Plaintiff has failed to plead direct evidence of an agreement. To the contrary, Plaintiff alleges an agreement to boycott Plaintiff and his MMA events only in the most conclusory of terms. For example, the sole allegation in the Amended Complaint of an alleged conspiracy states: "[a]ll of the Pennsylvania Casinos, **acting in concert with one another** are now boycotting plaintiff from being able to promote his mixed martial arts events at all of their casinos. . ." (Am. Compl. at ¶ 42) (emphasis added). See also *id.* at ¶ 141 (repeating same conclusion with slightly different wording but without alleging any facts). However, such allegations of a "conclusory nature...are not entitled to assumptions of truth," Burtsch, 662 F.3d at 225, and Twombly requires more than "a few stray statements [that] speak directly of agreement." 550 U.S. at 564; see also Schuylkill Health Sys. v. Cardinal Health 200, LLC, No. 12-7065, 2014 U.S. Dist. LEXIS 103663, 2014 WL 3746817, at \*7 (E.D. Pa. July 30, 2014) (dismissing conspiracy claims and explaining "most telling factor" was that Plaintiff "state[d] only in a conclusory fashion that Defendants conspired [\*18] to allocate markets or employ identical contract terms"). Indeed, the Amended Complaint lacks any allegation related to Defendants' purported group boycott.

Plaintiff argues that Erb's email to him in which Erb stated "SugarHouse is never going to let you in here. If it wasn't for you, we would have had MMA events here long ago. You filed that lawsuit, now live with it." (ECF 77 at 11 (quoting Am. Compl. at ¶ 92)) constitutes direct evidence of a conspiracy. At best, Erb's statement constitutes unilateral action on the part of SugarHouse Casino not to do business with Plaintiff. Plaintiff has not alleged any connection between Erb's statement and any actions of employees of Parx Casino and Sands Casino. Indeed, Plaintiff alleges that Erb made this statement as part of her response to Plaintiff's earlier email on the same day in which he threatened to sue SugarHouse Casino. (*Id.* at 92).

Plaintiff also argues that non-party David Feldman's alleged revelation of a plot by Sands Casino to allow Plaintiff to do one promotion at the Sands' event center in the hope that he would fail constitutes direct evidence. (ECF 77 at 12-13 citing Am. Compl. at ¶¶ 44-50). Again, even assuming the truth of this allegation, [\*19] it demonstrates nothing more than unilateral action on the part of Sands Casino and not a conspiracy between all three Defendants. In any event, Plaintiff admits that he was in fact allowed to promote two MMA events at the Sands' event center even after the filing of his initial antitrust lawsuit. (*Id.*) The Court finds that Plaintiff has failed to plead any type of an agreement at all through allegations of direct evidence.

Circumstantial evidence of parallel behavior must be pled in "a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." Twombly, 550 U.S. at 557, 127 S. Ct. 1955. The law is well-established that "evidence of parallel conduct by alleged co-conspirators is not sufficient to show an agreement." Ins. Brokerage, 618 F.3d at 321; Plaintiff must allege both parallel conduct and something "more," commonly referred to as a "plus factor." *Id.* A plus factor could include evidence (1) "that the defendant had a motive to enter into a . . . conspiracy," (2) "that the defendant acted contrary to its interests," or (3) "implying a traditional conspiracy." Id. at 321-22. Such facts must "tend to rule out the possibility that the defendants were acting independently." Ins. Brokerage, 618 F.3d at 322-23 (emphasis added) [\*20] (quoting Twombly, 550 U.S. at 553-54).

Plaintiff cannot meet this burden where, as here, "*common economic experience*,' or the *facts alleged in the complaint itself*, show that independent self-interest is an '*obvious alternative explanation*' for defendants' common behavior." *Id. at 326* (emphasis added). Here, Plaintiff has failed to plead any facts that, as *Twombly* and *Insurance Brokerage* require, "rule out the possibility that the defendants were acting independently." *618 F.3d at 321*. The few facts that Plaintiff pleads with respect to Defendants' refusal to host his MMA events clearly demonstrate conduct consistent with independent decision-making and that Defendants' independent self-interest is an "*obvious alternative explanation*" for Defendants' conduct. See *id. at 322-23*.

Specifically, with regard to the Sands Defendants, Plaintiff admits that he actually promoted two events at the Sands Casino during his alleged boycott (Am. Compl. at ¶¶ 44; 49-50) and was offered the opportunity to host an additional event, but declined because he did not like the business terms offered. (*Id.* at ¶¶ 55; 57). In addition, Plaintiff alleges that no MMA events have taken place at the Sands Casino since Plaintiff's last event because the other MMA promoters will [\*21] also not agree to the Casino's "inflated terms." (*Id.* at ¶ 59).

With regard to both SugarHouse (see *id.* at ¶¶ 61-100) and Parx (see *id.* at ¶¶ 101-131), Plaintiff's Amended Complaint discloses that both of these casinos engaged in a lengthy dialogue with Plaintiff but were non-committal about hosting his events and ultimately declined. It is certainly probable that the harassing and threatening nature of Plaintiff's constant communications with both Casinos and their representatives caused each casino to unilaterally not want to enter into a business relationship with Plaintiff. (*Id.* at ¶¶ 90-92; 117-119). See also *id.* at ¶ 124 ("All of our decisions are not always about the best financials, but with whom we are comfortable working with and we find synergy with to be successful together.") After all, *in this country* a business has "the right to deal or not to deal with whomever it likes, as long as it does so independently." *Laurel Sand & Gravel, Inc. v. CSX Transp. Inc.* 924 F.2d 539, 542 (4th Cir. 1991).

Moreover, assuming, *arguendo*, that each of the three Casinos *independently* decided to boycott XCC from doing MMA events at their event centers solely because of Plaintiff's previous suit, Plaintiff does not identify a single meeting, phone call, or document in which [\*22] an agreement concerning a group boycott was reached between any of the Defendants. Nor does Plaintiff identify a single employee of any Defendant who was involved in forming an unlawful agreement with an employee of another Defendant. Finally, Plaintiff does not state any facts at all that would indicate that any alleged agreement was even formed, or what it entailed.

In short, nowhere in the Amended Complaint does Plaintiff allege any evidence of a conspiracy that supports an inference of collusion. The Amended Complaint fails to allege any facts demonstrating "traditional" noneconomic evidence of conspiracy. *Ins. Brokerage*, 618 F.3d at 322. Instead, Plaintiff attempts to imply a conspiracy claim from allegations that since he supplied the Defendants with better business proposals than those of his competitors the fact that none of the three Defendants would enter into an agreement with Plaintiff must mean that the Defendants engaged in a horizontal conspiracy to boycott Plaintiff. In making this argument, Plaintiff ignores the other allegations in the Amended Complaint that indicate purely unilateral conduct of each Casino Defendant in not wanting to enter into a business relationship because of his threatening [\*23] and litigious actions. None of the allegations in the Amended Complaint demonstrate that "the inference of rational independent choice is less attractive than that of concerted action." *Ins. Brokerage*, 618 F.3d at 323 & n.22 (quoting *Lum v. Bank of America*, 361 F.3d 217, 230 (3d Cir. 2004)).

Accordingly, since Plaintiff has failed to plead an agreement, we need not reach any of the other elements of claim under *Section 1 of the Sherman Act* and Count I will be dismissed.

In Count Two, Plaintiff alleges that Defendants (as well as previous defendants Harrah's Casino and Valley Forge Casino) are collective monopolists who have control of essential facilities from Central to Eastern Pennsylvania to which Plaintiff needs access in order to remain a viable competitor in the MMA industry. (*Id.* at ¶¶ 152-162).

"[U]nder the 'essential facilities' or 'bottleneck' doctrine, 'a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it.'" *Cyber Promotions, Inc. v. Am. Online, Inc.*, 948 F. Supp. 456, 460 (E.D. Pa. 1996) (citing *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 846, 856 & n. 34 (6th Cir. 1980)). The elements of an essential facility claim are: "(1) control of the essential facility by a monopolist;

(2) the competitor's inability practically or reasonably to duplicate the essential facility; (3) denial of the use of the facility to a competitor; [\*24] and (4) the feasibility of providing the facility." [Ideal Dairy Farms, Inc. v. John Labatt, Ltd., 90 F.3d 737, 748 \(3d Cir. 1996\)](#).

"An 'essential facility' is one that is not merely helpful but vital to the claimant's competitive viability." [Cyber Promotions, 948 F. Supp. at 463 \(E.D. Pa. 1996\)](#). For purposes of **antitrust law**, "essential means essential; it does not mean 'the most economical.' Nor does it mean 'best' or 'preferable.' A facility is not essential even if it is widely preferred by consumers and producers in the market, as long as there is an alternative (albeit inferior) venue." [JamSports and Entertainment, LLC v. Paradama Productions, Inc., 336 F. Supp. 2d 824, 839 \(N.D. Ill. 2004\)](#).

Plaintiff's own allegations in the Amended Complaint undermine any claim that the event centers of the Defendant Casinos are essential facilities. Plaintiff alleges that he has promoted MMA events longer than any promoter in the state's history and that XCC has been in existence for over eight years. (Am. Comp. at ¶¶ 3-4). Plaintiff further alleges that he has promoted 16 of his 29 MMA events at the National Guard Armory in Philadelphia and was scheduled to promote a 17th event at the armory on February 3, 2018. (*Id.* at ¶ 103). Obviously, an MMA event can take place in many different kinds of venues. In fact, Plaintiff even admits that besides the casino event centers, other venues exist such as the National Guard Armory [\*25] for him to promote his MMA events. By his own words he has ended up promoting MMA events in this state longer than any other promoter. Plaintiff also alleges that as part of his settlement with Valley Forge Casino and Harrah's Casino in the previous case, Plaintiff agreed not to use their event centers to promote any of his MMA events. (*Id.* at ¶ 40). Therefore, two of the five casinos that Plaintiff alleges comprise the essential casino market are not available because it was Plaintiff himself who agreed not to host events at these casino's event centers. Again, essential does not mean the most economical or the most preferable. Plaintiff does not allege that attendance at his promotions has dwindled, that he has had to raise ticket prices or that his fighters have refused to fight at venues other than casinos. As long as Plaintiff has access to alternative venues such as the National Guard Armory, hotels, arenas and other venues to promote his MMA events, even though in Plaintiff's view such venues are economically inferior to the casino event centers, access to casino event centers is not essential to Plaintiff's competitive viability.

The Court also notes that the essential facilities [\*26] doctrine is applicable "only where a party is being denied access to something necessary for that party to engage in business which is controlled by his competitors." [Mid-South Grizzlies v. National Football League, 550 F. Supp. 558, 569-70 \(E.D. Pa. 1982\)](#) (emphasis added).

Plaintiff does not and cannot allege that any of the casino defendants are competitors with Plaintiff. Indeed, Plaintiff alleges that Defendants own or manage casino event facilities (or are employed by such), and that he promotes MMA events. Plaintiff does not allege that he is in the casino business; nor does he allege that any of the Defendants are in the business of promoting MMA events. Accordingly, he cannot even establish that Defendants have denied an essential facility to a competitor.

Plaintiff has filed a motion to for leave to file a second amended complaint. In doing so, Plaintiff fails to take into consideration that he has already been given an opportunity to amend his complaint after the Defendants filed motions to dismiss his original complaint. Further, in light of the reasons cited above for dismissing his claims, Plaintiff has not set forth any reason to believe that further amendment of his complaint will cure the deficiencies identified by the Court. [Phillips, 515 F.3d at 245 \(3d Cir.2008\)](#) (determining that dismissal [\*27] without leave to amend is justified where the amendment would be futile).

An appropriate Order follows.

## **ORDER**

**AND NOW**, this 8th day of March, 2019, it is hereby **ORDERED** that:

1. The second motion of defendant Sands Bethworks Gaming, LLC to dismiss [Doc. 61] is **GRANTED**.

2. The motion of defendants of Greenwood Gaming & Entertainment LLC, Parx Casino, Helmut Perzi to dismiss [Doc. 62] is **GRANTED**.
3. The motion of defendants Erika Joy Erb, Linda Powers, Julia Spielet, SugarHouse Casino, SugarHouse HSP Gaming LP, SugarHouse HSP Gaming Prop Mezz LP and Jules Vorndran to dismiss [Doc. 63] is **GRANTED**.
4. The motion of defendant Rush Street Gaming LLC to dismiss [Doc. 64] is **GRANTED**.
5. The motion of defendants James Hines, SMG Worldwide Entertainment & Convention Venue Management to dismiss [Doc. 65] is **GRANTED**.
6. The Complaint is **DISMISSED** in its entirety with prejudice.
7. The motion of the Plaintiff for leave to amend first amended complaint [Doc. 55] is **DENIED**.
8. The motion of the Plaintiff to compel [Doc. 56] is **DENIED** as moot.
9. The joint motion to stay discovery [Doc. 57] is **DENIED** as moot.
10. The Clerk is **DIRECTED** to mark this case closed.

**BY THE COURT:**

/s/ Jeffrey L. Schmehl

JEFFREY L. SCHMEHL [\*28], J.

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## Roxul USA, Inc. v. Armstrong World Indus.

United States District Court for the District of Delaware

March 8, 2019, Decided; March 8, 2019, Filed

CIVIL ACTION NO. 17-1258

### **Reporter**

2019 U.S. Dist. LEXIS 37925 \*; 2019-1 Trade Cas. (CCH) P80,708; 2019 WL 1101385

ROXUL USA, INC. v. ARMSTRONG WORLD INDUSTRIES, INC.

**Prior History:** [Roxul USA, Inc. v. Armstrong World Indus., 2018 U.S. Dist. LEXIS 21513 \(D. Del., Feb. 9, 2018\)](#)

## **Core Terms**

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distributors, foreclosure, argues, anticompetitive, contractors, ceiling tile, damages, sales, brand, procompetitive, incentivize, reliable, but-for, effects, court of appeals, cross-examination, manufacturer, unforeclosed, calculation, unreliable, dealers, rivals, foreclosing, aggregate, consumers, responds, competitors, customers, products, smaller

**Counsel:** [\*1] For Roxul USA, Inc., Plaintiff: Joseph J. Farnan, Jr., LEAD ATTORNEY, Brian E. Farnan, Michael J. Farnan, Farnan LLP, Wilmington, DE; Christopher S. Finnerty, PRO HAC VICE; Jack S. Brodsky, PRO HAC VICE; Jeffrey S. Patterson, PRO HAC VICE; Michael R. Murphy, PRO HAC VICE; Morgan T. Nickerson, PRO HAC VICE.

For Armstrong World Industries Inc., Defendant: Kevin J. Mangan, LEAD ATTORNEY, Womble Bond Dickinson (US) LLP, Wilmington, DE; Caeli A. Higney, PRO HAC VICE; Cynthia Richman, PRO HAC VICE; Daniel G. Swanson, PRO HAC VICE.

**Judges:** KEARNEY, J.

**Opinion by:** KEARNEY

## **Opinion**

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### **MEMORANDUM**

**KEARNEY, J.**

Commercial acoustical ceiling tile manufacturer Roxul USA, Inc., doing business as Rockfon, claims its largest American competitor Armstrong World Industries, Inc. requires building supply distributors sign agreements, as a condition of selling Armstrong ceiling tiles, prohibiting the distributor from selling a ceiling tile other than Armstrong ceiling tile and, even if the distributor does not sell Armstrong ceiling tile in a certain geographic area, to still not sell Roxul's ceiling tile sold through its Rockfon company. Roxul seeks damages from Armstrong alleging anti-competitive conduct prohibited by federal law. Armstrong [\*2] claims its agreements are not anti-competitive under federal law. Roxul hired Professor Einer Elhauge of Harvard University to assist the jury in understanding the alleged anti-competitive conduct. Armstrong hired Dr. Janusz Ordover of New York University to assist the jury in understanding how its agreements are not anti-competitive. We face the prototypical battle of economic competition experts. Armstrong now moves we preclude Professor Elhauge's opinions as lacking a reliable fact basis and

possibly not fitting Roxul's anti-competitive claims. We studied Professor Elhauge's lengthy opinions. At counsel's request, we evaluated his testimony in a hearing where Armstrong cross-examined him. After this analysis, we find Professor Elhauge's testimony based on his disclosed opinions is reliable, fits the issues, and will assist our jury. We deny Armstrong's motion to preclude his opinions at trial.

## I. Analysis.<sup>1</sup>

Armstrong argues Professor Elhauge's methodology supporting his opinions lacks reliability and his opinions do not fit the facts of this complex anti-trust challenge in a national market with multiple channels to sales. Roxul, the seller of acoustical ceiling tile through its United [\*3] States company Rockfon, responds Professor Elhauge used reliable methods fitting the facts. While finding Armstrong raises several fair questions better suited for jury evaluation, we cannot preclude Professor Elhauge's opinions.

Federal Rule of Evidence 702 governs admissibility of an expert's testimony. Rule 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.<sup>2</sup>

When determining whether to exclude testimony, we act "as a gatekeeper to ensure that the expert's opinion is based on the methods and procedures of science rather than on subjective belief or unsupported speculation."<sup>3</sup> As a gatekeeper, we must ensure the proffered expert opinions "reliably follow from the facts known to the expert and the methodology used."<sup>4</sup> We do not preclude expert opinions [\*4] because we may disagree with the findings. Roxul, in adducing Professor Elhauge's opinions, bears the burden of showing a basis for admitting his testimony by a preponderance of the evidence.

Armstrong advances several arguments as to why we should exclude Professor Elhauge's testimony as to foreclosure, anticompetitive conduct, and injury. We address each in turn.

### A. Professor Elhauge may opine as to substantial foreclosure and anticompetitive harm.

#### 1. Armstrong's challenge to falsity of foreclosure assumption.

Armstrong argues we should exclude Professor Elhauge's opinion regarding substantial foreclosure because (1) he ignored Rockfon's growth, (2) he failed to assert Armstrong's exclusivity agreements bind contractors to purchase Armstrong tiles, (3) he failed to prove contractors cannot freely choose to purchase different tile brands.

<sup>1</sup> Armstrong filed its Motion to Exclude Professor Elhauge's Testimony at ECF Doc. 210 and its memorandum at ECF Doc. No. 212. Roxul filed its response in opposition at ECF Doc. 244. Armstrong filed its reply at ECF Doc. 255. The parties filed its Joint Appendix at ECF Docs. No. 201, 239, and 258.

<sup>2</sup> Fed. R. Evid. 702.

<sup>3</sup> In re Mushroom Direct Purchaser Antitrust Litig., No. 06-0620, 2015 U.S. Dist. LEXIS 120892, 2015 WL 5767415, at \*2 (E.D. Pa. July 29, 2015).

<sup>4</sup> Heller v. Shaw Indus., 167 F3d 146, 153 (3d Cir. 1999).

Roxul argues (1) Professor Elhauge did not ignore Rockfon's growth but found Rockfon would have grown "two times faster but-for the market foreclosure,"<sup>5</sup> and (2) our Court of Appeals rejected arguments against foreclosure when the defendant did not foreclose the "ultimate consumers."

Roxul can still show foreclosure despite its growth. In *Mc Wane, Inc. [\*5] v. FTC*, the court of appeals for the Eleventh Circuit held a plaintiff can prove foreclosure even when "the targeted rival gained market share—but less than it likely would have absent the conduct."<sup>6</sup> The court, citing our Court of Appeals' decisions in *ZF Meritor* and *Dentsply*, explained "exclusive dealing measures that slow a rival's expansion can still produce consumer injury."<sup>7</sup>

While Armstrong argues its exclusivity agreements do not bind contractors, we do not look only at contractors as the "ultimate consumers." In *Dentsply*, the defendant manufacturer argued because the plaintiff could sell its tooth products directly to dental laboratories, it had not foreclosed the plaintiff by exclusively dealing with dental distributors. The district court concluded the defendant could not exclude rivals from the market because it did not have exclusive agreements with the "ultimate consumers," the dental laboratories.<sup>8</sup> Our Court of Appeals explained the district court clearly erred by focusing on "ultimate consumers" when manufacturers sell to both distributors and dental laboratories.<sup>9</sup> Our Court of Appeals found the defendant excluded rivals from the market through its exclusive arrangements [\*6] with distributors, even though the agreements did not contractually bind the dental laboratories.

We do not exclude Professor Elhauge's opinion on foreclosure. Professor Elhauge amply demonstrates while Rockfon grew in the relevant time period, it grew "less than it likely would have absent the conduct." Professor Elhauge cites evidence showing, while Armstrong's exclusivity agreements do not bind contractors, contractors may not have "the ability to make a meaningful choice" because of their reliance on preferred distributors.<sup>10</sup> Professor Elhauge cited evidence showing the tiles brands a distributor carries influence a contractor's choice.<sup>11</sup>

Both Professor Elhauge and Dr. Ordover relied on a survey amongst contractors.<sup>12</sup> When asked whether they prefer a particular ceiling tile brand, several contractors identified distributor availability as the most important factor, with responses including "[n]umber 1 is our supplier," "the main thing [is] the service I get from my distributor," and "having the distributor have the product in stock."<sup>13</sup> When asked to rate factors "important to contractors in determining their preferred brand," the most important factors were "lowest price for product" [\*7] and "availability and service from the distributor or dealer you prefer."<sup>14</sup> Professor Elhauge also relied on evidence showing distributors' sales forces influence the brands contractors purchase.<sup>15</sup> We do not exclude as unreliable Professor

<sup>5</sup> ECF Doc. No. 244 (Roxul Response to Motion to Exclude), at p. 2.

<sup>6</sup> [\*Mc Wane, Inc. v. FTC, 783 F.3d 814, 838 \(11th Cir. 2015\)\*](#).

<sup>7</sup> [\*Id. at 838\*](#) (first citing XI Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1802c, at 76 (3d ed. 2011); then citing [\*United States v. Dentsply Int'l, Inc., 399 F.3d 181, 191 \(3d Cir. 2005\)\*](#); and then citing [\*ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 271 \(3d Cir. 2012\)\*](#)).

<sup>8</sup> [\*Dentsply, 399 F.3d at 190\*](#).

<sup>9</sup> *Id.*

<sup>10</sup> [\*Eisai, Inc. v. Sanofi Aventis US., LLC, 821 F.3d 394, 404 \(3d Cir. 2016\)\*](#) (quoting [\*ZF Meritor, 696 F.3d at 285\*](#)).

<sup>11</sup> ECF Doc. No. 201, at JA6793-95 (Elhauge Report).

<sup>12</sup> *Id.* at JA6794 (Elhauge Report); JA6931 (Ordover Report).

<sup>13</sup> *Id.* at JA6794 (Elhauge Report).

<sup>14</sup> *Id.*

Elhauge's opinion regarding foreclosure because Armstrong's exclusivity agreements do not contractually bind end-users.

## **2. Challenge to including repair and replace sales.**

Armstrong argues we must exclude Professor Elhauge's foreclosure opinion because it incorrectly includes Armstrong's "repair and replace" sales. Roxul responds Armstrong's foreclosure share includes "all sales subject to the foreclosing conduct, even if [Armstrong] still would have made some of those sales but-for the foreclosing conduct."<sup>16</sup> Professor Elhauge testified at our *Daubert* hearing Armstrong's position in "repair and replace" jobs exacerbate the effect of its exclusivity agreements.

While Armstrong argues Roxul's inclusion of "repair and replace" sales warrants exclusion of Professor Elhauge's opinion, we note our Court of Appeals have affirmed foreclosure findings even when the foreclosure calculations include sales the defendant would have made despite the alleged [\*8] anticompetitive conduct.<sup>17</sup> To the extent Armstrong challenges Professor Elhauge's foreclosure calculation, it can cross-examine him on his basis and conclusions.

## **3. Challenge to aggregating USG and Armstrong conduct.**

Armstrong argues Professor Elhauge improperly aggregates the conduct of USG and Armstrong to arrive at its foreclosure calculation. Roxul argues Supreme Court precedent allows Professor Elhauge to aggregate Armstrong and USG's conduct.

In *Standard Oil Co. of California v. United States*, the United States sued Standard Oil alleging its exclusivity contracts with petroleum dealers violated the Sherman and [Clayton Acts](#).<sup>18</sup> The Supreme Court considered Standard Oil's competitors used similar exclusivity agreements. In finding foreclosure, the Court explained the effect of Standard Oil and its competitors' conduct "ha[d] been to enable the established suppliers individually to maintain their own standing and at the same time collectively, even though not collusively, to prevent a late arrival from wresting away more than an insignificant portion of the market."<sup>19</sup>

In *Federal Trade Commission v. Motion Picture Advertising Service Co.*, the defendant advertising company had exclusivity [\*9] agreements with movie theaters to play advertisements in the theaters.<sup>20</sup> The defendant and three other companies in the market maintained exclusive agreements with theaters.<sup>21</sup> The Commission charged only the defendant and found the "[defendant]'s exclusive contracts unreasonably restrain competition and tend to monopoly" under the [Federal Trade Commission Act](#).<sup>22</sup> The Supreme Court affirmed the Commission. It found

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<sup>15</sup> *Id.* at JA6795 (Elhauge Report).

<sup>16</sup> ECF Doc. No. 244 (Roxul Response to Motion to Exclude), at p. 8.

<sup>17</sup> See [ZF Meritor](#), 696 F.3d at 278; [Dentsply](#), 399 F.3d at 194.

<sup>18</sup> [Standard Oil Co. of Ca. v. United States](#), 337 U.S. 293, 69 S. Ct. 1051, 93 L. Ed. 1371 (1949).

<sup>19</sup> [Id.](#) at 309.

<sup>20</sup> [Fed. Trade Comm'n v. Motion Picture Adver. Serv. Co.](#), 344 U.S. 392, 395, 73 S. Ct. 361, 97 L. Ed. 426, 49 F.T.C. 1730 (1953).

<sup>21</sup> [Id.](#) at 393.

<sup>22</sup> [Id.](#) at 395.

substantial evidence to support the Commission's finding, explaining the "[defendant] and the three other major companies have foreclosed to competitors 75 percent of all available outlets for this business throughout the United States."<sup>23</sup> The Supreme Court also found the defendant's conduct violated the *Sherman Act*.

Armstrong cites the dissent in *Motion Picture* to support its argument Roxul may not aggregate foreclosure. Concerning the court's decision to aggregate the conduct of the defendant and the non-defendant companies, Justice Frankfurter, who wrote the majority opinion in *Standard Oil*, explained "[w]hile the existence of the other exclusive contracts is, of course, not irrelevant in a market analysis, this Court has never decided that they may, in the absence of conspiracy, [\*10] be aggregated to support a charge of Sherman Law violation."<sup>24</sup>

While Armstrong cites district court cases outside our circuit, we find the Supreme Court approved aggregation in the context of the antitrust laws. Again, Armstrong can cross-examine Professor Elhauge on his basis and conclusions.

#### **4. Challenge to anticompetitive harm for denying "most efficient" distributors.**

Armstrong argues Professor Elhauge's opinion warrants exclusion because he bases anticompetitive harm on Armstrong foreclosing the "most efficient" distributors. Roxul argues our Court of Appeals allows a finding of foreclosure when the defendant prevents access to the most efficient distributors.

In *Dentsply*, the defendant signed exclusivity agreements with distributors to sell artificial teeth. The defendant argued against foreclosure because manufacturers could sell teeth directly to dental laboratories. The defendant's competitor sold through dealers, but the defendant maintained exclusivity agreements with twenty-three "key dealers" in the market, leaving hundreds of other distributors for competitors.<sup>25</sup> Our Court of Appeals reversed the district court's grant of summary judgment for the defendant, holding the defendant [\*11] excluded rivals because the defendant maintained exclusive dealing agreements with "the key dealers."<sup>26</sup> Although competitors could sell through nonexclusive distributors, the court held such alternative channels were not viable as the defendant "block[ed] access to the key dealers," explaining "the firm that ties up the key dealers rules the market."<sup>27</sup>

Armstrong's argument for excluding Professor Elhauge's opinion citing preclusion from the "most effective dealers" fails. As explained, a jury may find no foreclosure if we find Rockfon can utilize alternative channels for selling ceiling tiles. But these alternative channels must be *viable*. If Rockfon's distributors were so inefficient as to prevent competition from rivals, a jury may find such alternatives to foreclosed distributors are not viable. Professor Elhauge cited evidence Armstrong's largest distributors—Foundation and Gypsum Management—purchased smaller distributors selling Rockfon tiles. After the acquisition, the "No Rockfon" clause in Foundation and Gypsum Management's agreements then bound these smaller distributors, foreclosing a portion of the distribution network. Roxul contends Foundation and Gypsum Management are two [\*12] of the biggest distributors in the market.

Roxul adduced evidence Armstrong had exclusivity agreements with "stronger distributors."<sup>28</sup> Professor Elhauge explained the 2017 Simon-Kutcher report shows Rockfon had access to lesser quality distributors due to

<sup>23</sup> *Id.*

<sup>24</sup> [\*Id. at 399-400\*](#) (Frankfurter, J., dissenting) (citing *Standard Oil*, 337 U.S. at 309).

<sup>25</sup> [\*Dentsply\*, 399 F.3d at 191](#).

<sup>26</sup> [\*Id. at 190\*](#).

<sup>27</sup> [\*Id. at 196\*](#) ("The mere existence of other avenues of distribution is insufficient without an assessment of their overall significance to the market.").

<sup>28</sup> ECF Doc. No. 239 (Joint App.), at JA7966 (Armstrong Internal Report).

foreclosure. Simon-Kutcher rated distributors on a scale of one to five, weakest to strongest.<sup>29</sup> It concluded distributors covered by Armstrong's exclusivity agreements rated on average 3.5, while unforeclosed distributors rated 2.2.<sup>30</sup> Professor Elhauge also cited evidence Armstrong's exclusivity forced Rockfon to rely on an insulation distributor with "lack of specialized [ceiling tile] knowledge and ceiling contractor relationships."<sup>31</sup>

We cannot exclude Professor Elhauge's testimony based on this evidence-based opinion. In his foreclosure analysis, Professor Elhauge assesses the ceiling tile market, including the effectiveness of the distributors in the market. He cites evidence Rockfon could not access the most effective distributors. A jury can use this evidence to determine whether the alternative channels available to Rockfon—here, the inferior "unforeclosed" distributors—were a viable means to sell its products. Armstrong cites [\*13] caselaw outside of our Circuit to argue we cannot find foreclosure because Rockfon could not access the most efficient distributors. But our Court of Appeals requires we must look whether alternative channels are viable. Professor Elhauge's opinion assists the jury in this analysis, subject to cross-examination and rebuttal.

## **5. Challenge to failing to show substantial anticompetitive effect.**

Armstrong argues Professor Elhauge fails to show the exclusivity agreements had a "substantial" anticompetitive effect on competition.<sup>32</sup> Roxul argues Professor Elhauge shows (1) Rockfon would have 100% greater revenue shares but for foreclosure, (2) foreclosure caused Rockfon to delay investment in a United States manufacturing plant; (3) Rockfon's slow growth prevented it from achieving economies of scale.

We find Professor Elhauge shows substantial anticompetitive effect. Our Court of Appeals explained when a monopolist enacts exclusivity agreements impeding a new market entrant, anticompetitive effect results "from the delay that the dominant firm imposes on the smaller rival's growth."<sup>33</sup> We find Professor Elhauge presents evidence of substantial anticompetitive effect. The jury may not believe this [\*14] opinion. But it is reliable and fits the issues.

## **B. Professor Elhauge may opine Armstrong's exclusivity agreements produce zero efficiencies.**

### **1. Challenge to ignoring Rockfon's and CertainTeed's exclusivity agreements.**

Armstrong argues we should exclude as unreliable Professor Elhauge's opinion Armstrong's exclusivity agreements produce "zero" procompetitive effects.<sup>34</sup> Armstrong argues Professor Elhauge ignored Rockfon and CertainTeed entered into exclusivity agreements.

Roxul responds a "lower-level Rockfon employee" entered into a single exclusivity agreement Rockfon terminated in 2013.<sup>35</sup> Roxul also responds Armstrong ignores Professor Elhauge acknowledged CertainTeed's exclusivity agreements failed because it lacked market power to exclude Rockfon.<sup>36</sup>

<sup>29</sup> ECF Doc. No. 201 (Joint App.), at JA7210 (Elhauge Rebuttal Report).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> ECF Doc. No. 212 (Armstrong Memorandum in Support of Motion to Exclude), at p. 11.

<sup>33</sup> [ZF Meritor, 696 F.3d at 290](#) (quoting Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1802c, at 64 (2d ed. 2002)).

<sup>34</sup> ECF Doc. No. 212 (Armstrong Memorandum in Support of Motion to Exclude), at p. 12.

<sup>35</sup> ECF Doc. No. 239 (Joint App.), at JA8065-66 (N.T. J. Moynihan, Sept. 11, 2018).

<sup>36</sup> ECF Doc. No. 201 (Joint App.), at JA6815-16 (Elhauge Report).

We do not exclude Professor Elhauge's testimony on this ground. Professor Elhauge provided factual basis for his opinion Armstrong's exclusivity agreements lack "procompetitive effects." Professor Elhauge found CertainTeed's exclusivity agreements failed because it lacked power to exclude rivals.<sup>37</sup> This evidence supports Professor Elhauge's opinion exclusivity agreements are anticompetitive. We cannot say, as Armstrong argues, an [\*15] exclusivity agreement is procompetitive merely because Rockfon and CertainTeed uses them. Professor Elhauge's opinion does not lack a factual basis to make it unreliable. To the extent Armstrong challenges Professor Elhauge's assumptions, Armstrong may cross-examine him based on this allegedly similar conduct.<sup>38</sup>

## **2. Challenge to ignoring efficiencies.**

Armstrong argues we should exclude Professor Elhauge's opinion because he "denies that exclusivity is a source of any procompetitive benefits to distributors."<sup>39</sup> Roxul responds Professor Elhauge acknowledged exclusivity agreements can have procompetitive effects but found Armstrong's agreements have no procompetitive effects. We agree with Roxul and leave the decision of which theory succeeds for the jury.

Contrary to Armstrong's argument, Professor Elhauge acknowledges "exclusive dealing agreements can have procompetitive effects in some cases."<sup>40</sup> Professor Elhauge also explained he found no procompetitive effects in this case. Acknowledging exclusive dealing can lead to investment in distributors, he found Armstrong's only "manufacturer agnostic" investment in its distributors consisted training course for which it charged attendees [\*16] \$1500.<sup>41</sup> We cannot say Professor Elhauge's testimony is unreliable because he concluded Armstrong's agreements produce no procompetitive effects.

## **3. Challenge to finding exclusive agreements do not incentivize distributors.**

Armstrong argues we should exclude Professor Elhauge's opinion because he "rejected the view that Armstrong's exclusive distribution agreements incentivize distributors to promote Armstrong's brand more aggressively."<sup>42</sup> Roxul responds while Professor Elhauge acknowledged an exclusivity agreement can incentivize a distributor, Armstrong's agreements fail to incentivize distributors.

In his deposition, Professor Elhauge explained the evidence did not support a finding "Armstrong's exclusive distribution agreements incentivize distributors to promote Armstrong's brand more aggressively."<sup>43</sup> Professor Elhauge rather found "Nile evidence suggests to the contrary, that [Armstrong's agreements] preclude competition, and thus, incentivize lackluster or weaker efforts to promote any brand because one brand is exclusive, so there's less free market competition for sales."<sup>44</sup> Professor Elhauge based this opinion on his finding Armstrong provided

<sup>37</sup> *Id.*

<sup>38</sup> See *Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 414 (3d Cir. 2002) ("Rule 705, together with Rule 703, places the burden of exploring the facts and assumptions underlying the testimony of an expert witness on opposing counsel during cross-examination."); *JMJ Enterprises, Inc. v. Via Veneto Italian Ice, Inc.*, No. 97-0652, 1998 U.S. Dist. LEXIS 5098, 1998 WL 175888, at \*6 (E.D. Pa. Apr. 15, 1998), aff'd, 178 F.3d 1279 (3d Cir. 1999) ("Questions as to the sufficiency of an expert's factual basis are generally left to the jury.").

<sup>39</sup> ECF Doc. No. 212 (Armstrong Memorandum in Support of Motion to Exclude), at p. 13.

<sup>40</sup> ECF Doc. No. 201 (Joint App.), at JA6854 (Elhauge Report).

<sup>41</sup> *Id.* at JA7239-40 (Elhauge Rebuttal Report).

<sup>42</sup> ECF Doc. No. 212 (Armstrong Memorandum in Support of Motion to Exclude), at p. 13.

<sup>43</sup> ECF Doc. No. 201 (Joint App.), at JA7535 (N.T. E. Elhauge, Jan. 14, 2019).

<sup>44</sup> *Id.*

smaller rebates than Rockfon.<sup>45</sup> Professor [\*17] Elhauge supported his opinion with facts from the record. We cannot say Professor Elhauge's opinion is unreliable.

#### **4. Challenging opinion exclusivity incentivizes distributors to provide distorted or misleading info.**

Professor Elhauge opines distributor incentivization does not necessarily benefit consumers. He explains exclusive agreements "actually provide dealers an incentive to provide distorted or misleading information to consumers in an attempt to convince consumers that the exclusive brand is best, given that the distributor will lose the customer's business if the customer chooses a brand that the distributor is not allowed to carry."<sup>46</sup> Armstrong characterizes Professor Elhauge's opinion exclusivity incentivizes distributors to provide misleading information as absurd. We cannot say Professor Elhauge's opinion is absurd as Armstrong suggests.

Armstrong also argues Professor Elhauge's opinion would lead to the conclusion any business would provide misleading information. Armstrong compares distributors to Apple Store employees and argues an Apple Store employee has an incentive to provide misleading information about Apple products.<sup>47</sup> The comparison fails, as distributors generally carry [\*18] different product brands. Roxul argues contractors trust distributors to provide neutral advice when selecting brands of building products.<sup>48</sup>

The cases Armstrong cite do not concern exclusive dealing. But *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* supports Roxul's argument.<sup>49</sup> In *Leegin*, the Supreme Court dealt with the legality of "resale price maintenance agreements," manufacturer agreements with distributors setting the minimum price the distributor can charge for the manufacturer's goods.<sup>50</sup> The Court explained while they can have procompetitive benefits, vertical agreements—like exclusive dealing in our case—can have "anticompetitive effects."<sup>51</sup> A powerful manufacturer can abuse the vertical arrangement tactic of resale price maintenance by "giv[ing] retailers an incentive not to sell the products of smaller rivals or new entrants."<sup>52</sup>

Roxul argues Armstrong uses its exclusivity agreements to prevent distributors from selling products from Rockfon, a company with a smaller market share than Armstrong. We cannot say Professor Elhauge's opinion is absurd. We do not exclude Professor Elhauge's opinion exclusivity agreements incentivize distributors to provide misleading information.

#### **C. [\*19] We allow Professor Elhauge to describe his damages model.**

Armstrong argues we should exclude Professor Elhauge's damages model as unreliable. Professor Elhauge calculated damages based on Rockfon's revenue from 2014 to 2018 amongst unforeclosed customers—customers not bound by Armstrong's exclusivity agreements. Professor Elhauge explained "[a] conservative benchmark for

<sup>45</sup> *Id.* at JA7242 (Elhauge Rebuttal Report) (finding "Rockfon made larger proportional investments in 'Gold Circle'-like promotional programs than Armstrong did with the benefit of exclusivity").

<sup>46</sup> *Id.* at JA6854 (Elhauge Report).

<sup>47</sup> ECF Doc. No. 212 (Armstrong Memorandum in Support of Motion to Exclude), at p. 14.

<sup>48</sup> ECF Doc. No. 244 (Roxul Response to Motion to Exclude), at p. 16.

<sup>49</sup> [551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 \(2007\)](#).

<sup>50</sup> [Leegin, 551 U.S. at 882](#).

<sup>51</sup> [Id. at 892](#).

<sup>52</sup> [Id. at 894](#).

how much [ceiling tiles] Rockfon would sell in the but-for world (where there would be no anticompetitive foreclosure) is Rockfon's actual share of [ceiling tiles] to unforeclosed customers.<sup>53</sup> We address each of Armstrong's arguments.

### **1. We allow foreclosure and anticompetitive harm opinions.**

Armstrong argues we should exclude Professor Elhauge's damages model for the same reasons it argues we should exclude his foreclosure and anticompetitive harm opinions. Because we rejected Armstrong's arguments on foreclosure and anticompetitive harm, we deny Armstrong's arguments for exclusion of Professor Elhauge's damages model for the same reasons.

### **2. Claiming Professor Elhauge's damages model suffers from selection bias.**

Armstrong argues Professor Elhauge's damages model suffers from selection bias because contractors can purchase [\*20] any ceiling tile they desire. Armstrong concludes Professor Elhauge's damages calculation includes contractors who wanted to purchase Armstrong tiles. Roxul argues (1) Armstrong merely speculates as to contractors' preference, (2) ceiling tiles only account for a small portion of a contractor's purchases from distributors, (3) foreclosure forced Rockfon to use unfavored distributors, and (4) Rockfon's market share among "direct-to-contractor" sales is similar to its share amongst unforeclosed customers. Roxul's argument is persuasive at least as to allowing Professor Elhauge explain this theory to the jury and face cross-examination.

Professor Elhauge swore when contractors purchase building materials from a distributor, eighty-four percent are materials other than ceiling tiles.<sup>54</sup> Because ceiling tiles account for approximately sixteen percent of a contractor's purchases, Professor Elhauge opines a contractor would not choose another distributor because of a preferred ceiling tile brand.<sup>55</sup> We cannot say Professor Elhauge's opinion is unreliable. Combined with Professor Elhauge's finding Armstrong forced Rockfon to rely on unfavored distributors,<sup>56</sup> we cannot find Professor Elhauge's opinion [\*21] suffers from selection bias as to render it unreliable.

Both Professor Elhauge and Dr. Ordover recognized Rockfon's market share among "direct-to-contractor" sales as a "benchmark to estimate Rockfon's but-for world sales."<sup>57</sup> Thus, Armstrong's expert acknowledges one can measure sales in the "but-for" world with sales in the unforeclosed world. We cannot say measuring damages based on actual performance amongst unforeclosed customers is unreliable.

### **3. Claiming Professor Elhauge ignore key features of the "but-for" world.**

Armstrong argues we should exclude Professor Elhauge's damages calculation because he failed to consider, in the "but-for" world: (1) Armstrong's exclusive distributors may voluntarily sell only Armstrong tiles, (2) Armstrong's "minimum purchase terms" in its agreements would still have a competitive effect, and (3) Rockfon would face additional competition from Armstrong.

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<sup>53</sup> ECF Doc. No. 201 (Joint App.), at JA6857 (Elhauge Report).

<sup>54</sup> ECF Doc. No. 239 (Joint App.), at JA8225 (N.T. E. Elhauge, Jan. 14, 2019).

<sup>55</sup> *Id.*

<sup>56</sup> ECF Doc. No. 201 (Joint App.), at JA7210 (Elhauge Rebuttal Report) (finding the "average distributor strength (rate 1-5, weakest to strongest) was 3.5 for foreclosed distributors but only 2.2 for accessible distributors, confirming that the foreclosure forced Rockfon to turn to less efficient distributors").

<sup>57</sup> *Id.* at JA7318 (Ordover Rebuttal Report).

Roxul responds Professor Elhauge did not assume Rockfon would sell to every exclusive Armstrong distributor in the "but-for" world. Professor Elhauge accounted for competition as the unforeclosed market he considered includes sales from Armstrong, USG, and CertainTeed.

We do not exclude Professor [\*22] Elhauge's damages model for failure to identify key features of the "but-for" world. Armstrong's expert acknowledged sales in the unforeclosed market are a "benchmark" for sales in the "but-for" world. To the extent Armstrong challenges alleged deficiencies in Professor Elhauge's damages model, it can raise these issues on cross-examination.

#### **4. Accounting for USG foreclosure in damages.**

#### **II. Conclusion.**

Armstrong asks we exclude Professor Elhauge's damages model because it includes damages attributable to USG's exclusivity agreements. Roxul argues Professor Elhauge offered two alternative damages calculations based on Armstrong's conduct alone and Armstrong and USG's conduct together. Roxul further argues because Supreme Court precedent allows it to aggregate conduct for its foreclosure calculation, it may do so in damages as well. Professor Elhauge described these alternative calculations during our evidentiary hearing. He explained the alternative nature of his fact patterns. He described the methodology. These are issues for the jury.

We do not view *Daubert* analysis as the time to decide who is right or which theory we would adopt. We evaluate whether there is a reliable basis for the [\*23] opinions fitting the facts. Professor Elhauge submitted an exhaustive analysis supporting his positions. Armstrong will have fertile territory to examine on these issues. It raises several fair points. But Professor Elhauge's opinions will assist the jury in understanding the complexity of competition claims based on the challenged conduct including Armstrong's agreements. We deny Armstrong's motion to preclude Professor Elhauge's opinions in the accompanying Order.

#### **ORDER**

**AND NOW**, this 8th day of March 2019, upon considering Defendant's Motion *in limine* to exclude the expert testimony of Professor Einer Elhauge (ECF Doc. No. 210), Plaintiff's Opposition (ECF Doc. No. 244), Defendant's Reply (ECF Doc. No. 255), following an evidentiary hearing where we evaluated Professor Elhauge's testimony responding to challenges to the reliability and fit of his expert opinions subject to cross-examination, and for reasons in the accompanying Memorandum, it is **ORDERED** Defendant's Motion *in limine* (ECF Doc. No. 210) is **DENIED** subject to fulsome cross-examination at trial.

/s/ Kearney, J.

**KEARNEY, J.**



## Roxul USA, Inc. v. Armstrong World Indus.

United States District Court for the District of Delaware

March 8, 2019, Decided; March 8, 2019, Filed

CIVIL ACTION NO. 17-1258

### **Reporter**

2019 U.S. Dist. LEXIS 37926 \*; 2019-1 Trade Cas. (CCH) P80,707

ROXUL USA, INC. v. ARMSTRONG WORLD INDUSTRIES, INC.

**Prior History:** [Roxul USA, Inc. v. Armstrong World Indus., 2018 U.S. Dist. LEXIS 21513 \(D. Del., Feb. 9, 2018\)](#)

## **Core Terms**

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distributors, tiles, ceiling tile, argues, market share, products, manufacturer, contractors, percent, foreclosure, sales, foreclosed, rivals, competitors, brand, calculated, replace, summary judgment, anti-competitive, monopoly power, Clayton Act, procompetitive, customers, opined, court of appeals, discount, selling, repair, specifications, genuine issue of material fact

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For Armstrong World Industries Inc., Defendant: Kevin J. Mangan, LEAD ATTORNEY, Womble Bond Dickinson (US) LLP, Wilmington, DE; Caeli A. Higney, Cynthia Richman, Daniel G. Swanson, PRO HAC VICE.

**Judges:** KEARNEY, J.

**Opinion by:** KEARNEY

## **Opinion**

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### **MEMORANDUM**

**KEARNEY, J.**

After thirty years of enjoying the largest market share in the sale of acoustical ceiling tiles to commercial builders in the United States among three long-established competitors, the leading domestic ceiling tile manufacturer decided it could not afford a Danish ceiling tile manufacturer hoping to sell its ceiling tiles in the United States beginning in 2013 to repeat its success in Europe. Before the Danish manufacturer arrived, the leading domestic manufacturer — and at least one of its existing domestic competitors — offered exclusivity rights to building supply distributors to sell only its commercial tile product in specified domestic markets. The distributors appear to be the end-consumer commercial [\*2] building contractor's primary means of purchasing ceiling tiles for their building projects. But when the Danish manufacturer arrived, the leading domestic manufacturer prohibited its exclusive building supply distributors from selling the Danish manufacturer's ceiling tiles in any market, even if its exclusive distributor did not otherwise sell its ceiling tiles in a certain market. As the large distributors purchased smaller distributors, this clause

precluded the Danish manufacturer from accessing building distributors who once sold its product or who never sold the leading manufacturer's ceiling tiles. The Danish manufacturer sued the lead domestic manufacturer for anti-trust violations under the *Sherman* and *Clayton Acts*. Following extensive discovery, the lead manufacturer now asks for summary judgment on all claims and the Danish manufacturer seeks summary judgment in its favor on one Clayton Act claim. We deny the motions due to genuine issues of material fact as to the extent of anti-trust injury and whether the lead manufacturer: substantially foreclosed the market, possesses monopoly power, used its power to foreclose competition, extended its exclusivity agreements to prevent [\*3] meaningful competition, and, coerced contractors into accepting exclusivity or otherwise precluding competition.

## I. Undisputed facts.<sup>1</sup>

Armstrong World Industries, Inc. and Roxul USA, Inc. dba Rockfon, sell suspended acoustical ceiling tiles for commercial buildings in the United States.<sup>2</sup> Four manufacturers now account for most commercial ceiling tile sales in the United States: Armstrong, United States Gypsum (USG), CertainTeed, and Rockfon.<sup>3</sup>

Contractors use ceiling tiles to cover ducts, wiring and other structural features in a commercial building.<sup>4</sup> The tiles fit into grid systems in two-by-two foot or two-by-four foot patterns.<sup>5</sup> Contractors purchase ceiling tiles for new construction projects and "repair and replace" projects.<sup>6</sup> For "repair and replace" jobs, contractors take old, worn-out, or damaged existing tiles in buildings and replace them with new tiles.<sup>7</sup>

In a construction project, a building owner can hire an architect to design the building.<sup>8</sup> The architect provides the specification—or "spec"—for the project, sometimes listing the architect's desired brand for the necessary building products.<sup>9</sup> Architects often include the listed brand of ceiling tile for the project and several [\*4] "equal" alternatives to the listed brand.<sup>10</sup> Ceiling tile manufacturers often influence architects to use their products in the specifications.<sup>11</sup>

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<sup>1</sup> Our Policies and Procedures require a Statement of Undisputed Material Facts ("SUMF") and an appendix in support of summary judgment. Roxul filed its initial SUMF ("Roxul SUMF") at ECF Doc. No. 207 and its memorandum in support of summary judgment at ECF Doc. No. 206. Armstrong filed its SUMF ("Armstrong SUMF") at ECF Doc. No. 209 and its memorandum at ECF Doc. No. 208. The parties filed a Joint Appendix ("Joint App.") in support of their motions for summary judgment at ECF Doc. No. 201. Roxul filed its opposition memorandum at ECF Doc. No. 242 and its response SUMF ("Roxul Response SUMF") at ECF Doc. No. 243. Armstrong filed its opposition memorandum at ECF Doc. No. 237 and its response SUMF ("Armstrong Response SUMF") at ECF Doc. No. 238. The parties filed a supplement to the Joint Appendix in support of their oppositions at ECF Doc. No. 239. Rockfon filed its reply to Armstrong's opposition at ECF Doc. No. 253 and Armstrong filed its reply at ECF Doc. No. 254. The parties filed a second supplement to the Joint Appendix in support of their replies at ECF Doc. No. 258. We cite to the Joint Appendix referencing the Bates number (e.g. JA0001).

<sup>2</sup> ECF Doc. No. 209 (Armstrong SUMF) ¶ 1.

<sup>3</sup> *Id.* at ¶ 3.

<sup>4</sup> *Id.* at ¶ 2.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at ¶ 7.

<sup>7</sup> *Id.*; ECF Doc. No. 243 (Roxul Response SUMF) ¶ 7.

<sup>8</sup> ECF Doc. No. 209 (Armstrong SUMF) ¶ 107.

<sup>9</sup> *Id.* at ¶ 108.

<sup>10</sup> ECF Doc. No. 243 (Roxul Response SUMF) ¶ 109.

<sup>11</sup> ECF Doc. No. 209 (Armstrong SUMF) ¶ 109.

The contractor orders the product based on the architect's specifications from retailers, distributors, or directly from the manufacturer.<sup>12</sup> Sometimes, the contractor "flips the spec" and orders a brand different than the brand in the specification.<sup>13</sup> A contractor may "flip the spec" because of preference, cost, or availability.<sup>14</sup> Contractors sometimes have preferred distributors who they use repeatedly for construction jobs.<sup>15</sup>

**A. Armstrong, holding the largest market share for commercial ceiling tile in the United States, placed restrictions on the building products distributors if they wish to sell Armstrong's tile.**

Armstrong has manufactured ceiling tiles since the 1940s.<sup>16</sup> Armstrong accounts for approximately sixty percent of the suspended acoustical ceiling tile market in the United States in terms of revenue.<sup>17</sup> USG is the second largest manufacturer, with a market share of twenty-nine to thirty percent, while CertainTeed is the third largest with eleven to fifteen percent of the market.<sup>18</sup> Armstrong sells its ceiling tiles primarily to building [\*5] supply distributors, who in turn sell the tiles to contractors for construction projects.<sup>19</sup> Contractors historically prefer to purchase their building supplies from a distributor who can minimize travel and delay costs. As testified at our *Daubert* hearing, a building supply distributor generally sells more than ceiling tile and will deliver the building products to the job site on the requested date. This practice allows contractors to efficiently manage inventory on a job site. Armstrong provides building distributors selling its acoustical tile with rebates through its "Gold Circle" program.<sup>20</sup> Armstrong also provides its distributors with online and in-class sales training programs.<sup>21</sup>

In addition to rebates and training, Armstrong hopes to maintain its market leader position through extensive multi-year contracts with building distributors. For example, Armstrong has long required distributors who wish to sell the largest selling Armstrong tile to only sell Armstrong's tiles: "Distributor will use its best efforts to promote, sell and service all Ceiling Products within its Territory and will not have a direct buying relationship with any other manufacturer of competing ceiling products[.]"<sup>22</sup> Armstrong generally limits its written exclusivity agreements to three-year terms, although Rockfon argues these exclusivity agreements last indefinitely.<sup>23</sup> Like Armstrong, USG also has exclusivity agreements with its distributors.<sup>24</sup> Armstrong enjoyed particularly strong distributor relationships with many of the largest building supply distributors, including Foundation Building Materials and Gypsum Management Supply, two of the largest building supply distributors in the United States.

**B. Rockfon's entry into the United States ceiling tile market.**

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<sup>12</sup> *Id.* at ¶ 110.

<sup>13</sup> *Id.* at ¶ 38.

<sup>14</sup> *Id.* at ¶ 113; ECF Doc. No. 243 (Roxul Response SUMF) ¶ 113.

<sup>15</sup> ECF Doc. No. 201 (Joint App.), at JA6794 (Elhauge Report).

<sup>16</sup> ECF Doc. No. 209 (Armstrong SUMF) ¶ 4.

<sup>17</sup> ECF Doc. No. 243 (Roxul Response SUMF) ¶ 133.

<sup>18</sup> ECF Doc. No. 209 (Armstrong SUMF) ¶ 13; ECF Doc. No. 243 (Roxul Response SUMF) ¶¶ 105, 124.

<sup>19</sup> ECF Doc. No. 201 (Joint App.), at JA6717 (Elhauge Report).

<sup>20</sup> ECF Doc. No. 209 (Armstrong SUMF) ¶ 21.

<sup>21</sup> *Id.* at ¶ 22.

<sup>22</sup> ECF Doc. No. 201 (Joint App.), at JA0056.

<sup>23</sup> ECF Doc. No. 209 (Armstrong SUMF) ¶ 31; ECF Doc. No. 243 (Roxul Response SUMF) ¶ 31.

<sup>24</sup> ECF Doc. No. 201 (Joint App.), at JA6813 (Elhauge Report).

Rockfon, a subsidiary of the Danish company Rockwool International, attained a thirty-percent market share in the European ceiling tile market before 2013. In 2011, Rockfon hired the consulting firm Ducker Worldwide to assess the North American market.<sup>25</sup> Ducker reported, assuming a "solid distribution network established upfront," Rockfon could "capture up to 3% of the overall suspended ceiling market" in five years.<sup>26</sup> Ducker also explained in the United States market, "Fit is most common for a distributor location to be exclusive in one brand (especially smaller distributors). . . . due to manufacturers desire for a secure dealer relationship and [\*7] decreased competition on the sales floor."<sup>27</sup>

Knowing these obstacles, Rockfon entered the United States market in 2013 with a strategy of building a distribution network and placing its tiles in architect specifications.<sup>28</sup> In a June 2016 presentation, Rockfon reported "Wile U.S. market is virtually 100% based on specification for ceiling products—being specified does not mean the project is automatically won, but not being specified severely limits growth opportunities."<sup>29</sup> Rockfon also reached out to architects to increase its presence in specifications.<sup>30</sup> By 2017, Rockfon specified over seventy million square feet of ceiling tiles.<sup>31</sup>

While maintaining a strategy of building a presence in specifications, Rockfon also recognized the importance of distributors. A Rockfon representative testified "[h]aving a strong distributor partner in any territory would be key to growing and maintaining market share."<sup>32</sup>

From 2013 to 2017, Rockfon imported its ceiling tiles into the United States from its plant in Poland.<sup>33</sup> In July 2017, Rockfon opened a tile manufacturing plant in Mississippi.<sup>34</sup> In the proposal for its first U.S. plant, it stated "[d]istributors see local production as a necessary show of ROCKWOOL's [\*8] commitment to the market. Without it, they will not take the risk of carrying ROCKFON as their sole ceilings brand."<sup>35</sup>

### C. Armstrong's response to Rockfon's entry in the United States market.

Armstrong described Rockfon's entry into the United States market as "one of the most challenging obstacles" to its business and "the most significant competitive threat in 30 years."<sup>36</sup> In September 2012, Armstrong told its employees, "Rockfon entered the European market and was able to gain approximately 30% market share in a relatively short period of time, we cannot afford this to happen in the Americas."<sup>37</sup>

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<sup>25</sup> *Id.* at JA0197.

<sup>26</sup> *Id.* at JA0216 (Ducker Report).

<sup>27</sup> *Id.*

<sup>28</sup> ECF Doc. No. 209 (Armstrong SUMF) ¶ 49; ECF Doc. No. 243 (Roxul Response SUMF) ¶ 49.

<sup>29</sup> ECF Doc. No. 201 (Joint App.), at JA2398 (Rockfon SD Growth Plan, June 2016).

<sup>30</sup> ECF Doc. No. 243 (Roxul Response SUMF) ¶ 51.

<sup>31</sup> ECF Doc. No. 209 (Armstrong SUMF) ¶ 55.

<sup>32</sup> ECF Doc. No. 239 (Joint App.), at JA8033 (N.T. R. Lay, Aug. 14, 2018).

<sup>33</sup> ECF Doc. No. 209 (Armstrong SUMF) ¶ 6.

<sup>34</sup> *Id.*

<sup>35</sup> ECF Doc. No. 201 (Joint App.), at JA1693.

<sup>36</sup> *Id.* at JA0603, JA5041.

<sup>37</sup> *Id.* at JA0603.

## 1. The "No Rockfon" clause in its exclusive distributor agreements.

In 2013, Armstrong began including a clause in its exclusivity agreements precluding building distributors selling Armstrong tile from selling Rockfon tile even if the distributor's specific location did not sell Armstrong:

Distributor will use its best efforts to promote, sell and service all Ceiling Products within the Territory. Distributor agrees not to purchase for resale at any Distributor Location listed on Attachment A of the Distribution Agreement, ceiling products of any type from any manufacturer other than Armstrong. [\*9] For all other Distribution Locations not listed on Attachment A that are owned or operated by any of Distributor, its owners, successors or affiliated companies ("Non-Armstrong Locations"), Distributor agrees (on behalf of itself and its owners, successor and affiliates) that **none of them will purchase any Rockfon ceiling products** for resale.<sup>38</sup>

If the building distributor decided to sell Rockfon tiles in locations where it did not sell Armstrong tiles, Armstrong could stop supplying Armstrong tiles to any of the building distributor's locations or allow other distributors to also now sell Armstrong in the distributor's otherwise exclusive markets:

In the event Distributor, its owners, successors or affiliated companies breach the agreements in this Paragraph 4, Armstrong may, in its sole discretion (a) terminate this Agreement or any other distribution arrangement with any of them for cause, (b) terminate for cause the authority to distribute Ceiling Products in all or part of any non-exclusive Territory, and (c) change to non-exclusive distribution any or all of any exclusive distribution Territory granted under this Agreement or any other distribution arrangement with any of them for [\*10] cause.<sup>39</sup>

Rockfon refers to this clause as the "No Rockfon" clause.<sup>40</sup> Armstrong included the "No Rockfon" clause in its written distribution agreements with six different distributors including Foundation Building Materials and Gypsum Management Supply.<sup>41</sup> By 2013, Foundation and Gypsum Management began to purchase smaller distributors across the country.<sup>42</sup> Since Foundation and Gypsum Management had "No Rockfon" Clauses in their distributor contractors, the "No Rockfon" clause similarly bound a smaller distributor after consolidation.<sup>43</sup> Distributors Great Western Building Materials, Gypsum Supply, Badgerland Supply, and Rockwise all sold Rockfon in the United States.<sup>44</sup> After Foundation and Gypsum Management purchased these distributors, they stopped selling Rockfon tiles.<sup>45</sup>

## 2. Armstrong's pressure outside of the "No-Rockfon" clause.

Armstrong pressured its distributor CEMEX not to carry Rockfon tiles. Armstrong contracted with CEMEX, a distributor in Florida.<sup>46</sup> In a November 2014 email, Armstrong area manager Frank Pasquerello informed Armstrong Vice President Paul Corr about a conversation he had with a CEMEX representative:

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<sup>38</sup> ECF Doc. No. 201 (Joint App.), at JA1374.

<sup>39</sup> *Id.*

<sup>40</sup> ECF Doc. No. 207 (Roxul SUMF) ¶ 6.

<sup>41</sup> *Id.* at ¶ 10.

<sup>42</sup> ECF Doc. No. 209 (Armstrong SUMF) ¶ 35.

<sup>43</sup> *Id.* at ¶ 39.

<sup>44</sup> ECF Doc. No. 207 (Roxul SUMF) ¶ 13.

<sup>45</sup> *Id.*

I explained the situation as we discussed and told him we have asked [\*11] our distributors not to support Rockfon in markets where they sell Armstrong and also markets where they don't handle the Armstrong line. I explained as you suggested that this was being handled either through new distributor agreements or through verbal understandings for lack of a better word.<sup>47</sup>

After meeting with Mr. Corr in 2014, CEMEX representative Frank Salters understood from Mr. Corr "if CEMEX pursued or attempted to pursue the Rockfon line, that CEMEX might lose the Armstrong line."<sup>48</sup>

Ceiling tile manufacturers sometimes sell their ceiling tiles directly to contractors — cutting out the middle man building distributor. The parties dispute whether direct sales to contractors is a viable alternative to selling through distributors. Armstrong argues its exclusivity agreements with distributors do not bind contractors, who can purchase their desired tile brand from any distributor or buy directly from a manufacturer. Rockfon argues direct sales to contractors are not a viable means of sale as manufacturers in the United States primarily sell ceiling tiles through distributors. Rockfon also argues contractors are not truly free to choose their desired brand as they usually purchase [\*12] the brand carried by their preferred distributor.

Acousti, a building contractor, refused to purchase ceiling tiles from Rockfon in 2014 because of "pressure from Armstrong."<sup>49</sup> Rockfon representative Douglas Bernard met with Acousti representatives in January 2014.<sup>50</sup> The contractor's representatives told Mr. Bernard of having "to take a hands-off approach" with respect to Rockfon, explaining it "had too much to risk with losing the Armstrong line."<sup>51</sup>

#### **D. Rockfon's growth in the United States market.**

In October 2013, Rockwool acquired Chicago Metallic Company, a tile grid manufacturer.<sup>52</sup> The purchase afforded access to Chicago Metallic's pre-established distributor network, with 190 grid distributors.<sup>53</sup> Rockfon also sold ceiling tiles through Insulation Distributors, Inc., a distributor primarily focused on selling insulation products.<sup>54</sup> Mr. Noeth, a Rockfon representative, testified IDI "was mostly insulation-focused," and Rockfon chose Insulation Distributors "because that was our only option after the changes that were forced on us through the Armstrong pressures."<sup>55</sup>

In 2014, Rockfon reported \$4,324,953 in ceiling tile revenue.<sup>56</sup> In 2017, it reported ceiling tile revenue of \$20,999,933.<sup>57</sup> It [\*13] projected \$30,707,152 in revenue for 2018.<sup>58</sup> While Rockfon had an exclusive arrangement

<sup>46</sup> ECF Doc. No. 201 (Joint App.), at JA6139.

<sup>47</sup> *Id.* at JA1371-72.

<sup>48</sup> *Id.* at JA6140.

<sup>49</sup> *Id.* at JA5986.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> ECF Doc. No. 209 (Armstrong SUMF) ¶ 100.

<sup>53</sup> *Id.* at ¶ 101; ECF Doc. No. 243 (Roxul Response SUMF) ¶ 101.

<sup>54</sup> ECF Doc. No. 209 (Armstrong SUMF) ¶ 104.

<sup>55</sup> ECF Doc. No. 239 (Joint App.), at JA8045-46 (N.T. S. Noeth, Aug. 23, 2018).

<sup>56</sup> ECF Doc. No. 209 (Armstrong SUMF) ¶ 92.

<sup>57</sup> *Id.* at ¶ 95.

with its distributor Gypsum Supply in 2013, it cancelled the arrangement and no longer has exclusivity agreements with distributors.<sup>59</sup>

In a 2017 report, independent consulting firm Simon-Kutcher found Rockfon had access to at least one distributor or contractor in each "metropolitan statistical area."<sup>60</sup> Simon-Kutcher also found with respect to the United States market a "[l]ack of distribution partners in core North American markets is a real issue."<sup>61</sup>

#### E. The parties adduced qualified expert testimony.

Rockfon's expert Professor Einer Elhauge, an antitrust professor at Harvard University, opined on foreclosure, damages, anti-competitive harm, lack of procompetitive effect, and Armstrong's monopoly power.<sup>62</sup> Professor Elhauge calculated Rockfon maintains an approximately two-percent share of the suspended acoustical ceiling tile market in the United States four years after entering the market.<sup>63</sup> He calculated Armstrong's market share as sixty-one to sixty-two percent in terms of revenue, and fifty-five to fifty-six percent in terms of volume from 2013 to 2017.<sup>64</sup>

Professor Elhauge defined sixty-one [\*14] regional submarkets in the United States where Armstrong charges different prices.<sup>65</sup> Armstrong calls these areas "Pricing Metros" and assigns each of its distributors to one of the metros.<sup>66</sup> Armstrong allows its distributors to sell its products only within the defined territory in the distributor agreement.<sup>67</sup> The defined territory is usually smaller than the Pricing Metro.<sup>68</sup>

Professor Elhauge opined on the extent Armstrong's exclusivity agreements foreclosed Rockfon from the United States market. He calculated between 2014 and 2017, Armstrong, through its exclusivity agreements, foreclosed thirty-eight to forty-one percent of the United States suspended acoustical ceiling tile market in terms of volume, and forty-six to fifty-one percent of the market in terms of revenue.<sup>69</sup> When aggregating foreclosure caused by both USG and Armstrong's exclusivity agreements, he calculated approximately fifty to fifty-three percent foreclosure by volume and fifty-eight to sixty-three percent by revenue.<sup>70</sup> He opined Rockfon grew faster amongst "unforeclosed" customers—distributors not bound by Armstrong's exclusivity agreements—than amongst "foreclosed" distributors, those bound by Armstrong's exclusivity [\*15] agreements.<sup>71</sup> He calculated between 2014 and 2017, Rockfon's

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<sup>58</sup> *Id.* at ¶ 96.

<sup>59</sup> ECF Doc. No. 243 (Roxul Response SUMF) ¶ 99.

<sup>60</sup> ECF Doc. No. 201 (Joint App.), at JA3300-54.

<sup>61</sup> *Id.* at JA3361.

<sup>62</sup> *Id.* at JA6713 (Elhauge Report).

<sup>63</sup> *Id.* at JA7200 (Elhauge Rebuttal Report).

<sup>64</sup> *Id.* at JA6718 (Elhauge Report).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at JA6744 (Elhauge Report).

<sup>67</sup> *Id.* at JA6757 (Elhauge Report).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at JA6823 (Elhauge Report).

<sup>70</sup> *Id.*

market revenue share amongst foreclosed distributors did not grow at all, while its revenue share amongst =foreclosed distributors increased from 0.8% in 2014 to 3.2% in 2017.<sup>72</sup> He also calculated while it had an actual market share of 1.9% in 2017, Rockfon's market share would have been 3.2% in 2017 "but for" Armstrong's alleged anti-competitive conduct—its exclusivity agreements.<sup>73</sup>

Professor Elhauge acknowledged while exclusive dealing agreements can have procompetitive effects, he opined Armstrong's exclusivity agreements have none.<sup>74</sup>

To measure Rockfon's damages, Professor Elhauge calculated Rockfon's lost profits resulting from Armstrong's exclusivity agreements. He calculated Rockfon's estimated revenue without Armstrong's exclusivity agreements—Rockfon's "but-for" revenue.<sup>75</sup> Professor Elhauge also calculated Rockfon's actual revenue amongst "unforeclosed" customers from 2014 to 2017, with projected revenue for 2018.<sup>76</sup> He then calculated Rockfon's incremental profit margin for both actual performance and "but-for" performance. To calculate lost profits, Professor Elhauge subtracted Rockfon's actual incremental profit [\*16] from its "but-for" incremental profits.<sup>77</sup>

Armstrong proffered Dr. Janusz Ordover, a professor of economics at New York University, to opine on whether Armstrong engaged in prohibited anti-competitive conduct. Dr. Ordover opined the evidence does not support Rockfon's allegations Armstrong violated anti-trust laws with its use of exclusivity agreements.<sup>78</sup> Dr. Ordover opined Rockfon's growth in the United States market precludes a finding of substantial foreclosure.<sup>79</sup> Dr. Ordover calculated Rockfon's 2018 market share as 2.7% in terms of volume, and 2.9% for revenue.<sup>80</sup> Dr. Ordover found this market share consistent with Ducker's projection from 2011.<sup>81</sup>

Dr. Ordover found Armstrong's exclusivity agreements have procompetitive effects. He opined exclusivity with distributors "can incentivize investments in a brand and increase competition among brands even if competition among distributors of the same brand is restricted."<sup>82</sup> He opined because Armstrong invests in its distributors with training classes and sales leads, its exclusivity agreements prevent competitors from "free-riding" on these investments.<sup>83</sup> Acknowledging the "No Rockfon" clause in Armstrong's exclusivity agreements [\*17] applies to locations where the distributor does not carry Armstrong tiles, he opines (1) Armstrong trained distributor

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<sup>71</sup> *Id.* at JA6718 (Elhauge Report).

<sup>72</sup> *Id.* at JA6841 (Elhauge Report).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at JA6854 (Elhauge Report).

<sup>75</sup> *Id.* at JA6859 (Elhauge Report).

<sup>76</sup> *Id.* at JA6857 (Elhauge Report).

<sup>77</sup> *Id.* at JA6867 (Elhauge Report).

<sup>78</sup> *Id.* at JA6907 (Ordover Report).

<sup>79</sup> *Id.* at JA6913 (Ordover Report).

<sup>80</sup> *Id.* at JA7279 (Ordover Rebuttal Report).

<sup>81</sup> *Id.* at JA7280; *Id.* at JA0216 (Ducker reported assuming a "solid distribution network established upfront," Rockfon could "capture up to 3% of the overall suspended ceiling market" in five years.).

<sup>82</sup> *Id.* at JA6943 (Ordover Report).

<sup>83</sup> *Id.* at JA6945 (Ordover Report).

employees at locations where the distributor does carry Armstrong tiles and (2) some trained distributor employees move to other locations where the distributor does not sell Armstrong tiles.<sup>84</sup>

## II. Analysis.<sup>85</sup>

Rockfon sues Armstrong for (1) unlawful monopolization under [Section 2](#) of the Sherman Act, (2) attempted monopolization under [Section 2](#) of the Sherman Act, (3) restraint of trade through exclusive dealing under [Section 1](#) of the Sherman Act and [Section 3](#) of the Clayton Act.<sup>86</sup> Rockfon moves for summary judgment solely claiming Armstrong's "No Rockfon" clause violates [Section 3](#) of the Clayton Act. Armstrong moves for summary judgment on all claims.

To establish an anti-trust violation under both Acts, Rockfon must show (1) Armstrong engaged in "anti-competitive conduct" and (2) Rockfon suffered anti-trust injury as a result of the challenged conduct.<sup>87</sup>

Rockfon alleges two types of anti-competitive conduct: (1) Armstrong's "exclusive dealing" agreements with its distributors and (2) the "No Rockfon" clause preventing its distributors from selling Rockfon tiles. "An exclusive dealing arrangement is an agreement [\*18] in which a buyer agrees to purchase certain goods or services only from a particular seller for a certain period of time."<sup>88</sup> "A claim of unlawful exclusive dealing may be pursued under [§ 1](#) or [§ 2](#) of the Sherman Act or [§ 3](#) of the Clayton Act."<sup>89</sup> Rockfon alleges exclusive dealing claims under all three sections. It also alleges Armstrong's "No Rockfon" clause is a naked restraint in violation of [Section 3](#) of the Clayton Act and seeks summary judgment on this [Section 3](#) claim.

### A. We deny Armstrong's Motion as there are several genuine issues of material fact precluding judgment on whether Armstrong engaged in anti-competitive conduct.

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<sup>84</sup> *Id.* at JA6951 (Ordover Report).

<sup>85</sup> Summary judgment is proper when "the movant shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [Fed. R. Civ. P. 56\(a\)](#). "Material facts are those 'that could affect the outcome' of the proceeding, and 'a dispute about a material fact is 'genuine' if the evidence is sufficient to permit a reasonable jury to return a verdict for the non-moving party." [Pearson v. Prison Health Serv.](#), [850 F.3d 526, 534 \(3d Cir. 2017\)](#) (quoting [Lamont v. New Jersey](#), [637 F.3d 177, 181 \(3d Cir. 2011\)](#)). On a motion for summary judgment, "we view the facts and draw all reasonable inferences in the light most favorable to the nonmovant." [Pearson](#), [850 F.3d at 533-34 \(3d Cir. 2017\)](#) (citing [Scott v. Harris](#), [550 U.S. 372, 378, 127 S. Ct. 1769, 167 L. Ed. 2d 686 \(2007\)](#)). "The party seeking summary judgment 'has the burden of demonstrating that the evidentiary record presents no genuine issue of material fact.' [Parkell v. Danberg](#), [833 F.3d 313, 323 \(3d Cir. 2016\)](#) (quoting [Willis v. UPMC Children's Hosp. of Pittsburgh](#), [808 F.3d 638, 643 \(3d Cir. 2015\)](#)). If the movant carries its burden, "the nonmoving party must identify facts in the record that would enable them to make a sufficient showing on essential elements of their case for which they have the burden of proof." [Willis](#), [808 F.3d at 643](#) (citing [Celotex Corp. v. Catrett](#), [477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 \(1986\)](#)). "If, after adequate time for discovery, the nonmoving party has not met its burden, pursuant to [Federal Rule of Civil Procedure 56](#), the court must enter summary judgment against the nonmoving party." [Willis](#), [808 F.3d at 643](#) (citing [Celotex Corp.](#), [477 U.S. at 322-323](#)).

<sup>86</sup> We dismissed Roxul's state law claim for tortious interference with business relations and eliminated Roxul's claims concerning the Canadian market for lack of jurisdiction. ECF Doc. No. 15.

<sup>87</sup> [Eisai, Inc. v. Sanofi Aventis US., LLC](#), [821 F.3d 394, 403 \(3d Cir. 2016\)](#) (citing [ZF Meritor, LLC v. Eaton Corp.](#), [696 F.3d 254, 269 n.9 \(3d Cir. 2012\)](#)).

<sup>88</sup> [ZF Meritor](#), [696 F.3d at 270](#).

<sup>89</sup> [Insight Equity A.P. X LP v. Transitions Optical, Inc.](#), No. 10-635, 2016 U.S. Dist. LEXIS 85751, 2016 WL 3610155, at \*4 (D. Del. July 1, 2016) (citing [ZF Meritor](#), [696 F.3d at 281](#)).

We use the rule of reason to analyze Rockfon's exclusive dealing agreements under [Sections 1](#) and [2](#) of the Sherman Act and [Section 3](#) of the Clayton Act.<sup>90</sup> "Under the rule of reason, an exclusive dealing arrangement is anti-competitive only if its 'probable effect' is to substantially lessen competition in the relevant market, rather than merely disadvantage rivals."<sup>91</sup> We look at "not only the percentage of the market foreclosed, but also take into account 'the restrictiveness and the economic usefulness of the challenged practice in relation to the business factors extant in the market.'"<sup>92</sup>

Our Court of Appeals [**\*19**] explained there is "no set formula" for determining legality of an exclusive dealing arrangement but generally a plaintiff must show (1) "significant market power by the defendant," (2) "substantial foreclosure," (3) "contracts of sufficient duration to prevent meaningful competition by rivals," and (4) "an analysis of likely or actual anticompetitive effects considered in light of any procompetitive effects."<sup>93</sup> With regard to foreclosure, we also ask whether competitors "can reach the ultimate consumers of the product by employing existing or potential alternative channels of distribution."<sup>94</sup> We also may ask whether Armstrong "engaged in coercive behavior" and whether the Armstrong's customers could terminate the agreements.<sup>95</sup> We can also consider whether Armstrong's competitors engaged in exclusive dealing.<sup>96</sup>

## **1. We find a genuine issue of fact as to substantial foreclosure.**

To establish "substantial foreclosure," Rockfon must "define the relevant market and prove the degree of foreclosure."<sup>97</sup> Rockfon need not prove "total foreclosure" from the market but must show Armstrong's practices "bar a substantial number of rivals or severely restrict the market's ambit."<sup>98</sup> "[O]ur concern is not about [**\*20**] which products a consumer chooses to purchase, but about which products are reasonably available to that consumer."<sup>99</sup> "Substantial foreclosure allows the dominant firm to prevent potential rivals from ever reaching 'the critical level necessary' to pose a real threat to the defendant's business."<sup>100</sup> In circumstances where a monopolist controls the market, we may find foreclosure when the monopolist uses "its power to break the competitive mechanism and deprive customers of the ability to make a meaningful choice."<sup>101</sup> "Traditionally a foreclosure percentage of at least

<sup>90</sup> [ZF Meritor, 696 F.3d at 281](#) ("The rule of reason governs Plaintiffs' claims under [Section 1](#) and [Section 2](#) of the Sherman Act, and [Section 3](#) of the Clayton Act.").

<sup>91</sup> [Id. at 271](#) (quoting [Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 328, 81 S. Ct. 623, 5 L. Ed. 2d 580 \(1961\)](#)).

<sup>92</sup> [Id.](#)

<sup>93</sup> [Id. at 271-72.](#)

<sup>94</sup> [Insight Equity, 2016 U.S. Dist. LEXIS 85751, 2016 WL 3610155, at \\*6](#) (quoting [Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1163 \(9th Cir. 1997\)](#)).

<sup>95</sup> [ZF Meritor, 696 F.3d at 272.](#)

<sup>96</sup> [Id.](#)

<sup>97</sup> [Eisai, 821 F.3d at 403](#) (quoting [United States v. Microsoft Corp., 253 F.3d 34, 69, 346 U.S. App. D.C. 330 \(D.C. Cir. 2001\)](#)).

<sup>98</sup> [Id.](#) (quoting [United States v. Dentsply Intl, Inc., 399 F.3d 181, 191 \(3d Cir. 2005\)](#)).

<sup>99</sup> [Id.](#) (citing [Se. Missouri Hosp. v. C.R. Bard, Inc., 642 F.3d 608, 616 \(8th Cir. 2011\)](#)).

<sup>100</sup> [ZF Meritor, 696 F.3d at 286](#) (quoting [Dentsply, 399 F.3d at 191](#)).

<sup>101</sup> [Eisai, 821 F.3d at 404](#) (quoting [ZF Meritor, 696 F.3d at 285](#)).

40% has been a threshold for liability in exclusive dealing cases," but some courts require a "lesser degree of foreclosure" when the "defendant is a monopolist."<sup>102</sup>

We also ask in determining substantial foreclosure whether Rockfon could sell its products through alternative channels. "If competitors can reach the ultimate consumers of the product by employing existing or potential alternative channels of distribution, it is unclear whether such restrictions foreclose from competition any part of the relevant market."<sup>103</sup> We ask not whether alternative channels exist, but whether such channels are "viable."<sup>104</sup>

The parties dispute [\*21] whether Armstrong's exclusivity agreements substantially foreclosed competition as necessary to find a violation under the Sherman and Clayton Acts. Armstrong argues we should follow the lead of our Court of Appeals' decisions in *Eisai and Barr Laboratories* affirming summary judgment in favor of the defendant in Sherman and Clayton Act cases. Rockfon argues our Court of Appeals' decision in *United States v. Dentsply International, Inc.*<sup>105</sup> applies.

***GN Netcom offers the most persuasive guidance on summary judgment.***

While these cases offer similarities to ours, we find Chief Judge Stark's opinion in *GN Netcom, Inc. v. Plantronics, Inc.*<sup>106</sup> most informative since Armstrong primarily argues its exclusivity agreements do not foreclose competition because they do not bind end-users—the architects and contractors who consume the products. In *GN Netcom*, Netcom sued Plantronics for exclusive dealing in the telephone headset market. Like the ceiling tile market, telephone headset manufacturers primarily sold their products to end users—call centers—through distributors. Plantronics maintained exclusivity agreements with its distributors prohibiting the distributors from purchasing or promoting competitors' [\*22] products.<sup>107</sup> Like today's case, Netcom sued for monopolization and attempted monopolization under Section 2 of the Sherman Act, and restraint of trade under Section 1 of the Sherman Act and Section 3 of the Clayton Act. Netcom argued Plantronics' exclusive dealing agreements with headset distributors foreclosed it from forty-seven percent of the market.<sup>108</sup> Plantronics moved for summary judgment on all claims, arguing Netcom's ability to reach to end-users "negate[d] the essential element of significant market foreclosure."<sup>109</sup>

Plantronics argued Netcom could market its products to call centers, sell its products through the "hundreds" of nonexclusive distributors available to Netcom, or even sell directly to call centers and deliver the products through Plantronics' distributors.<sup>110</sup> Plantronics also presented evidence Netcom successfully sold to call centers through

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<sup>102</sup> [Mc Wane, Inc. v. F.T.C., 783 F.3d 814, 837 \(11th Cir. 2015\)](#) (citing [Microsoft, 253 F.3d at 70](#)).

<sup>103</sup> [Insight Equity, 2016 U.S. Dist. LEXIS 85751, 2016 WL 3610155, at \\*6](#) (quoting [Omega, 127 F.3d at 1163](#)).

<sup>104</sup> [GN Netcom, Inc. v. Plantronics, Inc., 278 F. Supp. 3d 824, 829 \(D. Del. 2017\)](#) (quoting [Dentsply, 399 F.3d at 193](#)) (explaining the court performs an "assessment of [the alternative means] overall significance to the market," and such alternative means must be "practical or feasible in the market as it exists and functions").

<sup>105</sup> [Dentsply, 399 F.3d at 181](#).

<sup>106</sup> [GN Netcom, 278 F. Supp. 3d at 824](#).

<sup>107</sup> [Id. at 826](#).

<sup>108</sup> [Id. at 830](#).

<sup>109</sup> [Id. at 827](#).

<sup>110</sup> [Id. at 828](#).

these alternative channels, resulting in an increased market share. Plantronics also introduced evidence it did not coerce call centers to purchase its products. Netcom argued such alternative channels were not viable because Plantronics maintained exclusivity with superior distributors, these distributors "control[led] access to end-users," the distribution networks [\*23] were "long entrenched," and the end-users remained loyal to Plantronics' distributors.<sup>111</sup>

Chief Judge Stark denied summary judgment on all claims finding a genuine issue of fact as to whether Netcom could avail itself of alternative channels. He explained Plantronics must show more than the "mere existence of other avenues of distribution" and the court must assess whether such alternative channels are "practical or feasible in the market as it exists and functions."<sup>112</sup> Chief Judge Stark explained while Plantronics offered evidence showing Netcom could "adequately compete" for end-users' business despite exclusivity agreements, Netcom offered evidence showing such efforts required "extensive work" to reach end-users.<sup>113</sup> Netcom also offered evidence showing "long-standing relationships between end-users and distributors," further impeding the viability of alternative channels.<sup>114</sup> Thus, while the exclusivity agreements did not contractually bind end-users, Judge Stark found a genuine issue of material fact as to whether Netcom could successfully reach end-users without Plantronics' distributors.

Armstrong essentially makes the same argument as Plantronics. Armstrong explains because its exclusivity [\*24] agreements do not bind contractors, a contractor seeking a Rockfon tile can freely choose to find a distributor carrying Rockfon. Armstrong also argues its agreements do not bind architects from including Rockfon tiles in the specifications for construction jobs.<sup>115</sup> Armstrong argues Rockfon did in fact reach out to architects to develop a presence in specifications. In a June 2016 presentation, Rockfon recognized "[t]he U.S. market is virtually 100% based on specification for ceiling products—being specified does not mean the project is automatically won, but not being specified severely limits growth opportunities."<sup>116</sup> Armstrong also argues Rockfon can sell directly to contractors, retail stores, and national accounts. Dr. Ordover estimated direct-to-contractor sales may account for twenty-five percent of sales across the entire market.<sup>117</sup> For retail sales, Dr. Ordover testified sales to retail stores accounted for ten to thirteen percent of Armstrong's revenue from 2011 to 2018.<sup>118</sup> Armstrong shows "national accounts" like Kaiser Permanente, Chick-fil-A, RaceTrac, and Taco Bell, purchase ceiling tiles directly from Rockfon.<sup>119</sup>

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<sup>111</sup> *Id.*

<sup>112</sup> [Id. at 830.](#)

<sup>113</sup> *Id.*

<sup>114</sup> [Id. at 831.](#)

<sup>115</sup> Roxul argues architects make the final decision regarding tile brand, citing [Santana Prods. Inc. v. Bobrick Washroom Equip., Inc.](#) [401 F.3d 123 \(3d Cir. 2005\)](#). In *Santana*, our Court of Appeals, evaluating the toilet partition market, found "architects who would make the ultimate decision of which product to specify for use in a particular project." [Id. at 133](#). Both the market and the challenged conduct were significantly different than here. The parties here agree as to the ultimate decision made by the contractor. They dispute the architect's dispositive role. In *Santana*, the plaintiff challenged the defendant's marketing statements to customers. We are not addressing marketing statements. The parties in *Santana* sold toilet partitions. We have disputed evidence as to the role of architects. We cannot simply transfer the realities of one market to another. Each market requires a fact-sensitive analysis.

<sup>116</sup> ECF Doc. No. 201 (Joint App.), at JA2398 (Rockfon SD Growth Plan, June 2016).

<sup>117</sup> *Id.* at JA6927 (Ordover Report).

<sup>118</sup> *Id.* at JA6928 (Ordover Report).

<sup>119</sup> ECF Doc. No. 207 (Roxul SUMF) ¶ 123.

Rockfon argues considering the reality of the [\*25] market, contractors do not freely switch between distributors based on a tile brand preference. Rockfon offers evidence showing contractors choose a tile based on the tiles carried by their preferred distributor. Professor Elhauge found "contractors typically will include a [ceiling tile] brand in its bid for the job only if the contractors' preferred distributor carries the [ceiling tile] brand."<sup>120</sup> As Armstrong maintains exclusivity with the largest and most efficient distributors, Rockfon argues it cannot effectively reach end users who prefer the largest, most efficient distributors. Rockfon instead resorts to inferior distributors not bound by Armstrong's exclusivity agreements. Professor Elhauge also testified, because ceiling tiles account for only sixteen percent of the building materials contractors use on a construction job, contractors do not switch from their preferred distributor merely to seek out a ceiling tile brand.<sup>121</sup> Rockfon also presents evidence Armstrong pressured contractors not to sell Rockfon tiles at the risk of losing Armstrong's line.<sup>122</sup>

Regarding architects, Rockfon argues fifty to seventy-five percent of architect specifications allow contractors to purchase brands [\*26] "equal" to the specified brand, allowing contractors to influence brand selection.<sup>123</sup> Rockfon offers evidence showing while it intended to develop a position in architect specifications, it understood the importance of distributors, as sales through distributors accounted for seventy-seven percent of ceiling tile sales between 2014 and 2017.<sup>124</sup>

Rockfon also argues direct sales to contractors, retail stores, and national accounts are not viable alternatives to sales through distributors. Rockfon also cites an Armstrong representative statement's showing direct sales to contractors is not a viable option: "Rockfon in 2017 has been focusing on going directly to contractors to sell products. Will this be a sustainable strategy? We think not, as ceiling tile primarily is sold through the distribution network for a reason."<sup>125</sup> Professor Elhauge testified manufacturers cannot viably sell through retailers like Home Depot because retailers do not provide the same "whole range of services" distributors provide.<sup>126</sup>

While a jury could find lack of foreclosure based on the availability of alternative channels, we find Roxul has presented sufficient evidence from which a jury could find such channels were [\*27] not feasible. We do not judge the strength of either party's evidence but find a jury could decide whether alternative means are "practical" and would "pose[ ] a real threat" to Armstrong's market share.<sup>127</sup>

#### ***We are not persuaded by cases evaluating other strategies in other markets.***

We are not similarly persuaded by the parties' reliance on guidance from other markets and involving other competitive strategies. For example, while Rockfon cites *Dentsply*, the size of the competitors in the market differed significantly. In *Dentsply*, the defendant sold artificial teeth through dealers and prevented its dealers from carrying competitors' products.<sup>128</sup> The defendant threatened to cut off access to its products when a dealer considered adding another manufacturer's products.<sup>129</sup> Our Court of Appeals reversed the district court's finding competitors

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<sup>120</sup> ECF Doc. No. 201 (Joint App.), at JA6794 (Elhauge Report).

<sup>121</sup> ECF Doc. No. 239 (Joint App.), at JA8225 (N.T. E. Elhauge, Jan. 14, 2019).

<sup>122</sup> ECF Doc. No. 201 (Joint App.), at JA5986.

<sup>123</sup> *Id.* at JA6799 (Elhauge Report).

<sup>124</sup> *Id.* at JA6778 (Elhauge Report).

<sup>125</sup> ECF Doc. No. 239 (Joint App.), at JA7910 (Thompson Research Group Report on U.S. Ceiling Tile Market).

<sup>126</sup> ECF Doc. No. 201 (Joint App.), at JA6781 (Elhauge Report).

<sup>127</sup> [GN Netcom, 278 F. Supp. 3d at 831](#) (quoting [Dentsply, 399 F.3d at 193](#)).

<sup>128</sup> [Dentsply, 399 F.3d at 185](#).

had access to alternative channels of distributions. It explained, while the defendant's competitors had access to hundreds of dealers, the defendant had exclusivity with twenty-three key dealers. The court noted "[t]he reality in this case is that the firm that ties up the key dealers rules the market."<sup>130</sup>

The defendant maintained a substantial market share [\*28] of seventy-five to eighty percent of the artificial teeth market, with the closest competitor achieving only five percent of the market.<sup>131</sup> While Armstrong does not dispute it holds the largest share of the ceiling tile market, the next largest competitor—USG—holds a thirty-percent market share, significantly larger than five percent. Even CertainTeed, the third largest manufacturer, holds an eleven to fifteen percent market share.

Armstrong argues we cannot find substantial foreclosure because its exclusivity agreements do not harm all rivals, pointing to USG and CertainTeed's significant market shares. But to determine substantial foreclosure, we ask whether Armstrong's exclusivity agreements "bar a substantial number of rivals **or severely restrict the market's ambit.**"<sup>132</sup> While the United States ceiling tile market has three established competitors, a new manufacturer had not successfully entered the market for thirty years before 2013. Rockfon argues it is a "maverick" firm with (1) more aggressive prices and (2) unique products.<sup>133</sup> Department of Justice Merger Guidelines instruct regulators ask whether a merger "may lessen competition by eliminating a 'maverick' firm, i.e., a firm that plays [\*29] a disruptive role in the market to the benefit of consumers."<sup>134</sup> Elimination of a maverick under anti-trust law has the same ability to lessen competition. A jury could find while Armstrong's exclusivity agreements do not foreclose a substantial number of rivals, exclusivity severely restricts the market's ambit by preventing a "maverick" like Rockfon from achieving a footing in the market.

The loyalty discount agreements in *Eisai* do not present the same anti-competitive conduct as Armstrong's exclusivity agreements. In *Eisai*, the defendant entered into agreements with hospitals offering incremental discounts if the hospitals purchased a certain percentage of its drugs from the defendant.<sup>135</sup> The defendant offered (1) a flat discount of one percent if a hospital purchased less than seventy-five percent of its drugs from the defendant and (2) discounts ranging from nine to thirty percent if the hospitals purchased over seventy-five percent of its drugs from the defendant.<sup>136</sup> While this incentivized purchasing the defendant's drugs, the hospitals "were not contractually obligated to do so."<sup>137</sup> If a hospital terminated the agreement, it could still buy the defendant's drugs at wholesale prices.<sup>138</sup>

The district court granted summary judgment for the defendant on the plaintiff's Sherman and Clayton Act claims and our Court of Appeals affirmed. The plaintiff argued the hospitals lacked a meaningful choice to purchase the plaintiff's products, comparing the loyalty discount agreements to the exclusivity agreements in *ZF Meritor* and *Dentsply*. The Court of Appeals explained the defendant's anti-competitive conduct differed from the challenged

<sup>129</sup> [Id. at 190.](#)

<sup>130</sup> [Id.](#)

<sup>131</sup> [Id. at 188.](#)

<sup>132</sup> [Eisai, 821 F.3d at 403](#) (quoting [Dentsply, 399 F.3d at 191](#)) (emphasis added).

<sup>133</sup> ECF Doc. No. 201 (Joint App.), at JA6790-01 (Elhauge Report).

<sup>134</sup> Dep't of Justice and the Fed. Trade Comm'n, Horizontal Merger Guidelines (Aug. 19, 2010).

<sup>135</sup> [Eisai, 821 F.3d at 394.](#)

<sup>136</sup> [Id. at 400.](#)

<sup>137</sup> [Id.](#)

<sup>138</sup> [\*30] [Id.](#)

conduct in those cases. If the hospitals did not achieve the seventy-five percent target, the defendant did not cut off supply to the hospital but merely offered the base one-percent discount. Even if the hospital terminated the agreement, it could still buy the defendant's drugs. The hospitals did not risk losing access to the defendant's products if they did not purchase seventy-five percent of its drugs from the defendant, or even chose to instead purchase the plaintiff's drugs. The court distinguished a case like *Dentsply* and *ZF Meritor*, where "the defendant threatened to refuse to continue dealing with customers if customers purchased rival's products."<sup>139</sup>

Armstrong's exclusivity agreements more closely resemble the exclusivity agreements [\*31] in *Dentsply* and *ZF Meritor* than the loyalty discount agreements in *Eisai*. With the "No Rockfon" clause in its exclusivity agreements, Armstrong provided if the covered distributor purchases Rockfon tiles for resale in locations where the distributor did not sell Armstrong tiles, Armstrong could, "in its sole discretion (a) terminate [the] Agreement or any other distribution arrangement with any of them for cause."<sup>140</sup> In other words, Armstrong could refuse to continue dealing with a distributor if it purchased Rockfon tiles. Armstrong's exclusivity agreements do not present the same choice as the discount agreements in *Eisai* since distributors risked losing Armstrong's products if they purchased Rockfon tiles.

Armstrong argues our case is like *Barr Laboratories v. Abbott Laboratories*, but the rebate agreements in *Barr* resemble the discount agreements in *Eisai*.<sup>141</sup> In *Barr*, the defendant contracted with drugstores offering discounts if the drugstores purchased a certain volume of the defendant's drugs.<sup>142</sup> The defendant charged back the difference between the discounted and undiscounted price if the drugstore failed to purchase the target volume. The drugstores did not believe the defendant's contracts [\*32] precluded them from buying competitors' drugs.<sup>143</sup> The plaintiff calculated (1) the defendant maintained a fifty-percent market share and (2) the defendant's contracts foreclosed the plaintiff from fifteen percent of the market.<sup>144</sup> The district court granted summary judgment for the defendant and our Court of Appeals affirmed. The Court of Appeals held the district court did not err in concluding fifteen-percent foreclosure combined with other factors—the stability in the market and the emergence of new manufacturers—showed a lack of "substantial foreclosure."<sup>145</sup>

We find *Barr* distinguishable for several reasons. The contracts in *Barr* were essentially loyalty discount agreements. The defendant did not prohibit drugstores from carrying competitors' products but rather only retracted a discount if the drugstore failed to purchase a target volume. The defendant in *Barr* did not include a provision allowing it to terminate the agreements if the drugstores carried a competitor's product, unlike the "No Rockfon" clause allowing Armstrong to terminate an agreement if the distributor carried Rockfon tiles. The plaintiff's foreclosure and market share calculations were significantly lower than the alleged [\*33] foreclosure and market share attributed to Armstrong in our case. The district court in *Barr* also found the number of manufacturers in the market increased by twenty-three percent in the relevant six-year timeframe.<sup>146</sup> Here, before Rockfon, a new competitor has not entered the market for thirty years.

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<sup>139</sup> *Id.* (quoting *ZF Meritor*, 696 F.3d at 278).

<sup>140</sup> ECF Doc. No. 201 (Joint App.), at JA1374.

<sup>141</sup> *Barr Labs., Inc. v. Abbott Labs.*, 978 F.2d 98 (3d Cir. 1992).

<sup>142</sup> *Id.* at 104.

<sup>143</sup> *Id.* at 105.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 111.

<sup>146</sup> *Id.* at 103.

***Rockfon adduced additional credible foreclosure evidence.***

In addition to the unavailability of alternative channels for tile sales, Rockfon argues Armstrong's exclusivity agreements both quantitatively and qualitatively foreclosed it from growing in the suspended acoustical ceiling tile market in the United States.

To show quantitative foreclosure, Professor Elhauge defined the relevant market as sales of suspended acoustical ceiling tiles in the United States.<sup>147</sup> Roxul further breaks down the market into sixty-one geographical submarkets known as "Price Metros" where Armstrong can charge different prices for their tiles.<sup>148</sup> Professor Elhauge calculated, between 2014 and 2017, Armstrong foreclosed thirty-eight to forty-one percent of the United States market in terms of volume.<sup>149</sup> USG and Armstrong's exclusivity agreements together foreclosed approximately fifty-percent foreclosure.<sup>150</sup> Professor Elhauge [\*34] further calculates after four years in the United States market, Rockfon has only achieved a two-percent market share.<sup>151</sup>

Professor Elhauge compared (1) Rockfon's unforeclosed distributors and (2) distributors foreclosed by Armstrong's exclusivity agreements. He determined Rockfon grew "significantly faster" among unforeclosed distributors when comparing foreclosed distributors and unforeclosed distributors.<sup>152</sup> He calculated between 2014 and 2017, Rockfon's market revenue share among foreclosed distributors did not grow at all, while its amongst unforeclosed customers increased from 0.8% in 2014 to 3.2% in 2017.<sup>153</sup> Professor Elhauge calculates in 2017, Rockfon's market share would have been 3.2% "but for" Armstrong's exclusivity agreements, as opposed to its actual market share of 1.9%.<sup>154</sup>

To show qualitative foreclosure, Roxul presents evidence showing Armstrong's exclusivity agreements forced Roxul to use inferior distributors. A 2017 report from independent firm Simon-Kutcher shows Rockfon had access to lesser quality distributors than Armstrong. Simon-Kutcher rated distributors on a scale of one to five, weakest to strongest.<sup>155</sup> It concluded distributors foreclosed by Armstrong's [\*35] exclusivity agreements rated on average 3.5, while unforeclosed distributors rated 2.2.<sup>156</sup> Roxul also points to evidence it had to rely on an insulation distributor with "lack of specialized [ceiling tile] knowledge and ceiling contractor relationships."<sup>157</sup>

Armstrong argues Professor Elhauge inflated his foreclosure calculation because he included Armstrong's incontestable "repair and replace" jobs. With these jobs, contractors replace worn-out Armstrong tiles with new tiles.

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<sup>147</sup> ECF Doc. No. 201 (Joint App.), at JA6718 (Elhauge Report). At the motion to dismiss stage, we limited the case to the United States market and excluded Canadian market.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at JA6823 (Elhauge Report).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at JA6784 (Elhauge Report).

<sup>152</sup> *Id.* at JA6839; JA6841 (Elhauge Report) (finding 0.1% growth or less from 2014-17 among customers foreclosed by Armstrong's exclusivity and 0.8% growth among unforeclosed customers).

<sup>153</sup> *Id.* at JA6841 (Elhauge Report).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at JA7210 (Elhauge Rebuttal Report).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

The building owners generally desire Armstrong replacement tiles to match the existing Armstrong tiles.<sup>158</sup> Armstrong argues its exclusivity agreements do not foreclose these sales since customer preference for the existing brand drives "repair and replace" sales. Armstrong cites deposition testimony showing the "repair and replace" sales account for sixty to eighty percent of ceiling tile sales, while accounting for only thirty to fifty percent of Rockfon's sales in the United States.<sup>159</sup> Armstrong argues Rockfon maintains a seven to fourteen percent share of non-"repair and replace" sales.<sup>160</sup>

Rockfon responds "repair or replace" sales for Armstrong tiles account for only twenty-five percent of suspended acoustical [\*36] ceiling tile sales in the United States.<sup>161</sup> Rockfon also denies incontestability since an Armstrong representative testified contractors can use ceiling tiles interchangeably; in other words, a contractor could use Rockfon tiles to replace existing Armstrong tiles in a building.<sup>162</sup> Rockfon further argues "repair and replace" sales exacerbate the effect of exclusivity as distributors cannot forego exclusivity with Armstrong or switch to Rockfon tiles without losing access to "repair and replace" sales.<sup>163</sup>

Armstrong also argues Rockfon's growth in the United States negates substantial foreclosure. Armstrong cites to an internal Rockfon presentation from September 2016 showing Rockfon's pace "to sell 28 million sqft of tile in 2016 which continues to be the fastest market introduction in Rockfon history."<sup>164</sup> Armstrong cites another Rockfon presentation from 2016 claiming Rockfon "ha[s] a location selling tile in every major [metropolitan statistical area] in the U.S."<sup>165</sup> In a February 2018 presentation, Rockfon stated it has "[d]istributors in every major market."<sup>166</sup>

Rockfon disputes the number of its distributors in the United States. Armstrong cites a Rockfon document showing it has "190+ distribution [\*37] points,"<sup>167</sup> but Dr. Ordover at times testified Rockfon has either 136 or 170 distributors.<sup>168</sup> Rockfon also presents evidence Armstrong foreclosed it from accessing the best distributors, forcing Rockfon to rely on inferior distributors.<sup>169</sup> For example, Rockfon enlisted an insulation distributor because, as a Rockfon representative testified, "that was our only option after the changes that were forced on us through the Armstrong pressures."<sup>170</sup>

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<sup>158</sup> *Id.* at JA6782 (Elhauge Report).

<sup>159</sup> *Id.* at JA6196-97 (N. T. J. Medio, Nov. 6, 2018) ("But I've seen estimates from our competitors in their publicly available documents that it's anywhere from 60 to 80 percent of the demand.").

<sup>160</sup> ECF Doc. No. 209 (Armstrong SUMF) ¶ 10.

<sup>161</sup> ECF Doc. No. 201 (Joint App.), at JA6799 (Elhauge Report).

<sup>162</sup> ECF Doc. No. 239 (Joint App.), at JA8030-31 (N.T. R. Lay, Aug. 14, 2018).

<sup>163</sup> ECF Doc. No. 201 (Joint App.), at JA7223-24 (Elhauge Rebuttal Report).

<sup>164</sup> *Id.* at JA2454.

<sup>165</sup> *Id.* at JA7267 (Ordover Rebuttal Report).

<sup>166</sup> *Id.* at JA3938.

<sup>167</sup> *Id.* at JA1830 ("Strategy for ROCKFON tiles in North America").

<sup>168</sup> *Id.* at JA6934 (finding 136 distributors); JA7268 (173 distribution locations).

<sup>169</sup> *Id.* at JA7210 (Elhauge Rebuttal Report) (finding the "average distributor strength (rate 1-5, weakest to strongest) was 3.5 for foreclosed distributors but only 2.2 for accessible distributors, confirming that the foreclosure forced Rockfon to turn to less efficient distributors").

<sup>170</sup> ECF Doc. No. 239 (Joint App.), at JA8045-46 (N.T. S. Noeth, Aug. 23, 2018).

Armstrong also argues distributors preferred local production and Rockfon did not have a manufacturing plant in the United States until July 2017.<sup>171</sup> Armstrong cites a May 2015 Rockfon report: "Distributors see local production as a necessary show of ROCKWOOL's commitment to the market. Without it, they will not take the risk of carrying ROCKFON as their sole ceilings brand."<sup>172</sup>

Armstrong cites a presentation from independent marketing consultant Simon-Kutcher stating "Rockfon can still compete successfully" in the United States.<sup>173</sup> Rockfon responds in the same presentation, Simon-Kutcher stated "[m]arket access is a valid concern," as "[t]op customers in the North American markets are exclusive to a competitor."<sup>174</sup>

There are genuine issues of material [\*38] fact as to whether Armstrong's exclusivity agreements substantially foreclosed the market for suspended acoustical ceiling tiles. Rockfon offers expert testimony showing it would have grown faster but for Armstrong's agreements. Professor Elhauge calculated Rockfon grew faster amongst unforeclosed customers than amongst foreclosed customers. Armstrong argues Professor Elhauge cannot attribute "repair and replace" sales to Armstrong's exclusivity agreements, but Professor Elhauge responds "repair and replace" jobs exacerbate the effect of exclusivity. Armstrong points to Rockfon's success in the United States market, Rockfon's priority for increasing its specification position, and distributor preference for local production.

While Armstrong points to Rockfon's success to show a lack of foreclosure, a new competitor's entry into the market does not necessarily negate foreclosure. Armstrong cites *McWane v. FTC*.<sup>175</sup> In *McWane*, the Federal Trade Commission sued iron pipe fitting manufacturer McWane under Section 5 of the Federal Trade Commission Act. When a new rival attempted to enter the market, McWane, the dominant market participant, threatened its distributors if they purchased the new rival's [\*39] products, McWane would withhold rebates and deny access to its products for twelve weeks.<sup>176</sup> During the relevant timeframe, the rival's market share grew ten percent, while McWane's share shrank.

The defendant argued on appeal the Federal Trade Commission erred in finding "substantial foreclosure" under the rule of reason since the new rival entered the market and attained significant growth. The court of appeals affirmed the Commission, explaining other courts "have found monopolists liable for anticompetitive conduct where, as here, the targeted rival gained market share—but less than it likely would have absent the conduct."<sup>177</sup> Citing *Dentsply* and *ZF Meritor*, the court explained "exclusive dealing measures that slow a rival's expansion can still produce consumer injury."<sup>178</sup> Rockfon argues it would have grown faster "but-for" Armstrong's exclusivity agreements and presents Professor Elhauge's calculations showing Roxul would have attained a higher market share "but for" Armstrong's exclusivity.

While Armstrong argues anti-trust law does not entitle Rockfon to the "best" distributors, our Court of Appeals instructs we look at the quality of distributors when determining anti-competitive conduct. [\*40] When discussing a

<sup>171</sup> ECF Doc. No. 201 (Joint App.), at JA6924-25.

<sup>172</sup> *Id.* at JA1693.

<sup>173</sup> *Id.* at JA3361.

<sup>174</sup> *Id.*

<sup>175</sup> [Mc Wane, 783 F.3d at 814.](#)

<sup>176</sup> [\*Id.\* at 819.](#)

<sup>177</sup> [\*Id.\* at 838.](#)

<sup>178</sup> *Id.*

monopolist's anti-competitive conduct, the court provided an example of when a monopolist's exclusive dealing is illegal:

[S]uppose an established manufacturer has long held a dominant position but is starting to lose market share to an aggressive young rival. A set of strategically planned exclusive-dealing contracts may slow the rival's expansion by requiring it to develop alternative outlets for its product, or rely at least temporarily on inferior or more expensive outlets. Consumer injury results from the delay that the dominant firm imposes on the smaller rival's growth.<sup>179</sup>

Assuming Rockfon proves Armstrong a monopolist, a jury could find because Armstrong's exclusivity agreements, coupled with the agreements containing the "No Rockfon" clause, forced Rockfon to use inferior distributors, such agreements substantially foreclosed Rockfon from the market.

While Rockfon's growth may be relevant to "substantial foreclosure," a jury must decide whether Armstrong's exclusivity agreements prevent Rockfon from ever attaining 'the critical level necessary' to pose a real threat to [Armstrong]'s business.<sup>180</sup>

## **2. We find a genuine issue of fact as to Armstrong's market [\*41] power.**

Roxul must show "significant market power by the defendant[.]"<sup>181</sup> For monopolization claims under Section 2 of the Sherman Act in particular, Rockfon must establish Armstrong (1) possessed monopoly power and (2) maintained monopoly power "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."<sup>182</sup>

### **a. The parties dispute whether Armstrong possesses monopoly power.**

"Monopoly power is the ability to control prices and exclude competition in a given market."<sup>183</sup> We infer "monopoly power" from "a predominant share of the market, and the size of that portion is a primary factor in determining whether power exists."<sup>184</sup> Our Court of Appeals determined a market share "significantly larger than 55%" establishes the requisite predominant market share.<sup>185</sup> In the event a defendant has less than a predominant market share, a plaintiff can establish monopoly power with other factors, including "the size and strength of competing firms, freedom of entry, pricing trends and practices in the industry, ability of consumers to substitute comparable goods, and consumer demand."<sup>186</sup>

<sup>179</sup> ZF Meritor, 696 F.3d at 271 (quoting Phillip Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1802c, at 64 (2d ed. 2002)).

<sup>180</sup> Id. at 286 (quoting Dentsply, 399 F.3d at 191).

<sup>181</sup> Id. at 271.

<sup>182</sup> Dentsply, 399 F.3d at 187 (quoting Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 480, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992))

<sup>183</sup> Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 (3d Cir. 2007).

<sup>184</sup> Dentsply, 399 F.3d at 187 (internal citations omitted) (citing United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)).

<sup>185</sup> Id.

<sup>186</sup> Id. (citing Tampa Elec. Co., 365 U.S. at 320).

Rockfon argues monopoly power based on Armstrong's share of the market. Professor [\*42] Elhauge found Armstrong maintains "an overall revenue share of 61-62% and an overall average square-foot share of 55-56% from 2013-2017."<sup>187</sup> With respect to Armstrong's distribution network, Rockfon points to evidence showing Armstrong has "over 15% more distribution points than the number two player which approximates to 900 distributor representatives."<sup>188</sup>

Rockfon argues Armstrong's market share combined with factors like exclusivity agreements, the need for a domestic manufacturing plant,<sup>189</sup> economies of scale,<sup>190</sup> and patent protection<sup>191</sup> allow a jury to find Armstrong possesses monopoly power in the United States.<sup>192</sup>

Professor Elhauge also testified "repair and replace" jobs give Armstrong a significant market power and present a barrier for new entrants to the market.<sup>193</sup> Professor Elhauge argues because Armstrong knows contractors working "repair and replace" jobs demand Armstrong tiles to replace existing Armstrong tiles, it can charge higher prices for these sales.<sup>194</sup> Professor Elhauge also explains Armstrong charges thirty percent more for its Optima and Ultima line of ceiling tiles than Rockfon's comparable Sonar and Alaska db lines.<sup>195</sup> Dr. Ordover testified through discounts, Armstrong charged [\*43] below its list price for thirty-four to fifty-one percent of its sales.<sup>196</sup>

Armstrong cites evidence showing it has only 355 distribution locations and 109 outside sales representatives in the United States.<sup>197</sup> Armstrong argues market share is properly measured by volume of sales and Professor Elhauge measured Armstrong's market share as fifty-three and fifty-five percent by volume.<sup>198</sup> Dr. Ordover testified Professor Elhauge excluded smaller ceiling tile manufacturers like OWA, Top Tile, and Sky Acoustics when he calculated Armstrong's market share.<sup>199</sup> Armstrong argues Professor Elhauge acknowledged these smaller companies "collectively achieved a 4% market share of tile and grid sales in North America."<sup>200</sup> Dr. Ordover also found between 2013 and 2017, Armstrong had less than a fifty-percent market share in twenty five of the Pricing

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<sup>187</sup> ECF Doc. No. 201 (Joint App.), at JA6765 (Elhauge Report).

<sup>188</sup> *Id.* at JA2717 (Armstrong Investor Q&A).

<sup>189</sup> *Id.* at JA6775 (Elhauge Report) (manufacturing plants require huge investment).

<sup>190</sup> *Id.* at JA6776 (Elhauge Report) (economies of scale).

<sup>191</sup> *Id.* at JA6777 (Elhauge Report) (explaining Armstrong stated its "competitive position has been enhanced by patents on products").

<sup>192</sup> ECF Doc. No. 242 (Roxul Opposition Brief), at p. 22.

<sup>193</sup> ECF Doc. No. 201 (Joint App.), at JA6783 ("60% of revenue comes from replacing damaged or old tiles, a business in which the original supplier needs to match the existing tiles."); JA6799 ("[A]t least 25% of [suspended acoustical ceiling tile] sales are for repairing or replacing Armstrong tiles and can be satisfied only by Armstrong tiles.").

<sup>194</sup> *Id.* at JA6783 (Elhauge Report).

<sup>195</sup> *Id.* at JA7166 (Elhauge Rebuttal Report).

<sup>196</sup> *Id.* at JA6958 (Ordover Report).

<sup>197</sup> ECF Doc. No. 209 (Armstrong SUMF) ¶ 34.

<sup>198</sup> ECF Doc. No. 201 (Joint App.), at JA6764 (Elhauge Report).

<sup>199</sup> *Id.* at JA7339 (Ordover Rebuttal Report).

<sup>200</sup> *Id.*

Metros.<sup>201</sup> Armstrong argues even assuming a sixty-percent market share, our Court of Appeals has never recognized a defendant with a sixty-percent market share as a monopolist in an anti-trust case.

While Armstrong argues we cannot find it a monopolist with only a sixty-percent market share, this is not the law. Our Court of Appeals determined a plaintiff [\*44] establishes predominant market share with "significantly larger than 55%."<sup>202</sup> A plaintiff can show monopoly power even with a showing of less than fifty-five percent by pointing to other relevant factors like barriers to entry.<sup>203</sup> The ultimate test is whether Armstrong has "the ability to control prices and exclude competition in a given market."<sup>204</sup>

The parties raise a genuine issue of fact as to Armstrong's market share. A reasonable jury could credit Professor Elhauge's calculation of market share. Rockfon points to several other relevant factors from which a jury could conclude Armstrong possesses monopoly power, including the need for a domestic plant, economies of scale, patent protection, and the significant share of "repair and replace" jobs, all showing barriers to entry into the United States market.

#### **b. A jury must determine whether Armstrong used monopoly power to foreclose competition.**

Under the second element of the [Section 2](#) claims, Rockfon must show Armstrong maintained monopoly power "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."<sup>205</sup> In other words, Rockfon must prove Armstrong used its monopoly power "to foreclose [\*45] competition."<sup>206</sup> "Unlawful maintenance of a monopoly is demonstrated by proof that a defendant has engaged in anti-competitive conduct that reasonably appears to be a significant contribution to maintaining monopoly power."<sup>207</sup>

Rockfon argues Armstrong has the power to exclude rivals from the market. Rockfon cites Armstrong's dealings with Acousti and CEMEX, showing Armstrong pressured contractors and distributors to refrain from carrying Rockfon tiles.<sup>208</sup> Professor Elhauge opined Armstrong charges higher prices for its tiles than its smaller competitors and can charge prices because of its significant market share.<sup>209</sup> Rockfon also argues Armstrong's ability to insert the "No Rockfon" clause in agreement without consideration demonstrates its power to exclude rivals.

Armstrong argues it does not have the ability to exclude rivals from the market. Dr. Ordover opined Armstrong cannot exclude rivals, pointing to (1) Rockfon's entry into the market and growth, achieving an approximately two-percent share of the United States market after four years, and (2) the existence of two formidable competitors, USG and CertainTeed, holding a thirty and fifteen percent market share respectively.<sup>210</sup> Dr. Ordover [\*46] also

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<sup>201</sup> *Id.* at JA7340 (Ordover Rebuttal Report).

<sup>202</sup> [Dentsply](#), 399 F.3d at 187.

<sup>203</sup> *Id.*

<sup>204</sup> [Broadcom](#), 501 F.3d at 307.

<sup>205</sup> [Dentsply](#), 399 F.3d at 187 (quoting [Eastman Kodak Co.](#), 504 U.S. at 480).

<sup>206</sup> *Id.* (quoting [Eastman Kodak Co.](#), 504 U.S. at 482-83).

<sup>207</sup> *Id.*

<sup>208</sup> ECF Doc. No. 201 (Joint App.), at JA1372, JA5986.

<sup>209</sup> *Id.* at JA6785 (Elhauge Report).

<sup>210</sup> *Id.* at JA6957 (Ordover Report).

found Armstrong charged higher prices due to rising demand, higher costs, and Armstrong marketing higher quality product.<sup>211</sup> Armstrong also argues its distributors received consideration in return for inclusion of the "No Rockfon" clause, namely, the ability to carry Armstrong tiles at new distributor locations acquired by the larger distributor.<sup>212</sup>

Professor Elhauge responds Dr. Ordover's claim of Rockfon's growth showing Armstrong's inability to exclude rivals is misleading. He argues to determine whether Armstrong excluded Rockfon, we "compare [Rockfon's] actual growth to an estimate of how they would have grown but-for the [anticompetitive] conduct."<sup>213</sup> Professor Elhauge calculates in 2017, Rockfon's market share would have been 3.2% "but for" Armstrong's exclusivity agreements, as opposed to its actual market share of 1.9%.<sup>214</sup>

We find a genuine issue of material fact as to whether Armstrong used monopoly power to exclude rivals. Rockfon presents evidence Armstrong charges higher prices for its products, despite Rockfon offering comparable products. Armstrong presents evidence it charged higher prices due to rising demand, higher costs, and higher quality products. A jury must [\*47] decide whether Armstrong can exclude rivals.

### **3. We find genuine issues of material fact on whether Armstrong's exclusivity agreements were of sufficient duration to prevent meaningful competition by rivals.**

Roxul must show Armstrong's exclusivity agreements were "of sufficient duration to prevent meaningful competition by rivals."<sup>215</sup> Long-term exclusivity agreements are not *per se* unlawful, but "[t]he significance of any particular contract duration is a function of both the number of such contracts and market share covered by the exclusive-dealing contracts."<sup>216</sup> In *ZF Meritor*, our Court of Appeals held exclusivity agreements with five to seven year terms with every purchaser, foreclosing eighty-five percent of the market, showed the agreements prevented meaningful competition.<sup>217</sup> Agreements less than one year, on the other hand, are presumptively lawful.<sup>218</sup>

Armstrong argues its exclusivity agreements last three years.<sup>219</sup> Armstrong further argues it did not have exclusivity agreements with all of its distributors, citing its agreements with Marjam, Kamco, and Contractors Choice Supply.<sup>220</sup> Rockfon argues while its written exclusivity agreements list terms of three years, Armstrong had "verbal understandings" [\*48] with its distributors exclusivity would last indefinitely, citing an email between Armstrong representatives from 2014.<sup>221</sup> Rockfon also cites an Armstrong representative's testimony showing Armstrong has exclusivity agreements with all of its distributors.<sup>222</sup>

<sup>211</sup> *Id.* at JA6959-60 (Ordover Report).

<sup>212</sup> ECF Doc. No. 209 (Armstrong SUMF) ¶ 39; ECF Doc. No. 201 (Joint App.), at JA0741.

<sup>213</sup> ECF Doc. No. 201 (Joint App.), at JA7172 (Elhauge Rebuttal Report).

<sup>214</sup> *Id.* at JA6841.

<sup>215</sup> [\*ZF Meritor\*, 696 F.3d at 271-72.](#)

<sup>216</sup> [\*Id.\* at 287.](#)

<sup>217</sup> [\*Id.\* at 286-87.](#)

<sup>218</sup> *Id.*

<sup>219</sup> ECF Doc. No. 209 (Armstrong SUMF) ¶ 31.

<sup>220</sup> *Id.* at ¶ 33.

<sup>221</sup> ECF Doc. No. 201 (Joint App.), at JA1371-72.

Rockfon adduces credible evidence creating genuine issues of material fact as to the duration of the exclusivity agreements. Combined with evidence of Armstrong's share of the market, a reasonable jury could credit Rockfon's evidence and decide Armstrong's exclusivity agreements prevent meaningful competition by its rivals.

#### **4. We find a genuine issue of fact as to procompetitive benefits and anti-competitive effects of Armstrong's exclusivity agreements.**

Our Court of Appeals instructs we perform "an analysis of likely or actual anticompetitive effects considered in light of any procompetitive effects."<sup>223</sup> Armstrong argues its exclusivity agreements have only procompetitive benefits because the agreements prevent competitors from free-riding on its investments in its distributors.

Dr. Ordover opined exclusive dealing arrangements have procompetitive benefits: "[W]herein a distributor sells only or primarily the products of a single manufacturer [\*49] can incentivize investments in a brand and increase competition among brands even if competition among distributors of the same brand is restricted."<sup>224</sup> He also opined exclusive dealing between a distributor and a manufacturer prevents a rival manufacturer from "free-riding" on the manufacturer's investment in the distributor.<sup>225</sup> Armstrong invests in its distributors by (1) sharing job opportunities in the distributor's sales territory, and (2) developing "Action Plans" to help distributors grow and improve their business.<sup>226</sup> Armstrong also provides training courses for its distributors on "general sales and marketing methods" and "inventory management."<sup>227</sup> Dr. Ordover testified Roxul could "free ride" on Armstrong's investments by using its distributors. While acknowledging the exclusivity agreements in this case prevent distributors from selling Rockfon products even in areas where the distributor does not sell Armstrong products, Dr. Ordover argues Rockfon could still take advantage of Armstrong's investments when distributor employees trained by Armstrong move locations.<sup>228</sup> Armstrong also enacted the "Gold Circle" program to provide rebates for its exclusive distributors based on sales figures. [\*50]<sup>229</sup>

While acknowledging exclusivity can produce procompetitive benefits, Rockfon argues Armstrong's exclusive agreements have no procompetitive benefits. Rockfon also argues Armstrong overstates its investment in its distributors. Professor Elhauge found Armstrong offers its distributors only one "manufacturer agnostic" training course—a course not specific to Armstrong's products.<sup>230</sup> He explained Rockfon could only potentially "free-ride" on this course since it does not pertain only to Armstrong's products. He explained the training course was highly selective and Armstrong charges attendants \$1,500 for the class.<sup>231</sup> Professor Elhauge explains Rockfon similarly invests in its distributors even without exclusivity agreements.<sup>232</sup> He found Rockfon offered greater rebates to its

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<sup>222</sup> *Id.* at JA4357 (N.T. R. Loufek, Aug. 21, 2018) ("Q: Are you aware of any distributors having non-written agreements with Armstrong to not sell Rockfon? . . . [A]: I believe all of our distributors have an agreement.").

<sup>223</sup> [ZF Meritor, 696 F.3d at 271-72](#).

<sup>224</sup> ECF Doc. No. 201 (Joint App.), at JA6943 (Ordover Report).

<sup>225</sup> *Id.* at JA6945 (Ordover Report).

<sup>226</sup> *Id.* at JA6946 (Ordover Report).

<sup>227</sup> *Id.* at JA6949 (Ordover Report).

<sup>228</sup> *Id.* at JA6951 (Ordover Report) ("Armstrong would likely have trained that distributor's staff at other locations where Armstrong products were resold by the same distributor.").

<sup>229</sup> *Id.* at JA6950 (Ordover Report).

<sup>230</sup> *Id.* at JA7239 (Elhauge Rebuttal Report).

<sup>231</sup> *Id.* at JA7239-40 (Elhauge Rebuttal Report).

customers than Armstrong.<sup>233</sup> He also explains exclusivity reduces investments in a distributor since a firm like Armstrong with an exclusivity agreement does not have to compete with rivals.<sup>234</sup> He further opined any increased investment provides no benefit to the ultimate consumers of the tiles.<sup>235</sup>

We find a genuine issue of fact as to whether Armstrong's exclusivity agreements provide procompetitive [\*51] benefits. Armstrong offers evidence its exclusivity agreements provide procompetitive benefits by preventing "free-riding" on its distributor investments. Rockfon offers evidence showing the exclusivity agreements do not offer procompetitive benefits because Armstrong overstates the impact of its investments. Rockfon also offers evidence it invests in its distributors even without exclusivity. A jury must decide whether Armstrong's exclusivity agreements offer any procompetitive benefits.

## **5. We find a genuine issue of material fact as to whether Armstrong coerced customers into accepting exclusivity.**

We consider "whether there is evidence that the dominant firm engaged in coercive behavior."<sup>236</sup>

Rockfon cites evidence showing Armstrong coerced its distributors into accepting the "No Rockfon" Clause. Frank Salters, a former manager with Armstrong's distributor CEMEX, attended a meeting with Armstrong representatives in 2014.<sup>237</sup> During the meeting, an Armstrong representative told him if CEMEX carried Rockfon products, even in areas where CEMEX did not sell Armstrong products, "it could affect the distribution position with Armstrong in the markets that they had the line."<sup>238</sup> Mr. Salters understood [\*52] this to mean CEMEX would lose Armstrong's business if it tried to sell Rockfon products.<sup>239</sup> Ms. Hart, a Rockfon sale representative, talked to a representative from the distributor Kamco in Connecticut.<sup>240</sup> The Kamco representative told her Kamco would not let him place an order with Rockfon because Kamco "didn't want to jeopardize [its] relationship with Armstrong."<sup>241</sup>

Armstrong argues it did not coercively prevent its distributors from carrying the Rockfon line. Armstrong argues its distributors wanted to carry the Armstrong line and willingly entered into its exclusivity agreements. The president of Hughes Industries, one of Armstrong's distributors, testified he preferred Armstrong over Rockfon because "[i]t's a name brand, it's already accepted . . . it's the premier line to have."<sup>242</sup> In cases where a larger distributor acquired a

<sup>232</sup> *Id.* at JA7151 (Elhauge Rebuttal Report).

<sup>233</sup> *Id.* at JA7242 (Elhauge Rebuttal Report) (finding "Rockfon made larger proportional investments in 'Gold Circle'-like promotional programs than Armstrong did with the benefit of exclusivity").

<sup>234</sup> *Id.* at JA7151 (Elhauge Rebuttal Report).

<sup>235</sup> *Id.*

<sup>236</sup> *ZF Meritor, 696 F.3d at 272* (citing *Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 77 (3d Cir. 2010)*).

<sup>237</sup> ECF Doc. No. 201 (Joint App.), at JA6139-40.

<sup>238</sup> *Id.* at JA6140.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at JA4594.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at JA6161.

smaller distributor, Armstrong argues the larger distributor received the ability to transfer the Armstrong line to the newly acquired distributor in return for applying the "No Rockfon" clause to the acquired distributor.<sup>243</sup>

While Armstrong offers evidence its distributors willingly entered into exclusivity agreements, a reasonable jury could find Armstrong [\*53] enforced its exclusivity agreements with coercion, thus creating an anti-competitive effect.<sup>244</sup> Rockfon offers evidence showing CEMEX felt threatened it would lose business if it sold Rockfon tiles.<sup>245</sup>

## **6. We find a genuine issue of material fact as to competitors' use of exclusive dealing.**

We also ask whether Armstrong's competitors used exclusive dealing agreements.<sup>246</sup> Rockfon presents evidence USG has exclusivity agreements with distributors. Armstrong offers evidence showing Rockfon has exclusivity agreements with distributors. Rockfon responds it briefly had an exclusivity agreement with a distributor but no longer has exclusivity with any distributor.<sup>247</sup>

The parties' evidence of competitors' exclusivity agreements does not warrant summary judgment. A jury can consider this evidence in determining whether Armstrong's use of exclusivity agreements violates anti-trust laws.

## **7. We find a genuine issue of material fact as to whether Armstrong's exclusivity agreement caused an anti-trust injury.**

We also ask whether Armstrong's exclusivity agreements caused anti-trust injury.<sup>248</sup> we ask whether the plaintiff's "loss stems from a competition-reducing aspect or effect of the defendant's behavior."<sup>249</sup> In *ZF Meritor* [\*54], our Court of Appeals found sufficient evidence existed the defendant's exclusive dealing agreements foreclosed a substantial share of the market for truck transmission and the plaintiff exited the market because it could not maintain a "high enough market shares to remain viable."<sup>250</sup> Because of such foreclosure evidence, the court found a jury could conclude the plaintiff's "inability to grow was a direct result of [the defendant]'s exclusionary conduct."<sup>251</sup>

Rockfon offers evidence from which a jury could conclude foreclosure limited Rockfon's ability to grow. Professor Elhauge calculated between 2014 and 2017, Rockfon grew faster amongst "unforeclosed" customers than amongst foreclosed customers bound by Armstrong's exclusivity agreements.<sup>252</sup> Further, Professor Elhauge found Rockfon

<sup>243</sup> ECF Doc. No. 209 (Armstrong SUMF) ¶ 39 (under distribution agreements with large distributors like Foundation, Armstrong required these distributors to obtain Armstrong's consent before allowing an acquired distributor to carry Armstrong products).

<sup>244</sup> *Insight Equity*, 2016 U.S. Dist. LEXIS 85751, 2016 WL 3610155, at \*6 (finding a triable issue of material fact when plaintiff offered evidence third-party distributors rejected its business out of concern for their exclusive arrangements with defendant).

<sup>245</sup> ECF Doc. No. 201 (Joint App.), at JA6140 (former CEMEX employee swore he understood "if CEMEX pursued or attempted to pursue the Rockfon line, that CEMEX might lose the Armstrong line and its rights under the Distribution Agreement").

<sup>246</sup> *ZF Meritor*, 696 F.3d at 272.

<sup>247</sup> ECF Doc. No. 201 (Joint App.), at JA0668, JA0746; ECF Doc. No. 239 (Joint App.), at JA8065-66 (N.T. J. Moynihan, Sept. 11, 2018).

<sup>248</sup> *ZF Meritor*, 696 F.3d at 289.

<sup>249</sup> *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990).

<sup>250</sup> *ZF Meritor*, 696 F.3d at 289.

<sup>251</sup> *Id.*

would have achieved a 1.3% greater market share in the absence of Armstrong's exclusivity agreements.<sup>253</sup> A jury could find Armstrong's exclusivity agreements caused Rockfon's inability to grow and thus caused an anti-trust injury.

**B. We deny Rockfon's Motion as there are genuine issues of material fact on whether the "No Rockfon" clause is a naked restraint.**

Rockfon argues Armstrong's "No Rockfon" clause is a [\*55] naked restraint under [Section 3](#) of the Clayton Act, with no other purpose than preventing Armstrong distributors from carrying Rockfon tiles. A naked restraint has "no purpose except (the) stifling of competition."<sup>254</sup> As explained, Armstrong adduces evidence it instituted the "No Rockfon" clause to prevent free-riding, an acknowledged procompetitive benefit.<sup>255</sup> Armstrong raises a genuine issue of fact as to whether the "No Rockfon" clause is a naked restraint. We deny Rockfon's motion for summary judgment under [Section 3](#) of the Clayton Act.

**III. Conclusion.**

In an accompanying Order, we deny (1) Rockfon's motion for summary judgment on its claim under [Section 3](#) of the Clayton Act limited to the "No Rockfon" clause and (2) Armstrong's motion for summary judgment on Rockfon's claims under [Section 1](#) and [2](#) of the Sherman Act, and [Section 3](#) of the Clayton Act.

**ORDER**

**AND NOW**, this 8th day of March 2019, upon considering the Plaintiff's Motion for partial summary judgment under [Section 3](#) of the Clayton Act (ECF Doc. No. 204), Defendant's Motion for summary judgment on all claims (ECF Doc. No. 205), Oppositions (ECF Doc. Nos. 237, 242), Reply Memoranda (ECF Doc. Nos. 253, 254), following oral argument, and for reasons in the accompanying Memorandum, it [\*56] is **ORDERED** the Motions for summary judgment (ECF Doc. Nos. 204, 205) are **DENIED** as there are genuine issues of material fact precluding judgment as a matter of law under [Sections 1](#) and [2](#) of the Sherman Act<sup>1</sup> and [Section 3](#) of the Clayton Act.<sup>2</sup>

/s/ Kearney

**KEARNEY, J.**

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<sup>252</sup> ECF Doc. No. 201 (Joint App.), at JA6841 (Elhauge Report) (opining Rockfon's market revenue share amongst foreclosed distributors did not grow at all, while its share of unforeclosed increased from 0.8% in 2014 to 3.2% in 2017).

<sup>253</sup> *Id.* (Elhauge Report) (showing Rockfon has achieved a 1.9% volume-based market share, and would have achieved a 3.2% volume-based market share in an unforeclosed market).

<sup>254</sup> [Evans v. S. S. Kresge Co., 544 F.2d 1184, 1191 \(3d Cir. 1976\)](#).

<sup>255</sup> See Section II.A.4.

<sup>1</sup> [15 U.S.C. §§ 1, 2](#).

<sup>2</sup> *Id.* [§ 14](#).



## In re Liquid Aluminum Sulfate Antitrust Litig.

United States District Court for the District of New Jersey

March 11, 2019, Decided; March 11, 2019, Filed

Civil Action No.: 16-md-2687 (JLL)

### **Reporter**

2019 U.S. Dist. LEXIS 39364 \*; 2019-1 Trade Cas. (CCH) P80,712; 2019 WL 1125589

IN RE LIQUID ALUMINUM SULFATE ANTITRUST LITIGATION. This Document Relates to: Civ. Action Nos. 18-9781, 18-3440, 18-11027, and 18-9231

**Notice:** NOT FOR PUBLICATION

**Prior History:** [In re Liquid Aluminum Sulfate Antitrust Litig., 159 F. Supp. 3d 1382, 2016 U.S. Dist. LEXIS 13293 \(J.P.M.L., Feb. 4, 2016\)](#)

## **Core Terms**

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conspiracy, bid, motion to dismiss, Chemical, allegations, personal jurisdiction, Plaintiffs', antitrust, unjust enrichment, Defendants', customers, contacts, principal place of business, prices, Sherman Act, participated, limitations, collusive, contracts, reasons, rigging, lack of personal jurisdiction, fraudulent concealment, manufactures, complaints, survive, argues

**Counsel:** [\*1] For CENTRAL ARKANSAS WATER, Plaintiff in 15-7827, Plaintiff: DIANNE M. NAST, LEAD ATTORNEY, NastLaw LLC, Philadelphia, PA; JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; LISA J. RODRIGUEZ, LEAD ATTORNEY, Schnader Harrison Segal & Lewis LLP, Cherry Hill, NJ; MICHAEL L. ROBERTS, LEAD ATTORNEY, ROBERTS LAW FIRM, LITTLE ROCK, AR; EMILY JOAN HANLON, SCHNADER HARRISON SEGAL & LEWIS LLP, PHILADELPHIA, PA.

For DETROIT WATER AND SEWERAGE DEPARTMENT, Plaintiff in 15-7896, THE CITY OF CINCINNATI, Plaintiff in 15-8065, Plaintiffs: JEFFREY J. CORRIGAN, LEAD ATTORNEY, JEFFREY L KODROFF, SPECTOR ROSEMAN & KODROFF, P.C., PHILADELPHIA, PA.

For CHESTER WATER AUTHORITY, Plaintiff in 15-7928, HAZELTON CITY AUTHORITY, Plaintiff in 15-8056, Plaintiffs: BARBARA JANE HART, GERALD LAWRENCE, LEAD ATTORNEYS, SUNG-MIN LEE, LOWEY DANNENBERG PC, WHITE PLAINS, NY; JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; WILLIAM J. OLSON, LOWEY DANNENBERG PC, CONSHOHOCKEN, PA.

For CITY AND COUNTY OF DENVER, Plaintiff in 15-7996, Plaintiff: GREGORY BRIAN KANAN, KENNETH F. ROSSMAN, LEAD ATTORNEYS, LEWIS ROCA ROTGERBER CHRISTIE [\*2] LLP, DENVER, CO; H. LADDIE MONTAGUE, RUTHANNE GORDON, LEAD ATTORNEYS, BERGER & MONTAGUE, PC, PHILADELPHIA, PA; JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; PETER S. PEARLMAN, LEAD ATTORNEY, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, LLP, SADDLE BROOK, NJ.

For CITY OF WINTER PARK, Plaintiff in 15-8031, Plaintiff: JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; LINDA P. NUSSBAUM, LEAD ATTORNEY, NUSSBAUM LAW GROUP PC, NEW YORK, NY; CAROLINE F. BARTLETT, DONALD A. ECKLUND, CARELLA BYRNE, ROSELAND, NJ.

For AMERICAN EAGLE PAPER MILLS, INC., Plaintiff in 15-8142, AMREX CHEMICAL COMPANY, INC., Plaintiff in 15-8227, Plaintiffs: BRUCE DANIEL GREENBERG, LEAD ATTORNEY, LITE DEPALMA GREENBERG, LLC, NEWARK, NJ.

For OAKLAND COUNTY, MICHIGAN, Plaintiff in 15-8198, Plaintiff: BRUCE DANIEL GREENBERG, LEAD ATTORNEY, LITE DEPALMA GREENBERG, LLC, NEWARK, NJ; WHITNEY ERIN STREET, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR BLOCK & LEVITON LLP, OAKLAND, CA.

For CITY OF GREENSBORO, Plaintiff in 15-8230, Plaintiff: CARLO SCARAMELLA, LEAD ATTORNEY, LAW OFFICES OF CARLO SCARAMELLA, LLC, MARLTON, NJ; JAMES [\*3] E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ. ROBERT S. KITCHENOFF, LEAD ATTORNEY, WEINSTEIN, KITCHENOFF & ASHER, LLC, PHILADELPHIA, PA.

For CITY OF NEWARK, Plaintiff in 15-8261, Plaintiff: DAVID L. ISABEL, LEAD ATTORNEY, GOLUB & ISABEL, PC, PARSIPPANY, NJ; ELIZABETH ANNE FEGAN, LEAD ATTORNEY, JASON ALLEN ZWEIG, COUNSEL NOT ADMITTED TO USDC-NJ BAR, HAGENS BERMAN SOBOL SHAPIRO LLP, CHICAGO, IL; ERIC E. TOMASZEWSKI, LEAD ATTORNEY, McManimon Scotland & Bauman, LLC, Roseland, NJ; MICHAEL D. CRITCHLEY, LEAD ATTORNEY, Critchley, Kinum & DeNoia, LLC, Roseland, NJ; STEVE W. BERMAN, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, HAGENS BERMAN SOBOL SHAPIRO LLP, SEATTLE, WA.

For THE CITY OF TEXARKANA, ARKANSAS, Plaintiff in 15-8294, Plaintiff: JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ.

For THE CITY OF TEXARKANA, TEXAS, Plaintiff in 15-8294, Plaintiff: JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ. KIMBERLY A. JUSTICE, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR KESSLER TOPAZ MELTZER & CHECK LLP, RADNOR, PA.

For CLARKSVILLE LIGHT & WATER [\*4] CO., Plaintiff in 15-8295, Plaintiff: JEFFREY B. GITTELMAN, LEAD ATTORNEY, BARRACK, RODOS & BACINE, PHILADELPHIA, PA.

For CITY OF SPOKANE, Plaintiff in 16-831, Plaintiff: LYNN L. SARKO, MARK A. GRIFFIN, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR KELLER ROHRBACK LLP, SEATTLE, WA.

DANIEL E. GUSTAFSON, LEAD ATTORNEY, DANIEL C. HEDLUND, GUSTAFSON GLUEK PLLC, MINNEAPOLIS, MN; E Michelle Drake, LEAD ATTORNEY, Berger & Montague, P.C., Minneapolis, MN; HEIDI M. SILTON, LEAD ATTORNEY, LOCKEDGE FRINDAL NAUEN PLLP, MINNEAPOLIS, MN; Joshua J Rissman, LEAD ATTORNEY, Gustafson Gluek PLLC, Mpls, MN; KARL CRAIG WILDFANG, LEAD ATTORNEY, ROBINS KAPLAN LLP, MINNEAPOLIS, MN; Kai H Richter, Megan D Yelle, LEAD ATTORNEYS, Nichols Kaster, PLLP, Mpls., MN.

For CITY OF MINNEAPOLIS, Plaintiff in 16-833, Plaintiff: BRIAN D. CLARK, W. JOSEPH BRUCKNER, LEAD ATTORNEYS, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; HEIDI M. SILTON, LEAD ATTORNEY, LOCKEDGE FRINDAL NAUEN PLLP, MINNEAPOLIS, MN.

For CITY OF DULUTH, MINNESOTA, Plaintiff in 16-834, Plaintiff: BRIAN D. CLARK, W. JOSEPH BRUCKNER, LEAD ATTORNEYS, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; DANIEL E. GUSTAFSON, LEAD ATTORNEY, DANIEL C. HEDLUND, [\*5] GUSTAFSON GLUEK PLLC, MINNEAPOLIS, MN; HEIDI M. SILTON, LEAD ATTORNEY, LOCKEDGE FRINDAL NAUEN PLLP, MINNEAPOLIS, MN; Joshua J Rissman, LEAD ATTORNEY, Gustafson Gluek PLLC, Mpls, MN; KARL CRAIG WILDFANG, LEAD ATTORNEY, ROBINS KAPLAN LLP, MINNEAPOLIS, MN.

For TEEMARK CORPORATION, Plaintiff in 16-842, Plaintiff: BRIAN D. CLARK, W. JOSEPH BRUCKNER, LEAD ATTORNEYS, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; DANIEL E. GUSTAFSON, LEAD ATTORNEY, DANIEL C. HEDLUND, GUSTAFSON GLUEK PLLC, MINNEAPOLIS, MN; HEIDI M. SILTON, LEAD ATTORNEY, LOCKEDGE FRINDAL NAUEN PLLP, MINNEAPOLIS, MN; Joshua J Rissman, LEAD ATTORNEY, Gustafson Gluek PLLC, Mpls, MN.

For MOBILE AREA WATER AND SEWER SYSTEM, Plaintiff in 16-843, Plaintiff: BRIAN RUSSELL STRANGE, LEAD ATTORNEY, LOS ANGELES, CA; Donald Beebe, LEAD ATTORNEY, PRO HAC VICE, The Atchison Firm P.C., Mobile, AL; JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ.

For MOBILE AREA WATER AND SEWER SYSTEM, Plaintiff in 16-843, Plaintiff: BRIAN RUSSELL STRANGE, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, LOS ANGELES, CA; Donald Beebe, James Atchison, R. Edward Massey, Jr., LEAD ATTORNEYS, PRO HAC VICE, The [\*6] Atchison Firm P.C., Mobile, AL; JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; JANET C. EVANS, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, GRAY PLANT MOOTY MOOTY & BENNETT PA, MINNEAPOLIS, MN; MICHAEL STEPHEN DAMPIER, LEAD ATTORNEY, PRO HAC VICE, COUNSEL NOT ADMITTED TO USDC-NJ BAR, THE DAMPIER LAW FIRM PC, FAIRHOPE, AL; MORVAREED ZAHRA SALEHPOUR, LEAD ATTORNEY, PRO HAC VICE, COUNSEL NOT ADMITTED TO USDC-NJ BAR, LOS ANGELES, CA.

For BOARD OF WATER COMMISIONERS OF THE CITY OF SAINT PAUL, MINNESOTA, Plaintiff in 16-844, Plaintiff: BRIAN D. CLARK, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; HEIDI M. SILTON, W. JOSEPH BRUCKNER, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, LOCKEIDGE FRINDAL NAUEN PLLP, MINNEAPOLIS, MN.

For CITY OF ST. CLOUD, MINNESOTA, Plaintiff in 16-846, Plaintiff: BRIAN D. CLARK, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; DANIEL E. GUSTAFSON, DANIEL C. HEDLUND, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, GUSTAFSON GLUEK PLLC, MINNEAPOLIS, MN; HEIDI M. SILTON, W. JOSEPH BRUCKNER, LEAD ATTORNEYS, [\*7] COUNSEL NOT ADMITTED TO USDC-NJ BAR, LOCKEIDGE FRINDAL NAUEN PLLP, MINNEAPOLIS, MN Joshua J Rissman, LEAD ATTORNEY, Gustafson Gluek PLLC, Mpls, MN; KARL CRAIG WILDFANG, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, ROBINS KAPLAN LLP, MINNEAPOLIS, MN; Robert J. Wozniak, Jr., LEAD ATTORNEY, PRO HAC VICE, Freed Kanner London & Millen, LLC, Bannockburn, IL; STEVEN A. KANNER, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, FREED KANNER LONDON & MIL, BONNOCKBURN, IL.

For CITY OF GRAND MARAIS, Plaintiff in 16-848, Plaintiff: Christian M Sande, LEAD ATTORNEY, Christian Sande LLC, Mpls, MN; Christopher M Hood, LEAD ATTORNEY, Flaherty & Hood, PA, St Paul, MN; GARRETT D. BLANCHFIELD, JR., ROBERTA A. YARD, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, REINHARDT WENDOFF & BLANCHFIELD, ST. PAUL, MN.

For CITY OF FERGUS FALLS, MINNESOTA, Plaintiff in 16-849, Plaintiff: BRIAN D. CLARK, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; DANIEL E. GUSTAFSON, DANIEL C. HEDLUND, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, GUSTAFSON GLUEK PLLC, MINNEAPOLIS, MN; HEIDI M. SILTON, W. JOSEPH BRUCKNER, LEAD ATTORNEYS, COUNSEL NOT ADMITTED [\*8] TO USDC-NJ BAR, LOCKEIDGE FRINDAL NAUEN PLLP, MINNEAPOLIS, MN; Jason S Kilene, LEAD ATTORNEY, Gustafson Gluek PLLC, Mpls, MN; Joshua J Rissman, LEAD ATTORNEY, Gustafson Gluek PLLC, Mpls, MN.

For METROPOLITAN COUNCIL, Plaintiff in 16-734, Plaintiff: BRIAN D. CLARK, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; DANIEL E. GUSTAFSON, DANIEL C. HEDLUND, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, GUSTAFSON GLUEK PLLC, MINNEAPOLIS, MN; HEIDI M. SILTON, W. JOSEPH BRUCKNER, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, LOCKEIDGE FRINDAL NAUEN PLLP, MINNEAPOLIS, MN.

For ENVIRONMENTAL RESEARCH AND DESIGN, INC., Plaintiff in 16-735, Plaintiff: ANTHONY J. BOLOGNESE, LEAD ATTORNEY, BOLOGNESE & ASSOCIATES LLC, PHILADELPHIA, PA; DAVID W. MITCHELL, PATRICK J. COUGHLIN, LEAD ATTORNEYS, ALEXANDRA SENYA BERNAY, ROBBINS GELLER RUDMAN & DOWD LLP, SAN DIEGO, CA; MARK JEFFREY DEARMAN, PAUL J. GELLER, LEAD ATTORNEYS, ROBBINS GELLER

RUDMAN & DOWD LLP, BOCA RATON, FL; ROBERT CECIL GILBERT, LEAD ATTORNEY, KOPELWITZ OSTROW FERGUSON WEISELBERG GILBERT, CORAL GABLES, FL.

For FLAMBEAU RIVER PAPERS, LLC, Plaintiff in 16-737, Plaintiff: HOWARD J. SEDRAN, [\*9] LEAD ATTORNEY, LEVIN, SEDRAN & BERMAN, PHILADELPHIA, PA; JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; KEITH J. VERRIER, LEAD ATTORNEY, LEVIN, SEDRAN & BERMAN, PHILADELPHIA, PA.

For CITY OF SACRAMENTO, Plaintiff in 16-853, Plaintiff: JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; Jeffrey Lewis, LEAD ATTORNEY, Keller Rohrback LLP, Oakland, CA; LYNN L. SARKO, MARK A. GRIFFIN, LEAD ATTORNEYS, KELLER ROHRBACK LLP, SEATTLE, WA.

For CITY OF ALEXANDRIA, Plaintiff in 16-856, Plaintiff: Charles E Johnson , Jr, LEAD ATTORNEY, Alexandria City Atty's Office, Alexandria, LA.

For EAST VALLEY WATER DISTRICT, Plaintiff in 16-869, Plaintiff: LEE ALBERT, LEAD ATTORNEY, Glancy Prongay & Murray LLP, NEW YORK, NY; THOMAS J. KENNEDY, LEAD ATTORNEY, PRO HAC VICE, GLANCY PRONGAY & MURRAY LLP, NEW YORK, NY; GEORGE CARLOS AGUILAR, ROBBINS ARROYO LLP, SAN DIEGO, CA.

For CITY OF MATTOON, Plaintiff in 16-870, CITY OF EAST MOLINE, Plaintiff in 16-897, Plaintiffs: CARL VINCENT MALMSTROM, LEAD ATTORNEY, FREEMAN & HERZ LLP, CHICAGO, IL; JEFFREY L KODROFF, LEAD ATTORNEY, SPECTOR, ROSEMAN & KODROFF, PC, PHILADELPHIA, PA; [\*10] THOMAS HAMILTON BURT, LEAD ATTORNEY, FREEMAN & HERZ LLP, NEW YORK, NY.

For CITY OF TACOMA, Plaintiff in 16-871, Plaintiff: DEREK W LOESER, Daniel P Mensher, Raymond J Farrow, LEAD ATTORNEYS, KELLER ROHRBACK, SEATTLE, WA; LYNN L. SARKO, MARK A. GRIFFIN, LEAD ATTORNEYS, KELLER ROHRBACK LLP, SEATTLE, WA.

For SUEZ WATER MANAGEMENT & SERVICES INC., Plaintiff in 15-8697, SUEZ WATER ENVIORNMENTAL SERVICES INC., Plaintiff in 15-8697, SUEZ WATER NEW JERSEY INC., Plaintiff in 15-8697, Plaintiffs: CHRISTOPHER A. SEEGER, LEAD ATTORNEY, SEEGER WEISS LLP, RIDGEFIELD PARK, NJ; JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; SAMI HUSAYN RASHID, STEPHEN RANDALL, LEAD ATTORNEYS, QUINN EMANUEL URQUHART & SULLIVAN LLP, NEW YORK, NY; TERRIANNE BENEDETTO, LEAD ATTORNEY, PARVIN KRISTY, SEEGER WEISS LLP, PHILADELPHIA, PA; SCOTT A. GEORGE, SEEGER WEISS, LLP, NEWARK, NJ.

For SUEZ WATER NEW YORK INC., Plaintiff in 15-8697, SUEZ WATER PENNSYLVANIA INC., Plaintiff in 15-8697, SUEZ WATER PRINCETON MEADOWS, INC., Plaintiff in 15-8697, Plaintiffs: CHRISTOPHER A. SEEGER, LEAD ATTORNEY, SEEGER WEISS LLP, RIDGEFIELD PARK, NJ; JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE [\*11] CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; SAMI HUSAYN RASHID, STEPHEN RANDALL, LEAD ATTORNEYS, QUINN EMANUEL URQUHART & SULLIVAN LLP, NEW YORK, NY; TERRIANNE BENEDETTO, LEAD ATTORNEY, PARVIN KRISTY, SEEGER WEISS LLP, PHILADELPHIA, PA; SCOTT A. GEORGE, SEEGER WEISS, LLP, NEWARK, NJ.

For TOWN OF TONAWANDA, NEW YORK, Plaintiff in 15-8739, Plaintiff: BRUCE DANIEL GREENBERG, LEAD ATTORNEY, LITE DEPALMA GREENBERG, LLC, NEWARK, NJ.

For THE CITY OF CHARLOTTE, Plaintiff in 15-8755, Plaintiff: JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ.

For BEAVER WATER DISTRICT, Plaintiff in 15-8887, CITY OF SILOAM SPRINGS, ARKANSAS, Plaintiff in 15-8888, CITY OF SPRINGDALE, ARKANSAS, Plaintiff in 15-8889, Plaintiffs: LISA J. RODRIGUEZ, LEAD ATTORNEY, Schnader Harrison Segal & Lewis LLP, Woodland Falls Corporate Park, Cherry Hill, NJ; MICHAEL L. ROBERTS, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, ROBERTS LAW FIRM, LITTLE ROCK, AR.

For INTERSTATE CHEMICAL CO., INC., Plaintiff in 16-0009, Plaintiff: JOSEPH J. DEPALMA, LEAD ATTORNEY, LITE, DEPALMA, GREENBERG, LLC, NEWARK, NJ.

For OTTAWA COUNTY, OHIO, Plaintiff in 16-303, Plaintiff: BRUCE DANIEL [\*12] GREENBERG, LEAD ATTORNEY, LITE DEPALMA GREENBERG, LLC, NEWARK, NJ; MINDEE J. REUBEN, LEAD ATTORNEY, Lite DePalma Greenberg LLC, PHILADELPHIA, PA.

For CITY OF LORAIN, Plaintiff in 16-453, Plaintiff: BRENT WILLIAM JOHNSON, LEAD ATTORNEY, COHEN MILSTEIN SELLERS & TOLL PLLC, WASHINGTON, DC; MANUEL JUAN DOMINGUEZ, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, COHEN MILSTEIN SELLERS & TOLL, PALM BEACH GARDENS, FL; RICHARD A. KOFFMAN, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, COHEN MILLSTEIN SELLERS & TOLL PLLC, WASHINGTON, DC; THOMAS ROBERT THEADO, COUNSEL NOT ADMITTED TO USDC-NJ BAR, GARY NAEGELE & THEADO LLC, LORAIN, OH.

For CITY OF FRESNO, CALIFORNIA, Plaintiff in 16-527, Plaintiff: BRENDAN P. GLACKIN, ERIC B. FASTIFF, KATHERINE LUBIN, LEAD ATTORNEYS, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, SAN FRANCISCO, CA; JASON LOUIS LICHTMAN, LEAD ATTORNEY, ADAM HERBERT WEINTRAUB, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, NEW YORK, NY; DANIEL EDWARD SELTZ, LIEFF CABRASER HEIMANN & BERNSTEIN, NEW YORK, NY.

For CITY OF COLUMBIA, SOUTH CAROLINA, Plaintiff in 15-8429, Plaintiff: ELIZABETH ANNE FEGAN, JASON ALLEN ZWEIG, LEAD ATTORNEYS, HAGENS BERMAN SOBOL SHAPIRO LLP, CHICAGO, IL; JOSEPH J. [\*13] DEPALMA, LEAD ATTORNEY, LITE, DEPALMA, GREENBERG, LLC, NEWARK, NJ; MICHAEL D. CRITCHLEY, LEAD ATTORNEY, Critchley, Kinum & DeNoia, LLC, Roseland, NJ; STEVE W. BERMAN, LEAD ATTORNEY, HAGENS BERMAN SOBOL SHAPIRO LLP, SEATTLE, WA.

For BOROUGH OF PHOENIXVILLE, Plaintiff in 16-582, AQUA PENNSYLVANIA, INC., Plaintiff in 16-1331,, Plaintiffs: JOSHUA DAVID SNYDER, LEAD ATTORNEY, BONI, ZACK & SNYDER LLC, BALA CYNWYD, PA; MATTHEW ADAM GREEN, LEAD ATTORNEY, OBERMAYER REBMANN MAXWELL & HIPPELL LLP, CHERRY HILL, NJ.

For City of Rochester, Minnesota, Plaintiff in 16-733, Plaintiffs: BRIAN D. CLARK, HEIDI M. SILTON, W. JOSEPH BRUCKNER, LEAD ATTORNEYS, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; DANIEL E. GUSTAFSON, DANIEL C. HEDLUND, LEAD ATTORNEYS, GUSTAFSON GLUEK PLLC, MINNEAPOLIS, MN; JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ.

For HACKETTSTOWN MUNICIPAL UTILITIES AUTHORITY, Plaintiff in 16-1022, Plaintiff: MICHAEL D FITZGERALD, LEAD ATTORNEY, BRIELLE, NJ.

For BAY COUNTY FLORIDA, Plaintiff in 16-648, Plaintiff: JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; LINDA P. NUSSBAUM, LEAD ATTORNEY, [\*14] NUSSBAUM LAW GROUP PC, NEW YORK, NY.

For CITY OF PHENIX CITY, Plaintiff in 16-1116, Plaintiff: JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ.

For CITY OF CHARLOTTE, NORTH CAROLINA, Plaintiff: JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; SANFORD P. DUMAIN, LEAD ATTORNEY, MILBERG LLP, NEW YORK, NY.

For City of Everett, Plaintiff: LYNN L. SARKO, LEAD ATTORNEY, MARK A. GRIFFIN, KELLER ROHRBACK LLP, SEATTLE, WA.

For City of Everett, Plaintiff in 16-1198, Plaintiff: LYNN L. SARKO, LEAD ATTORNEY, KELLER ROHRBACK LLP, SEATTLE, WA.

For KEY LARGO WASTEWATER TREATMENT DISTRICT, On behalf of itself and all others similarly situated, Plaintiff: DAN DRACHER, LEAD ATTORNEY, ZWERLING SCHACHTER & ZWERLING LLP, SEATTLE, WA;

JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ.

For City of Milwaukee, Plaintiff in 16-1386, Plaintiff: BRIAN D. CLARK, HEIDI M. SILTON, LEAD ATTORNEYS, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; Rachel Kitze Collins, LEAD ATTORNEY, Lockridge Grindal Nauen PLLP, Minneapolis, MN; W. JOSEPH BRUCKNER, LEAD ATTORNEY, LOCKRIDGE GRINDAL [\*15] NAUEN PLLP, MINNEAPOLIS, MN.

For AQUA OHIO, INC., Plaintiff in 16-1331, Plaintiff: JOSHUA DAVID SNYDER, LEAD ATTORNEY, BONI, ZACK & SNYDER LLC, BALA CYNWYD, PA; MATTHEW ADAM GREEN, LEAD ATTORNEY, OBERMAYER REBMANN MAXWELL & HIPPELL LLP, CHERRY HILL, NJ.

For City of Scottsdale, City of Mesa, Plaintiffs: LYNN L. SARKO, LEAD ATTORNEY, MARK A. GRIFFIN, KELLER ROHRBACK LLP, SEATTLE, WA.

For CITY OF BLOOMINGTON, INDIANA, Plaintiff in 16-1503, Plaintiff: DAVID M. CIAKOWSKI, LEAD ATTORNEY, ZIMMERMAN REED PLLP, MINNEAPOLIS, MN. JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ.

For Lake Restoration, Inc., Plaintiff in 16-1581, Plaintiff: BRIAN D. CLARK, W. JOSEPH BRUCKNER, LEAD ATTORNEYS, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; Diana Young Morrissey, LEAD ATTORNEY, Wallen-Friedman & Floyd, P.A., Mpls, MN; HEIDI M. SILTON, LEAD ATTORNEY, LOCKEIDGE FRINDAL NAUEN PLLP, MINNEAPOLIS, MN; Rachel Kitze Collins, LEAD ATTORNEY, Lockridge Grindal Nauen PLLP, Minneapolis, MN.

For City of Scottsdale, Plaintiff in 16-1579, Plaintiff: DEREK W LOESER, LEAD ATTORNEY, KELLER ROHRBACK, SEATTLE, WA; Daniel P Mensher, LEAD ATTORNEY, KELLER ROHRBACK, SEATTLE, WA; [\*16] Lynn Lincoln Sarko, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback LLP, Seattle, WA; MARK A. GRIFFIN, LEAD ATTORNEY, KELLER ROHRBACK LLP, SEATTLE, WA; RON KILGARD, LEAD ATTORNEY, DALTON, GOTTO, SAMSON & KILGARD, PLC, PHOENIX, AZ; Raymond J Farrow, LEAD ATTORNEY, KELLER ROHRBACK, SEATTLE, WA.

For City of Mesa, Plaintiff in 16-1712, Plaintiff: DEREK W LOESER, LEAD ATTORNEY, KELLER ROHRBACK, SEATTLE, WA; Daniel P Mensher, LEAD ATTORNEY, KELLER ROHRBACK, SEATTLE, WA; MARK A. GRIFFIN, LEAD ATTORNEY, KELLER ROHRBACK LLP, SEATTLE, WA; RON KILGARD, LEAD ATTORNEY, DALTON, GOTTO, SAMSON & KILGARD, PLC, PHOENIX, AZ; Raymond J Farrow, LEAD ATTORNEY, KELLER ROHRBACK, SEATTLE, WA.

For CITY OF HOMESTEAD, FLORIDA, Plaintiff in 16-2873, Plaintiff RICHARD MARVIN KERGER, LEAD ATTORNEY, THE KERGER LAW FIRM LLC, TOLEDO, OH; WILLIAM L. MENTLIK, LEAD ATTORNEY, AARON SCOTT ECKENTHAL, LERNER, DAVID, LITTBENBERG, KRUMHOLZ & MENTLIK, LLP, WESTFIELD, NJ; ABIGAIL G. CORBETT, JAY B. SHAPIRO, MARIA A. FEHRETDINOV, SAMUEL OLDS PATMORE, STEARNS WEAVER MILLER, MIAMI, FL; ANDREW SZOT, MILLER LLC, CHICAGO, IL; KATHLEEN ELLEN BOYCHUCK, MILLER LAW LLC, CHICAGO, IL; MARVIN A. MILLER, CHICAGO, IL; MATTHEW ERIC VAN TINE, MILLER [\*17] LAW LLC, CHICAGO, IL; ROY HENRY WEPNER, LERNER, DAVID, LITTBENBERG, KRUMHOLZ & MENTLIK, LLP, WESTFIELD, NJ.

For Jefferson County, Alabama, Plaintiff in 16-3228, Plaintiff: Craig L Lowell, LEAD ATTORNEY, WIGGINS CHILDS PANTAZIS FISHER & GOLDFARB, Birmingham, AL; Dennis G Pantazis, LEAD ATTORNEY, WIGGINS CHILDS PANTAZIS FISHER & GOLDFARB LLC, Birmingham, AL.

For City of Moulton, Alabama, Plaintiff in 16-3379, Plaintiff: Craig L Lowell, LEAD ATTORNEY, WIGGINS CHILDS PANTAZIS FISHER & GOLDFARB, Birmingham, AL; Dennis G Pantazis, LEAD ATTORNEY, WIGGINS CHILDS PANTAZIS FISHER & GOLDFARB LLC, Birmingham, AL; Robert V Goldsmith, III, LEAD ATTORNEY, Caine Goldsmith, Moulton, AL.

For CITY OF CRESTON WATER WORKS DEPARTMENT, Plaintiff in 16-4037, Plaintiff: ALEC BLAINE FINLEY, JR., LEAD ATTORNEY, CUNEO GILBERT & LASUCA LLP, WASHINGTON, DC; MARVIN A. MILLER, CHICAGO, IL.

For Phoenix, City of Plaintiff in 16-4257, Plaintiff: DEREK W LOESER, LEAD ATTORNEY, KELLER ROHRBACK, SEATTLE, WA; Daniel P Mensher, Raymond J Farrow, LEAD ATTORNEYS, KELLER ROHRBACK, SEATTLE, WA; Lynn Lincoln Sarko, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback LLP, Seattle, WA; MARK A. GRIFFIN, LEAD ATTORNEY, KELLER ROHRBACK LLP, SEATTLE, [\*18] WA.

For City of Shreveport, Plaintiff in 16-4679, Plaintiff: CURTIS RAY JOSEPH, JR, LEAD ATTORNEY, WINCHELL & JOSEPH LLC, SHREVEPORT, LA; DANIEL R. LAPINSKI, LEAD ATTORNEY, WILENTZ, GOLDMAN & SPITZER, PC, WOODBRIDGE, NJ.

For STATE OF FLORIDA, OFFICE OF THE ATTORNEY GENERAL, DEPARTMENT OF LEGAL AFFAIRS, Plaintiff in 17-384, Plaintiff: GREGORY SCOTT SLEMP, LEAD ATTORNEY, FLORIDA ATTORNEY GENERAL'S OFFICE, TALLAHASSEE, FL; COLIN GRAHAM FRASER, FLORIDA OFFICE OF THE ATTORNEY GENERAL, TALLAHASSEE, FL; LEEISTRAIL, OFFICE OF THE ATTORNEY GENERAL OF FLORIDA, TALLAHASSEE, FL; ROBERT SCOTT PALMER COUNSEL NOT ADMITTED TO FLORIDA ATTORNEY GENERAL, TALLAHASSEE.

For ILLINOIS-AMERICAN WATER COMPANY, Plaintiff in 17-2752, Plaintiff: HAE SUNG NAM, JASON A. URIS, ROBERT N. KAPLAN, LEAD ATTORNEYS, KAPLAN FOX & KILSHEIMER LLP, NEW YORK, NY; IRMA ESPINO, SCOTT SUMMY, ZACHARY DAVID SANDMAN, LEAD ATTORNEYS, BARON & BUDD PC, DALLAS, TX; WILLIAM J. PINILIS, LEAD ATTORNEY, PINILIS HALPERN, MORRISTOWN, NJ.

For INDIANA-AMERICAN WATER COMPANY, Plaintiff in 17-2752, IOWA-AMERICAN WATER COMPANY, Plaintiff in 17-2752, MISSOURI-AMERICAN WATER COMPANY, Plaintiff in 17-2752, NEW JERSEY-AMERICAN WATER COMPANY, Plaintiff [\*19] in 17-2752, PENNSYLVANIA-AMERICAN WATER COMPANY, Plaintiff in 17-2752, VIRGINIA-AMERICAN WATER COMPANY, Plaintiff in 17-2752, Plaintiffs: HAE SUNG NAM, JASON A. URIS, ROBERT N. KAPLAN, LEAD ATTORNEYS, KAPLAN FOX & KILSHEIMER LLP, NEW YORK, NY; IRMA ESPINO, SCOTT SUMMY, ZACHARY DAVID SANDMAN, LEAD ATTORNEYS, BARON & BUDD PC, DALLAS, TX.

For City of Richmond, Plaintiff in 17-4656, Plaintiff: Constantinos George Panagopoulos, LEAD ATTORNEY, Ballard Spahr LLP (DC), Washington, DC; EDWARD D. ROGERS, JASON ALLEN LECKERMAN, LEAD ATTORNEYS, BALLARD SPAHR LLP, PHILADELPHIA, PA; JAY N. FASTOW, LEAD ATTORNEY, JUSTIN WARD LAMSON, BALLARD SPAHR LLP, NEW YORK, NY; THOMAS JOSEPH GALLAGHER, BALLARD SPAHR LLP, PHILADELPHIA, PA.

For MAYOR AND CITY COUNCIL OF BALTIMORE, Plaintiff in 17-4659, Plaintiff: David E Ralph Baltimore City Department of Law 100 N Holliday St Baltimore, MD 21202 4108071014 Fax: 4105767203 LEAD ATTORNEY EDWARD D. ROGERS, JASON ALLEN LECKERMAN, LEAD ATTORNEYS, BALLARD SPAHR LLP, PHILADELPHIA, PA; JAY N. FASTOW, LEAD ATTORNEY, JUSTIN WARD LAMSON, BALLARD SPAHR LLP, NEW YORK, NY; Suzanne Sangree, LEAD ATTORNEY, City of Baltimore Law Department, Senior Public Safety Counsel, Baltimore, [\*20] MD; TIMOTHY FRANCIS MCCORMACK, LEAD ATTORNEY, BALLARD SPAHR LLP, BALTIMORE, MD; THOMAS JOSEPH GALLAGHER, BALLARD SPAHR LLP, PHILADELPHIA, PA.

For CENTRAL ARKANSAS WATER, plaintiff in 17-5974, CITY OF CHARLOTTE, NORTH CAROLINA, plaintiff in 17-5974, CITY AND COUNTY OF DENVER, COLORADO, plaintiff in 17-5974, FLAMBEAU RIVER PAPERS, LLC, plaintiff in 17-5974, CITY OF GREENSBORO, NORTH CAROLINA, plaintiff in 17-5974, MOBILE AREA WATER AND SEWER SYSTEM, plaintiff in 17-5974, CITY OF SACRAMENTO, CALIFORNIA, plaintiff in 17-5974, SUEZ WATER ENVIRONMENTAL SERVICES INC., plaintiff in 17-5974, SUEZ WATER NEW JERSEY INC., plaintiff in 17-5974, SUEZ WATER PRINCETON MEADOWS INC., plaintiff in 17-5974, SUEZ WATER NEW YORK INC., plaintiff in 17-5974, SUEZ WAER PENNSYLVANIA INC., plaintiff in 17-5974, CITY OF GREENSBORO, NORTH CAROLINA, Plaintiff in 17-6674, Plaintiffs: JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ.

For CITY OF ROCHESTER, MINNESOTA, plaintiff in 17-5974, Plaintiff: JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; W. JOSEPH BRUCKNER, LEAD ATTORNEY, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, [\*21] MN.

For CITY OF TEXARKANA, ARKANSAS, plaintiff in 17-5974, CITY OF TEXARKANA, TEXAS D/B/A TEXARKANA WATER UTILITIES, plaintiff in 17-5974, Plaintiffs: ETHAN J. BARLIEB, LEAD ATTORNEY, KESSLER TOPAZ MELTZER & CHECK, RADNOR, PA; JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ.

For City of Stockton, Plaintiff in 17-6956, Plaintiff: FRANCIS ONOFREI SCARPULLA, LEAD ATTORNEY, LAW OFFICES OF FRANCIS O. SCARPULLA, SAN FRANCISCO, CA; PATRICK BRADFORD CLAYTON, LEAD ATTORNEY, THE LAW OFFICES OF FRANCIS O. SCARPULLA, SAN FRANCISCO, CA; WILLIAM H. PARISH, LEAD ATTORNEY, PARISH & SMALL, A PROFESSIONAL LAW CORPORATION, STOCKTON, CA.

For Washington Suburban Sanitary Commission, Plaintiff in 17-11416, Plaintiff: William Alden McDaniel, Jr, LEAD ATTORNEY, Ballard Spahr, LLP, Baltimore, MD; JUSTIN WARD LAMSON, BALLARD SPAHR LLP, NEW YORK, NY.

For Fairfax County Water Authority, Plaintiff in 18-8163, Plaintiff: Constantinos George Panagopoulos, LEAD ATTORNEY, Ballard Spahr LLP (DC), Washington, DC.

For Appomattox River Water Authority, Plaintiff in 18-8159, Plaintiff: CHRISTOPHER DONALD POMEROY, FRANK PAUL CALAMITA, III, PAUL THOMAS NYFFELER, LEAD ATTORNEYS, [\*22] AQUALAW PLC, RICHMOND, VA; JUSTIN WARD LAMSON, BALLARD SPAHR LLP, NEW YORK, NY.

For Commissioners of Public Works of the City of Charleston, Grand Strand Water & Sewer Authority, Plaintiffs: CHRISTOPHER DONALD POMEROY, FRANK PAUL CALAMITA, III, PAUL THOMAS NYFFELER, LEAD ATTORNEYS, AQUALAW PLC, RICHMOND, VA.

For City of Norfolk, County of Chesterfield, South Central Wastewater Authority, City of Newport News, County Of Henrico, Rivanna Water & Sewer Authority, City of Lynchburg, City of Springfield, Plaintiffs: CHRISTOPHER DONALD POMEROY, FRANK PAUL CALAMITA, III, PAUL THOMAS NYFFELER, LEAD ATTORNEYS, AQUALAW PLC, RICHMOND, VA; JUSTIN WARD LAMSON, BALLARD SPAHR LLP, NEW YORK, NY.

For CITY OF AKRON, Plaintiff in 18-9781, Plaintiff: Brian D. Bremer, LEAD ATTORNEY, City of Akron - Civil Division, Department of Law, Akron, OH; HAE SUNG NAM, JASON A. URIS, ROBERT N. KAPLAN, LEAD ATTORNEYS, KAPLAN FOX & KILSHEIMER LLP, NEW YORK, NY.

For Commission of Public Works of the City of Greenville SC, Plaintiff in 18-11027, Plaintiff: FRANK PAUL CALAMITA, III, LEAD ATTORNEY, AQUALAW PLC, RICHMOND, VA.

City of Spartanburg, Plaintiff, Pro se.

City of Winston-Salem, Plaintiff, Pro se.

South Carolina Public [\*23] Service Authority, Plaintiff, Pro se.

The City of Greenville, Plaintiff, Pro se.

For FRANK A REICHL, Defendant: MICHAEL B. HIMMEL, MICHAEL ANDREW KAPLAN, LEAD ATTORNEYS, LOWENSTEIN SANDLER LLP, ROSELAND, NJ.

For GENERAL CHEMICAL CORPORATION, GENERAL CHEMICAL PERFORMANCE PRODUCTS, LLC, GENTEK, INC., CHEMTRADE LOGISTICS, INC, Defendant in 15-7827, CHEMTRADE LOGISTICS INCOME FUND, CHEMTRADE LOGISTICS INC., CHEMTRADE CHEMICALS CORPORATION, CHEMTRADE CHEMICALS US, LLC, CHEMTRADE US, LLC, CHEMTRADE SOLUTIONS LLC, Defendants: RICHARD H. EPSTEIN, LEAD ATTORNEY, SILLS CUMMIS & GROSS PC, NEWARK, NJ; LAURA ELLEN SEDLAK, SILLS CUMMIS & GROSS P.C., NEWARK, NJ.

For KEMIRA CHEMICALS, INC., Defendant: DANIELLE CHATTIN, EMILY SHOEMAKER NEWTON, JEFFREY S. CASHDAN, LEAD ATTORNEYS, KING & SPALDING LLP, ATLANTA, GA; LOHR A. BECK-KEMP, MELANIE C. PAPADOPOULOS, KING & SPALDING, ATLANTA, GA.

For C&S CHEMICALS, INC, C&S CHEMICALS, INC, Defendants: JOHN DURAND DALBEY, LEAD ATTORNEY, CHILIVIS COCHRAN LARKINS & BEVER LLP, ATLANTA, GA.

For USALCO, LLC., Defendant: AARON LOUIS CASAGRANDE, AARON ANDREW NICHOLS, LEAD ATTORNEY, EDWARD MARK BUXBAUM WHITEFORD TAYLOR & PRESTON LLP, BALTIMORE, MD; WILLIAM FITTS RYAN, JR., LEAD [\*24] ATTORNEY, WHITEFORD TAYLOR PRESTON LLP, BALTIMORE, MD.

For SOUTHERN IONICS, INC., Defendant: JOHN S. MAIRO, ROBERT FERRI, LEAD ATTORNEYS, KELLY D. CURTIN, PORZIO BROMBERG & NEWMAN PC, MORRISTOWN, NJ; WILLIAM J. HUGHES, JR., Porzio, Bromberg & Newman, P.C., Morristown, NJ.

For VINCENT J. OPALEWSKI, Defendant: JAMES J. DIGIULIO, LEAD ATTORNEY, O'TOOLE SCRIVO FERNANDEZ WEINER VAN LIEU, LLC, CEDAR GROVE, NJ; ROBERT C. SCRIVO, LEAD ATTORNEY, O'Toole Scrivo Fernandez Weiner Van Lieu, Cedar Grove, NJ; ANDREW GIMIGLIANO, O'Toole Scrivo Fernandez Weiner Van Lieu, LLC, Cedar Grove, NJ; MICHAEL B. DEVINS, MCELROY, DEUTSCH, MULVANEY AND CARPENTER, LLP, MORRISTOWN, NJ; WALTER R. KRZASTEK, JR., MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP, MORRISTOWN, NJ.

For GENERAL CHEMICAL, LLC., Defendant: RICHARD H. EPSTEIN, LEAD ATTORNEY, SILLS CUMMIS & GROSS PC, NEWARK, NJ; LAURA ELLEN SEDLAK, SILLS CUMMIS & GROSS P.C., NEWARK, NJ.

For ALEX AVRAAMIDES, Defendant: DENNIS T. SMITH, LEAD ATTORNEY, PASHMAN STEIN, PC, HACKENSACK, NJ.

For AMITA GUPTA, Defendant: MICHAEL SVETKEY, LEAD ATTORNEY, FELDBERG ALLEN & OVERY LLP, NEW YORK, NY; ALEXANDER KAIM BUSSEY, ALLEN & OVERY LLP, NEW YORK, NY.

For Milton Sundbeck, Defendant: [\*25] JOHN S. MAIRO, LEAD ATTORNEY, PORZIO BROMBERG & NEWMAN PC, MORRISTOWN, NJ.

For Delta Chemical Corporation, Defendant: CHARLES OWEN MONK , II, LEAD ATTORNEY, SAUL EWING LLP, BALTIMORE, MD; DOUGLAS ALAN SAMPSON, GEOFFREY MAURICE GAMBLE, SAUL EWING ARNSTEIN & LEHR LLP, BALTIMORE, MD; KAYLEIGH TOTH KEILTY, SAUL EWING SRNSTEIN & LEHR, BALTIMORE, MD,

For RGM Chemical, LLC, RGM OF GEORGIA, LTD, C&S CHEMICALS (OF GEORGIA) INC., Defendant: JOHN DURAND DALBEY, LEAD ATTORNEY, CHILIVIS COCHRAN LARKINS & BEVER LLP, ATLANTA, GA.

For AMERICAN SECURITIES LLC, MATTHEW LEBARON, SCOTT WOLFF, Defendants: AARON RUBINSTEIN, C. SCOTT LENT, PAUL Q. ANDREWS, LEAD ATTORNEYS, ARNOLD & PORTER KAYE SCHOLER, NEW YORK, NY.

For BRENNTAG MID-SOUTH, INC., BRENNTAG SOUTHEAST, INC., BRENNTAG NORTH AMERICA, INC., Defendants: DAVID G. MURPHY, LEAD ATTORNEY, REED SMITH LLP, PRINCETON, NJ; CONOR MICHAEL SHAFFER, WILLIAM JENNINGS SHERIDAN, REED SMITH LLP, PITTSBURGH, PA.

US Department of Justice, Intervenor: FRANCIS ADAM CAVANAGH, OFFICE OF THE U.S. ATTORNEY, NEWARK, NJ; MARY ANNE FLORENTINA CARNIVAL, DEPARTMENT OF JUSTICE, NEW YORK, NY.

For Lawrence McShane, Intervenor: GLEN D. SAVITS, LEAD ATTORNEY, GREEN SAVITS, LLC, Florham [\*26] Park, NJ.

**Judges:** JOSE L. LINARES, Chief United States District Judge.

**Opinion by:** JOSE L. LINARES

## **Opinion**

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**LINARES**, Chief District Judge.

This matter comes before the Court by way of several motions to dismiss by various Defendants in differing underlying actions. These motions are as follows:

- Defendant USALCO, LLC ("USALCO") moves to dismiss the City of Akron ("Akron")'s Complaint filed in Civil Action Number 18-9781 pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). (ECF No. 1100).<sup>1</sup>
- Defendants Brenntag Mid-South, Inc., Brenntag Southeast, Inc., and Brenntag North America (collectively "Brenntag") move to dismiss the Commissioners of Public Works of the City of Charleston (*d.b.a* Charleston Water System) and Grand Strand Water & Sewer Authority ("GSWSA") (collectively "the Charleston Plaintiffs")'s Complaint filed in Civil Action Number 18-3440 pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). (ECF No. 1116).
- Brenntag moves to dismiss the Commission of Public Works of the City of Greenville (*d.b.a*. Greenville Water) ("Greenville")'s Complaint filed in Civil Action Number 18-11027 pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). (ECF No. 1117).
- USALCO moves to dismiss the Charleston Plaintiffs, Greenville, and the Commission of Public Works of the City of Spartanburg, the City of Winston-Salem, and the South Carolina [\*27] Public Service authority (*d.b.a*. Santee Cooper) (collectively "the Spartanburg Plaintiffs" and all together "the South Carolina Plaintiffs")'s Complaints filed in Civil Action Numbers 18-3440, 18-11027, and 18-9231 pursuant to [Federal Rule of Civil Procedure 12\(b\)\(2\)](#). (ECF No. 1143).
- Delta Chemical Corporation and John D. Besson (the "Delta Defendants") move to dismiss the South Carolina Plaintiffs' Complaints filed in Civil Action Numbers 18-3440, 18-11027, and 18-9231 pursuant to [Federal Rules of Civil Procedure 12\(b\)\(2\)](#) and [12\(b\)\(6\)](#). (ECF Nos. 1144-46).

All Plaintiffs named above have submitted oppositions (ECF Nos. 1101, 1118, 1147-48), to which all Defendants named above have replied. (ECF Nos. 1104, 1120, 1149, 1152). The Court decides this matter without oral argument pursuant to [Rule 78 of the Federal Rules of Civil Procedure](#). Because of the similarity of the facts in these complaints and the similarity of the arguments set forth in the motions and oppositions, the Court will consolidate the analysis where feasible. For the reasons set forth below, the Court denies Defendants' motions to dismiss.

## I. BACKGROUND<sup>2</sup>

The Court has set forth, at length, the factual and procedural background as it pertains to this Multidistrict Litigation in its Opinion dated July 20, 2017. (ECF No. 405 at 1-24). Accordingly, the [\*28] Court need not restate, and hereby incorporates, that factual and procedural background herein. Thus, the Court will set forth only the relevant factual and procedural background as it pertains to these specific Defendants and their motions.

Plaintiffs brought these actions seeking to recover monetary damages and injunctive relief against Defendants for conspiring to suppress and eliminate competition in the sale and marketing of aluminum sulfate ("Alum"), pursuant

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<sup>1</sup> The ECF numbers cited to herein refer to the main consolidated docket: 16-md-2687.

<sup>2</sup> For purposes of brevity, the Court will cite only to the Charleston Plaintiffs' Amended Complaint whenever the Akron, Greenville, and/or Spartanburg Complaints allege similar facts. Hence, this background is generally derived from Charleston Plaintiffs' Amended Complaint ("FAC"), which was docketed on the consolidated docket, 16-md-2687. (ECF No. 839). The Court must accept the allegations therein as true at this stage of the proceedings. See [Alston V. Countrywide Fin. Corp., 585 F.3d 753, 758 \(3d Cir. 2009\)](#).

to the *Sherman Antitrust Act*, 15 U.S.C. § 1, et seq., the *Clayton Antitrust Act*, 15 U.S.C. §§ 12-17 & 29 U.S.C. §§ 52-53, and the laws of the State of South Carolina and North Carolina.<sup>3</sup> (FAC ¶ 1; Civ. No. 18-9231, ECF No. 1 ("Spartanburg Compl.") III). Plaintiffs contend that Defendants agreed to "rig bids and allocate customers for, and to fix, stabilize, inflate, and maintain the price of Alum sold to companies and municipal authorities in the United States from January 1, 1997 through at least February 2011 . . . ." (FAC ¶ 1). Specifically, Plaintiffs allege that Defendants met to "discuss their respective Alum businesses," agreed to "stay away" from each other's historical customers," submitted "intentionally high," or "throw away" bids, and withdrew winning bids "in [\*29] cases where a bid was inadvertently submitted." (FAC ¶ 14).

Defendant John D. Besson is presently a resident of Miami Beach, Florida. (FAC ¶ 21). He was the president of Delta Chemical and "oversaw its sale and marketing of water treatment chemicals, including Alum," in addition to "effectuating attempts" to sell or merge Delta Chemical with another company. (FAC ¶ 21). Plaintiffs allege that Defendant John Besson "joined, participated in, and benefitted from the unlawful [Alum] conspiracy." (FAC ¶ 21). After Delta Chemical combined with USALCO in November 2011, Defendant John Besson became a USALCO consultant. (FAC ¶ 21).

Defendant Delta Chemical is a Maryland corporation with a principal place of business in Baltimore, Maryland. (FAC ¶ 49). Delta Chemical sold Alum throughout the United States. (FAC ¶ 49). Plaintiffs allege that "[f]rom the beginning of the Conspiracy Period to the date USALCO combined with Delta Chemical on November 17, 2011, Delta Chemical was an active participant in, and benefitted from, the conspiracy." (FAC ¶ 49). Moreover, "[a]s a result of Delta Chemical's combination with USALCO, Delta Chemical ceased to be a potential competitor in the sale and marketing [\*30] of Alum." (FAC ¶ 49). Plaintiffs contend that the combination "was made in furtherance of and intended to reinforce, the Defendants' unlawful conspiracy . . . by increasing USALCO's market power and eliminating the possibility of competition emerging . . . ." (FAC ¶ 50). Plaintiffs also argue that Defendant John Besson "profited handsomely" from the combination of the two firms. (FAC ¶ 51).

Defendant USALCO is a Maryland corporation with a principal place of business in Baltimore, Maryland. (FAC ¶ 48). USALCO manufactures and distributes Alum throughout North America. (FAC ¶ 48). After the combination of Delta Chemical and USALCO, USALCO "assumed Delta Chemical's rights and obligations under Delta Chemical's then-operative Alum supply contracts." (FAC ¶ 49). Thus, USALCO became the successor in interest to Delta Chemical's liabilities. (FAC 1149).

Brenntag Mid-South and Brenntag Southeast are wholly owned subsidiaries of Brenntag North America, which are Kentucky and North Carolina corporations with principal places of business in Kentucky and North Carolina, respectively. (FAC ¶¶ 54, 56). Brenntag North America is a Delaware corporation with a principal place of business in Reading, [\*31] Pennsylvania. (FAC ¶ 55). Brenntag distributes Alum throughout the United States and is alleged to have participated in the conspiracy. (FAC ¶ 55).

Akron alleges that USALCO was part of a conspiracy to fix Alum prices, allocate consumers, and reduce competition amongst the members of the conspiracy. (Akron Compl. 115). In order to further and effectuate the conspiracy, Akron contends that USALCO met and communicated in secret to exchange confidential, competitive information regarding their business with other members of the conspiracy. (Akron Compl. ¶ 5). Those meetings and conversations resulted in agreements to: (1) "stay away" from each firm's historical customers, (2) track the bid and pricing histories of the co-conspirators for the purposes of rigging bids, (3) actually submit those rigged—or "throw away"—bids to intentionally lose the bid for a coconspirator's customer, (4) set price floors for the price of Alum, (5) compensate the losing firm where one of the other firms could not withdraw a bid that it was not supposed to win, (6) teach new employees how to figure out how to comply with the bid rigging arrangement, and (7) sell Alum to customers at non competitive rates. (Akron [\*32] Compl. ¶¶ 5-6, 56-74).

The South Carolina Plaintiffs assert similar allegations against Defendants. For example, they point to an example from March 2005, where USALCO entered into a three-year contract with Grand Rapids, Michigan at a price of

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<sup>3</sup> Akron does not bring state law claims. (Civ. No. 18-9781, ECF No. 1 ("Akron Compl.")).

\$149.52 per ton. (FAC ¶ 185(a)). The other two bidders were General Chemical and C&S Chemicals which submitted bids that were 25% and 55% higher than USALCO's, indicating a practice of "throw-away" bidding. (FAC ¶ 185(a)). On top of these anomalous bidding practices, a study of forty-seven United States drinking water utilities indicated an average 53% price increase over the preceding year from 2008 to 2009. (FAC ¶ 99). These stark price jumps can be seen in Brenntag's winning bid for a contract with GWSA in 2009. (FAC ¶ 244). Brenntag's bid—at \$359.75 per ton of Alum—constituted a 94% increase in price from 2007. (FAC ¶ 244). Plaintiffs also contend that Defendants' bidding history with respect to Alum contracts was not "freight-logical," because Defendants did not bid (or submitted higher bids) on customers that were close to their production plants, which would have reduced shipping costs. (FAC ¶ 181-84).

"As a result of the conspiracy among [\*33] Defendants," the Plaintiffs were allegedly "forced to pay supra-competitive prices for Alum." (FAC ¶ 264). The Charleston Plaintiffs, for example, saw their cost for Alum quadruple over a decade rising from \$95.34 per ton in 1998 to \$319.10 per ton in 2011. (FAC ¶ 264). Plaintiffs argue that Defendants "used non-public means of communication . . . to eliminate competition by, *inter cilia*, fixing prices, rigging bids, and allocating customers for Alum in the United States." (FAC ¶ 271). Moreover, Defendants allegedly "took additional affirmative acts of concealment, including ensuring that there were few written communications regarding their conspiracy and agreement;"<sup>4</sup> (FAC ¶ 282).

Accordingly, Plaintiffs assert the following contested claims: Conspiracy in Restraint of Trade in violation of the Sherman Act against all Defendants; Arrangements, Contracts, Agreements, Trusts and Combinations Adversely Affecting Competition or Price in violation of [South Carolina Code Ann. § 39-3-10](#) against all Defendants; Common Law Fraud against Brenntag; Breach of Contract against Brenntag (by GWSA only); and Restitution, Disgorgement, and Unjust Enrichment against the Delta Defendants.<sup>5</sup>

Defendants now seek to dismiss Plaintiffs' complaints [\*34] for lack of personal jurisdiction pursuant to [Federal Rule of Civil Procedure 12\(b\)\(2\)](#) and for failure to state a claim upon which relief can be granted under [Federal Rules of Civil Procedure 12\(b\)\(6\)](#).

## **II. LEGAL STANDARD**

### **A. 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction**

In a multi-district litigation such as this, the "transferee court can exercise personal jurisdiction to the same extent that the transferor court could." [In re Auto. Refinishing Paint Antitrust Litig.](#), 358 F.3d 288, 297 n.11 (3d Cir. 2004). In this case, that would be the District Court for the District of South Carolina.

Once a defendant files a motion to dismiss for lack of personal jurisdiction pursuant to [Federal Rule of Civil Procedure 12\(b\)\(2\)](#), the burden shifts to the plaintiff to prove that jurisdiction exists. [In re Celotex Corp.](#), 124 F.3d 619, 628 (4th Cir. 1997). Where, as here, there is no evidentiary hearing, a plaintiff need only establish a prima facie case of personal jurisdiction and the court must construe the facts and draw inferences in favor of the plaintiff. *Id.*

A federal court sitting in South Carolina has jurisdiction over parties to the extent provided under South Carolina state law. [Gracious Living Corp. v. Colucci & Gallaher, PC](#), 216 F. Supp. 3d 662, 667 (D.S.C. 2016). "South Carolina's long-arm statute extends to the outer limits allowed by the [Due Process Clause](#)." *Id.* A district court sitting in South Carolina may therefore exercise personal jurisdiction over a non-resident defendant if the defendant has "certain minimum contacts [with [\*35] South Carolina] such that the suit does not offend 'traditional notions of fair

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<sup>4</sup> This is the only count Akron asserts in its Complaint.

<sup>5</sup> This claim is not being brought by the Spartanburg Plaintiffs.

play and substantial justice.'" *Id.* (quoting [Int'l Shoe Co. v. Washington](#), 326 U.S. 310, 320, 66 S. Ct. 154, 90 L. Ed. 95 (1945)).

A court's personal jurisdiction over a non-resident defendant is either specific or general. [ESAB Grp. v. Centricut, Inc.](#) 126 F.3d 617, 623-24 (4th Cir. 1997). General jurisdiction results from systematic and continuous contact between a non-resident defendant and the forum state. [Helicopteros Nacionales de Colombia, S.A. v. Hall](#), 466 U.S. 408, 414, 104 S. Ct. 1868, 80 L. Ed. 2d 404 & nn. 8-9 (1984).<sup>6</sup> Specific jurisdiction over a defendant exists where the suit is related to the defendants conduct in the forum. *Id.*

The Fourth Circuit has established a three-part test for specific jurisdiction: first, the defendant must have purposefully availed itself of the privilege of conducting activities within the forum; second, the plaintiff's claims must arise out of those activities related to the forum; and third, the exercise of jurisdiction must be "constitutionally reasonable." [Christian Sci. Bd. of Dirs. of First Church of Christ, Scientist v. Nolan](#), 259 F.3d 209, 216 (4th Cir. 2001).

#### **B. Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim**

To withstand a motion to dismiss for failure to state a claim, a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" [Ashcroft v. Iqbal](#), 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to [\*36] draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id. at 678* (citing [Twombly](#), 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting [Twombly](#), 550 U.S. at 556).

To determine the sufficiency of a complaint under Twombly and Iqbal in the Third Circuit, the Court must take three steps. "First, it must 'tak[e] note of the elements [the] plaintiff must plead to state a claim.' Second, it should identify allegations that, 'because they are no more than conclusions, are not entitled to the assumption of truth.' Finally, '[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." [Connelly v. Lane Constr. Coip.](#), 809 F.3d 780, 787 (3d Cir. 2016) (quoting [Iqbal](#), 556 U.S. at 675, 679) (citations omitted). "In deciding a Rule 12(b)(6) motion, a court must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." [Mayer v. Belichick](#), 605 F.3d 223, 230 (3d Cir. 2010). The Court can review the record of prior actions between the parties and take judicial notice of the same in considering a motion to [\*37] dismiss. See [Toscano v. Conn. Gen. Life Ins. Co.](#), 288 F. App'x 36, 38 (3d Cir. 2008).

### **III. ANALYSIS**

#### **A. Personal Jurisdiction**

USALCO and the Delta Defendants move to dismiss the South Carolina Plaintiffs' complaints for lack of personal jurisdiction pursuant to Rule 12(b)(2).

##### *i. USALCO*

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<sup>6</sup> Plaintiffs are not asserting general jurisdiction, so the Court will not go into detail regarding that legal standard.

USALCO argues that this Court lacks personal jurisdiction over it because the South Carolina Plaintiffs' complaints "are devoid of any . . . factual allegations sufficient to establish personal jurisdiction" and instead "make two sweeping, generalized, bare and conclusory allegations that they fail to back up with supporting facts." (ECF No. 1143-2 at 7-8). USALCO contends that the South Carolina Plaintiffs have failed to establish jurisdiction by lumping all Defendants together in their allegations, and that the allegations specific to USALCO are vague and conclusory. (ECF No. 1143-2 at 8). The South Carolina Plaintiffs respond that USALCO is subject to personal jurisdiction on three grounds: (1) under the national contacts doctrine applicable in federal antitrust actions, (2) as a co-conspirator in the Alum conspiracy, and (3) under the doctrine of pendant personal jurisdiction for the state law claims. (ECF No. 1147 at 5-6).

The South Carolina Plaintiffs are correct that personal jurisdiction [\*38] in federal antitrust lawsuits is assessed under the national contacts doctrine, which bases personal jurisdiction on a defendant's aggregate contacts with the United States where the relevant statute authorizes nationwide service of process. See e.g., [ESAB Grp., 126 F.3d at 626 27](#) (applying the national contacts doctrine to a RICO suit, where Congress has authorized nationwide service of process); see also [In re Auto. Refinishing Paint Antitrust Litig., 358 F.3d at 299](#) ("We hold that personal jurisdiction in federal antitrust litigation is assessed on the basis of a defendant's aggregate contacts with the United States as a whole."). This means that personal jurisdiction must comply with the due process requirements of the [Fifth Amendment](#), which requires only that the South Carolina Plaintiffs show that USALCO had minimum contacts with the United States as a whole. [ESAB Grp., 126 F.3d at 626-27](#). The South Carolina Plaintiffs allege that USALCO is a Maryland corporation, with a principal place of business in Maryland, that manufactured, distributed and sold Alum throughout the United States from January 1, 1997 through at least February 2011. (FAC ¶ 48). Plaintiffs also allege that USALCO has manufacturing facilities in Indiana, Louisiana, Maryland, and Ohio. (FAC ¶¶ 1, 48). Such contacts are sufficient to establish [\*39] personal jurisdiction.<sup>7</sup> See [In re Celotex Corp., 124 F.3d at 630](#) (holding that there is "no doubt" that a Delaware corporation with a principal place of business in New York has sufficient contacts with the United States so as not to offend the [Due Process Clause of the Fifth Amendment](#)). With respect to the state law antitrust claims, this Court has pendant jurisdiction over those claims, as those claims arise out of the "same nucleus of operative fact." [ESAB Grp., 126 F.3d at 628](#).<sup>8</sup>

## *ii. The Delta Defendants*

The Delta Defendants make the same arguments regarding lack of personal jurisdiction as USALCO, and the South Carolina Plaintiffs respond in the same manner with one exception: individual defendant John Besson. (ECF Nos. 1144-1 at 17-20; 1145-1 at 17-20; 1146-1 at 17-20; 1148 at 16-22). The South Carolina Plaintiffs allege that Delta Chemical is a Maryland Corporation, with a principal place of business in Maryland and that throughout the injury period, Delta Chemical sold Alum across the United States. (FAC ¶ 49). For the same reasons that these allegations established personal jurisdiction over USALCO, they establish personal jurisdiction over Delta Chemical for both the federal and state antitrust claims.

As to John Besson, the Delta Defendants argue that he is not subject to personal [\*40] jurisdiction as an officer of Delta Chemical. (ECF No. 1144-1 at 19). Personal jurisdiction over an officer of a defendant corporation is established where there is a "showing of direct, personal involvement by the corporate officer in some decision or action which is causally related to the plaintiff's injury." [Magic Toyota, Inc. v. Se. Toyota Distrib., Inc., 784 F. Supp. 306, 315 \(D.S.C. 1992\)](#) (quoting [Escude Cruz v. Ortho Pharm. Corp., 619 F.2d 902, 907 \(1st Cir. 1980\)](#)). This Court

<sup>7</sup> The Court need not analyze service of process and venue, as USALCO waived service of process, (ECF No. 804), and it does not challenge venue.

<sup>8</sup> USALCO also moves in the alternative for a more definite statement concerning the pleading of certain facts related to the Court's personal jurisdiction analysis. (ECF No. 1143-2 at 12-14). As the Court finds that the South Carolina Plaintiffs have established personal jurisdiction without relying on those facts, USALCO's motion for a more definite statement is denied as moot.

has already found that John Besson participated in the conspiracy, (ECF No. 1030 at 10, 12), and as such there has been a showing of Besson's direct and personal involvement that was causally related to the plaintiffs injury.

## B. Failure to State a Claim

For the following reasons, Defendants' motions to dismiss Plaintiffs' complaints are denied.

### i. *Conspiracy in Restraint of Trade in Violation of the Sherman Act*

To survive a motion to dismiss, Plaintiffs must prove two essential elements for a claim of conspiracy in restraint of trade in violation of the Sherman Act. Plaintiffs must show that (1) a contract, combination, or conspiracy existed and that (2) such contract, combination, or conspiracy "imposed an unreasonable restraint on trade." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 315 (3d Cir. 2010) (quoting *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 218 (3d Cir. 2008)).

Preliminarily, this Court has already found that, at least at the pleading stage, a conspiracy existed. (ECF [\*41] No. 405 at 45-65). In addition to the specific examples of alleged bid-rigging and collusive behavior detailed above, Plaintiffs allege that Defendants conspired to suppress and eliminate competition in the sale and marketing of Alum. (FAC ¶ 1). Specifically, Plaintiffs allege that Defendants agreed to "rig bids and allocate customers for, and to fix, stabilize, inflate, and maintain the price of Alum sold to companies and municipal authorities in the United States from January 1, 1997 through at least February 2011 . . ." (FAC ¶ 1). Furthermore, Plaintiffs allege Defendants met to "discuss their respective Alum businesses," agreed to 'stay away' from each other's historical customers," submitted "intentionally high," or "throw away" bids, and withdrew winning bids "in cases where a bid was inadvertently submitted." (FAC ¶ 4). These allegations are sufficient to support a *prima facie* claim that Defendants engaged in a conspiracy which imposed an unreasonable restraint on the trade of Alum in violation of the Sherman Act. Hence, the claim must survive Defendants' motions to dismiss.

As to USALCO's argument that they have been improperly lumped together with other Defendants in the [\*42] Akron Complaint, that argument fails. "If 'inferences can be fairly drawn from the behavior of the alleged conspirators' which indicate that they participated in the conspiracy, the Court should construe the Complaint 'liberally in the plaintiffs' favor' at the motion to dismiss stage and allow the case to proceed. *In re Elec. Carbon Prods. Antitrust Litig.*, 333 F. Supp. 2d 303, 312 (D.N.J. 2004) (quoting *Jung v. Assoc. of Am. Med. Colleges*, 300 F. Supp. 2d 119, 157-58) (D.D.C. 2004)). Given the Court's preliminary findings about the existence of a conspiracy, (ECF No. 405 at 45-65), Akron's Complaint sufficiently ties USALCO to that wide-ranging conspiracy in that it alleges that USALCO manufactures and sells Alum in a market that is conducive to collusion and that has seen guilty pleas from other participants in that same market who are involved in this litigation, (Akron Compl. ¶¶ 3-4, 8-9, 27, 44-55).

Brenntag also makes a statute of limitations argument as well as one it claims is unique to its position as a distributor of Alum rather than a manufacturer. First, it argues that the Charleston Plaintiffs and Greenville's claims are barred by the Sherman Act's four-year statute of limitations. (ECF No. 1116-1 at 10-13).<sup>9</sup> Second, Brenntag argues that it had no rational economic incentive to participate in the conspiracy, and even if it did, its [\*43] conduct complied with federal law. (ECF No. 1116-1 at 14-19).

The Sherman Act's statute of limitations would apply unless the Charleston Plaintiffs and Greenville have sufficiently pled fraudulent concealment. *In re Elec. Carbon Prods.*, 333 F. Supp. 2d at 315. For fraudulent concealment to toll the statute of limitations, a plaintiff must plead "(1) wrongful concealment by the party raising the statute of limitations defense, resulting in (2) plaintiff's failure to discover the operative facts forming the basis of his

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<sup>9</sup> It also argues that the Charleston Plaintiffs and Greenville's state antitrust claims are time-barred under that statute's three-year statute of limitations. (ECF No. 1116-1 at 13-14). For the same reasons that this Court finds that the Charleston Plaintiffs and Greenville's federal antitrust claims are not time-barred, their state antitrust claims are not time-barred.

cause of action during the limitations period (3) despite the exercise of due diligence." [Dewey v. Volkswagen AG, 558 F. Supp. 2d 505, 523 \(D.N.J. 2008\)](#).

The Court is satisfied that the Charleston Plaintiffs and Greenville have adequately pled fraudulent concealment. First, the Court has already found that the conspiracy was self-concealing and that the applicable statute of limitations may be tolled as to other defendants in the conspiracy. (ECF No. 405 at 38-40). The Charleston Plaintiffs and Greenville make very similar allegations to those that this Court already found established fraudulent concealment. They allege that Brenntag participated in a "self-concealing" conspiracy, that the participation in that conspiracy was secret, and that Brenntag included non-collusion provisions [\*44] in their bid invitations to hide their conspiratorial acts. (FAC ¶¶ 270,276,277-79). These allegations, coupled with a detailed history of Brenntag's participation in the conspiracy, (FAC ¶¶ 241-55), are sufficient to establish a claim of fraudulent concealment. Brenntag's argument that the Charleston Plaintiffs and Greenville should have been on notice of the conspiracy because due diligence would have uncovered the obviously coordinated nature of their bids has already been rejected by this Court. (ECF No. 405 at 37-40).

As to Brenntag's economic incentive to participate in the conspiracy, the Charlotte Plaintiffs and Greenville point to emails that they allege show that Brenntag's profit was based on a percentage of the price charged for Alum. (FAC ¶¶ 250-52). As the Charlotte Plaintiffs and Greenville correctly indicate, it is a matter of mathematics that a fixed percentage of a higher sale price would result in higher profits for Brenntag, if that is indeed how the compensation structure was arranged. (ECF No. 1118 at 22). In any event, accepting those allegations as true at this stage, Brenntag had sufficient financial incentive to participate in the conspiracy. Nor was Brenntag's [\*45] conduct "equally consistent with lawful conduct," as they allege, (ECF No. 1116-1 at 17). As explained above, the Charleston Plaintiffs and Greenville have made several allegations and attached several documents indicating Brenntag's participation in the conspiracy. (See, e.g., FAC ¶ 250 (purporting to show bid coordination between C&S Chemical and Brenntag); ECF No. 1118-3 at 2 (an internal GEO Specialty Chemicals report noting that they discussed with Brenntag their "concerns with competitive activity [they] have experienced at municipal accounts," and that Brenntag assured it would "work closely with GEO to eliminate the opportunity of taking any direct accounts of [theirs]")). Consistent with this Court's earlier decisions in this MDL, such allegations are sufficient to state a claim under the Sherman Act at the motion to dismiss stage.

ii. *Arrangements, Contracts, Agreements, Trusts and Combinations Adversely Affecting Competition or Price in violation of South Carolina Code Ann. Ss 39-3-10*

"South Carolina has long adhered to a policy of following federal precedents in matters relating to state trade regulation enforcement." [Drs. Steuer and Latham, P.A. v. Nat'l Med. Enters., 672 F. Supp. 1489, 1521 \(D.S.C. 1987\)](#), aff'd 846 F.2d 70 (4th Cir. 1988) (quoting [In re Wiring Device Antitrust Litig., 489 F. Supp. 76, 78 \(E.D.N.Y. 1980\)](#)). As such, claims brought under South [\*46] Carolina's state **antitrust law** will be interpreted the same as claims brought under federal **antitrust law**. *Id.* Because the South Carolina Plaintiffs' claims pursuant to the Sherman Act are sufficient to survive Defendants' motions to dismiss, the South Carolina Plaintiffs' claims under South Carolina state antitrust claims must also survive.<sup>10</sup>

iii. *Common Law Fraud as to Brenntag*

Brenntag fails to brief the Court on the requirements of a common law fraud claim in South Carolina and instead only argues that Greenville and the Charleston Plaintiffs fail to meet the standard of [Rule 9\(b\)](#). (ECF No. 116-1 at 20-21). The Court must analyze Greenville and the Charleston Plaintiffs' fraud claim in the context of the relevant state law, so the elements of a South Carolina fraud claim are as follows: (1) a representation; (2) that is false; (3) and material; (4) made with either knowledge of or reckless disregard for its truth or falsity; (5) with the intent that it be acted upon; (6) where the hearer is ignorant of the representation's falsity; (7) relies on its truth; (8) had a right to rely on its truth; (9) and was proximately injured by that reliance. [Ardis v. Cox, 314 S.C. 512, 431 S.E.2d 267, 269 \(S.C. 1993\)](#).

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<sup>10</sup> The City of Spartanburg brings its state antitrust claims under the antitrust laws of North Carolina. The Delta Defendants admit that this analysis is substantially the same as the federal antitrust analysis. (ECF No. 1146-1 at 31).

The Greenville and Charleston Plaintiffs allege [\*47] that Brenntag "used deception," "made a misrepresentation," and "concealed, suppressed or omitted material facts in connection with the sale" of Alum. (FAC ¶ 319). Specifically, Defendants allegedly "represented" that Alum prices were offered based on a "competitive market" while participating in an unlawful conspiracy to "inflict monetary harm" on Plaintiffs. (FAC ¶¶ 320, 324). For example, Greenville and the Charleston Plaintiffs have set forth a number of communications that they allege show explicit bid coordination between Brenntag and C&S chemicals. (FAC ¶¶ 250-52). One such communication shows the vice president of C&S Chemicals directing the market manager of Brenntag Southeast to bid on the Greenville contract at \$246.75. (FAC ¶ 250). Brenntag bid that amount, and C&S chemicals submitted a bid only 25 cents higher. (FAC 250). The Greenville and Charleston Plaintiffs also allege that Brenntag affirmatively concealed this conspiratorial behavior in their contracts, which contained sections affirming and ensuring compliance with federal, state, and local law, and assured the parties to the contract that the bids were not collusive. (FAC ¶¶ 277-79).

Greenville and the Charleston [\*48] Plaintiffs' allegations, when taken as true, support the claims that Brenntag knowingly misrepresented the propriety of their Alum bidding practices with the purpose of defrauding Greenville and the Charleston Plaintiffs and that Greenville and the Charleston Plaintiffs reasonably relied upon Brenntag's representation and suffered a resulting compensable injury. [Ardis, 431 S.E.2d at 269](#). Therefore, at this juncture, Plaintiffs' claims of common law fraud must survive Brenntag's motion to dismiss.

#### *iv. Breach of Contract against Brenntag*

Brenntag argues only that GSWSA's breach of contract claim fails for the same reasons that its antitrust claims fail: "no allegations plausibly suggest that Brenntag engaged in collusive conduct." (ECF No. 1116-1 at 21). As this Court has already found that there are allegations plausibly suggesting that Brenntag engaged in collusive conduct, Brenntag's argument fails and this Court will allow GSWSA's breach of contract claim to proceed.

#### *v. Restitution, Disgorgement, and Unjust Enrichment*

In South Carolina, to support a claim for unjust enrichment, a "plaintiff must show: (1) he conferred a non-gratuitous benefit on the defendant; (2) the defendant realized some value from the [\*49] benefit; and (3) it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value." [Inglese v. Beal, 403 S.C. 290, 742 S.E.2d 687, 691 \(S.C. Ct. App. 2013\)](#). "The remedy for unjust enrichment is restitution." *Id.*

The South Carolina Plaintiffs assert that it would be "inequitable" for the Delta Defendants "to be allowed to retain the benefits" they "obtained from their illegal agreements, manipulative acts, and other unlawful conduct" at the expense of the South Carolina Plaintiffs. (FAC 338). Moreover, the South Carolina Plaintiffs aver that it would be equally inequitable for Defendant John Besson to be "allowed to retain the millions of dollars that he personally received . . . in connection with Delta Chemical's combination with USALCO" because of its alleged connection to the aforementioned conspiracy. (FAC ¶ 339). However, the Delta Defendants argue, and the South Carolina Plaintiffs do not contest, that there were no contracts between the Delta Defendants and the South Carolina Plaintiffs for the sale of Alum, and thus there was no benefit conferred. (ECF No. 1144-1 at 33).<sup>11</sup>

The question then is whether a claim for unjust enrichment can be based on the inflated prices that the South Carolina Plaintiffs paid [\*50] for Alum and the allegedly excess profits that the Delta Defendants received, albeit not directly from the South Carolina Plaintiffs, based on the conspiracy as a whole. One court, analyzing state-law unjust enrichment claims (including South Carolina) in a nationwide antitrust class action at the motion to dismiss stage, collected substantial authority indicating that the benefit conferred on the defendant need not be direct. [In re Auto. Parts Antitrust Litig., 50 F. Supp. 3d 869, 896-97 \(E.D. Mich. 2014\)](#) (collecting cases and concluding that the "critical inquiry" is whether the relationship between the plaintiff's detriment and defendant's benefits "flow[s] from the challenged conduct" (quoting [In re Cardizem CD Antitrust Litig., 105 F. Supp. 2d 618, 669 \(E.D. Mich. 2000\)](#))); see also [In re Auto. Parts Antitrust Litig., 12-md-2311, 2014 U.S. Dist. LEXIS 90724, 2014 WL 2993753, at \\*36 \(E.D. Mich. July 3, 2014\)](#) (finding that where the plaintiffs alleged that they "conferred a benefit to [the defendants]

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<sup>11</sup> It should be noted that the absence of a contract is not fatal to an unjust enrichment claim; on the contrary, it is a requirement. [Swanson v. Stratos, 350 S.C. 116, 564 S.E.2d 117, 120 \(S.C. Ct. App. 2002\)](#).

because they paid more than the true value of [the product] as a result of [the defendants'] conspiracy," those allegations satisfied the elements of South Carolina law at the pleading stage for a claim of unjust enrichment); Daniel R. Karon, *Undoing the Otherwise Pet, fect Crime — Applying Unjust Enrichment to Consumer Price-Fixing Claims*, [108 W. Va. L. Rev. 395, 418-28 \(2005\)](#) (surveying unjust enrichment claims in antitrust cases across the country and [\*51] concluding that the plaintiff need not pay a direct benefit to the defendant).

As discussed above, the South Carolina Plaintiffs have sufficiently alleged the existence of the Delta Defendants' collusive behavior, which contributed to higher prices of Alum across the United States and increased profits for the Delta Defendants. As such, the South Carolina Plaintiffs have adequately pled a claim for unjust enrichment against the Delta Defendants.<sup>12</sup>

#### **IV. CONCLUSION**

For the aforementioned reasons, Defendants' motions to dismiss are denied. An appropriate Order accompanies this Opinion.

/s/ Jose L. Linares

JOSE L. LINARES

Chief Judge, United States District Court

Date: March 11, 9019

#### **ORDER**

This matter comes before the Court by way of several motions to dismiss by various Defendants in differing underlying actions. These motions are as follows:

- Defendant USALCO, LLC ("USALCO") moves to dismiss the City of Akron ("Akron")'s Complaint filed in Civil Action Number 18-9781 pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). (ECF No. 1100).<sup>1</sup>
- Defendants Brenntag Mid-South, Inc., Brenntag Southeast, Inc., and Brenntag North America (collectively "Brenntag") move to dismiss the Commissioners of Public Works of the City of Charleston (*d.b.a* Charleston [\*52] Water System) and Grand Strand Water & Sewer Authority ("GSWSA") (collectively "the Charleston Plaintiffs")'s Complaint filed in Civil Action Number 18-3440 pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). (ECF No. 1116).
- Brenntag moves to dismiss the Commission of Public Works of the City of Greenville (*d.b.a* Greenville Water) ("Greenville")'s Complaint filed in Civil Action Number 18-11027 pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). (ECF No. 1117).
- USALCO moves to dismiss the Charleston Plaintiffs, Greenville, and the Commission of Public Works of the City of Spartanburg, the City of Winston-Salem, and the South Carolina Public Service authority (*d.b.a* Santee Cooper) (collectively "the Spartanburg Plaintiffs" and all together "the South Carolina Plaintiffs")'s Complaints

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<sup>12</sup> The Delta Defendants also argue that for the South Carolina Plaintiffs to proceed on their unjust enrichment claim against John Besson, they must pierce the corporate veil. (ECF No. 1144-1 at 33-34). However, the cases cited by the Delta Defendants do not establish that this is the law of South Carolina. The Court declines to weigh in on what appears to be unsettled state law, particularly in light of the fact that it has already allowed unjust enrichment claims to proceed against John Besson based on nearly identical allegations, (ECF No. 1030 at 15).

<sup>1</sup> The ECF numbers cited to herein refer to the main consolidated docket: 16-md-2687.

filed in Civil Action Numbers 18-3440, 18-11027, and 18-9231 pursuant to Federal Rule of Civil Procedure 12(b)(2). (ECF No. 1143).

- Delta Chemical Corporation and John D. Besson (the "Delta Defendants") move to dismiss the South Carolina Plaintiffs' Complaints filed in Civil Action Numbers 18-3440, 18-11027, and 18-9231 pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6). (ECF Nos. 1144-46).

For the reasons set forth in the Court's corresponding Opinion,

IT IS on this 11 day of March, 2019,

**ORDERED** that Defendants' motions to dismiss, (ECF Nos. 1100, [\*53] 1116, 1117, 1143, and 1144-46), are hereby DENIED.

**SO ORDERED.**

/s/ Jose L. Linares

JOSE L. LINARES

Chief Judge, United States District Court

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End of Document



## In re Interest Rate Swaps Antitrust Litig.

United States District Court for the Southern District of New York

March 13, 2019, Decided; March 13, 2019, Filed

16 MD 2704 (PAE); 16 MC 2704 (PAE)

### **Reporter**

2019 U.S. Dist. LEXIS 40742 \*; 2019-1 Trade Cas. (CCH) P80,713; 2019 WL 1147149

IN RE: INTEREST RATE SWAPS ANTITRUST LITIGATION. This Document Relates to All Actions

**Subsequent History:** As Amended March 14, 2019.

**Prior History:** [In re Interest Rate Swaps Antitrust Litig., 2016 U.S. Dist. LEXIS 101959 \(S.D.N.Y., Aug. 3, 2016\)](#)

## **Core Terms**

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Dealers, trading, discovery, platform, allegations, plaintiffs', all-to-all, rule of reason, clearing, buy-side, negotiations, anonymous, episodes, joint venture, electronic, depositions, anti-competitive, condemnation, entities, pled, deadline, launch, pleadings, amend, personnel, boycott, good cause, defendants', mandates, reasons

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For Tradition America LLC, Non-party, Miscellaneous (1:16-md-02704-PAE): William D. Briendel, LEAD ATTORNEY, Greenberg Traurig, LLP (NY), New **[\*14]** York, NY.

**Judges:** Paul A. Engelmayer, United States District Judge.

**Opinion by:** Paul A. Engelmayer

## Opinion

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### AMENDED OPINION & ORDER

PAUL A. ENGELMAYER, District Judge:

This decision resolves a motion by the putative class plaintiffs in this multi-district litigation for leave to file a proposed Fourth Amended Complaint ("PFAC"). The Court has sustained as well-pled plaintiffs' Sherman Act [§ 1](#) claims covering the years 2013-2016. Fact discovery as to these claims is set to close soon. The Court, however, has twice ruled against class plaintiffs on their bid to also pursue claims covering the five preceding years, 2008-2012. For the reasons that follow, the Court denies the motion to amend to the extent that plaintiffs again seek to add claims for 2008-2012. The Court, however, grants the motion to the extent that plaintiffs seek to amplify on their factual allegations bearing on the 2013-2016 claims.

### I. Background

This case centers on claims of [§ 1](#) violations affecting the market for interest rate swaps ("IRS" or "IRSSs"). Plaintiffs claim that the investment banks who dealt in IRSs (the "Dealer Defendants" or "Dealers") conspired to block the emergence and later the survival of electronic trading platforms that would have permitted **[\*15]** IRSs to be traded on an anonymous, "all-to-all" basis. Such platforms, plaintiffs claim, would have provided price benefits to investors relative to the over-the counter ("OTC") model by which IRSs were historically traded, *i.e.*, dealer-to-investor, with the investor's name disclosed to the dealer.

The Court has issued two decisions reviewing the claims and procedural history. On July 28, 2017, the Court issued a 108-page decision resolving motions to dismiss the Second Amended Complaints: one by the putative class of IRS investors ("SAC"); the other by non-class plaintiffs Javelin Capital Markets LLC ("Javelin") and Tera Group Inc. ("Tera"), each of which in or after 2013 opened electronic platforms for all-to-all trading of IRSs ("JTSAC"). See [\*In re Interest Rate Swaps Antitrust Litigation, 261 F. Supp. 3d 430 \(S.D.N.Y. 2019\)\*](#) ("IRS I"). On May 23, 2018, the Court issued a 59-page decision resolving class plaintiffs' motion for leave to file a proposed Third Amended Complaint ("PTAC"). See [\*In re Interest Rate Swaps Antitrust Litig., Nos. 16 MD 2704 \(PAE\) & 16 MC 2704 \(PAE\), 2018 U.S. Dist. LEXIS 86732, 2018 WL 2332069 \(S.D.N.Y. May 23, 2018\)\*](#) ("IRS II").<sup>1</sup> The Court incorporates those decisions by reference and, in summarizing them below, recites only necessary background.

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<sup>1</sup> On November 20, 2018, the Court resolved a motion to dismiss the later-filed complaint of a third "platform" (*i.e.*, non-class) plaintiff, trueEX LLC. See [\*In re Interest Rate Swaps Antitrust Litig., 351 F. Supp. 3d 698, 2018 WL 6067325 \(S.D.N.Y. 2018\)\*](#). That decision, which sustained trueEX's claims in principal part, is not germane to the present motion.

## A. [\*16] IRS I

On November 25, 2015, the initial complaint before this Court was filed. On June 2, 2016, the United States Judicial Panel on Multi-District Litigation transferred all related matters to this Court for coordinated or consolidated pretrial proceedings. Dkt. 1.<sup>2</sup> On December 9, 2016, after appointment of interim lead counsel for the class and the setting of a briefing schedule, class plaintiffs filed the SAC, Dkt. 142, and the Javelin/Tera plaintiffs filed the JTSAC, Dkt. 145.

On July 28, 2017, the Court, in *IRS I*, ruled on the motions to dismiss the SAC and JTSAC. The Court sustained the § 1 claims as to 2013-2016 (made by both sets of plaintiffs) but dismissed the § 1 claims as to 2008-2012 (made by class plaintiffs only). For each period, plaintiffs had pursued claims of *per se* illegal conduct.

As to the 2013-2016 period, the Court held that plaintiffs had plausibly pled a *per se* illegal group boycott among IRS Dealers. In this period, the Court held, plaintiffs had pled significant parallel conduct among the Dealers sufficient to give rise to an inference of an agreement among them aimed at boycotting and otherwise hobbling the platforms opened by Javelin, Tera, and a third entity, trueEX [\*17] LLC ("trueEX"). In or after 2013, after the effective date of the Dodd-Frank Act, these three entities had each opened a "swap execution facility," or "SEF"—a platform on which IRSs could be electronically traded in an anonymous, "all-to-all" manner. Dodd-Frank, enacted July 21, 2010 and effective in 2013 after significant rulemaking and regulatory implementation, had anticipated, enabled, and mandated the opening of SEFs. See generally *IRS I*, 261 F. Supp. 3d at 472-81.

As to the 2008-2012 period, however, before Dodd-Frank's mandates had taken effect, the Court did not find plausible class plaintiffs' claims of a *per se* unlawful agreement among Dealers to prevent from coming into existence electronic trading platforms permitting all-to-all anonymous trading of IRSs. See *id. at 463-72*. Independently, the Court held, class plaintiffs lacked antitrust standing to pursue their pre-2013 claims. To pursue such claims, the Court noted, a plaintiff must be an "efficient enforcer" of the antitrust laws; a central factor in that inquiry is whether the plaintiff's claimed injury is speculative. The Court held that class plaintiffs' claims of injury from the failure of electronic trading to emerge in 2008-2012 were unduly speculative, as [\*18] they required the finder of fact to postulate an "alternative history of IRS trading" that "require[d] too many leaps of imagination and guesswork for a claim of class injury to be viable." *Id. at 494* (citation omitted). The Court, finally, held that plaintiffs' claims based on injuries incurred before November 25, 2011 fell outside the four-year statute of limitations and were time-barred. *Id. at 487-90*.

## B. IRS II

After *IRS I*, the litigation proceeded to discovery, pursuant to a court-approved case management plan. See *IRS II*, 2018 U.S. Dist. LEXIS 86732, 2018 WL 2332069, at \*4. On February 21, 2018—the last day on which motions seeking leave to amend were authorized—class plaintiffs moved for leave to file the PTAC. 2018 U.S. Dist. LEXIS 86732, [WL] at \*5. It sought to add a new class plaintiff, new allegations as to 2013-2016, and, most consequentially, to restore the putative class's claims as to 2008-2012. 2018 U.S. Dist. LEXIS 86732, [WL] at \*6.

On May 23, 2018, the Court in *IRS II* resolved the motion for leave to amend. The Court authorized the addition of a new plaintiff and of new allegations as to 2013-2016. 2018 U.S. Dist. LEXIS 86732, [WL] at \*8-9. The Court, however, denied the motion to restore the 2008-2012 claims, under Federal Rule of Civil Procedure 15(a), for the following reasons.

**Futility:** The PTAC did not remedy the deficiencies that had led to dismissal of the SAC's claims as to 2008-2012 and thus [\*19] was futile. 2018 U.S. Dist. LEXIS 86732, [WL] at \*9-19. This was so for multiple reasons, four of

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<sup>2</sup> Docket references here are to 16-MD-2704, which embraces all filings in this case, not to the "master case" docket, 16-MC-2704, established for filings of significance.

which the Court developed. First, the PTAC's theory of investor injury from the failure of electronic all-to-all IRS trading to then emerge remained "a product of speculation, imagination, and guesswork," [2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*10](#), making class plaintiffs' claims of injury "far too conjectural to survive," [2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*9](#). Second, the PTAC's allegations as to "Project Fusion," a joint venture among Dealers, did not make out *per se* unlawful conduct under [§ 1](#), and the PTAC's two paragraphs of allegations as to the rule of reason were too incomplete and spare to make out a rule of reason claim. [2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*11-13](#). Third, the PTAC's allegations as to the Dealers' conduct towards Swapstream, a proposed platform of the Chicago Mercantile Exchange ("CME") for clearing transactions, also did not viably plead a [§ 1](#) violation, either *per se* (as the PTAC pled) or under the rule of reason (a theory the Court *sua sponte* considered). [2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*13-17](#). Fourth, plaintiffs' claims predating November 25, 2011 remained time-barred. [2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*18-19](#).

Independently, the Court held, considerations of delay, prejudice, and gamesmanship all required denial of the motion for leave to add claims for 2008-2012. [2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*19-28](#).

**Delay:** The parties had organized and conducted discovery [**\*20**] based on the 2013-2016 parameters. Discovery disputes had been negotiated and litigated based on the premise that these were the sole claims plaintiffs were pursuing. Permitting the 2008-2012 claims would have upended the negotiated and court-approved discovery schedule. Allowing the PTAC's pre-2013 claims "would [have been] functionally tantamount—or close to it—to allowing a new MDL-sized lawsuit to be hitched to the existing claims." [2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*20](#); see also [2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*20-22](#) (listing discovery areas uniquely relevant to 2008-2012 claims and assessing implications of reopened discovery, as to parties, third parties, and data gathering).

**Prejudice:** Adding the 2008-2012 claims would have prejudiced defendants, who for seven months had expended time and money in discovery based on the "only rational assumption as to this case's temporal scope: that plaintiffs' surviving claims were limited to 2013-2016." [2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*22](#); see also [2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*22-23](#).

**Gamesmanship:** Plaintiffs' counsel admitted that they had been intending and planning since the day *IRS I* issued to move to amend to revive the 2008-2012 claims. The Court chronicled plaintiffs' counsels' communications to the Court and the defense between *IRS I* and the PTAC's filing. Rather than disclose [**\*21**] this intention, these communications instead repeatedly implied the opposite. [2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*23-27](#). "In ways large and small," the Court stated, "plaintiffs' counsel throughout these seven months fed the false impression that the temporal scope of plaintiffs' claims was fixed at 2013-2016. The result was to mislead the Court and the defense and to occasion extensive work and expense that—had the retooled 2008-2012 claims proven viable—would have largely gone wasted." [2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*24](#); see also [2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*24-26](#) (reviewing communications). The Court rejected plaintiffs' counsels' justifications for such "coy" and "tactical" behavior—that the work product doctrine or the need to avoid witness tampering necessitated it. [2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*27](#). This "unacceptable gamesmanship," [2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*27](#), independently warranted denying the motion to add the 2008-2012 claims, [2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*28](#).

After the decision in *IRS II*, plaintiffs filed a Third Amended Complaint, consistent with the Court's rulings. Dkt. 398. Discovery continued, pursuant to the case management plan.

## C. The PFAC

On October 26, 2018, class plaintiffs filed a motion for leave to amend via a proposed Fourth Amended Complaint, Dkt. 590, the PFAC, Dkt. 693 (Declaration of Daniel L. Brockett Ex. A ("PFAC"),<sup>3</sup> and a memorandum of law in support, [\*22] Dkt. 591 ("Pl. Mem."). Plaintiffs had alerted the Court that a motion to amend was under consideration. See Dkt. 408 (June 19, 2018 letter from plaintiffs); Dkt. 430 (July 17, 2018 joint status letter).

The Court describes the PFAC more fully below. In brief, it principally seeks to restore plaintiffs' 2008-2012 claims. As to these, the PFAC reprises and recasts plaintiffs' earlier allegations regarding the two episodes on which plaintiffs' prior claims as to 2008-2012 have mainly been based: (1) Tradeweb/"Project Fusion," in which Dealers jointly acquired part of the business of trading-platform company Tradeweb; and (2) CME/"Project Magellan," in which the Dealers jointly negotiated and reached agreement with CME regarding its "Swapstream" product. The PFAC adds limited allegations as to these episodes. It also includes allegations as to several new areas of alleged Dealer collaboration. More than earlier complaints, the PFAC pleads, as an alternative to its theory of *per se* § 1 liability, a claim of § 1 liability under the rule of reason for 2008-2012. The PFAC also expands on its allegations as to 2013-2016. In particular, to a greater degree than before, it seeks to account for the failure [\*23] to emerge, after Dodd-Frank became effective in 2013, of all-to-all platforms permitting anonymous trading of IRSs other than the allegedly boycotted platforms of Javelin, Tera, and trueEX.

On December 4, 2018, defendants filed an omnibus memorandum of law in opposition to the motion for leave to file the PFAC, Dkt. 638 ("Def. Mem."), and a declaration in support, attaching exhibits, Dkt. 637 ("Playforth Decl."). On December 27, 2018, class plaintiffs filed a reply brief, Dkt. 664 ("Pl. Reply"), and a declaration in support, Dkt. 665 ("Brockett Decl.").

## II. Legal Standards Governing the Motion to Amend

Class plaintiffs' motion to amend is subject to two [Federal Rules of Civil Procedure: 15\(a\)](#) and [16\(b\)](#).

[Rule 15\(a\)](#) provides that a court "should freely give leave [to amend] when justice so requires." [Fed. R. Civ. P. 15\(a\)\(2\)](#). "[I]t is within the sound discretion of the district court to grant or deny leave to amend" under [Rule 15. McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 200 \(2d Cir. 2007\)](#). "A district court has discretion to deny leave for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." *Id.* (citing [Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 \(1962\)](#)). As noted in [IRS II, 2018 U.S. Dist. LEXIS 86732, 2018 WL 2332069, at \\*7](#), leave to amend under [Rule 15\(a\)](#) is properly denied upon a showing of prejudice or bad faith; "[a]mendment may be prejudicial when, [\*24] among other things, it would 'require the opponent to expend significant additional resources to conduct discovery and prepare for trial' or 'significantly delay the resolution of the dispute.' [AEP Energy Servs. Gas Holding Corp. v. Bank of Am., N.A., 626 F.3d 699, 725-26 \(2d Cir. 2010\)](#) (quoting [State Teachers Ret. Bd. v. Fluor Corp., 654 F.2d 843, 856 \(2d Cir. 1981\)](#)); see also [Cresswell v. Sullivan & Cromwell, 922 F.2d 60, 72 \(2d Cir. 1990\)](#) ("The court plainly has discretion . . . to deny leave to amend where the motion is made after an inordinate delay, no satisfactory explanation is offered for the delay, and the amendment would prejudice the defendant.").

Because the present motion to amend was filed after the deadline set in the court-ordered case management plan, it—unlike the motion addressed in *IRS II*—is also subject to [Rule 16\(b\)](#). See [Kassner v. 2nd Ave. Delicatessen, Inc., 496 F.3d 229, 243-45 \(2d Cir. 2007\)](#) ("[Rule 16\(b\)](#) also may limit the ability of a party to amend a pleading if the deadline specified in the scheduling order for amendment of the pleadings has passed."); [Fresh Del Monte Produce, Inc. v. Del Monte Foods, Inc., 304 F.R.D. 170, 174-76 \(S.D.N.Y. 2014\)](#) (discussing interplay between [Rules 15](#) and [16](#) in motions to amend). [Rule 16\(b\)](#) requires that the Court set a schedule, which "must limit the time to join other parties, amend the pleadings, complete discovery, and file motions." [Fed. R. Civ. P. 16\(b\)\(3\)\(A\)](#). Relevant here, [Rule 16\(b\)\(4\)](#) provides that such a schedule "may be modified only for good cause." *Id.* [16\(b\)\(4\)](#).

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<sup>3</sup> The Court notes that there are differences between the unredacted hard copy of the PFAC sent to the Court as a courtesy copy and the electronic version emailed to the Court on October 25, 2018 with plaintiffs' request to file it under seal. The differences include divergent paragraph numbering. The Court cites here to the paragraph numbers of the electronic version.

Where [Rule 16\(b\)](#) applies, it informs the Court's exercise of discretion under [Rule 15\(a\)](#): Although [Rule 15\(a\)](#) provides that leave to amend [\*25] is to be freely given "when justice so requires," "a district court does not abuse its discretion in denying leave to amend the pleadings after the deadline set in the scheduling order where the moving party has failed to establish good cause [pursuant to [Rule 16](#)]." *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 340 (2d Cir. 2000); see also *Ramsay-Nobles v. Keyser*, No. 16 Civ. 5778 (CM), 2018 U.S. Dist. LEXIS 214472, 2018 WL 6985228, at \*7 (S.D.N.Y. Dec. 18, 2018) ("[T]he 'good cause' standard is permitted but not mandated when a party seeks to amend its pleadings after the deadline set in the scheduling order." (citation omitted)).

As the Second Circuit has explained, the scheduling order for which [Rule 16](#) provides serves an important purpose: "By limiting the time for amendments, [[Rule 16](#)] is designed to offer a measure of certainty in pretrial proceedings, ensuring that at some point both the parties and the pleadings will be fixed." *Parker*, 204 F.3d at 340 (quotation marks and citation omitted). Therefore, "a finding of 'good cause' depends on the diligence of the moving party" in complying with the deadline for amendments. *Id.* (citation omitted). In addition, a court applying [Rule 16](#) has discretion to examine the [Rule 15\(a\)](#) factors, "in particular, whether allowing the amendment of the pleading at this stage of the litigation will prejudice defendants," *Kassner*, 496 F.3d at 244, as well as "futility, bad faith, [and] undue delay," *McCarthy*, 482 F.3d at 200 (citation omitted). [\*26]

Practical considerations pertinent to the above multi-factor analysis include the duration of the case and the stage of discovery. In *McCarthy*, for example, the Second Circuit affirmed the denial of leave to amend under [Rule 15](#) where the motion came "more than two months after discovery was completed and more than a year and a half after the filing of the original complaint." [482 F.3d at 201](#) (citation omitted). The district court had noted that "if the amendment is allowed, merits discovery will need to be reopened and the litigation will, in essence, start over—the same experts will likely need to produce new reports and be re-deposed." *Id.* (quotation marks, alteration, and citation omitted). Similarly, in *Ramsay-Nobles*, Chief Judge McMahon noted when applying [Rules 15](#) and [16](#) that the proposed counterclaims had come less than a month before fact discovery's close and "would have required the reopening of a case for which extensive discovery has been conducted and one that has been proceeding for far too long." [2018 U.S. Dist. LEXIS 214472, 2018 WL 6985228, at \\*9](#) (quotation marks and citations omitted). Other decisions have denied motions to amend on similar grounds. See, e.g., *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 86 (2d Cir. 2003) (upholding denial of motion to amend under [Rules 15](#) and [16](#) where "plaintiffs delayed more than one [\*27] year before seeking to amend their complaint [and] discovery had been completed"); *Wilson v. CoreLogic SafeRent, LLC*, No. 14 Civ. 2477 (JPO), 2016 U.S. Dist. LEXIS 15238, 2016 WL 482985, at \*1-3 (S.D.N.Y. Feb. 8, 2016) (denying under [Rules 15](#) and [16](#) motion for leave to amend filed six months after deadline for amendment where motion sought to add to class claim).

### III. The PFAC's Claims as to 2008-2012

The Court first addresses plaintiffs' motion to amend to add claims as to 2008-2012—the primary focus of the new allegations in the PFAC.

The PFAC's core allegation as to this period remains that the Dealers collaborated to impede the emergence of electronic platforms permitting all-to-all IRS trading on an anonymous basis. To this end, the PFAC amplifies on the two episodes at the heart of the 2008-2012 allegations in earlier complaints. These involve (1) "Project Fusion," the joint venture by which the Dealers in 2007 and 2008 invested in and took control of Tradeweb, and allegedly induced it not to pursue all-to-all electronic IRS trading, PFAC ¶¶ 133-204; and (2) CME, whose Swapstream trading platform the Dealers allegedly collectively shunned in 2007-2008 and whose launch of an IRS clearinghouse usable to the buy-side the Dealers allegedly acted to stall in 2008-2012 in "Project Magellan," *id.* in 205-96. These two episodes remain [\*28] the centerpieces of plaintiffs' theories of how the Dealers, in 2008-2012, violated § 1.

The PFAC includes claims about two other joint ventures, in which Dealers participated with inter-dealer brokers ("IDBs")—ICAP and Tradition. The Dealers allegedly dissuaded these IDBs from supporting all-to-all anonymous trading. See *id.* ¶¶ 341-73 (Tradition); ¶¶ 394-413 (ICAP). Plaintiffs' earlier amended complaints contained

allegations about ICAP and Tradition, but the PFAC's claims as to these entities are mostly new. The PFAC also newly alleges that the Dealers, in and after 2010, declined to support IDCG, a startup IRS clearinghouse. *Id.* ¶¶ 297-323. Finally, the PFAC newly alleges that the Dealers boycotted two trading platforms of non-party Bloomberg (ALLQ and BSEF), with the intention to pressure Bloomberg not to open, following Dodd-Frank, a SEF permitting all-to-all IRS trading. *Id.* ¶¶ 324-40.

Addressing these actions thematically, the PFAC alleges that the Dealers over time pursued two main strategies. *Id.* ¶ 8. First, they made "consortium investments" in critical IRS infrastructure," *id.* ¶ 8, such as Tradeweb and CME, with the goal of "mak[ing] sure those providers acted only to protect [\*29] the dealers' interests," *id.* ¶ 9. Second, when that strategy proved unavailable or unsuccessful, the Dealers engaged in a group boycott of platforms such as Javelin, Tera, and/or trueEX, with the goal that the platform changed course or "withered on the vine." *Id.* ¶ 10.

## A. Futility

Defendants argue that, for various reasons, the PFAC's 2008-2012 claims fail to state a claim and hence are futile. The Court here finds these claims futile in two respects. First, as before, class plaintiffs lack antitrust standing. Second, with one very narrow, arguable exception, the PFAC's 2008-2012 claims do not allege conduct that is *per se* illegal under § 1. The PFAC's principal theory, *of per se* liability, is thus not viable. In the interest of efficiency, the Court does not reach or resolve defendants' alternative arguments why these claims are futile. These include that the PFAC's claims as to Tradeweb, CME, and ICAP alleging conduct before November 25, 2011—and its claims as to IDCG, Tradition, and Bloomberg alleging conduct before October 25, 2014—are time-barred. In discussing, *infra*, the lack of good cause for amendment, the Court does, however, comment on the PFAC's new allegations of § 1 liability [\*30] under the rule of reason.

### 1. Antitrust Standing

In both *IRS I* and *IRS II*, the Court held that class plaintiffs' theory of injury from the absence of electronic fora offering all-to-all anonymous trading was too speculative to make them "efficient enforcers" of the antitrust laws and thus give rise to antitrust standing, under cases including [Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 \(1983\)](#), and [Gatt Communs., Inc. v. PMC Assocs., L.L.C., 711 F.3d 68 \(2d Cir. 2013\)](#).

In *IRS I*, the Court explained:

[C]lass plaintiffs' theory of pre-2013 injury is extraordinarily conjectural, such that, had the § 1 claim as to that period not otherwise have been dismissed as implausible (and had the pre-2012 aspects of that claim not been dismissed as time-barred), the claim would not satisfy the requirements of antitrust standing. Among other infirmities, it is "entirely uncertain," [Gatt, 711 F.3d at 79](#), that, absent the scheme, the necessary infrastructural preconditions for anonymous all-to-all trading, such as central clearing of IRS trades, would have developed before Dodd—Frank willed them into being in 2013. Plaintiffs' alternative history of IRS trading for the first five years of the class period (2008-2012) requires too many leaps of imagination and guesswork for a claim of class injury to be viable. See [Reading Indus., Inc. v. Kennecott Copper Corp.](#), 631 F.2d 10, [13] [(2d Cir. 1980)] (no antitrust standing [\*31] where indirect purchaser at end of vertical distribution line "predicate[d] its claim of injury on a basis too tenuous and conjectural for a valid causal finding of anticompetitive effect and damages"); see also [Paycom Billing Servs., Inc. v. Mastercard Int'l, Inc.](#), 467 F.3d 283, 293 [(2d. Cir. 2006)] (no antitrust standing where chain of causation was "highly speculative" and was built on "conclusory allegation[s]").

[IRS I](#), 261 F. Supp. 3d at 494. In *IRS II*, the Court rejected the PTAC's attempts to cure this problem, developing at greater length why plaintiffs' theory of investor injury was speculative:

The new allegations in the PTAC do not cure this fundamental problem. Plaintiffs' claim is still that, that but for defendants' conduct, all-to-all anonymous trading platforms would have developed years prior to Dodd-Frank, such that defendants' conduct caused them injury on their 2008-2012 IRS trades. But in various ways including the following, plaintiffs' 2008-2012 theory of injury remains a product of speculation, imagination, and guesswork.

First, the PTAC does not allege that any such platform actually developed in the pre-2013 period, or came anywhere close. In this respect, the PTAC's allegations as to 2008-2012, like the SAC's, sharply contrast with those regarding 2013-2016. With respect [\*32] to 2013-2016, plaintiffs concretely allege collusion to boycott and otherwise stymie three extant all-to-all anonymous IRS trading platforms (Javelin, Tera, and [t]rueEx) accessible to the buy-side. Plaintiffs are joined in so alleging by two entities that operated such platforms, Javelin and Tera. In contrast, the PTAC does not allege that either CME or Tradeweb ever launched such a platform during 2008-2012. See discussion *infra*, at 23-29. Nor does the PTAC allege that—despite such a platform's ostensible business logic, its ostensible appeal at the time to the buy-side, and the ostensible existence of the technological and infrastructural "pillars" that could be adapted to support such a platform—any entity, including ones like Bloomberg that are not alleged to have been boycotted, ever launched or came close to launching such a platform until after Dodd-Frank's mandates took effect in 2013.

Second, while the PTAC adds detail to its allegations as to the existence *among Dealers* of clearing arrangements, post-trade processing technology, and the necessary legal infrastructure in the pre-2013 period, see PTAC ¶¶ 104-118, its repeated allegation that these building blocks would have been seamlessly [\*33] adapted to the all-to-all context, see, e.g., *id.* ¶¶ 100, 110-111, 117, is conclusory. Plaintiffs posit the ready adaptation of such infrastructure as central clearing of trades from an inter-dealer environment in which swaps were traded among highly capitalized, repeat players to one that facilitated trading of sophisticated derivatives by any market participant, no matter how small, thinly capitalized, or inexperienced. But the PTAC does not concretely allege why this process would have been natural, fluid, or at all likely. On the contrary, the PTAC—tracking the observations of the [Commodities Futures Trading Commission ("CFTC")] when it later guided this process—elsewhere notes some of the formidable hurdles to such an evolution. See, e.g., PTAC ¶¶ 98, 100, 110, 115, 334, 345 (acknowledging that buy-side clearing would require "operational changes," "connections," legal arrangements, collateral arrangements, and retention of clearing agents).

Third, the PTAC's claim that buy-side firms would have participated in an anonymous, all-to-all platform had one been introduced before Dodd-Frank is an *ipse dixit*. Although the PTAC alleges that buy-side firms were interested conceptually [\*34] in such a potential platform, the PTAC does not allege that any buy-side firm, before Dodd-Frank's mandates took effect, had invested in any of the collateral, technological, or legal arrangements needed to facilitate such participation in anonymous all-to-all trading. Class plaintiffs CPTF and LACERA, large public pension funds, do not allege that they did so. And while the PTAC lists large buy-side firms that had expressed interest in using central clearing so as to permit trading on an all-to-all platform, see, e.g., PTAC ¶¶ 133-134 (listing Allstate, BlackRock, DE Shaw, Freddie Mac and PIMCO as firms to whom CME "successfully reached out," and stating that Citadel, Countrywide Financial Corporation, Nomura, and other "asset managers, hedge funds, and proprietary trading firms" had committed to "an Early Adopter Program for clearing via Swapstream"), it does not allege that any such firm made any investment or took other concrete action toward this end pre-Dodd-Frank. None of these firms is party to this lawsuit.

Indeed, even after Dodd-Frank had *mandated* the central clearing and collateralization arrangements necessary to enable all-to-all swap trading, compliance with these obligations [\*35] by buy-side participants proved challenging: Ultimately, the CFTC delayed implementation of its mandates, recognizing as late as December 2012 that buy-side firms were still scrambling to achieve "operational readiness" to clear their trades. As the Court earlier observed: "The CFTC delayed implementation of this mandate to 2013, in part due to 'multiple requests from buy-side entities for extra time to cope with the costs and burdens imposed by implementing mandatory clearing, which one commenter described as 'overwhelming.' See *[IRS II, 261 F. Supp. 3d at 446* (quoting CFTC Clearing Rule at 74,320).

Fourth and finally, to resolve reliably class plaintiffs' claim to have experienced pricing injuries on their 2008-2012 trades as a result of the absence of the IRS trading platforms they imagine, a jury presumably would have to do more than merely posit the existence of some such platform. A jury would also have to conjure features of the platform or platforms that might have been, such as their design, mechanics, costs, entry barriers, efficiencies, limitations, regulatory constraints, and trading metrics and modalities. The PTAC scarcely addresses such matters, even as to the platforms that it claims CME and Tradeweb, but for the [\*36] alleged boycott, would have introduced. Nor can the structural features of the allegedly aborted platforms be inferred from later events. While Dodd-Frank put into place a "SEF" framework for swaps trading, it cannot be assumed that the free market—but for the Dealers' allegedly illegal actions to quell CME and Tradeweb—would organically have arrived at the same place. The PTAC leaves these important parameters, which may well be inherently unknowable, to speculation.

In light of these and other factors, a jury evaluating plaintiffs' claims to have experienced injuries between 2008-2012 from the alleged conspiracy would thus be required to imagine a mode of market trading that—until mandated by a landmark federal statute and its implementing regulations aimed at stabilizing this corner of the financial system—never came to be (or even close). The PTAC's 2008-2012 claims would unavoidably require a jury to conjure an alternative history in which a form of marketplace that took federal legislation to bring about would have organically sprung up. Such would require an unacceptable amount of conjecture. The PTAC's claim of injury as to 2008-2012, anchored in an imagined alternate history, [\*37] therefore remains unacceptably speculative. It is "too tenuous and conjectural for a valid causal finding of anticompetitive effect and damages." [Reading, 631 F.2d at 13.](#)

[IRS II, 2018 U.S. Dist. LEXIS 86732, 2018 WL 2332069, at \\*10-11](#) (footnotes, including as to CFTC implementing rules for Dodd-Frank, omitted).

The PFAC tries again to fill this void. However, the Court's judgment, on close review of the new allegations and the documents from discovery on which these are based, is that the analysis above remains correct. The PFAC's theory of investor injury from the fact that an all-to-all marketplace permitting anonymous trading did not evolve to fruition during 2008-2012 still requires piling too many contingencies and assumptions. It remains far too conjectural to establish antitrust standing for class plaintiffs as efficient enforcers of the antitrust laws. This theory continues to stand in sharp contrast to class plaintiffs' allegations for 2013-2016, which involve a plot to boycott extant platforms, which have joined the investor plaintiffs in bringing this litigation against the Dealers.

The Court therefore affirms the analyses in *IRS I* and *IRS II*. The Court adds the following points, relevant to new material in the PFAC or arguments plaintiffs now make:

*First, to [\*38]* a large extent, documents the PFAC newly cites reflect the unremarkable fact that, *after* Dodd-Frank, efforts were underway in the industry to build out the infrastructure necessary to support trading on SEFs consistent with Dodd-Frank's mandates. These included developing IRS clearing solutions accessible to the buy-side. See, e.g., Playforth Decl. Ex. 12 (email draft of CME clearing solution press release, Oct. 18, 2010) at 2 (identifying advisory group of 5 buy-side and 10 dealer participants in CME's clearing solution development, announcing its launch and "live test[ing]" that day with participation by PIMCO "and perhaps one other client," but adding: "[n]ote however there is material additional work required by the CME and the dealers before the platform is fully scalable"); *id.* Ex. 11 (Bank of America PowerPoint presentation, Dec. 6, 2010) (noting "only approximately 200 days before vanilla CDS and IRS will be mandated to cleared [sic] at an eligible clearinghouse," *id.* at 2, and noting CME's October 18, 2010 rollout, *id.* at 6); *id.* Ex. 10 (Barclays PowerPoint presentation, Dec. 6, 2011) at 5 (reporting the build-out of "BarCap's clearing platform" and "[c]urrently experiencing client ramp-up [\*39] in OTC clearing ahead of mandatory dates" in a "Clearing update"); see also PFAC ¶ 446 & nn.535-36, 541 (citing all three documents).

Further, these documents, as defendants observe, reflect only the introduction of such clearing products and their usage on starter trades. See *also*, e.g., *id.* Ex. 9 (Citi OTC Derivatives Clearing Response to Caisse De Depot RFI, Dec. 6 2011) at 19 ("Citi's current OTC Derivatives Clearing business . . . reflect[s] our leadership position, albeit in a market with largely ceremonial client activity. Citi expect [sic] this to increase significantly, given the levels of client

engagement and mandates won, as clearing becomes mandatory."); PFAC ¶ 446 & nn.537-38 (citing same). They do not reveal the existence of meaningful buy-side clearing infrastructure before Dodd-Frank's mandates. Still less do they reveal the industry's practical readiness for all-to-all anonymous IRS trading independent of Dodd-Frank or before 2013.<sup>4</sup> The fact that some buy-side clearing had begun as the industry moved to implement Dodd-Frank, see *id.* ¶ 446, similarly does not prove such readiness.

Second, the CFTC's rules and implementing regulations for Dodd-Frank underscore that [\*40] major technological and infrastructural changes were needed to ready the industry for broad buy-side IRS clearing, that the industry was not ready for all-to-all anonymous IRS trading until long after Dodd-Frank's passage, and that Dodd-Frank's regulatory mandates were integral to achieving that readiness in 2013. In assessing whether plaintiffs' claim of injury is speculative, the Court takes notice of these historical events and the explanations given by the CFTC for its regulatory actions as reflecting the publicized condition of the market. See, e.g., *Staer v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 425 (2d Cir. 2008) ("[I]t is proper to take judicial notice of the fact that . . . regulatory filings contained certain information [including] the publicized condition of the junk bond market during the relevant time period (citations omitted)); *Cunningham v. Cornell Univ.*, 16 Civ. 6525 (PKC), 2017 U.S. Dist. LEXIS 162420, 2017 WL 4358769, at \*3 (S.D.N.Y. Sept. 29, 2017) ("Courts regularly take notice of publicly available documents during regulatory filings." (citations omitted)). Such is all the more appropriate here insofar as the PFAC draws upon CFTC rule-making and implementing regulations for Dodd-Frank, see, e.g., PFAC ¶¶ 44950 & nn.547-53, and upon a buy-side commenter's submissions to the CFTC, see *id.* ¶ 442 & n.527; [\*41] see also PTAC ¶ 333 & nn.124, 127-28 (citing buy-side comment letters on proposed CFTC rules).<sup>5</sup>

The CFTC's pronouncements reflect its determination that, even with Dodd-Frank's impetus, market infrastructure and buy-side participants were not yet ready for all-to-all SEF trading. These led to the CFTC's deferring until March 2013 the effective date of Dodd-Frank's mandate. See, e.g., Clearing Requirement Determination Under Section 2(h) of the CEA, 77 Fed. Reg. 74,284, 74,323 (Dec. 13, 2012) (IRS clearing requires "startup and ongoing costs relating to technology and infrastructure, new or updated legal agreements, . . . and costs related to collateralization of their positions."); *id. at 74,324* ("In response to . . . concerns about legal documentation and operational readiness, the Commission has clarified that compliance with the clearing requirement will not be required for any swaps until March 11, 2013 . . .").<sup>6</sup> That there was "[r]obust [d]emand" from the buy-side for central clearing, PFAC

<sup>4</sup> On the Court's review, the PFAC cites just one pre-Dodd-Frank document reflecting any extant buy-side IRS clearing: a December 17, 2009 press release entitled "LCH.Clearnet Launches Buy-side Clearing for Global OTC Interest Rate Swaps." Playforth Decl. Ex. 14 at 1; see PFAC ¶ 442 & n.512 (citing same). Class plaintiffs have previously stated that "there was no investor clearing of IRS trades before Dodd-Frank." Dkt. 193 (class plaintiffs' consolidated opposition to defendants' motion to dismiss the SAC) at 45. The press release adds: "The extension of this proven service to customers of banks reflects a key pillar of the market changes being contemplated by regulators and legislators worldwide." Playforth Decl. Ex. 14 at I.

<sup>5</sup> For avoidance of doubt, the Court would still hold that plaintiffs' claimed injury for 2008-2012 is too speculative to support antitrust standing even had it not considered these regulatory materials. Neither party here argues that the Court's notice of the fact of regulatory events is improper. See Pl. Mem. at 20 n.74 (disputing defendants' characterization of CFTC comments); Def. Mem. at 14 n.9 (citing cases in support of the Court taking judicial notice of CFTC filings); Pl. Reply at 12 & n. 12 (disputing defendants' characterization of CFTC rules).

<sup>6</sup> Buy-side comment letters were to the same effect. See, e.g., *Managed Funds Ass'n, Comment Letter on Proposed Clearing and Execution Implementation Rule*, 76 Fed. Reg. 58,186, and *Proposed Documentation and Margining Implementation Rule*, 76 Fed. Reg. 58,176, at 2 (Nov. 4, 2011) (recognizing "current structural and economic barriers to widespread clearing [of swaps]"), <https://www.managedfunds.org/wp-content/uploads/2011/11/CFTC-Implementation-Rules-on-Clearing-Execution-Documentation-and-Margining-Final-MFA-Letter.pdf>; Def. Mem. at 14 n.9 (citing Vanguard Comment Letter on *76 Fed. Reg. 58,186*, RN 3038-AD60, at 4, 6 (Nov. 4, 2011) ("time [is] needed" to "develop industry infrastructure," "implement complex operational connections," "educate clients," and "negotiate new trading agreements"—a "process [that] is so time intensive")); *id.* (citing Ass'n of Inst. Investors, Comment Letter on *76 Fed. Reg. 58,186*, RIN 308-AD60, at 3 (Nov. 4, 2011) (a "voluminous amount of documentation" is necessary, which "requires negotiations and agreements [to] be made across thousands of accounts")); *id.* (citing Coal. for Derivatives End-Users, Comment Letter on *76 Fed. Reg. 58,186*, RIN 3038-AD60, at 1, 4 (Nov. 4, 2011) (claiming more time is needed to put in place "technological connections" and legal agreements)); *id.* (citing Inv. Co.

¶¶ 440-46, does not make less speculative the claim that, absent alleged misconduct, this costly infrastructure would have grown up in 2008, or 2009, or 2010, or any time before Dodd-Frank compelled it. Tasking a jury to gauge the stack of many unknowable questions [\*42] embedded in the PFAC's alternative history—for example, whether a sufficient number of buy-side entities would have invested in such infrastructure and undertaken such collateralization to make all-to-all anonymous trading of IRSs a reality as of a particular date—would unavoidably invite an exercise in guesswork, not reliable fact-finding.

*Third*, in claiming to have cured the problem of speculative injury noted in the SAC and PTAC, plaintiffs emphasize the PFAC's allegations that Dealers acted with the intent to slow the evolution of certain offerings (of Tradeweb, CME, Tradition, Bloomberg, and ICAP) which had the potential to lead towards all-to-all trading. See, e.g., PFAC ¶¶ 19, 153, 230-39, 249, 325-27, 352-53, 392-93. But these intentions do not establish the market's readiness for such trading at any time, including 2008-2012. Some PFAC allegations, in fact, describe Dealer actions aimed at post-Dodd-Frank (and indeed post-2012) platforms. See, e.g., *id.* ¶¶ 325, 331-40 (allegations that Dealers, after Dodd-Frank, were concerned that Bloomberg would open a SEF permitting all-to-all IRS trading, and since 2012 have boycotted certain Bloomberg platforms); [\*43] *id.* ¶¶ 344-73 (allegations that after Tradition announced in 2010 its intention to open a SEF-compliant platform, Dealers acted to take control over Tradition's SEF, did so by September 2013, and today govern it so as to frustrate all-to-all anonymous trading).

To be sure, the PFAC (even more than prior complaints) alleges instances in which Dealer personnel expressed hostility to all-to-all trading or acted with intent to discourage the market's evolution in that direction. But these do not show that, before 2013, the market was ready for this transformation. As the implementation of Dodd-Frank demonstrated, even when backed by regulatory mandates, the buy-side did not adapt on the CFTC's required timetable, necessitating an extension of the mandates until March 2013. Statements by Dealers in 2008-2012 fearing the eventual emergence of all-to-all trading do not mean that this market structure was then imminently viable.

The PFAC's claims as to 2008-2012 are therefore futile for lack of antitrust standing.

## 2. Claims of a *Per Se* § 1 Violation in 2008-2012

The PFAC, like plaintiffs' earlier complaints, dominantly pursues a § 1 theory of *per se* illegality. The Court first reviews its rulings as [\*44] to the SAC's and PTAC's allegations in support of a *per se* theory, before assessing those in the PFAC.

### a. The SAC

In *IRS I*, the Court sustained plaintiffs' *per se* theory as to 2013-2016, in that the SAC and JTSAC alleged "a recognized type of *per se* unlawful § 1 conspiracy: a group boycott," [261 F. Supp. 3d at 472](#), and parallel conduct and circumstantial evidence that made plausible the inference of a Dealer boycott aimed at the three new SEF platforms that offered all-to-all IRS trading, [id. at 472-77](#). As to 2008-2012, however, the SAC's theory was based not on a boycott—for no all-to-all IRS trading platforms then existed—nor on meaningful parallel conduct, but largely on the Dealers' acquisition in 2007 alongside Thomson Corporation of a controlling stake in Tradeweb, allegedly in order to terminate a plan there to open such a platform.

The Court found the SAC's claim of *aper se* § 1 violation deficient for two reasons. First, its factual allegations as to the existence of such a plan at Tradeweb and of the Dealers' agreement to terminate it were hazy and conclusory.

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Inst., Comment Letter on [76 Fed. Reg. 58,186](#), RIN 3038-AD60, at 2, 4 (Nov. 4, 2011) (stating that the CFTC "significantly underestimate[d] the time needed for the swap market to transition to the new framework" and that "[t]hese time periods are woefully insufficient"); *id.* (citing Fin. Servs. Roundtable, Comment Letter on [76 Fed. Reg. 58,186](#), RIN 3038-AD60, at 5 (Nov. 4, 2011) ("[E]stablishing clearing arrangements is resource-intensive")).

Id. at 466. Second, even assuming a well-pled agreement among Tradeweb's Dealer owners to terminate such a plan, the SAC did not plead facts under which an agreement would [\*45] be *per se* unlawful:

The SAC's allegations as to Project Fusion do not fit into any category of agreement recognized as *per se* illegal. It alleges a decision among participating Dealer Defendants as to the strategic direction of a single financial technology company which they majority-owned pursuant to a joint venture. But, viewing the operation of a legitimate joint venture as akin to that of a single firm, modern **antitrust law** evaluates such joint conduct—including the creation of the joint venture itself, its business focus, its product selection, and its pricing—under the rule of reason, with the pleading requirements that standard imposes.

Id. at 467 (citations and footnote omitted). The Court added:

Plaintiffs do not cite any case in which a decision by competitors to invest in or acquire control over a business, or to direct the activities of a business, in the context of a legitimate joint venture, has been evaluated under the *per se* standard. And the SAC does not plead facts that remove the Project Fusion joint venture from Tradeweb, the subject of the joint venture, became a horizontal competitor of the Dealer Defendants which thereafter conspired with them. And Tradeweb was not such [\*46] a competitor: As alleged, it was a provider of electronic trading platforms, not a market maker. And the SAC does not adequately plead that the Project Fusion joint venture was an illegitimate shell that offered no efficiency enhancements and served only to mask concerted conduct. The SAC's allegations as to Tradeweb—including as to non-defendant Thomson's minority-ownership of it, the Dealers' infusion of \$280 million in it, and its existence and operation from 2007 forward—would not permit such an inference.

Id. at 467-68 (citation and footnote omitted).

### ***b. The PTAC***

In the PTAC, plaintiffs based their theory of a *per se* violation of [§ 1](#) during 2008-2012 on two collaborations among Dealers.

The first was, again, "Project Fusion." But, the Court held in *IRS II*, the PTAC failed to rehabilitate the claims as to that arrangement. The PTAC had abandoned the SAC's conclusory claim that "Tradeweb was planning to introduce electronic all-to-all trading to the IRS market," [IRS II, 2018 U.S. Dist. LEXIS 86732, 2018 WL 2332069, at \\* 11](#) (quoting the SAC), replacing it with the claim that Tradeweb was gradually upgrading its swap trading capabilities and was "primed to adopt all-to-all trading," *id.* (quoting PTAC ¶ 102), and that unspecified persons at Tradeweb had discussed [\*47] doing so, *id.* (quoting PTAC ¶ 223). However, the Court held that "[t]hese reconfigured allegations about amorphous 'discussions' and Tradeweb's being 'primed' to adopt all-to-all trading, [PTAC] ¶ 102, again fall far short of plausibly alleging plaintiffs' critical background premise: that Tradeweb was planning in 2007 to launch all-to-all IRS trading." [2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*12](#) (quoting *IRS I, 261 F. Supp. 3d at 466*); see also *id.* ("The PTAC's theory of a plot to block a Tradeweb plan to introduce all-to-all IRS trading thus starts with the ill-pled premise that there ever was such a plan.").

In any event, the Court held, the PTAC failed to rectify the other pleading deficiencies in the SAC's "Project Fusion" allegations. The PTAC dubbed the "Project Fusion" joint venture a "sham" and a "formalistic shell." But the facts pled were inconsistent with these labels, including:

"(1) The Dealers invested \$280 million in Tradeweb; (2) they owned Tradeweb alongside existing owner Thomson; (3) Tradeweb, post-acquisition, was organized consistent with customary corporate formalities; (4) Tradeweb proceeded to expand other aspects of its trading platforms; and (5) its decision not to offer an all-to-all trading platform until 2013 put it on par [\*48] with all other trading platforms of the day, including . . . Tera, Javelin, [t]rueEx, and Bloomberg."

*Id. at \* 12* (quoting [IRS I, 261 F. Supp. 3d at 468 n.17](#)). Accordingly, the Court held, "even assuming a well-pled agreement among owners to terminate a Tradeweb plan to open an all-to-all IRS trading platform, the Project Fusion joint venture as alleged remains subject to review only under the Rule of Reason." *Id.* (citation omitted).

The second basis for the PTAC's claim of *per se* illegal conduct in 2008-2012 involved CME. The PTAC alleged that, in 2006, CME had acquired Swapstream, a trading platform focused on a limited number of dealer-to-dealer IRS swaps in Europe; that CME had hoped to transform Swapstream into a worldwide electronic platform for all-to-all IRS trading; but that CME could not secure Dealer agreement to participate. [2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*13](#). CME then began joint negotiations with the Dealers, who were collectively represented by Edward Rosen of the Cleary Gottlieb law firm. These negotiations, in which the Dealers sought 'governance' over the platform, did not bear fruit. See *id.* (quoting PTAC ¶ 155). Eventually, CME initiated joint negotiations with the Dealers, again represented jointly by Rosen, regarding a "clearing-only solution" [\*49] that would be "open to the buy-side." See *id.* (quoting PTAC ¶¶ 160-61). These "Project Magellan" negotiations led to a written agreement in which Dealers agreed to provide minimum clearing volume to CME in exchange for revenue sharing. The PTAC alleged that the agreement contained a "poison pill" that effectively disabled CME from launching an execution platform, by allowing the Dealers to "capture nearly all the profits." *Id.* (quoting PTAC ¶ 179).

In *IRS II*, the Court rejected this set of allegations, too, as a basis for a claim of a *per se* violation of [§ 1](#) during 2008-2012. Various PTAC factual allegations were contradicted by pled or cognizable facts. See [2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*14](#). These included the PTAC's implication that Swapstream had launched a trading platform, which a close reading revealed had not happened, and its errant characterization of the "Project Magellan" agreement to contain a "poison pill" provision to neuter any CME plan to launch an IRS trading platform. See *id.* ("By its plain terms, the Magellan Agreement did *not* 'poison' CME's plans to launch an IRS clearinghouse."). The PTAC's discussion of CME also contained a significant number of conclusory or general allegations, including [\*50] as to central allegations for the period before the Dealers' joint, counseled negotiations with CME had begun. [2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*15](#).

As to the PTAC's well-pled allegations of collective action among Dealers regarding Swapstream, the Court noted, these "are centered on the period *after* joint negotiations between CME and the Dealers are alleged to have begun." *Id.* This activity, the Court held, did not fit within a category that courts applying [§ 1](#) had held susceptible to *per se* condemnation:

In that period, as pled, discussions and lawyered negotiations had begun between CME and the Dealers to reach agreement regarding the terms under which participating Dealers collectively would participate in CME's Swapstream platform. As reviewed above, the parleys during this period occurred in two phases: regarding (1) CME's initial proposal to revamp Swapstream; and (2) CME's ensuing proposal—which resulted in a negotiated business arrangement memorialized in the Magellan Agreement—to launch a stand-alone clearinghouse.

This paradigm of collective negotiations between multiple collaborating competitors and a shared counterparty or counterparties to explore facially legitimate business arrangements does not lend itself [\*51] to *per se* condemnation. See, e.g., [Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501, 108 S. Ct. 1931, 100 L. Ed. 2d 497 \(1988\)](#) (standard setting is subject to the Rule of Reason). As the Court reviewed in its discussion of Tradeweb, legitimate joint business ventures, including at the point of their creation, are subject to the Rule of Reason, and "business practice[s]" involving the "core activity of [a] joint venture . . . do not fall within the narrow category of activity that is *per se* unlawful." [Texaco, Inc. v. Dagher, 547 U.S. 1, 8, 126 S. Ct. 1276, 164 L. Ed. 2d 1 \(2006\)](#); see *id. at n.1*; [Nw. Wholesaler Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 298, 105 S. Ct. 2613, 86 L. Ed. 2d 202 \(1985\)](#) ("mere allegation of a concerted refusal to deal does not suffice" to merit *per se* condemnation "because not all concerted refusals to deal are predominantly competitive"); [Major League Baseball Props., Inc. v. Salvino, 542 F.3d 290, 316 \(2d Cir. 2008\)](#) ("*Per se* treatment is not appropriate . . . where the economic and competitive effects of the challenged practice are unclear"); see also [In re IRS, 261 F. Supp. 3d at 467](#) (collecting cases and holding "Project Fusion" subject to Rule of Reason review).

The facts pled reveal potential pro-competitive justifications from the collaboration here in connection with the Dealers' negotiations with CME, enough to persuade the Court that the conduct alleged—in contrast to a horizontal price-fixing conspiracy or the boycott pled against Javelin, Tera, and [t]rueEx—is not by nature suitable to condemnation *per se*. Both sets of discussions [\*52] among the Dealers and CME had the potential, *inter alia*, (1) to launch a new venture by assuring CME of the critical mass of Dealer support it claimed to need; (2) to help CME set standards for a new modality of IRS trading acceptable to a broad range of market participants; and, (3) as in other business contexts involving negotiations with a swath of industry players, to avoid the inefficiencies associated with duplicative one-on-one negotiations. See, e.g., PTAC ¶ 135 (noting CME's goal to enlist one or more Dealers from each of "Tier 1" and "Tier 2").

That the second stage of Dealer/CME negotiations led to a counseled agreement between CME and most (although not all) Dealer Defendants also weighs against finding *per se* anti-competitiveness. The Magellan Agreement's text, too, reveals a pro-competitive justification: The revenue-sharing pact enabled the introduction of a novel clearing platform whose standing was enhanced by the agreed participation of reputable Dealers who agreed to provide minimum clearing volume to the CME. See *id.* ¶¶ 160, 179-180.

[2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*15-16](#) (footnote omitted).

### c. The PFAC

In pursuing a theory of *per se* § 1 illegality as to 2008-2012, the PFAC again principally relies on the [\*53] Tradeweb and CME episodes, while also adding allegations about episodes relating to several other entities, discussed below.

As to Tradeweb and CME, the PFAC reorders and re-packages the PTAC's allegations—e.g., referring to the two episodes as embodying a "consortium strategy" across Dealers, see, e.g., PFAC ¶¶ 8,141-43—but adds limited new factual allegations. These do not disturb the Court's earlier assessment that these complex dealings do not fall into a recognized category of conduct which the courts have condemned *per se*. The Court holds, as before, that any § 1 assessment of the balance between the pro-competitive purposes and anti-competitive effects of these ventures must instead be under the rule of reason.

**Tradeweb:** The PFAC claims the "Project Fusion" joint venture was illegitimate because participating Dealers were motivated, in gaining control of Tradeweb and in setting its course, to shape IRS market developments so as to reduce the possibility that exchange-like trading would emerge. See, e.g., PFAC ¶¶ 15-17, 142, 154-55; see also Pl. Mem. at 8 (collecting PFAC allegations as to Dealers' aim to, *inter alia*, "negate[] the threat" of IRS exchange trading, *id.* (quoting PFAC [\*54] ¶ 155 (alteration in original)) and "slow the inevitable slide to all-to-all," *id. at 9* (quoting PFAC ¶ 191)). The PFAC claims that Dealers later ran Tradeweb "as a utility," preferring the interests of its Dealer majority owners over profit-maximization. PFAC ¶ 195. These allegations that the Dealers harbored such sectarian intentions track allegations in earlier complaints. See, e.g., [IRS I, 261 F. Supp. 3d at 447-49](#) (discussing SAC and JTSAC).

The Court credits as well-pled that the Dealer personnel quoted in the PFAC had the intentions alleged: to steer Tradeweb's evolution, and to influence the evolution of the market, in a direction that maximized Dealers' economic interests, including to preserve trading margins. But whether *per se* condemnation under § 1 is available does not turn on subjective intent. The availability of the *per se* rule does not turn on case-specific determinations about the quality of evidence of (or pleadings as to) intent. It does not turn on the adjectives or metaphors used by competitors in emails. It is a categorical doctrine. *Per se* condemnation is available only when courts' "considerable experience" teaches that the category of restraint at issue has "manifestly anticompetitive effects" and [\*55] "lack[s] any redeeming virtue." [Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 \(2007\)](#) (quotation marks and citations omitted); see also [NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 137-38, 119 S. Ct. 493, 142 L. Ed. 2d 510 \(1998\)](#) (declining to apply *per se* rule to alleged boycott claim despite allegation that defendants acted with a "special anticompetitive motive" to force the plaintiff out of business; Court

did not "find a convincing reason why the presence of this special motive should lead to the application of the *per se* rule"); cf. [Conn. Ironworkers Emp's Ass'n v. New England Reg'l Council of Carpenters, 324 F. Supp. 3d 293, 305 \(D. Conn 2018\)](#) ("[A]llegedly pernicious motives on their own do not suffice to overcome the 'presumption in favor of [the] rule-of-reason standard.'" (quoting [Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 726, 108 S. Ct. 1515, 99 L. Ed. 2d 808 \(1988\)](#)).

Here, for the reasons given in *IRS I* and *IRS II*, the collaboration alleged in "Project Fusion" does not correspond to any category of activity among horizontal competitors that courts to date have condemned *per se*. It cannot be condemned on its face as an act of price-fixing, market allocation, or—in contrast to the Dealers' alleged actions in 2013-2016 towards the new opened SEFs—as a group boycott. Rather, its structure is that of a capitalized and operational joint venture. It cannot facially be condemned as an illegitimate sham.

The Court of course does not and cannot on the pleadings assess the net competitive impact of the "Project Fusion" [\*56] joint venture. But whatever the evidence adduced on a well-pled rule of reason claim might have shown as to the balance of pro- and anti-competitive effects, plaintiffs' pleadings themselves reveal the venture's potential pro-competitive effects. These include, as noted, that after participants invested \$280 million in Tradeweb's fledgling platform, Tradeweb expanded aspects of its trading operations. See [IRS II, 2018 U.S. Dist. LEXIS 86732, 2018 WL 2332069, at \\*12](#) (quoting [IRS I, 261 F. Supp. 3d at 468 n.17](#)).<sup>7</sup> *IRS I* invited plaintiffs to "cite any case in which a decision by competitors to invest in or acquire control over a business, or to direct the activities of the business, in the context of a legitimate joint venture, has been evaluated under the *per se* standard." [IRS I, 261 F. Supp. 3d at 467-68](#). Plaintiffs have not done so.<sup>8</sup>

**CME:** The PFAC's allegations, though re-sequenced, are in substance quite similar to those in the PTAC, including as to the successive rounds of joint negotiations between Dealers and CME on which the Court focused in *IRS II*. See PFAC ¶¶ 223-56 (first round followed by abandonment of Swapstream plan to open all-to-all platform); *id.* ¶¶ 257-93 (second round followed by execution of "Project Magellan" agreement, in which Dealers [\*57] agreed to provide minimum clearing volume to CME in exchange for revenue sharing and opening of CME clearinghouse for buy-side IRS trades).

For the same reasons noted in *IRS II*, these business arrangements also do not resemble any that courts, based on considerable experience, have condemned as *per se* anti-competitive. See [IRS II, 2018 U.S. Dist. LEXIS 86732, 2018 WL 2332069, at \\*15](#) (collecting cases). Plaintiffs do not cite any case in which a court has *per se* condemned a horizontal collaboration that is structurally or thematically similar to that pled. Nor do they cite any case so condemning a business agreement meaningfully akin to the written, counseled agreement with CME that resulted from these negotiations. Further making *per se* condemnation unavailable is the presence, on the pleadings, of the potential pro-competitive justifications noted in *IRS II* for these joint negotiations and outcomes. See *id.*

<sup>7</sup> Consistent with this, defendants note that documents cited in the PFAC reflect that after the Dealers' investment per "Project Fusion," Tradeweb's trading volume in IRSs, credit default swaps, and several other asset classes grew substantially from a *de minimis* base. See Def. Mem. at 28 & n.20 (quoting documents cited by the PFAC reflecting that Tradeweb IRS revenue grew from approximately \$1.9 million in 2006 to approximately \$21 million in 2009); cf. *id.* at 28 (quoting documents cited by the PFAC that articulate "Project Fusion" participants' purposes for investing as including launching "the first global trading network to offer clients the ability to trade any asset class in any currency on one platform 24 hours a day"). The PFAC contains allegations about post-"Project Fusion" business decisions by Tradeweb, for example, delaying the launch date of "click to trade" functionality, see PFAC ¶¶ 158, 181-87, or as to the direction of the later Dealerweb platform, see *id.* ¶¶ 188-95. The parties debate whether these later events bear on whether the "Project Fusion" joint venture was *per se* illegal. Compare Def. Mem. at 29-30 & n.22 with Pl. Reply at 19 & nn.34-35. The Court treats the PFAC as alleging that the joint venture, from its inception, was *per se* illegal, and that ensuing decisions by Tradeweb, given its control by Dealers, shed light on the motives of the Dealer participants in that venture. As noted, however, the pled facts, in totality, do not permit the venture to be condemned *per se*.

<sup>8</sup> For many of the same reasons, "quick look" analysis is unavailable here. It does not apply to collaborations among competitors that "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition." [Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 318 \(2d Cir. 2008\)](#) (quoting [Cal. Dental Ass 'n v. FTC, 526 U.S. 756, 771, 119 S. Ct. 1604, 143 L. Ed. 2d 935 \(1999\)](#)).

To be sure, the PFAC adds concrete allegations as to the motives of participating Dealer personnel preceding and during the sequential joint discussions with CME. See, e.g., PFAC ¶¶ 230, 237, 239-43, 256, 293. As with Tradeweb, it is, in general, well-pled that these persons aspired to delay evolution of exchange trading, in favor of existing [\*58] trading norms. But, again, as with Tradeweb, whether *per se* condemnation under § 1 is available turns on judicial experience with a category of business arrangement, not on participants' *mentes reae*. Otherwise, business arrangements that the courts have not condemned as *per se* and that may after discovery prove net pro-competitive could be held illegal at the threshold. This could deter economically worthwhile conduct. See, e.g., [NYNEX, 525 U.S. at 137](#).

Otherwise, the main substantive change from the PTAC as to the CME narrative is that the PFAC drops the allegation that a "Project Magellan" agreement provision (§ 5.05) was a "poison pill"—an allegation the Court found inconsistent with the agreement's text. See [IRS II, 2018 U.S. Dist. LEXIS 86732, 2018 WL 2332069, at \\*14](#). The PFAC now assails § 5.05 as "so onerous in practice that it effectively prevents CME from launching an IRS trading platform," PFAC ¶ 279, on account of its requirement of consultation with Dealer founding members over trading protocols, *id.*, and its "most favored nation" and "right of first refusal" clauses, *id.* ¶ 280; see also *id.* ¶¶ 281-82 (discussing the effect of these clauses). The parties debate whether these terms have potential pro-competitive justifications. See Def. Mem. at 32 n.26 ("obvious" justifications [\*59] include "incentiviz[ing] the Magellan dealers to support the new IRS clearing house by granting them a potential right to participate in the upside if CME successfully leveraged the new clearinghouse into a vertically integrated trading platform" (citing federal antitrust guidelines)); Pl. Reply at 22 n.43 (distinguishing guidelines as inapposite). In assessing the availability of *per se* condemnation of "Project Magellan," the Court, however, takes a holistic focus. For the reasons stated in *IRS II*, the overall agreement negotiated among the Dealers and CME is properly evaluated under the rule of reason. Whether any provision of that agreement, including § 5.05, is pro-or anti-competitive would form part of the rule of reason inquiry.

**"A unitary conspiracy":** Plaintiffs separately argue that they have alleged a "*unitary conspiracy*" that predated 2013 and should not be "forced to prosecute a truncated conspiracy." Pl. Reply at 1, 3. The import of this argument is not clear. The Court construes plaintiffs to argue that because they have alleged a viable claim of *per se* unlawful conduct for 2013-2016, and because they have also alleged collaboration among Dealers in the preceding five years, [\*60] they are entitled to application of the *per se* rule for their allegations as to collaboration in 2008-2012.

To the extent this argument seeks to relieve plaintiffs of the pleading burdens imposed by the rule of reason for the Dealers' pre-2013 business arrangements as alleged, it is wrong. The character of the Dealer collaboration alleged in 2008-2012 is fundamentally different from that alleged in 2013-2016. For 2013-2016, plaintiffs have alleged conduct among horizontal competitors (a group boycott aimed at extant platforms) of a kind that is quintessentially unlawful *per se*. It does not follow, however, that earlier agreements among Dealers of a different character (e.g., the "Project Fusion" and "Project Magellan" joint ventures)—even if motivated by a common desire to have the market maintain name-disclosed RFQ trading and not evolve towards anonymous all-to-all trading—were therefore *per se* illegal. Plaintiffs have not shown that those earlier joint arrangements are of a kind that judicial experience has condemned as *per se* unlawful. To be sure, pre-2013 dealings among Dealers may prove admissible at a trial to shed light, *inter alia*, on the existence or nature of agreements among [\*61] them during 2013-2016. But plaintiffs have not offered any authority why the fact of viably pled claims of *per se* illegal conduct in 2013-2016 alters the analysis that *antitrust law* uses to assess earlier agreements of a different character. See, e.g., [City of Groton v. Conn. Light & Power Co., 662 F.2d 921, 928 \(2d Cir. 1981\)](#) (even where alleged conduct is "interrelated and interdependent," courts must "analyze the various issues individually").

**ICAP, Tradition, Bloomberg, and IDCG:** Finally, although the Tradeweb and CME episodes remain the heart of plaintiffs' pre-2013 claims, the PFAC alleges joint Dealer conduct towards four other entities: ICAP, Tradition, Bloomberg, and IDCG. The Court elaborates on these allegations later, in the course of discussing delay and prejudice. The PFAC's allegations as to these episodes do not, however, warrant sustaining the claim of a *per se* violation of § 1 spanning 2008-2012.

As pled, two of the four episodes—those involving ICAP and Tradition—centrally involve a facially legitimate joint venture between Dealers and an inter-dealer broker. As such, these arrangements cannot be condemned *per se*, even if the motivations of participants were, as plaintiffs claim, to "[m]aintain the [s]tatus quo." Pl. Mem. at 26 (quotation [\*62] marks omitted). Under the authorities above, they are to be evaluated under the rule of reason. As to ICAP, the PFAC alleges that ICAP developed an electronic trading platform (i-Swap) for European dealer-to-dealer trading. PFAC ¶ 397. It initially achieved "no traction" but, in 2011, ICAP, in "Project Snowflake," recruited three Dealers (Barclays, Deutsche Bank, JP Morgan) to support (by streaming prices to it) a revamped i-Swap trading platform in exchange for an equity stake and governance rights. *Id.* ¶ 402. i-Swap launched in the United States when the new SEF rules took effect in 2013. See *id.* ¶ 410. Plaintiffs allege that these Dealers have used their influence to induce ICAP not to open an all-to-all trading platform. See *id.* ¶¶ 394-413. As to Tradition, the PFAC alleges that other Dealers entered into a "Trad-X" joint venture with Tradition, in which they too agreed to support a new Trad-X trading platform in exchange for equity and governance rights. See *id.* ¶¶ 341-73. Trad-X launched in the United States in 2013. See *id.* ¶ 357.<sup>9</sup>

The PFAC's new allegations about a plot against non-party Bloomberg also do not support a *per se* claim for 2008-2012. The PFAC's allegations [\*63] as to Bloomberg overwhelmingly relate to 2013-2016. Specifically, the PFAC alleges that Dealer personnel met with Bloomberg in late 2011 and early 2012 to discuss Bloomberg's forthcoming SEF and conveyed that they might support Tradeweb if a partnership between Bloomberg with the Dealers were not arranged. *Id.* ¶¶ 325-36. It alleges that, in 2013, Bloomberg decided to launch an anonymous CLOB, known as BSEF, which allowed RFQ trading and received CFTC approval, but that the Dealers, viewing BSEF as a threat to develop into an all-to-all trading platform, today "refuse to provide liquidity" to BSEF. *Id.* ¶ 340; see *id.* ¶¶ 338-40. The PFAC's only allegation as to Bloomberg services offered before 2013 is that, in 2011, Bloomberg extended an OTC trading screen called ALLQ to IRSs, *id.* ¶ 326, but that Goldman Sachs, "along with several other banks," withheld quote streams from ALLQ, *id.* ¶ 330 (quoting Playforth Decl. Ex. 43 (Goldman Sachs offsite management committee meeting slide notes) at 4) (emphasis omitted). The PFAC does not, however, allege any other parallel conduct or plus factors indicating that the decision by Goldman Sachs and other unspecified Dealers not to do business with [\*64] ALLQ was coordinated. And, as defendants note, a document quoted in the PFAC appears to contradict this claim of Dealer non-participation, stating that "7 of the top 10 [dealers] "opted in" to ALLQ at its launch, and by 2013, '[a]ll dealers [were] live' on ALLQ." Def. Mem. at 42 & n.39 (quoting Playforth Decl. Exs. 40,41).<sup>10</sup>

Of the four newly alleged episodes, the PFAC's claims alleging a boycott are strongest as to IDCG. The PFAC alleges that IDCG was a small clearinghouse which in 2007 developed a promising clearing solution but which by

<sup>9</sup> Apart from the fact that the "Project Snowflake" and "Trad-X" joint ventures do not resemble any of the species of arrangements among horizontal competitors that courts have condemned *per se*, defendants note a number of other problematic features of plaintiffs' claims of a Dealer conspiracy along the lines alleged. See Def. Mem. at 44-47. An example as to ICAP: In conflict with the PFAC's assertion that ICAP has "restricted all of its IRS trading platforms in the U.S. to dealers alone," PFAC ¶ 411, the SAC suggested that i-Swap's U.S. platform achieved a significant share of SEF trades and, in accordance with Dodd-Frank's "impartial access" mandate, has been "open for IRS trading by the buy side" since its launch, see [IRS I, 261 F. Supp. 3d at 484-85](#). An example as to Trad-X: documents cited in the PFAC identify the group of Dealers supporting Trad-X as a "rival group" to the three Dealers supporting i-Swap, Playforth Decl. Ex. 50 (email from JP Morgan representative about "Project Snowflake" meeting), and state that "Trad-X will be a counter force to other platforms such as ICAP's i-SWAP, which is mainly supported by DB, JPM and BarCap," Playforth Decl. Ex. 51 (Credit Suisse PowerPoint presentation on "Project Trad-X").

<sup>10</sup> As with ICAP and Tradition, defendants identify other problematic features of the alleged plot among Dealers against Bloomberg. Def. Mem. at 41-44. An example as to the CLOB allegations: Defendants note that these rest almost entirely on allegations that there is minimal trading on this platform. The PFAC, however, lacks circumstantial evidence that this limited trading resulted from inter-Dealer coordination. And documents cited in the PFAC suggest independent reasons for the limited trading, *i.e.*, that "many [buyside firms are] accustomed to receiving preferential quotes offered as part of the relationships they enjoy with their dealers," "prices being quoted for RFQs are very tight," Playforth Decl. Ex. 49 (internal JP Morgan email exchanges) at 2-3, and "most clients like to [RFQ] to find dealer axes that might not be reflected in the firm price," *id.* Ex. 48 (Citigroup chat exchanges) at 6; see also PFAC ¶ 570 & n.617 (acknowledging that Bloomberg "does not promote" its CLOB and offers it at least partially because "Dodd-Frank requires that all SEFs operate and offer an order book").

2011 had not "gain[ed] any traction." PFAC ¶ 314 (quotation marks and footnote omitted). The PFAC does not plead any non-conclusory claim of concerted Dealer activity towards IDCG until July 2010. That Dealers did not use IDCG before Dodd-Frank, despite pitches IDCG had made to them, *id.* ¶ 305, does not support inferring collective action. See *IRS II, 2018 U.S. Dist. LEXIS 86732, 2018 WL 2332069, at \*17* ("[P]arallel lack of interest is not indicative of an inter-Dealer agreement" because, "[a]s pled, such conduct was consistent with any Dealer's independent self-interest." (citation omitted)). However, the PFAC claims, in July 2010, after IDCG cleared a starter trade with emerging SEF Javelin, PFAC ¶ 308, [\*65] Dealers exchanged emails "trying to figure out who was involved in Javelin and IDCG," *id.* ¶ 309-10. Thereafter, on August 11, 2010, a "bank group" meeting was held at Deutsche Bank involving representatives of six Dealers. *Id.* ¶ 311. The notes from the meeting state, *inter alia*, that "banks will oppose moves which move significant volumes to exchanges." *Id.* (quoting Playforth Decl. Ex. 38 at 2). Thereafter, the PFAC alleges, Dealers "kept up their engagement with IDCG on the surface," *id.* ¶ 315, but continued to give it limited support until its sale in 2012, *id.* ¶¶ 322-23.

Whether this plausibly pleads a *per se* agreement among the six Dealers thereafter to boycott IDCG presents a close question. On the one hand, the PFAC does not allege that these Dealers changed their behavior towards IDCG: both before and afterwards, as alleged, they gave limited support to IDCG. And, as defendants note, the notes from the August 11, 2010 meeting, in the main, address a different matter entirely from IDCG. They describe a meeting between LCH and its board-member banks whose purpose was to consider "how LCH could succeed in the US market." Playforth Decl. Ex. 38 at 1. They mention IDCG solely as one [\*66] of a number of potential U.S. "partners" for LCH; the notes' reference to opposing "mov[ing] significant volumes to exchanges" appears in a list of general topics as to which "[t]here was broad agreement," *id.* at 2; see also *id.* at 2-3 (stating that the "discussion focused on the need for and attractiveness of US partners" for LCH; listing points of "agreement" among LCH and its board about potential partners; identifying five "potential partners," including IDCG, and indicating that one "[n]ext step[]" was to "investigate" IDCG). No aspect of the meeting notes other than the excerpt quoted in the PFAC supports the PFAC's theory. On the other hand, that excerpt is certainly suggestive. Significant, too, is that IDCG had just provided clearing assistance on a maiden trade the month earlier to *Javelin*. The Court has held, in *IRS I*, that plaintiffs have adequately pled a plot among Dealers to boycott and destroy *Javelin*'s post-Dodd-Frank SEF. The PFAC's claim that certain Dealers exchanged emails about *Javelin* and IDCG after IDCG assisted with *Javelin*'s starter trade makes more plausible that the Dealers that met thereafter and discussed IDCG agreed to shun it on account of its assistance to *Javelin*. The [\*67] Court thus will assume *arguendo* that a plausible agreement has been pled among these Dealers effective August 2010 and lasting until IDCG's purchase in 2012 to continue not to utilize (*i.e.*, to boycott) IDCG's services.<sup>11</sup>

However, this strand is alone among the many facts that the PFAC pleads as to 2008-2012 in (arguably) plausibly pleading an instance of a *per se* unlawful agreement. No others do so. The IDCG episode as pled involves an agreement among a subset of Dealers from August 2010 until 2012 to continue to make limited use of a single clearinghouse that had theretofore been largely in a state of disuse. It does not and cannot support the sweeping claim of *per se* illegality pursued by the PFAC as to 2008-2012: of a five-year agreement among all Dealer Defendants to boycott a host of concerns with some potential to one day facilitate all-to-all anonymous trading.

The Court, therefore, holds that to the extent that the PFAC claims that defendants' conduct during 2008-2012 was *per se* illegal, it is futile.

## B. Delay, Prejudice, and Absence of Good Cause

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<sup>11</sup> The PFAC's allegations as to later events regarding IDCG are of a different nature. It alleges that IDCG later unsuccessfully sought a consortium investment from Dealers and others, but that, because the Dealers insisted on excessive equity and governance rights, no agreement was reached. PFAC ¶ 316. This negotiation does not describe a boycott; any claim as to it would be analyzed, if at all, under the rule of reason. The allegation that, in 2012, IDCG sold itself to the Dealer-controlled clearinghouse LCH.Clearnet, which "neutralize[d] IDCG," *id.* ¶ 322, also does not describe *per se* unlawful conduct.

The Court next considers the related questions whether granting leave to add the PFAC's claims covering 2008 through 2012 would [\*68] (1) unduly delay this litigation and (2) cause prejudice to the defense. After considered review, the Court holds yes as to both. The scale of delay and prejudice would far exceed that which permitting the PTAC's claims as to these five years would have caused. The Court further holds that plaintiffs have not shown good cause for pursuing these claims at this late date.

## 1. Delay

The issue of delay is framed by the chronology of this litigation.

Fact discovery began upon the July 28, 2017 decision in *IRS I*. Today, the deadline for fact discovery is April 10, 2019, some four weeks from now. Dkt. 549.

Throughout, fact discovery has entailed extended negotiations among the parties, and occasionally with third parties, as to scope and parameters. It has entailed resolution by the Court of intermittent disputes regarding such discovery. See, e.g., Dkt. 266 (October 10, 2017 decision); Dkt. 296 (October 24, 2017 decision); Dkt. 322 (January 8, 2018 decision); Dkt. 492 (August 22, 2018 decision); Dkt. 494 (August 22, 2018 decision); Dkt. 550 (September 21, 2018 decision); Dkt. 583 (October 19, 2018 decision); Dkt. 618 (November 13, 2018 decision); Dkt. 686 (January 23, 2019 decision). The Court [\*69] has held monthly status calls with counsel, beginning in November 2017. Dkt. 268. These have enabled the Court informally to resolve, or guide the resolution of, many other discovery disputes (some concrete and some inchoate). These calls have kept the Court abreast of the discovery process.

Early in the fact discovery process, the Court resolved a dispute particularly important here: as to the start date of document discovery for the surviving (2013-2016) claims. Dkt. 266 (October 10, 2017 decision). Class plaintiffs had sought an order requiring defendants to produce documents created on or after January 1, 2009; defendants had proposed a start date of January 1, 2012. See Dkt. 265 (defendants' letter). The Court chose an intermediate start date: July 21, 2010, the date of Dodd-Frank's passage. Dkt. 266 at 2. This date, the Court held, balanced plaintiffs' interest in discovering defendants' "pre-conspiracy dealings" against the burdens of obliging the 11 defendant groups to make pre-conspiracy discovery. *Id.* Explaining why documents created after July 21, 2010 were more likely relevant than those created before, the Court stated: "[A]fter Dodd-Frank was enacted, it became materially [\*70] more foreseeable that electronic all-to-all trading platforms for IRSs would one day develop." *Id.* The July 21, 2010 start date framed the parties' ensuing negotiations and many ensuing rulings on fact discovery disputes. These included an omnibus ruling on January 8, 2018, which resolved whether, and to what extent, a host of topics pertinent to events in 2007-2012 that plaintiffs sought to explore were relevant to the surviving claims. Dkt. 322.

Under the court-approved case management plan, the deadline for substantial completion of document discovery, as extended, was June 29, 2018.<sup>12</sup> As of December 2018, the parties and third parties had produced more than four million documents. See Brockett Decl. ¶ 6 & n.l. In addition, substantial data compilations, largely capturing the terms of IRS trades between 2013 and 2016, have been produced from multiple sources.

On October 26, 2018, plaintiffs filed the pending motion for leave to file the PFAC. Dkts. 590-92. The motion was filed more than eight months after the February 21, 2018 deadline set for amended pleadings in the case management plan. Briefing on the motion was completed in late December 2018, 10 months after that deadline.

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<sup>12</sup> Document discovery continued after the substantial completion deadline. Today, as reflected on the Court's most recent status calls with counsel and counsel's submissions in advance of those calls, only discrete areas of document discovery remain incomplete. For example, the parties continue to discuss the adequacy of entries on certain privilege logs. Both sides have also sought—and the Court has authorized—discovery from custodians abroad pursuant to the Hague Convention; this discovery remains outstanding.

Fact [\*71] depositions are nearing completion. The Court set by order a cap on each side's fact depositions. The Court, *inter alia*, authorized plaintiffs to take 110 depositions of fact witnesses across the 11 defendant groups and an additional five [Rule 30\(b\)\(6\)](#) depositions on data issues; and authorized defendants to take 30 depositions of fact witnesses across the three platform plaintiffs. Dkt. 583. As of the parties' February 20, 2019 joint status report, plaintiffs had taken or noticed 86 depositions of witnesses affiliated with defendants, defendants had taken 25 depositions of witnesses affiliated with plaintiffs, and an additional 25 depositions had been taken or noticed of third-party witnesses.

Also underway, consistent with the case management plan, is briefing on plaintiffs' motion for class certification. See Dkt. 522 (briefing schedule). On February 20, 2019, plaintiffs submitted their opening motion and expert reports. See Dkts. 722-25. Defendants are to depose plaintiffs' class certification experts by April 10, 2019; defendants are to submit opposition briefs and supporting expert reports by May 31, 2019; plaintiffs are to depose defendants' experts by June 28, 2019, and to submit replies [\*72] in support of their motion by August 16, 2019. See Dkt. 522.

Particularly viewed in light of the mature stage of this litigation, permitting the PFAC to supplant the current pleadings would upend the schedule and introduce enormous delay. The PFAC would more than double the temporal duration covered by plaintiffs' claims, adding five years to the current four. It would introduce a vast array of events, entities, concepts, witnesses, custodians, trades, and data not presently in the case. Given the nature of the PFAC's claims as to defendants' alleged conduct during 2008-2012, it would also require the testing of a complex and layered theory of [§ 1](#) liability that could proceed at most under the rule of reason, markedly different from the far simpler *per se* theory of [§ 1](#) liability, involving a boycott of three new trading platforms, that plaintiffs have pursued as to 2013-2016. For these reasons, adding the PFAC would effectively re-start the discovery process in this long-running litigation.

Briefly:

As to topics, the PFAC would inject into this litigation, among others, the following five episodes. The Court has referred to them earlier in the context of analyzing whether a *per se* violation [\*73] of [§ 1](#) has been adequately pled. The following synopses drawn from the PFAC underscore that each is complex, involved numerous participants, including a large number of non-parties to this lawsuit, played out over years, and transpired largely if not exclusively before the passage of Dodd-Frank:

**Tradeweb/"Project Fusion":** The PFAC alleges that, as one part of a "dealer consortium" strategy, see, e.g., PFAC ¶¶ 8, 144, the Dealers collectively invested in an existing IRS business as part of a joint venture, see PFAC ¶¶ 155-57. They did so with the goal of steering Tradeweb from developing its anticipated click-to-trade platform offering, which the Dealers viewed as "a precursor to all-to-all trading," *id.* ¶ 141, to market, see *id.* ¶¶ 143-44. The PFAC alleges that the Dealers' scheme to invest in Tradeweb so as to redirect its focus had its roots in memos and communications in 2006-2007, see, e.g., *id.* ¶¶ 145, 154, 157; entailed, post-investment, installing senior personnel of the Dealers on the boards of various Tradeweb business lines, see, e.g., *id.* ¶¶ 161-73 (identifying 23 such personnel); and led to Dealer-influenced decisions by Tradeweb not to launch a click-to-trade platform, [\*74] *id.* ¶¶ 181-87, due to open in 2013, but instead to devote minimal resources to an inter-Dealer SEF called "Dealerweb," *id.* ¶¶ 188-93, and to develop a central limit order book, or CLOB, that today is "effectively closed off to the buy side," *id.* ¶ 203; see also *id.* ¶¶ 194-95.

**CME/Swapstream/"Project Magellan":** The PFAC alleges that, as part of the consortium strategy, the Dealers beginning in 2007 shunned the Swapstream clearing platform that CME had acquired, fearing CME would use that platform as a building block towards developing all-to-all anonymous trading. *Id.* ¶¶ 205-96. It alleges that internal memos and communications at one Dealer as to concerns about Swapstream date to 2006-2007. *Id.* ¶¶ 230-31. It alleges that CME approached the Dealers' strategic investment groups about supporting the platform; that Dealers' initial responses varied; and that Dealer personnel discussed Swapstream during and around board meetings of a separate entity, OTCDerivNet, and over email. *Id.* at ¶¶ 231-41. It alleges that in fall 2008, CME and the Dealers, the latter represented by a partner from the Cleary Gottlieb law firm, began "collective negotiations," *id.* ¶ 249, as to "governance" of, *id.* ¶ [\*75] 252, and Dealer

use of Swapstream, *id.* ¶¶ 249-54. In the end, the Dealers privately agreed not to support Swapstream during "at least one (and probably more) meetings among themselves." *Id.* ¶ 255. CME was left, by early 2009, with "no choice but to abandon Swapstream." *Id.* ¶ 256. Later, CME initiated joint negotiations with the Dealers regarding a "clearing-only solution" available only to the buy-side. *Id.* ¶ 257. Negotiations regarding this "Project Magellan" involved representatives of each Dealer, *id.* ¶ 260 (listing 14 Dealer personnel, plus the Cleary partner); in the negotiations, the Dealers took common positions and insisted on "governance' and 'control' over any IRS clearing platform," so as to prevent it from becoming used as the basis for an all-to-all trading platform, *id.* ¶ 273. The PFAC parses the revenue-sharing agreement to which CME and the Dealers eventually agreed, the terms of which, the PFAC alleges, together "effectively prevent[] CME from launching an IRS trading platform." *Id.* ¶ 279; see also *id.* ¶¶ 276-82. Finally, between 2008 and 2012, the Dealers delayed the launch of CME's clearinghouse via coordinated actions, including through use of a Dealer-controlled [\*76] trade-processing entity, MarkitSERV, which CME found "impossible to deal with." *Id.* ¶ 291; see also *id.* IN ¶¶ 283-96. The result was that the Dealers made only limited use of CME to clear inter-dealer trades. *Id.* ¶ 294.

**ICAP/"Project Snowflake":** The PFAC alleges that, by 2009, ICAP had developed an IRS order book used by the Dealers, but that buy-side customers could not access this platform because ICAP had agreed with the Dealers to block buy-side access as part of a 2009 "détente." *Id.* ¶ 394. The détente arose after Tradeweb (substantially owned by Dealers) launched a trading platform for mortgage bonds called "Dealerweb," which had a "devastating impact" on ICAP's competing mortgage-bond-trading business. *Id.* ¶ 395. ICAP allegedly then threatened, in retaliation, to open an all-to-all electronic trading platform, building on a product ICAP had developed for the European inter-dealer-broker market called iSwap. *Id.* ¶¶ 394-97. In response, in 2009, the PFAC alleges, ICAP and the Dealers agreed that the Dealers would not further expand Dealerweb into the IRS inter-dealer-broker space and ICAP would not establish an all-to-all IRS trading platform *Id.* ¶¶ 398-401. Later, in 2011, three [\*77] Dealers engaged in a transaction ("Project Snowflake") with ICAP under which, in exchange for an equity interest and these Dealers' agreement to stream prices to ICAP, these Dealers were given seats on ICAP's board and effective control of its platform. *Id.* ¶¶ 402-05. ICAP has since abided by its agreement with the Dealers. *Id.* ¶¶ 409-12.

**IDCG:** The PFAC alleges that IDCG, founded in 2007, developed a promising clearing solution for IRSs which was consistent with exchange-trading and favorably viewed by the buy-side. *Id.* ¶¶ 297-304. But, it alleges, unspecified Dealer-affiliated FCMs refused to clear through IDCG. *Id.* ¶ 307. And after platform plaintiff Javelin cleared its first swap in July 2010, the PFAC alleges, several Dealers communicated by email and, at a meeting including six Dealer personnel, agreed "to oppose moves which move significant volumes to exchanges," including IDCG. *Id.* ¶ 311 (emphases, quotation marks, and citation omitted). The PFAC further alleges that afterwards, although Dealers "kept up their engagement with IDCG on the surface," *id.* ¶ 315, and met with IDCG to discuss doing business together, the Dealers took a "unified position" that they would do so only [\*78] if granted equity in the platform and, implicitly, "governance and control," *id.* ¶ 316. Later, six Dealers strung along a potential acquirer of IDCG (truClear LLC); the acquisition failed. *Id.* ¶¶ 317-19. Finally, the Dealers "sought to kill IDCG once and for all" by having LCH.Clearnet (which operated SwapClear, a Dealer-controlled clearinghouse) pursue the acquisition of IDCG. *Id.* ¶ 322. After the August 2012 acquisition, LCH.Clearnet "mothballed much of its technology." *Id.* ¶ 323.

**Tradition:** The PFAC alleges that Tradition announced in 2010, consistent with Dodd-Frank, that it would launch a SEF-compliant platform, and that, in October 2010, it approached the Dealers to form an advisory committee as to the SEF's operation. *Id.* ¶ 344. In March 2011, Tradition and the Dealers entered into a joint contract that provided for liquidity to be given to Tradition's SEF and for dominant Dealer participation on Tradition's "Product [Commit]tee," *id.* ¶ 346, which sets, *inter alia*, trading protocols, see *id.* ¶¶ 346-50. This gave the Dealers, by September 2013, "complete governance" over the SEF, known as Trad-X. *Id.* ¶ 351 (emphasis and citation omitted). However, Dealers remained concerned that [\*79] Tradition might introduce all-to-all IRS trading with the buy side and used their governance power to limit buy-side access to Trad-X's view-only screens, to control clearing for Trad-X, to set access criteria, and to insist on non-anonymity of trading (i.e., "name give-up"). *Id.* ¶¶ 357-70.

In addition to these episodes,<sup>13</sup> the PFAC's claim of a plot to inhibit, pre-Dodd-Frank, the emergence of anonymous all-to-all electronic trading would inject the following three thematic topics into the case. Each, too, is complex, and implicates a large array of new concepts, events, persons (including third parties, and records).

**Status of Market Infrastructure—Adaptability to All-to-All Trading:** The PFAC broadly alleges that by 2007, the market was technologically ready for the introduction of electronic all-to-all trading of IRSs; that the "pillars" of electronic execution, post-trade processing, trade confirmation, order routing, and central clearing were in place and capable of adaptation from the context of inter-Dealer trades context to that of IRS trades made on an anonymous basis on an all-to-all exchange; that—notwithstanding the delays and difficulties that later led regulators to defer [\*80] the effective date of Dodd-Frank's SEF mandates—clearing infrastructure in particular was readily adaptable to the context of clearing buy-side trades; and that buy-side customers as early as 2007 would have invested as necessary (e.g., in clearing services) to enable them to trade on an electronic all-to-all market. See *id.* ¶¶ 93, 110-21,440-52.

**Steps by Dealers to Limit Buy-Side Clearing:** The PFAC alleges that, years before Dodd-Frank, the Dealers erected artificial barriers to buy-side clearing. *Id.* ¶¶ 414-52. One step included "[t]ak[ing] [c]ontrol of [c]learing [i]nfrastructure." *Id.* ¶ 416. The PFAC alleges that, in 2000, Dealers founded OTCDerivNet, installed their personnel on its board, and used this new entity to secure control of SwapClear, an entity founded in 1999 by LCH.Clearnet to clear IRS trades. *Id.* ¶¶ 416-21. It alleges that the Dealers thereafter operated SwapClear as a utility, not as a profit-maximizing entity, which deterred other entities from opening clearing businesses; and also used OTCDerivNet as a forum to collude about market structure. *Id.* ¶¶ 422-25. After Dodd-Frank, the Dealers continued to impede buy-side clearing, for example by requiring clearing [\*81] members of SwapClear to make large contributions of capital, limiting the buy-side's ability to utilize SwapClear. *Id.* ¶¶ 426-27.

**Pre-Dodd-Frank Collaboration Among Dealers:** The PFAC alleges that, in the years before Dodd-Frank, personnel across Dealers communicated about their concerns regarding potential "disintermediation" were electronic all-to-all exchanges to develop. See *id.* ¶ 122-32. Further, apparently at all relevant periods, the Dealers communicated about this topic and potential responses to the threat of disintermediation in trade associations, including the International Swaps and Derivatives Association, *id.* ¶ 374-75, and the Futures Industry Association, *id.* ¶¶ 376-81.

As the above review makes abundantly clear, adequate exploration of these alleged pre-Dodd-Frank episodes and topics would entail a vast amount of new discovery—documentary, testimonial, and expert. The Court so observed in noting the substantial delay that the PTAC would cause. See [IRS II, 2018 U.S. Dist. LEXIS 86732, 2018 WL 2332069, at \\*20-22](#). The Court's assessment is that the delay the PFAC would occasion would be far greater, given the expanded number of complex episodes and the topics it implicates, and given that more than a year of fact discovery has passed [\*82] since the decision denying leave to add the PTAC's claims as to 2008-2012.

As to document collection, review, and production, as the Court noted in *IRS II*, "the parties' agreements as to document production parameters in 2013-2016 would not, logically, control discovery relevant to the 2008-2012 claims." [2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*20](#). Document production in this case is nearly complete. As to document custodians, given the PFAC's new claims, collection of electronic and hard-copy records would need to re-start, and would now need to reach back at least to the start of 2008 (if not earlier: the PFAC contains many allegations as to circumstances in 2006 and 2007, and some as to earlier years). Records retrieval would also assuredly be necessary for a very sizable new group of custodians. That is because, "at particular Dealers, given natural turnover and promotions and reassessments, there were assuredly different personnel responsible for IRS-related matters during the two periods," [2018 U.S. Dist. LEXIS 86732, \[WL\] at 21](#), and because the many issues and incidents novel to the earlier period "likely involved substantially different personnel at particular Dealers from those as to whom discovery has been authorized as to 2013-2016," *id.*

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<sup>13</sup> The Court has not included here the PFAC's allegations about Bloomberg, viewing these as occurring after Dodd-Frank and largely in or after 2013.

As to the delineation [\*83] of topics and search terms that would guide document collection and review of materials germane to the new five years of claims, much as the Court noted in *IRS II*:

[T]he many distinct events, issues, entities, and players at issue in 2008-2012 similarly would require a fresh assessment of these parameters. So would the fact that plaintiffs' claims involve a materially different (pre-Dodd-Frank) regulatory environment than during 2013-2016. It is likely, too, that there would be rounds of discovery disputes requiring judicial intervention, including as to the start date for document review (numerous allegations in the [PFAC] date to 2007 and years before) and as to the permissibility of discovery into particular topics.

*Id.*

As to fact depositions, they too are close to complete. That plaintiffs would seek substantial new and reopened depositions of past and present defense personnel is inevitable, given the multi-chapter, multi-dimensional nature of the § 1 scheme among Dealers that the PFAC postulates, and that the PFAC names many dozens of Dealer personnel, including in connection with the episodes and topic areas synopsized above. Unavoidably, adding claims as to 2008-2012 would occasion, [\*84] and justify, a new round of depositions. The Court's expectation is that between new and reopened depositions, the PFAC's added claims would credibly support depositions of approximately the same number of defense deponents as has been authorized for the existing claims.

The PFAC's expanded claims also implicate third parties. The Court's description of the PTAC applies: "Those identified on the face of the [PFAC] include numerous clearinghouses, interdealer brokers, other service providers, and industry associations." *Id.* The number of third-party entities implicated for 2008-2012 is, in fact, greater in the PFAC than the PTAC, given its expanded claims for this period. The number of such third parties vastly outstrips those implicated by plaintiffs' 2013-2016 claims, consistent with plaintiffs' simpler theory of § 1 liability for the later period (a boycott of three existing SEFs). Extensive and protracted third-party discovery—both documentary and deposition—would certainly be sought by both sides were the PFAC's 2008-2012 claims permitted to go forward. There would also assuredly be no shortage of disputes about the scale of such discovery (and how the expense occasioned by it is to [\*85] be borne). Even as to the 2013-2016 claims, the Court has already been called upon on multiple occasions to resolve or pretermitted discovery disputes regarding third-party discovery. See, e.g., Dkts. 456 (Tradition), 550 (Tradition), 609 (ICAP and Tullett).

Finally, as to data, as the Court has previously noted:

[I]ndependent of electronic and hard-copy document discovery, the 2008-2012 claims would require—as have the 2013-2016 claims—the locating and harvesting of IRS trading data throughout the period. Such data is relevant, *inter alia*, to liability (including the existence of a pricing injury from the alleged conspiracy) and damages. Even assuming that such discovery demands did not give rise to disputes requiring extended negotiation and resolution, identifying and collecting this data, which before Dodd-Frank's SEF mandate took effect was likely held in decentralized locales, would likely take substantial time.

[IRS II, 2018 U.S. Dist. LEXIS 86732, 2018 WL 2332069, at \\*21.](#) The same need to identify, harvest, and review these data sets applies to the PFAC.

In *IRS II*, the Court's assessment was that

an amendment to add the industry-wide, complex, and half-decade-long claims proposed by the PTAC . . . would obliterate the [then] May 21, 2018 deadline [\*86] for substantial completion of document production. In connection with the 2013-2016 period, it took counsel for the many parties (and third parties) seven months of focused work, beginning from the date of the ruling on the motion to dismiss, to formulate and narrow discovery demands, negotiate discovery parameters including as to custodians and search terms and strings, and to litigate to completion most discovery disputes as to matters pertinent to that period. A similar exercise would now be necessitated as to plaintiffs' new claims.

[2018 U.S. Dist. LEXIS 86732, \[WL\] \\*21](#) (footnotes omitted). Considering related factors including the need to elongate deposition discovery, the Court's conservative estimate was that permitting the PTAC's 2008-2012 claims to stand would cause a delay of, at the very least, 12 months for the completion of fact discovery. *Id.* ¶ 22.

The Court's assessment here is that, relative to the PTAC, permitting the PFAC's 2008-2012 claims to stand would occasion a materially *longer* delay of the case schedule. Unlike at the time of *IRS II*, fact discovery today is close to complete. Even were fact discovery on the 2008-2012 claims to commence immediately, it would virtually all occur after the current [\*87] April 10,2019 deadline for fact discovery. And with document production substantially complete and most depositions taken, there are limited opportunities to achieve efficiencies or economies of scale across discovery for the 2008-2012 and 2013-2016 events.

In effect, adding the 2008-2012 claims would again "allow[] a new MDL-sized lawsuit to be hitched to the existing claims." [2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*20](#). And with fact discovery all but complete for 2013-2016, the processes of organizing and taking fact discovery for these two lawsuits would effectively proceed *seriatim*, with the 2013-2016 discovery wrapping up shortly after 2008-2012 fact discovery commenced. With limited efficiencies to be gained, fact discovery on the 2008-2012 claims would thus be tantamount to undertaking fact discovery in a new litigation.

In estimating the added length of fact discovery were the PFAC's 2008-2012 claims permitted, a fair starting point is the length of time such discovery will ultimately have taken as to plaintiffs' 2013-2016 claims. From the date of *IRS I* (July 28, 2017) to April 10,2019 was 20.5 months. To more precisely calibrate the extent of the delay in fact discovery that the PFAC would occasion, certain adjustments [\*88] would need to be made. On the one hand, two factors would tend to reduce (at the margin) the extent to which the 2008-2012 claims would extend the fact discovery deadline. First, four weeks remain before the current fact discovery deadline. Second, as a result of the initial (2013-2016) round of fact discovery, both sides' counsel are doubtless more familiar with the concepts and terminology in this area, and with one another. This would facilitate discovery requests and negotiations. On the other hand, two factors would significantly elongate 2008-2012 discovery relative to 2013-2016 discovery. First, the PFAC's claims as to 2008-2012 are materially more complex and more difficult to discover than those for 2013-2016. These claims implicate more events, older events, older and harder to secure evidence, and—most importantly—far more varied episodes and third parties than do the 2013-2016 claims. Second, assuming *arguendo* that plaintiffs' § 1 claims as to 2008-2012 were held viable, the Court's assessment is that these claims, which largely involve claims related to the Dealers' "consortium investments," could at most state a claim under the rule of reason, in contrast to plaintiffs' [\*89] 2013-2016 claims of *aper se* unlawful boycott of the nascent SEF platforms. The issues implicated by a rule of reason claim (e.g., as to the product and geographic markets, as to product substitutes and barriers to entry, and as to the anti-competitive effects versus the pro-competitive benefits of the challenged practices) would complicate and measurably add to the duration of fact discovery. See discussion *infra* p. 61.

All in, the Court's best estimate—based on its experience overseeing this litigation to date, its broader experience involving complex civil litigation, and its assessment of the unique features of the 2008-2012 claims—is that fact discovery attributable to the PFAC's 2008-2012 claims would, conservatively, add approximately 18-21 months to the current fact discovery deadline, and quite possibly more. Adding these claims would also further require a re-setting of all ensuing deadlines in the case management plan (e.g., class certification), with these deadlines presumably keyed to the new end dates for fact discovery.

In arriving at this estimate, the Court notes that plaintiffs, strikingly, do not engage at all with the implications of their claims for relevant fact discovery. [\*90] They do not argue, for example, that the discovery addressed above would or could be provided with materially quicker dispatch. Nor, given the instructive experience of this litigation to date, could they credibly do so. Instead, plaintiffs declare that—as long as the defendants are ordered to produce to them productions that they have made to the CFTC in connection with a regulatory investigation—plaintiffs will "agree[]" not to pursue further document discovery and to a fact discovery extension of just three months. Pl. Mem. at 6; see also Pl. Reply at 6.

For a host of reasons, this bid is a non-starter. The Court has rejected plaintiffs' attempt to gain defendants' document productions in the CFTC's regulatory investigation (and in another civil litigation). See Dkt. 266. In the interests of all parties, and consistent with the integrity of the truth-seeking process, the metes and bounds of document production here are to be measured against the viable claims pursued *in this litigation*. A party's regulatory production may overlap only slightly with pertinent records in a civil litigation. And it may include materials outside the proper scope of discovery here, which plaintiffs have [\*91] no right to access.<sup>14</sup>

Plaintiffs' suggestion that a fact discovery extension for the 2008-2012 claims can be cabined to three months is also inconsistent with their acknowledgement (in a footnote) that, if leave to amend is granted, they intend to pursue third-party discovery (and presumably third-party trading data). See Pl. Mem. at 6 n.18. Notably, too, plaintiffs have not foresworn *deposition* discovery, of defendants or third parties. This, too, makes facetious the estimate that a bare three-month fact discovery extension would suffice. Plaintiffs' request that they be allowed "full discovery" into the viability of all-to-all IRS trading platforms before 2013, so as to meet the defense that the investor plaintiffs' injuries are too speculative to supply antitrust standing, *id.* at 21, is also inconsistent with the notion of a three-month extension.

Finally, plaintiffs ignore *defendants'* right to discovery. Even if plaintiffs were taken to have unilaterally disarmed from any further fact discovery, defendants would have the right to pursue, presumably via new or amended subpoenas, third-party document discovery, data, and depositions germane to the added claims. And, for the reasons addressed, [\*92] third-party discovery, by whichever party sought, is apt to be substantial and time-consuming. The Court would expect substantial third-party discovery to be directed by defendants, at a minimum, to the entities above whom the Dealers are alleged to have impaired, pressured, or boycotted; and to the buy-side entities whom the PFAC claims were deprived of an otherwise available and desired opportunity to trade IRSs anonymously on an all-to-all electronic platform.<sup>15</sup> See, e.g., PFAC ¶¶ 220-21,303-04,442 (listing such buy-side entities). Finally, to meet plaintiffs' broad claims as to 2008-2012, defendants would be expected to review and harvest their own records, including employee emails, covering the years of the new claims. Production of materials from among these records—e.g., in support of defense motions on summary judgment or opposing class certification or in connection with a joint pretrial order—would assuredly be met with demands for production of a fuller set.

Accordingly, plaintiffs' proposal to forgo certain document discovery is not a credible means of addressing the substantial delay that the PFAC would produce.

Plaintiffs, lastly, ask that, as an alternative [\*93] to permitting the claims as to 2008-2012, the Court permit plaintiffs to pursue claims from the date of Dodd-Frank's enactment forward. This proposal is, presumably, keyed to the start date of document discovery. But this, too, is not a coherent means of redressing delay. As plaintiffs acknowledge, even if the start date of the class period were moved forward 30 months from January 1, 2008 to July 21, 2010, discovery would still be needed as to "the origins and impact of Defendants' conspiracy in the 2007-2010 period." Pl. Mem. at 6 n.19. That is because the alleged stratagems on which plaintiffs base their claims of a pre-2013 § 1 violation—e.g., Tradeweb /"Project Fusion," CME /"Project Magellan," ICAP /"Project Snowflake," IDCG, and Tradition—predate Dodd-Frank and often 2008. While plaintiffs' proposal would prune temporally the evidence bearing on investor damages, on plaintiffs' theory, substantially the same discovery would be needed to test issues bearing on § 1 liability, including the existence, origins, scope, and participation in the alleged scheme; whether investor plaintiffs' injuries are sufficiently non-speculative to support antitrust standing; and whether the elements of [\*94] a rule of reason claim are met.

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<sup>14</sup> The Court has further recognized the practical reality that "a regulated entity confronted with a regulatory subpoena may be unable or unwilling to resist the subpoena's document production demands, even where those demands, if made in federal civil litigation, would fail the standards of **Rule 26**." Dkt. 266 at 4.

<sup>15</sup> Defendants would also have the right to take document and deposition discovery of the class plaintiffs who did not trade IRSs post-2013 and thus have been out of this case since *IRS I*, i.e., for the entire discovery period. This could entail negotiations as to custodians and search terms, production of responsive documents, and depositions of these plaintiffs' employees and investment advisors.

The Court, accordingly, finds that permitting plaintiffs' 2008-2012 claims to proceed would cause substantial delay, realistically 18-21 months or more, to this litigation.

## 2. Prejudice

Drawing on its experience closely supervising pretrial proceedings in this litigation, the Court also finds that the amendment to add the 2008-2012 claims, even more than the proposed amendment in the PTAC, would palpably prejudice the defendants. Cf. [IRS II, 2018 U.S. Dist. LEXIS 86732, 2018 WL 2332069, at \\*22-23](#).

In *IRS II*, the Court noted that as of the date of the PTAC, defendants had for seven months "expended time, money, and energy in the discovery phase of this litigation on the only rational assumption as to this case's temporal scope: that plaintiffs' surviving claims were limited to 2013-2016." [2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*22](#). The Court noted that, based on that temporal premise, counsel had exchanged hundreds of discovery communications, held dozens of meet-and-confers, and "devoted enormous effort to reaching agreement on matters such as the as scope of discovery, search terms, and custodians." *Id.* (quotation marks and citation omitted). Counsel had also litigated a series of discovery disputes that turned on this time period, including those that involved [\*95] the document-discovery start date and the proper subjects of document collection and review.

In finding prejudice, the Court noted:

The Court's resolution of these disputes in turn shaped the time-intensive discovery efforts that followed—including the identification of custodians, the formulation of search terms and search strings, the tabulation of "hit counts" aimed at measuring efficacy and burden and ensuing negotiations, and the collection of millions of documents. It is safe to assume that, on these efforts, each of the 11 defendant groups devoted very substantial time and incurred very substantial legal fees.

*Id.* (internal citation and footnote omitted). However:

Reviving the 2008-2012 claims would negate this work, waste these efforts, and largely send the parties back to the discovery drawing board. It would effectively overrule the Court's rulings setting the document-discovery start date and excluding (in whole or large part) a host of pre-Dodd Frank topics from the scope of permitted discovery. It would require counsel to start negotiating anew the expanded universe of discovery issues. It would require developing and testing new potential search terms to gauge the utility [\*96] and burden of each. It would require counsel to revisit prior compromises based on aggregate burdens for each defendant in light of the added burdens presented by the amended allegations and extended time period. It would almost certainly open up new rounds of protracted litigation over discovery disputes. It is safe to say that the duplicative fees (of counsel and litigation support) and costs wasted by the need for this do-over, when measured across the 11 defense firms, would extend well into seven figures, to say nothing of the wasted time of client personnel.

*Id.* (footnote omitted).

These considerations apply with even greater force more than a year after *IRS II*. As of February 2018, at least some efficiencies remained achievable via coordinating discovery (document and deposition) on plaintiffs' 2008-2012 claims with as-yet unfinished discovery on the 2013-2016 claims. But today, those efficiencies are realistically all but gone, with document discovery complete save for loose ends, and deposition discovery due to close in under a month.

Were the PFAC's claims to be permitted, the substantial costs and burdens borne by defendants would therefore include ones that would have not [\*97] existed had plaintiffs filed the PFAC within—or even close to—the February 21, 2018 deadline set in the case management plan. For each of the 11 defendant groups, the cumbersome, time-intensive, and costly processes associated with modern document discovery would need to begin from even closer to a "standing start," [2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*20](#), than in the case of the PTAC.

There would first be the "laborious process of framing the document discovery to be produced for that period . . ." *Id.* Much time and expense would assuredly be spent on new rounds of negotiating search terms and protocols keyed to the PFAC's new claims, including testing these terms and protocols based on hits yielded by experimental search terms. This process would be all the more involved and time-consuming given the complex, multi-faceted nature of the conduct that the PFAC claims was part of an overall § 1 conspiracy during the years before SEFs took root in 2013 pursuant to Dodd-Frank. Substantial time would inevitably be spent, too, litigating discovery disputes. Once parameters were in place, each defendant would then need to identify, find, and collect millions of electronic (and hard copy) records from or for numerous custodians; retain [\*98] and train a new set of contract lawyers about this litigation and the review protocols specific to it; put in place the mechanical apparatus for such review; and arrange and train teams for second-tier production tasks (e.g., privilege reviews).

As to depositions, plaintiffs have taken or noticed most allotted for defense personnel. And plaintiffs would undoubtedly demand new and reopened depositions to account for the five years of added claims. The Court would surely permit additional depositions, to allow for fair discovery of areas of conduct newly relevant in light of the PFAC. But the untimely date at which depositions as to events and concepts relevant to pre-2013 claims were decided upon too would prejudice defendants, relative to the scenario in which overall discovery was negotiated more holistically. Addressing all forms of discovery in *IRS II*, the Court noted that:

Adding five years of claims to the existing four years would not ineluctably entitle plaintiffs to the receipt of 125% more discovery. A nine-year conspiracy claim implicating numerous episodes, issues, and personnel would by its nature require thoughtful application of the proportionality command of *Federal Rule of Civil Procedure 26(b)(1)*. To the extent [\*99] that defense discovery for 2013-2016 had not already been produced to plaintiffs, a fair question would arise whether to revisit the agreed parameters of that discovery in the interest of keeping the overall discovery burden manageable.

[2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*21](#). Today, with deposition and document discovery largely complete as to 2013-2016, defendants have lost the ability to negotiate or move, in the wake of the added claims, for a reduced scope of discovery as to 2013-2016 in the interests of keeping manageable the overall discovery burden.

The Court therefore assesses that the tangible prejudice to defendants from plaintiffs' late amendment would substantially exceed the scale of prejudice estimated in *IRS II* from permitting the PTAC's similar amendment.

Plaintiffs, notably, do not challenge the account in *IRS II* as to the costs and burdens that adding the 2008-2012 claims would then have added. Nor do they dispute defendants' statement that adding such claims now would add to these costs and burdens. That is unavoidably correct. Plaintiffs instead argue that as a matter of law, the "time, effort and money" that a party's late amendment visits on its adversary cannot alone qualify as "prejudice." Pl. Mem. [\*100] at 23-24 (quotation marks and citation omitted). Plaintiffs claim that only "legal prejudice" is cognizable, and that a defendant cannot show this where "the proposed amendment is simply variations on the original theme." *Id.* at 23 (quotation marks and citations omitted).

Plaintiffs incorrectly portray the law. As the authorities reviewed above recognize, an amendment may be prejudicial when it would require an opponent "to expend significant additional resources to conduct discovery . . ." [AEP Energy Servs., 626 F.3d at 725](#) (quoting [State Teachers Ret. Bd., 654 F.2d at 856](#)). One case on which plaintiffs rely says precisely that. See [Pasternack v. Shrader, 863 F.3d 162, 174 \(2d Cir. 2017\)](#) ("A litigant may be 'prejudiced' within the meaning of [Rule 15(a)] if the new claim would: '(i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial [or] (ii) significantly delay the resolution of the dispute . . .').

To be sure, in the two Second Circuit cases on which plaintiffs rely, leave to amend was held wrongly denied based solely on delay and associated litigation expenses. But these are easily distinguished. *Miller v. Selsky*, 234 F.3d 1262 (2d Cir. 2000), an unpublished opinion, solely involved [Rule 15. 2018 U.S. Dist. LEXIS 86732, \[WL\] at \\*2](#). It did not involve [Rule 16](#). And no discovery had taken place as of the date of the requested amendment. *Id.* *Pasternack*, too, was resolved [\*101] only under [Rule 15](#). The Circuit's decision does not address [Rule 16](#). On the contrary, it states: "[I]t does not appear that there is any allegation of untimeliness based on a scheduling order."

863 F.3d at 174. The Circuit held only that the trial court had abused its discretion when it denied leave to amend because the litigation had lasted years and defendants had spent "a vast amount of money litigating the sufficiency of various complaints in this case." *Id.* (quotation marks and citation omitted). These cases do not bear on the situation here, where—long after the lapse of the amendment deadline and with fact discovery near complete—plaintiffs seek to add claims that would more than double the case's scope, far more than double its complexity, and require the re-starting of discovery at great cost and inefficiency.<sup>16</sup>

In fact, courts in this District have repeatedly found prejudice where motions to amend were filed late and after extensive discovery. See, e.g., Levy v. Young Adult Inst., No. 13 Civ. 2861 (JPO) (SN), 2016 U.S. Dist. LEXIS 85278, 2016 WL 3637109, at \*3 (S.D.N.Y. June 29, 2016) (denying leave to amend under Rule 16 when deadline to amend complaint had passed 2 years before); Eastman Chem. Co. v. Nestlé Waters Mgmt. & Tech., No. 11 Civ. 2589 (KPF), 2014 U.S. Dist. LEXIS 46343, 2014 WL 1316772, at \*5-10 (S.D.N.Y. Apr. 1, 2014) (finding prejudice in a motion to amend two-and-a-half months after the deadline where amendment would have required, *inter alia*, a whole new area of discovery [\*102] on "commercial reasonableness"); Pereira v. Cogan, No. 00 Civ. 619 (RJS), 2002 U.S. Dist. LEXIS 21558, 2002 WL 31496224, at \*3-4 (S.D.N.Y. Nov. 8, 2002) (denying leave to amend after finding prejudice under Rule 15 where the motion to amend was filed 5 days before trial).

### 3. Good Cause

The Court, finally, addresses whether plaintiffs had good cause to move for leave to file the PFAC eight months after the deadline for amended pleadings. As briefed, this question turns on whether new discovery justified plaintiffs' late filing. Plaintiffs argue that the PFAC is based on "newly discovered evidence"—documents produced that revealed a viable § 1 claim. Pl. Mem. at 6; see also Pl. Reply at 3-5; Brockett Decl. ¶¶ 2-15 (describing counsels' pre-PFAC review and analysis of defense productions). Defendants counter that the PFAC essentially recycles the PTAC's factual allegations using different phrases and packaging, Def. Mem. at 4-5, and relies largely on public sources available before the PTAC's filing, *id.* at 5 & n.3, on statements of a consultant who has worked with plaintiffs since 2017, *id.* at 5-6, on unattributed assertions, *id.* at 6 & n.4, and on "new" documents mostly produced by the June 29, 2018 deadline for substantial completion of document production, *id.* at 6-7 (claiming over 75% of the documents cited in the PFAC were produced by that deadline). [\*103] Defendants argue that, far from having good cause to file the PFAC out of time, plaintiffs failed to act with the required diligence.<sup>17</sup>

Were the question of "good cause" to turn on whether newly-found evidence justified the late filing, the Court's assessment is that defendants would have, on balance, the better of this argument. Having examined the series of amended complaints, actual and proposed, and the materials cited therein, the Court's judgment is that, as to the two episodes on which the PFAC overwhelmingly relies in claiming a 2008-2012 conspiracy—involving Tradeweb/"Project Fusion" and CME/Swapstream/"Project Magellan"—the PFAC's allegations are largely recycled from past complaints. These two episodes were the crux of the PTAC's claims as to 2008-2012. See IRS II, 2018 U.S. Dist. LEXIS 86732, 2018 WL 2332069, at \*11-13 (Tradeweb), \*13-17 (CME). The Tradeweb episode had also been the crux of the 2008-2012 claims in the SAC, see IRS I, 261 F. Supp. 3d at 465-69. The PFAC newly packages these episodes as part of a "consortium strategy" among the Dealers during this period, aimed at investing in or otherwise coopting platforms or clearing products that had the potential to lead to all-to-all IRS

<sup>16</sup> Also inapposite is S. African Apartheid Litig. v. Daimler AG, 617 F. Supp. 2d 228 (S.D.N.Y. 2009), the third case on which plaintiffs rely. It held that under Rule 15, the "practical prejudice" to a defendant "of being subject to greater awards" under the amended pleadings does not qualify as "legal prejudice," i.e., prejudice cognizable under Rule 15. *Id.* at 290 (footnote omitted). The Court here does not find prejudice based on the prospect of a larger award but on the factors addressed above.

<sup>17</sup> Towards the same end, defendants note that, more than three months before filing the PFAC, plaintiffs' counsel had acknowledged that they believed document discovery supported an amendment on the subjects the PFAC addresses. See Dkt. 408 (June 19, 2018 status letter); Dkt. 430 (July 17, 2018 status letter); Dkt. 457 (Transcript of July 19, 2018 telephone conference) at 61.

trading. But a close examination reveals that, once such recasting efforts (and the PFAC's resequencing [\*104] of allegations) are accounted for, the PFAC adds only minor, largely cosmetic details to these two central episodes.

In contrast, as to three secondary episodes alleged in connection with the 2008-2012 conspiracy, the PFAC alleges new facts. These are that Dealers entered into joint ventures with the goal of gaining control over ICAP's i-Swap and Tradition's Trad-X platforms, and denied support to IDCG's startup clearinghouse. On review, it appears that the documents from which plaintiffs derive their claims as to these episodes were largely obtained in discovery. However, the heart of the PFAC's § 1 claims as to 2008-2012 remains the Tradeweb and CME episodes. These are pled in far more detail than any others. And they far more plausibly allege significant collective action by Dealers with the aim of steering the industry's long-term trajectory away from a course leading eventually towards all-to-all anonymous trading. Even putting aside defendants' challenges to the plausibility of the PFAC's pleadings as to ICAP, Tradition, and IDCG, the new allegations regarding them would not provide good cause for such a late, consequential, and disruptive pleading.

There is, however, an additional [\*105] and more fundamental impediment to finding good cause: plaintiffs' failure, until the PFAC, to seriously pursue a rule of reason theory of § 1 liability. As described further below, the one area in which the PFAC moves plaintiffs' claims materially forward towards viability is in its articulation of a rule of reason theory. As the Court's decisions in *IRS I* and *IRS II* have made clear, given the focus of plaintiffs' 2008-2012 claims on the Tradeweb/"Project Fusion" and CME/"Project Magellan" episodes, this route, while imposing demanding pleading and proof requirements, had more potential to state a § 1 claim than did a theory of *per se* illegal conduct during this period. Yet, until filing the PFAC in late October 2018, plaintiffs all but disdained a rule of reason claim.

In *IRS I*, the Court canvassed the law as to the limited categories of agreements among horizontal competitors that the law treats as *per se* illegal, *i.e.*, "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality . . . ." *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978). As to these categories of restraints, experience has enabled courts to "predict with confidence that the [\*106] rule of reason will condemn it," and therefore permits courts to apply "a conclusive presumption that the restraint is unreasonable." *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 344, 102 S. Ct. 2466, 73 L. Ed. 2d 48 & n.15. Paradigmatic examples, the Court noted, are horizontal agreements among competitors to fix prices or to divide markets, and group boycotts. See *IRS I*, 261 F. Supp. 3d at 467. The Court held plaintiffs' allegations regarding the 2013-2016 group boycott of Javelin, Tera, and trueEX to be of such a nature. *Id. at 472*.

But, as reviewed above, plaintiffs' flagship allegations as to 2008-2012, involving "Project Fusion," in which the Dealers jointly invested alongside Thomson in a controlling stake in Tradeweb, described an arrangement that was not susceptible to *per se* condemnation. The Court explained in detail why the SAC's allegations as to "Project Fusion" did not fit into any category of agreement recognized as *per se* illegal. See *id. at 467-68*. And the SAC had not seriously pursued any rule of reason claim as to "Project Fusion." See *id. at 468* (outlining pleading requirements for rule of reason claim). It did not contain any section addressed to the rule of reason. And its factual allegations did not fill that void:

[T]here are no allegations in the SAC defining Tradeweb's product or geographic market, [\*107] or, within that market, defining its market share or market power. There is, in fact, no allegation that Tradeweb had any presence, let alone power, in *any* market. And, vitally important, there are no allegations as to the pro-competitive benefits and anti-competitive harms of Tradeweb after the joint venture, whether in general or as to Tradeweb's specific choices after 2007 as to which trading platforms and asset classes to pursue and which to forego.

Therefore, even assuming it adequately pled an agreement among Dealers to terminate a Tradeweb plan to open an all-to-all trading platform, the SAC does not plead facts supporting, under the rule of reason, the inference that [that] agreement was anti-competitive so as to violate § 1.

*Id. at 469* (footnote omitted).

The decision and discussion in *IRS I* was an invitation for plaintiffs to pursue, in a timely amended complaint, a claim under § 1 for 2008-2012 based on the rule of reason, at least as a carefully-pled alternative to a theory of illegality *per se*.

Plaintiffs, however, chose in the PTAC, filed on the final day permitted, again to pursue—almost exclusively—a *per se* theory. That theory remained defective, for the reasons reviewed above. See *IRS II, 2018 U.S. Dist. LEXIS 86732, 2018 WL 2332069, at \*12* (quoting [\*108] *IRS I, 261 F. Supp. 3d at 468 n.17*). And the PTAC, like the SAC, made only a nominal hat tip towards a rule of reason claim as to Tradeweb:

The PTAC adds two paragraphs of allegations as to application of the Rule of Reason. See PTAC ¶¶ 281-282. These are far too spare and incomplete to close the gaps in the SAC's pleadings on this point. See *[IRS II, 261 F. Supp. 3d at 468-469]*. Like the SAC, the PTAC lacks allegations defining Tradeweb's product or geographic market, *id. at 469*. It loosely recites that "[t]he relevant market is the market for IRS," PTAC ¶ 281, compare SAC ¶¶ 398-400, but that allegation is a mismatch for Tradeweb's function as alleged, which was not as a buyer or seller of (nor a market maker for) ITSSs, but as a provider of electronic trading platforms, [*IRS I*, *261 F. Supp. 3d at 468*]. As to that market, the PTAC does not make any allegations as to Tradeweb's market power, let alone regarding its actual or potential competitors and/or the barriers to other entrants. It is silent as to the market share of Tradeweb's then-competitors (e.g., Bloomberg, the New York Stock Exchange, Nasdaq, CME, or others). The assembled pleadings again do not allege "that Tradeweb had any presence, let alone power, in any market." *Id. at 469*.

The PTAC's failure to situate Tradeweb in any [\*109] relevant market, as required, again leaves to conjecture the impact of this one market participant's alleged decision not to introduce a novel product (a new IRS trading platform) in favor of other business priorities. See *id. at 469*. And while the PTAC recites that this decision was anti-competitive because it "reduce[d] output," PTAC ¶ 280, it lacks non-conclusory allegations as to the pro-competitive benefits and anti-competitive harms of the joint venture's decision to focus Tradeweb's offerings (like those of competitor Bloomberg) on other products and platforms. Measured against the standards applicable to Rule of Reason claims, see *[IRS II, 261 F. Supp. 3d at 468]*, the PTAC, like its predecessor, falls well short.

#### 2018 U.S. Dist. LEXIS 86732, [WL] at \*12-13.

For similar reasons (and others), the Court in *IRS II* held the PTAC's allegations as to CME and "Project Magellan" defective. See *2018 U.S. Dist. LEXIS 86732, [WL] at \*13-17*. That project also centrally involved joint, counseled business negotiations between CME and the Dealers which could not be condemned as *per se* anti-competitive under § 1. See, e.g., *2018 U.S. Dist. LEXIS 86732, [WL] at \*16 & n.11* (reviewing facts inconsistent with *per se* condemnation). The Court then added:

That leaves the Rule of Reason. Potentially, a viable Rule of Reason claim could have been pled with respect [\*110] to the Dealers' collective action as to CME, attempting to show overall anti-competitive effect in a defined market. But unlike with respect to Tradeweb, the PTAC does not even gesture in that direction with respect to Swapstream, confining itself to a theory of *per se* illegality.

In any event, the PTAC does not make the requisite pleadings to enable a Rule of Reason claim. It does not define the product or geographic market of the company, CME, whose offerings were allegedly skewed by the defendants' collective refusal to support an al-to-all IRS trading platform. Nor, although touting CME's capabilities, does it allege that CME had power in any market, including that for electronic exchanges with respect to swap trading generally or IRS trading in particular. See *[IRS II, 261 F. Supp. 3d at 469]*. And while the PTAC denounces the Dealers' conduct as anti-competitive, *id.* ¶¶ 193-196, it does not assess these anti-competitive impacts against the potential pro-competitive benefits of the agreement that the collaborating Dealers negotiated towards, and eventually struck, with CME, including those identified above.

#### 2018 U.S. Dist. LEXIS 86732, [WL] at \*17.

In the PFAC, plaintiffs for the first time make more than a token effort to plead a rule of reason [\*111] claim, alongside their predominant claim of a *per se* violation of § 1. See PFAC ¶¶ 626-72. In contrast to the SAC, which lacked rule of reason allegations, and the PTAC, which contained just two paragraphs as to the rule of reason, the PFAC contains concrete allegations as to the foundational concepts for a rule of reason claim. It defines the defendants' product market as the IRS market, *id.* ¶¶ 628-38; defines the geographic market as the United States, *id.* ¶¶ 639-41; sets out the Dealers' market shares, individually and in the aggregate, *id.* ¶¶ 642-45; makes allegations as to Dealers' market power in light of the Justice Department's Merger Guidelines, *id.* ¶¶ 646-49; addresses why the alternative market definition (the market for trading platforms) posited by defendants is, ostensibly, not correct, *id.* ¶¶ 650-52; alleges why the "Project Fusion" and "Project Magellan" joint ventures had anti-competitive purposes and effects, *id.* ¶¶ 653-58; and alleges, for each joint venture, why the anti-competitive effects of the venture outweigh the pro-competitive justifications, *id.* ¶¶ 659-72.

However, plaintiffs nowhere explain why it took until October 26, 2018 to first meaningfully pursue a rule [\*112] of reason claim. The subject is unaddressed in the PFAC and in the plaintiffs' memoranda of law. No valid reason is apparent for plaintiffs' failure to pursue such a claim long ago. Plaintiffs cannot pin the absence of an earlier rule of reason claim on recent discovery. On the contrary, the PFAC's rule of reason allegations center on the very two episodes (Tradeweb and CME) as to which its factual allegations are in substance the same as in the PTAC. Moreover, as pled in the PFAC, plaintiffs' rule of reason claim does not cite, or turn at all on, new document discovery. The same rule of reason claim could equally have been made in (if not before) the PTAC or at any time after IRS II. The Court is left to infer that plaintiffs held off until late October 2018 to plead a rule of reason claim not for any reason inherent to that claim. Instead, it appears that plaintiffs deferred pursuing this theory until more than eight months after the deadline for moving to amend had lapsed, in the hope that such would never prove necessary—that the basis for a viable theory of *per se* liability for 2008-2012 would emerge in discovery.

It is far too late for a complex legal claim of this nature to be [\*113] added, particularly without a convincing justification. A late pleading of this nature is highly disruptive. The addition of a rule of reason claim, by its nature, would inject into the case, on the brink of the fact discovery deadlines, a host of new factual issues. These include issues relating to the definitions of the product and the geographic markets, defendants' market share(s), entry barriers, potential entrants, and potential substitutes. Relevant issues would also be generated based on the parties' articulations of the anti-competitive effects of, and the pro-competitive justifications for, the various agreement(s) alleged among defendants during 2008-2012. Although expert analysis would surely be brought to bear as to these issues, a consequential expansion of fact discovery—above and beyond that which a *per se* claim for these years would necessitate—would be necessary to elicit evidence and to develop the record relating to unique elements of a rule of reason claim. Plaintiffs have not articulated good cause for disrupting the case schedule by first pursuing a rule of reason theory so late in the day. The Court finds none.

In finding an absence of good cause for first pursuing [\*114] a rule of reason claim so close to the end date for fact discovery, the Court has no occasion to definitively resolve whether the PFAC has adequately pled such a claim. Defendants have chronicled deficiencies in the PFAC's iteration of that claim. See generally Def. Mem. 24-34. A number of these critiques appear substantial. These include that because the PFAC tightly focuses its rule of reason allegations on the Dealers' attempts to control Tradeweb and CME through the two joint ventures, a rule of reason claim can lie only if these entities had market power.<sup>18</sup>

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<sup>18</sup> In its rule of reason allegations, the PFAC alleges that the anti-competitive effects of the "Project Fusion" and "Project Magellan" joint ventures outweighed their pro-competitive potential. See PFAC ¶¶ 661-65 (Tradeweb); *id.* ¶¶ 666-72 (CME). Its rule of reason pleadings focus on these two initiatives, and are not directed at the Dealers' conduct holistically during 2008-2012. As a result, there is a substantial argument that the proper subject of the market power inquiry under the rule of reason, as analyzed in IRS I and IRS II, is the market power of the two entities restrained by the defendants' joint ventures (*i.e.*, Tradeweb and CME). As the Court has noted, these entities were providers of electronic trading platforms, not market makers. See [IRS I, 261 F. Supp. 3d at 469; IRS II, 2018 U.S. Dist. LEXIS 86732, 2018 WL 2332069, at \\*12-13](#); see also PFAC ¶ 627 (acknowledging that relevant question under the DOJ joint venture guidelines is whether "the joint venture has market power"). Therefore, although the PFAC alleges that the Dealers have a combined 70% market share in the "IRS market," PFAC ¶ 638, that market appears a mismatch for the rule of the reason claim as pled.

Notwithstanding the particular manner in which the PFAC is pled, the Court's judgment is that a viable rule of reason claim quite possibly could have been formulated for 2008-2012. Plaintiffs have amassed evidence of statements by officials at various Dealers preferring the traditional model of dealer-to-customer IRS trading and disfavoring the prospect of anonymous trading of IRSs on an exchange. Plaintiffs have also alleged various actions by Dealer personnel, including in connection with Projects "Fusion" and "Magellan," that [\*115] made it less likely that exchange trading along the lines that plaintiffs preferred would take root. While the Dealers' complex business arrangements in 2008-2012--whether labeled as "consortium investments" or otherwise--do not implicate any category of conduct recognized as *per se* anti-competitive, a viable rule of reason claim potentially could have been pled for this period, alleging an overall agreement among Dealers to steer future IRS trading towards bilateral, party-disclosed trading and against the development of anonymous all-to-all exchange trading. Such a claim would, presumably, have alleged that the overall anti-competitive effects of this agreement outweighed the pro-competitive potential of such a course.

Had plaintiffs seriously pursued a rule of reason claim earlier in this litigation rather as an untimely after-thought, there would have been opportunity for considered briefing and decision, and to the extent found necessary, for a potentially curative amended complaint. The iterative process by which claims are assessed on a motion to dismiss and refined through an amended pleading is unusually well-tailored to complex claims such as under the rule of reason, which [\*116] may require successive iterations to hone to viability. It is, however, far too late to embark on that journey now, with fact discovery due to close in under a month.

For the reasons above, the Court therefore does not find good cause to permit plaintiffs to file the PFAC more than eight months after the deadline for amended pleadings set in the case management plan. The episodes on which the PFAC's S.1 claim predominantly relies are not new. Indeed, they were articulated earlier in the SAC and/or the PTAC and do not substantially turn on new evidence. And plaintiffs failed to pursue earlier the one potentially viable theory of S.1 liability for 2008-2012, under the rule of reason, despite having ample opportunities to do so. Furthermore, that theory appears to require significant modification to approach viability and would significantly disrupt the existing schedule.

#### D. Conclusion

For the above reasons, the Court denies plaintiffs' motion for leave to amend, so as to add claims covering 2008-2012.

#### IV. The PFAC's Claims as to 2013-2016

The PFAC also adds a limited number of allegations bearing on the period 2013-2016. Most notably, it alleges why two entities—Tradeweb and Bloomberg—that potentially [\*117] could have offered all-to-all anonymous trading of IRSs did not do so during this period.

As to Tradeweb, it alleges that Tradeweb could offer "an all-to-all RFQ platform," but that it chose instead to limit its RFQ "to facilitate dealer-to-client or dealer-to-dealer trading by allowing only dealers to respond to the quote

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As an alternative to its theory of a rule of reason violation affecting the "IRS market," the PFAC does, cursorily, plead for the first time that "[d]efendants' own documents suggest that Tradeweb's share for execution of interest rate swaps with the buy side is at least 60% [and the] only other significant competitor is Bloomberg." *Id.* ¶ 652. But this allegation, too, is problematic. It is not anchored to the 2008-2012 time period. And the PFAC does not attempt to define the electronic trading platform market. It leaves unclear on what basis it claims for Tradeweb a 60% market share of the subset of that market consisting of "execution of interest rate swaps with the buy side," *id.*, or whether such is a viably defined market, see Def. Mem. at 25-26. That the PFAC identifies numerous other electronic trading platforms for swaps trading makes the PFAC's passing suggestion that the platforms restrained had market power all the more problematic. See *id.* at 26.

requests submitted by the platform." PFAC ¶ 204. This, the PFAC alleges, "is the result of the Dealer Defendants' control of Tradeweb." *Id.*

As to Bloomberg, it alleges that Bloomberg's BSEF received regulatory approval from the CFTC on July 31, 2013 and was equipped to enable order book trading between any market participants. *Id.* ¶ 338. However, it alleges, the Dealers today refuse to provide liquidity to BSEF's CLOB except "on a name-disclosed basis," such that Bloomberg's CLOB therefore has "no volume on it." *Id.* ¶ 340 ("As a result of these tactics against Bloomberg's IRS trading platforms, the Dealer Defendants have succeeded in preventing Bloomberg from offering a meaningful all-to-all anonymous trading platform and have forced buy-side customers to trade IRS on Bloomberg via a non-anonymous RFQ protocol.").)

The Court will permit the addition of these allegations. [\*118] The status during 2013-2016 of other platforms for the trading of IRSs is, for a variety of reasons, relevant context for plaintiffs' well-pled claims of a contemporaneous boycott by Dealers of Javelin, Tera, and trueEX. Among other things, to the extent that no other platforms permitting the all-to-all anonymous trading of IRSs are shown to have been operational during this period, plaintiffs' claim that an effective boycott of Javelin, Tera, and trueEX affected all investors who wished to trade IRSs in such a manner on such an exchange is strengthened. Separately, Dealers' actions during this period towards other platforms that carried the promise of enabling anonymous all-to-all IRS trading have the potential to bear significantly on the factfinder's determination whether the Dealers did or did not boycott Javelin, Tera, and trueEX. Consistent with its discovery rulings, the Court has assumed throughout that the Dealers' conduct towards other platforms during 2013-2016 besides the three boycott targets is within the scope of matters to be discovered. The Court therefore authorizes plaintiffs to file a FAC incorporating the PFAC's allegations bearing on the manner in which IRSs were [\*119] and were not traded on Tradeweb and Bloomberg during 2013-2016. As these matters have been within the scope of existing authorized discovery, this amendment will not result in any change to the existing discovery schedule.

## CONCLUSION

For the reasons stated above, the Court denies plaintiffs' motion for leave to amend to add allegations regarding 2008-2012 but grants the motion for leave to amend to add allegations regarding 2013-2016 as described above.

SO ORDERED.

/s/ Paul A. Engelmayer

Paul A. Engelmayer

United States District Judge

Dated: March 13, 2019

New York, New York

## Crockett v. NEA-Alaska

United States District Court for the District of Alaska

March 14, 2019, Decided; March 14, 2019, Filed

3:18-CV-00179 JWS

**Reporter**

367 F. Supp. 3d 996 \*; 2019 U.S. Dist. LEXIS 42923 \*\*; 2019 L.R.R.M. 87470; 2019 WL 1212082

Tracey Crockett, et al., Plaintiffs, vs. NEA-Alaska, et al., Defendants.

**Subsequent History:** Affirmed by [Crockett v. Nea-Alaska, 2021 U.S. App. LEXIS 22541 \(9th Cir. Alaska, July 29, 2021\)](#)

## **Core Terms**

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fair-share, collection, good faith, bargaining, school district, anti trust law, collective bargaining, collective bargaining agreement, union membership, good-faith, employees, common law, prospective relief, public employee, private party, allegations, compulsory, non-union, entities, refund, exclusive representative, qualified immunity, union member, state law, terms of employment, labor relations, monetary relief, state statute, collect fees, contractual

## **LexisNexis® Headnotes**

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Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Units

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements

### **[HN1](#)[] Collective Bargaining & Labor Relations, Bargaining Units**

Alaska's Public Employment Relations Act (PERA) authorizes bargaining units of public employees to choose to be exclusively represented by a labor union for purposes of bargaining with public employers as to employment terms. To cover the costs of union representation, PERA authorized public employers and unions to agree that all represented employees would pay their proportionate share of the costs of representation, regardless of union membership. That is, a union could require through its collective bargaining agreement that public employers collect fair share fees from non-union members that would be remitted to the union to apply towards its bargaining activities. In the event an employee qualified as a religious objector to union activities under PERA, a bargaining agreement could nonetheless require that the employee pay a fair-share fee to the union, but the union has to donate the amount of that fee to a charity of its choosing.

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

### **[HN2](#)[] Motions to Dismiss, Failure to State Claim**

Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of a plaintiff's claims. In reviewing such a motion, all allegations of material fact in the complaint are taken as true and construed in the light most favorable to the nonmoving party. To be assumed true, the allegations, may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Dismissal for failure to state a claim can be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Conclusory allegations of law are insufficient to defeat a motion to dismiss.

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

#### [HN3](#) Motions to Dismiss, Failure to State Claim

To avoid dismissal, a plaintiff must plead facts sufficient to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. In sum, for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief. In all cases, evaluating a complaint's plausibility is a context-specific endeavor that requires courts to draw on judicial experience and common sense.

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

#### [HN4](#) Motions to Dismiss, Failure to State Claim

In deciding whether to dismiss a claim under Fed. R. Civ. P. 12(b)(6), the court is generally limited to reviewing only the complaint, but may review materials which are properly submitted as part of the complaint and may take judicial notice of undisputed matters of public record that are outside the pleadings. Furthermore, documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Fed. R. Civ. P. 12(b)(6) motion to dismiss.

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

#### [HN5](#) Exemptions & Immunities, Parker State Action Doctrine

Public entities such as municipalities are exempt from federal antitrust laws if their anticompetitive activities are authorized by state policy meant to displace competition with regulation.

Antitrust & Trade Law > Exemptions & Immunities

#### [HN6](#) Antitrust & Trade Law, Exemptions & Immunities

State legislation is an exercise of a state's sovereign power and therefore exempt from the operation of antitrust laws.

**Counsel:** **[\*\*1]** For Kathryn McCollum, on behalf of themselves and all others similarly situated, David Nees, on behalf of themselves and all others similarly situated, Carol Carman, on behalf of herself and all others similarly situated, Dolores McKee, on behalf of themselves and all others similarly situated, Donn Liston, on behalf of themselves and all others similarly situated, Plaintiffs: John B. Thorsness, LEAD ATTORNEY, Clapp, Peterson, Tiemessen, Thorsness & Johnson, LLC (Anch), Anchorage, AK; Jonathan F. Mitchell, LEAD ATTORNEY, PRO HAC VICE, Mitchell Law PLLC, Austin, TX; Matthew Price Browne, Talcott Jay Franklin, LEAD ATTORNEYS, PRO HAC VICE, Talcott Franklin P.C., Dallas, TX.

For Timothy C. Christopherson, Plaintiff: John B. Thorsness, LEAD ATTORNEY, Clapp, Peterson, Tiemessen, Thorsness & Johnson, LLC (Anch), Anchorage, AK; Jonathan F. Mitchell, Mitchell Law PLLC, Austin, TX.

For NEA-Alaska, Matanuska-Susitna Education Association, as representative of the class of all chapters and affiliates of NEA-Alaska, National Education Association, Defendants: Eric P. Brown, P. Casey Pitts, Scott A. Kronland, LEAD ATTORNEYS, Altshuler Berzon LLP, San Francisco, CA; Kim Dunn, LEAD ATTORNEY, Landye **[\*\*2]** Bennett Blumstein LLP, Anchorage, AK.

For Matanuska-Susitna Borough School District, as representative of the class of all school districts in the state of Alaska, Defendant: Sarah E. Josephson, LEAD ATTORNEY, Saul R. Friedman, Jermain Dunnagan & Owens, P.C., Anchorage, AK.

**Judges:** JOHN W. SEDWICK, SENIOR UNITED STATES DISTRICT JUDGE.

**Opinion by:** JOHN W. SEDWICK

## **Opinion**

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### **[\*999] ORDER AND OPINION**

**[Re: Motions at docket 49, 53]**

#### **I. MOTIONS PRESENTED**

At docket 49, Defendants NEA-Alaska, National Education Association, and Matanuska-Susitna Education Association ("Union Defendants") move to dismiss all of Plaintiffs' claims against them. They argue **[\*1000]** that Plaintiffs' claim for prospective relief with respect to compulsory payments to unions must be dismissed pursuant to [Rule 12\(b\)\(1\)](#) for lack of subject matter jurisdiction. They argue that Plaintiffs' [§ 1983](#) claim and Alaska tort claims for retrospective monetary relief in relation to these compulsory payments must be dismissed under [Rule 12\(b\)\(6\)](#) for failure to state a claim. They argue that Plaintiff Kathryn McCollum's claim challenging Alaska's system of exclusive representative collective bargaining and asking for prospective relief and treble damages must also be dismissed under [Rule 12\(b\)\(6\)](#).

At docket 53, Defendant Matanuska-Susitna **[\*\*3]** Borough School District ("School District") joins the Union Defendants' motion to the extent it addresses the more limited claims against it. Plaintiffs only seek prospective relief against the School District with respect to its collection of compulsory union payments and with respect to its exclusive collective bargaining activities.

Plaintiffs<sup>1</sup> respond at docket 56. Plaintiffs concede that the court lacks jurisdiction over their claims for prospective relief with respect to compulsory union payments, but they maintain that they are entitled to retrospective monetary

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<sup>1</sup> Plaintiffs in this case at this time include Timothy Christopherson, Kathryn McCollum, David Ness, Carol Carman, Dolores McKee, and Donn Liston. The lead Plaintiff in the case caption, Tracey Crockett, has been terminated from the case. If the

relief for the past collection of these payments. Plaintiff McCollum concedes that Supreme Court precedent bars her constitutional challenge to exclusive representative collective bargaining but maintains her challenge to such a system based on federal antitrust laws.

The Union Defendants reply at docket 58. The School District replies at docket 59. Oral argument was heard February 15, 2019.

## **II. BACKGROUND**

**HN1** [Alaska's Public Employment Relations Act \("PERA"\)](#) authorizes bargaining units of public employees to choose to be exclusively represented by a labor union for purposes of bargaining with public employers as to employment [\\*\\*4](#) terms.<sup>2</sup> To cover the costs of union representation, PERA authorized public employers and unions to agree that all represented employees would pay their proportionate share of the costs of representation, regardless of union membership.<sup>3</sup> That is, a union could require through its collective bargaining agreement that public employers collect "fair share fees" from non-union members that would be remitted to the union to apply towards its bargaining activities. In the event an employee qualified as a religious objector to union activities under PERA, a bargaining agreement could nonetheless require that the employee pay a fair-share fee to the union, but the union had to donate the amount of that fee to a charity of its choosing.<sup>4</sup> Until recently, such fair-share fees were explicitly authorized by Supreme Court precedent, *Abood v. Detroit Board of Education*.<sup>5</sup> *Abood* held that public employees may be required to pay their proportionate share of the costs of union representation for collective bargaining purposes.<sup>6</sup>

**[\*1001]** Matanuska-Susitna Education Association ("MSEA") is the union that represents a bargaining unit of the School District's employees. Plaintiffs McCollum and McKee are employees in [\\*\\*5](#) that bargaining unit. The agreement between the School District and the employees includes a fair-share provision that required the School District to deduct fees from its payments to non-union members and remit them to MSEA. Plaintiff McCollum was not a union member at the time Plaintiffs filed their complaint; therefore, she was required to pay fair-share fees. Plaintiff McKee was a union member at the time. She alleges that she has long opposed the union but chose to remain in it because she otherwise would have had to pay a fair-share fee "and the difference in money between the full membership dues and the [fair-share fees] would not have been worth the loss of [her] vote and . . . influence . . . in collective-bargaining matters."<sup>7</sup>

The other plaintiffs are current or former public school teachers that worked in other school districts and were represented by NEA-Alaska affiliate unions for collective bargaining purposes. Plaintiffs Ness and Christopherson were compelled to pay non-union member fair-share fees to their representative union. Plaintiff Carmen was not a union member but was compelled, as a religious objector under [AS 23.40.225](#), to pay fees to the union for charitable [\\*\\*6](#) purposes. Plaintiff Liston is a retired teacher who had been a union member during his career but,

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parties wish to remove Plaintiff Crockett from the court's official caption, a motion to amend the caption must be filed with the court.

<sup>2</sup> [AS 23.40.100\(b\)](#).

<sup>3</sup> [AS 23.40.110\(b\)](#).

<sup>4</sup> [AS 23.40.225](#).

<sup>5</sup> [431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 \(1977\)](#).

<sup>6</sup> Under *Abood*, payments may be compelled from non-union members for collective bargaining activities but not for "ideological activities unrelated to collective bargaining." [Id. at 236](#).

<sup>7</sup> Doc. 44 at ¶ 38.

like Plaintiff McKee, alleges that he only became one because he otherwise would have been required to pay fair-share fees.

On June 27, 2018, the Supreme Court issued its decision in *Janus v. AFSCME*,<sup>8</sup> which overruled *Abood* and held that requiring non-union members to pay union fees as a condition of public employment "violates the *First Amendment*" and cannot continue.<sup>9</sup>

On August 2, 2018, Plaintiffs filed suit under [42 U.S.C. § 1983](#), Alaska common law, and federal **antitrust law**. Their complaint can be divided into four different requests: (1) a request for declaratory and injunctive relief to prevent the future collection of fair-share fees, including religious objector fees; (2) a request that the Union Defendants be required to refund all fair-share fees collected prior to *Janus*; (3) a request that the Union Defendants be required to refund a portion of union membership dues paid by Plaintiffs McKee and Liston; and (4) a request for prospective relief that would make Alaska's exclusive representative collective bargaining system unlawful and prevent its future use, as well as a request for treble damages to public employees [\*\*7] who have not been allowed to negotiate on their own behalf.

### **III. STANDARD OF REVIEW**

**HN2**[ [Rule 12\(b\)\(6\)](#)] tests the legal sufficiency of a plaintiff's claims. In reviewing such a motion, "[a]ll allegations of material fact in the complaint are taken as true and construed in the light most favorable to the nonmoving party."<sup>10</sup> To be assumed true, the allegations, "may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively."<sup>11</sup> [**\*1002**] Dismissal for failure to state a claim can be based on either "the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory."<sup>12</sup> "Conclusory allegations of law . . . are insufficient to defeat a motion to dismiss."<sup>13</sup>

**HN3**[ To avoid dismissal, a plaintiff must plead facts sufficient to "state a claim to relief that is plausible on its face."<sup>14</sup> "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."<sup>15</sup> "The plausibility standard is not akin to a 'probability requirement,' but it asks for [\*\*8] more than a sheer possibility that a defendant has acted unlawfully."<sup>16</sup> "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief."<sup>17</sup> "In sum, for a complaint to survive a motion

<sup>8</sup> [138 S. Ct. 2448, 201 L. Ed. 2d 924 \(2018\)](#).

<sup>9</sup> [Id. at 2486](#).

<sup>10</sup> [Vignolo v. Miller, 120 F.3d 1075, 1077 \(9th Cir. 1997\)](#).

<sup>11</sup> [Starr v. Baca, 652 F.3d 1202, 1216 \(9th Cir. 2011\)](#).

<sup>12</sup> [Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 \(9th Cir. 1990\)](#).

<sup>13</sup> [Lee v. City of Los Angeles, 250 F.3d 668, 679 \(9th Cir. 2001\)](#).

<sup>14</sup> [Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#) (quoting [Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#)).

<sup>15</sup> [Id.](#) (citing [Twombly, 550 U.S. at 556](#)).

<sup>16</sup> [Id.](#) (citing [Twombly, 550 U.S. at 556](#)).

to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief."<sup>18</sup> "In all cases, evaluating a complaint's plausibility is a 'context-specific' endeavor that requires courts to 'draw on ... judicial experience and common sense.'"<sup>19</sup>

**HN4** In deciding whether to dismiss a claim under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#), the Court is generally limited to reviewing only the complaint, but may review materials which are properly submitted as part of the complaint and may take judicial notice of undisputed matters of public record that are outside the pleadings.<sup>20</sup> Furthermore, documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a [Rule 12\(b\)\(6\)](#) motion to dismiss.<sup>21</sup>

## IV. DISCUSSION [\*\*9]

### A. Prospective relief with respect to compulsory union fees

Plaintiffs concede in their response brief that they cannot seek injunctive relief against the Union Defendants and the School District to prevent the future collection of compulsory union fees because [\*1003] there is not a current controversy to be resolved on this point.<sup>22</sup> The day *Janus* was announced, NEA-Alaska sent a letter to all non-union members in bargaining units represented by its local affiliates to inform them that it would cease collecting fair-share fees. It informed them that any such fees that had been collected in advance—to cover the period falling after the *Janus* decision date up to the end of the fiscal year—would be refunded. Refund checks were mailed the next day. NEA-Alaska local affiliates contacted school districts to notify them to immediately stop deducting fair-share fees. Given that it is undisputed that the collection of fair-share fees ceased immediately after *Janus*, there is no actual, live controversy sufficient to establish this court's jurisdiction over Plaintiffs' claims for prospective relief with respect to fair-share fees.<sup>23</sup>

### B. Monetary relief with respect to [\*\*10] compulsory fees collected pre-*Janus*

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<sup>17</sup> *Id.* (quoting [Twombly, 550 U.S. at 557](#)).

<sup>18</sup> [Moss v. U.S. Secret Serv., 572 F.3d 962, 969 \(9th Cir. 2009\)](#); see also [Starr, 652 F.3d at 1216](#).

<sup>19</sup> [Levitt v. Yelp! Inc., 765 F.3d 1123, 1135 \(9th Cir. 2014\)](#) (quoting [Eclectic Props. E., LLC v. Marcus & Millichap Co., 751 F.3d 990, 996 \(9th Cir. 2014\)](#)).

<sup>20</sup> See [Gonzalez v. First Franklin Loan Services, 2010 U.S. Dist. LEXIS 1657, 2010 WL 144862, at \\*3 \(E.D. Cal. Jan. 11, 2010\)](#) (citing [Lee v. City of Los Angeles, 250 F.3d 668, 688-89 \(9th Cir. 2001\)](#); [Campanelli v. Bockrath, 100 F.3d 1476, 1479 \(9th Cir. 1996\)](#); [MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504 \(9th Cir. 1986\)](#)).

<sup>21</sup> [Branch v. Tunnell, 14 F.3d 449, 454 \(9th Cir. 1994\)](#) overruled on other grounds by [Galbraith v. County of Santa Clara, 307 F.3d 1119 \(9th Cir. 2002\)](#).

<sup>22</sup> Doc. 56 at p. 41.

<sup>23</sup> See [Timbisha Shoshone Tribe v. Dep't of Interior, 824 F.3d 807, 812 \(9th Cir. 2016\)](#) (discussing how the court's jurisdiction is premised on there being an actual controversy to resolve). Recent district court cases in this circuit have also dismissed claims for prospective relief with regard to compulsory union fees post-*Janus* for lack of current controversy. See [Danielson v. Inslee, 345 F. Supp. 3d 1336, 1338-40 \(W.D. Wash. 2018\)](#); [Danielson v. AFSCME Council 28, 340 F. Supp. 3d 1083, 1084 \(W.D. Wash. 2018\)](#); [Cook v. Brown, No. 6:18-cv-01085, 364 F. Supp. 3d 1184, 2019 U.S. Dist. LEXIS 32217, 2019 WL 982384, at \\*3-\\*4 \(D. Or. Feb. 28, 2019\)](#); [Carey v. Inslee, 3:18-cv-05208, 364 F. Supp. 3d 1220, 2019 U.S. Dist. LEXIS 38742, 2019 WL 1115259, at \\*3-\\*4 \(W.D. Wash. Mar. 11, 2019\)](#).

Plaintiffs ask for monetary damages under [§ 1983](#) for the Union Defendants' collection of fair-share fees pre-*Janus*. They assert that the court's *Janus* decision is retroactive under *Harper v. Virginia Department of Transportation*.<sup>24</sup> Consequently, Plaintiffs assert that the Union Defendants' past collection of fair-share fees from them, as non-members, was a constitutional deprivation for which they are entitled to [§ 1983](#) damages. The Union Defendants contend that *Janus* was not meant to have a retroactive effect, but they note that the court need not make an affirmative ruling on the issue because regardless of how the civil retroactivity doctrine applies to the case, the good faith defense excuses them from liability under [§ 1983](#). They argue that they are shielded from monetary liability because they collected fair-share fees according to a presumptively valid state statute and as authorized under then-binding Supreme Court precedent, *Abood*.

As private defendants acting under the color of state law, the doctrine of qualified immunity from [§ 1983](#) suits is not available to the Union Defendants. The Supreme Court in *Wyatt v. Cole*<sup>25</sup> held as much based on the fact that the rationales [\*\*11] justifying the application of qualified immunity to government officials are not transferrable to private parties.<sup>26</sup> However, in so holding, the Court did not foreclose "the possibility that private defendants faced with [§ 1983](#) liability . . . could be entitled to an affirmative defense based on good faith."<sup>27</sup> The Court recognized that "principles of equity and fairness may suggest . . . that private citizens who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid should have some protection from liability."<sup>28</sup> Since *Wyatt*, several circuit [\*1004] courts, including the Ninth Circuit, have relied upon the defense in shielding private defendants from liability.<sup>29</sup> In *Clement v. City of Glendale*, the Ninth Circuit relied on the good faith defense when it affirmed that a private defendant, a towing company, was entitled to summary judgment as to the plaintiff's [§ 1983](#) claim against it for towing her car in violation of the [Fourteenth Amendment](#). It held that the facts of the case supported the application of the defense: the towing company "did its best to follow the law" in that "the tow was authorized by the police department, conducted under close police supervision and appeared to be [\*\*12] permissible under both local ordinance and state law."<sup>30</sup>

Plaintiffs argue that *Clement* contradicts a prior Ninth Circuit case, *Howerton v. Gabica*.<sup>31</sup> They assert that *Howerton* makes "good-faith defenses . . . categorically inapplicable to private parties who violate [section 1983](#)."<sup>32</sup> *Howerton*, which came before *Clement*, held only that a private party cannot invoke the doctrine of qualified immunity from suit—a holding that the Supreme Court would later endorse in *Wyatt*. As noted above, the Court in *Wyatt* left open the possibility that private defendants could avail themselves of an affirmative defense based on good faith, a concept which the Court recognized as separate and distinct from qualified immunity.

<sup>24</sup> [509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 \(1993\)](#).

<sup>25</sup> [504 U.S. 158, 112 S. Ct. 1827, 118 L. Ed. 2d 504 \(1992\)](#).

<sup>26</sup> [Id. at 168](#).

<sup>27</sup> [Id. at 169](#).

<sup>28</sup> [Id. at 168](#).

<sup>29</sup> [Clement v. City of Glendale, 518 F.3d 1090 \(9th Cir. 2008\)](#); [Wyatt v. Cole, 994 F.2d 1113 \(5th Cir. 1993\)](#); [Vector Research, Inc. v. Howard & Howard Attorneys, P.C., 76 F.3d 692, 698-99 \(6th Cir. 1996\)](#); [Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1275-78 \(3d Cir. 1994\)](#).

<sup>30</sup> [518 F.3d at 1097](#).

<sup>31</sup> [708 F.2d 380 \(9th Cir. 1983\)](#).

<sup>32</sup> Doc. 56 at p. 16.

Plaintiffs also argue that only private individuals, as opposed to private companies, can invoke good faith to protect themselves from [§ 1983](#) liability. They base such an argument on the fact that qualified immunity only applies to individual officials, not government entities. Again, however, qualified immunity is not the same as a good-faith affirmative defense. The rationale for qualified immunity—protecting individual officers from the threat of personal monetary liability for carrying out their duties—is [\[\\*\\*13\]](#) admittedly not transferrable to private entities. However, other rationales, such as principles of equity and fairness, support the application of the defense to private entities in certain circumstances.<sup>33</sup> Moreover, [Clement](#), the controlling case law in this circuit allowed a private entity to assert the good-faith defense.

Plaintiffs alternatively argue that if the defense is indeed available to private defendants in [§ 1983](#) cases, its application is nonetheless limited. They argue that under [Wyatt](#) the defense can only be applied to a constitutional claim if the claim is analogous to a common law tort that would have conferred similar defenses when [§ 1983](#) was enacted. They argue that the most analogous tort in this situation is conversion, and because conversion does not include an intent element, the good faith defense cannot apply. Like the other three district courts in the Ninth Circuit to consider this argument, the court disagrees with Plaintiffs' construction of the defense.<sup>34</sup>

[Clement](#) did not interpret the defense in this limited manner. It applied the [\[\\*1005\]](#) defense to a [§ 1983](#) claim without considering whether the common law would have conferred the defense with respect to an analogous tort. The [\[\\*\\*14\]](#) court was clearly more "concerned about the inequities of holding the private towing company liable" when it subjectively and reasonably believed it was following the law.<sup>35</sup> Indeed, the impetus for such a defense is rooted in concerns about the unfairness that would result from holding private parties retrospectively liable under [§ 1983](#) for following the law. When the Supreme Court held that private parties using a process established by state statute can be considered state actors for purposes of [§ 1983](#), it recognized that private individuals could unfairly be held liable if the state law is later held to be unconstitutional and suggested that the "problem should be dealt with . . . by establishing an affirmative defense."<sup>36</sup> As noted by the Union Defendants, the approach propounded by Plaintiffs "would increase the potential for unfairness by permitting some defendants that rely on presumptively valid state laws to assert the defense while others could not, based solely on the elements of various nineteenth-century common law torts."<sup>37</sup>

Even if the court must find a common law analogue, conversion is not the most closely related tort. "The core element of Plaintiffs' [First Amendment](#) claim . . . is not that the Unions [\[\\*\\*15\]](#) acquired property. Instead, [it] is premised upon their right not to be compelled by the government to associate with the Unions' expressive activities."<sup>38</sup> That is, their claim stems from the dignitary harm that comes from being compelled to support speech with which they disagree, not the taking of their property.

There are other common law torts with scienter elements that can be analogized to Plaintiffs' claim. Tortious interference with a contract is one such cause of action:

The wages from which Plaintiffs' agency fees were deducted were a contractual debt owed to Plaintiffs by their employer under the collective bargaining agreement. In 1871, such a debt could not provide the basis for a conversion claim. Instead, a plaintiff would have had to pursue a claim based on the third party's interference

<sup>33</sup> See [Wyatt](#), 504 U.S. at 168-69; [Cook](#), 2019 U.S. Dist. LEXIS 32217, 2019 WL 982384, at \* 6.

<sup>34</sup> See [Danielson](#), 340 F. Supp. 3d at 1086; [Cook](#), 2019 U.S. Dist. LEXIS 32217, 2019 WL 982384, at \*5-\*6; [Carey](#), 2019 U.S. Dist. LEXIS 38742, 2019 WL 1115259, at \* 6.

<sup>35</sup> [2019 U.S. Dist. LEXIS 32217, 2019 WL 982384, at \\*6.](#)

<sup>36</sup> [Lugar v. Edmondson Oil Co., Inc.](#), 457 U.S. 922, 942 n.23, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982).

<sup>37</sup> Doc. 58 at pp. 8-9.

<sup>38</sup> Doc. 58 at p. 11.

with the employer's satisfaction of its contractual obligations--- and malice or lack of justification was an element of [that tort] at common law.<sup>39</sup>

Abuse of process is also analogous to Plaintiffs' [First Amendment](#) claim. It is a "cause of action against private defendants for unjustified harm arising out of the misuse of governmental processes."<sup>40</sup> Here, Plaintiffs' claim against the Union Defendants depends **[\*\*16]** on the use of governmental processes: their "invocation of Alaska statutes authorizing deduction of agency fees from employees' paychecks and transmission of those fees to the [Union Defendants]."<sup>41</sup> At common law, an abuse of process claim requires the plaintiff to establish that the defendant acted with malice or without probable cause. Given the array of common law torts with scienter elements that can be analogized to Plaintiffs' claim, the good-faith defense **[\*1006]** would be available to the Union Defendants under Plaintiffs' approach.

Plaintiffs also assert that the defense is further limited in that it should only protect defendants from legal claims, as opposed to equitable ones. Plaintiffs argue that because they seek repayment from the Union Defendants based on equitable considerations, the defense cannot apply here. Plaintiffs' position is unavailing under the case law. Furthermore, as the Union Defendants persuasively argue in their reply brief:

Plaintiffs had no expectation of receiving the fair share fees paid to the Unions, and Plaintiffs already have received the benefits of collective bargaining representation paid for with those fees. Requiring the Unions to pay those **[\*\*17]** funds to Plaintiffs as an equitable remedy would 'stand[ ] that remedy on its head.'<sup>42</sup>

Plaintiffs' argument is also flawed in that the relief they seek does in fact sound in law. Their fair-share fees paid for ongoing costs of representation the Union Defendants provided on their behalf. There is no segregated fund to which Plaintiffs' payments can now be traced, and therefore any relief would be paid from the Union Defendants' general assets. A "personal claim against the defendant's general assets . . . is a *legal* remedy, not an equitable one."<sup>43</sup>

Given that the good faith defense is indeed available to private defendants in [§ 1983](#) cases, the court must consider whether it in fact shields the Union Defendants from monetary liability here. In line with the three other district courts that have applied the defense under nearly identical facts, the court concludes that it does. As discussed above, "traditional principles of equity and fairness . . . underpin the [good faith] defense."<sup>44</sup> The Union Defendants collected fair-share fees in accordance with PERA and in accordance with then-binding Supreme Court precedent that upheld the constitutionality of such fees. "It would be highly inequitable to **[\*\*18]** hold private parties retroactively liable for [§ 1983](#) damages in such a circumstance."<sup>45</sup>

Plaintiffs argue that the good faith defense should not apply to the facts here because the Union Defendants should have known that the Supreme Court was poised to overturn *Abood* given dicta in the Court's cases over the past six years. They argue it was beyond question that the Court had "grave misgivings about the constitutionality of public-sector agency shops" and the Union Defendants should not have continued to collect fees pursuant to these arrangements in the face of such uncertainty, which therefore precludes any argument that they collected fees in

<sup>39</sup> Doc. 58 at p. 11. See also [Danielson, 340 F. Supp. 3d. at 1086.](#)

<sup>40</sup> [Wyatt, 504 U.S. at 164.](#)

<sup>41</sup> Doc. 58 at p. 12.

<sup>42</sup> Doc. 58 at p. 18 (citing [Gilpin v. AFSCME, 875 F.2d 1310, 1316 \(7th Cir. 1989\).](#)

<sup>43</sup> [Montanile v. Board of Trustees, 136 S.Ct. 651, 658, 193 L. Ed. 2d 556 \(2016\).](#)

<sup>44</sup> [Cook, 2019 U.S. Dist. LEXIS 32217, 2019 WL 982384, at \\*7.](#)

<sup>45</sup> *Id.*

good faith.<sup>46</sup> But "reading the tea leaves of Supreme Court dicta has never been a precondition to good faith reliance on governing law."<sup>47</sup> Barring the use of the good-faith defense on a private defendant who relied on Supreme Court precedent to justify its conduct based on the likelihood of the Supreme Court overruling that precedent would indeed "imperil the rule of law."<sup>48</sup>

[\*1007] Plaintiffs argue that, if nothing else, it is improper to dismiss a claim based on the good-faith defense pursuant to [Rule 12\(b\)\(6\)](#). They assert that the defense is a subjective one [\*\*19] that requires evidence of the defendant's actual state of mind. Therefore, they believe they need an opportunity to gather evidence as to what the Union Defendants subjectively believed about the continued lawfulness of such fees; that is, whether they understood such fees to be "constitutionally dubious."<sup>49</sup> Such evidence, they assert, would prove whether the Union Defendants were indeed acting in good faith or whether they were just collecting as much money as they could before the inevitable overruling of *Abood*. Again, this argument has been considered and correctly rejected as unworkable by the other courts addressing this same issue in these circumstances:

Admittedly, the subjective state of mind of a party asserting good faith is a common inquiry in cases discussing the defense. . . . But applying the subjectivity standard to this case results in a perverse outcome, if followed to its logical conclusion. Assuming that the Union Defendant (or, more accurately, an employee of the union), subjectively believed the Supreme Court would *not* overrule *Abood*, the Union Defendant's collection of [fair-share] fees, up until *Janus*, would be shielded by the good faith defense, but not so if the [\*\*20] same employee instead subjectively believed (correctly) that the Supreme Court *would* overrule *Abood*. . . . Inviting discovery on the subjective anticipation of an unpredictable shift in the law undermines the importance of observing existing precedent and ignores the possibility that prevailing jurisprudential winds may shift. . . . The good faith defense should apply here as a matter of law.<sup>50</sup>

It is indisputable that the Union Defendants' collection of fair-share fees was lawful under state statute and then-binding Supreme Court precedent. No amount of discovery would prove otherwise.

Relatedly, Plaintiffs argue that dismissal is premature because the Union Defendants have not shown that its pre-*Janus* collection of fees from non-union members complied with *Abood*'s restriction on the use of these fees for non-ideological activities only. They assert that discovery is needed on this compliance issue before the Union Defendants can establish a good-faith defense. Their argument is without merit. As noted by the Union Defendants "Plaintiffs do not allege the Unions failed to comply with *Abood*. Instead, Plaintiffs seek a refund of all fees the Unions received in *reliance* on *Abood* [\*\*21]."<sup>51</sup> Their argument that discovery is needed on a different claim for different relief on a different class before the court can apply the good-faith defense simply does not track.

### C. Monetary relief for union dues collected pre-*Janus*

Plaintiffs McKee and Liston were union members who paid union membership dues rather than fair-share fees. They allege that they only became members because they otherwise would have been forced to pay fair-share fees and the difference between the amount of the membership dues and the amount of the fair-share fees "would not have been worth the loss of their vote and whatever little influence they might have been able to exert in collective

<sup>46</sup> Doc. 56 at p. 25.

<sup>47</sup> [Cook, 2019 U.S. Dist. LEXIS 32217, 2019 WL 982384, at \\*7](#).

<sup>48</sup> *Id.*; see also [Carey, 2019 U.S. Dist. LEXIS 38742, 2019 WL 1115259, at \\*7](#) (noting that such a position on the good faith defense would cause "chaos in constitutional interpretation").

<sup>49</sup> Doc. 56 at p. 25.

<sup>50</sup> [Danielson, 340 F. Supp. 3d at 1086](#); see also [Carey, 2019 U.S. Dist. LEXIS 38742, 2019 WL 1115259, at \\*7](#) (stating that "good faith may be decided as a matter of law when the defendant relied upon a valid statute").

<sup>51</sup> Doc. 58 at p. 17.

bargaining matters.<sup>52</sup> That is, [\*1008] they believe the existence of the "unconstitutional agency shop" structure and its accompanying fair-share fees compelled their union membership. They seek a refund of a portion of their union membership fees exceeding the amount of the fair-share fees paid by non-union members. Given that the union members' claim is also based upon pre-*Janus* collection of fair-share fees, the court concludes that the good-faith defense applies here as well.

Other reasons support denial of the union members' [\*22] claims. First, they admit that they made a decision to pay union membership dues in exchange for certain benefits: a right to vote in union elections and the ability to influence collective bargaining efforts. This voluntary choice precludes an argument that they were compelled to subsidize the Union Defendants' private speech. Indeed, "Janus says nothing about people who join a union, agree to pay dues, and then later change their mind about paying union dues."<sup>53</sup> Their assertion that their union memberships were compelled because they should have had the option to avoid union fees altogether, as *Janus* now makes clear, is unpersuasive. The fact that plaintiffs would not have opted to pay union membership fees if *Janus* had been the law at the time of their decision does not mean their decision was therefore coerced.

Second, Plaintiffs McKee and Liston's agreement to become union members in exchange for benefits created a contract between them and their unions that remains enforceable after *Janus*.<sup>54</sup> Plaintiffs cannot "seek to claw back money paid in exchange for already-provided contractual benefits . . . based on later changes in the law."<sup>55</sup> Plaintiffs argue that the Union Defendants cannot [\*23] rely on this contractual argument to support dismissal under [Rule 12\(b\)\(6\)](#) because the contract is not described or referenced in the complaint. However, the complaint admits that Plaintiffs McKee and Liston agreed to pay union membership dues in exchange for membership benefits. This admission alone supports the Union Defendants' contractual argument.

#### D. Monetary relief under Alaska common law

Plaintiffs argue that they are entitled to a refund of pre-*Janus* fair-share fees and dues under state tort law, specifically conversion and trespass to chattels, as well as "replevin, unjust enrichment, restitution, and any other legal or equitable cause of action that offers relief for the unlawful seizure of their personal property."<sup>56</sup> The Union Defendants are entitled to have these state law claims dismissed under [Rule 12\(b\)\(6\)](#), because there can be no common law liability for conduct authorized by state statute. Plaintiffs do not dispute that PERA authorized fair-share fees, and the Alaska Labor Relations Agency, pursuant to PERA, promulgated regulations setting forth the procedures for collecting fees. This "comprehensive system to govern labor relations for public employees that includes fair-share fees . . . displaced [\*24] any contrary common law in this area."<sup>57</sup> [\*1009] Pursuant to *Janus*, the federal Constitution prohibits the continued enforcement of fair-share fee requirements under PERA; however, *Janus* "did not change the Alaska Legislature's determination that fair-share fees do not violate state law."<sup>58</sup> That is, *Janus* does not change the fact that PERA displaced any state common law tort claims that could have been brought with regard to fair-share fees collected prior to *Janus*.

<sup>52</sup> Doc. 44 at ¶ 38.

<sup>53</sup> [Belgau v. Inslee, No. 18-5620, 2018 U.S. Dist. LEXIS 175543, 2018 WL 4931602, at \\*5 \(W.D. Wash. Oct. 11, 2018\)](#).

<sup>54</sup> [Fisk v. Inslee, No. C16-5889, 2017 U.S. Dist. LEXIS 170910, 2017 WL 4619223, at \\*5 \(W.D. Wash. Oct. 16, 2017\)](#).

<sup>55</sup> Doc. 50 at p. 33; [Coltec Indus., Inc. v. Hobgood, 280 F.3d 262, 277 \(3d Cir. 2002\)](#).

<sup>56</sup> Doc. 44 at ¶ 58.

<sup>57</sup> Doc. 50 at p. 36. See [AS 01.10.010](#) ("So much of the common law not inconsistent with . . . any law passed by the legislature of the State of Alaska is the rule of decision in this state."); [City of Homer v. Gangl, 650 P.2d 396 \(Alaska 1982\)](#) (noting that the adoption of an applicable statute "prevails over the principles of common law").

<sup>58</sup> Doc. 50 at p. 37.

Plaintiffs argue that because the statute is now unconstitutional it can no longer "confer immunity on otherwise tortious conduct."<sup>59</sup> The court disagrees. It cannot ignore the fact that the Union Defendants' collection of fair-share fees prior to *Janus* was authorized by state statute that was constitutional under controlling precedent. The court cannot now go back and impose tort liability under common law for that conduct. In any event, the court agrees with the Union Defendants that dismissal of Plaintiffs' tort law claims is also warranted because Plaintiffs cannot establish the elements of the various common law claims.<sup>60</sup>

#### **E. Exclusive representative collective bargaining**

Plaintiff McCollum uses the Supreme Court's issuance of *Janus* [\*\*25] as an opportunity to challenge not only the Union Defendants' past collection of fair-share fees but also to more broadly challenge Alaska's system of exclusive representative collective bargaining. She contends that the *Janus* decision calls into doubt the constitutionality of exclusive union bargaining.<sup>61</sup> She alleges that Alaska's exclusive collective bargaining system infringes upon her associational freedoms because she "remains bound to the terms of employment negotiated by a union that she does not belong to and wants nothing to do with."<sup>62</sup>

Despite the dicta set forth in *Janus* that enticed Plaintiff McCollum to bring such a *First Amendment* challenge, binding Supreme Court precedent flatly rejects her position. In *Minnesota State Board for Community Colleges v. Knight*,<sup>63</sup> the Supreme Court held that a system of exclusive union representation does not violate the speech or associational rights of individuals who are not members of the union. Indeed, the Court in *Janus* reaffirmed as much, distinguishing between compelled financial support for a union's exclusive representation and the underlying system of exclusive union representation and acknowledging that states can continue to require that a union [\*\*26] serve as the exclusive bargaining agent for its public employees.<sup>64</sup> Plaintiff McCollum now concedes that she cannot maintain her constitutional challenge to Alaska's system of exclusive union bargaining. She, however, maintains that the system is nonetheless unlawful under federal antitrust law.

Plaintiff's antitrust theory is that collective bargaining agreements stemming from Alaska's PERA are anti-competitive because they require compensation based on union-imposed pay scales and prevent individual employees from negotiating compensation based on individual performance and merits. Plaintiff fails to cite any case authority for her position. Indeed, it does not stand to reason that [\*1010] "federal antitrust law" prohibits Alaska from structuring labor relations for its public-sector employees in the same way that Congress structured labor relations for private-sector and federal government employees and that approximately 40 other states have structured their public employee labor relations.<sup>65</sup> Federal antitrust law, which seeks to preserve competition in the private sector, simply does not encompass the way in which a state chooses to set employment terms for its public employees. As to employees [\*\*27] not covered by federal labor relations law, Congress left states "free to legislate as they see fit, and [to] apply their own views of proper public policy to the collective bargaining process."<sup>66</sup>

<sup>59</sup> Doc. 56 at p. 32.

<sup>60</sup> See doc. 50 at pp. 37-40; Doc. 58 at pp. 21-22 for reasoning that the court adopts herein.

<sup>61</sup> Doc. 44 at ¶ 50.

<sup>62</sup> Doc. 44 at ¶ 49.

<sup>63</sup> [465 U.S. 271, 104 S. Ct. 1058, 79 L. Ed. 2d 299 \(1984\)](#).

<sup>64</sup> [138 S. Ct. at 2465-67, 2485 n. 27](#).

<sup>65</sup> Doc. 58 at p. 23.

<sup>66</sup> [United Farm Workers of Am. v. Ariz. Agric. Emp't Relations Bd., 669 F.2d 1249, 1257 \(9th Cir. 1982\)](#).

Several exemptions and doctrines of federal **antitrust law** bolster this court's conclusion that Plaintiff's claim falls outside the ambit of federal **antitrust law**. First, antitrust laws do not "restrain a state or its officer or agents from activities directed by its legislature."<sup>67</sup> Plaintiff consequently cannot challenge PERA itself. The legislature's adoption of this exclusive representative bargaining system is "an undoubted exercise of state sovereign authority" and is immune without further analysis.<sup>68</sup>

The collective bargaining agreements between the Union Defendants and school districts, which are a result of this legislatively authorized system, likewise cannot be challenged under antitrust laws. Although non-state actors, the Union Defendants and school districts are undoubtedly carrying out the state's regulatory scheme through their collective bargaining, and the agreements that stem therefrom, and consequently enjoy state-action immunity from federal antitrust laws as to this conduct. [\*\*28]<sup>69</sup> There are no issues of fact to develop on this issue; that is, it is indisputable that the challenged restraint—a collective bargaining agreement negotiated by a representative union—is "clearly articulated and affirmatively expressed as state policy."<sup>70</sup>

Plaintiff argues that state immunity cannot be applied to dismiss her antitrust claim under [Rule 12\(b\)\(6\)](#) because the Union Defendants, as private actors, cannot avail themselves of the state-action immunity defense unless, in addition to carrying out state policy, they are actively supervised by the state in carrying out that policy, which is an issue not discernible on the face of the complaint. The active supervision requirement, however, is inapplicable here because the [\*1011] other party to the challenged collective bargaining agreement is the School District. "[U]nlike private parties, [local government] entities are not subject to the 'active state supervision requirement' because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies."<sup>71</sup> A local government entity is entitled to a presumption that it "acts in the public interest" and consequently there is "little or no danger" that [\*\*29] the entity would become "involved in a *private* price-fixing arrangement."<sup>72</sup>

Second, the labor of a human being cannot be a commodity whose price is protected under federal antitrust regulation.<sup>73</sup> Therefore, "restraints on the sale of the employee's services to the employer"—those employment terms set forth in a collective bargaining agreement—"are not themselves combinations or conspiracies in the restraint of trade or commerce under the Sherman Act" even if they "curtail the competition among employees."<sup>74</sup>

<sup>67</sup> [Parker v. Brown, 317 U.S. 341, 350-51, 63 S. Ct. 307, 87 L. Ed. 315 \(1943\)](#); see also [Town of Hallie v. City of Eau Claire, 471 U.S. 34, 39, 105 S. Ct. 1713, 85 L. Ed. 2d 24 \(1985\)](#) (noting that HN5[<sup>↑</sup>] public entities such as municipalities are exempt from federal antitrust laws if their anticompetitive activities are authorized by state policy meant to displace competition with regulation).

<sup>68</sup> [N.C. State Bd. of Dental Exam'r's v. FTC, 574 U.S. 494, 135 S. Ct. 1101, 1110-11, 191 L. Ed. 2d 35 \(2015\)](#) (stressing that HN6[<sup>↑</sup>] state legislation is an exercise of a state's sovereign power and therefore exempt from the operation of antitrust laws).

<sup>69</sup> See [Chamber of Commerce v. City of Seattle, 890 F.3d 769, 781 \(9th Cir. 2018\)](#) (discussing when the Supreme Court has extended state-action immunity to non-state actors).

<sup>70</sup> [Id. at 782](#). See also [Preferred Commc'n's, Inc. v. City of L.A., 754 F.2d 1396, 1414 \(9th Cir. 1985\)](#) (stating that state-action immunity extends to actions that the legislature contemplated when authorizing the conduct at issue or that were a "necessary or reasonable consequent of engaging in the authorized activity").

<sup>71</sup> [FTC v. Phoebe Putney Health Sys. Inc., 568 U.S. 216, 133 S. Ct. 1003, 185 L. Ed. 2d 43 \(2013\)](#) (citing [Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46-47, 105 S. Ct. 1713, 85 L. Ed. 2d 24 \(1985\)](#)).

<sup>72</sup> [Hallie, 471 U.S. at 45, 47.](#)

<sup>73</sup> [15 U.S.C. § 17.](#)

<sup>74</sup> [Apex Hosiery Co. v. Leader, 310 U.S. 469, 503, 60 S. Ct. 982, 84 L. Ed. 1311 \(1940\).](#)

Indeed, the Ninth Circuit has held that restraints in a collective bargaining agreement fall within the labor exemption to federal antitrust law.<sup>75</sup>

Third, the court is persuaded that the *Noerr-Pennington* doctrine also shields collective bargaining agreements from a federal antitrust challenge. Under the doctrine, efforts to convince the government to act in an anticompetitive manner are protected by the First Amendment. Federal antitrust law therefore does not "regulate the conduct of private individuals in seeking anticompetitive action from the government."<sup>76</sup> As long as the unions are not using the governmental process, as opposed to the outcome of the process, as an anticompetitive weapon, negotiating [\*\*30] with public officials for employment terms that may in fact restrict competition is exempt from federal antitrust liability.<sup>77</sup>

## **V. CONCLUSION**

Based on the preceding discussion, the motions at docket 49 and 53 are GRANTED. Plaintiffs' complaint is hereby dismissed in its entirety.

DATED this 14th day of March 2019.

/s/ JOHN W. SEDWICK

SENIOR JUDGE, UNITED STATES DISTRICT COURT

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<sup>75</sup> [Bodine Produce, Inc. v. United Farm Workers Org. Comm.](#), 494 F.2d 541, 558 (9th Cir. 1974).

<sup>76</sup> [City of Columbia v. Omni Outdoor Adver., Inc.](#), 499 U.S. 365, 379-80, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991).

<sup>77</sup> [Allied Tube & Conduit Corp. v. Indian Head, Inc.](#), 486 U.S. 492, 499, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988); see also [Omni Outdoor Adver.](#), 499 U.S. at 380.



## Soul'd out Prods., LLC v. Anschutz Entm't Grp., Inc.

United States District Court for the District of Oregon, Portland Division

March 14, 2019, Decided; March 14, 2019, Filed

No. 3:18-cv-00598-MO

### **Reporter**

2019 U.S. Dist. LEXIS 42648 \*; 2019 WL 1212085

SOUL'D OUT PRODUCTIONS, LLC, Plaintiff, v. ANSCHUTZ ENTERTAINMENT GROUP, INC.; THE ANSCHUTZ CORPORATION; GOLDENVOICE, LLC; AEG PRESENTS, LLC; and COACHELLA MUSIC FESTIVAL, LLC, Defendants.

**Subsequent History:** Reversed by, Remanded by [Soul'd Out Prods., LLC v. Anschutz Entm't Grp., Inc., 2020 U.S. App. LEXIS 15137 \(9th Cir. Or., May 12, 2020\)](#)

**Prior History:** [Soul'd out Prods., LLC v. Anschutz Entm't Grp., Inc., 2018 U.S. Dist. LEXIS 175967 \(D. Or., Oct. 12, 2018\)](#)

## **Core Terms**

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intentional interference, fraudulently, festival, leave to amend, wrongfully, statement of reasons, amended complaint, motion to dismiss, antitrust, Radius, contractual relationship, reasonable inference, restraint of trade, unfair competition, factual matter, alleges, Music

**Counsel:** [\*1] For Soul'd Out Productions, LLC, an Oregon limited liability company, Plaintiff: Nicholas F. Aldrich, Jr., LEAD ATTORNEY, Angela E. Addae, Kathryn E. Kelly, Schwabe, Williamson & Wyatt, Portland, OR; Thomas M. Triplett, LEAD ATTORNEY, Schwabe Williamson & Wyatt (Bend), Bend, OR.

For Anschutz Entertainment Group, Inc., a Colorado corporation, The Anschutz Corporation, a Delaware corporation, Goldenvoice, LLC, a California company, AEG Presents, LLC, a Delaware company, Coachella Music Festival, LLC, a Delaware company, Defendants: Joseph M. Krauss, Justin W. Bernick, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells U.S. LLP, Washington, DC; Casey M. Nokes, Cable Huston LLP, Portland, OR.

**Judges:** MICHAEL W. MOSMAN, Chief United States District Judge.

**Opinion by:** MICHAEL W. MOSMAN

## **Opinion**

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### OPINION AND ORDER

**MOSMAN, J.,**

This matter comes before me on Defendants' Motion to Dismiss [37] Plaintiff's Second Amended Complaint [35]. For the reasons stated on the record and the reasons stated below, I GRANT Defendants' Motion to Dismiss, with prejudice as to Claims One, Two, and Three. Claims Four, Five, Six, and Seven are dismissed with leave to amend.

## DISCUSSION

For the reasons stated on the record, Plaintiff's antitrust claims (Claims [\*2] One, Two, and Three) are dismissed with prejudice. Plaintiff's state law claims for intentional interference with prospective economic advantage (Claim Four), intentional interference with contractual relations (Claim Five), intentional interference with economic relations (Claim Six), and unfair competition (Claim Seven) are dismissed with leave to amend.

Claims Four, Five, and Six of Plaintiff Soul'd Out's Second Amended Complaint assert intentional interference claims under Oregon and California law. A plaintiff alleging intentional interference with economic or contractual relations must plead that the defendant acted wrongfully "by some measure beyond the fact of the interference itself." [\*Della Penna v. Toyota Motor Sales, U.S.A., Inc.\*, 11 Cal. 4th 376, 45 Cal. Rptr. 2d 436, 902 P.2d 740, 751 \(Cal. 1995\); \*Top Serv. Body Shop, Inc. v. Allstate Ins. Co.\*, 283 Ore. 201, 582 P.2d 1365, 1371 \(Or. 1978\)](#). Soul'd Out advanced four ways in which Defendant Anschutz Entertainment Group (AEG) acted wrongfully. The first three rationales rely on the illegality of the contract at issue in this case: Soul'd Out alleges that the contract violated (1) **antitrust law**, (2) California's statutory prohibition on restraint of trade (*Cal. Bus. & Prof. Code § 16600*), and (3) Oregon's common law prohibition on restraint of trade. Resp. [40] at 31. The first rationale fails because, as noted above, Soul'd Out has not plausibly alleged an antitrust [\*3] violation. The second and third rationales fail because I previously decided that Soul'd Out lacks standing to challenge the contracts formed between AEG and parties not before the Court as illegal restraints of trade. Op. & Order [34].

Soul'd Out also alleged that AEG's acted wrongfully in "fraudulently informing artists that the Soul'd Out Music Festival is a 'festival' within the meaning of the Radius Clause, whereas it is not." Resp. [40] at 31. AEG responded by noting that Soul'd Out did not allege any facts to support its allegation that AEG acted fraudulently. Mot. Dismiss [41] at 32 n.10. I agree.

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

[\*Ashcroft v. Iqbal\*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#) (quoting [\*Bell Atl. Corp. v. Twombly\*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#)).

The Second Amended Complaint provided no facts to support the allegation that AEG acted fraudulently. Nor is it reasonable to infer that AEG acted fraudulently if it told musicians that the Soul'd Out Festival was a "festival" as defined by the [\*4] Radius Clause—Soul'd Out itself previously argued that it was such a festival. See, e.g., Tr. [32] at 25 ("We're both popular music festivals, as defined by their radius clause . . . .").

Soul'd Out has failed to plausibly allege that AEG acted wrongfully and has therefore failed to state a claim for intentional interference. Because this defect could be amended by pleading sufficient factual matter to support the claim that AEG acted fraudulently, Claims Four, Five, and Six are dismissed with leave to amend.

Soul'd Out's final claim alleges that the contract at issue in this case violates California's Unfair Competition Law (UCL), which prohibits "any unlawful, unfair or fraudulent business act or practice." [\*Cal. Bus. & Prof. Code § 17200\*](#). For the same reasons that Soul'd Out failed to plausibly allege that AEG acted wrongfully for the purposes of an intentional interference claim, I find that Soul'd Out has not plausibly alleged that AEG violated the UCL by acting unlawfully, unfairly, or fraudulently. Like the intentional interference claims, this deficiency could be corrected in an amended pleading. Therefore, Claim Seven is dismissed with leave to amend.

## CONCLUSION

For the reasons stated above, I GRANT Defendants' Motion to [\*5] Dismiss [37], with prejudice as to Claims One, Two, and Three. Claims Four, Five, Six, and Seven are dismissed with leave to amend. Plaintiff may file an amended complaint within thirty days of this Order.

IT IS SO ORDERED.

DATED this 14th day of March, 2019.

/s/ Michael W. Mosman

MICHAEL W. MOSMAN

Chief United States District Judge

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## **UFCW & Employers Benefit Trust v. Sutter Health**

Superior Court of California, County of San Francisco

March 14, 2019, Decided; March 14, 2019, Filed

Case No. CGC-14-538451 Consolidated with Case No. CGC-18-565398

### **Reporter**

2019 Cal. Super. LEXIS 342 \*; 2019-1 Trade Cas. (CCH) P80,742

UFCW & EMPLOYERS BENEFIT TRUST, et al., Plaintiffs, v. SUTTER HEALTH, ET AL., Defendants. PEOPLE OF THE STATE OF CALIFORNIA, ex rel. XAVIER BECERRA, Plaintiff, v. SUTTER HEALTH, Defendant.

## **Core Terms**

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Cartwright Act, monopolize, monopoly, vertical, specific intent, restraint of trade, tampering, cases, conspiracy, supplier, bids, price fixing, distributor, prices, summary judgment, cause of action, Sherman Act, complaints, unreasonable restraint, initial burden, argues, subcontractors, prohibitions, constitutes, settlement, financing, commerce, dealers, parties, summary adjudication

**Judges:** [\*1] Anne-Christine Massullo, Judge of the Superior Court.

**Opinion by:** Anne-Christine Massullo

## **Opinion**

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### ORDER RE SUTTER'S MOTION FOR SUMMARY ADJUDICATION OF COUNTS I AND III

#### **INTRODUCTION**

Plaintiffs UFCW & Employers Benefit Trust ("UEBT") and the People of the State of California (the "People") filed substantially similar complaints. Through the present motion, Sutter<sup>1</sup> moves for summary adjudication of Counts I and III of both complaints. Plaintiffs jointly oppose.

The matter was set for hearing on March 11, 2019. The Court provided the parties with a tentative ruling. Having considered the argument of the parties in addition to the pleadings on file, Sutter's motion is denied.

#### **LEGAL STANDARD**

"A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding. The motion may be made at any time after 60 days have elapsed since the general appearance in the action or proceeding of each party against whom the motion is directed or at any earlier time after the general appearance that the court, with or without notice and upon good cause shown, may direct." ([Cal. Code of Civ. Proc., § 437c\(a\)\(1\)](#)) "A party may move for summary adjudication as to one or more [\*2] causes of action within an action, one or more affirmative defenses, one or more claims for

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<sup>1</sup> The parties refer to the moving Defendants as "Sutter Health et al. ('Sutter')." (Notice of Motion, 1; see also Opposition, 1.)

damages, or one or more issues of duty, if the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, that there is no merit to a claim for damages, as specified in [Section 3294 of the Civil Code](#), or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (*Id.*, [§ 437c\(f\)\(1\)](#)).

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." ([Aguilar v. Atl. Richfield Co. \(2001\) 25 Cal.4th 826, 843, 107 Cal. Rptr. 2d 841, 24 P.3d 493](#).)

"First, and generally, from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Id. at 850*.) "There is a triable issue of material fact if, and only if, [\*3] the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.*) "[A] defendant bears the burden of persuasion that 'one or more elements of the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto." (*Ibid.*)

"Second, and generally, the party moving for summary judgment bears an initial burden of production to make a *prima facie* showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a *prima facie* showing of the existence of a triable issue of material fact." (*Ibid.*) "A burden of production entails only the presentation of 'evidence.'" (*Ibid.*)

"Third, and generally, how the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production depends on *which* would bear *what* burden of proof at trial." (*Id. at 851*.) "Thus, if a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, [\*4] he must present evidence that would require a reasonable trier of fact to find any underlying material fact more likely than not-otherwise, he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact. By contrast, if a defendant moves for summary judgment against such a plaintiff, he must present evidence that would require a reasonable trier of fact not to find any underlying material fact more likely than not-otherwise, he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact." (*Ibid.*)

The pleadings delimit the scope of the issues and frame the outer measure of materiality in a summary judgment proceeding. ([Hutton v. Fidelity Nat'l Title Co. \(2013\) 213 Cal.App.4th 486, 493, 152 Cal. Rptr. 3d 584](#).) The burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability as alleged in the complaint; a moving party need not refute liability on some theoretical possibility not included in the pleadings. (*Ibid.*)

## **DISCUSSION AND ANALYSIS**

### **I. Count I**

Count I is a claim for price tampering in violation of the Cartwright Act. (See UEBT Complaint ¶¶ 138-144; People's Complaint ¶¶ 140-146.) In short, the theory of liability [\*5] set forth in the complaints is that Sutter's contracts with Network Vendors unlawfully control and tamper with the price terms that Self-Funded Payors may offer the enrollees of their Health Plans. (UEBT Complaint ¶ 138; People's Complaint ¶ 140.) The purpose of Sutter's contractual restrictions is to eliminate price competition and thereby stabilize and maintain prices for general acute care hospital services and ancillary products at supra-competitive levels in violation of the Cartwright Act. (UEBT Complaint ¶ 138; People's Complaint ¶ 140.) The conduct constitutes either a *per se* violation of California's

antitrust laws or an unreasonable and unlawful restraint of trade. (UEBT Complaint ¶ 142; People's Complaint ¶ 144.)

There are two layers to Sutter's argument. First, Sutter contends that, as a matter of law, the only "price tampering" prohibited by the Cartwright Act is price fixing. (Motion, 11-12.) Second, Sutter argues that, as a matter of fact, Sutter did not fix prices. (*Id.* at 12-14.) Sutter asserts that Plaintiffs' rely on vertical restraints that indirectly resulted in prices. (*Id.* at 14-15.) Sutter argues that this theory is not cognizable. (*Id.* at 14-17.)

Plaintiffs disagree. [\*6] First, Plaintiffs contend that claims based vertical tampering with price and price structures are cognizable under the Cartwright Act. (Opposition, 8-13.) Plaintiffs assert that they have evidence to support such a theory. (*Id.* at 13-14.) Second, if Sutter's legal position is correct, Plaintiffs argue that Plaintiffs have evidence of vertical price fixing. (*Id.* at 14-16.)

#### A. The Cartwright Act

Under the Cartwright Act, a "trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: ... (d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State. [¶] (e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any combination of any of the following: ... (2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure. [¶] (3) Establish or settle the price of any article, commodity or transportation between them or themselves [\*7] and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity. [¶] (4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected." ([Cal. Bus. & Prof. Code, § 16720\(d\), \(e\)\(2\)-\(4\).](#))

The Cartwright Act is this state's principal **antitrust law**. ([In re Cipro Cases I & II \(2015\) 61 Cal.4th 116, 136, 187 Cal. Rptr. 3d 632, 348 P.3d 845.](#)) The act's principal goal is the preservation of consumer welfare. (*Ibid.*) "At its heart is a prohibition against agreements that prevent the growth of healthy, competitive markets for goods and services and the establishment of prices through market forces. [Citation.] 'The act 'generally outlaws any combinations or agreements which restrain trade or competition or which fix or control prices' [citation], and declares that, with certain exceptions, 'every trust is unlawful, against public policy and void.' [Citations.]'" (*Ibid.* [internal citations omitted].)

"Though the Cartwright Act is written in absolute terms, in practice not every agreement within the four corners of its prohibitions has been deemed [\*8] illegal." (*Ibid.*) Instead, based on common law prohibitions against restraints of trade, the broad prohibitions in the act are subject to an implied exception similar to one that validates reasonable restraints of trade under the federal Sherman Antitrust Act. ([Id. at 136-37, 146.](#))

#### B. Vertical Price Tampering<sup>2</sup>

It is undisputed that the Cartwright Act prohibits both horizontal and vertical price fixing. (See, e.g., Motion, 12.) Where the parties part company is on the question of whether the Cartwright Act imposes liability on agreements that "might in any manner" affect prices. (Compare Motion, 12; Opposition, 9.)

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<sup>2</sup> Plaintiffs do not base their claims on any agreement of any kind between Sutter and other hospitals or healthcare providers. (Plaintiffs' Response to Separate Statement ¶ 7.) Accordingly, the court need not discuss horizontal price fixing or horizontal price tampering.

Plaintiffs' argument is rooted in the broad language of the statute. (Opposition, 8-9.) But, as observed above, the statute does not prohibit every agreement that falls within the four corners of its prohibitions. (*In re Cipro*, 61 Cal.4th at 136-37.) Under the common law, reasonable restraints of trade are permitted. (*Ibid.*)

Accordingly, the first question presented here is whether vertical price tampering is, or may be, prohibited by the Cartwright Act. On that question, Plaintiffs direct the court's attention to *Oakland-Alameda County Builders' Exchange v. F.P. Lathrop Construction Co.* (1971) 4 Cal.3d 354, 93 Cal. Rptr. 602, 482 P.2d 226 ("Lathrop"). (See Opposition, 9-10.) There, the California Supreme Court held that "the rules of the Oakland-Alameda [¶9] County Bid Depository impose requirements on participating subcontractors and general contractors which involve illegal price tampering and group boycotts." (Lathrop, 4: Cal.3d at 369.) The bid depository rules provided the exclusive process by which general contractors could obtain bids from subcontractors in formulating their bids on prime contracts. (See *id. at 357*.) First, subcontractors submitted their bids to a lockbox by an appointed time. (See *ibid.*) Second, general contractors could use only the bids that had been submitted to the lockbox to formulate their bids for the prime contract, without any opportunity to negotiate lower bids. (See *ibid.*) The process violated the Cartwright Act for two reasons. First, it stifled price competition amongst subcontractors. (*Id. at 362-64*.) Second, it required general contractors to boycott subcontractors who failed to comply with the bid depository rules. (*Id. at 364-65*.)

Sutter argues that *Lathrop* is factually distinguishable because the bid depository rules precluded horizontal price competition — competition between subcontractors. (Motion, 16; Reply, 3.) Further, Sutter argues that cases involving vertical price competition are limited to vertical price fixing — situations [¶10] in which the supplier fixes the price at which the distributor will sell the product. Among other cases, Sutter highlights *Kunert v. Mission Financial Services Corp.* (2003) 110 Cal.App.4th 242, 1 Cal. Rptr. 3d 589 and *Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 60 Cal. Rptr. 2d 195. (See Motion, 13-14; Reply, 4.)

In *Kunert*, the Court of Appeal evaluated whether the Kunerts could amend their complaint to state a claim for vertical price-fixing based on certain proposed allegations. (*Kunert*, 110 Cal.App.4th at 262.) The Court explained that a "vertical price-fixing agreement, commonly known as resale price maintenance, involves the efforts of a supplier to control the distribution of its product or service by retailers or distributors. [Citation.] Such an agreement limits the distributor's freedom to sell the supplier's product at a price independently selected by the distributor [citation]; instead, the supplier establishes the price at which its distributors may sell the supplier's products, resulting in maintenance of the resale price at a single level. The supplier's price restrictions are often enforced through the supplier's refusal to deal with a particular distributor. [Citation.] A vertical price-fixing or resale price maintenance agreement between supplier and distributor 'destroys horizontal competition as effectively as would a horizontal agreement among [¶11] distributors or retailers' [citation] and is per se unlawful under the Cartwright Act. [Citation]' (*Id. at 263* [internal quotations omitted].) The proposed allegations were insufficient because "[t]he essence of resale price maintenance is the supplier's—in this case, Mission Financial's—control of the resale price of its automobile financing, setting it at the same level for all its dealers and thus restricting competition among the dealers on the financing rate. The Kunerts have not and cannot in good faith assert that Mission Financial set the financing rate dealers must charge their customers, or made any effort whatsoever to restrict the financing rate charged by the dealer." (*Id. at 263-64*.)

In *Exxon*, Exxon franchisee service station dealers alleged that Exxon violated, *inter alia*, the Cartwright Act by requiring them to pay excessive rates for gasoline. (*Exxon*, 51 Cal.App.4th at 1677.) The Court of Appeal analyzed the restraint as a vertical non-price restraint that is tested under the rule of reason such that the plaintiffs were required to prove that the restraint had an anticompetitive effect in the relevant market in order to prevail. (*Id. at 1680-81*.)

Sutter's cases, especially read in conjunction with *Lathrop*,<sup>3</sup> do not establish that "vertical [\*12] price tampering" is lawful so long as it does not rise to the level of price fixing. Rather, "price tampering," as described in Count I, may be actionable under the Cartwright Act. Sutter concedes that if Sutter is correct that the "price tampering" described in the complaints constitutes only a "non-price vertical restraint," the result is that the restraints are "evaluated just like any other alleged unreasonable restraint of trade" — not that the claim is invalid. (Motion, 23; [Exxon, 51 Cal.App.4th at 1680-81](#); [Kunert, 110 Cal.App.4th at 263-64](#) [concluding that the Kunerts could not plead vertical price-fixing because they could not allege that Mission Financial set financing rates or "made any effort whatsoever to restrict the financing rate charged by the dealer"].)<sup>4</sup>

### C. Sutter's Initial Burden

To meet its initial burden, Sutter must meet Plaintiffs' theory of liability as alleged in the complaints. (See [Hutton, 213 Cal.App.4th at 493](#).) Sutter has not done so.

To carry its initial burden, Sutter refers to interrogatory responses in an effort to show that Plaintiffs have disclaimed any intent to show horizontal price tampering or vertical price fixing. (See Sutter Separate Statement ¶¶ 1-9.) This is consistent with Sutter's legal argument that "vertical price tampering" [\*13] is not a cognizable offense, only vertical price fixing. But Sutter concedes that "non-price vertical restraint[s]" are evaluated "like any other alleged restraint of trade." (Motion, 23.) Plaintiffs alleged that what the conduct they alleged constituted "price tampering" constitutes "an unreasonable and unlawful restraint of trade." (UEBT Complaint ¶ 142; People's Complaint ¶ 144.) Accordingly, consistent with Sutter's own argument, demonstrating that Plaintiffs' cannot prove price fixing does not indicate that the conduct they describe as "price tampering" is lawful. Accordingly, Sutter has not carried its initial burden of producing evidence that Plaintiffs will be unable to establish an element of their first cause of action.

## II. Count III

Count III is a claim for combination to monopolize in violation of the Cartwright Act. (See UEBT Complaint ¶¶ 156-160; People's Complaint ¶¶ 158-162.) In short, the theory of liability set forth in the complaints is that Sutter compelled Health Plan Vendors to agree to contract terms through which Sutter unlawfully restrains trade with the purpose and effect of obtaining or maintaining monopoly power with the relevant geographic markets, which [\*14] in turn allows Sutter to demand supra-competitive prices. (UEBT Complaint ¶¶ 156-157; People's Complaint ¶¶ 158-159.)

There are again two layers to Sutter's argument. First, Sutter argues that a "combination to monopolize" claim can only be maintained where the members of the combination shared a specific intent to monopolize the market. (See Motion, 17-20.) Second, Sutter contends that, as a matter of fact, the Health Plan Vendors, or insurers, did not have a specific intent to help Sutter monopolize the market. (*Id.* at 20-23.)

Plaintiffs' disagreement is with the Sutter's first line of argument. Plaintiffs assert that they need not show that all combining parties shared a specific intent to monopolize to support a claim for a combination to monopolize. (See Opposition, 16-19.)

### A. Essential Elements

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<sup>3</sup> The *Lathrop* court did not focus on any distinction between horizontal and vertical price competition. Instead, it underscored the fact that one of the central purposes of the Cartwright Act is to promote price competition. ([Lathrop, 4 Cal.3d at 362-63](#).)

<sup>4</sup> The point Sutter is making here is that Sutter believes that all three theories of liability set forth in Counts I, II, and III should have been included in a single cause of action for unreasonable restraint of trade. (Motion, 23.) However, Sutter does not cite authority to support its implied assertion that the court should remove valid and distinct theories of liability from the case because they could have been alleged as a single cause of action.

## 1. The Cartwright Act

"[T]he Cartwright Act is not derived from the Sherman Act, but rather from the laws of other states, and the Cartwright Act and the Sherman Act differ in wording and scope." ([Asahi Kasei Pharma Corp. v. CoTherix, Inc. \(2012\) 204 Cal.App.4th 1, 8, 138 Cal. Rptr. 3d 620](#) (citation omitted).) "The Cartwright Act bans combinations, but single firm monopolization is not cognizable under the Cartwright Act. [Citations.] To maintain an action for combination in restraint [\*15] of trade under the Cartwright Act, 'the following elements must be established: (1) the formation and operation of the conspiracy; (2) illegal acts done pursuant thereto; and (3) damage proximately caused by such acts. [Citation.]' [Citation.]" (*Ibid.* [internal citations omitted].)<sup>5</sup>

"[A]greements to establish or maintain a monopoly are restraints of trade made unlawful by the Cartwright Act. [Citations.] Under general antitrust principles, a business may permissibly develop monopoly power, i.e., 'the power to control prices or exclude competition' [citation], through the superiority of its product or business acumen. To acquire or maintain that power through agreement and combination with others, however, is quite a different matter. [Citation.]" ([In re Cipro, 61 Cal.4th at 148](#); see also [Lowell v. Mother's Cake & Cookie Co. \(1978\) 79 Cal.App.3d 13, 23, 144 Cal. Rptr. 664](#) ["Though not specifically listed, monopoly is a prohibited restraint of trade. The offense of monopoly involves the willful acquisition of the power to control prices or exclude competition from commerce in a particular geographic area with respect to a specific product"].)

## 2. *In re Cipro*

The *In re Cipro* Court was presented with a "reverse payment" patent settlement whereby a brand-name drug manufacturer paid a generic in exchange [\*16] for the generic dropping its patent challenge and consenting to stay out of the market. ([In re Cipro, 61 Cal.4th at 130](#).) Summarizing its ruling, the Court stated that parties "illegally restrain trade when they privately agree to substitute consensual monopoly in place of potential competition that would have followed a finding of invalidity or noninfringement." (*Ibid.*) In its analysis, the Court addressed whether reverse payment settlements are subject to a rule of reason analysis and, if so, how the analysis should be structured. (*Id. at 148.*) In that context, the Court made the foregoing observation that agreements to establish or maintain a monopoly are unlawful restraints of trade. (*Ibid.*) As an example, the Court noted that a firm may not pay its only potential competitor not to compete in return for a share of the profits that firm can obtain by being a monopolist. (*Ibid.*) In the meat of its analysis, the Court described how the rule of reason analysis applies where a plaintiff challenges a reverse payment patent settlement. (See [id. at 151-160.](#)) The focus of the analysis is on whether the settlement fund includes a payment made in exchange for a delay in market entry. (See *ibid.*) Specific intent is never discussed.

## 3. Plaintiffs' [\*17] Argument

Plaintiffs' argument is straightforward. A "combination to monopolize" is a restraint of trade. (Opposition, 16; [In re Cipro, 61 Cal.4th at 148](#) ["agreements to establish or maintain a monopoly are restraints of trade made unlawful by the Cartwright Act".]) The elements of a claim for a combination in restraint of trade do not include a shared specific intent to create a monopoly. (Opposition, 16-17; [Asahi Kasei, 204 Cal.App.4th at 8; Kolling v. Dow Jones & Co. \(1982\) 137 Cal.App.3d 709, 720, 187 Cal. Rptr. 797](#) ["the 'conspiracy' or 'combination' necessary to support an antitrust action can be found where a supplier or producer, by coercive conduct, imposes restraints to which distributors involuntary adhere".]) Accordingly, Plaintiffs conclude that they need not show a shared specific intent to create a monopoly.

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<sup>5</sup> Count II of the complaints is a separate claim for unreasonable restraint of trade in violation of the Cartwright Act. (See UEBT Complaint ¶¶ 146-154; People's Complaint ¶¶ 148-156.)

#### 4. Sutter's Arguments

##### a. Whether Counts II and III are Duplicative

First, Sutter argues that the court should disregard Plaintiffs' reference to the elements of a combination in restraint of trade because Plaintiffs pled a separate cause of action for "unreasonable restraint of trade." (Reply, 8; see also Motion, 23.) As detailed more fully below, the manner in which Plaintiffs organized their legal theories does not govern the court's determination of the essential elements of the Plaintiffs' legal claims. [\*18]

Turning to the complaints, Plaintiffs allege that the "combination to monopolize" addressed in Count III violates the Cartwright Act because, at minimum, it constitutes an unreasonable restraint of trade. (UEBT Complaint ¶ 158; People's Complaint ¶ 160.) In Count II, Plaintiffs allege that similar conduct constituted, at minimum, an unreasonable restraint of trade, but do not allege that Sutter had the specific intent to obtain or maintain monopoly power. (See UEBT Complaint ¶¶ 146, 152, 157; People's Complaint ¶¶ 148, 154, 159.) Accordingly, Plaintiffs alleged that the conduct addressed in Counts II and III is unlawful under the Cartwright Act for the same reason — it constitutes an unreasonable restraint of trade. (UEBT Complaint ¶¶ 152, 158; People's Complaint ¶¶ 154, 160.)

Sutter suggests that if its motion is granted the Count III theory can, in the absence of specific intent to monopolize, be pursued under Count II. (Motion, 23.) But Sutter's motion seeks relief that would remove the Count III theory from the case. Sutter has not cited authority to support the proposition that a distinct theory of liability can be removed from a case on summary adjudication because it was pled [\*19] as a separate cause of action. Instead, Sutter argues that Count III is invalid because Plaintiffs do not have evidence of a specific intent to monopolize shared by the insurers. The court's present analysis is limited to that challenge.

##### b. Sherman Act

Second, Sutter contends that the specific intent requirement it would impose is required by analogous cases interpreting the Sherman Act. (See Motion, 18-19.) However, a review of those cases does not lead to the conclusion that Plaintiffs must prove a shared specific intent to monopolize to prevail on Count III.

Under Section 2 of the Sherman Act: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court." ([15 U.S.C. § 2](#))<sup>6</sup>

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<sup>6</sup> Under Section 1 of the Sherman Act: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court." ([15 U.S.C. § 1](#)) Plaintiffs suggest that the court should analogize their claim to a claim for conspiracy to monopolize under Section 1, which Plaintiffs contend lacks a specific intent requirement. (See Opposition, 19; *City of Vernon v. Southern California Edison Co. (9th Cir. 1992) 955 F.2d 1361, 1371* [stating in dicta that a Section 1 conspiracy to monopolize may exist even where one of the conspirators participates involuntarily or under coercion].) This line of argument is tangential. Plaintiffs' primary argument is that federal law is inapposite. (See Opposition, 18.) The reason that Sutter turns to Section 2 of the Sherman Act is because it deals specifically with monopolization. It is the strength of the analogy between Section 2 and California law that determines the weight to be given to Sutter's argument.

Section 2 of the Sherman Act applies to both actual monopolies and the preliminary steps that can lead to monopoly, but [\*20] conduct falling short of a monopoly is not illegal unless it is part of a plan to monopolize or to gain such other control of a market as is equally forbidden. (See [United States v. Aluminum Co. of America \(2d Cir. 1945\) 148 F.2d 416, 431-32](#).) Attempt-to-monopolize and conspiracy to monopolize claims require a specific intent to monopolize any part of the trade or commerce, but conspiracy claims do not require proof that the conspiracy resulted in a dangerous threat of achieving monopoly power. (See, e.g., [Auraria Student Housing at the Regency, LLC v. Campus Village Apartments, LLC \(10th Cir. 2016\) 843 F.3d 1225, 1233](#) [attempt-to-monopolize and conspiracy to monopolize claims require a specific intent to monopolize any part of the trade or commerce, but conspiracy claims do not require proof that the conspiracy resulted in a dangerous threat of achieving monopoly power]; [Rebel Oil Co., Inc. v. Atlantic Richfield Co. \(9th Cir. 1995\) 51 F.3d 1421, 1437 n.8](#).) Sutter explains that specific intent is necessary because "combination or conspiracy to monopolize is an inchoate offense—it prohibits an agreement to monopolize even if monopolization does not in fact occur." (Motion, 19.)

There are two California cases that treat agreements to establish or maintain a monopoly as unlawful restraints of trade under the Cartwright Act. (See [In re Cipro, 61 Cal.4th at 148](#); [Lowell, 79 Cal.App.3d at 23](#); see also [Dimidowich v. Bell & Howell \(9th Cir. 1986\) 803 F.2d 1473, 1478](#) [citing *Lowell* for the proposition that monopoly is a prohibited restraint of trade under the Cartwright Act and [\*21] stating, in dicta, that a claim for conspiracy to monopolize between two actors is cognizable under the Cartwright Act].) Sutter notes that the discussions in those cases include citations to cases interpreting Section 2 of the Sherman Act. (Motion, 17-19; [Lowell, 79 Cal.App.3d at 23](#) [citing [United States v. Grinnell Corp. \(1966\) 384 U.S. 563, 86 S. Ct. 1698, 16 L. Ed. 2d 778](#) and *Aluminum Co.* to support the proposition that the "offense of monopoly involves the willful acquisition of the power to control prices or exclude competition from commerce in a particular geographic area with respect to a specific product]; [In re Cipro, 61 Cal.4th at 148-49](#) [citing numerous federal cases in explaining examples of prohibited conduct]<sup>7</sup>.)

The fact that California cases cited to Section 2 cases in outlining general principles of monopoly law does not, in itself, indicate that the Cartwright Act tracks Section 2 of the Sherman Act. Instead, *In re Cipro* adopts an approach to evaluating the anticompetitive effects of an agreement to establish or maintain a monopoly in the unique reverse patent settlement context by formulating an analysis focusing on whether the settlement eliminates competition beyond the point at which competition would have been expected in the absence of the agreement.<sup>8</sup> ([In re Cipro, 61 Cal.4th at 151-60](#).) This is consistent with the language in *In re Cipro*, *Lowell*, and [\*22] *Dimidowich* that monopoly is one form of prohibited restraint of trade. The upshot is this: an agreement to monopolize is prohibited by the Cartwright Act if it constitutes an unreasonable restraint on trade. This is consistent with the theory pled in the complaints. (DEBT Complaint ¶ 158 [alleging that combination to monopolize constituted an unreasonable restraint of trade]; People's Complaint ¶ 160 [same].)<sup>9</sup> Shared specific intent amongst all co-conspirators is not an essential element of that offense. ([Kolling, 137 Cal.App.3d at 720](#).)

## B. Sutter's Initial Burden

Because Plaintiffs are not required to prove that the insurers had a specific intent to help Sutter form a monopoly, Sutter has not carried its initial burden. (See Sutter Separate Statement ¶¶ 2, 10-65 [the facts on which the motion

<sup>7</sup> *In re Cipro* did not only cite cases decided under Section 2 of the Sherman Act. (See [Palmer v. BRG of Georgia, Inc. \(1990\) 498 U.S. 46, 111 S. Ct. 401, 112 L. Ed. 2d 349](#) [Section 1 case].)

<sup>8</sup> During oral argument Sutter suggested that *In re Cipro* is limited to reverse patent settlement cases. The court respectfully rejects such a limited interpretation of the opinion.

<sup>9</sup> This conclusion is also consistent with Sutter's position that the claim is nothing more than a further theory that Sutter unreasonably restrained trade. (Motion, 23.) At the same time, it is consistent with Plaintiffs' argument that a "combination to monopolize" is analyzed like any other restraint of trade. (Opposition, 16-17.) To the extent there is nothing more here than a disagreement as to whether the theory should have been pled as part of the second cause of action rather than as the third cause of action, Sutter has not explained why this pleading formality makes a difference.

is based are intended to show that the insurers with which Sutter contracted did not act out of a desire to help Sutter secure a monopoly or to restrain trade]; Motion, 17-23 [argument predicated on the absence of specific intent].)

**CONCLUSION AND ORDER**

For all these reasons, Sutter's motion is denied.<sup>10</sup>

IT IS SO ORDERED.

Dated: March 14, 2019

/s/ Anne-Christine Massullo

Anne-Christine Massullo

Judge of the Superior Court

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<sup>10</sup> Plaintiffs submitted objections to evidence in conjunction with their opposition papers and Sutter did the same in conjunction with its reply papers. The motion is denied because Sutter did not meet its initial burden, even if its evidence is considered. Accordingly, the court does not rule on the evidentiary objections. ([Cal. Code of Civ. Proc., § 437c\(g\).](#))



## **United States v. GS Caltex Corp.**

United States District Court for the Southern District of Ohio, Eastern Division

March 14, 2019, Decided; March 14, 2019, Filed

Case No. 2:18-CV-1456

**Reporter**

2019 U.S. Dist. LEXIS 125998 \*; 2019-1 Trade Cas. (CCH) P80,830; 2019 WL 3765371

UNITED STATES OF AMERICA, Plaintiff, v. GS CALTEX CORPORATION, Defendant.

**Prior History:** [United States v. Hanjin Transp. Co., 2019 U.S. Dist. LEXIS 125997 \(S.D. Ohio, Mar. 14, 2019\)](#)

### **Core Terms**

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Antitrust, costs, employees, assigns, Compliance, Parties, Settlement, contracts, plea agreement, cooperation, Unallowable, successors, settlement agreement, attorney's fees, expenses, agrees, accrue, annual, notice, heirs, best efforts, payment due, obligations, proceedings, documents, purposes, rights and privileges, cause of action, subsidiaries, provisions

**Counsel:** [\*1] For United States, Plaintiff: Andrew M Malek, LEAD ATTORNEY, United States Attorney's Office, Columbus, OH USA.

For Gs Caltex Corp., Defendant: James Allison Wilson, Jr, LEAD ATTORNEY, Vorys Sater Seymour & Pease, Columbus, OH USA; Daniel G. Swanson, Melissa Phan, PRO HAC VICE, Gibson, Dunn & Crutcher LLP, Los Angeles, CA USA; Scott D. Hammond, PRO HAC VICE, Gibson, Dunn & Crutcher LLP, Washington, DC USA.

For Hanjin Transportation Co., Ltd., Defendant: D Michael Crites, LEAD ATTORNEY, Michael Ferrara, Dinsmore & Shohl, LLP, Columbus, OH USA; Kelly B. Kramer, William Stallings, PRO HAC VICE, Mayer Brown LLP, Washington, DC USA.

For Sk Energy Co., Ltd., Defendant: James M Garland, LEAD ATTORNEY, Covington & Burling LLP, Washington, DC USA; Daniel N. Shallman, PRO HAC VICE, Covington & Burling LLP, Los Angeles, CA USA; Phillip H. Warren, PRO HAC VICE, Covington & Burling LLP, San Francisco, CA USA.

**Judges:** Algenon L. Marbley, UNITED STATES DISTRICT JUDGE. Magistrate Judge Chelsey M. Vascura.

**Opinion by:** Algenon L. Marbley

### **Opinion**

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#### **FINAL JUDGMENT AS TO DEFENDANT GS CALTEX CORPORATION**

WHEREAS Plaintiff, United States of America, filed its Complaint on November 14, 2018, the United States and Defendant GS Caltex Corporation [\*2] ("GS Caltex"), by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law;

WHEREAS, on such date as may be determined by the Court, GS Caltex will plead guilty pursuant to [Fed. R. Crim. P. 11\(c\)\(1\)\(C\)](#) (the "Plea Agreement") to an Information to be filed in *United States v. GS Caltex Corporation* [to be assigned] (S.D. Ohio) (the "Criminal Action") that will allege a violation of [Section 1 of the Sherman Act, 15 U.S.C. § 1](#), relating to the same events giving rise to the allegations described in the Complaint;

WHEREAS, this Final Judgment does not constitute any evidence against or admission by any party regarding any issue of fact or law;

NOW, THEREFORE, before the taking of any testimony and without trial or final adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby ORDERED, ADJUDGED, AND DECREED:

## **I. JURISDICTION**

This Court has jurisdiction of the subject matter of this action and each of the parties consenting hereto. The Complaint states a claim upon which relief may be granted to the United States against GS Caltex under [Section 1 of the Sherman Act, 15 U.S.C. §1](#).

## **II. APPLICABILITY**

This Final Judgment applies to GS Caltex, as defined [\*3] above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

## **III. PAYMENT**

GS Caltex shall pay to the United States within ten (10) business days of the entry of this Final Judgment the amount of fifty-seven million, five hundred thousand dollars (\$57,500,000), less the amount paid (excluding any interest) pursuant to the settlement agreement attached hereto as Attachment 1, to satisfy all civil antitrust claims alleged against GS Caltex by the United States in the Complaint. Payment of the amount ordered hereby shall be made by wire transfer of funds or cashier's check. If the payment is made by wire transfer, GS Caltex shall contact Janie Ingalls of the Antitrust Division's Antitrust Documents Group at (202) 514-2481 for instructions before making the transfer. If the payment is made by cashier's check, the check shall be made payable to the United States Department of Justice and delivered to: Janie Ingalls, United States Department of Justice Antitrust Division, Antitrust Documents Group, 450 5th Street, NW, Suite 1024, Washington, D.C. 20530. In the event of a default in payment, [\*4] interest at the rate of eighteen (18) percent per annum shall accrue thereon from the date of default to the date of payment.

## **IV. COOPERATION**

GS Caltex shall cooperate fully with the United States regarding any matter about which GS Caltex has knowledge or information relating to any ongoing civil investigation, litigation, or other proceeding arising out of any ongoing federal investigation of the subject matter discussed in the Complaint (hereinafter, any such investigation, litigation, or proceeding shall be referred to as a "Civil Federal Proceeding").

The United States agrees that any cooperation provided in connection with the Plea Agreement and/or pursuant to the settlement agreement attached hereto as Attachment 1 will be considered cooperation for purposes of this Final Judgment, and the United States will use its reasonable best efforts, where appropriate, to coordinate any requests for cooperation in connection with the Civil Federal Proceeding with requests for cooperation in connection with the Plea Agreement and the settlement agreement attached hereto as Attachment 1, so as to avoid unnecessary duplication and expense.

GS Caltex's cooperation shall include, but not be limited [\*5] to, the following:

- (a) Upon request, completely and truthfully disclosing and producing, to the offices of the United States and at no expense to the United States, copies of all non-privileged information, documents, materials, and records in its possession (and for any foreign-language information, documents, materials, or records, copies must be produced with an English translation), regardless of their geographic location, about which the United States may inquire in connection with any Civil Federal Proceeding, including but not limited to all information about activities of GS Caltex and present and former officers, directors, employees, and agents of GS Caltex;
- (b) Making available in the United States, at no expense to the United States, its present officers, directors, employees, and agents to provide information and/or testimony as requested by the United States in connection with any Civil Federal Proceeding, including the provision of testimony in trial and other judicial proceedings, as well as interviews with law enforcement authorities, consistent with the rights and privileges of those individuals;
- (c) Using its best efforts to make available in the United States, at no [\*6] expense to the United States, its former officers, directors, employees, and agents to provide information and/or testimony as requested by the United States in connection with any Civil Federal Proceeding, including the provision of testimony in trial and other judicial proceedings, as well as interviews with law enforcement authorities, consistent with the rights and privileges of those individuals;
- (d) Providing testimony or information necessary to identify or establish the original location, authenticity, or other basis for admission into evidence of documents or physical evidence produced by GS Caltex in any Civil Federal Proceeding as requested by the United States; and
- (e) Completely and truthfully responding to all other inquiries of the United States in connection with any Civil Federal Proceeding.

However, notwithstanding any provision of this Final Judgment, GS Caltex is not required to: (1) request of its current or former officers, directors, employees, or agents that they forgo seeking the advice of an attorney nor that they act contrary to that advice; (2) take any action against its officers, directors, employees, or agents for following their attorney's advice; or (3) [\*7] waive any claim of privilege or work product protection.

The obligations of GS Caltex to cooperate fully with the United States as described in this Section shall cease upon the conclusion of all Civil Federal Proceedings (which may include Civil Federal Proceedings related to the conduct of third parties), including exhaustion of all appeals or expiration of time for all appeals of any Court ruling in each such Civil Federal Proceeding, at which point the United States will provide written notice to GS Caltex that its obligations under this Section have expired.

## V. ANTITRUST COMPLIANCE PROGRAM

A. Within thirty (30) days after entry of this Final Judgment, GS Caltex shall appoint an Antitrust Compliance Officer and identify to the United States his or her name, business address, telephone number, and email address. Within forty-five (45) days of a vacancy in the Antitrust Compliance Officer position, GS Caltex shall appoint a replacement, and shall identify to the United States the Antitrust Compliance Officer's name, business address, telephone number, and email address. GS Caltex's initial or replacement appointment of an Antitrust Compliance Officer is subject to the approval of the [\*8] United States, in its sole discretion.

B. The Antitrust Compliance Officer shall institute an antitrust compliance program for the company's employees and directors with responsibility for bidding for any contract with the United States. The antitrust compliance program shall provide at least two hours of training annually on the antitrust laws of the United States, such training to be delivered by an attorney with relevant experience in the field of United States antitrust law.

C. Each Antitrust Compliance Officer shall obtain, within six months after entry of this Final Judgment, and on an annual basis thereafter, on or before each anniversary of the entry of this Final Judgment, from each person subject to Paragraph V.B of this Final Judgment, and thereafter maintaining, a certification that each such person has received the required two hours of annual antitrust training.

D. Each Antitrust Compliance Officer shall communicate annually to all employees that they may disclose to the Antitrust Compliance Officer, without reprisal, information concerning any potential violation of the United States antitrust laws.

E. Each Antitrust Compliance Offer shall provide to the United States within [\*9] six months after entry of this Final Judgment, and on an annual basis thereafter, on or before each anniversary of the entry of this Final Judgment, a written statement as to the fact and manner of GS Caltex's compliance with Section V of this Final Judgment.

## **VI. RETENTION OF JURISDICTION**

This Court retains jurisdiction to enable any of the parties to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions.

## **VII. ENFORCEMENT OF FINAL JUDGMENT**

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including the right to seek an order of contempt from the Court. GS Caltex agrees that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of this Final Judgment, the United States may establish a violation of the decree and the appropriateness of any remedy therefor by a preponderance of the evidence, and GS Caltex waives any argument that [\*10] a different standard of proof should apply.

B. The Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws and to restore all competition the United States alleged was harmed by the challenged conduct. GS Caltex agrees that they may be held in contempt of, and that the Court may enforce, any provision of this Final Judgment that, as interpreted by the Court in light of these procompetitive principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of this Final Judgment should not be construed against either party as the drafter.

C. In any enforcement proceeding in which the Court finds that GS Caltex has violated this Final Judgment, the United States may apply to the Court for a one-time extension of this Final Judgment, together with such other relief as may be appropriate. In connection with any successful effort by the United States to enforce this Final Judgment against GS Caltex, whether litigated or resolved prior to litigation, GS Caltex agrees to reimburse the United States for the [\*11] fees and expenses of its attorneys, as well as any other costs including experts' fees, incurred in connection with that enforcement effort, including in the investigation of the potential violation.

## **VIII. EXPIRATION OF FINAL JUDGMENT**

Unless this Court grants an extension, this Final Judgment shall expire seven (7) years from the date of its entry, except that after five (5) years from the date of its entry, this Final Judgment may be terminated upon notice by the United States to the Court and GS Caltex that the continuation of the Final Judgment no longer is necessary or in the public interest.

## **IX. PUBLIC INTEREST DETERMINATION**

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, [15 U.S.C. § 16](#), including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to

comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

DATED: March 14, 2019

/s/ Algenon [\*12] L. Marbley

UNITED STATES DISTRICT JUDGE

## ATTACHMENT 1

### SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is entered into among the United States of America, acting through the Civil Division of the United States Department of Justice and the United States Attorney's Office for the Southern District of Ohio, on behalf of the Defense Logistics Agency (DLA) and the Army and Air Force Exchange Service (AAFES) (collectively the "United States"), GS Caltex Corporation (GS Caltex), and Relator [TEXT REDACTED BY THE COURT] (hereafter collectively referred to as "the Parties"), through their authorized representatives.

### RECITALS

A. GS Caltex is a South Korea-based energy company that produces various petroleum products that it sells to South Korean and international customers, including the United States Department of Defense (DoD).

B. On February 28, 2018, Relator, a resident and citizen of South Korea, filed a *qui tam* action in the United States District Court for the Southern District of Ohio captioned *United States ex rel. [TEXT REDACTED BY THE COURT] v. GS Caltex, et al.*, Civil Action No. [TEXT REDACTED BY THE COURT], pursuant to the *qui tam* provisions of the False Claims Act, [31 U.S.C. § 3730\(b\)](#) (the Civil [\*13] FCA Action). Relator contends that GS Caltex conspired with other South Korean entities to rig bids on DoD contracts to supply fuel to U.S. military bases throughout South Korea beginning in 2005 and continuing until 2016, including DLA Post, Camps, and Stations contracts and/or contract amendments ("PC&S contracts") executed in 2006, 2009, 2011, and 2013, and AAFES contracts executed in 2008.

C. On such date as may be determined by the Court, GS Caltex will plead guilty pursuant to [Fed. R. Crim. P. 11\(c\)\(1\)\(C\)](#) (the "Plea Agreement") to an Information to be filed in *United States v. GS Caltex Corporation*, Criminal Action No. [to be assigned] (S.D. Ohio) (the "Criminal Action") that will allege that GS Caltex participated in a combination and conspiracy beginning at least in or around March 2005 and continuing until at least in or around October 2016, to suppress and eliminate competition on certain contracts solicited by the DoD to supply ultra-low sulfur diesel and gasoline to numerous U.S. Army, Navy, Marine, and Air Force installations in Korea, known as PC&S contracts, in violation of the [Sherman Antitrust Act](#), [15 U.S.C. § 1](#).

D. GS Caltex will execute a Stipulation with the Antitrust Division of the United States Department [\*14] of Justice in which GS Caltex will consent to the entry of a Final Judgment to be filed in *United States v. GS Caltex Corporation*, Civil Action No. [to be assigned] (S.D. Ohio) (the Civil Antitrust Action) that will settle any and all civil antitrust claims of the United States against GS Caltex arising from any act or offense committed before the date of the Stipulation that was undertaken in furtherance of an attempted or completed antitrust conspiracy involving PC&S and/or AAFES fuel supply contracts with the U.S. military in South Korea during the period 2005 through 2016.

E. The United States contends that it has certain civil claims against GS Caltex arising from a conspiracy with other South Korean entities to rig bids on DoD contracts to supply fuel to U.S. military bases throughout South Korea executed between 2005 and 2013, including DLA PC&S contracts and AAFES contracts, as well as the conduct

described in the Plea Agreement in the Criminal Action. The conduct referenced in this Paragraph, as well as the conduct, actions, and claims alleged by Relator in the Civil FCA Action is referred to below as the Covered Conduct.

F. With the exception of any admissions that are made [\*15] by GS Caltex in connection with the Plea Agreement in the Criminal Action, this Settlement Agreement is neither an admission of liability by GS Caltex nor a concession by the United States or Relator that their claims are not well founded.

G. Relator claims entitlement under [31 U.S.C. § 3730\(d\)](#) to a share of the proceeds of this Settlement Agreement and to Relator's reasonable expenses, attorneys' fees and costs.

To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, and in consideration of the mutual promises and obligations of this Settlement Agreement, the Parties agree and covenant as follows:

#### TERMS AND CONDITIONS

1.a. GS Caltex shall pay to the United States \$42,621,000 (FCA Settlement Amount), of which \$28,414,474 is restitution. Relator's right pursuant to [31 U.S.C. § 3730\(d\)](#) to reasonable expenses, attorneys' fees and costs will be addressed separately by Relator, Relator's counsel and GS Caltex.

1.b. Interest at an annual rate of three (3) percent shall accrue on the FCA Settlement Amount beginning on the Effective Date of this Agreement and continuing until the date that both of the following events have occurred: (i) the Plea Agreement is accepted by the Court in [\*16] the Criminal Action; and (ii) the proposed Final Judgment is entered by the Court in the Civil Antitrust Action (Accrued Interest).

1.c. The total FCA payment due from GS Caltex shall be the FCA Settlement Amount plus any Accrued Interest (Total FCA Settlement Amount). GS Caltex shall pay the Total FCA Settlement Amount by electronic funds transfer no later than seven (7) business days after both events identified above in Paragraph 1.b. have occurred (Payment Due Date). The Civil Division of the United States Department of Justice shall provide to counsel for GS Caltex written payment instructions and confirmation of the Total FCA Settlement Amount no later than five (5) business days before the Payment Due Date. If GS Caltex does not pay the Total FCA Settlement Amount on or before the Payment Due Date, interest at an annual rate of nine (9) percent shall accrue on the Total FCA Settlement Amount beginning on the first calendar day after the Payment Due Date and shall continue to accrue until paid.

1.d. If GS Caltex's Plea Agreement in the Criminal Action is not accepted by the Court or the Court does not enter the Final Judgment in the Civil Antitrust Action, this Agreement shall [\*17] be null and void at the option of either the United States or GS Caltex. If either the United States or GS Caltex exercises this option, which option shall be exercised by notifying all Parties, through counsel, in writing within five (5) business days of the Court's decision, the Parties will not object and this Agreement will be rescinded. If this Agreement is rescinded, GS Caltex will not plead, argue or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel or similar theories, to any civil or administrative claims, actions or proceedings arising from the Covered Conduct that are brought by the United States within ninety (90) calendar days of rescission, except to the extent such defenses were available on the day on which Relator's *qui tam* complaint in the Civil FCA Action was filed.

2. Subject to the exceptions in Paragraph 3 (concerning excluded claims) below, and conditioned upon GS Caltex's full payment of the Total FCA Settlement Amount, the United States releases GS Caltex together with its current and former parent corporations; direct and indirect subsidiaries; brother or sister corporations; divisions; current or former corporate owners; [\*18] and the corporate successors and assigns of any of them from any civil or administrative monetary claim the United States has for the Covered Conduct under the [False Claims Act, 31 U.S.C. §§ 3729-3733](#); the [Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812](#); [Contract Disputes Act, 41 U.S.C. §§ 7101-7109](#); or the common law theories of breach of contract, payment by mistake, unjust enrichment, and fraud, or under any statute creating causes of action for civil damages or civil penalties which the Civil Division

of the United States Department of Justice has authority to assert and compromise pursuant to [28 C.F.R. Part 0, Subpart I, § 0.45\(d\)](#).

3. Notwithstanding the release given in paragraph 2 of this Agreement, or any other term of this Agreement, the following claims of the United States are specifically reserved and are not released:

- a. Any liability arising under [Title 26, U.S. Code \(Internal Revenue Code\)](#);
- b. Any criminal liability, except to the extent detailed in the Plea Agreement;
- c. Except as explicitly stated in this Agreement, any administrative liability, including the suspension and debarment rights of any federal agency;
- d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;
- e. Any liability [\*19] based upon obligations created by this Agreement;
- f. Any liability of individuals;
- g. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services;
- h. Any liability for failure to deliver goods or services due; and
- i. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct.

4. Relator and his heirs, successors, attorneys, agents, and assigns shall not object to this Agreement but agree and confirm that this Agreement is fair, adequate, and reasonable under all the circumstances, pursuant to [31 U.S.C. § 3730\(c\)\(2\)\(B\)](#). The determination of Relator's share, if any, of the FCA Settlement Amount pursuant to [31 U.S.C. §3730\(d\)](#) is a matter that shall be handled separately by and between the Relator and the United States, without any direct involvement or input from GS Caltex. In connection with this Agreement and this Civil FCA Action, Relator, on behalf of himself and his heirs, successors, attorneys, agents, and assigns agrees that neither this Agreement, nor any intervention by the United States in the Civil FCA Action in order to dismiss the Civil FCA Action, nor any dismissal [\*20] of the Civil FCA Action, shall waive or otherwise affect the ability of the United States to contend that provisions in the False Claims Act, including [31 U.S.C. § 3730\(d\)\(3\)](#), bar Relator from sharing in the proceeds of this Agreement, except that the United States will not contend that Relator is barred from sharing in the proceeds of this Agreement pursuant to [31 U.S.C. § 3730\(e\)\(4\)](#). Moreover, the United States and Relator, on behalf of himself and his heirs, successors, attorneys, agents, and assigns agree that they each retain all of their rights pursuant to the False Claims Act on the issue of the share percentage, if any, that Relator should receive of any proceeds of the settlement of his claims, and that no agreements concerning Relator share have been reached to date.

5. Relator, for himself, and for his heirs, successors, attorneys, agents, and assigns, releases GS Caltex, together with its predecessors, successors, assigns, shareholders, subsidiaries, businesses, affiliates, divisions, sister companies, owners, directors, officers, agents, employees, and counsel, from any action, in law or in equity, suits, debts, liens, contracts, agreements, covenants, promises, liability, obligations, claims, demands, rights of [\*21] subrogation, contribution and indemnity, damages, loss, cost or expenses, direct or indirect, of any kind or nature whatsoever (including without limitation any civil monetary claim Relator has on behalf of the United States for the Covered Conduct under the False Claims Act. [31 U.S.C. §§ 3729-3733](#)), known or unknown, fixed or contingent, foreign (including Korean), state or federal, under common law, statute or regulation, liquidated or unliquidated, claimed or concealed, and without regard to the date of occurrence, which Relator ever had, now has, may assert, or may in the future claim to have, against GS Caltex by reason of any act, cause, matter, or thing whatsoever from the beginning of time to the date hereof. Relator represents and warrants that he and his counsel are the exclusive owner of the rights, claims, and causes of action herein released and none of them have previously assigned, reassigned, or transferred or purported to assign, reassign or transfer, through bankruptcy or by any other means, any or any portion of any claim, demand, action, cause of action, or other right released or discharged under this Agreement except between themselves and their counsel. Notwithstanding the foregoing, [\*22] or any other terms of this Agreement, this Agreement does not resolve or release Relator's right pursuant to [31 U.S.C. § 3730\(d\)](#) to

reasonable expenses necessarily incurred, plus reasonable attorneys' fees and costs relating to the Covered Conduct, the amount of which will be addressed separately by Relator, Relator's counsel, and GS Caltex.

6. GS Caltex waives and shall not assert any defenses GS Caltex may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the *Double Jeopardy Clause in the Fifth Amendment of the Constitution*, or under the *Excessive Fines Clause in the Eighth Amendment of the Constitution*, this Agreement bars a remedy sought in such criminal prosecution or administrative action.

7. GS Caltex fully and finally releases the United States, its agencies, officers, agents, employees, and servants, from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that GS Caltex has asserted, could have asserted, or may assert in the future against the United States, its agencies, officers, agents, employees, and servants, related to the Covered Conduct and the United States' investigation and prosecution thereof.

8. GS Caltex, for itself and on behalf of its predecessors, successors, [\*23] assigns, shareholders, subsidiaries, businesses, affiliates, divisions, sister companies, owners, directors, officers, agents, employees, and counsel, releases Relator, together with his heirs, successors, attorneys, agents, and assigns from any action, in law or in equity, suits, debts, liens, contracts, agreements, covenants, promises, liability, obligations, claims, demands, rights of subrogation, contribution and indemnity, damages, loss, cost or expenses, direct or indirect, of any kind or nature whatsoever, known or unknown, fixed or contingent, foreign (including Korean), state or federal, under common law, statute or regulation, liquidated or unliquidated, claimed or concealed, and without regard to the date of occurrence, which GS Caltex ever had, now has, may assert, or may in the future claim to have, against Relator by reason of any act, cause, matter, or thing whatsoever from the beginning of time to the date hereof. GS Caltex represents and warrants that it and its counsel are the exclusive owner of the rights, claims, and causes of action herein released and none of them have previously assigned, reassigned, or transferred or purported to assign, reassign or transfer, [\*24] through bankruptcy or by any other means, any or any portion of any claim, demand, action, cause of action, or other right released or discharged under this Agreement except between themselves and their counsel. Notwithstanding the foregoing, or any other terms of this Agreement, this Agreement does not resolve or release GS Caltex's right pursuant to [31 U.S.C. § 3730\(d\)](#) to assert defenses to Relator's claimed attorneys' fees, expenses, and costs relating to the Covered Conduct, the amount of which will be addressed separately by Relator, Relator's counsel, and GS Caltex.

9. a. Unallowable Costs Defined: All costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47) incurred by or on behalf of GS Caltex, and its present or former officers, directors, employees, shareholders, and agents in connection with:

- (1) the matters covered by this Agreement, any related plea agreement, and any related civil antitrust agreement;
- (2) the United States' audit(s) and civil and any criminal investigation(s) of the matters covered by this Agreement;
- (3) GS Caltex's investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and civil and any criminal investigation(s) in connection [\*25] with the matters covered by this Agreement (including attorney's fees);
- (4) the negotiation and performance of this Agreement, any related plea agreement, and any related civil antitrust agreement;
- (5) the payment GS Caltex makes to the United States pursuant to this Agreement and any payments that GS Caltex may make to Relator, including costs and attorneys' fees, are unallowable costs for government contracting purposes (hereinafter referred to as Unallowable Costs).

b. Future Treatment of Unallowable Costs: Unallowable Costs will be separately determined and accounted for by GS Caltex, and GS Caltex shall not charge such Unallowable Costs directly or indirectly to any contract with the United States.

c. Treatment of Unallowable Costs Previously Submitted for Payment: Within 90 days of the Effective Date of this Agreement, GS Caltex shall identify and repay by adjustment to future claims for payment or otherwise any Unallowable Costs included in payments previously sought by GS Caltex or any of its subsidiaries or affiliates from the United States. GS Caltex agrees that the United States, at a minimum, shall be entitled to recoup from GS Caltex any overpayment plus applicable interest [\*26] and penalties as a result of the inclusion of such Unallowable Costs on previously-submitted requests for payment. The United States, including the Department of Justice and/or the affected agencies, reserves its rights to audit, examine, or re-examine GS Caltex's books and records and to disagree with any calculations submitted by GS Caltex or any of its subsidiaries or affiliates regarding any Unallowable Costs included in payments previously sought by GS Caltex, or the effect of any such Unallowable Costs on the amount of such payments.

10. GS Caltex agrees to cooperate fully and truthfully with the United States in connection with the Civil FCA Action. The Civil Division of the United States Department of Justice will use reasonable best efforts, where appropriate, to coordinate any requests for cooperation in connection with the Civil FCA Action with requests for cooperation in connection with the Plea Agreement in the Criminal Action and the Civil Antitrust Action, so as to avoid unnecessary duplication and expense. GS Caltex's ongoing, full, and truthful cooperation shall include, but not be limited to:

a. upon request by the United States with reasonable notice, producing at [\*27] the offices of counsel for the United States in Washington, D.C. and not at the expense of the United States, complete and un-redacted copies of all non-privileged documents related to the Covered Conduct wherever located in GS Caltex's possession, custody, or control;

b. upon request by the United States with reasonable notice, making current GS Caltex directors, officers, and employees available for interviews, consistent with the rights and privileges of such individuals, by counsel for the United States and/or their investigative agents, not at the expense of the United States, in the United States or Hong Kong unless another place is mutually agreed upon;

c. upon request by the United States with reasonable notice, (i) using best efforts to assist in locating former GS Caltex directors, officers, and employees identified by attorneys and/or investigative agents of the United States, and (ii) using best efforts to make any such former GS Caltex directors, officers, and employees available for interviews, consistent with the rights and privileges of such individuals, by counsel for the United States and/or their investigative agents, not at the expense of the United States, in the [\*28] United States or Hong Kong unless another place is mutually agreed upon; and

d. upon request by the United States with reasonable notice, making current GS Caltex directors, officers, and employees available, and using best efforts to make former GS Caltex directors, officers, employees available, to testify, consistent with the rights and privileges of such individuals, fully, truthfully, and under oath, without falsely implicating any person or withholding any information, (i) at depositions in the United States, Hong Kong, or any other mutually agreed upon place, (ii) at trial in the United States, and (iii) at any other judicial proceedings wherever located related to the Civil FCA Action.

11. This Agreement is intended to be for the benefit of the Parties only.

12. Upon receipt of the payment of the Total FCA Settlement Amount described in Paragraph 1.a-c., above, or receipt of the Total FCA Settlement Amount and any additional interest that accrues if GS Caltex does not pay on or before the Payment Due Date, the United States and Relator shall promptly sign and file a Joint Stipulation of Dismissal, with prejudice, of the claims filed against GS Caltex in the Civil FCA Action, pursuant [\*29] to [Rule 41\(a\)\(1\)](#), which dismissal shall be conditioned on the Court retaining jurisdiction over Relator's claims to a relator's share and recovery of attorneys' fees and costs pursuant to [31 U.S.C. § 3730\(d\)](#).

13. Except as provided herein, each Party shall bear its own legal and other costs incurred in connection with this matter. The Parties agree that Relator and GS Caltex will not seek to recover from the United States any costs or fees related to the preparation and performance of this Agreement.

14. Each party and signatory to this Agreement represents that it freely and voluntarily enters into this Agreement without any degree of duress or compulsion.

15. This Agreement is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Agreement is the United States District Court for the Southern District of Ohio. GS Caltex agrees that the United States District Court for the Southern District of Ohio has jurisdiction over it for purposes of the Civil FCA Action. For purposes of construing this Agreement, this Agreement shall be deemed to have been drafted by all Parties to this Agreement and shall not, therefore, be construed against any Party for that reason [\*30] in any subsequent dispute.

16. This Agreement constitutes the complete agreement between the Parties on the subject matters addressed herein. This Agreement may not be amended except by written consent of the Parties.

17. The undersigned counsel represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below.

18. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement.

19. This Agreement is binding on GS Caltex's successors, transferees, heirs, and assigns.

20. This Agreement is binding on Relator's successors, transferees, heirs, and assigns.

21. All parties consent to the United States' disclosure of this Agreement, and information about this Agreement, to the public, as permitted by order of the Court. This Agreement shall not be released in un-redacted form until the Court unseals the entire Civil FCA Action.

22. This Agreement is effective on the date of signature of the last signatory to the Agreement (Effective Date of this Agreement). Electronic copies of signatures shall constitute acceptable, binding signatures for purposes of [\*31] this Agreement.

THE UNITED STATES OF AMERICA

DATED: 11/14/18 BY: /s/ Andrew A. Steinberg

Andrew A. Steinberg

Trial Attorney

Commercial Litigation Branch

Civil Division, U.S. Department of Justice

DATED: 11/13/18 BY: /s/ Mark T. D'Alessandro

Mark T. D'Alessandro

Civil Chief

Andrew Malek

Assistant United States Attorney

U.S. Attorney's Office for the Southern District of Ohio

GS CALTEX CORPORATION - DEFENDANT

DATED: Nov. 13, 2018 BY:

Authorized Representative of GS Caltex Corporation

DATED: Nov. 13, 2018 BY: /s/ Marguerite M. Sullivan

Marguerite M. Sullivan

Latham & Watkins LLP

Scott D. Hammond

Gibson, Dunn & Crutcher LLP

Counsel for GS Caltex Corporation

[TEXT REDACTED BY THE COURT] RELATOR

DATED: \_\_ BY: \_\_

[TEXT REDACTED BY THE COURT]

DATED: \_\_ BY: \_\_

Eric Havian

Constantine Cannon LLP

Counsel for Relator

GS CALTEX CORPORATION - DEFENDANT

DATED: \_\_ BY: \_\_

Authorized Representative of GS Caltex Corporation

DATED: \_\_ BY: \_\_

Marguerite M. Sullivan

Latham & Watkins LLP

Scott D. Hammond

Gibson, Dunn & Crutcher LLP

Counsel for GS Caltex Corporation

[TEXT REDACTED BY THE COURT] RELATOR

DATED: Nov. 14th 2018 BY: [TEXT REDACTED BY THE COURT]

[TEXT REDACTED BY THE COURT]

DATED: 11/14/18 BY: /s/ Eric Havian

Eric Havian

Constantine [\*32] Cannon LLP

Counsel for Relator

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## **United States v. Hanjin Transp. Co.**

United States District Court for the Southern District of Ohio, Eastern Division

March 14, 2019, Decided; March 14, 2019, Filed

Case No. 2:18-CV-1456

### **Reporter**

2019 U.S. Dist. LEXIS 125997 \*; 2019-1 Trade Cas. (CCH) P80,832; 2019 WL 3765373

UNITED STATES OF AMERICA Plaintiff, v. HANJIN TRANSPORTATION CO., LTD., Defendant.

**Subsequent History:** Settled by, Judgment entered by [United States v. GS Caltex Corp., 2019 U.S. Dist. LEXIS 125998 \(S.D. Ohio, Mar. 14, 2019\)](#)

Settled by, Judgment entered by [United States v. SK Energy Co., 2019 U.S. Dist. LEXIS 125999 \(S.D. Ohio, Mar. 14, 2019\)](#)

## **Core Terms**

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Antitrust, costs, assigns, employees, Compliance, Parties, Unallowable, attorney's fees, cooperation, contracts, settlement agreement, plea agreement, successors, expenses, agrees, heirs, subsidiaries, notice, waives, Settlement, documents, purposes, rights and privileges, corporate successor, corporate owner, best efforts, proceedings, interviews, provisions, indirect

**Counsel:** [\*1] For United States, Plaintiff: Andrew M Malek, LEAD ATTORNEY, United States Attorney's Office, Columbus, OH USA.

For Gs Caltex Corp., Defendant: James Allison Wilson, Jr, LEAD ATTORNEY, Vorys Sater Seymour & Pease, Columbus, OH USA; Daniel G. Swanson, Melissa Phan, PRO HAC VICE, Gibson, Dunn & Crutcher LLP, Los Angeles, CA USA; Scott D. Hammond, PRO HAC VICE, Gibson, Dunn & Crutcher LLP, Washington, DC USA.

For Hanjin Transportation Co., Ltd., Defendant: D Michael Crites, LEAD ATTORNEY, Michael Ferrara, Dinsmore & Shohl, LLP, Columbus, OH USA; Kelly B. Kramer, PRO HAC VICE, Mayer Brown LLP, Washington, DC USA; William Stallings, PRO HAC VICE, Mayer Brown LLP, Washington, DC USA.

For Sk Energy Co., Ltd., Defendant: James M Garland, LEAD ATTORNEY, Covington & Burling LLP, Washington, DC USA; Daniel N. Shallman, PRO HAC VICE, Covington & Burling LLP, Los Angeles, CA USA; Phillip H. Warren, PRO HAC VICE, Covington & Burling LLP, San Francisco, CA USA.

**Judges:** ALGENON L. MARBLEY, UNITED STATES DISTRICT JUDGE. Magistrate Judge Chelsey M. VascuraZ.

**Opinion by:** ALGENON L. MARBLEY

## **Opinion**

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**FINAL JUDGMENT AS TO DEFENDANT HANJIN TRANSPORTATION CO., LTD.**

WHEREAS Plaintiff, United States of America, filed its Complaint on November [\*2] 14, 2018, the United States and Defendant Hanjin Transportation Co., Ltd. ("Hanjin"), by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law;

WHEREAS, on such date as may be determined by the Court, Hanjin will plead guilty pursuant to [Fed. R. Crim. P. 11\(c\)\(1\)\(C\)](#) (the "Plea Agreement") to an Information to be filed in United States v. Hanjin Transportation Co., Ltd. [to be assigned] (S.D. Ohio) (the "Criminal Action") that will allege a violation of [Section 1](#) of the Sherman Act, [15 U.S.C. § 1](#), relating to the same events giving rise to the allegations described in the Complaint;

WHEREAS, this Final Judgment does not constitute any evidence against or admission by any party regarding any issue of fact or law;

NOW, THEREFORE, before the taking of any testimony and without trial or final adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby ORDERED, ADJUDGED, AND DECREED:

## I. JURISDICTION

This Court has jurisdiction of the subject matter of this action and each of the parties consenting hereto. The Complaint states a claim upon which relief may be granted to the United States against Hanjin under [Section 1](#) of the Sherman [\*3] Act, [15 U.S.C. §1](#).

## II. APPLICABILITY

This Final Judgment applies to Hanjin, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

## III. PAYMENT

Hanjin shall pay to the United States within ten (10) business days of the entry of this Final Judgment the amount of six million, one hundred eighty-two thousand dollars (\$6,182,000), less the amount paid (excluding any interest) pursuant to the settlement agreement attached hereto as Attachment 1, to satisfy all civil antitrust claims alleged against Hanjin by the United States in the Complaint. Payment of the amount ordered hereby shall be made by wire transfer of funds or cashier's check. If the payment is made by wire transfer, Hanjin shall contact Janie Ingalls of the Antitrust Division's Antitrust Documents Group at (202) 514-2481 for instructions before making the transfer. If the payment is made by cashier's check, the check shall be made payable to the United States Department of Justice and delivered to: Janie Ingalls, United States Department of Justice Antitrust Division, Antitrust Documents Group, 450 5th Street, NW, Suite 1024, [\*4] Washington, D.C. 20530. In the event of a default in payment, interest at the rate of eighteen (18) percent per annum shall accrue thereon from the date of default to the date of payment.

## IV. COOPERATION

Hanjin shall cooperate fully with the United States regarding any matter about which Hanjin has knowledge or information relating to any ongoing civil investigation, litigation, or other proceeding arising out of any ongoing federal investigation of the subject matter discussed in the Complaint (hereinafter, any such investigation, litigation, or proceeding shall be referred to as a "Civil Federal Proceeding").

The United States agrees that any cooperation provided in connection with the Plea Agreement and/or pursuant to the settlement agreement attached hereto as Attachment 1 will be considered cooperation for purposes of this Final Judgment, and the United States will use its reasonable best efforts, where appropriate, to coordinate any requests for cooperation in connection with the Civil Federal Proceeding with requests for cooperation in connection with the

Plea Agreement and the settlement agreement attached hereto as Attachment 1, so as to avoid unnecessary duplication and expense. [\*5]

Hanjin's cooperation shall include, but not be limited to, the following:

- (a) Upon request, completely and truthfully disclosing and producing, to the offices of the United States and at no expense to the United States, copies of all non-privileged information, documents, materials, and records in its possession (and for any foreign-language information, documents, materials, or records, copies must be produced with an English translation), regardless of their geographic location, about which the United States may inquire in connection with any Civil Federal Proceeding, including but not limited to all information about activities of Hanjin and present and former officers, directors, employees, and agents of Hanjin;
- (b) Making available in the United States, at no expense to the United States, its present officers, directors, employees, and agents to provide information and/or testimony as requested by the United States in connection with any Civil Federal Proceeding, including the provision of testimony in trial and other judicial proceedings, as well as interviews with law enforcement authorities, consistent with the rights and privileges of those individuals;
- (c) Using its best efforts [\*6] to make available in the United States, at no expense to the United States, its former officers, directors, employees, and agents to provide information and/or testimony as requested by the United States in connection with any Civil Federal Proceeding, including the provision of testimony in trial and other judicial proceedings, as well as interviews with law enforcement authorities, consistent with the rights and privileges of those individuals;
- (d) Providing testimony or information necessary to identify or establish the original location, authenticity, or other basis for admission into evidence of documents or physical evidence produced by Hanjin in any Civil Federal Proceeding as requested by the United States; and
- (e) Completely and truthfully responding to all other inquiries of the United States in connection with any Civil Federal Proceeding.

However, notwithstanding any provision of this Final Judgment, Hanjin is not required to: (1) request of its current or former officers, directors, employees, or agents that they forgo seeking the advice of an attorney nor that they act contrary to that advice; (2) take any action against its officers, directors, employees, or agents for [\*7] following their attorney's advice; or (3) waive any claim of privilege or work product protection.

The obligations of Hanjin to cooperate fully with the United States as described in this Section shall cease upon the conclusion of all Civil Federal Proceedings (which may include Civil Federal Proceedings related to the conduct of third parties), including exhaustion of all appeals or expiration of time for all appeals of any Court ruling in each such Civil Federal Proceeding, at which point the United States will provide written notice to Hanjin that its obligations under this Section have expired.

## V. ANTITRUST COMPLIANCE PROGRAM

A. Within thirty (30) days after entry of this Final Judgment, Hanjin shall appoint an Antitrust Compliance Officer and identify to the United States his or her name, business address, telephone number, and email address. Within forty-five (45) days of a vacancy in the Antitrust Compliance Officer position, Hanjin shall appoint a replacement, and shall identify to the United States the Antitrust Compliance Officer's name, business address, telephone number, and email address. Hanjin's initial or replacement appointment of an Antitrust Compliance Officer is subject [\*8] to the approval of the United States, in its sole discretion.

B. The Antitrust Compliance Officer shall institute an antitrust compliance program for the company's employees and directors with responsibility for bidding for any contract with the United States. The antitrust compliance program shall provide at least two hours of training annually on the antitrust laws of the United States, such training to be delivered by an attorney with relevant experience in the field of United States antitrust law.

C. Each Antitrust Compliance Officer shall obtain, within six months after entry of this Final Judgment, and on an annual basis thereafter, on or before each anniversary of the entry of this Final Judgment, from each person subject to Paragraph V.B of this Final Judgment, and thereafter maintaining, a certification that each such person has received the required two hours of annual antitrust training.

D. Each Antitrust Compliance Officer shall communicate annually to all employees that they may disclose to the Antitrust Compliance Officer, without reprisal, information concerning any potential violation of the United States antitrust laws.

E. Each Antitrust Compliance Offer shall provide [\*9] to the United States within six months after entry of this Final Judgment, and on an annual basis thereafter, on or before each anniversary of the entry of this Final Judgment, a written statement as to the fact and manner of Hanjin's compliance with Section V of this Final Judgment.

## **VI. RETENTION OF JURISDICTION**

This Court retains jurisdiction to enable any of the parties to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions.

## **VII. ENFORCEMENT OF FINAL JUDGMENT**

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including the right to seek an order of contempt from the Court. Hanjin agrees that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of this Final Judgment, the United States may establish a violation of the decree and the appropriateness of any remedy therefor by a preponderance of the evidence, and Hanjin waives [\*10] any argument that a different standard of proof should apply.

B. The Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws and to restore all competition the United States alleged was harmed by the challenged conduct. Hanjin agrees that they may be held in contempt of, and that the Court may enforce, any provision of this Final Judgment that, as interpreted by the Court in light of these procompetitive principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of this Final Judgment should not be construed against either party as the drafter.

C. In any enforcement proceeding in which the Court finds that Hanjin has violated this Final Judgment, the United States may apply to the Court for a one-time extension of this Final Judgment, together with such other relief as may be appropriate. In connection with any successful effort by the United States to enforce this Final Judgment against Hanjin, whether litigated or resolved prior to litigation, Hanjin agrees to reimburse the United States for [\*11] the fees and expenses of its attorneys, as well as any other costs including experts' fees, incurred in connection with that enforcement effort, including in the investigation of the potential violation.

## **VIII. EXPIRATION OF FINAL JUDGMENT**

Unless this Court grants an extension, this Final Judgment shall expire seven (7) years from the date of its entry, except that after five (5) years from the date of its entry, this Final Judgment may be terminated upon notice by the United States to the Court and Hanjin that the continuation of the Final Judgment no longer is necessary or in the public interest.

## **IX. PUBLIC INTEREST DETERMINATION**

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

DATED: March 14, 2019

/s/ Algenon [\*12] L. Marbley

UNITED STATES DISTRICT JUDGE

## ATTACHMENT 1

### SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is entered into among the United States of America, acting through the Civil Division of the United States Department of Justice and the United States Attorney's Office for the Southern District of Ohio, on behalf of the Defense Logistics Agency (DLA) and the Army and Air Force Exchange Service (AAFES) (collectively the "United States"), Hanjin Transportation Co., Ltd. (Hanjin), and Relator [TEXT REDACTED BY THE COURT] (hereafter collectively referred to as the Parties"), through their authorized representatives.

### RECITALS

A. Hanjin is a South Korea-based logistics company with South Korean and international customers, including the United States Department of Defense (DoD).

B. On February 28, 2018, Relator, a resident and citizen of South Korea, filed a *qui tam* action in the United States District Court for the Southern District of Ohio captioned *United States ex rel. [TEXT REDACTED BY THE COURT] v. GS Caltex, et al.*, Civil Action No. [TEXT REDACTED BY THE COURT], pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b) (the Civil FCA Action). Relator contends that Hanjin conspired [\*13] with other South Korean entities to rig bids on DoD contracts to supply fuel to U.S. military bases throughout South Korea beginning in 2008 and continuing until 2016, including DLA Post, Camps, and Stations contracts executed in 2009 and 2013, and AAFES contracts executed in 2008.

C. On such date as may be determined by the Court, Hanjin will plead guilty pursuant to Fed. R. Crim. P. 11(c)(1)(C) (the "Plea Agreement") to an Information to be filed in *United States v. Hanjin Transportation Co., Ltd.*, Criminal Action No. [to be assigned] (S.D. Ohio) (the "Criminal Action") that will allege that Hanjin participated in a combination and conspiracy beginning at least in or around March 2005 and continuing until at least in or around October 2016, to suppress and eliminate competition on certain contracts solicited by the DoD to supply ultra-low sulfur diesel and gasoline to numerous U.S. Army, Navy, Marine, and Air Force installations in Korea, including PC&S contracts, in violation of the Sherman Antitrust Act, 15 U.S.C. § 1.

D. Hanjin will execute a Stipulation with the Antitrust Division of the United States Department of Justice in which Hanjin will consent to the entry of a Final Judgment to be filed in *United States v. Hanjin [\*14] Transportation Co., Ltd.*, Civil Action No. [to be assigned] (S.D. Ohio) (the Civil Antitrust Action) that will settle any and all civil antitrust claims of the United States against Hanjin arising from any act or offense committed before the date of the Stipulation that was undertaken in furtherance of an attempted or completed antitrust conspiracy involving PC&S and or AAFES fuel supply contracts with the U.S. military in South Korea during the period 2005 through 2016.

E. The United States contends that it has certain civil claims against Hanjin arising from a conspiracy with other South Korean entities to rig bids on DoD contracts to supply fuel to U.S. military bases throughout South Korea

beginning in 2008 and continuing to 2016, including DLA Post, Camps, and Stations contracts executed in 2009 and 2013, and AAFES contracts executed in 2008. The conduct described in this Paragraph, as well as the conduct, actions, and claims alleged by Relator in the Civil FCA Action is referred to below as the Covered Conduct.

F. With the exception of any admissions that are made by Hanjin in connection with the Plea Agreement in the Criminal Action, this Settlement Agreement is neither an [\*15] admission of liability by Hanjin nor a concession by the United States or Relator that their claims are not well founded.

G. Relator claims entitlement under [31 U.S.C. § 3730\(d\)](#) to a share of the proceeds of this Settlement Agreement and to Relator's reasonable expenses, attorneys' fees, and costs.

To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, and in consideration of the mutual promises and obligations of this Settlement Agreement, the Parties agree and covenant as follows:

## TERMS AND CONDITIONS

1. Hanjin agrees to pay to the United States \$6,182,000 (FCA Settlement Amount) by electronic funds transfer no later than thirteen (13) business days after the Effective Date of this Agreement pursuant to written instructions to be provided by the Civil Division of the United States Department of Justice. Relator claims entitlement under [31 U.S.C. § 3730\(d\)](#) to Relator's reasonable expenses, attorneys' fees and costs. The FCA Settlement Amount does not include the Relator's fees and costs, and Hanjin acknowledges (without waiving any applicable arguments or defenses) that Relator retains all rights to seek to recover such expenses, attorneys' fees, and costs from Hanjin pursuant [\*16] to [31 U.S.C. § 3730\(d\)](#).

2. Subject to the exceptions in Paragraph 4 (concerning excluded claims) below, and conditioned upon Hanjin's full payment of the FCA Settlement Amount, the United States releases Hanjin together with its current and former parent corporations; direct and indirect subsidiaries; brother or sister corporations; divisions; current or former corporate owners; and the corporate successors and assigns of any of them from any civil or administrative monetary claim the United States has for the Covered Conduct under the False Claims Act, [31 U.S.C. §§ 3729-3733](#); the [Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812](#); [Contract Disputes Act, 41 U.S.C. §§ 7101-7109](#); or the common law theories of breach of contract, payment by mistake, unjust enrichment, and fraud.

3. Except as set forth in Paragraph 1 (concerning Relator's claims under [31 U.S.C. § 3730\(d\)](#)), and subject to the exceptions in Paragraph 4 below, and conditioned upon Hanjin's full payment of the FCA Settlement Amount, Relator, on behalf of: (a) his respective heirs, successors, assigns, agents and attorneys; and (b) his companies ([TEXT REDACTED BY THE COURT]., together with their direct and indirect subsidiaries, brother or sister corporations, divisions, current or former corporate owners, and the corporate [\*17] successors and assigns of any of them); hereby fully and finally releases, waives, and forever discharges Hanjin, together with its direct and indirect subsidiaries, brother or sister corporations, divisions, current or former corporate owners, and the corporate successors and assigns of any of them, from: (i) any civil monetary claim Relator has on behalf of the United States for the Covered Conduct under the False Claims Act, [31 U.S.C. §§ 3729-3733](#); (ii) any claims or allegations Relator has asserted or could have asserted against Hanjin arising from the Covered Conduct; and (iii) all liability, claims, demands, actions or causes of action whatsoever, whether known or unknown, fixed or contingent, in law or in equity, in contract or in tort, under any federal, Korean, or state statute or regulation or otherwise, or in common law, including claims for attorneys' fees, costs, and expenses of every kind and however denominated, that Relator would have standing to bring or which Relator may now have or claim to have against Hanjin and/or its direct and indirect subsidiaries, brother or sister corporations, divisions, current or former corporate owners, and the corporate successors and assigns of any of them. [\*18]

4. Notwithstanding the releases given in paragraphs 2 and 3 of this Agreement, or any other term of this Agreement, the following claims of the United States are specifically reserved and are not released:

- a. Any liability arising under Title 26, U.S. Code (Internal Revenue Code);
- b. Any criminal liability, except to the extent detailed in the Plea Agreement;
- c. Except as explicitly stated in this Agreement, any administrative liability, including the suspension and debarment rights of any federal agency;
- d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;
- e. Any liability based upon obligations created by this Agreement;
- f. Any liability of individuals;
- g. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services;
- h. Any liability for failure to deliver goods or services due; and
- i. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct.

5. Relator and his heirs, successors, attorneys, agents, and assigns shall not object to this Agreement but agree and confirm that this Agreement [\*19] is fair, adequate, and reasonable under all the circumstances, pursuant to [31 U.S.C. § 3730\(c\)\(2\)\(B\)](#). In connection with this Agreement and this Civil FCA Action, Relator, on behalf of himself and his heirs, successors, attorneys, agents, and assigns, agrees that neither this Agreement, nor any intervention by the United States in the Civil FCA Action in order to dismiss the Civil FCA Action, nor any dismissal of the Civil FCA Action, shall waive or otherwise affect the ability of the United States to contend that provisions in the False Claims Act, including [31 U.S.C. § 3730\(d\)\(3\)](#), bar Relator from sharing in the proceeds of this Agreement, except that the United States will not contend that Relator is barred from sharing in the proceeds of this Agreement pursuant to [31 U.S.C. § 3730\(e\)\(4\)](#). Moreover, the United States and Relator, on behalf of himself and his heirs, successors, attorneys, agents, and assigns agree that they each retain all of their rights pursuant to the False Claims Act on the issue of the share percentage, if any, that Relator should receive of any proceeds of the settlement of his claims, and that no agreements concerning Relator share have been reached to date.

6. Hanjin waives and shall not assert any defenses Hanjin may have to [\*20] any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the [Double Jeopardy Clause in the Fifth Amendment of the Constitution](#), or under the [Excessive Fines Clause](#) in the [Eighth Amendment of the Constitution](#), this Agreement bars a remedy sought in such criminal prosecution or administrative action.

7. Hanjin fully and finally releases the United States, its agencies, officers, agents, employees, and servants, from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that Hanjin has asserted, could have asserted, or may assert in the future against the United States, its agencies, officers, agents, employees, and servants, related to the Covered Conduct and the United States' investigation and prosecution thereof.

8. Hanjin, together with its direct and indirect subsidiaries, brother or sister corporations, divisions, current or former corporate owners, and the corporate successors and assigns of any of them, hereby fully and finally releases, waives, and forever discharges the Relator, together with his respective heirs, successors, assigns, agents and attorneys, and his companies ([TEXT REDACTED BY THE COURT]) from any claims or allegations Hanjin has asserted or could have asserted, [\*21] arising from the Covered Conduct, and from all liability, claims, demands, actions or causes of action whatsoever, whether known or unknown, fixed or contingent, in law or in equity, in contract or in tort, under any federal, Korean, or state statute or regulation or otherwise, or in common law, including claims for attorneys' fees, costs, and expenses of every kind and however denominated, that it would have standing to bring or which Hanjin may now have or claim to have against Relator and his heirs, successors,

assigns, agents, and attorneys. Relator hereby represents that neither he nor his companies, [TEXT REDACTED BY THE COURT] performed business with Hanjin.

9. a. Unallowable Costs Defined: All costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47) incurred by or on behalf of Hanjin, and its present or former officers, directors, employees, shareholders, and agents in connection with:

- (1) the matters covered by this Agreement, any related plea agreement, and any related civil antitrust agreement;
- (2) the United States' audit(s) and civil and any criminal investigation(s) of the matters covered by this Agreement;
- (3) Hanjin's investigation, defense, and corrective actions undertaken [\*22] in response to the United States' audit(s) and civil and any criminal investigation(s) in connection with the matters covered by this Agreement (including attorney's fees);
- (4) the negotiation and performance of this Agreement, any related plea agreement, and any related civil antitrust agreement;
- (5) the payment Hanjin makes to the United States pursuant to this Agreement and any payments that Hanjin may make to Relator, including costs and attorneys' fees,

are unallowable costs for government contracting purposes (hereinafter referred to as Unallowable Costs).

b. Future Treatment of Unallowable Costs: Unallowable Costs will be separately determined and accounted for by Hanjin, and Hanjin shall not charge such Unallowable Costs directly or indirectly to any contract with the United States.

c. Treatment of Unallowable Costs Previously Submitted for

Payment: Within 90 days of the Effective Date of this Agreement, Hanjin shall identify and repay by adjustment to future claims for payment or otherwise any Unallowable Costs included in payments previously sought by Hanjin or any of its subsidiaries or affiliates from the United States. Hanjin agrees that the United States, at a minimum, shall [\*23] be entitled to recoup from Hanjin any overpayment plus applicable interest and penalties as a result of the inclusion of such Unallowable Costs on previously-submitted requests for payment. The United States, including the Department of Justice and/or the affected agencies, reserves its rights to audit, examine, or re-examine Hanjin's books and records and to disagree with any calculations submitted by Hanjin or any of its subsidiaries or affiliates regarding any Unallowable Costs included in payments previously sought by Hanjin, or the effect of any such Unallowable Costs on the amount of such payments.

10. Hanjin agrees to cooperate fully and truthfully with the United States in connection with the Civil FCA Action. Hanjin's ongoing, full, and truthful cooperation shall include, but not be limited to:

a. upon request by the United States with reasonable notice, producing at the offices of counsel for the United States in Washington, D.C. and not at the expense of the United States, complete and un-redacted copies of all non-privileged documents related to the Covered Conduct wherever located in Hanjin's possession, custody, or control, including but not limited to, reports, memoranda [\*24] of interviews, and records concerning any investigation of the Covered Conduct that Hanjin has undertaken, or that has been performed by another on Hanjin's behalf;

b. upon request by the United States with reasonable notice, making current Hanjin directors, officers, and employees available for interviews, consistent with the rights and privileges of such individuals, by counsel for the United States and/or their investigative agents, not at the expense of the United States, in the United States or Hong Kong, unless another place is mutually agreed upon;

c. upon request by the United States with reasonable notice, (i) using best efforts to assist in locating former Hanjin directors, officers, and employees identified by attorneys and/or investigative agents of the United States, and (ii) using best efforts to make any such former Hanjin directors, officers, and employees available for interviews, consistent with the rights and privileges of such individuals, by counsel for the United States and/or their

investigative agents, not at the expense of the United States, in the United States or Hong Kong, unless another place is mutually agreed upon; and

d. upon request by the United States [\*25] with reasonable notice, making current Hanjin directors, officers, and employees available, and using best efforts to make former Hanjin directors, officers, employees available, to testify, consistent with the rights and privileges of such individuals, fully, truthfully, and under oath, without falsely implicating any person or withholding any information, (i) at depositions in the United States, Hong Kong, or any other mutually agreed upon place, (ii) at trial in the United States, and (iii) at any other judicial proceedings wherever located related to the Civil FCA Action.

11. This Agreement is intended to be for the benefit of the Parties only.

12. Upon receipt of the payment of the FCA Settlement Amount described in Paragraph 1 above, the United States and Relator shall promptly sign and file a Joint Stipulation of Dismissal, with prejudice, of the claims filed against Hanjin in the Civil FCA Action, pursuant to [Rule 41 \(a\)\(1\)](#), which dismissal shall be conditioned on the Court retaining jurisdiction over Relator's claims to a relator's share and recovery of attorneys' fees and costs pursuant to [31 U.S.C. § 3730\(d\)](#).

13. Except with respect to payment (if any) by Hanjin of Relator's attorneys' fees, expenses, and [\*26] costs pursuant to [31 U.S.C. § 3730\(d\)](#), each Party shall bear its own legal and other costs incurred in connection with this matter. The Parties agree that Relator and Hanjin will not seek to recover from the United States any costs or fees related to the preparation and performance of this Agreement.

14. Each party and signatory to this Agreement represents that it freely and voluntarily enters in to this Agreement without any degree of duress or compulsion.

15. This Agreement is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Agreement is the United States District Court for the Southern District of Ohio. Hanjin agrees that the United States District Court for the Southern District of Ohio has jurisdiction over it for purposes of the Civil FCA Action. For purposes of construing this Agreement, this Agreement shall be deemed to have been drafted by all Parties to this Agreement and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

16. This Agreement constitutes the complete agreement between the Parties on the subject matters addressed herein. This Agreement may not be amended except by written [\*27] consent of the Parties.

17. The undersigned counsel represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below.

18. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement.

19. This Agreement is binding on Hanjin's successors, transferees, heirs, and assigns.

20. This Agreement is binding on Relator's successors, transferees, heirs, and assigns.

21. All parties consent to the United States' disclosure of this Agreement, and information about this Agreement, to the public, as permitted by order of the Court. This Agreement shall not be released in un-redacted form until the Court unseals the entire Civil FCA Action.

22. This Agreement is effective on the date of signature of the last signatory to the Agreement (Effective Date of this Agreement). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

THE UNITED STATES OF AMERICA

DATED: 11/14/18

/s/ Andrew A. Steinberg

Andrew A. Steinberg

Trial Attorney

Commercial Litigation Branch

Civil Division, U.S. Department of Justice

DATED: 11/13/18 BY:

Mark T. D'Alessandro  
Mark T. D'Alessandro  
Civil Chief  
Andrew Malek  
Assistant United States Attorney  
U.S. Attorney's Office for the  
Southern District of Ohio

HANJIN TRANSPORTATION CO., LTD.  
DEFENDANT

DATED: 2018.11.13. BY:

Young-Goo Kim  
Authorized Representative  
of Hanjin Transportation Co., Ltd

DATED: 11/14/18 BY:

William H. Stallings  
William H. Stallings  
Counsel for Hanjin Transportation Co., Ltd

DATED: 11/14/18 BY:

Kelly B. Kramer  
Kelly B. Kramer  
Counsel for Hanjin Transportation Co., Ltd

[REDACTED] RELATOR

DATED: BY: [REDACTED]

DATED: BY:

Eric Havian  
Counsel for Relator

DATED: \_\_\_\_\_ BY: \_\_\_\_\_

Mark T. D'Alessandro  
Civil Chief  
Andrew Malek  
Assistant United States Attorney  
U.S. Attorney's Office for the  
Southern District of Ohio

HANJIN TRANSPORTATION CO., LTD. DEFENDANT

DATED: \_\_\_\_\_ BY: \_\_\_\_\_

Authorized Representative  
of Hanjin Transportation Co., Ltd.

DATED: \_\_\_\_\_ BY: \_\_\_\_\_

William H. Stallings  
Counsel for Hanjin Transportation Co., Ltd.

DATED: \_\_\_\_\_ BY: \_\_\_\_\_

Kelly B. Kramer  
Counsel for Hanjin Transportation Co., Ltd.

[REDACTED] RELATOR

DATED: *Nov 19th* BY: *[Signature]* [REDACTED]

DATED: *11/19/06* BY: *[Signature]* [REDACTED]  
Eric Hayan  
Constantine Cannon LLP  
Counsel for Relator



## United States v. SK Energy Co.

United States District Court for the Southern District of Ohio, Eastern Division

March 14, 2019, Decided; March 14, 2019, Filed

Case No. 2:18-CV-1456

### **Reporter**

2019 U.S. Dist. LEXIS 125999 \*; 2019-1 Trade Cas. (CCH) P80,831; 2019 WL 3756364

UNITED STATES OF AMERICA, Plaintiff, v. SK ENERGY CO., LTD., Defendant.

**Prior History:** [United States v. Hanjin Transp. Co., 2019 U.S. Dist. LEXIS 125997 \(S.D. Ohio, Mar. 14, 2019\)](#)

## **Core Terms**

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Energy, Antitrust, Parties, costs, employees, Compliance, plea agreement, cooperation, assigns, Unallowable, attorney's fees, successors, agrees, settlement agreement, Settlement, heirs, contracts, expenses, notice, best efforts, proceedings, documents, purposes, rights and privileges, conditioned, interviews, provisions, requests, annual

**Counsel:** [\*1] For United States, Plaintiff: Andrew M Malek, LEAD ATTORNEY, United States Attorney's Office, Columbus, OH USA.

For Gs Caltex Corp., Defendant: James Allison Wilson, Jr, LEAD ATTORNEY, Vorys Sater Seymour & Pease, Columbus, OH USA; Daniel G. Swanson, Melissa Phan, PRO HAC VICE, Gibson, Dunn & Crutcher LLP, Los Angeles, CA USA; Scott D. Hammond, PRO HAC VICE, Gibson, Dunn & Crutcher LLP, Washington, DC USA.

For Hanjin Transportation Co., Ltd., Defendant: D Michael Crites, LEAD ATTORNEY, Michael Ferrara, Dinsmore & Shohl, LLP, Columbus, OH USA; Kelly B. Kramer, William Stallings, PRO HAC VICE, Mayer Brown LLP, Washington, DC USA.

For Sk Energy Co., Ltd., Defendant: James M Garland, LEAD ATTORNEY, Covington & Burling LLP, Washington, DC USA; Daniel N. Shallman, PRO HAC VICE, Covington & Burling LLP, Los Angeles, CA USA; Phillip H. Warren, PRO HAC VICE, Covington & Burling LLP, San Francisco, CA USA.

**Judges:** Algenon L. Marbley, UNITED STATES DISTRICT JUDGE. Magistrate Judge Chelsey M. Vascura.

**Opinion by:** Algenon L. Marbley

## **Opinion**

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### **FINAL JUDGMENT AS TO DEFENDANT SK ENERGY CO., LTD.**

WHEREAS Plaintiff, United States of America, filed its Complaint on November 14, 2018, the United States and Defendant SK Energy Co., Ltd. ("SK [\*2] Energy"), by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law;

WHEREAS, on such date as may be determined by the Court, SK Energy will plead guilty pursuant to Fed. R. Crim. P. 11(c)(1)(C) (the "Plea Agreement") to an Information to be filed in United States v. SK Energy Co., Ltd. [to be assigned] (S.D. Ohio) (the "Criminal Action") that will allege a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, relating to the same events giving rise to the allegations described in the Complaint;

WHEREAS, this Final Judgment does not constitute any evidence against or admission by any party regarding any issue of fact or law;

NOW, THEREFORE, before the taking of any testimony and without trial or final adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby ORDERED, ADJUDGED, AND DECREED:

## **I. JURISDICTION**

This Court has jurisdiction of the subject matter of this action and each of the parties consenting hereto. The Complaint states a claim upon which relief may be granted to the United States against SK Energy under Section 1 of the Sherman Act, 15 U.S.C. §1.

## **II. APPLICABILITY**

This Final Judgment applies to SK Energy, as defined above, [\*3] and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

## **III. PAYMENT**

SK Energy shall pay to the United States within ten (10) business days of the entry of this Final Judgment the amount of ninety million, three hundred eighty-four thousand, eight hundred and seventy-two dollars (\$90,384,872), less the amount paid (excluding any interest) pursuant to the settlement agreement attached hereto as Attachment 1, to satisfy all civil antitrust claims alleged against SK Energy by the United States in the Complaint. Payment of the amount ordered hereby shall be made by wire transfer of funds or cashier's check. If the payment is made by wire transfer, SK Energy shall contact Janie Ingalls of the Antitrust Division's Antitrust Documents Group at (202) 514-2481 for instructions before making the transfer. If the payment is made by cashier's check, the check shall be made payable to the United States Department of Justice and delivered to: Janie Ingalls, United States Department of Justice Antitrust Division, Antitrust Documents Group, 450 5th Street, NW, Suite 1024, Washington, D.C. 20530. In the [\*4] event of a default in payment, interest at the rate of eighteen (18) percent per annum shall accrue thereon from the date of default to the date of payment.

## **IV. COOPERATION**

SK Energy shall cooperate fully with the United States regarding any matter about which SK Energy has knowledge or information relating to any ongoing civil investigation, litigation, or other proceeding arising out of any ongoing federal investigation of the subject matter discussed in the Complaint (hereinafter, any such investigation, litigation, or proceeding shall be referred to as a "Civil Federal Proceeding").

The United States agrees that any cooperation provided in connection with the Plea Agreement and/or pursuant to the settlement agreement attached hereto as Attachment 1 will be considered cooperation for purposes of this Final Judgment, and the United States will use its reasonable best efforts, where appropriate, to coordinate any requests for cooperation in connection with the Civil Federal Proceeding with requests for cooperation in connection with the Plea Agreement and the settlement agreement attached hereto as Attachment 1, so as to avoid unnecessary duplication and expense.

SK Energy's cooperation [\*5] shall include, but not be limited to, the following:

- (a) Upon request, completely and truthfully disclosing and producing, to the offices of the United States and at no expense to the United States, copies of all non-privileged information, documents, materials, and records in its possession (and for any foreign-language information, documents, materials, or records, copies must be produced with an English translation), regardless of their geographic location, about which the United States may inquire in connection with any Civil Federal Proceeding, including but not limited to all information about activities of SK Energy and present and former officers, directors, employees, and agents of SK Energy;
- (b) Making available in the United States, at no expense to the United States, its present officers, directors, employees, and agents to provide information and/or testimony as requested by the United States in connection with any Civil Federal Proceeding, including the provision of testimony in trial and other judicial proceedings, as well as interviews with law enforcement authorities, consistent with the rights and privileges of those individuals;
- (c) Using its best efforts to make available [\*6] in the United States, at no expense to the United States, its former officers, directors, employees, and agents to provide information and/or testimony as requested by the United States in connection with any Civil Federal Proceeding, including the provision of testimony in trial and other judicial proceedings, as well as interviews with law enforcement authorities, consistent with the rights and privileges of those individuals;
- (d) Providing testimony or information necessary to identify or establish the original location, authenticity, or other basis for admission into evidence of documents or physical evidence produced by SK Energy in any Civil Federal Proceeding as requested by the United States; and
- (e) Completely and truthfully responding to all other inquiries of the United States in connection with any Civil Federal Proceeding.

However, notwithstanding any provision of this Final Judgment, SK Energy is not required to: (1) request of its current or former officers, directors, employees, or agents that they forgo seeking the advice of an attorney nor that they act contrary to that advice; (2) take any action against its officers, directors, employees, or agents for following their [\*7] attorney's advice; or (3) waive any claim of privilege or work product protection.

The obligations of SK Energy to cooperate fully with the United States as described in this Section shall cease upon the conclusion of all Civil Federal Proceedings (which may include Civil Federal Proceedings related to the conduct of third parties), including exhaustion of all appeals or expiration of time for all appeals of any Court ruling in each such Civil Federal Proceeding, at which point the United States will provide written notice to SK Energy that its obligations under this Section have expired.

## **V. ANTITRUST COMPLIANCE PROGRAM**

A. Within thirty (30) days after entry of this Final Judgment, SK Energy shall appoint an Antitrust Compliance Officer and identify to the United States his or her name, business address, telephone number, and email address. Within forty-five (45) days of a vacancy in the Antitrust Compliance Officer position, SK Energy shall appoint a replacement, and shall identify to the United States the Antitrust Compliance Officer's name, business address, telephone number, and email address. SK Energy's initial or replacement appointment of an Antitrust Compliance Officer is subject [\*8] to the approval of the United States, in its sole discretion.

B. The Antitrust Compliance Officer shall institute an antitrust compliance program for the company's employees and directors with responsibility for bidding for any contract with the United States. The antitrust compliance program shall provide at least two hours of training annually on the antitrust laws of the United States, such training to be delivered by an attorney with relevant experience in the field of United States antitrust law.

C. Each Antitrust Compliance Officer shall obtain, within six months after entry of this Final Judgment, and on an annual basis thereafter, on or before each anniversary of the entry of this Final Judgment, from each person subject to Paragraph V.B of this Final Judgment, and thereafter maintaining, a certification that each such person has received the required two hours of annual antitrust training.

D. Each Antitrust Compliance Officer shall communicate annually to all employees that they may disclose to the Antitrust Compliance Officer, without reprisal, information concerning any potential violation of the United States antitrust laws.

E. Each Antitrust Compliance Offer shall provide [\*9] to the United States within six months after entry of this Final Judgment, and on an annual basis thereafter, on or before each anniversary of the entry of this Final Judgment, a written statement as to the fact and manner of SK Energy's compliance with Section V of this Final Judgment.

## **VI. RETENTION OF JURISDICTION**

This Court retains jurisdiction to enable any of the parties to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions.

## **VII. ENFORCEMENT OF FINAL JUDGMENT**

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including the right to seek an order of contempt from the Court. SK Energy agrees that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of this Final Judgment, the United States may establish a violation of the decree and the appropriateness of any remedy therefor by a preponderance of the evidence, and SK Energy [\*10] waives any argument that a different standard of proof should apply.

B. The Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws and to restore all competition the United States alleged was harmed by the challenged conduct. SK Energy agrees that they may be held in contempt of, and that the Court may enforce, any provision of this Final Judgment that, as interpreted by the Court in light of these procompetitive principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of this Final Judgment should not be construed against either party as the drafter.

C. In any enforcement proceeding in which the Court finds that SK Energy has violated this Final Judgment, the United States may apply to the Court for a one-time extension of this Final Judgment, together with such other relief as may be appropriate. In connection with any successful effort by the United States to enforce this Final Judgment against SK Energy, whether litigated or resolved prior to litigation, SK Energy agrees to reimburse [\*11] the United States for the fees and expenses of its attorneys, as well as any other costs including experts' fees, incurred in connection with that enforcement effort, including in the investigation of the potential violation.

## **VIII. EXPIRATION OF FINAL JUDGMENT**

Unless this Court grants an extension, this Final Judgment shall expire seven (7) years from the date of its entry, except that after five (5) years from the date of its entry, this Final Judgment may be terminated upon notice by the United States to the Court and SK Energy that the continuation of the Final Judgment no longer is necessary or in the public interest.

## **IX. PUBLIC INTEREST DETERMINATION**

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to

comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

DATED: [\*12] March 14, 2019

/s/ Algenon L. Marbley

Algenon L. Marbley

UNITED STATES DISTRICT JUDGE

## **ATTACHMENT 1**

### **SETTLEMENT AGREEMENT**

This Settlement Agreement (Agreement) is entered into among the United States of America, acting through the Civil Division of the United States Department of Justice and the United States Attorney's Office for the Southern District of Ohio, on behalf of the Defense Logistics Agency (DLA) and the Army and Air Force Exchange Service (AAFES) (collectively the "United States"), SK Energy Co., Ltd. (SK Energy), and Relator [TEXT REDACTED BY THE COURT] (hereafter collectively referred to as "the Parties"), through their authorized representatives.

### **RECITALS**

A. SK Energy is a South Korea-based energy company that produces various petroleum products that it sells to South Korean and international customers, including the United States Department of Defense (DoD).

B. On February 28, 2018, Relator, a resident and citizen of South Korea, filed a *qui tam* action in the United States District Court for the Southern District of Ohio captioned *United States ex rel. [TEXT REDACTED BY THE COURT] v. GS Caltex, et al.*, Civil Action No. [TEXT REDACTED BY THE COURT], pursuant to the *qui tam* provisions [\*13] of the [False Claims Act, 31 U.S.C. § 3730\(b\)](#) (the Civil FCA Action). Relator contends that SK Energy conspired with other South Korean entities to rig bids on DoD contracts to supply fuel to U.S. military bases throughout South Korea beginning in 2005 and continuing until 2016, including DLA Post, Camps, and Stations (PC&S) contracts executed in 2006, 2009, and 2013, and AAFES contracts executed in 2008.

C. On such date as may be determined by the Court, SK Energy will plead guilty pursuant to [Fed. R. Crim. P. 11\(c\)\(1\)\(C\)](#) (the "Plea Agreement") to an Information to be filed in *United States v. SK Energy Co., Ltd.*, Criminal Action No. [to be assigned] (S.D. Ohio) (the "Criminal Action") that will allege that SK Energy participated in a combination and conspiracy beginning at least in or around March 2005 and continuing until at least in or around October 2016, to suppress and eliminate competition on certain contracts solicited by the DoD to supply fuel to numerous U.S. Army, Navy, Marine, and Air Force installations in Korea, including PC&S contracts and the 2008 AAFES contract, in violation of the [Sherman Antitrust Act, 15 U.S.C. § 1](#).

D. SK Energy will execute a Stipulation with the Antitrust Division of the United States Department of Justice [\*14] in which SK Energy will consent to the entry of a Final Judgment to be filed in *United States v. SK Energy Co., Ltd.*, Civil Action No. [to be assigned] (S.D. Ohio) (the Civil Antitrust Action) that will settle any and all civil antitrust claims of the United States against SK Energy arising from any act or offense committed before the date of the Stipulation that was undertaken in furtherance of an attempted or completed antitrust conspiracy involving PC&S and/or AAFES fuel supply contracts with the U.S. military in South Korea during the period 2005 through 2016.

E. The United States contends that it has certain civil claims against SK Energy arising from the conduct described in the Plea Agreement in the Criminal Action and in the Stipulation in the Civil Antitrust Action, as well as the

conduct, actions, and claims alleged by Relator in the Civil FCA Action. The conduct referenced in this Paragraph is referred to below as the Covered Conduct.

F. With the exception of any admissions that are made by SK Energy in connection with the Plea Agreement in the Criminal Action, this Settlement Agreement is neither an admission of liability by SK Energy nor a concession by the United States [\*15] that its claims are not well founded.

G. Relator claims entitlement under [31 U.S.C. § 3730\(d\)](#) to a share of the proceeds of this Settlement Agreement and to Relator's reasonable expenses, attorneys' fees and costs.

To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, and in consideration of the mutual promises and obligations of this Settlement Agreement, the Parties agree and covenant as follows:

## TERMS AND CONDITIONS

1.a. SK Energy agrees to pay to the United States \$71,866,000 (FCA Settlement Amount), of which \$47,910,887 is restitution, by electronic funds transfer no later than thirteen (13) business days after the Effective Date of this Agreement pursuant to written instructions to be provided by the Civil Division of the Department of Justice. Relator claims entitlement under [31 U.S.C. § 3730\(d\)](#) to Relator's reasonable expenses, attorneys' fees and costs. The FCA Settlement Amount does not include the Relator's fees and costs, and SK Energy acknowledges that Relator retains all rights to recover such expenses, attorneys' fees, and costs from SK Energy pursuant to [31 U.S.C. § 3730\(d\)](#).

1.b. If SK Energy's Plea Agreement in the Criminal Action is not accepted by the Court or the Court does [\*16] not enter a Final Judgment in the Civil Antitrust Action, this Agreement shall be null and void at the option of either the United States or SK Energy. If either the United States or SK Energy exercises this option, which option shall be exercised by notifying all Parties, through counsel, in writing within five (5) business days of the Court's decision, the Parties will not object and this Agreement will be rescinded and the FCA Settlement Amount shall be returned to SK Energy. If this Agreement is rescinded, SK Energy will not plead, argue or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel or similar theories, to any civil or administrative claims, actions or proceedings arising from the Covered Conduct that are brought by the United States within ninety (90) calendar days of rescission, except to the extent such defenses were available on the day on which Relator's *qui tam* complaint in the Civil FCA Action was filed.

2. Subject to the exceptions in Paragraph 4 (concerning excluded claims) below, and conditioned upon SK Energy's full payment of the FCA Settlement Amount, the United States releases SK Energy together with its current and [\*17] former parent corporations; direct and indirect subsidiaries; brother or sister corporations; divisions; current or former corporate owners; and the corporate successors and assigns of any of them (the "SK Energy Released Parties") from any civil or administrative monetary claim the United States has for the Covered Conduct under the [False Claims Act, 31 U.S.C. §§ 3729-3733](#); the [Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812](#); [Contract Disputes Act, 41 U.S.C. §§ 7101-7109](#); or the common law theories of breach of contract, payment by mistake, unjust enrichment, and fraud.

3. Except as set forth in Paragraph 1 (concerning Relator's claims under [31 U.S.C. § 3730\(d\)](#)), and conditioned upon SK Energy's full payment of the FCA Settlement Amount, Relator, for himself and for his heirs, successors, attorneys, agents, and assigns, releases the SK Energy Released Parties from (a) any civil monetary claim the Relator has or may have for the claims set forth in the Civil FCA Action, the Civil Antitrust Action, the Criminal Action, and the Covered Conduct under the [False Claims Act, 31 U.S.C. §§ 3729-3733](#), up until the date of this Agreement; and (b) all liability, claims, demands, actions, or causes of action whatsoever, whether known or unknown, fixed or contingent, in law or in equity, in [\*18] contract or in tort, under any federal, state, or Korean statute, law, regulation or doctrine, that Relator, his heirs, successors, attorneys, agents, and assigns otherwise has brought or would have standing to bring as of the date of this Agreement, including any liability to Relator arising

from or relating to the claims Relator asserted or could have asserted in the Civil FCA Action, up until the date of this Agreement. Relator further represents he does not know of any conduct by the SK Energy Released Parties or any current or former owners, officers, directors, trustees, shareholders, employees, executives, agents, or affiliates of the SK Energy Released Parties that would constitute a violation of the False Claims Act other than the claims set forth in the Civil FCA Action and the Covered Conduct, and Relator acknowledges and agrees that his representations are a material inducement to SK Energy's willingness to enter into this Agreement.

4. Notwithstanding the releases given in paragraphs 2 and 3 of this Agreement, or any other term of this Agreement, the following claims of the United States are specifically reserved and are not released:

- a. Any liability arising under Title **[\*19]** 26, U.S. Code (Internal Revenue Code);
- b. Any criminal liability, except to the extent detailed in the Plea Agreement;
- c. Except as explicitly stated in this Agreement, any administrative liability, including the suspension and debarment rights of any federal agency;
- d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;
- e. Any liability based upon obligations created by this Agreement;
- f. Any liability of individuals;
  
- g. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services;
  
- h. Any liability for failure to deliver goods or services due; and
  
- i. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct.

5. Relator and his heirs, successors, attorneys, agents, and assigns shall not object to this Agreement but agree and confirm that this Agreement is fair, adequate, and reasonable under all the circumstances, pursuant to [31 U.S.C. § 3730\(c\)\(2\)\(B\)](#). The determination of Relator's share, if any, of the FCA Settlement Amount pursuant to [31 U.S.C. § 3730\(d\)](#) is a matter that shall be handled separately by and between the Relator **[\*20]** and the United States, without any direct involvement or input from SK Energy. In connection with this Agreement and this Civil FCA Action, Relator, on behalf of himself and his heirs, successors, attorneys, agents, and assigns agrees that neither this Agreement, nor any intervention by the United States in the Civil FCA Action in order to dismiss the Civil FCA Action, nor any dismissal of the Civil FCA Action, shall waive or otherwise affect the ability of the United States to contend that provisions in the False Claims Act, including [31 U.S.C. § 3730\(d\)\(3\)](#), bar Relator from sharing in the proceeds of this Agreement, except that the United States will not contend that Relator is barred from sharing in the proceeds of this Agreement pursuant to [31 U.S.C. § 3730\(e\)\(4\)](#). Moreover, the United States and Relator, on behalf of himself and his heirs, successors, attorneys, agents, and assigns agree that they each retain all of their rights pursuant to the False Claims Act on the issue of the share percentage, if any, that Relator should receive of any proceeds of the settlement of his claims, and that no agreements concerning Relator share have been reached to date.

6. SK Energy waives and shall not assert any defenses SK Energy may **[\*21]** have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the [Double Jeopardy Clause in the Fifth Amendment of the Constitution](#), or under the [Excessive Fines Clause in the Eighth Amendment of the Constitution](#), this Agreement bars a remedy sought in such criminal prosecution or administrative action.

7. SK Energy fully and finally releases the United States, its agencies, officers, agents, employees, and servants, from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that SK Energy has asserted, could have asserted, or may assert in the future against the United States, its agencies, officers, agents, employees, and servants, related to the Covered Conduct and the United States' investigation and prosecution thereof.

8. Conditioned upon Relator's agreement herein, the SK Energy Released Parties fully and finally release Relator his heirs, successors, assigns, agents and attorneys (the "Relator Released Parties"), from (a) any civil monetary claim SK Energy has or may have now or in the future against the Relator Released Parties related to the claims set forth in the Civil FCA Action, the Civil Antitrust Action, the Criminal Action, and the Covered Conduct under the [False \[\\*22\] Claims Act, 31 U.S.C. §§ 3729-3733](#), and the Relator's investigation and prosecution thereof, including attorney's fees, costs, and expenses of every kind and however denominated, up until the date of this Agreement; and (b) all liability, claims, demands, actions, or causes of action whatsoever, whether known or unknown, fixed or contingent, in law or in equity, in contract or in tort, under any federal, state, or Korean statute, law, regulation or doctrine, that the SK Energy Released Parties otherwise have brought or would have standing to bring as of the date of this Agreement, including any liability to SK Energy arising from or relating to claims the SK Energy Released Parties asserted or could have asserted related to the Civil FCA Action, up until the date of this Agreement. The SK Energy Released Parties further acknowledge and agree that these representations are a material inducement to Relator's willingness to enter into this Agreement.

9. a. Unallowable Costs Defined: All costs (as defined in the Federal Acquisition Regulation, *48 C.F.R. § 31.205-47*) incurred by or on behalf of SK Energy, and its present or former officers, directors, employees, shareholders, and agents in connection with:

- (1) the matters covered [**\*23**] by this Agreement, any related plea agreement, and any related civil antitrust agreement;
- (2) the United States' audit(s) and civil and any criminal investigation(s) of the matters covered by this Agreement;
- (3) SK Energy's investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and civil and any criminal investigation(s) in connection with the matters covered by this Agreement (including attorney's fees);
- (4) the negotiation and performance of this Agreement, any related plea agreement, and any related civil antitrust agreement;
- (5) the payment SK Energy makes to the United States pursuant to this Agreement and any payments that SK Energy may make to Relator, including costs and attorneys' fees,

are unallowable costs for government contracting purposes (hereinafter referred to as Unallowable Costs).

b. Future Treatment of Unallowable Costs: Unallowable Costs will be separately determined and accounted for by SK Energy, and SK Energy shall not charge such Unallowable Costs directly or indirectly to any contract with the United States.

c. Treatment of Unallowable Costs Previously Submitted for Payment: Within 90 days of the Effective Date of this [**\*24**] Agreement, SK Energy shall identify and repay by adjustment to future claims for payment or otherwise any Unallowable Costs included in payments previously sought by SK Energy or any of its subsidiaries or affiliates from the United States. SK Energy agrees that the United States, at a minimum, shall be entitled to recoup from SK Energy any overpayment plus applicable interest and penalties as a result of the inclusion of such Unallowable Costs on previously-submitted requests for payment. The United States, including the Department of Justice and/or the affected agencies, reserves its rights to audit, examine, or re-examine SK Energy's books and records and to disagree with any calculations submitted by SK Energy or any of its subsidiaries or affiliates regarding any Unallowable Costs included in payments previously sought by SK Energy, or the effect of any such Unallowable Costs on the amount of such payments.

10. SK Energy agrees to cooperate fully and truthfully with the United States in connection with the Civil FCA Action. The Civil Division of the United States Department of Justice will use reasonable best efforts, where appropriate, to coordinate any requests for cooperation [**\*25**] in connection with the Civil FCA Action with requests for cooperation in connection with the Plea Agreement in the Criminal Action and the Civil Antitrust Action, so as to avoid unnecessary duplication and expense. SK Energy's ongoing, full, and truthful cooperation shall include, but not be limited to:

- a. upon request by the United States with reasonable notice, producing at the offices of counsel for the United States in Washington, D.C. and not at the expense of the United States, complete and un-redacted copies of all non-privileged documents related to the Covered Conduct wherever located in SK Energy's possession, custody, or control, including but not limited to, reports, memoranda of interviews, and records concerning any investigation of the Covered Conduct that SK Energy has undertaken, or that has been performed by another on SK Energy's behalf;
- b. upon request by the United States with reasonable notice, making current SK Energy directors, officers, and employees available for interviews, consistent with the rights and privileges of such individuals, by counsel for the United States and/or their investigative agents, not at the expense of the United States, in the United [\*26] States or Hong Kong, unless another place is mutually agreed upon;
- c. upon request by the United States with reasonable notice, (i) using best efforts to assist in locating former SK Energy directors, officers, and employees identified by attorneys and/or investigative agents of the United States, and (ii) using best efforts to make any such former SK Energy directors, officers, and employees available for interviews, consistent with the rights and privileges of such individuals, by counsel for the United States and/or their investigative agents, not at the expense of the United States, in the United States or Hong Kong, unless another place is mutually agreed upon; and
- d. upon request by the United States with reasonable notice, making current SK Energy directors, officers, and employees available, and using best efforts to make former SK Energy directors, officers, employees available, to testify, consistent with the rights and privileges of such individuals, fully, truthfully, and under oath, without falsely implicating any person or withholding any information, (i) at depositions in the United States, Hong Kong, or any other mutually agreed upon place, (ii) at trial in the United [\*27] States, and (iii) at any other judicial proceedings wherever located related to the Civil FCA Action.

11. This Agreement is intended to be for the benefit of the Parties only.

12. Upon receipt of the payment of the FCA Settlement Amount described in Paragraph 1 above, the Court's acceptance of SK Energy's Plea Agreement in the Criminal Action, and the Court's entry of a Final Judgment in the Civil Antitrust Action, the United States and Relator shall promptly sign and file a Joint Stipulation of Dismissal, with prejudice, of the claims filed against SK Energy in the Civil FCA Action, pursuant to [Rule 41\(a\)\(1\)](#), which dismissal shall be conditioned on the Court retaining jurisdiction over Relator's claims to a relator's share and recovery of attorneys' fees and costs pursuant to [31 U.S.C. §3730\(d\)](#).

13. Except with respect to the recovery of Relator's attorneys' fees, expenses, and costs pursuant to [31 U.S.C. §3730\(d\)](#), each Party shall bear its own legal and other costs incurred in connection with this matter. The Parties agree that Relator and SK Energy will not seek to recover from the United States any costs or fees related to the preparation and performance of this Agreement.

14. Each party and signatory to this Agreement represents [\*28] that it freely and voluntarily enters in to this Agreement without any degree of duress or compulsion.

15. This Agreement is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Agreement is the United States District Court for the Southern District of Ohio. SK Energy agrees that the United States District Court for the Southern District of Ohio has jurisdiction over it for purposes of this case. For purposes of construing this Agreement, this Agreement shall be deemed to have been drafted by all Parties to this Agreement and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

16. This Agreement constitutes the complete agreement between the Parties on the subject matter addressed herein. This Agreement may not be amended except by written consent of the Parties.

17. The undersigned counsel represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below.

18. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement.
19. This Agreement [\*29] is binding on SK Energy's successors, transferees, heirs, and assigns.
20. This Agreement is binding on Relator's successors, transferees, heirs, and assigns.
21. All parties consent to the United States' disclosure of this Agreement, and information about this Agreement, to the public, as permitted by order of the Court. This Agreement shall not be released in un-redacted form until the Court unseals the entire Civil FCA Action.
22. This Agreement is effective on the date of signature of the last signatory to the Agreement (Effective Date of this Agreement). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

THE UNITED STATES OF AMERICA

DATED: 11/14/18 BY: /s/ Andrew A. Steinberg

Andrew A. Steinberg

Trial Attorney

Commercial Litigation Branch

Civil Division, U.S. Department of Justice

DATED: 11/13/18 BY: /s/ Mark T. D'Alessandro

Mark T. D'Alessandro

Civil Chief

Andrew Malek

Assistant United States Attorney

U.S. Attorney's Office for the Southern District of Ohio

SK ENERGY CO., LTD. - DEFENDANT

DATED: Nov. 14th 2018 BY: /s/ Myunghun Lee

Myunghun Lee

Authorized Representative of SK Energy, Co., Ltd.

DATED: Nov. 14, 2018 BY: /s/ Phillip H. Warren

Phillip [\*30] H. Warren

Counsel for SK Energy Co., Ltd.

[TEXT REDACTED BY THE COURT] RELATOR

DATED: \_\_ BY: \_\_

[TEXT REDACTED BY THE COURT]

DATED: \_\_ BY: \_\_

—

Eric Havian

Counsel for Realtor

SK ENERGY CO., LTD. - DEFENDANT

DATED: \_\_ BY: \_\_

Myunghun Lee

Authorized Representative of SK Energy, Co., Ltd.

DATED: \_\_ BY: \_\_

Phillip H. Warren

Counsel for SK Energy Co., Ltd.

[TEXT REDACTED BY THE COURT] RELATOR

DATED: Nov. 14th 2018 BY: [TEXT REDACTED BY THE COURT]

DATED: 11/14/18 BY: /s/ Eric Havian

Eric Havian

Counsel for Realtor

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End of Document



## Anadarko Petro. Corp. v. Commonwealth

Commonwealth Court of Pennsylvania

November 14, 2018, Argued; March 15, 2019, Decided; March 15, 2019, Filed

No. 58 C.D. 2018, No. 60 C.D. 2018

### **Reporter**

206 A.3d 51 \*; 2019 Pa. Commw. LEXIS 236 \*\*; 2019 WL 1211892

Anadarko Petroleum Corporation and Anadarko E&P Onshore LLC, Appellants v. Commonwealth of Pennsylvania; Chesapeake Energy Corporation; Chesapeake Appalachia, LLC; Chesapeake Operating, LLC; Chesapeake Energy Marketing, LLC Chesapeake Energy Corporation; Chesapeake Appalachia, LLC; Chesapeake Operating, LLC; and Chesapeake Energy Marketing, L.L.C. Appellants v. Commonwealth of Pennsylvania

**Subsequent History:** Appeal granted by, Request denied by, As moot *Commonwealth v. Chesapeake Energy Corp., 218 A.3d 1205, 2019 Pa. LEXIS 6088, 2019 WL 5589084 (Pa., Oct. 30, 2019)*

Appeal granted by, Request denied by, As moot [Commonwealth v. Chesapeake Energy Corp., 2021 Pa. LEXIS 1213, 2021 WL 1116949 \(Pa., Mar. 24, 2021\)](#)

Reversed by, in part, Affirmed by, in part, Remanded by *Commonwealth v. Chesapeake Energy Corp., 247 A.3d 934, 2021 Pa. LEXIS 1205 (Pa., Mar. 24, 2021)*

Appeal granted by, Appeal dismissed by [Commonwealth v. Chesapeake Energy Corp., 2021 Pa. LEXIS 3533 \(Pa., Sept. 8, 2021\)](#)

**Prior History:** [\*\*1] Common Pleas Court of the County of Bradford. Appealed from No. 2015IR0069. Brown, Senior Judge.

## **Core Terms**

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leases, commerce, unfair, trial court, consumers, practices, terms, deceptive act, trade and commerce, seller, deceptive, transactions, includes, preliminary objection, private landowner, antitrust, unfair methods of competition, mineral rights, landowners', demurrsers, lessees, consumer protection, cause of action, dictionary, indirectly, subsurface, offering, situate, viable, antitrust claim

## **LexisNexis® Headnotes**

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

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

**[HN1](#)** [] **Defenses, Demurrsers & Objections, Demurrsers**

A demurrer tests the legal sufficiency of the complaint. In ruling on preliminary objections, the courts must accept as true all well-pled allegations of material fact as well as all inferences reasonably deducible from the facts. However, unwarranted inferences, conclusions of law, argumentative allegations or expressions of opinion need not be accepted. For preliminary objections to be sustained, it must appear with certainty that the law will permit no recovery, and any doubt must be resolved in favor of the non-moving party.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

## **HN2** [] **Appellate Jurisdiction, Interlocutory Orders**

[Pa.R.A.P. 312](#), [1311](#), [1322](#) allow parties to request, and appellate courts to grant, interlocutory appeals by permission.

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

Governments > Legislation > Interpretation

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

An appellate court's standard of review regarding questions of statutory interpretation is "de novo and plenary." [1](#) [Pa.C.S. § 1921](#) provides legislatively established standards for judicial interpretation of statutes.

Governments > Legislation > Interpretation

## **HN4** [] **Legislation, Interpretation**

The Legislature sought by Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 Pa. Stat. Ann. §§ 201-1-201-9.3, to benefit the public at large by eradicating, among other things, "unfair or deceptive" business practices. Just as earlier legislation was designed to equalize the position of employer and employee and the position of insurer and insured, this Law attempts to place on more equal terms seller and consumer. These remedial statutes are all predicated on a legislative recognition of the unequal bargaining power of opposing forces in the marketplace. Instantly, the Legislature strove, by making certain modest adjustments, to ensure the fairness of market transactions. No sweeping changes in legal relationships were occasioned by the Law, since prevention of deception and the exploitation of unfair advantage has always been an object of remedial legislation. Although the UTPCPL did articulate the evils desired to be remedied, the statute's underlying foundation is fraud prevention. Since the UTPCPL was in relevant part designed to thwart fraud in the statutory sense, it is to be construed liberally to effect its object of preventing unfair or deceptive practices.

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

## **HN5** [] **Deceptive & Unfair Trade Practices, State Regulation**

Per Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. §§ 201-1-201-9.3, express language, the General Assembly has "declared unlawful" 21 separate categories of unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce, as well as any acts or practices designated as such by the Attorney General through the administrative rulemaking process. [73 Pa.](#)

Stat. Ann. §§ 201-3, 201-2(4), 201-3.1. One particular subsection prohibits engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding. § 201-2(4)(xi).

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

#### **HN6** [] **Deceptive & Unfair Trade Practices, State Regulation**

The Attorney General may adopt, after public hearing, such rules and regulations as may be necessary for the enforcement and administration of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. §§ 201-1-201-9.3. Such rules and regulations when promulgated pursuant to the act of July 31, 1968, known as the "Commonwealth Documents Law," shall have the force and effect of law. 73 Pa. Stat. Ann. § 201-3.1.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

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

#### **HN7** [] **Private Actions, State Regulation**

The Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 Pa. Stat. Ann. §§ 201-1-201-9.3, defines "trade" and "commerce" as the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth. 73 Pa. Stat. Ann. § 201-2(3). In addition, the UTPCPL authorizes actions by private parties and imbues the Attorney General, as well as district attorneys throughout the Commonwealth, with the power to file suit if they have reason to believe that any person is using or is about to use any method, act or practice declared by 73 Pa. Stat. Ann. § 201-3 to be unlawful, and that proceedings would be in the public interest. 73 Pa. Stat. Ann. § 201-4.

Governments > Legislation > Interpretation

#### **HN8** [] **Legislation, Interpretation**

Under statutory construction doctrine ejusdem generis (of the same kind or class), where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated.

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

Governments > Legislation > Interpretation

#### **HN9** [] **Deceptive & Unfair Trade Practices, State Regulation**

"Trade" and "commerce" mean the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate. 73 Pa. Stat. Ann. § 201-2(3).

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation  
Governments > Legislation > Interpretation  
Real Property Law > Landlord & Tenant > Lease Agreements

#### **HN10** [ ] **Deceptive & Unfair Trade Practices, State Regulation**

The Pennsylvania Supreme Court recognized long ago that residential leases are functionally equivalent to a property sale in many ways, and that residential leases fall within the scope of "trade" and "commerce" under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. §§ 201-1-201-9.3. There is substantial common-law authority that the leasing of property is identical to the sale of the premises. When land is leased to a tenant, the law of property regards the lease as equivalent to a sale of the premises for the term. Courts of other jurisdictions have considered leases as the sale of an interest in real estate, or as the sale of the possession, occupancy and profits of land for a term. Still other courts recognize that the lessee's interest is tantamount to absolute ownership of the premises for the term. It is certainly the modern understanding of the common law of leases that a tenant is a purchaser of an estate in land.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation  
Governments > Legislation > Interpretation  
Real Property Law > Landlord & Tenant > Lease Agreements

#### **HN11** [ ] **Deceptive & Unfair Trade Practices, State Regulation**

Given the General Assembly's intent that the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. §§ 201-1-201-9.3, be liberally interpreted, so as to benefit the public at large by eradicating, among other things, unfair or deceptive business practices, § 2(3) of the Law's express language covers business and commercial leases as well, not just those which involve consumers or are residential in nature. [73 Pa. Stat. Ann. § 201-2\(3\)](#).

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

#### **HN12** [ ] **Deceptive & Unfair Trade Practices, State Regulation**

The Pennsylvania Supreme Court interpreted § 2(3) of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. §§ 201-1-201-9.3, as containing two distinct and independent clauses, the latter of which does not modify or qualify the preceding terms. [73 Pa. Stat. Ann. § 201-2\(3\)](#). Instead, the second clause is appended to the end of the first clause's definition and is prefaced by "and includes," thus indicating an inclusive and broader view of trade and commerce than expressed by the antecedent language. Therefore, this second clause operates as a catch-all of sorts, enabling "trade" and "commerce" to be defined in terms of common usage and not just through the narrower, more specific language of the first clause. [1 Pa.C.S. § 1903\(a\)](#). Pennsylvania courts generally use dictionaries as source material to determine the common and approved usage of terms not defined in statutes. "Trade" and "commerce," in part and respectively, are defined as the business of buying and selling or bartering commodities and the exchange or buying and selling of commodities on a large scale involving transportation from place to place.

Governments > Legislation > Interpretation

### **HN13** [blue] Legislation, Interpretation

Words and phrases shall be construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a peculiar and appropriate meaning or are defined in this part, shall be construed according to such peculiar and appropriate meaning or definition. [1 Pa.C.S. § 1903\(a\)](#).

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

Governments > Legislation > Interpretation

### **HN14** [blue] Deceptive & Unfair Trade Practices, State Regulation

The Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 Pa. Stat. Ann. §§ 201-1-201-9.3, states that unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce as defined by subclauses (i) through (xxi) of [73 Pa. Stat. Ann. § 201-2](#) and regulations promulgated under [73 Pa. Stat. Ann. § 201-3.1](#) are hereby declared unlawful. [73 Pa. Stat. Ann. § 201-3](#). The key phrase is "in the conduct," which, when read in the full context of the language used in § 3 of the UTPCPL, pertains to all unfair methods of competition and unfair or deceptive acts or practices connected to UTPCPL-defined "trade" or "commerce," regardless of who is committing these unlawful acts.

Antitrust & Trade Law > Regulated Practices > Private Actions

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

### **HN15** [blue] Regulated Practices, Private Actions

While the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 Pa. Stat. Ann. §§ 201-1-201-9.3, places restrictions on the ability of private parties to file suit, the Law creates no such impediment for the Attorney General. Instead, the Attorney General is imbued with the express authority to file suit against "any person," whenever the Attorney General determines that such a person is using or is about to use any method, act or practice declared by [73 Pa. Stat. Ann. § 201-3](#) to be unlawful, and that proceedings would be in the public interest. [73 Pa. Stat. Ann. § 201-4](#). Section 2(2) of the Law defines "person" as natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entities. [73 Pa. Stat. Ann. § 201-2\(2\)](#).

Antitrust & Trade Law > Regulated Practices > Private Actions

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

### **HN16** [blue] Regulated Practices, Private Actions

The Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 Pa. Stat. Ann. §§ 201-1-201-9.3, is not designed to render all antitrust violations actionable and the scope of actionable antitrust behavior under the UTPCPL is narrower than under federal **antitrust law**. The UTPCPL provides two avenues through which activities can be declared "unfair methods of competition" or "unfair or deceptive acts or practices." First, the General Assembly may define a given activity as unlawful by statute in § 2(4) of the Law. [73 Pa. Stat. Ann. § 201-](#)

2(4). Second, the Attorney General, by virtue of § 3.1 of the Law, may also promulgate definitions of these terms through the administrative rulemaking process. 73 Pa. Stat. Ann. § 201-3.1. Neither the Attorney General nor the General Assembly has thus far used their powers to expressly define monopolistic behavior, joint ventures, or market sharing agreements as examples of "unfair methods of competition" or "unfair or deceptive acts or practices." Such activities are not per se unlawful for purposes of the UTPCPL.

**Counsel:** Stephen A. Cozen, Philadelphia, for designated appellant Anadarko Petroleum Corporation and Anadarko E&P Onshore LLC.

Daniel T. Donovan, Washington, DC, for designated appellant Chesapeake Energy Corporation.

Daniel T. Brier, Scranton, for designated appellant Chesapeake Energy Marketing, LLC.

Howard G. Hopkirk, Sr. Deputy Attorney General, Joseph S. Betsko, Sr. Deputy Attorney General, and Norman W. Marden, Sr. Deputy Attorney General, Harrisburg, for appellee Commonwealth of Pennsylvania.

**Judges:** BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge, HONORABLE ROBERT SIMPSON, Judge, HONORABLE P. KEVIN BROBSON, Judge, HONORABLE PATRICIA A. McCULLOUGH, Judge, HONORABLE ANNE E. COVEY, Judge, HONORABLE MICHAEL H. WOJCIK, Judge, HONORABLE ELLEN CEISLER, Judge. OPINION BY JUDGE CEISLER. CONCURRING AND DISSENTING OPINION BY JUDGE COVEY.

**Opinion by:** ELLEN CEISLER

## Opinion

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### [\*53] OPINION BY JUDGE CEISLER

In these combined interlocutory appeals by permission, we address two issues of first impression pertaining to Pennsylvania's Unfair Trade Practices and Consumer Protection Law (Law or UTPCPL).<sup>1</sup> The first is whether Appellee Commonwealth of Pennsylvania, [\*\*2] Office of Attorney General (Attorney General), can bring a cause of action against lessees pursuant to the UTPCPL, due to allegedly wrongful conduct perpetrated by the lessees in the context of leasing subsurface mineral rights from private landowners. The second issue is whether the Attorney General can bring a cause of action against those lessees, pursuant to the UTPCPL, for alleged violations of antitrust law. The Court of Common Pleas of Bradford County (Trial Court) answered both questions in the affirmative; however, after thorough consideration, we affirm in part and reverse in part.

The Attorney General filed suit in the Trial Court against Appellants Anadarko Petroleum Corporation and Anadarko E&P Onshore LLC (Anadarko), as well as Chesapeake Energy Corporation, Chesapeake Appalachia, LLC, Chesapeake Operating, LLC, and Chesapeake Energy Marketing, LLC (Chesapeake), (collectively, Appellants). In the complaint, the Attorney General alleges that, pursuant to both the UTPCPL and Pennsylvania antitrust common law, Appellants acted unlawfully by using deceptive, misleading, and unfair tactics, and committed antitrust violations, in their efforts to secure subsurface [\*\*3] mineral rights leases from private landowners. See Second Amended Complaint at 1-4, 29-105.<sup>2</sup> These leases allow Appellants to extract natural gas from the Marcellus Shale

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<sup>1</sup> Act of December 17, 1968, P.L. 1224, as amended, 73 P.S. §§ 201-1-201-9.3.

<sup>2</sup> Black's Law Dictionary defines "antitrust law," in relevant part, as: "The body of law designed to protect trade and commerce from restraints, monopolies, price-fixing, and price discrimination." Antitrust Law, BLACK'S LAW DICTIONARY (10th ed. 2014), available at <https://1.next.westlaw.com/Document/lfdbf7970808411e4b391a0bc737b01f9/View/FullText.html>. As discussed in more detail *infra*, the Attorney General alleges that Appellants committed antitrust violations by entering into joint venture and market sharing agreements, as well as by giving private landowners incomplete and misleading information that was materially relevant to the mineral rights leases.

formations underneath these private landowners' properties, in exchange for royalties and other types of payments. *Id.* at 14-28.

The Attorney General alleges that Appellants agreed to split the portion of "northeast Pennsylvania within the Marcellus Shale gas play" between them, so that Anadarko and Chesapeake would each effectively have exclusive areas in which to [\*\*54] seek mineral rights leases, without the fear that the other would tender competing offers to private landowners who were prospective lessors. See Second Amended Complaint at 62-76.

In response to the Attorney General's Second Amended Complaint, Appellants each filed preliminary objections. As part of their overall preliminary objections, Appellants made two arguments that are relevant to these interlocutory appeals. First, they demurred<sup>3</sup> on the basis that the Attorney General could not state claims against them under the UTPCPL, because this law could only be applied to address the allegedly deceptive or unfair conduct of *sellers* in the context [\*\*4] of a consumer transaction. Anadarko's Preliminary Objections at 11; Chesapeake's Preliminary Objections at 2-3. Since they had leased subsurface mineral rights, Appellants argued that they were effectively *buyers* in these transactions, and that their conduct was thus not actionable under the terms of the UTPCPL. Anadarko's Preliminary Objections at 11-13; Chesapeake's Preliminary Objections at 3. Second, they demurred on the grounds that antitrust claims could not be made under the UTPCPL, as this law was not designed to be an antitrust statute. Anadarko's Preliminary Objections at 28-32; Chesapeake's Preliminary Objections at 5-6.

The [\*\*5] Trial Court sustained Appellants' Preliminary Objections in part and overruled them in part. Of relevance to these interlocutory appeals, the Trial Court held that the Attorney General could sue Appellants pursuant to the UTPCPL, since the companies were conducting trade or commerce, as those terms were defined in the Law, and determined that the Law permitted the Attorney General to pursue antitrust claims against these companies under the UTPCPL. Tr. Ct. Op. at 16-33, 47-50. After making these rulings, the Trial Court *sua sponte* certified these issues for interlocutory appeal, recognizing that they are questions of first impression in which different interpretations of the law were being debated. *Id.* at 73-75, 79, 81-82. Appellants then filed separate petitions for permission to appeal on an interlocutory basis,<sup>4</sup> which the Honorable Bonnie Brigance Leadbetter granted, consolidating Appellants' respective appeals and limiting them to the following two questions:

1. Whether a cause of action may be brought under the [UTPCPL] for alleged wrongful conduct by lessees in oil and gas lease transactions.
2. Whether a cause of action may be brought under the [UTPCPL] for alleged antitrust violations.

Commonwealth Court [\*\*6] Order, 3/12/18, at 2-3. The parties subsequently filed responsive briefs and appeared for *en banc* argument. These issues are now ready for our consideration.<sup>5</sup>

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**HN1** [↑] A demurrer tests the legal sufficiency of the complaint. . . . In ruling on preliminary objections, the courts must accept as true all well-pled allegations of material fact as well as all inferences reasonably deducible from the facts. . . . However, unwarranted inferences, conclusions of law, argumentative allegations or expressions of opinion need not be accepted. . . . For preliminary objections to be sustained, it must appear with certainty that the law will permit no recovery, and any doubt must be resolved in favor of the non-moving party.

*Christ the King Manor v. Dep't of Pub. Welfare, 911 A.2d 624, 633 (Pa. Cmwlth. 2006), aff'd, 597 Pa. 217, 951 A.2d 255 (Pa. 2008).*

<sup>4</sup> See **HN2** [↑] Pa. R.A.P. 312, 1311, 1322 (allowing parties to request, and appellate courts to grant, interlocutory appeals by permission).

<sup>5</sup> **HN3** [↑] Our standard of review regarding questions of statutory interpretation is "*de novo* and plenary." Danganan v. Guardian Prot. Servs., 179 A.3d 9, 15 (Pa. 2018); see also 1 Pa. C.S. § 1921 (legislatively established standards for judicial interpretation of statutes).

## [\*55] The UTPCPL

**HN4** [↑] The Legislature sought by the [UTPCPL] to benefit the public at large by eradicating, among other things, 'unfair or deceptive' business practices. Just as earlier legislation was designed to equalize the position of employer and employee and the position of insurer and insured, this Law attempts to place on more equal terms seller and consumer. These remedial statutes are all predicated on a legislative recognition of the unequal bargaining power of opposing forces in the marketplace.

Instantly, the Legislature strove, by making certain modest adjustments, to ensure the fairness of market transactions. No sweeping changes in legal relationships were occasioned by the [Law], since prevention of deception and the exploitation of unfair advantage has always been an object of remedial legislation.

Although the [UTPCPL] did articulate the evils desired to be remedied, the statute's underlying foundation is fraud prevention. . . .

Since the [UTPCPL] was in relevant part designed to thwart fraud in the statutory [\*\*7] sense, it is to be construed liberally to effect its object of preventing unfair or deceptive practices.

*Com., by Creamer v. Monumental Props., Inc., 459 Pa. 450, 329 A.2d 812, 815-17 (Pa. 1974)* (footnotes and internal citations omitted).

**HN5** [↑] Per the UTPCPL's express language, the General Assembly has "declared unlawful" 21 separate categories of "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce[,"] as well as any acts or practices designated as such by the Attorney General through the administrative rulemaking process. Section 3 of the UTPCPL, 73 P.S. § 201-3; see Sections 2(4) and 3.1 of the UTPCPL, 73 P.S. §§ 201-2(4), 201-3.1.<sup>6</sup> Of relevance here is the subsection that prohibits "[e]ngaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding." Section 2(xxi) of the UTPCPL, 73 P.S. § 201-2(4)(xxi).

**HN7** [↑] The Law defines "'trade' and 'commerce'" as "the advertising, offering for sale, sale or distribution of any services and any property, [\*\*8] tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth." Section 2(3) of the UTPCPL, 73 P.S. § 201-2(3). In addition, the UTPCPL authorizes actions by private parties and imbues the Attorney General, as well as district attorneys throughout this Commonwealth, with the power to file suit if they "[have] reason to believe that any person is using or is about to use any method, act or practice declared by [73 P.S. § 201-3] to be unlawful, and that proceedings would be in the public interest[.]" Section 4 of the UTPCPL, 73 P.S. § 201-4.

### **The Attorney General's UTPCPL Claims Against Appellants**

In this interlocutory appeal, Appellants argue that the Trial Court erred by holding that the Attorney General could sue [\*56] them pursuant to the UTPCPL. According to Appellants, since they merely leased subsurface mineral rights from private landowners, they were not selling or distributing anything and consequently, the UTPCPL does

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**HN6** [↑] The Attorney General may adopt, after public hearing, such rules and regulations as may be necessary for the enforcement and administration of this act. Such rules and regulations when promulgated pursuant to the act of July 31, 1968 (P.L. 769, No. 240), [as amended, 45 P.S. §§ 1102-1602, and 45 Pa. C.S. §§ 501-907,] known as the "Commonwealth Documents Law," shall have the force and effect of law.

73 P.S. § 201-3.1, added by the Act of November 24, 2016, P.L. 1166.

not apply to their conduct, as the lease transactions do not satisfy the statutory definition of 'trade or commerce[.]'" Appellants' Br. at 13, 18-19. Instead, Appellants contend that the UTPCPL is designed to [\*\*9] only protect consumers against the underhanded behavior of sellers, rather than *all parties* to a given transaction. *Id.* at 13, 16-17.

In addition, Appellants maintain that the Trial Court erred in finding that these leases constituted "distribution of services," which is part of the definition of "'trade' and 'commerce'" found in [73 P.S. § 201-2\(3\)](#). *Id.* at 19-20. Appellants argue that the Trial Court was bound by the Attorney General's averments in its Second Amended Complaint, which make clear "that the object of the lease arrangement was for [Appellants] and other gas companies to purchase outright landowners' interests in oil and gas deposits beneath the surface of their land." *Id.*

Furthermore, Appellants state that the Trial Court erred by finding that their conduct fell within the second clause of the UTPCPL's definition of "'trade' and 'commerce,'" which states, "'trade' and 'commerce' . . . includes any trade or commerce directly or indirectly affecting the people of this Commonwealth." *Id.* at 20-21; see [73 P.S. § 201-2\(3\)](#). According to Appellants, the doctrine of *eiusdem generis*<sup>7</sup> requires this second clause to be read as referring to activities of the "same general nature or class" as those mentioned in the first clause<sup>8</sup> of [Section 2\(3\) of the UTPCPL](#). Appellants' Br. at 21. Consequently, the Trial [\*\*10] Court should not have used the ordinary definition of "'trade' and 'commerce'" when deciding whether Appellants' actions were trade or commerce for purposes of the Law, not only because of the doctrine of *eiusdem generis*, but also because reading the second clause as being independent would effectively render the first clause's narrower definition superfluous. *Id.* at 22-25.

We disagree. Contrary to Appellants' desired conclusion, we find that their conduct in relation to the aforementioned leases constitutes "'trade' and 'commerce,'" as those terms are understood in the context of the Law. As we have already noted, [Section 2\(3\) of the UTPCPL](#) states that

'Trade' and 'commerce' mean the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth.

#### [73 P.S. § 201-2\(3\)](#).

Per this statutory language, and our case law, these leases were, in essence, sales. [HN10](#) [↑] The Pennsylvania Supreme Court recognized long ago that residential leases [\*57] are functionally equivalent to a property sale in many ways, and [\*\*11] that residential leases fall within the scope of "'trade' and 'commerce'" under the UTPCPL. See [Monumental Props., Inc., 329 A.2d at 820-26](#). As the *Monumental Properties* court noted,

there is substantial common-law authority that the leasing of property is identical to the sale of the premises. Dean Prosser accurately states the general rule:

'When land is leased to a tenant, the law of property regards the lease as equivalent to a sale of the premises for the term.'

W. Prosser, *Handbook of the Law of Torts* [§] 63, at 399 (4th ed. 1971) (footnote omitted).

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Courts of other jurisdictions have considered leases as the sale of an interest in real estate, e.g., [Brenner v. Spiegle, 116 Ohio St. 631, 632, 5 Ohio Law Abs. 380, 157 N.E. 491, 492-493 \(1927\)](#), or as the 'sale of the

<sup>7</sup> [HN8](#) [↑] "Under our statutory construction doctrine *eiusdem generis* ('of the same kind or class'), where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated." [McClellan v. Health Maint. Org. of Pa., 546 Pa. 463, 686 A.2d 801, 806 \(Pa. 1996\)](#).

<sup>8</sup> [HN9](#) [↑] "'Trade' and 'commerce' mean the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate[.]" [73 P.S. § 201-2\(3\)](#).

possession, occupancy and profits of land for a term.' [\*Thiokol Chemical Corp. v. Morris County Board of Taxation, 41 N.J. 405, 416, 197 A.2d 176, 182 \(1964\)\*](#). Still other courts recognize that the lessee's interest is tantamount to absolute ownership of the premises for the term.

...

It is certainly the modern understanding of the common law of leases that '(a) tenant is a purchaser of an estate in land[.]' [\*Pines v. Persson, 14 Wis.2d 590, 594, 111 N.W.2d 409, 412 \(1961\)\*](#).

*Id. at 822-23* (some footnotes and citations omitted). We recognize that *Monumental Properties* focused upon residential leases, and stated that the UTPCPL "attempts to place on more equal terms seller and consumer." [\*Id. at 816\*](#). However, [HN11](#)[<sup>↑</sup>] given the General Assembly's intent [\*\*12] that the Law be liberally interpreted, so as "to benefit the public at large by eradicating, among other things, 'unfair or deceptive' business practices[.]" [\*id. at 815\*](#), we find that [Section 2\(3\)](#)'s express language covers business and commercial leases as well, not just those which involve consumers or are residential in nature. See [\*Danganan, 179 A.3d at 16\*](#) ("[W]e recognize . . . the wide range of conduct the [UTPCPL] was designed to address, including equalizing the bargaining power of the seller and consumer, ensuring the fairness of market transactions, and preventing deception and exploitation, all of which harmonize with the statute's broad underlying foundation of fraud prevention.").

Here, under the terms of the at-issue leases, the private landowners effectively relinquish title to Appellants for natural gas that is extracted from their land during the lease term, in exchange for some combination of up-front and royalty payments. See, e.g., Second Amended Complaint, Exs. G, H, Q. We fail to see how that is functionally different from a sale of property.

Furthermore, in *Danganan*, [HN12](#)[<sup>↑</sup>] our Supreme Court interpreted [Section 2\(3\) of the UTPCPL](#) as containing two *distinct and independent* clauses, the latter of which "does not modify or qualify the preceding [\*\*13] terms. [73 P.S. § 201-2\(3\)](#). Instead, [the second clause] is appended to the end of the [first clause's] definition and [is] prefaced by 'and includes,' thus indicating an inclusive and broader view of trade and commerce than expressed by the antecedent language." [\*Danganan, 179 A.3d at 16\*](#). Therefore, this second clause operates as a catch-all of sorts, enabling "'trade' and 'commerce'" to be defined in terms of common usage and not just, as argued by Appellants, through the narrower, more specific language of the first clause. See [1 Pa. C.S. § 1903\(a\)](#).<sup>9</sup> [\*\*58] "Pennsylvania courts generally use dictionaries as source material to determine the common and approved usage of terms not defined in statutes." [\*THW Grp., LLC v. Zoning Bd. of Adjustment, 86 A.3d 330, 343 \(Pa. Cmwlth. 2014\)\*](#). Consequently, we turn to Merriam-Webster's Dictionary, which defines "trade" and "commerce," in relevant part and respectively as, "the business of buying and selling or bartering commodities"<sup>10</sup> and "the exchange or buying and selling of commodities on a large scale involving transportation from place to place."<sup>11</sup>

Again, Appellants have, by virtue of leasing subsurface mineral rights, purchased time-limited rights to whatever natural gas is situated underneath the private landowners' properties. Thus, these transactions are, in the context of the UTPCPL, "'trade' [\*\*14] or 'commerce'."<sup>12</sup>

Having decided that Appellants' leases qualify under the Law as "'trade' or 'commerce,'" the question then becomes whether this type of activity can give rise to a UTPCPL action by the Attorney General. We find that it can. As noted

<sup>9</sup> [HN13](#)[<sup>↑</sup>] "Words and phrases shall be construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a peculiar and appropriate meaning or are defined in this part, shall be construed according to such peculiar and appropriate meaning or definition." [1 Pa. C.S. § 1903\(a\)](#).

<sup>10</sup> "Trade." Merriam-Webster.com. <https://www.merriam-webster.com/dictionary/trade> (last visited March 12, 2019).

<sup>11</sup> "Commerce." Merriam-Webster.com. <https://www.merriam-webster.com/dictionary/commerce> (last visited March 12, 2019).

<sup>12</sup> Because of our holding that these leases are "sales," within the context of [Section 2\(3\)](#)'s first clause, and "'trade' or 'commerce,'" within the context of [Section 2\(3\)](#)'s second clause, we do not address Appellants' argument that the Trial Court erred in ruling that the leases constitute "'trade' or 'commerce'" because they qualify as "distribution of services."

above, [HN14](#)<sup>12</sup> the UTPCPL states that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce as defined by subclauses (i) through (xxi) of [73 P.S. § 201-2] and regulations promulgated under [73 P.S. § 201-3.1] are hereby declared unlawful." [73 P.S. § 201-3](#). The key phrase here is "in the conduct," which, when read in the full context of the language used in [Section 3 of the UTPCPL](#), pertains to all "[u]nfair methods of competition and unfair or deceptive acts or practices" connected to UTPCPL-defined "'trade' or 'commerce'," regardless of who is committing these unlawful acts.

Additionally, [HN15](#)<sup>13</sup> while the UTPCPL places restrictions on the ability of private parties to file suit,<sup>13</sup> the Law creates no such [\[\\*59\]](#) impediment for the Attorney General. Instead, the Attorney General is imbued with the express authority to file suit against "any person," whenever the Attorney General determines that such a person "is using or is about to use any method, act or practice declared [\[\\*\\*15\]](#) by [\[73 P.S. § 201-3\]](#) to be unlawful, and that proceedings would be in the public interest[.]" [73 P.S. § 201-4](#). [Section 2\(2\) of the Law](#) defines "person" as "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entities." *Id.* at [§ 201-2\(2\)](#). Given that the Appellants are comprised of various corporations and other legal entities, they are thus subject to suit under the UTPCPL.

Tying this all together, the Attorney General has asserted that Appellants, which are UTPCPL-classified "persons," have operated deceptively, misleadingly, and unfairly "in the conduct of any trade or commerce" (i.e., the leasing of subsurface mineral rights from private landowners). Second Amended Complaint at [\[\\*\\*17\]](#) 1-4, 29-78, 82-105; [73 P.S. § 201-3](#); see [73 P.S. § 201-2\(4\)\(xxi\)](#) (defining "[u]nfair methods of competition" and 'unfair or deceptive acts or practices'[.]' in relevant part, as "[e]ngaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding"). Therefore, the Attorney General has stated legally viable claims against Appellants. For these reasons, we hold that the Trial Court properly overruled Appellants' demurrers that their behavior in securing these leases was not actionable under the UTPCPL.

### The Attorney General's Antitrust Actions under the UTPCPL

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<sup>13</sup> [Sections 7\(a\)](#) and [9.2\(a\)-\(b\) of the UTPCPL](#) limit private actions to those initiated by buyers, consumers, and lessees:

(a) Where goods or services having a sale price of twenty-five dollars (\$25) or more are sold or contracted to be sold to a buyer, as a result of, or in connection with, a contact with or call on the buyer or resident at his residence either in person or by telephone, that consumer may avoid the contract or sale by notifying, in writing, the seller within three full business days following the day on which the contract or sale was made and by returning or holding available for return to the seller, in its original condition, any merchandise received under the contract or sale. Such notice of rescission shall be effective upon depositing the same in the United States mail or upon other service which gives the seller notice of rescission.

[73 P.S. § 201-7\(a\).](#)

(a) Any person who purchases or leases goods or services primarily [\[\\*\\*16\]](#) for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by [\[73 P.S. § 201-3\]](#), may bring a private action to recover actual damages or one hundred dollars (\$100), whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained, but not less than one hundred dollars (\$100), and may provide such additional relief as it deems necessary or proper. The court may award to the plaintiff, in addition to other relief provided in this section, costs and reasonable attorney fees.

(b) Any permanent injunction, judgment or order of the court made under [\[73 P.S. § 201-4\]](#) shall be prima facie evidence in an action brought under [\[73 P.S. § 201-9.2\]](#) that the defendant used or employed acts or practices declared unlawful by [\[73 P.S. § 201-3\]](#).

Appellants argue that the Trial Court erred in ruling that the Attorney General could use the UTPCPL to pursue claims against them that were rooted in alleged violations of antitrust law. Appellants note that the UTPCPL "does not prohibit joint ventures or in any way purport to regulate or penalize agreements among businesses[.]" such as those entered into by Appellants during their efforts to secure the aforementioned leases. Appellants' Br. at 13-14, 29. Instead, Appellants assert that the Attorney General is simply attempting to "retroactively and unilaterally" rewrite the UTPCPL, in order to get around the General [\*\*18] Assembly's repeated failure to pass an antitrust statute, and the fact that damages are not recoverable under Pennsylvania antitrust common law. *Id.* at 13-14, 27-32.

According to Appellants, "[n]either the 'trade or commerce' definition in [\[73 P.S.\] § 201-2\(3\)](#) nor the catchall provision in [\[73 P.S.\] § 201-2\(4\)\(xxi\)](#) addresses agreements between market participants or in any other way purports to regulate competition." *Id.* at 29. Appellants note that the UTPCPL contains specific statutory definitions of "unfair methods of competition" and "unfair or deceptive acts or practices" [\*60] that do not include joint venture agreements, such as the kind in which Appellants were involved. Appellants' Reply Br. at 16-17. Appellants opine that this is what differentiates the UTPCPL from federal antitrust statutes such as the [Federal Trade Commission \(FTC\) Act, 15 U.S.C. §§ 41-58](#), which contains no definition of "unfair methods of competition" and "unfair or deceptive acts or practices" and, thus, renders unlawful a far broader swath of activities than the UTPCPL.<sup>14</sup> *Id.* at 16-18. Consequently, Appellants conclude that the General Assembly's intent that the UTPCPL be liberally construed should not be interpreted in a way that disregards the plain language of the Law or permits the creation of antitrust provisions [\*\*19] that are not explicitly contained within the UTPCPL. Appellants' Br. at 32-33.

We agree with Appellants that [HN16](#)[] the UTPCPL is not designed to render *all* antitrust violations actionable and that the scope of actionable antitrust behavior under the UTPCPL is narrower than under federal antitrust law. As we have already noted, the UTPCPL provides two avenues through which activities can be declared "unfair methods of competition" or "unfair or deceptive acts or practices." First, the General Assembly may define a given activity as unlawful by statute in [Section 2\(4\) of the Law](#). Second, the Attorney General, by virtue of [Section 3.1 of the Law](#), may also promulgate definitions of these terms through the administrative rulemaking process. [73 P.S. § 201-3.1](#). Given that neither the Attorney General nor the General Assembly has thus far used their powers to expressly define monopolistic behavior, joint ventures, or market sharing agreements as examples of "unfair methods of competition" or "unfair or deceptive acts or practices," we find that such activities are not *per se* unlawful for purposes of the UTPCPL. Consequently, the only manner in which these activities can give rise to viable UTPCPL actions is if they fit within one of the [\*\*20] categories of behavior deemed, by rule or in the Law itself, "unfair methods of competition" or "unfair or deceptive acts or practices."

The Attorney General's Second Amended Complaint contains two claims which allege antitrust violations by Appellants under the UTPCPL. The first can be discerned in Count III, in which the Attorney General asserts that Appellants' allegedly unlawful joint venture and market sharing agreements violated the UTPCPL through "impairment of choice and the competitive process[.]" Second Amended Complaint at 65-67. According to the Attorney General, these agreements "created the likelihood of confusion and misunderstanding" amongst the private landowners under whose land the desired natural gas was situated, by eliminating the prospect of competition between potential lessees and depressing the amount of compensation the landowners received in return for leasing their land to Appellants. *Id.* at 66-70.

Thus, the Attorney General essentially argues through Count III that Appellants' joint venture and market sharing agreements *intrinsically* violated the UTPCPL. As we have already explained, the plain terms of the UTPCPL do not support such a conclusion. Rather, the Attorney [\*\*21] General's claim that the mere existence of these business dealings created "impairment of choice and the competitive process" is insufficient and does not enable Count III to fit within any of the 21 categories of "unfair methods of competition" or "unfair or deceptive acts or practices" listed in [Section 2\(4\) of the Law](#). [\*61] Furthermore, the Attorney General has thus far declined to deem joint ventures or market sharing agreements as "unfair methods of competition" or "unfair or deceptive acts or practices" under the

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<sup>14</sup> [Section 5 of the FTC Act](#) merely states: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." [15 U.S.C. § 45\(a\)\(1\)](#).

UTPCPL through the administrative rulemaking process. Consequently, the Attorney General has failed to state a viable UTPCPL-based antitrust claim in Count III, and, therefore, the Trial Court erred by overruling Appellants' demurrers to Count III of the Attorney General's Second Amended Complaint.

The second UTPCPL-based antitrust claim can be discerned in Count IV, in which the Attorney General argues that Appellants deceived and acted unfairly towards private landowners by giving them misleading information, and/or failing to disclose information, regarding the open market's true appetite for subsurface mineral rights leases, as well as whether the terms of the agreed-to leases "were **[\*\*22]** competitive and fair." *Id.* at 72-76.

With regard to Count IV, however, we find that the Attorney General has articulated a legally viable UTPCPL claim. The Attorney General's assertions in Count IV regarding Appellants' allegedly disingenuous and misleading behavior brings that claim within the ambit of [Section 2\(4\)\(xxi\) of the Law](#), which defines "[u]nfair methods of competition" and "unfair or deceptive acts or practices" as "[e]ngaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding." [73 P.S. § 201-2\(4\)\(xxi\)](#). Hence, the Trial Court did not err by overruling Appellants' demurrers to Count IV of the Attorney General's Second Amended Complaint.

## **Conclusion**

In summation, we hold that the Attorney General was permitted to file a UTPCPL-based lawsuit against Appellants, but can only pursue antitrust claims through the UTPCPL where the so-called "antitrust" conduct qualifies as "unfair methods of competition" or "unfair or deceptive acts or practices," as those terms have been either statutorily defined in the UTPCPL or by the Attorney General through the administrative rulemaking process. Thus, in light of the requirement that, in order to sustain a demurrer, "it must appear with **[\*\*23]** certainty that the law will permit no recovery, and any doubt must be resolved in favor of the non-moving party[.]" [Christ the King Manor, 911 A.2d at 633](#), we reverse the Trial Court regarding its decision to overrule Appellants' demurrers to Count III of the Attorney General's Second Amended Complaint, but otherwise affirm the Trial Court. Furthermore, we direct Appellants to each file an Answer to the Second Amended Complaint within 20 days of this matter's record being returned to the Trial Court.<sup>15</sup>

ELLEN CEISLER, Judge

Judges Brobson and McCullough concur in result only.

Judge Fizzano Cannon did not participate in the decision of this case.

## **[\*62] ORDER**

AND NOW, this 15th day of March, 2019, the December 15, 2017 order of the Court of Common Pleas of Bradford County (Trial Court) is AFFIRMED IN PART, regarding the Trial Court's ruling that Appellee Commonwealth of Pennsylvania, Office of Attorney General (Attorney General), may bring causes of action under the [Unfair Trade Practices and Consumer Protection Law \(UTPCPL\), Act](#) of December 17, 1968, P.L. 1224, as amended, [73 P.S. §§ 201-1-201-9.3](#), against Appellants Anadarko Petroleum Corporation; Anadarko E&P Onshore LLC; Chesapeake Energy Corporation; Chesapeake Appalachia, LLC; Chesapeake Operating, **[\*\*24]** LLC; and Chesapeake Energy

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<sup>15</sup>We note that Chesapeake filed an Application for Relief on September 14, 2018, bringing to our attention the Attorney General's August 11, 2018, draft proposed UTPCPL rulemaking, through which the Attorney General, in relevant part, articulated its desire to define "sale" as encompassing both selling and purchasing, as well as to define "unfair methods of competition and unfair or deceptive acts or practices" as including market sharing agreements. Chesapeake's Application for Relief at 2-4; *id.*, Ex. A at 12-13. Chesapeake requests that we "take judicial notice of the Attorney General's admissions in the [d]raft [p]roposed [r]ulemaking that the UTPCPL does not 'clearly' or 'plainly' authorize claims against buyers like Chesapeake or provide a cause of action based on alleged market allocation arrangements." Application for Relief at 4-5. In keeping with our broader holding in this matter, we deny Chesapeake's Application for Relief.

Marketing, LLC (collectively Appellants), and has stated a legally viable UTPCPL claim in Count IV of its Second Amended Complaint, and REVERSED IN PART, regarding the Trial Court's ruling that the Attorney General has stated a legally viable UTPCPL claim in Count III of its Second Amended Complaint.

It is FURTHER ORDERED that Chesapeake Energy Corporation, Chesapeake Appalachia, LLC, Chesapeake Operating, LLC, and Chesapeake Energy Marketing, LLC's Application for Relief is DENIED.

It is FURTHER ORDERED that this matter is REMANDED to the Trial Court. Appellants shall have twenty (20) days, calculated from the date this matter's record is returned to the Trial Court, in which to file Answers to the Attorney General's Second Amended Complaint.

Jurisdiction relinquished.

ELLEN CEISLER, Judge

**Dissent by:** ANNE E. COVEY

## Dissent

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### CONCURRING AND DISSENTING OPINION BY JUDGE COVEY

I concur with the Majority that the Bradford County Common Pleas Court (trial court) erred by overruling the demurrers of Anadarko Petroleum Corporation and Anadarko E&P Onshore LLC, Chesapeake Energy Corporation, Chesapeake Appalachia, LLC, Chesapeake Operating, LLC, and Chesapeake Energy Marketing, LLC (Chesapeake **[\*\*25]** Appellants), (collectively, Appellants) to Count III of the Attorney General's Second Amended Complaint. However, I do not agree that the Attorney General has stated legally viable claims against Appellants, as lessees, under the Unfair Trade Practices and Consumer Protection Law (UTPCPL).<sup>1</sup> Because the Majority manipulates the language of the UTPCPL for a purpose the General Assembly never intended and, as a result, Appellants find themselves facing liability for conduct that, prior to the Majority's pronouncement, neither Appellants (nor anyone else) could have foreseen would be considered a violation of state law, I respectfully dissent from those portions of the Majority opinion.

The UTPCPL is a **consumer** protection statute. The Pennsylvania Supreme Court has recognized that

[t]he UTPCPL was created to even the **bargaining power between consumers and sellers** in commercial transactions, and to promote that objective, **it aims to protect the consumers** of the Commonwealth against fraud and unfair or deceptive business practices. As a remedial statute, it is to be construed liberally to effectuate **that goal**.

*Commonwealth v. Golden Gate Nat'l Senior Care LLC*, 194 A.3d 1010, 1023 (Pa. 2018) (citation omitted; bold and underline emphasis added).

In *Meyer v. Community College of Beaver County*, 625 Pa. 563, 93 A.3d 806 (Pa. 2014), our Supreme **[\*\*26]** Court explained, "the **[\*63]** legislature enacted the UTPCPL to account for the fundamental inequality between buyer and seller, and to **protect consumers from exploitative merchants**." *Id.* at 814 (bold and italic emphasis added). In *Commonwealth v. Monumental Properties, Inc.*, 459 Pa. 450, 329 A.2d 812 (Pa. 1974), the Pennsylvania Supreme Court stated that

the [UTPCPL] was designed **to equalize the market position and strength of the consumer vis-a-vis the seller**. A perception of unfairness led the Legislature to regulate more closely market transactions. The

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<sup>1</sup> Act of December 17, 1968, P.L. 1224, as amended, [73 P.S. §§ 201-1 - 201-9.3](#).

**mischief to be remedied was the use of unfair or deceptive acts and practices by sellers.** As part of the [UTPCPL's] object, fraudulent conduct that would mislead or confuse a **consumer** was banned.

*Id. at 820* (bold and italic emphasis added). The *Monumental Properties* Court recognized: "The Legislature directed that **consumers** were to be safeguarded by the [UTPCPL]. . . . [T]enants are in every meaningful sense consumers." *Id. at 826* (emphasis added).

Based thereon, the Majority acknowledges that lessee Appellants are **purchasers**, i.e., consumers of "time-limited rights to whatever natural gas is situated underneath the private landowners' properties."<sup>2</sup> Majority Op. at 10-11; see also Majority Op. at 9 (recognizing that the lease transactions are not "functionally **[\*\*27]** different from a sale of property"). Conversely, the private landowners were sellers in the subject transactions.

Appellants correctly observe:

No court has ever interpreted the UTPCPL as authorizing a claim by or on behalf of a seller *against* a person who acquires something from the seller or as separately authorizing a right of action against a person simply because that person is involved in any form of commercial transaction.<sup>3</sup>

Chesapeake Appellants' Br. at 25.

*Section 3 of the UTPCPL* declares unlawful "[u]nfair methods of competition **[\*64]** and unfair or deceptive acts **[\*\*28]** or practices in the conduct of any trade or commerce . . . ." *73 P.S. § 201-3. Section 2(3) of the UTPCPL*. *Section 2(3) of the UTPCPL* defines "trade" and "commerce" as "the advertising, **offering for sale, sale or distribution** of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, **and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth.**" *73 P.S. § 201-2(3)* (emphasis added). Notwithstanding that *Section 2(3) of the UTPCPL* specifically defines trade or commerce as "offering for sale, sale or distribution" (i.e., the act of **selling**), the Majority, citing to the Pennsylvania Supreme Court's decision in *Danganan v. Guardian Protection Services, 179 A.3d 9 (Pa. 2018)*, interprets the definition's second clause (which describes but does not limit what selling includes) to apply to the act of **purchasing**. The Majority misreads *Danganan*.

The issue before the Court in *Danganan* was whether a non-Pennsylvania resident could maintain a cause of action against a Pennsylvania-headquartered business, based on out-of-state transactions. The Court considered the text of *Section 2(3) of the UTPCPL*, explaining that

<sup>2</sup> The Attorney General acknowledged in the Second Amended Complaint:

An oil and gas lease is a misnomer as it operates as a fee simple determinable for the mineral estate[;] [a] fee simple determinable for the mineral estate operates to sever the ownership of certain minerals from the ownership of the surface of the land[; and t]he mineral estate **conveyed by Pennsylvania Landowners** typically includes all geologic horizons including, but not limited to, Marcellus Shale and Utica Shale.

Second Amended Complaint, ¶¶ 77-79, Reproduced Record at 980a (emphasis added).

<sup>3</sup> The UTPCPL describes **only** unlawful activity by a **seller, and provides protections for buyers**. See, e.g., *Section 2(4) of the UTPCPL, 73 P.S. § 201-2(4)* (defining "[u]nfair methods of competition" and "unfair or deceptive acts or practices"); see also Section (5) of the UTPCPL, *73 P.S. § 201-5* (permitting the Attorney General to accept an assurance of voluntary compliance by stipulation "for voluntary payment by the alleged violator providing for the restitution by the alleged violator **to consumers**, of money, property or other things received from them in connection with a violation of [the UTPCPL]." (emphasis added)); *Section 7 of the UTPCPL, 73 P.S. § 201-7* (providing **buyers** under a contract for \$25 or more, a 3-day cancellation period, requiring particular information and notice to be provided to the buyer, and requiring a seller to honor such cancellation within 10 business days); *Section 9.2 of the UTPCPL*, as amended, added by *Section 1 of the Act of November 24, 1976, P.L. 1166, 73 P.S. § 201-9.2* (creating a private cause of action for "[a]ny person who **purchases or leases** goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal" by a UTPCPL violation) (emphasis added); *Section 9.3 of the UTPCPL*, as amended, added by *Section 1 of the Act of June 25, 1997, P.L. 287, 73 P.S. § 201-9.3* (providing dog **purchaser protection** and imposing obligations on the seller).

the plain language definitions of 'person' and 'trade' and 'commerce' evidence no geographic limitation or residency requirement relative to the [UTPCPL's] **[\*\*29]** application. **Although the trade and commerce definition includes a clause relating to conduct that 'directly or indirectly affect[s] the people of this Commonwealth,' that phrase does not modify or qualify the preceding terms.** [73 P.S. § 201-2\(3\)](#). Instead, it is appended to the end of the definition and prefaced by 'and includes,' thus indicating an inclusive and broader view of trade and commerce than expressed by the antecedent language. See *id.* (defining those terms as 'the advertising, offering for sale, sale or distribution of any services and any property, . . . and any other article, commodity, or thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth').

[Danganan, 179 A.3d at 16](#) (emphasis added). The *Danganan* Court held that, given the General Assembly's use of the words "and includes," the second clause description **did not limit** the first clause only to "trade or commerce directly or indirectly affecting the people of this Commonwealth." [73 P.S. § 201-2\(3\)](#). Because the UTPCPL describes "the advertising, offering for sale, sale or distribution of any services and any property" to **include** "any trade or commerce affecting the people of this Commonwealth[.]" it **[\*\*30]** is logical that the Supreme Court did not read the first clause to apply to **only** "trade or commerce affecting the people of this Commonwealth." [73 P.S. § 201-2\(3\)](#).

Here, the Majority incorrectly construes *Danganan* to justify its disregard of the first clause in the UTPCPL's definition of "trade" or "commerce." Rather than concluding that the first clause is not limited by the second, as the Supreme Court in *Danganan* did, the Majority concludes that the second clause is not limited by the first. This interpretation completely ignores the General Assembly's use of the words "and includes" and renders the first clause unnecessary. [73 P.S. § 201-2\(3\)](#). Perhaps best demonstrating the error of the Majority's approach, the Majority consults the dictionary for the definition of "trade" and "commerce" notwithstanding that the UTPCPL already defines "trade" and "commerce" in the first clause. "The legislature may create its own dictionary, and its definitions may be different from **[\*65]** ordinary usage. **When it does define the words used in a statute, the courts** need not refer to the technical meaning and derivation of those words as given in dictionaries, but **must accept the statutory definitions.**" [Commonwealth v. Massini, 200 Pa. Super. 257, 188 A.2d 816, 817 \(Pa. Super. 1963\)](#) (emphasis added); see also [Commonwealth v. Lobiondo, 501 Pa. 599, 462 A.2d 662, 664 \(Pa. 1983\)](#). Here, **[\*\*31]** although the statute defines the terms "trade" and "commerce," the Majority nevertheless disregards the statutory definition in favor of the dictionary definition, which it may not do. By ignoring this well-established principle, the Majority erroneously concludes that the UTPCPL "pertains to all '[u]nfair methods of competition and unfair or deceptive acts or practices' connected to UTPCPL-defined 'trade' or 'commerce,'" **regardless of who is committing these unlawful acts[.]**" and authorizes a UTPCPL action against Appellants, the **consumers** in the commercial transaction. Majority Op. at 11 (bold emphasis added).

I believe that the Majority misconstrues the terms "trade" and "commerce" as used in [Section 2\(3\) of the UTPCPL](#) in a way that is wholly inconsistent with the UTPCPL's legislative purpose. Thereby, the Majority holds that the UTPCPL, a consumer protection statute intended to bolster consumers' bargaining powers, can authorize legal action **against a purchaser**. "It is a primary canon of construction that statutes must be construed in such a way as to effectuate the legislative purpose and policy." [Commonwealth v. Wanamaker, 450 Pa. 77, 296 A.2d 618, 623 \(Pa. 1972\)](#). "The most basic tenet of statutory construction is that a **court must effectuate the intent of the General Assembly** **[\*\*32]** ." [Gardner v. Workers' Comp. Appeal Bd. \(Genesis Health Ventures\), 585 Pa. 366, 888 A.2d 758, 761 \(Pa. 2005\)](#) (emphasis added). The Majority's holding completely ignores the legislative purpose and erroneously relies on a dictionary definition, thereby undermining the General Assembly's intent. Consequently, the Majority has overstepped its authority by ignoring the statutory definition of "trade" or "commerce" and substituting a definition that directly conflicts with the legislature's purpose to protect **consumers**.

Further, the Majority's "trade" and "commerce" interpretation conflicts with Pennsylvania Superior Court decisions [Schwarzwaelder v. Fox, 2006 PA Super 61, 895 A.2d 614 \(Pa. Super. 2006\)](#) and [DeFazio v. Gregory, 2003 PA Super 418, 836 A.2d 935 \(Pa. Super. 2003\)](#), wherein the Court held that the UTPCPL served to protect buyers rather than sellers. The *Schwarzwaelder* Court held that where plaintiffs did not purchase from the defendant, the UTPCPL is inapplicable.

Recently, the Pennsylvania Superior Court explained:

The UTPCPL is for **consumer** protection. It undoes the ills of sharp business dealings by vendors, who, as here, may be counseling consumers in very private, highly technical concerns. . . . [T]hose consumers may be especially reliant upon a vendor's specialized skill, training, and experience in matters with which consumers have little or no expertise. **Therefore, the legislature has placed the duty of UTPCPL [\*\*33] compliance squarely and solely on vendors; they are not to engage in deceitful conduct and have no legally cognizable excuse, if they do.**

[Gregg v. Ameriprise Fin., Inc., 2018 PA Super 252, 195 A.3d 930, 940 \(Pa. Super. 2018\)](#) (bold and italic emphasis added). Although Schwarzwaelder, DeFazio and Gregg involved lawsuits by private parties rather than the Attorney General, all such actions are confined to the UTPCPL's definition of "trade" and "commerce," which applies both to actions by the Attorney General and by private **[\*66]** parties. Thus, the aforementioned cases are instructive.

By imposing a **consumer** protection statute's restrictions, prohibitions and burdens **on consumers**, the Majority's analysis and ruling is a gross misinterpretation and misapplication of the UTPCPL. Such ruling is inconsistent with the UTPCPL's statutory purpose, creates a never-intended or anticipated UTPCPL cause of action that is completely contrary to the General Assembly's intent, and creates a dangerous precedent.

With respect to Count IV, the second UTPCPL-based antitrust claim, the Second Amended Complaint alleges therein that Appellants violated the UTPCPL:

- a. Each time a[n Appellant] failed to disclose the existence of the joint venture agreement, the market allocation agreement and the option **[\*\*34]** of the other [Appellant] to acquire an interest in the lease in the course of negotiating an oil and gas lease with a Pennsylvania Landowner within the area of mutual interest covering the Marcellus Shale gas play;
- b. Each time a Pennsylvania Landowner received an artificially deflated acreage signing bonus from a[n Appellant]; and
- c. Each time a Pennsylvania Landowner received an artificially deflated royalty from a[n Appellant].

Reproduced Record (R.R.) at 1034a-1035a. The Majority concludes that the claim which clearly targets an alleged restraint of trade falls "within the ambit of [Section 2\(4\)\(xxi\) of the Law](#),<sup>4</sup>" given the "Appellants' allegedly disingenuous and misleading behavior . . ." Majority Op. at 16.<sup>5</sup>

Appellants properly argue:

The UTPCPL does not provide on its face any remedy for alleged antitrust violations. . . . Neither the 'trade or commerce' definition in [\[Section\] 2\(3\) of the UTPCPL](#), nor the catchall provision in [\[Section\] 2\(4\)\(xxi\) of the UTPCPL](#) addresses agreements between market participants or in any other way purports to regulate competition.

Chesapeake Appellants' Br. at 29. Appellants also correctly observe that the "Pennsylvania General Assembly has tried **24 times** to pass an antitrust statute that would **[\*\*35]** have provided a remedy for alleged anticompetitive practices since the enactment of the UTPCPL in 1968, but each time the measure has failed."<sup>6</sup> Chesapeake **[\*67]** Appellants' Br. at 30-31; see also, R.R. at 675a.

<sup>4</sup> [73 P.S. § 201-2\(4\)\(xxi\).](#)

<sup>5</sup> For the reasons previously discussed, I believe that Count IV of the Second Amended Complaint must also be dismissed since Appellants' conduct, as purchasers, does not fall within the UTPCPL's definition of "trade" and "commerce."

<sup>6</sup> Appellants' exhibit listed **25** bills. The last bill, Senate Bill 578 of 2015, was described as still pending. On August 29, 2017, Senator Greenleaf reintroduced Senate Bill 578 of 2015 as Senate Bill 858 P.N. 1122 of 2017 (Senate Bill 858), and it was

There is no dispute that the General Assembly has not enacted a state antitrust statute. By affirming the trial court's decision to overrule Appellants' demurrers to Count IV, the Majority erroneously interprets the UTPCPL to create a statutory prohibition unapproved by the General Assembly, and wields that unauthorized and un-enacted prohibition to punish **consumers** under the purported authority of a **consumer** protection statute. This is judicial overreach.

"[C]ourts may not legislate[.]" Willman v. Children's Hosp. of Pittsburgh, 74 Pa. Commw. 67, 459 A.2d 855, 858 (Pa. Cmwlth. 1983), aff'd, 505 Pa. 263, 479 A.2d 452 (Pa. 1984); see also Spectrum Arena Ltd. P'ship v. Commonwealth, 603 Pa. 180, 983 A.2d 641 (Pa. 2009); Benson v. Patterson, 574 Pa. 346, 830 A.2d 966 (Pa. 2003); Martin v. Soblotney, 502 Pa. 418, 466 A.2d 1022 (Pa. 1983); Pa. State Police, Bureau of Liquor Control Enft v. Can, Inc., 651 A.2d 1160 (Pa. Cmwlth. 1994). "[I]t is not the role of the judiciary to legislate changes in the law which our legislature has declined to adopt." Garney v. Estate of Hain, 439 Pa. Super. 42, 653 A.2d 21, 21 (Pa. Super. 1995) (emphasis added).

[An appellate] court is constrained from [legislating] by the nature of the judicial role in our governmental system. We are not the promulgator of statutory law, only its interpreter. We seek to divine the intent of the legislature and apply it in a given situation. Judges [\*\*37] who overstep the bounds of their authority become Platonic Commissioners, a role which is anathema to our democratic system.

In Interest of R.M.R., 366 Pa. Super. 243, 530 A.2d 1381, 1389-90 (Pa. Super. 1987). "[An appellate court's] role is to interpret the laws as enacted by the General Assembly." Williams v. GEICO Gov't Emps. Ins. Co., 613 Pa. 113, 32 A.3d 1195, 1209 (Pa. 2011).<sup>7</sup> As then-Chief Justice Castille recognized in his dissent in Commonwealth v.

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referred to the Senate Judiciary Committee on the same date. Thus, there have been 26 attempts — none yet successful. Senator Greenleaf's May 26, 2017 Memorandum describing Senate Bill 858 provides in pertinent part:

In consultation with the Office of Attorney General, I am reintroducing **Senate Bill 578**, a comprehensive **antitrust law**. . . .  
....

The legislation authorizes only the Attorney General to file a civil action for an antitrust violation. The purpose of the law is to allow for a full and fair recovery to satisfy claims arising from an antitrust injury sustained by the Commonwealth and its residents and to provide the investigative tools to satisfactorily achieve this objective. The language is derived from other states' statutes and federal law.

*The legislation is intended to make illegal any contract, conspiracy or combination in restraint of trade and any monopolization in restraint of trade.* The legislation also makes illegal any mergers or acquisitions that lessens competition substantially in any line of commerce. The legislation provides for criminal penalties for obstructing compliance with a subpoena and for knowingly removing or falsifying documents to be produced. Any such obstruction [\*\*36] or falsification constitutes a misdemeanor of the second degree.

The legislation incorporates exemptions that are judicially recognized under federal antitrust laws. The Commonwealth Court would have original jurisdiction for all actions for violations of the statute.

<https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20170 &cosponId=24006> (last visited March 8, 2019) (italic emphasis added).

This memorandum explicitly acknowledges that there is currently no state antitrust statute and, thus, "contract, conspiracy or combination in restraint of trade and any monopolization in restraint of trade" are not currently prohibited under state law. *Id.*

<sup>7</sup> The Pennsylvania Supreme Court emphasized:

'Judicial power, as [\*\*38] contra distinguished from the power of the laws, has no existence. Courts are mere instruments of the law and can will nothing. . . . Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; in other words, to the will of the law.' Osborn v. President, Dir[s.] & J. Col. of the Bank of the U.S.] (Chief Justice Marshall), 9 Wheaton 738, 866, 22 U.S. 738, 6 L.Ed. 204 (U.S. 1824). The situation complained of may only be cured by the legislature. It is not for us to legislate or by interpretation to add to legislation matters which the legislature saw fit not to include.

Wilgus, 615 Pa. 32, 40 A.3d 1201, 1209 (Pa. 2012) (Castille, C.J., dissenting), "[t]he consequences of statutory interpretation can affect citizens in a myriad of ways, including: their professions and business relationships, [\*\*68] their property, their personal wealth, their freedom of movement, and most seriously, their very freedom itself." The United States Supreme Court has explained that "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." Fed. Commc'n's Comm'n v. Fox Television Stations, Inc., 567 U.S. 239, 253, 132 S. Ct. 2307, 183 L. Ed. 2d 234 (2012). I find it unconscionable that as the direct result of the Majority's decision, Appellants may be retroactively liable for engaging in conduct that was not considered to be violative of state law at the time such activities occurred. For these reasons, I would also hold that the trial court erred by overruling Appellants' demurrers to Count IV of the Attorney General's Second Amended Complaint.

I, therefore, respectfully dissent from those portions of the Majority opinion. \_\_

ANNE E. COVEY, Judge

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## Krukas v. AARP, Inc.

United States District Court for the District of Columbia

March 17, 2019, Decided

Civil Action No. 18-1124 (BAH)

### **Reporter**

376 F. Supp. 3d 1 \*; 2019 U.S. Dist. LEXIS 43023 \*\*; 2019 WL 1243864

HELEN KRUKAS, Plaintiff, v. AARP, Inc., et al., Defendants.

**Subsequent History:** Claim dismissed by, Without prejudice [Krukas v. AARP, Inc., 458 F. Supp. 3d 1, 2020 U.S. Dist. LEXIS 79642 \(D.D.C., May 6, 2020\)](#)

Summary judgment granted by, Dismissed by, Class certification denied by, As moot [Krukas v. Aarp, Inc., 2021 U.S. Dist. LEXIS 211105 \(D.D.C., Nov. 2, 2021\)](#)

## **Core Terms**

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premiums, alleges, defendants', consumers, royalty, filed-rate, rates, policies, regulated, quotation, marks, misrepresentation, solicitation, collected, challenges, misleading, renewed, advertising, entity, plaintiff's claim, cases, damages, deceptive, coverage, licensed, parties, disclosure, courts, alterations

**Counsel:** [\[\\*\\*1\]](#) For HELEN KRUKAS, on behalf of herself and all others similarly situated, Plaintiff: Jason Samuel Rathod, LEAD ATTORNEY, Nicholas A. Migliaccio, MIGLIACCIO & RATHOD LLP, Washington, DC; Brett H. Cebulash, PRO HAC VICE, Tess Bonoli, PRO HAC VICE, Kevin S. Landau, TAUS, CEBULASH & LANDAU, LLP, New York, NY; David A. Goodwin, PRO HAC VICE, GUSTAFSON GLUEK PLLC, Minneapolis, MN.

For AARP, AARP SERVICES INC., AARP INSURANCE PLAN, Defendants: Alec W. Farr, LEAD ATTORNEY, BRYAN CAVE LEIGHTON PAISNER LLP, Washington, DC; Heather Shaw Goldman, BRYAN CAVE LEIGHTON PAISNER, LLP, Washington, DC; Jeffrey S. Russell, PRO HAC VICE, BRYAN CAVE LEIGHTON PAISNER, LLP, St. Louis, MO.

**Judges:** BERYL A. HOWELL, Chief United States District Judge.

**Opinion by:** BERYL A. HOWELL

## **Opinion**

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### **[\*9] MEMORANDUM OPINION**

The plaintiff, Helen Krukas, individually, and on behalf of all others similarly situated (except for individuals residing in California), as well as the general public, brings this putative class action against the defendants, AARP Inc., ("AARP"), AARP Services Inc. ("ASI"), and AARP Insurance Plan ("AARP Trust") (collectively referred to as "AARP"), alleging a violation of the [Washington D.C. Consumer Protection Procedures Act \("CPPA"\), D.C. Code § 28-3901 et seq.](#) [\[\\*\\*2\]](#), as well as common law violations of conversion, unjust enrichment, and fraudulent concealment, based on her purchase of a Medicare supplemental health insurance policy, also known as a

"Medigap" policy, administered by AARP. See Compl. ¶¶ 1, 16, 17, 88, ECF No. 1. These statutory and common law claims are predicated on the plaintiff's allegations that she was "fooled into paying AARP an undisclosed 4.95% commission" when purchasing her Medigap policy and, since "AARP is not licensed as an insurance broker or agent," the defendants "may not legally collect these commissions." *Id.* ¶ 1. Pending before the Court is the defendants' Motion to Dismiss for failure to state a claim upon which relief can be granted under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). See Defs.' Mot. to Dismiss & Mem. in Supp. ("Defs.' Mem."), ECF No. 8.<sup>1</sup> For the reasons set forth below, the defendants' motion is denied.<sup>2</sup>

## I. BACKGROUND

The plaintiff challenges AARP's role in soliciting, marketing, and administering Medigap policies, a state-regulated form of health insurance to supplement Medicare. Since at least 1997, AARP has held, in its name, group Medigap policies underwritten by UnitedHealth Group and UnitedHealthcare Insurance Company (collectively, "UnitedHealth") and offered participation in those group policies to individual AARP members and the general public. See Compl. ¶¶ 22, 37, 51. The plaintiff alleges that AARP's administration and provision of other services in support of these group Medigap policies amounted to acting as an unlicensed insurance agent, that the "royalties" paid to AARP as a percentage of premiums constituted illegal commissions, and that AARP materially misrepresented the nature and source of the "royalties," causing consumers to pay more for AARP Medigap policies **[\*\*3]** than they otherwise would. See Compl. ¶¶ 4-15. The following discussion **[\*10]** provides a general overview of Medigap policies and summarizes the plaintiff's allegations, claims against AARP, and desired relief.

### A. Medigap Policies Generally

A Medigap policy is insurance offered by a private insurer to help pay for certain "gaps" in Medicare coverage. See [United States v. Blue Cross & Blue Shield of Md., Inc., 989 F.2d 718, 721 \(4th Cir. 1993\)](#) (citing [Pub. L. No. 96-265, § 507, 94 Stat. 441, 476](#) (codified as amended at [42 U.S.C. § 1395ss](#))). The Centers for Medicare and Medicaid Services has described a Medigap policy as "health insurance [sold by private insurance companies that] can help pay some of the health care costs that Original Medicare doesn't cover, like coinsurance, copayments, or deductibles." CTRS. FOR MEDICARE & MEDICAID SERVS., CHOOSING A MEDIGAP POLICY: A GUIDE TO HEALTH INSURANCE FOR PEOPLE WITH MEDICARE 5 (2019), <https://www.medicare.gov/Pubs/pdf/02110-Medicare-Medigap-guide.pdf> [hereinafter "CMS Medigap Guide"]; see also Compl. ¶ 29 ("Medigap plans offer extra coverage to Medicare beneficiaries . . . such as first-dollar coverage and reduced co-payment and deductibles.").<sup>3</sup> "Each standardized Medigap policy must offer the same basic benefits, no matter which insurance company sells it. Cost is usually the only difference between **[\*\*4]** [standardized] Medigap policies . . . sold by different insurance

<sup>1</sup> At the parties' request, the deadline to seek class certification has been tolled until resolution of the defendants' pending Motion to Dismiss. See Min. Order (Aug. 9, 2018) (granting Joint Mot. to Extend (Aug. 9, 2018), ECF No. 12). Accordingly, whether a class should be certified or whether the plaintiff, by herself and absent class certification, would meet the amount-in-controversy requirement for diversity jurisdiction, are issues not addressed herein.

<sup>2</sup> The defendants' request for oral argument is denied because the ample briefing is sufficient to resolve the pending motion. See D.D.C. Local Civil Rule 7(f) (allowance of an oral hearing is "within the discretion of the Court").

<sup>3</sup> While matters "outside the pleadings" generally may not be considered on a [Rule 12\(b\)\(6\)](#) motion without converting the motion to one for summary judgment, see [Fed. R. Civ. P. 12\(d\)](#), this conversion rule is not triggered by consideration of "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." [Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 \(2007\)](#). Judicial notice is taken of the CMS Medigap Guide, which is issued by a component of a federal agency, the U.S. Department of Health and Human Services. See [Fed. R. Evid. 201\(b\); Cannon v. District of Columbia, 717 F.3d 200, 205 n.2, 405 U.S. App. D.C. 141 \(D.C. Cir. 2013\)](#) (taking judicial notice of public records posted online); [Johnson v. Comm'n on Presidential Debates, 202 F. Supp. 3d 159, 167 \(D.D.C. 2016\)](#) (same).

companies," CMS Medigap Guide at 9, because "[d]ifferent insurance companies may charge different premiums for the same exact policy," *id.* at 13. Indeed, "big differences" may occur "in the premiums that different insurance companies charge for exactly the same coverage." *Id.* at 19. Age, where a person lives, medical underwriting, and discounts may affect an insurance company's choice of what premium to charge. *Id.* at 17.

## B. AARP's Alleged Role in Administering UnitedHealth's Medigap Policies

The plaintiff, currently a resident of Boca Raton, Florida, originally purchased a UnitedHealth Medigap policy from AARP in Louisiana in 2012, and continuously maintained this coverage by paying her monthly premium to AARP until November 2016. See Compl. ¶ 20; Pl.'s Mem. in Opp'n to Mot. to Dismiss ("Pl.'s Opp'n") at 16, ECF No. 13. Her most recent renewal of her AARP Medigap policy coverage occurred when she resided in Florida. See Compl. ¶ 20; Pl.'s Opp'n at 16. She alleges that "[b]ut for Defendants' deceptive and unlawful acts . . . [she] would not have agreed to pay an additional 4.95% above the premium for an AARP Medigap policy, and would have sought out other, cheaper [\*\*5] and lawful Medigap insurance." Compl. ¶ 20.

Defendant AARP is a non-profit membership organization for seniors aged 50 years or older, with reportedly over 40 million members, about half of whom are over the age of 65. See *id.* ¶¶ 2, 21, 25. The organization is organized under the laws of [\*11] the District of Columbia and maintains its national headquarters and primary place of business in Washington, D.C., *id.* ¶ 21, which is where AARP establishes its "corporate policies and practices, including those for AARP Medigap policies," *id.* Defendant ASI is a wholly owned subsidiary of AARP, organized under the laws of Delaware, with its primary place of business in Washington, D.C. *Id.* ¶ 22. As AARP's taxable, "for-profit" division, ASI "negotiates, oversees, and manages lucrative contracts with AARP's insurance business partners." *Id.* AARP created ASI in 1999 pursuant to a settlement agreement with the U.S. Internal Revenue Service (IRS), following an IRS investigation into the income that AARP earned through endorsement deals. See *id.* ¶¶ 22, 36.

Defendant AARP Trust is a grantor trust organized by AARP under the laws of Washington, D.C., where the Trust maintains its primary place of business. [\*\*6] *Id.* ¶ 22. AARP is not a licensed insurance broker or agent. *Id.* ¶ 8. Rather, AARP, through AARP Trust, serves as the group policy holder for Medigap coverage underwritten by UnitedHealth. See *id.* ¶ 22. In this role, AARP Trust maintains depository accounts to collect insurance premiums from individual purchasers of Medigap policies through AARP's group plan and, as part of that premium, AARP Trust also collects the challenged 4.95% "royalty" charge assessed on every Medigap policy sold or renewed. See *id.* ¶¶ 22, 52, 54. AARP Trust remits premiums to UnitedHealth, and transfers the money collected as a 4.95% "royalty" to AARP and ASI. *Id.* ¶¶ 22, 56, 57; see also *id.* ¶ 52 ("In accordance with the agreement [with UnitedHealth] . . . collections [of premiums] are remitted to third-party insurance carriers . . . , net of the contractual royalty payments that are due to AARP, Inc., which are reported as royalties.") (quoting AARP's 2016 Audited Financial Statement) (emphasis added).

A joint venture agreement ("Agreement"), first entered in 1997, governs AARP and UnitedHealth's relationship with respect to Medigap insurance. *Id.* ¶ 37; see also Defs.' Mem., Ex. 1 (Agreement), ECF No. 8-1.<sup>4</sup> The [\*7] Complaint provides detail on the evolution of the Agreement over time, most notably that AARP was initially entitled to an "allowance," which was renamed a "royalty" after AARP's 1999 settlement with the IRS. Compl. ¶¶ 39, 40. Under the Agreement, AARP agrees to: (1) market, solicit, sell and renew AARP Medigap policies with UnitedHealth; (2) collect and remit premium payments on behalf of UnitedHealth; (3) generally administer the AARP Medigap program; and (4) otherwise act as UnitedHealth's agent. *Id.* ¶ 38. The Agreement makes clear that AARP

<sup>4</sup> As noted, *supra* n.3, judicial notice may be taken of documents referenced in the Complaint, such as the Agreement. See, e.g., *Hurd v. District of Columbia*, 864 F.3d 671, 678, 431 U.S. App. D.C. 83 (D.C. Cir. 2017) (quoting *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624, 326 U.S. App. D.C. 67 (D.C. Cir. 1997)); *Eagle Tr. Fund v. U.S. Postal Serv.*, No. 17-cv-2450 (KBJ), 365 F. Supp. 3d 57, 2019 U.S. Dist. LEXIS 17334, 2019 WL 451350, at \*5 (D.D.C. Feb. 4, 2019) (documents incorporated by reference in the complaint may be considered even when the document is attached as exhibit to defendant's motion to dismiss); *Hinton v. Corr. Corp. of Am.*, 624 F. Supp. 2d 45, 46-47 (D.D.C. 2009) (collecting cases).

owns all solicitation materials related to the Medigap program. *Id.* ¶ 47 (citing Agreement Subsection 7.2, "Member Communications"). "[I]n exchange for AARP's administering of the insurance program and its marketing, soliciting, and selling or renewing of AARP Medigap policies on behalf of UnitedHealth, as well as its collecting and remitting insurance premiums on behalf of UnitedHealth, AARP earns a 4.95% commission—disguised [\*12] as a 'royalty'—on each policy sold or renewed." *Id.* ¶ 45. In 2016, AARP generated \$880 million in revenues from "royalties," of which 68% came from UnitedHealth insurance products, including Medigap Policies and other [\*8] insurance products. See *id.* ¶¶ 28, 32, 33, 37. The \$880 million in royalty revenue equated to over 54% of AARP's 2016 total operating revenue. *Id.* ¶ 32.

The nature of the 4.95% charge, and AARP's representations to consumers regarding this charge, are the focus of the plaintiff's claims. While the defendants describe the 4.95% charge as a royalty compensating AARP for UnitedHealth's use of its intellectual property, see *id.* ¶¶ 40-45, the plaintiff alleges, relying on a Ninth Circuit case for support, that the 4.95% charge is an illegal and not properly disclosed commission compensating AARP for agreeing to act as UnitedHealth's agent in connection with the marketing, solicitation, sale, and administration of Medigap policies. See *id.* ¶¶ 49, 62-68; see also *id.* ¶ 6 (citing *Friedman v. AARP, Inc.*, 855 F.3d 1047, 1052-53 (9th Cir. 2017) (finding that the plaintiff had sufficiently alleged that AARP's royalty fits California's definition of "commission wages" as "compensation paid to any person for services rendered in the sale of such employer's property or services and based proportionately upon the amount or value thereof" and holding that AARP's retention of this commission could plausibly violate [\*9] California law)). The plaintiff suggests that AARP characterizes its "commission" as a "royalty" to avoid oversight by insurance regulators and to avoid paying taxes on the income generated through insurance sales, whereas other associations "do the right thing and acquire a license to act as an agent." Compl. ¶ 8 & n.1 (citing example of the automobile club AAA, which is licensed to sell insurance).

According to the plaintiff, "AARP and UnitedHealth, together and through their respective subsidiaries, have orchestrated an elaborate scheme where AARP, as the de facto agent of UnitedHealth, helps market, solicit, and sell or renew AARP Medigap policies and generally administers the AARP Medigap program for UnitedHealth, in exchange for an undisclosed and illegal 4.95% commission that AARP collects from" plaintiff and other consumers when they pay AARP for their Medigap policies. *Id.* ¶ 4. The plaintiff further complains that "[d]espite the fact that AARP is not licensed as an insurance agent," *id.* ¶ 8, AARP received "a 4.95% commission from every policy sold or renewed," *id.*, which "constitutes an illegal kickback," *id.* Set against the local statutory bar prohibiting unlicensed entities [\*10] from engaging in the solicitation of insurance or accepting a commission for the sale or renewal of an insurance policy, *id.* ¶¶ 8, 74 (citing *D.C. Code §§ 31-1131.13(b); 31-2502.31; 31-1131.03*), the plaintiff bolsters her allegation that AARP has acted as an unlicensed insurance agent or broker by pointing to AARP's marketing materials, which are owned by AARP under the Agreement, *id.* ¶¶ 47, 72, and explicitly state "[t]his is a solicitation of insurance," *id.* ¶ 51 (citing AARP sponsored websites, [www.aarphealthcare.com](http://www.aarphealthcare.com) and [www.aarpmedicareplans.com](http://www.aarpmedicareplans.com), as well as AARP's television, Internet, and print advertisements).

The plaintiff identifies certain harms resulting from AARP's actions, alleging that "[h]ad AARP disclosed the fact that the 'member contribution amount' that [she] paid monthly to AARP included an embedded 4.95% commission payment to AARP, [she] would have sought out another Medigap policy offering the same services for a lower rate. . . . [o]r if Defendants had acted within the bounds of the law, AARP would not have been able to collect" the 4.95% charge." *Id.* ¶ 11; see also *id.* ¶¶ 12, [\*13] 77, 79, 81, 82. The plaintiff avers that "[b]ut for Defendants' deceptive and unlawful acts, [she] would not have [\*11] agreed to pay the 4.95% illegal insurance commission," *id.* ¶ 14 and that she was injured both by paying this commission and by being denied information that would have prompted her to seek out and purchase another Medigap policy for a lower price, *id.* ¶ 15. The plaintiff notes that "[o]ther Medigap policies offered without the highly regarded 'AARP Brand' provide identical benefits, often at a lower cost in part because those insurers do not secretly charge consumers unlawful insurance-agent commissions on top of the premiums assessed." *Id.* ¶ 78.

Based on the foregoing, the plaintiff alleges that AARP collects an illegal commission, acts as an unlicensed insurance agent, and materially misrepresents information about the 4.95% charge, all of which constitute violations of the CCPA and common law.

### C. Claims Against AARP

The plaintiff brings four claims, asserting, in Count One, that AARP violated the CCPA, [D.C. Code § 28-3901 et seq.](#), by engaging in an unlawful trade practice by misrepresenting material facts concerning the 4.95% payment and the fact that AARP is not a licensed insurance broker or agent in its solicitation materials, letters to prospective consumers, billing statements, renewal letters, and website. [\[\\*\\*12\]](#) Compl. ¶¶ 5, 92-103. The plaintiff alleges financial harm from these unlawful trade practices and being "deprived of truthful information regarding [her] choice" of Medigap policies, *id.* ¶ 100, because she would have sought a different Medigap policy that did not incorporate a 4.95% "commission that AARP is not legally entitled to," *id.* ¶ 97. For these alleged violations of the CCPA, the plaintiff seeks damages and injunctive relief. *Id.* ¶ 101.

In Count Two, the plaintiff claims the defendants' conversion of her "ownership right to the 4.95% of [her] payments that was wrongfully charged and illegally diverted to AARP as a commission," *id.* ¶¶ 104-06, resulted in damages in the amount of the premium for which she was wrongfully charged, *id.* ¶ 107.

In Count Three, the plaintiff alleges unjust enrichment, based on her conferral of a benefit to the defendants "in the form of the hidden 4.95% charge on top of [her] monthly premium payments that [was] unlawfully and deceptively charged and illegally diverted to AARP as a commission." *Id.* ¶ 109. The defendants "voluntarily accepted and retained this benefit," *id.* ¶ 110, which was "collected without proper disclosure and amounted to a commission [\[\\*\\*13\]](#) in violation of" District of Columbia law, *id.* ¶ 111, such that the defendants' retention of this benefit without paying its value to the plaintiff would be "inequitable," *id.*

Finally, in Count Four, the plaintiff alleges fraudulent concealment stemming from AARP's "conceal[ing] or fail[ing] to disclose [the] material fact" that AARP was collecting a 4.95% commission, *id.* ¶ 113, that AARP "knew or should have known that this material fact should be disclosed or not concealed," *id.* ¶ 114, that it concealed the fact "in bad faith," *id.* ¶ 115, in spite of its "duty to speak," *id.* ¶ 118, and that it thereby "induced [the plaintiff] to act by purchasing an AARP-endorsed Medigap plan," *id.* ¶ 116. The plaintiff alleges that she suffered damages as a result of this fraudulent concealment, *id.* ¶ 117.

As relief, the plaintiff seeks orders: (1) requiring AARP to restore all money or other property taken by means of unlawful acts or practices, *id.* at 30; (2) requiring the disgorgement of all sums taken from consumers by means of deceptive practices, [\[\\*14\]](#) together with all proceeds, interest, income, and accessions, *id.*; (3) certifying a proposed class of "[a]ll persons in the United States, excluding California, [\[\\*\\*14\]](#) who purchased or renewed an AARP Medigap Policy," *id.* ¶ 84, with plaintiff as Class Representative and her counsel as Class Counsel, *id.* at 30; and (4) awarding court costs and reasonable attorneys' fees and any other relief the Court deems just and proper, *id.*

## II. LEGAL STANDARD

To survive a motion to dismiss under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#), the "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." [Wood v. Moss, 572 U.S. 744, 757-58, 134 S. Ct. 2056, 188 L. Ed. 2d 1039 \(2014\)](#) (quoting [Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#)). A claim is facially plausible when the plaintiff pleads factual content that is more than "merely consistent with" a defendant's liability," and "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." [Iqbal, 556 U.S. at 678](#) (quoting [Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#)); see also [Rudder v. Williams, 666 F.3d 790, 794, 399 U.S. App. D.C. 45 \(D.C. Cir. 2012\)](#). Although "detailed factual allegations" are not required to withstand a [Rule 12\(b\)\(6\)](#) motion, a complaint must offer "more than labels and conclusions[] and a formulaic recitation of the elements of a cause of action" to provide "grounds" for "entitle[ment] to relief," [Twombly, 550 U.S. at 555](#) (internal quotation marks omitted; alteration in original), and "nudge[] [the] claims across the line from conceivable to plausible," *id. at 570*; see [Banneker Ventures, LLC v. Graham, 798 F.3d 1119, 1129, 418 U.S. App. D.C. 398 \(D.C. Cir. 2015\)](#) ("Plausibility requires more than a sheer possibility that a defendant [\[\\*\\*15\]](#) has acted unlawfully.")

(internal quotation marks omitted). Thus, "a complaint [does not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557) (second alteration in original).

In considering a motion to dismiss for failure to plead a claim for which relief can be granted, the court must consider the complaint in its entirety, accepting all factual allegations in the complaint as true, "even if doubtful in fact," and construe all reasonable inferences in favor of the plaintiff. See *Twombly*, 550 U.S. at 555; *Nurridin v. Bolden*, 818 F.3d 751, 756, 422 U.S. App. D.C. 83 (D.C. Cir. 2016) (per curiam) ("We assume the truth of all well-pleaded factual allegations and construe reasonable inferences from those allegations in the plaintiff's favor.") (citing *Sissel v. United States HHS*, 760 F.3d 1, 4, 411 U.S. App. D.C. 301 (D.C. Cir. 2014)). The court, however, "is not required to accept the plaintiff's legal conclusions as correct," *Sissel*, 760 F.3d at 4, nor is it required to "accept inferences drawn by [a] plaintiff[] if such inferences are unsupported by the facts set out in the complaint." *Nurridin*, 818 F.3d at 756 (alterations in original) (quoting *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276, 305 U.S. App. D.C. 60 (D.C. Cir. 1994)).

### III. DISCUSSION

The defendants raise, under *Federal Rule of Civil Procedure 12(b)(6)*, several threshold issues challenging the justiciability of the plaintiff's claims, as well as the sufficiency of the plaintiff's factual allegations to support the plausibility of **[\*\*16]** her claims. Specifically, the defendants argue that the Complaint must be dismissed due to: (1) the primary jurisdiction doctrine; (2) the filed-rate doctrine; and (3) operation of the applicable statute of limitations.<sup>5</sup> **[\*15]** In addition, the defendants raise choice-of-law issues as to whether Florida, Louisiana, or District of Columbia law applies to this action.<sup>6</sup> These threshold issues—none of which warrants dismissal—are addressed, before turning to consideration of whether the plaintiff has plausibly stated a claim.

#### A. The Primary Jurisdiction Doctrine Does Not Bar The Instant Claims

The defendants seek a stay or dismissal of this action under the primary jurisdiction doctrine. See Defs.' Mem. at 50-51. The primary jurisdiction doctrine applies where a court has jurisdiction over a claim or set of claims, but adjudication of those claims "requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63-64, 77 S. Ct. 161, 1 L. Ed. 2d 126, 135 Ct. Cl. 997 (1956); see also *Reiter v. Cooper*, 507 U.S. 258, 268, 113 S. Ct. 1213, 122 L. Ed. 2d 604 (1993) (describing primary jurisdiction doctrine as "specifically **[\*\*17]** applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency" to

<sup>5</sup> The defendants correctly frame these justiciability arguments as reasons to dismiss for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*, rather than as reasons to dismiss for lack of jurisdiction under *Fed. R. Civ. P. 12(b)(1)*. See *Sickle v. Torres Advanced Enter. Sols., LLC*, 884 F.3d 338, 345 & n.3 (D.C. Cir. 2018) (noting that "merits-based barrier" to claims posed by preemption challenge is subject to review under *Rule 12(b)(6)*, by contrast to jurisdictional challenge implicating the power of the forum to adjudicate the dispute, which is resolved under *Rule 12(b)(1)*); *Sierra Club v. Jackson*, 648 F.3d 848, 853, 396 U.S. App. D.C. 297 (D.C. Cir. 2011) (noting that "distinction between a claim that is not justiciable because relief cannot be granted upon it and a claim over which the court lacks subject matter jurisdiction is important," and finding justiciability challenge subject to review under *Rule 12(b)(6)*); see also *Wilson v. EverBank, N.A.*, 77 F. Supp. 3d 1202, 1233 n.6 (S.D. Fla. 2015) (collecting cases holding that a motion to dismiss under the filed-rate doctrine is properly treated as part of a motion to dismiss under *12(b)(6)*).

<sup>6</sup> The defendants also initially argued that the first-to-file rule favored dismissal or a stay of this case because an earlier filed, pending case in Florida asserted similar claims. See Defs.' Mem. at 28-37. That Florida case has since been voluntarily dismissed, which the defendants concede "disposes" of their first-to-file argument. See Defs.' Notice of Supp. Auth. at 2, ECF No. 25.

which "referral" may be made, "staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling"); *Am. Ass'n of Cruise Passengers v. Cunard Line, Ltd.*, 31 F.3d 1184, 1186, 308 U.S. App. D.C. 177 (D.C. Cir. 1994) (explaining that the primary jurisdiction doctrine may be invoked when the agency is "best suited to make the initial decision on the issues in dispute, even though the district court has subject-matter jurisdiction"); *Lawlor v. District of Columbia*, 758 A.2d 964, 973 (D.C. 2000) (explaining that the primary jurisdiction doctrine "comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body" (quoting *Drayton v. Poretsky Mgmt., Inc.*, 462 A.2d 1115, 1118 (D.C. 1983))).

Noting that state regulatory agencies comprehensively regulate virtually all aspects of the Medigap market, including approval for rates and advertising, and that the plaintiff already has this mechanism for raising her concerns, the defendants urge that this case be stayed while the plaintiff pursues relief before a state regulatory agency. See Defs.' Mem. at 37. [\*16] For example, in the District of Columbia, AARP's Medigap program is regulated [\*\*18] by the District of Columbia Department of Insurance, Securities and Banking ("DISB"), pursuant to *D.C. Code § 31-3701 et seq.* and *D.C. MUN. REGS. tit. 26-A, § 2200 et seq.* UnitedHealth must file proposed rates with DISB, which reviews the rates to ensure that they are reasonable, see *D.C. Code § 31-3704*, and further requires at least 75% of aggregate group policy Medigap premiums to be paid toward benefit claims, see *D.C. Mun. Regs. tit. 26-A, § 2212.1(a)*. If a Medigap policy fails to meet this loss ratio standard, insurers must rebate excess revenue. *Id.* §§ 2213.2, 2213.4. DISB also enforces prohibitions against misleading advertising, see *id.* §§ 2224.1, 2224.2, and, to this end, insurers are required to submit advertisements to DISB for review, see *id.*, § 2223.1; *D.C. Code § 31-3708*. DISB also limits compensation and commission arrangements. See *D.C. MUN. REGS. tit. 26-A, § 2217*. The defendants suggest that due to this comprehensive regulation, primary jurisdiction rests with DISB or insurance regulators in Florida or Louisiana, rather than with this Court.

Four factors are relevant to determining whether to apply the primary jurisdiction doctrine: "(1) whether the issue is within the conventional expertise of judges; (2) whether the issue lies within the agency's discretion or requires the exercise of agency expertise; (3) whether there is a substantial danger of inconsistent rulings; [\*\*19] and (4) whether a prior application to the agency has been made." *APCC Servs., Inc. v. WorldCom, Inc.*, 305 F. Supp. 2d 1, 13 (D.D.C. 2001); see also *United States v. Philip Morris USA Inc.*, 686 F.3d 832, 837, 402 U.S. App. D.C. 34 (D.C. Cir. 2012) (noting that "no fixed formula exists" but that "some principles emerge from our precedents," including a "concern for uniform outcomes," the "advantages of allowing an agency to apply its expert judgment," and whether the question is "within the particular competence of an agency" (internal alterations and citations omitted)). Consideration of these factors demonstrates that no stay is necessary to permit DISB or any other state insurance agency the first opportunity to opine on the merits of the plaintiff's instant claims.

The plaintiff has not made a prior application to DISB, or to any other state insurance agency that regulates Medigap insurance, and thus no apparent danger of inconsistent rulings between this Court and a state insurance agency is presented that, as a matter of comity, would warrant this Court abstaining. While mindful that DISB has the authority to review rates and even advertising related to Medigap insurance, and that nothing prevents a consumer troubled by the 4.95% charge from alerting DISB to her concerns rather than pursuing a nationwide class action, the mere availability of regulatory [\*\*20] review is not sufficient reason to apply the primary jurisdiction doctrine. Simply put, DISB has no exclusive jurisdiction over the claims at issue here.

Moreover, rather than requiring agency expertise, the claims at issue here—whether advertising is deceptive or misleading, and related common law claims of conversion, unjust enrichment and fraudulent concealment—are regularly subject to judicial review and therefore fall squarely within the conventional expertise of the courts. The Supreme Court's decision in *Nader v. Allegheny Airlines*, 426 U.S. 290, 292, 96 S. Ct. 1978, 48 L. Ed. 2d 643 (1976), well illustrates this point. There, the Court declined the defendant's request to stay the plaintiff's common law tort suit for fraudulent misrepresentation stemming from the airline's overbooking policy and refer the claim to the Civil Aeronautics [\*17] Board. Noting that the plaintiff was not challenging the airline's tariff and that the Board's authority to ban deceptive practices did not displace the tort suit, the Court held that the tort suit was "within the conventional competence of the courts, . . . the judgment of a technically expert body was not likely to be helpful in the application of the [tort] standards." *Id.* 304-06. See also *Philip Morris USA Inc.*, 686 F.3d at 838 (observing that

"courts consistently have refused [\*\*21] to invoke the primary jurisdiction doctrine for 'claims based upon fraud or deceit'—claims that are "within the conventional competence of courts" (citing *Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio*, 900 F.2d 882, 889 (6th Cir. 1990) and *In re Long Distance Telecomms. Litig.*, 831 F.2d 627, 633-34 (6th Cir. 1987))). Likewise, here, the plaintiff does not directly challenge the reasonableness of the insurance rates charged and has chosen to pursue in this Court her CCPA and common law claims. These statutory and tort claims may be resolved without the need for "an informed evaluation of the economics or technology of the regulated industry." *Nader*, 426 U.S. at 305. Thus, the expertise vested in a specialized regulatory agency, which expertise might make the agency the preferred forum in some instances, is not necessary to resolve the claims at issue here. Accordingly, the primary jurisdiction doctrine does not bar this suit.

## B. The Filed-Rate Doctrine Does Not Bar The Instant Claims

Following a brief review of the purpose and scope of the filed-rate doctrine, the defendants' arguments urging application of this doctrine are considered. The Court concludes the filed-rate doctrine does not apply here.

### 1. The Filed-Rate Doctrine Generally

The parties spill much ink disputing whether the judicially created filed-rate doctrine (also known as the "filed-tariff" doctrine) [\*\*22] requires dismissal of this case. The filed-rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory entity." *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577, 101 S. Ct. 2925, 69 L. Ed. 2d 856 (1981). The filed[-]rate doctrine has its origins in [the Supreme] Court's cases interpreting the Interstate Commerce Act ["ICA"], . . . and has been extended across the spectrum of regulated utilities." *Id.* (internal citations omitted). One of those originating cases was *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156, 43 S. Ct. 47, 67 L. Ed. 183 (1922), in which the Supreme Court rejected antitrust challenges to rates that had been filed with and approved as reasonable by the Interstate Commerce Commission. Regardless of the regulated industry involved, "[t]he considerations underlying the doctrine are preservation of the agency's primary jurisdiction over reasonableness of rates and the need to [e]nsure that regulated companies charge only those rates of which the agency has been made cognizant." *Ark. La. Gas Co.*, 453 U.S. at 577-78 (internal quotation marks and alterations omitted). The Second Circuit has termed these interests as "two 'companion principles'—(1) preventing carriers from engaging in price discrimination as between ratepayers (the 'nondiscrimination strand') and (2) preserving the exclusive [\*\*23] role of federal agencies in approving rates . . . that are 'reasonable' by keeping courts out of the rate-making process (the 'nonjusticiability strand')." *Marcus v. AT&T Corp.*, 138 F.3d 46, 58 (2d Cir. 1998).

A corollary of the filed-rate doctrine is that regulatory agencies have the [\*18] sole authority to decide whether rates are reasonable and "[n]o court may substitute its own judgment on reasonableness for the judgment" of the regulatory agency. *Ark. La. Gas Co.*, 453 U.S. at 577. This principle typically has a statutory basis and has been expressed, for example, in Federal Energy Regulatory Commission (FERC) cases, due to provisions in the *Natural Gas Act*, 15 U.S.C. § 717c et seq., that require regulated entities to file their rates and deem such rates are lawful only if they are "just and reasonable" as determined by the Commission. See *Ark. La. Gas Co.*, 453 U.S. at 577 ("The authority to decide whether the rates are reasonable is vested by [15 U.S.C. § 717c(a)] of the [Natural Gas] Act solely in the Commission."). In telecommunications cases, the corollary is derived from the tariff-filing provisions of the *Federal Communications Act* ("FCA"), 47 U.S.C. § 203(a). See *Marcus*, 138 F.3d at 58. In ICA cases, the corollary reflects the Interstate Commerce Commission's authority to determine that filed rates are "reasonable and non-discriminatory." See *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 411, 415, 106 S. Ct. 1922, 90 L. Ed. 2d 413 (1986) (citing *Keogh*, 260 U.S. at 161; 49 U.S.C. § 10101 et seq.).

In the FCA, FERC and [\*\*24] ICA contexts, the filed-rate doctrine supports the supremacy of federal regulation over certain federal as well as state and common law claims. Thus, when plaintiffs attempt to evade the filed-rate doctrine by bringing claims seeking relief that would affect the approved rates charged by the entities subject to the regulatory regimes of the ICA, FERC or FCA, the claims have been dismissed. See, e.g., *AT&T Co. v. Cent. Office*

[Tel., Inc., 524 U.S. 214, 222, 118 S. Ct. 1956, 141 L. Ed. 2d 222 \(1998\)](#) (stating, in the context of a case seeking to apply state law claims to a federally regulated telecommunications carrier, that "even if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff"); [id. at 223-24](#) (refusing to hold the filed-rate doctrine inapplicable to claims regarding the "provisioning of services and billing," and noting that "[a]ny claim for excessive rates can be couched as a claim for inadequate services and vice versa" (internal quotation marks omitted)); [Ark. La. Gas Co., 453 U.S. at 580](#) ("[W]hen [C]ongress has established an exclusive form of regulation, 'there can be no divided authority over interstate commerce.'" (quoting [Missouri P. R. Co. v. Stroud, 267 U.S. 404, 408, 45 S. Ct. 243, 69 L. Ed. 683 \(1925\)](#))); [S. Union Co. v. FERC, 857 F.2d 812, 817, 273 U.S. App. D.C. 21 \(D.C. Cir. 1988\)](#) ("[T]he preemptive effect of the [Natural Gas Act] is [\*\*25] not . . . limited to state actions that directly and expressly relate to the price term of sale transactions. The test is instead whether state law conflicts or interferes with attainment of federal law objectives."); [City of Moundridge v. Exxon Mobil Corp., 471 F. Supp. 2d 20, 45 \(D.D.C. 2007\)](#) ("The filed[-]rate doctrine 'provides that state law, and some federal law (e.g. **antitrust law**), may not be used to invalidate a filed rate or to assume a rate would be charged other than the rate adopted by the federal agency in question.' . . . when 'the relief sought by plaintiff would require the court to set damages by assuming a hypothetical rate,' it violates the filed[-]rate doctrine." (internal alterations, brackets, and citations omitted)).

Notwithstanding that the filed-rate doctrine preempts "those suits that seek to alter the terms and conditions provided for in the tariff," this doctrine "does not serve as a shield against all actions based in state law." [Cent. Office \[\\*19\] Tel., 524 U.S. at 229-31](#) (Rehnquist, C.J., concurring) ("The tariff does not govern . . . the entirety of the relationship between the common carrier and its customers."). Where a claim does not seek to alter the terms and conditions of a tariff, "[t]here is no direct relationship [to the filed-rate doctrine] at all and it is [\*\*26] simply not the case that any action which might arguably and coincidentally implicate rates, much less those determined by a state, rather than a federal agency, is governed by the doctrine." [Arroyo-Melecio v. Puerto Rican Am. Ins. Co., 398 F.3d 56, 73 \(1st Cir. 2005\)](#). Similarly, in the preemption context, courts have recognized that federal regulatory regimes do not necessarily preempt state law actions prohibiting deceptive business practices, false advertisement, or common law fraud. See [Marcus, 138 F.3d at 54](#). Indeed, "states may have an equal or greater interest in preventing [a carrier from misrepresenting the nature of its rates] as manifested by state consumer protection laws." *Id.*

Thus, the filed-rate doctrine operates to bar only claims, which, if successful, would undermine the critical policies underlying the filed-rate doctrine in the first place: nondiscrimination among customers and nonjusticiability as to the reasonableness of a rate. See [id. at 59](#) ("[T]he focus for determining whether the filed[-]rate doctrine applies is the impact the court's decision will have on agency procedures and rate determinations." (internal quotation marks omitted) (quoting [H.J. Inc. v. Nw. Bell Tel. Co., 954 F.2d 485, 489 \(8th Cir. 1992\)](#))). In other words, the filed-rate doctrine bars claims that would require a regulated entity to charge more or less than the [\*\*27] rate approved by the federal regulatory authority but does not reach those claims for which the remedy would leave the regulated entity in compliance with the approved rate.

Consequently, when a claim seeks to vindicate rights or tortious harms without disturbing a properly filed rate—for example, by seeking prospective injunctive relief against the regulated entity—the filed-rate doctrine poses no obstacle. See, e.g., [Square D, 476 U.S. at 417, 422 & n.28](#) (explaining that filed-rate doctrine barred antitrust price-fixing claims for treble damages against regulated entities for their rates fixed by ICC since "rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier," but injunctive antitrust actions are permitted); [Marcus, 138 F.3d at 62-63](#) (affirming dismissal of common law fraud and negligent misrepresentation claims and state false advertising claims for damages against telecommunications company for its billing policies, because the regulated entity was required to charge the rates on file, but explaining that "a suit for injunctive relief appears not to interfere with the nondiscrimination policy underlying the filed rate doctrine"); cf. [Alicke v. MCI Communs. Corp., 111 F.3d 909, 913, 324 U.S. App. D.C. 150 \(D.C. Cir. 1997\)](#) (affirming dismissal of fraud claims against a telecommunications [\*\*28] company on grounds other than filed-rate doctrine, without addressing "whether the district court correctly held that the filed[-]tariff doctrine bars all the claims made in the complaint. As such, we leave for another day the question whether there are any circumstances in which injunctive relief may be based upon a billing practice disclosed in a filed tariff").

Contrary to the defendants' contention, this case does not fall neatly into the body of cases in which the filed-rate doctrine has been found to apply. The plaintiff raises no challenge to the setting or reasonableness of the Medigap insurance rates, asserts no claims against the regulated entity responsible for filing, and obtaining [\*20] approval for, those rates, and thus seeks no damages from a regulated entity or even a third-party that would vary or enlarge the approved rate. Instead, the plaintiff challenges the conduct of a third-party doing business with the regulated entity and seeks relief that may be awarded without any alteration in the approved premiums collected by the regulated entity. As discussed further below, and as other courts have found, this makes a difference. See, e.g., [Williams v. Duke Energy Int'l, Inc., 681 F.3d 788, 796-98 \(6th Cir. 2012\)](#) (reversing district court's holding [\*\*29] on preclusive effect of filed-rate doctrine and holding that the doctrine is inapplicable to claims challenging "side-agreements" made by utility's affiliate for rebates to favored customers allowing those customers to pay lower rates than plaintiffs since a "ruling by this court will have no effect on the filed tariff or rate" (internal quotation marks and citation omitted)); [Alston v. Countrywide Fin. Corp., 585 F.3d 753, 764-65 \(3d Cir. 2009\)](#) (finding that "[t]he filed-rate doctrine bars suit from" plaintiffs who "think that the price they paid . . . was unfair," but not claims "alleg[ing] a violation of fair business practices through the use of illegal kickback payments" (internal citation omitted)); [Alpert v. Nationstar Mortg. LLC, 243 F. Supp. 3d 1176, 1182 \(W.D. Wash. 2017\)](#) (collecting cases challenging kickbacks and concluding that the filed-rate doctrine "will bar kickback claims as long as they upset the principles set forth in Keogh," but does not serve as a bar where the plaintiffs do not challenge the filed rates); [Jackson v. U.S. Bank, N.A., 44 F. Supp. 3d 1210, 1216-17 \(S.D. Fla. 2014\)](#) (holding the filed-rate doctrine "unavailable as a defense" where defendants "are not insurers subject to the relevant regulatory regime" (internal quotation marks and citation omitted)); [Maloney v. Indymac Mortg. Servs., No. CV 13-04781 DDP \(AGRx\), 2014 U.S. Dist. LEXIS 161060, 2014 WL 6453777, at \\*4 \(C.D. Cal. Nov. 17, 2014\)](#) (drawing a distinction between a challenge to the defendants' conduct [\*\*30] in an alleged kickback scheme and a challenge to the rates themselves, and noting that the regulated entity's conduct with respect to third parties "is not dependent upon or made pursuant to any ratemaking authority"); [Valdez v. Saxon Mortg. Servs., Inc., No. 2:14-cv-03595-CAS\(MANx\), 2014 U.S. Dist. LEXIS 182640, 2014 WL 7968109, at \\*10-11 \(C.D. Cal. Sept. 29, 2014\)](#) (same); [Cannon v. Wells Fargo Bank N.A., 917 F. Supp. 2d 1025, 1036-38 \(N.D. Cal. 2013\)](#) (acknowledging contrary authority but permitting plaintiffs to maintain a lawsuit challenging kickbacks rather than the cost of insurance).

## 2. Assuming The Filed-Rate Doctrine Applies To State-Regulated Insurance Rates, Plaintiff's Claims Are Not Barred

At the outset, the parties do not dispute but assume, without analysis, that the filed-rate doctrine extends beyond comprehensive federal regulatory regimes, which have specific statutory provisions granting a regulatory agency some exclusivity regarding the setting of reasonable rates or tariffs as well as the constitutional underpinning of the [Supremacy Clause](#). The Court makes the same assumption that the filed-rate doctrine applies in a case raising statelaw claims implicating state-regulated insurance rates. See [In re N.J. Title Ins. Litig., No. 08-1425, 2009 U.S. Dist. LEXIS 92310, 2009 WL 3233529, at \\*3 \(D.N.J. Oct. 5, 2009\)](#) (noting that "a number of courts have recognized that the filed[-]rate doctrine applies in the context of private suits challenging insurance rates approved [\*\*31] by state regulatory agencies") (collecting cases).<sup>7</sup> [\*21] The parties disagree whether the filed-rate doctrine bars the plaintiff's claims.

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<sup>7</sup> The D.C. Circuit has not addressed whether the filed-rate doctrine applies to state-regulated insurance rates. Likewise, the D.C. Court of Appeals has not addressed this issue and only references the filed-rate doctrine in the context of public utilities. See, e.g., [Office of People's Counsel v. D.C. Pub. Serv. Comm'n, 989 A.2d 190, 193 \(D.C. 2010\)](#); [District of Columbia v. District of Columbia, PSC, 905 A.2d 249, 256-57 \(D.C. 2006\)](#); [Watergate E., Inc. v. D.C. Pub. Serv. Comm'n, 662 A.2d 881, 888-89 \(D.C. 1995\)](#). The defendants, for their part, point to no provision of District of Columbia law requiring the plaintiff to exhaust any remedies with a state insurance agency prior to filing suit. Indeed, as for the CCPA claim, the D.C. Court of Appeals has explained that the legislative history of the CCPA confirms that it "may be used even when other laws provide 'different enforcement procedures and mechanisms.'" [Atwater v. D.C. Dep't of Consumer & Regulatory Affairs, 566 A.2d 462, 467 \(D.C. 1989\)](#) (quoting Council of the District of Columbia, Comm. on Pub. Servs. & Consumer Affairs, Rep. on Bill No. 1-253, at 24 (Mar. 24, 1976)); see also [Osbourne v. Capital City Mortg. Corp., 727 A.2d 322, 325 \(D.C. 1999\)](#) ("[W]hile the CCPA is broad in the conduct it proscribes, even more important perhaps is the array of enforcement mechanisms it contains."). Cf. [Alpert, 243 F.](#)

The defendants argue that because Medigap policies are extensively regulated in each state, and because the plaintiff was charged precisely the premium filed with, and approved by, the state regulatory agencies in Florida and Louisiana, she is barred from challenging those rates except by bringing appropriate action before those state regulatory agencies. See Defs.' Mem. at 23-28. Otherwise, the defendants contend, the plaintiff would violate the nonjusticiability principle of the filed-rate doctrine because her claim attacks the rate that insurance regulators have already approved, and would violate the nondiscrimination principle because she seeks damages that, if paid, would reduce the rate below the rate on file with state regulators. *Id.* at 26-27 ("[B]y seeking a refund of the portion of the rate she claims is improper (i.e., the royalty), Plaintiff seeks to effectively pay a lower rate than the filed rate paid by other insureds under the Policy. That claim is exactly the type of collateral attack barred by the filed rate doctrine.").

[\*\*32] The plaintiff counters that the filed-rate doctrine does not bar her suit because she challenges neither the setting of the rates nor their reasonableness, or even the collection by the regulated entity, UnitedHealth, of the Medigap insurance premiums. See Pl.'s Opp'n at 16-18, (acknowledging that filed-rate doctrine "generally bars suits asserting that the filed rate was unreasonable" but highlighting that "Plaintiff does not seek a refund for or challenge the appropriateness, reasonableness, or legality of the premiums UnitedHealth received for AARP Medigap coverage"). Instead, she claims damages only from the defendants' misrepresentations and deceitful tactics that prevented consumers from making informed decisions about the undisclosed and unlawful "commission" the defendants collected. Compl. ¶ 83; see also *id.* ¶¶ 59, 60 (quoting AARP's own executives' statements before Congress in 2011 that the royalties—what the plaintiff challenges—have "nothing to do" with premiums). In this way, the "Court is being asked to rule on the misleading and deceitful nature of Defendants' conduct when it solicits its members to purchase AARP Medigap," but is "not [being asked] to alter the rate or make a determination of the rate's reasonableness." Pl.'s Opp'n at 18. As the plaintiff points out, UnitedHealth is not a defendant in this action and would not be liable for any refund she seeks. See *id.*

[\*22] The defendants urge wholesale rejection of the plaintiff's theory that the filed-rate doctrine is inapplicable when the plaintiff challenges only the conduct by a third-party in charging an allegedly illegal commission "to consumers on top of the premiums." Compl. ¶ 58 (emphasis omitted). The defendants point to UnitedHealth and AARP's Agreement, which expressly states that the royalty is *paid out of the premium rate approved by state regulators*, and to UnitedHealth's public rate filings in Florida, which indicate the same. Defs.' Mem. at 27-28. The defendants also note that, as to the claim of allegedly misleading advertising, the Florida Insurance Commissioner already has the authority to determine whether an insurance advertisement has a capacity or tendency to mislead or deceive. *Id.* at 26. As noted above, DISB has this authority as well. See *supra* Section III.A.

For the reasons that follow, this Court holds that the filed-rate [\*\*33] doctrine cannot be used as a shield to bar review of claims predicated on fraudulent misrepresentation against a third-party doing business with a regulated entity just because those claims have *some* relation to filed rates for state insurance coverage. First, at the motion-to-dismiss stage, without a full record regarding the information UnitedHealth filed concerning its rates and the precise role of the payments to AARP in each state in question, concluding that this suit "seek[s] to alter the terms and conditions provided for in the tariff," *Central Office Telephone, 524 U.S. at 229* (Rehnquist, C.J., concurring), would be premature. Although the defendants attached a number of exhibits to their motion to dismiss, including copies of UnitedHealth's rate filings in Louisiana and Florida (but not the District of Columbia), the defendants did not seek to, and the Court declines to, convert their dismissal motion to one for summary judgment. See *Fed. R. Civ. P. 12(d)* (requiring, "[i]f, on a motion under *Rule 12(b)*, . . . matters outside the pleadings are presented to and not excluded by the court," that motion "be treated as one for summary judgment under *Rule 56*"). Thus, the Court looks only to the plaintiff's Complaint, which alleges that consumers are not informed [\*\*34] that expenses charged to them as part of a premium include a 4.95% royalty UnitedHealth is contractually obligated to pay AARP. Importantly, the plaintiff does not seek to "enforce agreements to provide services on terms different from those listed in the tariff," which "is all that the tariff governs," *Central Office Telephone, 524 U.S. at 229*, but rather to hold AARP responsible for violating state laws banning unfair and deceptive trade practices and related common law

claims, see [\*id. at 230\*](#) (the filed-rate doctrine "does not affect whatever duties state law might impose" on the regulated entity).

Second, the plaintiff's claims focus on her relationship with AARP and its affiliates, not with UnitedHealth, the regulated entity responsible for filing rates. This fact underscores that the plaintiff challenges behavior independent of the terms and conditions of the filed rate. The plaintiff alleges that, through unfair and deceptive trade practices, the defendants collect and retain a commission to which they are not legally entitled. Should the plaintiff prevail on these claims to require AARP to stop collecting that "commission" on extant terms, no change to UnitedHealth's rates would necessarily follow. Indeed, nothing about the plaintiff's [\[\\*\\*35\]](#) claims against AARP and its affiliates prevents UnitedHealth from continuing to collect precisely the approved rates. Any follow-on disruption to UnitedHealth and AARP's side agreement regarding the "royalty" [\[\\*23\]](#) payment and whether, as a result of this disruption, UnitedHealth will decide to change the rates filed going forward is irrelevant to an analysis of whether the filed-rate doctrine bars plaintiff's claims against AARP now. As the Second Circuit held, "the focus for determining whether the filed[-]rate doctrine applies is the impact the court's decision will have on agency procedures and rate determinations." [\*Marcus, 138 F.3d at 59\*](#) (internal quotation marks and citation omitted); see also [\*Medco Energi US, L.L.C. v. Sea Robin Pipeline Co., L.L.C.\*, 729 F.3d 394, 399 \(5th Cir. 2013\)](#) (per curiam) (explaining that filed-rate cases "ask this question: when the plaintiff's claims—at least on their face—do not attempt to challenge a filed rate, do the claims implicate the parties' rights and liabilities under that rate?") (internal quotation marks, alterations, and citation omitted). Any decision that AARP's advertising practices violate District of Columbia consumer protection laws or related common law claims has no effect on agency procedures and rate determinations and does not affect plaintiff [\[\\*\\*36\]](#) or UnitedHealth's rights and liabilities under that rate. Therefore, the filed-rate doctrine is not implicated.

A recent case, challenging as unlawful the commissions paid by a telephone service provider to a Sheriff's Office for inmate telephone calls when state law allegedly did not authorize such commission payments, illustrates why the plaintiff's claims here are independent of a challenge to the rates UnitedHealth files. In [\*Pearson v. Hodgson\*](#), the Court held that the filed-rate doctrine posed no bar to the plaintiffs' claim that the telephone provider's commission payments violated state law and helped the Sheriff's Office to "circumvent state law." [\*No. 18-cv-11130-IT, 363 F. Supp. 3d 197, 2018 U.S. Dist. LEXIS 214338, 2018 WL 6697682, at \\*9 \(D. Mass. Dec. 20, 2018\)\*](#). The court reasoned that the claim "stands independent of any challenges to the specific rates charged," *id.*, and "is enough to survive a motion to dismiss," *id.* Acknowledging that parts of the complaint "may implicate the cost of" the inmate call services, *id.*, the *Pearson* Court nonetheless found that the plaintiffs were not "alleging that a contractual rate . . . differed from the [filed] rates," *id.*, but only that "what [the telephone provider] is doing with the revenue that it receives from the telephone calls" [\[\\*\\*37\]](#) may violate state law, "and the filed[-]rate doctrine does not shield [the telephone provider] from claims of unfair or deceptive acts relating to their use of these funds," *id.*

Just as the *Pearson* Court reasoned that challenging allegedly unfair and deceptive practices in payments by the provider to the Sheriff's Office of unlawful commissions was "independent of any challenges to the specific rates charged," *id.*, so too here: so long as the claims challenge the deceptive and misleading statements and acts concerning the collection of allegedly unlawful payments, without seeking any change to the rate—and where the rate-filer is not even a defendant—the filed-rate doctrine is no obstacle.<sup>8</sup>

Although the defendants rely on several decisions from the Second, Fifth and Eleventh Circuits that have applied the filed-rate doctrine to bar actions for common law fraud or claims seeking relief under state consumer protection statutes, those cases are distinguishable on their facts. See Defs.' Mem. at 23-28 (citing [\*Medco F\\*241 Energi, 729 F.3d 394; Hill v. BellSouth Telecomms., Inc.\*, 364 F.3d 1308, 1315 \(11th Cir. 2004\); Marcus, 138 F.3d 46; Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 18 \(2d Cir. 1994\)\); Defs.' Reply Supp. of Mot. to Dismiss \("Defs.' Reply"\) at 10-14, ECF No. 15 \(citing \[\\*Patel v. Specialized Loan Servicing, LLC\\*, 904 F.3d 1314 \\(11th Cir. 2018\\)\]\(#\)\).](#)

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<sup>8</sup> Indeed, on *Pearson*'s logic, which allowed a suit against the regulated entity, even a suit against UnitedHealth might withstand the filed-rate doctrine so long as the plaintiff challenged not the rates, but the unlawful allocation of funds. The Court need not decide this issue, however, as UnitedHealth is not a defendant in the instant action.

The defendants rely in particular on *Patel*, where the Eleventh Circuit held that [\*\*38] the filed-rate doctrine barred the plaintiffs' state and federal claims, including for breach of contract, tortious interference, and unjust enrichment, against a regulated insurance company and mortgage service providers, which had an exclusive arrangement to place the insurance company's hazard insurance. *Patel*, 904 F.3d at 1317. In that case, the plaintiffs expressly challenged the premium insurance rates they were charged for hazard insurance required to be maintained on real property securing the plaintiffs' mortgage loans ("force-placed insurance"), which premiums were allegedly "artificially inflated" to cover the cost of the insurance company's alleged "kickback" to mortgage loan servicers. *Id.* at 1317, 1326. In reaching this conclusion, the Eleventh Circuit focused on "[t]he most obvious basis," *id. at 1325*, namely, "the fact that the plaintiffs repeatedly state that they are challenging [the insurance company's] premiums," *id. at 1325-26*, using language targeting "artificially inflated premiums," "unreasonably high force-placed insurance premiums," and "amounts charged for insurance coverage," *id. at 1326*, such that "[t]he plain language of the complaints therefore shows that the plaintiffs are challenging the reasonableness of [the insurance company's] [\*\*39] premiums; and since these premiums are based upon rates filed with state regulators, plaintiffs are directly attacking those rates as being unreasonable as well," *id.* The court described these claims "directly challenging the rates ... filed with state regulators" as "textbook examples of the sort of claims that we have previously held are barred by the nonjusticiability principle." *Id.*

The other circuit cases on which the defendants rely are distinguishable from the plaintiff's claims for precisely the reason *Patel* is: in each case, the plaintiffs directly challenged the filed rate. See e.g., *Medco*, 729 F.3d at 399 (concluding that the plaintiff's claim against regulated entity for "misrepresentation about repair times, though 'extra-contractual,' involve the specific subject matter of the tariff [concerning interruptible pipeline service]"); *Hill*, 364 F.3d at 1316-17 (holding that misrepresentation claims against a telecommunications provider for not disclosing that it passed a federally required fee through to consumers as part of its filed rate "in effect" challenged the rate because it "seeks recovery of [the] . . . undisclosed charges" and damages would therefore reduce the filed rate (internal quotation marks and citation [\*\*40] omitted)); *Marcus*, 138 F.3d at 59-62 (holding that the filed-rate doctrine prohibited false advertising claims for damages against telecommunications provider for its practice of "rounding up" the length of a long-distance call because any damages would have the effect of reducing the rate); *Wegoland*, 27 F.3d at 20-21 (concluding that the filed-rate doctrine blocked common law fraud claims against a telecommunications carrier that provided regulating agencies with misleading information in seeking approval of its rate, because in calculating damages the court would have to determine what the reasonable rate would have been absent the fraud).

By contrast to *Patel* and the other circuit cases on which the defendants rely, the Complaint at issue does not challenge the amount of the Medigap insurance rate [\*\*25] or the amount collected by the insurance provider that has been approved by state insurance agencies. The focus of the plaintiff's claims is not the approved rate but AARP's description and practices related to the payments collected by AARP from each premium paid. The crafting of the claims here carefully avoids any direct criticism of the approved Medigap rates, as well as skipping any direct claims against the insurance provider. This [\*\*41] makes a difference since, again, this suit against AARP targets not the insurance premiums but the disclosures about the defendants' side agreement with a regulated entity and, if successful, does not alter the rate the regulated entity is entitled to charge.

This is not the first case to raise the question whether the filed-rate doctrine bars state consumer protection or common law fraud claims against AARP and/or UnitedHealth for the same 4.95% "royalty" charge at issue here. Those courts to address this issue have reached different outcomes, but closer scrutiny shows this is due to differences in the claims asserted. The defendants highlight that district courts in Texas and New York have held that the filed-rate doctrine barred state law claims regarding the 4.95% charge. Defs.' Mem. at 19 (citing *Peacock v. AARP, Inc.*, 181 F. Supp. 3d 430, 441 (S.D. Tex. 2016); *Roussin v. AARP, Inc.*, 664 F. Supp. 2d 412, 415-19 (S.D.N.Y. 2009), aff'd, 379 F. App'x 30 (2d Cir. 2010) (summary order)). District courts in California and New Jersey have rejected this position. See *Bloom v. AARP, Inc.*, No. 18-cv-2788-MCA-MAH (D.N.J. Nov. 30, 2018), Order at

2-4, ECF No. 40; *Levay v. AARP, Inc., No. 17-09041 DDP (PLAx), 2018 U.S. Dist. LEXIS 116585, 2018 WL 3425014, at \*7 (C.D. Cal. July 12, 2018)*; *Friedman v. AARP, Inc., 283 F. Supp. 3d 873, 877-79 (C.D. Cal. 2018)*.<sup>9</sup>

The reasoning of the two [\*\*42] courts that have applied the filed-rate doctrine to bar claims regarding the 4.95% charge is neither binding nor persuasive given the differences in the claims here. In *Peacock*, for example, the plaintiffs "flatly allege[d] that the rates are illegal," [181 F. Supp. 3d at 440](#), and asserted claims that "attack[ed] the legality *vel non* of the rates charged by [AARP and UnitedHealth] for group insurance," [id. at 441](#). The *Peacock* Court therefore had no trouble concluding that this direct attack on the filed rates was barred by the filed-rate doctrine. *Id.* This reasoning is easily distinguishable since the instant suit is not filed against UnitedHealth and does not challenge the legality of the approved rates charged by UnitedHealth. Rather, the plaintiff's claims challenge AARP's practices and disclosures regarding the defendants' retention of a portion of the rates UnitedHealth filed.

*Roussin* similarly sheds little light on the filed-rate doctrine's application to the instant claims. Although the plaintiff in *Roussin* sued only AARP and its affiliates, and not UnitedHealth, her suit directly attacked the reasonableness of the filed [\*26] rates by arguing that the defendants had "failed to fulfill their fiduciary duties to keep [\*\*43] insurance premiums reasonable," [664 F. Supp. 2d at 414](#) (internal quotation marks omitted), a claim the court concluded "at base, challeng[ed] the reasonableness of the cost of her AARP-sponsored health insurance rates," [id. at 415](#), and would require the court to determine whether the rates were reasonable as a predicate to assessing AARP's breach of any duty to the plaintiff, see [id. at 417, 419](#). No such determination about the reasonableness of the Medigap insurance rate is necessary here. For these reasons, *Peacock* and *Roussin* are inapposite.

By contrast, the district courts in New Jersey and California, which rejected application of the filed-rate doctrine to bar claims challenging the 4.95% charge under state consumer protection laws, are more closely analogous to the instant suit. In *Bloom*, the plaintiff sued both AARP and UnitedHealth and their affiliates for failing to disclose, and for false and misleading material statements about, UnitedHealth's payment of the 4.95% commission to AARP. The court found that "'the filed[-]rate doctrine simply does not apply' where a Plaintiff challenges 'allegedly wrongful conduct, not the reasonableness or propriety of the rate that triggered that conduct.'" *Bloom*, No. 18-cv-2788, Order at 2 [\*\*44] (quoting [Alston, 585 F.3d at 765](#)).

Similarly, the plaintiffs in *Levay* and *Friedman* were not barred from pursuing unfair business practices and false advertising claims against both AARP and UnitedHealth because the claims were "essentially about false or misleading advertising, and not challenges to the reasonableness of the actual rates that were approved by the [state department of insurance]," [Levay, 2018 U.S. Dist. LEXIS 116585, 2018 WL 3425014, at \\*7](#), and were "more akin to challenges to Defendants' alleged misrepresentations, rather than challenges to the approved rate, or challenges to whether the rate is reasonable in light of the statutorily prescribed loss ratios for Medigap insurance," [Friedman, 283 F. Supp. 3d at 878](#) (footnote omitted).

The *Levay* Court further explained that the theory of injury did "not concern the price of the insurance policy *per se*," but was that "consumers were 'duped' into joining AARP and paying membership fees in order to access the AARP-branded policies from UnitedHealth," without being told that AARP made "a commission on each sale" and had this ulterior motive to recommend the policies. See [Levay, 2018 U.S. Dist. LEXIS 116585, 2018 WL 3425014, at \\*5](#). As such, the *Levay* Court concluded that the state insurance agency's "rate determination is different from what is at issue here—whether the lender mischaracterized [\*\*45] the nature of the charges. . . . [u]nder this theory of

<sup>9</sup> AARP and UnitedHealth have sought dismissal due, *inter alia*, to the filed-rate doctrine in other cases challenging the 4.95% charge, but those dismissal motions remain pending. See, e.g., *Dane v. Unitedhealthcare Ins. Co.*, No. 18-cv-792-SRU (D. Conn.); *Christoph v. AARP, Inc.*, No. 18-cv-3453-NIQA (E.D. Pa.). In addition, other similar cases have been dismissed voluntarily without a decision on the merits. See, e.g., *Sacco v. AARP, Inc.*, No. 18-cv-14041-JEM (S.D. Fla. Jan. 23, 2019), Stipulation of Dismissal, ECF No. 89 (a putative class action filed on behalf of Florida residents against AARP and UnitedHealth and raising Florida law claims was stayed by the Southern District court of Florida and then voluntarily dismissed upon the Eleventh Circuit's denial of a petition for rehearing in *Patel*); *Baruch v. AARP, Inc.*, No. 18-cv-1563-AJN (S.D.N.Y. Mar. 26, 2018), Notice of Voluntary Dismissal, ECF No. 30 (a putative class action filed on behalf of New York residents raising New York state claims against AARP and UnitedHealth).

recovery, the adjudication of Plaintiffs' claims would not improperly encroach on . . . rate-making authority." [2018 U.S. Dist. LEXIS 116585, \[WL\] at \\*7](#) (internal quotation marks, alterations, and citation omitted). The *Friedman* Court similarly reasoned that "the gravamen of the complaint is not the premium rate per se, but the failure to disclose the allegedly fraudulent nature of the commission charged to borrowers," such that the challenged payments "appear to fall outside of the scope of the . . . regulatory approval of rates," and the filed-rate doctrine. [283 F. Supp. 3d at 878-79](#) (internal quotation marks and citation omitted).

Just as in *Bloom*, *Levay* and *Friedman*, the plaintiff's state law claims against AARP and its affiliates regarding AARP's allegedly deceptive conduct and unfair business practices are independent of any approved rates UnitedHealth filed in the District of Columbia, or any other state. Thus, resolution of these claims about whether the plaintiff was *deceived by* and *injured by* the defendants' false representations [\*27] concerning the 4.95% charge, or its incorporation as part of the premiums on file, does not necessitate any determination about the reasonableness of the [\*\*46] rate.

Accordingly, the filed-rate doctrine does not bar the plaintiff's claims.

### C. Choice of Law

The defendants contend that because the plaintiff originally purchased a Medigap policy in 2012 when she resided in Louisiana, and later renewed that coverage while residing in Florida, either Louisiana or Florida law should apply. Defs.' Mem. at 17 n.3, 28. The plaintiff seeks application of District of Columbia law. Pl.'s Opp'n at 22-28. The Court agrees that District of Columbia law applies, though without agreeing with all of the plaintiff's reasoning.

The plaintiff first submits that her claims must be considered under District of Columbia law due to a provision in the group policy indicating as much. See Compl. ¶ 22 (quoting the Certificate of Insurance as stating that AARP "issued the Group Policy in the District of Columbia. . . . [and] [i]t provides insurance for AARP members and is governed by the laws of the District of Columbia"); Pl.'s Opp'n at 22-24. The defendants argue persuasively, however, that this provision only governs contractual claims related to the insurance policy and does not apply to the tort claims alleged here. See Defs.' Mem. at 32 n.9; Defs.' Reply at 23. The [\*\*47] Court agrees that the contractual choice-of-law provision does not necessarily bind parties with respect to non-contractual causes of action, such as those asserted here. See [Base One Techs., Inc. v. Ali, 78 F. Supp. 3d 186, 192 \(D.D.C. 2015\)](#) (noting that contractual choice-of-law provisions do not bind parties with respect to tort actions) (citing [Minebea Co., Ltd. v. Papst, 377 F. Supp. 2d 34, 38-39 \(D.D.C. 2005\)](#)). Nevertheless, under a choice-of-law analysis, the plaintiff prevails on the issue of which state's law governs this action.

When exercising diversity jurisdiction, the choice-of-law rules of the forum apply. [Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 \(1941\)](#); [Shaw v. Marriott Int'l, Inc., 605 F.3d 1039, 1045, 390 U.S. App. D.C. 422 \(D.C. Cir. 2010\)](#). Under District of Columbia law, the first step in a choice-of-law analysis is determining "whether a 'true conflict' exists between the laws of the [competing] jurisdictions—that is, whether more than one jurisdiction has a potential interest in having its law applied and, if so, whether the law of the competing jurisdictions is different." [In re APA Assessment Fee Litig., 766 F.3d 39, 51-52, 412 U.S. App. D.C. 324 \(D.C. Cir. 2014\)](#) (citing [GEICO v. Fetisoff, 958 F.2d 1137, 1141, 294 U.S. App. D.C. 279 \(D.C. Cir. 1992\)](#); [Fowler v. A & A Co., 262 A.2d 344, 348 \(D.C. 1970\)](#)). If there is no conflict, the law of the District of Columbia applies by default. See [Estate of Doe v. Islamic Republic of Iran, 808 F. Supp. 2d 1, 20-21 \(D.D.C. 2011\)](#). If a conflict does exist, courts must employ a "modified governmental interests analysis which seeks to identify the jurisdiction with the most significant relationship to the dispute." [Washkoviak v. Sallie Mae, 900 A.2d 168, 180 \(D.C. 2006\)](#) (internal quotation marks and citation omitted); see also [Oveissi v. Islamic Republic of Iran, 573 F.3d 835, 842, 387 U.S. App. D.C. 366 \(D.C. Cir. 2009\)](#) ("District of [\*\*48] Columbia courts blend a 'governmental interests analysis' with a 'most significant relationship' test." (internal quotation marks and citation omitted)). The Court addresses each of these issues *seriatim*.

### 1. Florida and Louisiana Law Conflicts With District of Columbia Law

"A conflict of laws does not exist when the laws of the different jurisdictions [\*28] are identical or would produce the identical result on the facts presented." [USA Waste of Md., Inc. v. Love, 954 A.2d 1027, 1032 \(D.C. 2008\)](#) (footnote omitted). On the other hand, a conflict may be found when two jurisdictions have different applicable laws, which would result in different outcomes. See *id.* In this case, the defendants argue vigorously that if the plaintiff were to litigate her claims under Florida law or Louisiana law, the outcome of this case would be different because her claims would be barred by the filed-rate doctrine. Defs.' Reply at 10-11 (citing [Patel, 904 F.3d at 1320, 1326 \(Florida law\)](#)); Defs.' Mem. at 27 n.8 (citing [Medco Energi, U.S., LLC v. Sea Robin Pipeline Co., 895 F. Supp. 2d 794, 816 \(W.D. La. 2012\)](#), aff'd, [729 F.3d 394 \(\(Louisiana law\)\)](#)). The plaintiff appears to concede a conflict with Louisiana law, while suggesting her claim is distinguishable from Florida-law claims barred by the filed-rate doctrine because UnitedHealth is not a defendant in the action. See Pl.'s Opp'n at 18 & n.5.<sup>10</sup> No matter. Even assuming a demonstrated [\*49] conflict among the laws of these three jurisdictions, consideration of the "governmental interest" and "significant relationship" tests confirms that the plaintiff's claims are governed by District of Columbia law.

## **2. Governmental Interest Test Favors Application of District of Columbia Law**

The governmental interest analysis requires a court to "evaluate the governmental policies underlying the applicable laws and determine which jurisdiction's policy would be most advanced by having its law applied to the facts of the case under review." [Oveissi, 573 F.3d at 842](#) (internal quotation marks and citation omitted). The defendants point out that Florida and Louisiana have comprehensive regulatory schemes for Medigap insurance and therefore have a strong governmental interest in having their laws applied. See Defs.' Mem. at 30-32. Moreover, they contend that Florida and Louisiana's interests outweigh the interests of the District of Columbia because the defendants' "place of business bears no meaningful connection to claims regarding a Louisiana and Florida resident who purchased Louisiana-and Florida-regulated insurance." *Id.* at 31-32.

The plaintiff counters that the most heavily weighted factor is the place of the [\*50] conduct causing injury, which "favors the District of Columbia because that is where AARP devised its scheme, prepared and approved of the marketing materials, entered into the Agreement with UnitedHealth, and where AARP Trust skimmed off 4.95% of Plaintiff's Medigap payments and forwarded it to AARP and ASI." Pl.'s Opp'n at 25-26. The plaintiffs' argument, based on the nature of the claims here, is more persuasive.

The plaintiff is seeking to vindicate her own rights, and the rights of those similarly situated under the District of Columbia's CCPA. For CCPA claims, "[t]he District of Columbia has an interest in protecting its own citizens from being victimized by unfair trade practices *and an interest in regulating the conduct of its business entities.*" [Shaw, 605 F.3d at 1045](#) (emphasis added). Indeed, the CCPA is not limited in its application to consumers or companies who are residents of the District, so the plaintiff's residence in Florida or previous residence in Louisiana does not prevent her from stating a claim under the CCPA. See [D.C. Code § 28-3904](#) [\*29] (it is a violation of the CCPA for any "person" to engage in deceptive trade practices); see also [Washkoviak, 900 A.2d at 180-83](#) (allowing non-residents to bring claims under the CCPA and claims under [\*51] District of Columbia common law). Even if Florida or Louisiana have an equal interest as the District of Columbia in applying their own laws, in such a situation the law of the forum state should apply. See [Washkoviak, 900 A.2d at 182](#) (citing [Logan v. Providence Hosp. Inc., 778 A.2d 275, 278 \(D.C. 2001\)](#)). Thus, the District of Columbia has a strong governmental interest in the application of the CCPA in this case.

## **3. The Significant Relationship Test Favors Application of D.C. Law**

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<sup>10</sup> Notably, the plaintiff made this argument before the Eleventh Circuit issued its opinion in *Patel*, holding that the filed-rate doctrine applies when an intermediary passes the cost of regulator-approved rates on to a third party. See [904 F.3d at 1322](#).

When evaluating which jurisdiction has the "most significant relationship" to the case, courts in the District of Columbia "must consider the factors enumerated in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145, which are: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered." Oveissi, 573 F.3d at 842 (internal quotation marks, alterations, and citations omitted); Washkoviak, 900 A.2d at 180.<sup>11</sup> The weighing of these four factors demonstrates that the District of Columbia has a more significant relationship to the plaintiff's misrepresentation and deceptive advertising claims, as well as the common law claims based on the same set of facts.

### a. The Place of Injury

The first factor requires the Court to consider the place where the injury to [\*30] the plaintiff occurred. In a typical misrepresentation case, the injury occurs where the plaintiff "received the alleged misrepresentations and made their payments." Washkoviak, 900 A.2d at 181. In this case, the plaintiff alleges that the defendants violated the CCPA by falsely advertising and misrepresenting the source and purpose of the 4.95% charge. The parties agree that the place of the plaintiff's injury for her misrepresentation claims are Florida or Louisiana, where she "received the alleged misrepresentations," Washkoviak, 900 A.2d at 181. See Pl.'s Opp'n at 25; Defs.' Mem. at 30-31.

Yet, according to the Restatement and the D.C. Court of Appeals, "the place of injury is less significant in the case of fraudulent misrepresentations" than "in the case of personal injuries and of injuries to tangible things." Washkoviak, 900 A.2d at 181-82 (internal quotation marks and citation omitted) (stating that there was a "discounted value of the place of injury in cases . . . involving claims of misrepresentation"); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. f ("[T]he place of injury is less significant in the case of fraudulent misrepresentations and of such [\*\*53] unfair competition as consists of false advertising and the misappropriation of trade values.") (internal citation omitted). Accordingly, although this factor weighs in favor of applying Florida or Louisiana law, the significance of this result is diminished because of the nature of the claims.

### b. The Place Where the Conduct Causing the Injury Occurred

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<sup>11</sup> In reply, the defendants suggest that Section 148 of the Second Restatement concerning "fraud and misrepresentation," should be applied here rather than Section 145. See Defs.' Reply at 21-22. While the D.C. Court of Appeals has previously looked to Section 148 as a "useful framework for selecting the law which applies to multi-state misrepresentation claims," Hercules & Co., Ltd. v. Shama Restaurant Corp., 566 A.2d 31, 43 (D.C. 1989), more recent cases primarily look to Section 145, see Washkoviak, 900 A.2d at 182 n.18 (relying on Section 145 but noting the result would be no different under Section 148); Jones v. Clinch, 73 A.3d 80, 82 (D.C. 2013) (citing Hercules but nonetheless relying on Section 145 when analyzing a CCPA claim alleging misrepresentation); see [\*\*52] also In re APA Assessment Fee Litig., 766 F.3d at 53-55 (following Washkoviak and conducting an analysis of choice of law for misrepresentation claims under Section 145, but concluding there would be no difference if the question were considered under Section 148); Margolis v. U-Haul Int'l, Inc., 818 F. Supp. 2d 91, 102 n.7 (D.D.C. 2011) (pointing to counsel's concession that "there is no case under the CCPA in the Superior Courts or in federal court that has ever applied [Section] 148") (internal alteration and quotation marks omitted); Mobile Satellite Commun's, Inc. v. Intelsat USA Sales Corp., 646 F. Supp. 2d 124, 130 (D.D.C. 2009) (noting that the D.C. Court of Appeals "has applied [Section] 145 even in cases of fraudulent misrepresentation," and citing both Washkoviak and Hercules). Given this background, the Court concludes that Section 145 provides the appropriate framework. The plaintiff's motion for leave to submit a surreply to address this argument (among others) is therefore unnecessary. See Pl.'s Mot. for Leave to File Surreply, ECF No. 17. Further, as the defendants note, see Defs.' Opp'n to Pl.'s Mot. for Leave to File Surreply at 4, ECF No. 18, the plaintiff has failed to attach her proposed surreply for the Court's consideration. See *id.* (citing Glass v. Lahood, 786 F. Supp. 2d 189, 231 (D.D.C. 2011) (in which the plaintiff submitted her proposed surreply so that the Court could evaluate whether it was warranted); Crummey v. Soc. Sec. Admin., 794 F. Supp. 2d 46, 54, 63-64 (D.D.C. 2011) (same)). Therefore, the plaintiff's Motion for Leave to File a Surreply is denied as both defective and unnecessary, since the issues the plaintiff seeks to address would not aid in the Court's resolution of the pending motion to dismiss.

The second factor in the choice-of-law analysis requires assessment of where the conduct causing the injury occurred. According to the Restatement, as previously discussed, "the place of injury does not play so important a role for choice-of-law purposes in the case of false advertising. . . . Instead, the principal location of the defendant's conduct is the contact that will usually be given the greatest weight." *RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. f.* See also Margolis, 818 F. Supp. 2d at 102-03 (quoting Washkoviak, 900 A.2d at 181-82 for the proposition that the place of injury has a "discounted value" in cases involving claims of misrepresentation).

Likewise, in cases alleging a misrepresentation, the place where the conduct causing the injury occurred is the place where the defendant has its principal place of business and sets its policies and practices. See Wu v. Stomber, 750 F.3d 944, 949, 409 U.S. App. D.C. 448 (D.C. Cir. 2014) (Kavanaugh, J.) (holding that the "conduct causing the injury" occurred in [\*\*54] the location of the defendant's principal place of business); Restatement (Second) Of Conflict Of Laws § 145 cmt. e (where the conduct occurred will usually be given particular weight when the place of injury "can be said to be fortuitous or when for other reasons it bears little relation to the occurrence and the parties with respect to the particular issue. . . . such as in the case of fraud and misrepresentation"). The defendants do not dispute that they set their practices and policies in the District of Columbia, where AARP is headquartered and where each of the AARP affiliates has its primary place of business. As a result, this second factor favors the application of District of Columbia law.

#### **c. The Residence, Place of Incorporation, and Place of Business of the Parties**

The third factor of the choice-of-law analysis focuses on the residency of the parties in the case. At the time she purchased AARP's Medigap policies, the plaintiff was a resident either of Louisiana or of Florida. See Pl.'s Opp'n at 25. The [\*31] defendants AARP, AARP Trust, and ASI are all incorporated, headquartered, and maintain their primary place of business in the District of Columbia. *Id.* at 26 (citing Compl. ¶¶ 21-23). As already noted, the District of Columbia has an [\*\*55] interest in regulating the conduct of businesses incorporated there. See Shaw, 605 F.3d at 1045. Although the states of Florida and Louisiana may have an interest in regulating insurance companies within their states, AARP is not such an insurance company. Moreover, to the extent those other states have an interest in regulating third-parties involved in the sale of insurance policies within their states, those interests are less than that third-party's place of incorporation and place of business. In any event, where interests may be equal, the forum state's law applies. See Washkoviak, 900 A.2d at 182. Consideration of this factor thus favors application of District of Columbia law.

#### **d. Where the Relationship Between the Parties is Centered**

The fourth Restatement factor instructs the Court to determine where the relationship between the parties is centered. The defendants suggest that because Medigap policies are subject to state regulation, the plaintiff's relationship to the defendants was centered in Louisiana, where she originally purchased her Medigap policy, and Florida, where she renewed it. See Defs.' Mem. at 31. The plaintiff counters that the fourth factor "clearly favors the District of Columbia above any other jurisdiction [\*\*56] [because] (1) the AARP membership organization is located in the District of Columbia and AARP membership is a requirement for purchasing Medigap insurance policies; (2) AARP's decision to market AARP Medigap Policies to AARP members emanated from the District of Columbia; and (3) it is where AARP Trust segregates Plaintiff's money, forwarding her premiums to UnitedHealth and diverting 4.95% to AARP and ASI." Pl.'s Opp'n at 26 (citing Compl. ¶¶ 22, 23, 71).

In this action, where the gravamen of the plaintiff's complaint is misrepresentation and false advertising, the Court agrees that the plaintiff's relationship with the defendants is centered in the District of Columbia, where the defendants have their primary place of business and where they make their policies and practices regarding advertising.

#### **4. District of Columbia Law Is Applied**

Having considered both the governmental interest analysis and the significant relationship test, informed by the four factors outlined by [Section 145](#) of the Second Restatement, the Court concludes that District of Columbia law should govern this dispute. The place of the plaintiff's alleged injury due to the defendants' alleged misrepresentations and failure to [\[\\*\\*57\]](#) disclose certain information occurred in Louisiana or Florida, but the alleged misconduct emanated from District of Columbia, where the defendants are headquartered and have their primary place of business. As the plaintiff alleges, "AARP formulated and conceived its role in the scheme largely in the District of Columbia, directed the scheme complained of . . . from the District of Columbia, and its communications and other efforts to execute the scheme largely emanated from the District of Columbia. . . . [including] AARP's decision to market AARP Medigap policies to AARP members, its policies and practices relating to AARP Medigap Policies, including the . . . decision to collect the 4.95% commission." Compl. ¶¶ 70-71. In light of the fact that this case involves allegations of misrepresentation, for which the place of the alleged injury is [\[\\*32\]](#) less important than in other tort cases, see [In re APA Assessment Fee Litig., 766 F.3d at 54](#) (citing [Washkoviak, 900 A.2d at 182](#)), bolstered by the District of Columbia's interest in regulating companies incorporated under its laws, District of Columbia law will be applied to the instant claims.

#### D. Statutes of Limitations

The defendants raise yet another threshold issue: namely, that the plaintiff filed the instant Complaint [\[\\*\\*58\]](#) outside of the statute of limitations under both Louisiana and District of Columbia law, since she first purchased her Medigap policy in 2012. See Defs.' Mem. at 37-38. The plaintiff counters that she last renewed her policy in November 2016, within the District of Columbia's three-year statute of limitations for the filing of her Complaint in 2018, and in any event her claim should be allowed under either a "continuing tort" or "fraudulent concealment" theory. See Pl.'s Opp'n at 32-34 & n.17. For the following reasons, the Court declines, at this stage, to dismiss the Complaint as untimely.

A defendant may raise a statute of limitations defense "in a pre-answer motion under . . . [Rule 12\(b\)](#)." [Smith-Haynie v. District of Columbia, 155 F.3d 575, 577, 332 U.S. App. D.C. 182 \(D.C. Cir. 1998\)](#). The D.C. Circuit has "repeatedly held," however, that "courts should hesitate to dismiss a complaint on statute of limitations grounds based solely on the fact of the complaint." [Firestone v. Firestone, 76 F.3d 1205, 1209, 316 U.S. App. D.C. 152 \(D.C. Cir. 1996\)](#) (per curiam). "[S]tatute of limitations issues often depend on contested questions of fact, [so] dismissal is appropriate only if the complaint on its face is conclusively time-barred." [Bregman v. Perles, 747 F.3d 873, 875, 409 U.S. App. D.C. 143 \(D.C. Cir. 2014\)](#) (internal quotation marks omitted) (quoting [de Csepel v. Republic of Hungary, 714 F.3d 591, 603, 404 U.S. App. D.C. 358 \(D.C. Cir. 2013\)](#)).

Under District of Columbia law, the plaintiff must bring her CCPA and related common [\[\\*\\*59\]](#) law claims within three years from the time when her right to maintain the action accrued. See [D.C. Code § 12-301\(8\); Comer v. Wells Fargo Bank, N.A., 108 A.3d 364, 369 n.7 \(D.C. 2015\)](#). A claim accrues when the plaintiff has "either 'actual notice of her cause of action' or is deemed to be on 'inquiry notice' by failing to 'act reasonably under the circumstances in investigating matters affecting her affairs, where 'such an investigation, if conducted, would have led to actual notice.'" [Medhin v. Hailu, 26 A.3d 307, 310 \(D.C. 2011\)](#) (quoting [Harris v. Ladner, 828 A.2d 203, 205-06 \(D.C. 2003\)](#)). "[W]hat constitutes the accrual of a cause of action is a question of law; the actual date of accrual, however, is a question of fact." [Medhin, 26 A.3d at 310](#) (internal alteration, quotation marks, and citation omitted). Moreover "[w]hat is 'reasonable under the circumstances' is a highly factual analysis. The relevant circumstances include, but are not limited to, the conduct and misrepresentations of the defendant, and the reasonableness of the plaintiff's reliance on the defendant's conduct and misrepresentations." [Diamond v. Davis, 680 A.2d 364, 372 \(D.C. 1996\)](#).

Related to the assessment of the reasonableness of reliance, the District of Columbia recognizes a "discovery rule" that operates to trigger the accrual date for the limitations period upon discovery of the injury when the alleged tortious conduct obscures when the injury occurred. [\[\\*60\]](#) See [Hughes v. Abell, 794 F. Supp. 2d 1, 12 \(D.D.C. 2010\)](#). Under this rule, a cause of action accrues "when one knows or by the exercise of reasonable diligence should know (1) of the injury, (2) its cause in fact, and (3) of some evidence of wrongdoing." [\[\\*33\]](#) *Id.* (internal

quotation marks omitted) (quoting *Morton v. Nat'l Med. Enters., Inc.*, 725 A.2d 462, 468 (D.C. 1999)). "[W]hen one person defrauds another, there will be a delay between the time the fraud is perpetrated and the time the victim awakens to that fact." *In re Estate of Delaney*, 819 A.2d 968, 981 (D.C. 2003) (internal quotation marks and citation omitted).

Relatedly, the District of Columbia also recognizes a "continuing tort doctrine," which allows a plaintiff to recover for harms that would otherwise be time barred when she suffers "(1) a continuous and repetitious wrong, (2) with damages flowing from the act as a whole rather than from each individual act, and (3) at least one injurious act . . . within the limitation period." *Beard v. Edmondson & Gallagher*, 790 A.2d 541, 547-48 (D.C. 2002) (internal quotation marks and citation omitted). This doctrine may apply when the claimed "injury might not have come about but for the entire course of conduct." *Pleznac v. Equity Residential Mgmt., L.L.C.*, 320 F. Supp. 3d 99, 104 (D.D.C. 2018) (internal quotation marks and emphasis omitted) (quoting *John McShain, Inc. v. L'Enfant Plaza Props., Inc.*, 402 A.2d 1222, 1231 n.20 (D.C. 1979)).

As to this latter theory, the defendants argue that the continuing tort doctrine is inapplicable to a situation where the plaintiff makes a series [\*\*61] of periodic payments, all stemming from an initial wrong outside of the limitations period, relying heavily on *Pleznac*, a case that is not binding on this Court. Defs.' Reply at 15-16 (citing *Pleznac*). The plaintiff in *Pleznac* alleged that she was fraudulently induced into signing a lease and that the renewal of that lease, occurring within the statute of limitations period, allowed her to bring a claim for the initial fraud. *Pleznac*, 320 F. Supp. 3d at 105-06. The Court rejected that argument, but held open the possibility that a plaintiff in a similar situation could "seek[] relief based on . . . subsequent lease renewals. . . . [because] [i]t could theoretically be the case that the renewals were independent acts of deception rather than mere injuries flowing from the initial misrepresentations or omissions." *Id.* at 105. The possibility that the Court held open in *Pleznac* applies here where the plaintiff alleges that AARP misrepresented the nature of the 4.95% charge both when she originally bought her policy and when she renewed it, and that therefore each renewal was an "independent act[] of deception" subject to the continuing tort doctrine. *Id.*

In any event, assuming that the plaintiff's claim did not accrue until she [\*\*62] learned the specifics of the 4.95% charge constituting a "royalty" UnitedHealth owed AARP and that consumers were charged the royalty in conjunction with their premium payments, she does not specify in her Complaint when she learned those details. Nor does any party address whether the plaintiff should be deemed to have been on inquiry notice of her claim as a result of the filing, as early as 2009, of other lawsuits against AARP with similar allegations, as well as AARP's testimony in 2011 before the House Ways and Means Committee, which testimony and related Congressional investigations are cited in the Complaint, see Compl. ¶¶ 48, 59-61. Moreover, the Complaint does not specify when the plaintiff viewed the defendants' advertisements or statements regarding the 4.95% charge, or when the plaintiff learned facts leading her to believe that such advertisements or statements were materially false. These dates may be relevant to an analysis of whether the plaintiff's claims are time barred or whether the discovery rule should apply. Yet, given that these factual matters remain unknown, and since the Complaint is not "on its face" conclusively [\*34] time barred, *Bregman*, 747 F.3d at 875, dismissal for statute of limitations [\*\*63] reasons is not appropriate at this time.

## **E. The Plaintiff Plausibly States a Claim for Relief**

The plaintiff asserts four claims against all three defendants: unfair trade practices under the CCPA, conversion, unjust enrichment, and fraudulent concealment. Since the factual allegations sufficiently state plausible claims, as explained further below, the defendants' motion to dismiss for failure to state a claim is denied.

### **1. Count One States a Violation of the CCPA**

The CCPA is a "comprehensive statute designed to provide procedures and remedies for a broad spectrum of practices which injure consumers." *Atwater*, 566 A.2d at 465. This law is expressly intended to "be construed and applied liberally to promote its purpose." *D.C. Code § 28-3901(c)*. The plaintiff invokes the CCPA to challenge the

defendants' conduct in marketing, soliciting members to enroll in, and administering Medigap policies. Specifically, the plaintiff alleges that AARP committed an unlawful trade practice, in violation of the CCPA, by issuing solicitation materials, letters to prospective consumers, billing statements, renewal letters, and website statements containing misrepresentations of material facts concerning the 4.95% payment and AARP's collection and receipt, [\*\*64] without being a licensed insurance broker or agent, of a commission on each policy sale or renewal. Compl. ¶¶ 5, 92-96. The plaintiff claims financial harm by these unlawful trade practices because she would have sought a different Medigap policy that did not incorporate a 4.95% "commission that AARP is not legally entitled to," *id.* ¶ 97, and because the defendants' actions "deprived [her] of truthful information regarding [her] choice" of Medigap policies, *id.* ¶ 100.

The defendants challenge the validity of this CCPA claim on four grounds: (1) the CCPA does not apply to transactions conducted outside the District of Columbia, *Defs.' Mem.* at 38-39; (2) the plaintiff lacks standing because she does not allege an injury in fact, *id.* at 39-41; (3) the defendants do not qualify as a "merchant" under the CCPA, *id.* at 41; and (4) unfair trade practices through material misrepresentations have not been sufficiently pled, *id.* at 42-44. Each of these arguments falls short.

#### a. The CCPA Applies to the Alleged Transactions

The CCPA applies to the transactions alleged in this case. The defendants argue that the CCPA only "establishes an enforceable right to truthful information from merchants about consumer goods and services that [\*\*65] are or would be purchased, leased, or received in the District of Columbia," and, since the plaintiff never alleges that she purchased, leased, or even saw any advertisements in the District of Columbia, the CCPA claim should be dismissed. *Defs.' Mem.* at 39 (emphasis omitted) (citing [D.C. Code § 28-3901\(c\)](#)). Noting that the CCPA must "be construed and applied liberally to promote its purpose," *Pl.'s Opp'n* at 35 (internal quotation marks omitted) (quoting [D.C. Code § 28-3901\(c\)](#)), the plaintiff contends that, regardless of her connections to other states, the CCPA applies when "the plaintiff . . . avers that the defendant[s'] actions in the District of Columbia gave rise to the plaintiff's claims under the CCPA," which the plaintiff has done here, *Pl.'s Opp'n* at 35 (emphasis omitted) (quoting [Renchard v. Prince William Marine Sales, Inc., 87 F. Supp. 3d 271, 283 \(D.D.C. 2015\)](#)). The Complaint expressly alleges that "AARP formulated and conceived its role in the scheme largely in the District of Columbia, directed the [\*35] scheme . . . from the District of Columbia, and its communications and other efforts to execute the scheme largely emanated from the District of Columbia. . . . [including] the oversight of the marketing . . . and decision to collect the 4.95% commission" Compl. ¶¶ 70, 71. These allegations sufficiently [\*\*66] "aver[] that the defendants' actions in the District of Columbia gave rise to [her] claims under the CCPA." [Renchard, 87 F. Supp. 3d at 283](#) (emphasis omitted).

The defendants question the plaintiff's reliance on *Renchard*, see *Defs.' Reply* at 17, a case in which a yacht owner asserted a CCPA claim against the Virginia company that financed his yacht purchase and subsequently seized the yacht in the District of Columbia for failure to make payment for improvements made to the yacht in the District of Columbia. See [Renchard, 87 F. Supp. 3d at 274-76](#). The Court found no merit to defendants' claims that the CCPA would involve extraterritorial conduct because in *Renchard*, the District of Columbia was "where the injury occurred and the place where the conduct causing the injury occurred." [Id. at 283](#). The defendants attempt to distinguish *Renchard* by pointing out that the Court also noted that the yacht was received in the District of Columbia, whereas in this suit the plaintiff purchased and received insurance in Florida and Louisiana. *Defs.' Reply* at 17. Yet this overlooks the Court's strong reliance on the plaintiff's allegations that "the defendants' actions in the District of Columbia gave rise to the plaintiff's claims under the CCPA," [Renchard, 87 F. Supp. 3d at 283](#) (emphasis in original), [\*\*67] and that even if other states may have interests in the matter, "the injury complained of, and direct conduct contributing to that injury, occurred in Washington D.C.," *id.* The same is true here: the plaintiff alleges that the defendants' false advertising and unfair business practices emanated from the District of Columbia, where they are based, and, as noted *supra* in Section III.C.3, the place of the plaintiff's injury is less important in false representation cases than where the conduct causing the injury occurred.

Furthermore, this Court has previously held that the CCPA had "extraterritorial" application and could govern disputes between out-of-state plaintiffs and a defendant headquartered in the District of Columbia. See *Shaw v. Marriott Int'l, Inc.*, 474 F. Supp. 2d 141, 147 & n.4, 149 (D.D.C. 2007). Indeed, Shaw noted that "courts in the District of Columbia have already concluded that its policies are advanced by application of the CCPA to cases involving non-District of Columbia consumers, merchants, and transactions." *Id. at 149-50* (citing *Williams v. First Gov't Mortg. & Inv'r Corp.*, 176 F.3d 497, 499, 336 U.S. App. D.C. 71 (D.C. Cir. 1999); *Washkoviak*, 900 A.2d at 177, 180-81); see also *In re APA Assessment Fee Litig.*, 766 F.3d at 53-55 (upholding the District Court's choice-of-law analysis applying District of Columbia law when out-of-state plaintiffs sued a defendant headquartered in the District of Columbia for misrepresentations [\*\*68] regarding membership fees).

In light of this precedent, the Court concludes that the CCPA applies to the conduct alleged in this case.

#### b. The Plaintiff Has Standing to Bring a CCPA Claim

Contrary to the defendants' contentions, the plaintiff has standing to pursue this CCPA claim. The "irreducible constitutional minimum" of standing consists of three elements. *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). The plaintiff must have suffered (1) an injury in fact (2) that is fairly traceable to the challenged conduct of the defendant and (3) that is likely [\*36] to be redressed by a favorable judicial decision. *City of Boston Delegation v. FERC*, 897 F.3d 241, 248 (D.C. Cir. 2018). The injury in fact must be both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks and citations omitted).

The defendants contend that the plaintiff suffered no injury in fact because she paid precisely the premium that was approved by state regulatory agencies, Defs.' Mem. at 40, and even if she believes she should have received more information about the royalties deducted from that premium, she "has not alleged, and cannot plausibly allege, any loss caused by United[Health]'s allocation of premium revenue to program expenses, including the AARP royalty," *id.* According [\*\*69] to the defendants, the plaintiff cannot avoid this flaw in her alleged injury in fact by positing that had she known about the defendants' alleged misconduct, she would have purchased Medigap insurance from another company. See *id.* (citing Compl. ¶ 79). The defendants further contend that the plaintiff "alleges no facts making this bald assertion plausible," including, for example, "what alternative carrier Plaintiff would have considered, the rates offered by that hypothetical alternative provider, or whether those rates were lower." Defs.' Mem. at 40. Consequently, this "conclusory statement that she would have purchased different coverage does not," in the defendants' view, "permit an inference that she suffered any loss." *Id.* at 40-41.

Drawing all inferences in the plaintiff's favor, as is required at this procedural stage, she has sufficiently alleged financial harm. See *Attias v. CareFirst, Inc.*, 865 F.3d 620, 622, 627-28, 431 U.S. App. D.C. 273 (D.C. Cir. 2017) (recognizing that allegations, rather than evidence of injury, may support standing at the motion-to-dismiss stage). This is especially true in the context of Medigap policies, which are often identical in every respect except for price. See CMS Medigap Guide at 9, 13, 19 ("Different insurance companies may charge different premiums for the same exact [\*\*70] policy."). The plaintiff asserts that she has sufficiently alleged an injury in fact based on: (1) the financial harm she suffered when AARP misled her into paying an illegal 4.95% commission; and (2) the violation of her statutory right to truthful information. Pl.'s Opp'n at 37. The plaintiff has sufficiently alleged that, had she understood what was presented to her as a "premium" to "pay expenses incurred by the [AARP] Trust in connection with the insurance programs and to pay the insurance company for . . . insurance coverage," Compl. ¶ 64, also included a 4.95% charge intended to meet UnitedHealth's royalty obligations, she would have sought out a different, lower-priced policy, and therefore she was financially harmed by the allegedly misleading advertisements. These allegations suffice to establish an injury in fact at this stage.

In making this determination, resolving whether the 4.95% charge is properly characterized as a "commission" or a "royalty" or an unlawful "kickback" is unnecessary. Regardless of labels, all the plaintiff is required to do is sufficiently to allege economic harm, "a classic form of injury-in-fact." *Osborn v. Visa Inc.*, 797 F.3d 1057, 1064, 418 U.S. App. D.C. 193 (D.C. Cir. 2015) (internal quotation marks and citation omitted); [\*\*71] see also *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5, 428 U.S. App. D.C. 243 (D.C. Cir. 2017) (Kavanaugh, J.) ("A dollar of

economic harm is still an injury-in-fact for standing purposes."). She has sufficiently stated an injury in fact, as other courts have found with respect to virtually identical allegations regarding the same 4.95% charge. See [Levay, 2018 U.S. Dist. LEXIS 116585, 2018 WL 3425014, at \\*4-5; Friedman, 283 F. Supp. 3d at 879-80](#) (holding that the [\*37] plaintiff had established an injury, but dismissing the claim because the plaintiff no longer held a Medigap policy and therefore had no standing to pursue injunctive relief).<sup>12</sup>

The plaintiff has sufficiently alleged financial harm as a result of the defendants' actions, and thus has met the injury in fact requirement to seek damages in Count One alleging a violation of the CCPA.<sup>13</sup>

### c. The Defendants Qualify as Merchants Under the CCPA

The defendants argue that the CCPA only applies to "merchants" who supply "goods and services," whereas none of the defendants sold, supplied, or transferred insurance policies to the plaintiff in a consumer-merchant relationship. Defs.' Mem. at 41-42. "[T]he CCPA does not cover all consumer transactions, and instead only covers 'trade practices arising out of consumer-merchant relationships.'" [Sundberg v. TTR Realty, LLC, 109 A.3d 1123, 1129 \(D.C. 2015\)](#) (quoting [Snowder v. District of Columbia, 949 A.2d 590, 599 \(D.C. 2008\)](#)). The CCPA defines "merchant" as one [\*\*72] "who in the ordinary course of business does or would sell, lease (to), or transfer, either directly or indirectly, consumer goods or services . . . or would supply the goods or services which are or would be the subject matter of a trade practice." [D.C. Code § 28-3901\(a\)\(3\)](#). Persons or entities sufficiently "connected with the supply side of the consumer transaction" meet the CCPA's definition of a merchant. [Adler v. Vision Lab Telecomm., Inc., 393 F. Supp. 2d 35, 39 \(D.D.C. 2005\)](#) (internal quotation marks omitted) (quoting [Save Immaculata/Dunblane, Inc. v. Immaculata Preparatory Sch., 514 A.2d 1152, 1159 \(D.C. 1986\)](#)).

The plaintiff alleges that "AARP's solicitation, marketing, and sale of AARP Medigap Policies constitutes the sale of consumer goods or services in the ordinary course of business." Compl. ¶ 53. In support, the plaintiff points out that, under the Agreement with UnitedHealth, AARP: (1) markets, solicits, sells, and renews AARP Medigap policies, *id.* ¶ 38; (2) collects and remits premium payments on behalf of [\*38] UnitedHealth, *id.*; (3) owns all solicitation materials related to the AARP Medigap program, *id.* ¶ 47; (4) performs quality control and generally oversees UnitedHealth operations relating to the Medigap program, *id.* ¶ 48; (5) has authority over UnitedHealth's operations regarding the Medigap program, *id.*; (6) gives prior review and approval over all communication [\*\*73] regarding the Medigap program, *id.*; (7) has the authority to consult, review, and consent to premium levels and rates and sales and distribution plans, *id.*; and (8) has review and modification authority over UnitedHealth's Medigap-related contracts with certain third-party vendors, *id.* The plaintiff posits that the 4.95% royalty charge is how UnitedHealth "compensates AARP to act as its agent in connection with the marketing, solicitation, sale, and administration of AARP Medigap policies." *Id.* ¶ 49; see also *id.* ¶¶ 50-52 (describing this "agency" relationship); *id.*

<sup>12</sup> As for the plaintiff's argument that she has alleged standing by virtue of asserting a violation of her statutory right to truthful information, the Court agrees with the defendants that this alleged violation, *without more*, is insufficient to establish standing. See Defs.' Mem. at 39-40; Pl.'s Opp'n at 37-38. "Although it might violate the CCPA to present misleading information even if no one was misled, a private plaintiff cannot bring a suit in federal court to enforce that claim unless he or she has suffered an injury in fact." [Mann v. Bahi, 251 F. Supp. 3d 112, 119 \(D.D.C. 2017\)](#) (citing [Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548, 194 L. Ed. 2d 635 \(2016\)](#)). The plaintiff does not have standing unless she can allege that the defendants violated the CCPA *and* that she suffered an injury in fact as a result. See [Hancock v. Urban Outfitters, Inc., 830 F.3d 511, 514, 424 U.S. App. D.C. 251 \(D.C. Cir. 2016\)](#); [Silvious v. Snapple Beverage Co., 793 F. Supp. 2d 414, 417 \(D.D.C. 2011\)](#) (collecting cases for the proposition that "a lawsuit under the CCPA does not relieve a plaintiff of the requirement to show a concrete injury-in-fact to himself").

<sup>13</sup> The plaintiff lacks standing, however, to pursue injunctive relief under the CCPA, see Compl. ¶ 103, because she does not allege that she is currently enrolled in an AARP Medigap policy. See [Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp., 879 F.3d 339, 346 \(D.C. Cir. 2018\)](#) (plaintiffs must demonstrate standing separately for each form of relief sought, and standing for prospective relief requires showing continuing or imminent harm); [Levay, 2018 U.S. Dist. LEXIS 116585, 2018 WL 3425014, at \\*3](#) (holding that plaintiffs lacked standing to pursue injunctive relief when they had not alleged how they would continue to be harmed by AARP's misrepresentations concerning the Medigap policies).

¶ 73 (suggesting that these activities render AARP an unlicensed insurance agent or broker). In other words, according to the plaintiff, "the [defendants'] involvement in the allegedly fraudulent [scheme] in this case is . . . far greater than a mere recommendation for services." [McMullen v. Synchrony Bank, 164 F. Supp. 3d 77, 92 \(D.D.C. 2016\)](#).

Notwithstanding all of the defendants' alleged activities to connect consumers to Medigap policies, the defendants argue that they are not "merchants" within the meaning of the CCPA because the plaintiff has not alleged that they "sold, supplied, or transferred insurance policies" in a manner creating a consumer-merchant relationship. Defs.' Mem. [\*74] at 41. To the extent the plaintiff does allege such activities, see, e.g., Compl. ¶¶ 38-52, the defendants dismiss these allegations as "bare legal conclusions regarding AARP's actions" under its Agreement for licensing intellectual property. Defs.' Mem. at 42. To the contrary, the plaintiff has alleged far more than "bare legal conclusions" and has, in fact, provided ample detail concerning AARP's extensive responsibilities with respect to marketing, advertising, soliciting, and administering Medigap policies to allow the reasonable inference that the defendants are so "connected with the supply side of the consumer transaction" so as to constitute merchants under the CCPA. See [Adler, 393 F. Supp. 2d at 39](#) (internal quotation marks omitted).

Moreover, the defendants' reliance on [Adler](#) to distinguish their activities is based on an apparent misinterpretation of its holding. The defendants cite [Adler](#) for the proposition that a "defendant that sent unsolicited advertisements on behalf of third party was not a 'merchant' within the meaning of the CCPA because the plaintiffs did not purchase or receive services from defendant." Defs.' Mem. at 42. The defendants' case summary ignores [Adler](#)'s holding that the defendants [\*75] were merchants, but no consumer-merchant relationship existed because the plaintiffs never bought anything, and thus were not consumers. [393 F. Supp. 2d at 40](#). [Adler](#) explicitly held that parties who do more than merely recommend goods and services may qualify as merchants under the CCPA, *id.* at 39-40, consistent with the holdings in other cases from this Court addressing this issue. See, e.g., [Hall v. S. River Restoration, Inc., 270 F. Supp. 3d 117, 123 \(D.D.C. 2017\)](#) (CKK); [McMullen, 164 F. Supp. 3d at 91-92 \(JEB\)](#); [Ihebereme v. Capital One, N.A., 730 F. Supp. 2d 40, 52 \(D.D.C. 2010\)](#) (ESH). Based on the plaintiff's allegations of the defendants' extensive involvement in marketing, selling, and administering Medigap policies to consumers, the defendants do far more than endorse UnitedHealth's Medigap policies.

For the foregoing reasons, the plaintiff has sufficiently alleged facts plausibly [\*39] showing that the defendants meet the CCPA's definition of "merchant."

#### d. The Plaintiff Sufficiently Alleged Material Misrepresentations

Finally, the plaintiff has sufficiently and plausibly alleged that the defendants engaged in unfair trade practices under the CCPA by materially misrepresenting information about the 4.95% charge.

The CCPA forbids a variety of "unfair or deceptive trade practice[s], whether or not any consumer is in fact misled, deceived, or damaged thereby," [D.C. Code § 28-3904](#), and "establishes an enforceable right [\*76] to truthful information from merchants about consumer goods and services that are or would be purchased, leased, or received in the District of Columbia." [Mann, 251 F. Supp. 3d at 116-17](#) (citing [D.C. Code §§ 28-3901 to 28-3903; id. § 28-3901\(c\)](#)) (establishing enforceable right to truthful information). A "trade practice" is "any act which does or would create, alter, repair, furnish, make available, provide information about, or, directly or indirectly, solicit or offer for or effectuate, a sale, lease or transfer, of consumer goods and services." [D.C. Code § 28-3901\(a\)\(6\)](#).

The plaintiff asserts violations of three CCPA "unfair or deceptive trade practice" provisions, claiming the defendants (1) misrepresented a material fact which has a tendency to mislead, in violation of *id.* [§ 28-3904\(e\)](#); (2) failed to state a material fact if such failure tends to mislead, in violation of *id.* [§ 28-3904\(f\)](#); and (3) used innuendo or ambiguity as to a material fact, which has a tendency to mislead, in violation of *id.* [§ 28-3904\(f-1\)](#). Compl. ¶ 93. As to each CCPA provision, the plaintiff points to three basic categories of misrepresentations: (1) the defendants' statements or omissions regarding the 4.95% charge, including its amount, what it is used for, and who pays it, see Compl. ¶ 96; (2) the defendants' activities as a *de facto* [\*77] or unlicensed insurance agent of UnitedHealth, rendering their activities on behalf of UnitedHealth to be unfair trade practices, *id.*; and (3) the defendants'

misrepresentation of the 4.95% charge a "royalty" when it qualifies as a commission and may not lawfully be collected by AARP under District of Columbia law, *id.*

In assessing whether the plaintiff's allegations plausibly plead an unfair or deceptive trade practice through use of material misrepresentations, a court must "consider an alleged unfair trade practice 'in terms of how the practice would be viewed and understood by a reasonable consumer.'" [Saucier v. Countrywide Home Loans, 64 A.3d 428, 442 \(D.C. 2013\)](#) (quoting [Pearson v. Chung, 961 A.2d 1067, 1075 \(D.C. 2008\)](#)). The same "reasonable consumer" standard applies to the question of whether information has a tendency to mislead. See [Saucier, 64 A.3d at 442](#). "How the practice would be viewed by a reasonable consumer is generally a question for the jury," [Mann, 251 F. Supp. 3d at 126](#), although "there are times when it is sufficiently clear to be determined as a matter of law," *id.* (citing [Alicke, 111 F.3d at 912](#) (determining that no reasonable person could interpret the consumer phone contract at hand in the manner the plaintiff had asserted)). For claims under [D.C. Code § 28-3904 \(e\), \(f\), and \(f-1\)](#), "a statement or 'omission is material if a significant number of unsophisticated consumers would find that information important in determining a course of action." [Mann, 251 F. Supp. 3d at 126](#) (internal quotation marks omitted) (quoting [Saucier, 64 A.3d at 442](#)). "Ordinarily the question of materiality should not be treated [\*\*78] as a matter of law." [Saucier, 64 A.3d at 442](#) (internal quotation marks and citation omitted).

With respect to the first category of alleged misrepresentations, concerning [\*40] the defendants' statements or omissions regarding the nature and purpose of the 4.95% charge, the plaintiff identifies two specific material misrepresentations: (1) AARP's disclaimer indicating that premiums are used to pay expenses incurred by AARP Trust and to pay UnitedHealth for insurance coverage; and (2) AARP's disclosure that UnitedHealth pays royalty fees to AARP for use of its intellectual property. See Compl. ¶ 96. The statements are made on AARP's websites, see Compl. ¶ 51, and "through television commercials . . . mailings, and [print] advertisements," *id.* ¶ 50. Although the plaintiff does not specify when she saw these statements or came to believe they were misleading, the defendants concede that the identified statements appear on AARP products or sponsored advertising, and have even attached exhibits of the advertising materials. See Defs.' Mem. at 17-18 (referring to Ex. 2 and Ex. 3 and quoting language disclosing the existence of the "royalty"). The only question, then, is whether the plaintiff has sufficiently alleged [\*\*79] that the statements are materially misleading under the CCPA.

The plaintiff alleges that AARP's Medigap disclaimer misleads consumers by stating that "premiums [collected from consumers] are used to pay expenses incurred by [AARP] Trust in connection with the insurance programs and to pay the insurance company for [consumer's] insurance coverage," Compl. ¶ 64, which, the plaintiff alleges, is "highly misleading and deceptive in that Defendants do not disclose that the amounts members are paying are not just 'premiums' to pay for the actual insurance coverage, and the administrative expenses incurred by the AARP Trust, but a 4.95% commission on top of the premiums that AARP remits to UnitedHealth," that AARP is in any event not entitled to collect because it is not an insurance agent or broker, *id.* ¶¶ 65, 75; see also Pl.'s Opp'n at 43.

Even if the 4.95% charge is not a commission, however, the plaintiff alleges that the disclaimer nevertheless misrepresents what the amounts collected from consumers are used for, "obfuscat[ing] the cost of the Medigap premiums [and] leading reasonable consumers to pay more than what they otherwise would." Pl.'s Opp'n at 43 (citing Compl. ¶ 99). That is, [\*80] the plaintiff alleges that if the defendants disclosed that consumers were being charged "premiums . . . to pay expenses incurred by [AARP] Trust in connection with the insurance programs and to pay the insurance company for [consumer's] insurance coverage," Compl. ¶ 64, and a 4.95% charge (on the amount of the premium) to satisfy UnitedHealth's obligation to "pay[] royalty fees to AARP for the use of its intellectual property. . . . [which] fees are used for the general purposes of AARP," Compl. ¶¶ 5, 67, they would not be misled because they would reasonably understand that their "premiums" included a specific charge—calculated as a percentage of those premiums—paid solely to AARP and unconnected to their insurance coverage. See Pl.'s Opp'n at 43.

The defendants' disclosure regarding that charge, "included on correspondence to" the plaintiff and other consumers, Compl. ¶ 67, according to the plaintiff, is misleading on its own. See Pl.'s Opp'n at 45 n.19; Compl. ¶¶ 62-65. The disclosure indicates that "UnitedHealthcare Insurance Company pays royalty fees to AARP for the use of its intellectual property. These fees are used for the general purposes of AARP." Compl. ¶¶ 5, 67. This disclosure [\*\*81] is allegedly "false and misleading" by failing to inform consumers that they, and not UnitedHealth,

will be required to pay this "royalty." *Id.* ¶ 5. Nor does the disclosure inform consumers that the "royalty" is [\*41] equivalent to 4.95% of their premiums. *Id.* ¶¶ 5, 67. Again, nowhere does AARP disclose that any portion of the "premiums" is in fact used to pay the "royalties" UnitedHealth is obligated to pay AARP. See *id.* ¶¶ 65, 62 ("[W]hile AARP and UnitedHealth disclose the existence of a payment in general to AARP—which they term a 'royalty' paid for the use of AARP's intellectual property—they hide the fact that the cost of AARP Medigap insurance includes a percentage-based commission to AARP, funded by consumers (and not UnitedHealth), *in addition* to the insurance premium paid to UnitedHealth for coverage.") (emphasis in original).

Based on these allegations, the plaintiff has sufficiently alleged that both misrepresentations, independently but even more so when considered together, would be misleading to the reasonable consumer. Contrary to the statement made in the AARP Medigap disclaimer, royalties owed by UnitedHealth are neither "expenses incurred by [AARP] Trust" nor payment to [\*82] UnitedHealth for "insurance coverage." Compl. ¶ 64. Especially in combination with the defendants' representations elsewhere that *UnitedHealth* pays "royalty fees" to AARP for "use of its intellectual property" and that such fees are "used for the general purposes of AARP," *id.* ¶ 5, the plaintiff has sufficiently alleged that a consumer may lack information to understand that UnitedHealth satisfied its contractual obligations to AARP by including an additional, percentage-based charge as part of the premium. See Pl.'s Opp'n at 45-46; Compl. ¶¶ 64-67.

Having concluded that the plaintiff sufficiently alleged that the two statements were misleading, the Court also concludes that she has sufficiently alleged that they were material. A matter is material if: "a reasonable [person] would attach importance to its existence or nonexistence in determining his or her choice of action in the transaction in question; or the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in his or her choice of action, although a reasonable [person] would not so regard it." *Saucier*, 64 A.3d at 442 (internal alterations omitted) (quoting *Restatement Of The Law (Second) Torts § 538(2)*).

Based on the disclosures [\*83] the plaintiff quotes in her Complaint, a reasonable consumer could lack information to understand that: (1) a portion of her premiums satisfied UnitedHealth's obligation to pay royalties to AARP; (2) such royalties were calculated as a percentage of what she paid for Medigap coverage; and (3) the operable percentage was 4.95%. This additional charge was billed to the plaintiff as part of her premium, the price of which, as already noted, is generally the *sole* differentiating factor among Medigap policies. This price, and its components, are factors that a reasonable person would likely attach importance to in determining whether to buy a Medigap policy and whether to buy an AARP-sponsored one. Therefore, these factors may likely be material to a reasonable consumer.

At this stage, regardless of whether the 4.95% charge is properly deemed a "royalty" rather than a "commission," the plaintiff has stated a claim under the CCPA based on the defendants' allegedly materially misleading representations concerning the 4.95% charge.

With respect to the second and third categories of alleged misrepresentations and unfair or deceptive practices, concerning whether the defendants are *de facto* or [\*84] unlicensed insurance agents of UnitedHealth and whether the 4.95% royalty, paid as a percentage of premiums, qualifies as a commission that may not lawfully be collected by AARP under District [\*42] of Columbia law, see Compl. ¶ 96, the plaintiff notes that "it is well-established under the CCPA that 'a merchant that presents misleading information about its services in violation of another statute commits an unlawful trade practice, even if that statute is not specifically enumerated elsewhere in the CCPA,'" Pl.'s Mem. at 43-44 (citing *Mann*, 251 F. Supp. 3d at 121; *Osbourne*, 727 A.2d at 325-26). The plaintiff argues that if the defendants solicit insurance without being licensed to do so, they are misleading consumers about the services they are authorized by law to perform in violation of the CCPA. Compl. ¶ 96 Further, because AARP is not licensed as an insurer, it is not legally allowed to collect a commission. *Id.* The plaintiff alleges that AARP's disclosures regarding the 4.95% charge misled consumers by leading them to believe that the charge is part of the premiums paid to UnitedHealth rather than a commission AARP would not otherwise be authorized to collect. See *id.* ¶¶ 6, 62-65, 96-97.

District of Columbia law bars the payment or receipt [\*85] of commissions in consideration for the sale, solicitation, or negotiation of insurance if the person paid was required to be licensed and was not. *D.C. Code § 31-1131.13*.

Persons who sell, solicit, or negotiate insurance must be licensed to do so. *Id.* [§ 31-1131.03](#). Key terms in this statutory provision are further defined, with "Sell" defined to mean "to sell or exchange a contract of insurance by any means, for money or its equivalent, on behalf of an insurance company," *id.* [§ 31-1131.02\(16\)](#), and "Solicit" defined to mean "attempting to sell insurance or asking or urging a person to apply for a particular kind of insurance from a particular company," *id.* [§ 31-1131.02\(17\)](#). "Commission" is not defined. See *id.* [§ 31-1131.02](#) (the definitions section for insurance regulations).

The defendants are not licensed insurance agents. Despite this, the plaintiffs allege that the defendants have agreed to: (1) market, solicit, sell and renew AARP Medigap policies with UnitedHealth; (2) collect and remit premium payments on behalf of UnitedHealth; (3) generally administer the AARP Medigap program; and (4) otherwise act as UnitedHealth's agent. *Id.* ¶ 38. In addition, AARP owns all solicitation materials related to the Medigap program. *Id.* ¶ 47, and its advertisements plainly [\*\*86] state "This is a solicitation of insurance," *id.* ¶ 51. Further, in exchange for AARP's services on behalf of UnitedHealth, it "earns a 4.95% commission—disguised as a 'royalty'—on each policy sold or renewed." *Id.* ¶ 45.

Although District of Columbia law does not define "commission," the plaintiff has adequately alleged that the defendants solicit insurance without being licensed to do so and that the 4.95% charge, calculated as a percentage of premiums, represents the payment or receipt of "a commission, service fee, brokerage fee, or other valuable consideration" for the sale, solicitation, or negotiation of insurance, which is prohibited if the person paid was required to be licensed and was not. [D.C. Code § 31-1131.13](#). The plaintiff has also sufficiently alleged that the defendants' advertisements and disclaimers concerning that charge and their role in soliciting insurance misled consumers about the services they are legally authorized to perform and their right to receive payment in consideration for the sale of insurance. See [Mann, 251 F. Supp. 3d at 126](#) (holding that whether a business's "statements implied that it was licensed in D.C. is a question of fact for the jury").

Finally, the plaintiff has adequately alleged that the [\*\*87] defendants' statements obscuring AARP's status as an unlicensed insurance agent that was not entitled to [\*43] receive a commission were material, because had she understood that AARP received an unlawful commission for each sale, she would have sought a lower-priced Medigap insurance policy or one sold by a company that complied with District of Columbia laws. See Compl. ¶¶ 81-83 . Therefore, as to the second and third categories of misstatements, the plaintiff has sufficiently alleged that the defendants have committed an unfair trade practice in violation of the CPPA.

Accordingly, the defendants' motion to dismiss Count I is denied.

## **2. Count Two States a Claim of Conversion**

In Count Two, the plaintiff alleges conversion of her ownership right to the 4.95% of her payments that was wrongfully charged and illegally diverted to [\*44] AARP as a commission. *Id.* ¶¶ 104-07. She contends that the defendants "wrongly asserted dominion" over 4.95% of her payments, *id.* ¶ 106, and that she is entitled to damages in the amount for which she was wrongfully charged, *id.* ¶ 107.

As a general principle, conversion is defined as "any unlawful exercise of ownership, dominion or control over the personal property of [\*\*88] another in denial or repudiation of [her] rights thereto." [Hall v. District of Columbia, 867 F.3d 138, 151, 432 U.S. App. D.C. 150 \(D.C. Cir. 2017\)](#) (internal quotation marks omitted) (quoting [Chase Manhattan Bank v. Burden, 489 A.2d 494, 495 \(D.C. 1985\)](#)). "[M]oney can . . . be the subject of a conversion claim 'if the plaintiff has the right to a specific identifiable fund of money.'" [Papageorge v. Zucker, 169 A.3d 861, 864 \(D.C. 2017\)](#) (quoting [McNamara v. Picken, 950 F. Supp. 2d 193, 194 \(D.D.C. 2013\)](#)).

The defendants contend that the plaintiff's conversion claim fails because she has not identified the right to any specific identifiable source of money. See Defs.' Mem. at 45 & n.11 (citing [McNamara, 950 F. Supp. 2d at 194](#)). This is incorrect. The plaintiff's Complaint alleges that for every AARP Medigap policy sold or renewed, AARP Trust collects premium payments that include the 4.95% charge, Compl. ¶ 54, that AARP Trust then deducts funds equivalent to the 4.95% charge and remits that amount to AARP, Inc. and ASI, with 8% going to ASI and 92% going

to AARP, Inc, *id.* ¶¶ 55, 57, and that the Agreement AARP has with UnitedHealth clearly delineates between the amount billed and paid by consumers, referred to as "Member Contributions," and the premiums remitted to UnitedHealth, referred to as "SHIP Gross Premiums," *id.* ¶ 58. The plaintiff alleges that she has a right to the money accumulated as a result of the 4.95% charge—namely: Member Contributions minus SHIP Gross Premiums. [\*\*89] The Court is persuaded that this rationale sufficiently alleges a right to a specific, identifiable source of money.

The plaintiff also sufficiently alleges that the defendants' assertion of dominion over this source of funds was wrongful. As noted elsewhere, the plaintiff has adequately alleged that she was misled into paying the 4.95% charge because she did not understand that 4.95% of her premiums were being used to make allegedly unlawful commission payments, and, had she understood the nature of the arrangement, she would have sought other coverage. The defendants' motion to dismiss this claim is therefore denied.

### 3. Count Three States a Claim of Unjust Enrichment

In Count Three, the plaintiff alleges unjust enrichment based on allegations that she conferred a benefit on defendants "in the form of the hidden 4.95% charge on top of [her] monthly premium payments that [was] unlawfully and deceptively charged and illegally diverted to AARP as a commission," *id.* ¶ 109, that the defendants "voluntarily accepted and retained this benefit," *id.* ¶ 110, which was "collected without proper disclosure and amounted to a commission in violation of" District of Columbia law, *id.* ¶ 111, and that [\*\*90] it would be "inequitable" for the defendants to retain the benefit without paying its value to the plaintiff, *id.*

An unjust enrichment claim under District of Columbia law requires the plaintiff to allege that she (1) conferred a benefit on the defendants; (2) the defendants retained the benefit that was conferred; and (3) it would be unjust for the defendant to retain the benefit under the circumstances. See *Euclid St., LLC v. D.C. Water & Sewer Auth.*, 41 A.3d 453, 463 n.10 (D.C. 2012). The doctrine applies "when a person retains a benefit (usually money) which in justice and equity belongs to another." *Falconi-Sachs v. LPF Senate Square, LLC*, 142 A.3d 550, 556 (D.C. 2016) (internal quotation marks omitted) (quoting *Jordan Keys & Jessamy, LLP v. St. Paul Fire & Marine Ins. Co.*, 870 A.2d 58, 63 (D.C. 2005)).

The plaintiff undisputedly conferred on the defendants a benefit they retained. See Defs.' Mem. at 46 (conceding that the defendants retained a benefit). The defendants argue, however, that the plaintiff cannot show that any benefits were retained *unjustly* because the "premium paid by Plaintiff afforded her the exact coverage she elected when she purchased the policy, and the royalty paid by United[Health] to AARP was simply a[] [fully disclosed] expense incurred by United[Health] in licensing intellectual property from AARP for its operation of the program." *Id.* Further, the defendants note that the plaintiff "received [\*\*91] precisely the Medigap coverage she purchased at the rate mandated." *Id.*

The plaintiff does not contest the coverage she received, but insists that, under the circumstances, the defendants retained 4.95% of her premiums unjustly. Specifically, she argues the defendants are not insurance agents and cannot retain a commission, yet nevertheless collected 4.95% of her premium without proper disclosures or licensing. Pl.'s Opp'n at 48-50. Regardless of whether the charge is a "commission" or not, the plaintiff alleges that she was deceived regarding the cost and purposes of her premiums. She understood these premiums to amount to a sum certain, which sum would be used to pay expenses incurred by AARP Trust in connection with her Medigap program and to pay UnitedHealth for the coverage itself. Compl. ¶ 64. Yet a portion of those premiums in fact satisfied UnitedHealth's obligations to pay "royalties" to AARP—a fact that she alleges was never fully disclosed and that would have affected how she compared Medigap policy rates. See *id.* ¶ 11.

Given these allegations of misrepresentation, the defendants' argument that no unjust enrichment claim exists when the plaintiff received her coverage as expected [\*\*92] and was told that UnitedHealth paid royalties to AARP erroneously assumes the plaintiff understood (or did not care) that such royalties were paid as a percentage of the plaintiff's premiums. The plaintiff plainly alleges she did *not* understand this fact and that it was material to her.

The D.C. Circuit, in an analogous context, held that plaintiffs had properly stated an unjust enrichment claim when they alleged that they were misled into paying a special assessment fee because they believed payment of such fee was necessary to retain membership in an organization. See *In re APA Assessment Fee Litig.*, 766 F.3d at 48. In fact, the fee was used to pay for lobbying services. *Id. at 47*. The defendants' argument that such lobbying services [\*45] were performed adequately was accordingly no barrier to the plaintiffs' claims, which rested, as do the plaintiff's claims here, on an allegation that the purpose of the payment was misrepresented to them. *Id. at 48*; see also *id. at 47* (holding that a theory of "mistaken payment of money not due" is "one of the core cases of restitution") (internal quotation marks, alterations, and citation omitted).

Under the circumstances, the plaintiff has sufficiently alleged that the defendants unjustly retained money accrued as a result [\*\*93] of the 4.95% charge. The defendants' motion to dismiss this claim is thereby denied.

#### 4. Count Four States a Claim of Fraudulent Misrepresentations or Omissions

The plaintiff titles her claim in Count IV "Fraudulent Concealment" and alleges that the defendants "concealed or failed to disclose [the] material fact . . . that AARP was collecting a 4.95% commission," Compl. ¶ 113, that AARP "knew or should have known that this material fact should be disclosed or not concealed," *id.* ¶ 114, that the defendants concealed the fact "in bad faith," *id.* ¶ 115, and in spite of their "duty to speak," *id.* ¶ 118, and that the defendants thereby "induced [the plaintiff] to act by purchasing an AARP-endorsed Medigap plan," *id.* ¶ 116. The plaintiff alleges that she suffered damages as a result of this fraudulent concealment, *id.* ¶ 117.

At the outset, the defendants rebut the plaintiff's fraudulent concealment claim relying solely on cases addressing the claim in the context of whether the statute of limitations should be tolled. See Defs.' Mem. at 48 n.13 (citing *Larson v. Northrop Corp.*, 21 F.3d 1164, 1172, 305 U.S. App. D.C. 416 (D.C. Cir. 1994); *Quick v. EduCap, Inc.*, 318 F. Supp. 3d 121, 143 (D.D.C. 2018); *Woodruff v. McConkey*, 524 A.2d 722, 728 (D.C. 1987)). Indeed, generally, a plaintiff need not assert a fraudulent concealment claim in the Complaint until after the defendant has answered asserting [\*\*94] a statute of limitations affirmative defense. See *Firestone*, 76 F.3d at 1210. The source of the confusion may be the plaintiff's reliance on *Howard University v. Watkins*, 857 F. Supp. 2d 67 (D.D.C. 2012) for the elements of a fraudulent concealment claim under District of Columbia law, see Pl.'s Opp'n at 50 (citing *Howard Univ.*, 857 F. Supp. 2d at 75). *Howard University*, in turn, cites for the elements of this claim another case, *Alexander v. Washington Gas Light Co.*, 481 F. Supp. 2d 16, 36-37 (D.D.C. 2006), which outlined the elements of a fraudulent concealment claim under Maryland law. The plaintiff's fourth claim is assumed to be pleading a related claim for fraudulent misrepresentations or omissions under District of Columbia law, which requires showing that the defendant: "(1) made a false representation of or willfully omitted a material fact; (2) had knowledge of the misrepresentation or willful omission; (3) intended to induce another to rely on the misrepresentation or willful omission; (4) the other person acted in reliance on that misrepresentation or willful omission; and (5) [the other person] suffered damages as a result of that reliance." *Sundberg*, 109 A.3d at 1130-31 (internal alterations quotation marks, alterations, and citations omitted). A false representation may be either an affirmative misrepresentation or a failure to disclose a material fact when a duty to disclose that fact has arisen. [\*\*95] *Id. at 1131*.

Fraudulent misrepresentation claims are subject to the heightened pleading standard under *Federal Rule of Civil Procedure 9(b)*, requiring a plaintiff to plead "with particularity the circumstances constituting fraud or mistake," *FED. R. CIV. P. 9(b)*.<sup>14</sup> [\*46] Intent, however, may be pleaded generally. *Id.* The information necessary to establish a fraud claim often includes "specific fraudulent statements, who made the statements, what was said, when or where these statements were made, and how or why the alleged statements were fraudulent." *Brink v. Cont'l Ins. Co.*, 787 F.3d 1120, 1127, 415 U.S. App. D.C. 332 (D.C. Cir. 2015) (internal quotation marks and citation

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<sup>14</sup> By contrast, claims alleging violations of the CCPA are not subject to this heightened pleading standard. See, e.g., *Frese v. City Segway Tours of Wash.*, D.C., 249 F. Supp. 3d 230, 235 (D.D.C. 2017); *McMullen*, 164 F. Supp. 3d at 90-91; *Campbell v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 130 F. Supp. 3d 236, 267 (D.D.C. 2015) (collecting cases).

omitted). "[T]he point of [Rule 9\(b\)](#) is to ensure that there is sufficient substance to the allegations to both afford the defendant the opportunity to prepare a response and to warrant further judicial process." [United States ex rel. Heath v. AT&T, Inc.](#), 791 F.3d 112, 125, 416 U.S. App. D.C. 289 (D.C. Cir. 2015).

The plaintiff has adequately pled the "who, what, where, when, and how" of her fraudulent misrepresentation claim. See Pl.'s Opp'n at 50 & nn.24-28. She has alleged that AARP, Inc., ASI, and AARP Trust, Compl. ¶¶ 2, 21, 22, concealed that 4.95% of plaintiff's premiums paid UnitedHealth's "royalties" to AARP, *id.* ¶¶ 5, 6, 62, 64, 67, that such misrepresentations and omissions were printed in documents sent to the plaintiff and published online, *id.* ¶¶ 5, 51, 67, [\*\*96] that these misrepresentations have existed in some form since 1999, including when the plaintiff bought or renewed her policy, *id.* ¶¶ 40-45, 20, and that the plaintiff reasonably relied on the misrepresentations to her detriment because she would not have purchased a Medigap policy whose premiums included a "royalty" charge, but instead would have purchased a lower-priced policy offering identical benefits, *id.* ¶¶ 20, 79, 81. Those allegations are sufficient, at this stage of the proceedings, to state a claim for fraudulent misrepresentation or omission.

The plaintiff also adequately alleges that the defendants failed to disclose a material fact—the nature and purpose of the 4.95% charge, which they had knowledge of—when a duty to disclose that fact had arisen. Under District of Columbia law, a party to a transaction has no duty of disclosure unless the party is a fiduciary to the other or the party knows that the other is acting unaware of a material fact that is unobservable or undiscoverable by an ordinarily prudent person upon reasonable inspection. [Sandza v. Barclays Bank PLC](#), 151 F. Supp. 3d 94, 107 (D.D.C. 2015). One party's "superior knowledge can give rise to a duty to disclose," *id.*, or such duty may arise "as a result of a partial disclosure," [\*\*97] [Intelect Corp. v. Cellco P'ship GP](#), 160 F. Supp. 3d 157, 187 (D.D.C. 2016) (internal quotation marks and citation omitted). The plaintiff alleges that defendants had a "duty to speak given that they were parties to transactions with [plaintiff] . . . [and] had a duty to say enough to prevent their words from misleading [plaintiff] . . . and they had special knowledge about the material[] facts that [plaintiff] . . . did not possess." Compl. ¶ 118.

The defendants suggest that their public rate filings and disclosure that AARP received a 4.95% royalty from UnitedHealth were observable or discoverable by an ordinarily prudent person upon reasonable inspection, and therefore the plaintiff has failed to establish fraudulent misrepresentation. Defs.' Mem. at 48-49. In general, "examining readily available public records [is] part of the responsibility of an 'ordinarily prudent person' conducting a 'reasonable inspection,' and . . . failure to perform this basic due diligence preclude[s] a fraud claim." [Sununu v. Philippine \[\\*47\] Airlines, Inc.](#), 792 F. Supp. 2d 39, 52 (D.D.C. 2011). Here, however, the plaintiff has adequately alleged that the defendants' disclaimer that UnitedHealth paid AARP a "royalty" was only a partial disclosure, as it did not sufficiently alert consumers to the undiscoverable or unobservable fact that they were being [\*\*98] charged 4.95% of their premiums in order to satisfy that obligation. See Compl. ¶ 67. Moreover, the plaintiff further alleges that the defendants are so entwined in the solicitation of and administration of UnitedHealth's insurance policies that the defendants should be considered unlicensed insurance agents or brokers. See, e.g., *id.* ¶¶ 8, 47, 51, 73. While the Court declines to resolve that issue at this stage of the proceedings, allowing the plaintiff's claims to go forward will supplement the record as to whether this alleged role creates a fiduciary duty or any other duty to disclose. *But see Attias v. CareFirst, Inc., No. 15 cv-00882 (CRC), 365 F. Supp. 3d 1, 2019 U.S. Dist. LEXIS 14387, 2019 WL 367984, at \*16 (D.D.C. Jan. 30, 2019)* (noting that District of Columbia generally considers the relationship between the insurer and the insured to be a contractual, rather than fiduciary relationship) (citing cases).

For the reasons already discussed, see *supra* Section III.E.1.d, the plaintiff has adequately alleged that the defendants' misrepresentations or omissions regarding the nature, cost, and purpose of the 4.95% charge may be material because they affected her understanding of the cost of her Medigap insurance. She has further sufficiently alleged that this misrepresentation [\*\*99] was intended to induce consumers to purchase AARP-sponsored Medigap insurance over other policies that offered identical benefits, believing that their premiums paid only for "expenses incurred by [AARP] Trust in connection with the insurance programs and to pay the insurance company for [consumer's] insurance coverage," Compl. ¶ 64, obscuring the fact that consumers were also being charged a 4.95% "royalty" fee, and that she relied on AARP's partial disclosures in making her purchasing decisions, foregoing the chance to purchase insurance that did not include such charge.

The plaintiff's allegations sufficiently state a fraudulent misrepresentation or omission claim, and the defendants' motion to dismiss is therefore denied.

#### **IV. CONCLUSION**

For the foregoing reasons, the defendants' motion to dismiss, ECF No. 8, is denied as to all counts in the plaintiff's Complaint.

An Order consistent with this Memorandum Opinion will be entered contemporaneously.

Date: March 17, 2019

/s/ Beryl A. Howell

BERYL A. HOWELL

Chief Judge

#### **ORDER**

Upon consideration of the defendants' Motion to Dismiss the Complaint, ECF No. 8, the plaintiff's Motion for Leave to File a Surreply, ECF No. 17, the related legal memoranda [\*\*100] in support and in opposition, and the entire record herein, for the reasons set forth in the accompanying Memorandum Opinion, it is hereby

**ORDERED that the defendants' Motion to Dismiss is DENIED; and it is further**

**ORDERED that the plaintiff's Motion for Leave to File a Surreply is DENIED; and it is further**

**ORDERED that the plaintiff and defendants comply with this Court's Standing Order ¶ 3, ECF No. 4, which requires the parties to file jointly a Meet and Confer Report pursuant to Local Civil Rule 16.3(d), by April 1, 2019.**

**SO ORDERED.**

Date: March 17, 2019

/s/ Beryl A. Howell

Beryl A. Howell

Chief Judge

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## *Robinson v. Onstar*

United States District Court for the Southern District of California

March 18, 2019, Decided; March 18, 2019, Filed

Case No.: 15-CV-1731 JLS (BGS)

### **Reporter**

2019 U.S. Dist. LEXIS 241113 \*

KATHRYN M. ROBINSON, individually and on behalf of all others similarly situated, Plaintiff, v. ONSTAR, LLC; and DOES 1 through 50, inclusive, Defendants.

## **Core Terms**

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OnStar, consumer, allegations, telemarketing, debit card, unfair, prong, violations, Automatic, pleadings, cause of action, free trial, customer, charges, courts, Renewal, actual damage, authorization, expiration, debited, electronic funds transfer, terms and conditions, balancing test, solicitation, unauthorized, causation, initiated, tethering, register, monthly

**Counsel:** [\*1] For Kathryn M. Robinson, individually and on behalf of all others similarly situated, Plaintiff: Kathleen Styles Rogers, LEAD ATTORNEY, Kralowec Law P.C., San Francisco, CA; Chad Saunders, LEAD ATTORNEY, Sundeep Salinas & Pyle, Oakland, CA.

For Onstar LLC, Defendant: Kenneth Kiyul Lee, Kirsten Hicks Spira, LEAD ATTORNEYS, Alexander Michael Smith, Nayiri Pilikyan, Jenner & Block LLP, Los Angeles, CA; Michael Timothy Brody, Dean Nicholas Panos, LEAD ATTORNEYS, PRO HAC VICE, Jenner & Block LLP, Chicago, IL.

**Judges:** Hon. Janis L. Sammartino, United States District Judge.

**Opinion by:** Janis L. Sammartino

## **Opinion**

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### **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS AND TO MODIFY CLASS ALLEGATIONS**

Presently before the Court is the Motion for Judgment on the Pleadings and Motion to Modify Class Allegations ("Mot.," ECF No. 73) filed by Defendant OnStar, LLC ("OnStar"). Also before the Court are Plaintiff Kathryn M. Robinson's Opposition to ("Opp'n," ECF No. 83) and Defendant's Reply in Support of ("Reply," ECF No. 86) the Motion. The Court vacated the hearing on the Motion and took the matters under submission without oral argument. Having carefully considered the parties' pleadings, arguments, [\*2] and the law, the Court **GRANTS IN PART AND DENIES IN PART** Defendant's Motion as follows.

## **BACKGROUND**

## I. Defendant OnStar

OnStar is a fully owned subsidiary of General Motors LLC that provides a hands-free calling, navigation, and emergency assistance service called OnStar Telematics Service ("OTS"). See Class Action Compl. ("Compl."), ECF No. 1-2, ¶¶ 1, 6, 14. OTS equipment and software comes installed in most General Motors-manufactured vehicles, including Chevrolet, Buick, and Cadillac. *Id.* ¶ 17. OTS is also available as an aftermarket product and service for those who install OnStar For My Vehicle ("FMV"). *Id.* OTS calling services are routed on AT&T's cellular network, so OnStar resells AT&T cellular network minutes to those using OTS. *Id.* ¶ 6.

OnStar offers its OTS both to those registering for a free trial period, which can last for several months up to one year, *id.* ¶ 15, and to those who pay for a subscription. *Id.* ¶ 14. Those who register for a free, initial trial period of OTS may register their vehicles' OTS equipment with OnStar by (1) pressing a blue OnStar button on the rearview mirror, which initiates a cellular telephone call to an OnStar agent; (2) calling OnStar's toll-tree [\*3] number; or (3) visiting OnStar's website. *Id.* ¶ 15. Once the free initial period has concluded, registrants may subscribe to continue to have access to OTS by paying a monthly fee, which can range between \$19.99 and \$34.99 per month depending on the service. *Id.* ¶ 16. Approximately fifty percent of registrants for the free trial period elect to subscribe to OTS. *Id.* ¶ 17.

OnStar has approximately 6 million active subscribers in the United States, and Plaintiff estimates that approximately 360,000 of these subscribers are located in California. *Id.*

## II. Plaintiff's Experience with Defendant OnStar

On December 15, 2013, Plaintiff's husband, Scott Robinson, leased a new 2014 Cadillac ATS sedan (VIN 1G6AA5RX0E0103492) (the "Vehicle") from Hoehn Buick GMC Cadillac in Carlsbad, California. Compl. ¶ 18. Plaintiff accompanied her husband to the dealership, *id.*, and has a community property interest in the Vehicle lease agreement and is the person who primarily operates the Vehicle. *Id.* ¶ 19. Plaintiff sat next to her husband as he signed several documents pertaining to the lease of the Vehicle. See ECF No. 71 ("Ans.") ¶ 18 (quoting ECF Nos. 35-11, 47 ("Tr.") at 26:6-27:21).<sup>1</sup> Among these document [\*4] was the GM Customer Incentive and OnStar Acknowledgment, see Ans. ¶ 26, in which Mr. Robinson acknowledge that (1) he had "received the Terms and Conditions applicable to the OnStar Services"; (2) "the OnStar services [we]re provided under a continuous service contract that w[ould] remain in effect until cancelled by [him] or OnStar"; (3) "if [he] provid[ed] OnStar with [his] credit or debit card information at any time, it w[ould] be kept securely on file and w[ould] be automatically charged when payment for [his] OnStar Plan bec[a]me[] due"; and (4) "[n]otice of the payment due date, the monthly amount due and how to update or remove [his] credit or debit card information w[ould] be provided at least 30 days prior to any charges." *Id.*; see also Tr. at 8:18-9:7, 26:6-28:9; ECF No. 35-2 ("Ex. 1-A").

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<sup>1</sup> On a motion for judgment on the pleadings, as here, the Court may take into account the parties' pleadings and any documents physically attached to those pleadings or incorporated by reference. See, e.g., [Gonzalez v. Planned Parenthood of L.A., No. CV 05-8818 AHM FMOX, 2011 WL 1481398, at \\*2 \(C.D. Cal. Apr. 19, 2011\)](#). Although the defendant generally "cannot rely on factual allegations contained in the answer . . . [because] all allegations in the answer are automatically deemed denied," Rutter Group Prac. Guide Fed. Civ. Pro. Before Trial Ch. 9-E, OnStar cites to the transcript of Plaintiff's testimony at an April 19, 2016 evidentiary hearing in responding to Plaintiff's allegations. See generally Ans. In ruling on OnStar's Motion, the Court may consider Plaintiff's testimony, as incorporated by reference into OnStar's Answer, which constitutes a binding judicial admission. See, e.g., [Yagman v. Allianz Ins., No. LACV1500921JAKJCX, 2015 WL 5553462, at \\*3 \(C.D. Cal. July 9, 2015\)](#) (granting Rule 12(b)(6) motion to dismiss on the basis of statement made by the plaintiff at oral argument); see also [Hornberger v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. SACV141645DOCRNBX, 2015 WL 13310465, at \\*3 \(C.D. Cal. Jan. 22, 2015\)](#) (judicial admissions may be considered in ruling on a motion to dismiss pursuant to Rule 12(b)(6)), aff'd, [677 F. App'x 336 \(9th Cir. 2017\)](#); [Baez v. Falor, No. CIV.A. 09-1149, 2011 WL 5406148, at \\*6 \(W.D. Pa. Sept. 21\)](#) (testimony from evidentiary hearing may be considered in resolving motion for judgment on the pleadings), report and recommendation adopted, [2011 WL 5374986 \(Nov. 8, 2011\)](#).

The Vehicle was outfitted with the equipment and software to access OTS and came with a one-year period of free OTS. Compl. ¶ 20. The dealer told Plaintiff that, to activate the one year of free access to OTS, she would have to register the Vehicle with OnStar from inside the vehicle. *Id.* ¶ 21; see also Tr. at [\*5] 28:15-29:19.

On December 17, 2013, Plaintiff pressed the blue OnStar button on the Vehicle's rearview mirror, initiating a cellular telephone call to an OnStar agent. Compl. ¶ 22. During the call with a live OnStar agent, Plaintiff registered the Vehicle to receive free OTS. *Id.* At no time during that call did the OnStar agent mention that there were terms or conditions to receive the free OTS, nor did the agent read or refer to any terms or conditions. *Id.* The agent also did not inform Plaintiff that she would be required to agree to pay for OTS after the free OTS terminated. *Id.* ¶ 29. At no time during that call did Plaintiff agree to pay for OTS after the one-year free OTS period expired, *id.* ¶ 23, nor did she agree to automatic renewal of OTS. *Id.* ¶ 30.

During the registration call, however, Plaintiff did agree to purchase sixty minutes on AT&T's cellular network, minutes that would enable Plaintiff to make calls using OTS rather than her cellular telephone. *Id.* ¶¶ 24-25. Plaintiff paid \$5.47 for the minutes, providing the OnStar agent with her Bank of America debit card account number. *Id.* ¶ 25.

After activating OTS, Plaintiff received several documents from OnStar regarding the [\*6] service and its cancellation, see Ans. ¶ 29, specifically:

- Emails dated December 17, 2013, and January 16, 2014, from OnStar Subscriber Services to Plaintiff regarding "OnStar Vehicle Diagnostics report from your Cadillac ATS" and noting that Plaintiff's "Hands-Free Calling" has an "Expiration" of "12/16/2014 (or when OnStar subscription ends, whichever comes first)," *id.*; see also Tr. at 31:21-33:18; ECF Nos. 35-8 ("Ex. 10") & 35-9 ("Ex. 11"); and
- A brochure entitled "Terms and Conditions of Your **OnStar** Service Effective as of August, 2010," mailed to Plaintiff's home address, providing, among other things, that "[t]he purchase or lease price of your Car may have included a prepayment for a period of time for a specified **OnStar Plan**. If so, you must arrange for payment to us after this period of time expires. If you have a payment account on file with us, we will automatically start charging you monthly as set out above."<sup>2</sup> Ans. ¶ 29; see also Tr. at 16:9-17:20; ECF No. 35-4 ("Ex. 4") (emphasis in original).

On December 17, 2014, OnStar took \$29.90 for OTS from [\*7] Plaintiff's bank account using her debit card account number. Compl. ¶ 33. OnStar also debited \$29.90 from Plaintiff's bank account in January, and again in February, 2015. *Id.* ¶ 34. When Plaintiff first noticed the charges in March 2015, she immediately called OnStar and instructed it to stop taking money from her bank account and to cancel her OnStar account. *Id.* ¶ 35. OnStar has not refunded Plaintiff any part of the \$89.70 that was debited from her account without her authorization. *Id.* ¶ 36.

### **III. Other Consumers' Experience with Defendant OnStar**

Plaintiff believes that her experience with OnStar was not an isolated incident and that "OnStar engages in a nationwide practice of surreptitiously obtaining consumers' debit and credit card numbers, . . . [t]hen, without obtaining the consumers' written authorization or express informed consent, OnStar charges Registrants' debit and credit cards up to \$34.99 every month for purported OTS services." Compl. ¶ 38. Plaintiff notes that there are numerous complaints about OnStar's billing practices available on consumer websites. See Compl. ¶ 39.

### **IV. Plaintiff Sues Defendant OnStar**

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<sup>2</sup>The Terms and Conditions also provided that "**WE BOTH AGREE, TO THE FULLEST EXTENT PERMITTED BY LAW, TO USE CONFIDENTIAL ARBITRATION, NOT LAWSUITS** (except for small claims court cases) **TO RESOLVE THE DISPUTE.**" Tr. at 17:11-17; Ex. 4 (emphasis in original).

On July 2, 2015, Plaintiff filed a putative class action against [\*8] OnStar in the Superior Court of the State of California, County of San Diego. See generally ECF No. 1-2. Plaintiff's Complaint alleged violations of the Electronic Funds Transfer Act, 15 U.S.C. §§ 1693 et seq. ("EFTA") and the Automatic Renewal Law, California Business and Professions Code §§ 17600 et seq. ("ARL"), as well as unlawful and unfair business practices under California Business and Professions Code §§ 17200 et seq. ("UCL"). See generally *id.*

OnStar removed to this Court, the Honorable William Q. Hayes, on August 4, 2015. See generally ECF No. 1. On September 11, 2015, OnStar moved to dismiss Plaintiff's Complaint on the grounds that the dispute was subject to an enforceable arbitration agreement. See ECF No. 15. Judge Hayes set the matter for oral argument on February 3, 2016, see ECF No. 21, after which he set an evidentiary hearing for April 2016, see ECF Nos. 21-23, to resolve four material factual disputes, see ECF No. 24 at 5:1-8:25; see also ECF No. 30, specifically:

1. Whether the OnStar Terms & Conditions ("T&C") upon which OnStar base[d] its Motion were in existence at the time Scott Robinson leased the Vehicle ("Issue #1");
2. Whether a copy of the T&C was in the glovebox of the Vehicle ("Issue #2");
3. Whether the T&C was available on [www.onstar.com](http://www.onstar.com) at the time of the Vehicle lease ("Issue #3"); [and]
4. Whether OnStar mailed a copy [\*9] of the T&C to Plaintiff ("Issue #4").

ECF No. 30 at 1. The evidentiary hearing was held on April 19, 2016. See ECF No. 32.

On August 25, 2016, Judge Hayes granted OnStar's motion to dismiss and to compel arbitration, concluding that "Plaintiff [had] received a copy of the OnStar Terms and Conditions and assented to those terms, including the arbitration agreement." ECF No. 49 at 12. Plaintiff appealed. See ECF No. 51.

The Ninth Circuit Court of Appeals reversed on May 1, 2018. See ECF No. 62. It determined that Plaintiff and OnStar formed an agreement when she called OnStar to activate her one-year trial subscription, but that the agreement, when formed, did not include the terms and conditions. *Id.* at 2. Consequently, the subsequently mailed terms and conditions, which included the arbitration clause, constituted an offer to modify the agreement, which Plaintiff did not accept. *Id.*

On remand, Judge Hayes recused, and the case was reassigned to this Court. See ECF No. 63. OnStar filed its Answer on June 12, 2018, see generally ECF No. 71, and the instant Motion followed on July 19, 2018. See generally ECF No. 73.

## LEGAL STANDARD

Any party may move for judgment on the pleadings "[a]fter the [\*10] pleadings are closed—but early enough not to delay trial." Fed. R. Civ. P. 12(c). A motion for judgment on the pleadings attacks the legal sufficiency of the claims alleged in the complaint. See Patel v. Contemporary Classics of Beverly Hills, 259 F.3d 123, 126 (2d Cir. 2001). The Court must construe "all material allegations of the non-moving party as contained in the pleadings as true, and [construe] the pleadings in the light most favorable to the [non-moving] party." Doyle v. Raley's Inc., 158 F.3d 1012, 1014 (9th Cir. 1998). Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1990). "Analysis under Rule 12(c) is 'substantially identical' to analysis under Rule 12(b)(6) because, under both rules, 'a court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy.'" Chavez v. United States, 683 F.3d 1102, 1108 (9th Cir. 2012).

## ANALYSIS

OnStar requests that the Court enter judgment on the pleadings on Plaintiff's claims for violation of the EFTA on the grounds that she has denied the existence of any agreement establishing a preauthorized electronic fund transfer,

for violation of the ARL on the grounds that the statute does not confer a private right of action, and for violation of the UCL on the grounds [\*11] that OnStar's conduct was not unlawful and that Plaintiff consented to be charged for OTS and failed to avoid or mitigate the alleged harm. See Not. of Mot.; see also Mot. at 1-2. Alternatively, and to the extent that the Court declines to dismiss Plaintiff's EFTA claim, OnStar requests that the Court modify Plaintiff's class allegations pursuant to [Federal Rule of Civil Procedure 23](#) on the grounds that the Court lacks jurisdiction over claims of alleged class members who are not California citizens concerning actions unrelated to California and Plaintiff cannot maintain a class action for actual damages under EFTA. See Not. of Mot.; see also Mot. at 2-3.

## I. Motion for Judgment on the Pleadings

### A. First Cause of Action: Violation of the Electronic Funds Transfer Act

Plaintiff's first cause of action alleges that OnStar violated [Section 1693\(a\) of the EFTA](#) by "uniformly and routinely initiat[ing] preauthorized electronic fund transfers and t[aking] money from the bank accounts of Plaintiff and members of the Nationwide EFTA Class without obtaining their written authorization for the transfers." Compl. ¶¶ 56, 58. [Section 1693e\(a\)](#) provides that "[a] preauthorized electronic fund transfer from a consumer's account may be authorized by the consumer only in writing, [\*12] and a copy of such authorization shall be provided to the consumer when made." The EFTA defines a "preauthorized electronic fund transfer" as "an electronic fund transfer authorized in advance to recur at substantially regular intervals." [15 U.S.C. § 1693a\(10\)](#).

OnStar argues that Plaintiff's EFTA claim must be dismissed because "Plaintiff alleges that she did not enter into any electronic fund transfer agreement" and "[a] natural reading of the EFTA provides that it is limited to transfers pursuant to agreement." Mot. at 6. In support of its argument, OnStar points to the Federal Reserve's Official Staff Interpretation, which provides:

The requirements of the regulation apply only to an account for which an agreement for EFT services to or from the account has been entered into between:

- i. The consumer and the financial institution (including an account for which an access device has been issued to the consumer, for example);
- ii. The consumer and a third party (for preauthorized debits or credits, for example), when the account-holding institution has received notice of the agreement and the fund transfers have begun.

Mot. at 6 (emphasis omitted) (quoting [12 C.F.R. Pt. 205, Supp. I § 205.3\(a\)](#)). OnStar maintains that "[c]ourts around the country [\*13] have . . . held that [the] EFTA does not apply where, as here, the plaintiff herself claims no transfer agreement exists between the parties." *Id.* at 7 (citing *Sharkey v. NAC Marketing Co.*, No. 12 C 4353, 2012 WL 5967409, at \*3 (N.D. Ill. Nov. 28, 2012)).

Plaintiff counters that "[Section 1693e\(a\) of the EFTA](#) makes vendors like OnStar liable for failing to obtain the required agreement in the required form," Opp'n at 9 (emphasis omitted) (citing *Wike v. Vertrue, Inc.*, 566 F.3d 590, 592 (6th Cir. 2009); *DeForest v. Pepper Tree Inc.*, No. SACV 17-02092-CJC(JDEX), 2018 WL 1005300, \*5 (C.D. Cal. Feb. 20, 2018); *Herman v. SeaWorld Parks & Entm't, Inc.*, No. 8:14-cv-3028-T-35JSS, 2017 WL 1376169, \*7 (M.D. Fla. Apr. 17, 2017); *Kleiner v. Earthlink, Inc.*, No. 2:16-cv-1609-WHO, 2017 WL 345525, \*3-4 (E.D. Cal. Jan. 24, 2017); *Starks v. Geico Indem. Co.*, No. CV-15-5771-MWF (PJW), 2015 WL 12942282, \*4 (C.D. Cal. Nov. 10, 2015); *FTC v. Grant Connect, LLC*, 827 F. Supp. 2d 1199, 1230-31 (D. Nev. 2011), aff'd in part and vacated in part on other grounds, 763 F.3d 1094 (9th Cir. 2014); *In re Easysaver Rewards Litig.*, 737 F. Supp. 2d 1159, 1182-83 (S.D. Cal. 2010); *Nordberg v. Trilegiant Corp.*, 445 F. Supp. 2d 1082, 1094 (N.D. Cal. 2006)), and "OnStar's argument rests on a misconstruction of the cited staff interpretation." *Id.*

Although the reasoning of *Sharkey* has superficial appeal, it is premised on an untenable misunderstanding of the EFTA. Citing [Section 1693\(a\)\(12\)](#), the district court in *Sharkey* claims that "at least one other section of the EFTA protects consumers from unauthorized electronic fund transfers initiated without the authority of the consumer." *Id.* at \*3. [Section 1693\(a\)\(12\)](#), however, is the statutory definition of an "unauthorized electronic fund transfer," and no

other provision of the EFTA holds accountable third parties who withdraw unauthorized electronic fund transfers from the account of a consumer. Cf. [15 U.S.C. § 1693c](#) (requiring financial institutions to disclose [\*14] to consumers consumers' liability for unauthorized electronic fund transfers); [15 U.S.C. § 1693f](#) (regarding obligation of financial institutions to resolve errors, including unauthorized electronic fund transfers); [15 U.S.C. § 1693g](#) (regarding liability of consumers for unauthorized electronic fund transfers). The Court therefore finds persuasive the reasoning of other courts that "whether a transfer is 'unauthorized' under [§ 1693a\(12\)](#) only speaks to the allocation of liability between the parties and has no bearing on a determination of whether there was a violation of [§ 1693e\(a\)](#)." *Starks*, 2015 WL 12942282, at \*5 (citing [Wike, 566 F.3d at 594-95](#)).

The only in-Circuit authority on which OnStar relies, *Merritt v. Yavone, LLC*, No. 6:15-CV-0269-TC, 2015 WL 9256682 (D. Or. Nov. 5), *report and recommendation adopted*, [2015 WL 9165898 \(Dec. 15, 2015\)](#), is distinguishable. In *Merritt*, the plaintiff ordered a "free trial" of a weight loss product, authorizing a \$5.00 charge for shipping and handling. *Id. at \*1*. A month later, the defendants debited her bank account in the amount of \$79.99. *Id.* Because Plaintiff did not allege that the transfers were recurring, the magistrate judge recommended that the plaintiff's EFTA claim be dismissed. *Id. at \*5*. Here, by contrast, OnStar debited Plaintiff's account on a monthly basis. See Compl. ¶¶ 33-34.

Plaintiff's [\*15] in-Circuit authorities are more persuasive and more in line with the purpose of the EFTA, which "is a remedial statute accorded 'a broad, liberal construction in favor of the consumer.'" *Simone v. M & M Fitness LLC*, No. CV-16-01229-PHX-JJT, 2017 WL 1318012, at \*2 (D. Ariz. Apr. 10, 2017) (quoting [Begala v. PNC Bank, Ohio, Nat'l Ass'n](#), 163 F.3d 948, 950 (6th Cir. 1998)); accord [Smith v. Bank of Haw., No. CV 16-00513 JAO-RLP](#), 2019 WL 404423, at \*11 (D. Haw. Jan. 31, 2019) ("Congress intended for courts to broadly construe [CCPA's] provisions [like EFTA and TILA] in accordance with its remedial purpose.") (citing [Stout v. FreeScore, LLC](#), 743 F.3d 680, 684 (9th Cir. 2014); [Clemmer v. Key Bank Nat'l Ass'n](#), 539 F.3d 349, 353 (6th Cir. 2008)). Courts therefore have allowed claims under the EFTA to proceed where, as here, see Compl. ¶¶ 25-37, "Plaintiff[] allege[s] that Defendant did not obtain any authorization, much less written authorization, prior to debiting [her] accounts on a recurring monthly basis." *DeForest*, 2018 WL 1005300, at \*5; accord *Starks*, 2015 WL 12942282, at \*4; see also [In re Easysaver Rewards Litig.](#), 737 F. Supp. 2d at 1182 ("The electronic transfer of funds by consumers to purchase goods (at brick and mortar stores or over the internet) falls within the plain language of the statute and its governing regulations."); [Nordberg](#), 445 F. Supp. 2d at 1095 ("[P]laintiffs' allegations that defendant failed to secure authorization from plaintiffs is supported by the plain text of the EFTA and its implementing regulations."). The Court therefore concludes that Plaintiff's allegations are sufficient to demonstrate a violation of [Section 1693e\(a\)](#). Consequently, the Court **DENIES** [\*16] OnStar's Motion as to Plaintiff's first cause of action for violation of the EFTA.

#### **B. Second Cause of Action: Violation of the Automatic Renewal Law**

Relying on [Johnson v. Pluralsight, LLC](#), 728 Fed. App'x 674 (9th Cir. 2018), and [Lopez v. Stages of Beauty, LLC](#), 307 F. Supp. 3d 1058 (S.D. Cal. 2018), see Mot. at 9, OnStar argues that "[t]he Court should dismiss Plaintiff's second claim because private individuals cannot assert causes of action under California's Automatic Renewal Law." *Id.* at 8. Plaintiff counters that "the ARL plainly contemplates private enforcement by preserving 'all available civil remedies,'" Opp'n at 11, and "OnStar's two cited cases, neither of which is binding, are unpersuasive and should not be followed." *Id.* at 12. OnStar notes that Plaintiff cites no authority supporting that the ARL creates a private cause of action. See Reply at 3.

Although not binding, see [9th Cir. R. 36-3\(a\)](#), the Court finds persuasive the Ninth Circuit's reasoning in [Johnson](#) and its holding that the ARL does not create a private action. See [728 Fed. App'x at 676](#); see also [Lopez](#), 307 F. Supp. 3d at 1067-69. Accordingly, the Court **GRANTS** OnStar's Motion as to Plaintiff's second cause of action for violation of California's ARL.

#### **C. Third and Fourth Causes of Action: Violation of the Unfair Competition Law**

### 1. Plaintiff's Standing

A plaintiff has standing to sue under the UCL if she "has suffered injury [\*17] in fact and has lost money or property as a result of the unfair competition." [Cal. Bus. & Prof. Code § 17204](#); accord [Kwikset Corp. v. Super. Ct., 51 Cal. 4th 310, 322 \(2011\)](#) ("To satisfy the . . . standing requirements [under the UCL] . . . , a party must now (1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim.") (emphasis in original). OnStar does not appear to challenge that Plaintiff adequately has alleged economic harm, instead challenging only the sufficiency of Plaintiff's allegations concerning causation and reliance. See Mot. at 9-12.

#### a. Causation

For purposes of standing under the UCL, "[t]he phrase 'as a result of' in its plain and ordinary sense means 'caused by' and requires a showing of a causal connection." [Veera, 6 Cal. App. 5th at 915-16](#) (quoting [Kwikset, 51 Cal. 4th at 326-27](#)). OnStar contends that "Plaintiff's Unfair Competition Law claims fail because she fails to allege an injury 'as a result of unfair competition' . . . because it is clear that she knew of OnStar's billing practices[,] namely that her debit card would be charged after the expiration of the trial period[,] well before [\*18] the charges in question were made." Mot. at 9 (quoting [Kwikset Corp., 51 Cal. 4th at 321](#)). Plaintiff argues that OnStar's arguments concerning her purported knowledge hinge on facts alleged in OnStar's Answer on which the Court cannot rely for purposes of the instant Motion. See Opp'n at 13. Further, "such facts cannot excuse a defendant's violations of other clear statutes requiring *earlier* disclosure in a different manner, nor strip away a plaintiff's UCL standing to assert those violations." *Id.* (emphasis in original) (citing [Veera v. Banana Republic, LLC, 6 Cal. App. 5th 907, 916-20 \(2016\)](#); [Medrano v. Honda of N. Hollywood, 205 Cal. App. 4th 1, 12 \(2012\)](#)).

Based on the facts properly before the Court on this Motion,<sup>3</sup> see *supra* pages 1-6 & n.1, the Court concludes that Plaintiff has adequately alleged causation. Plaintiff received two emails in the months *after* she enrolled in OTS showing that her OnStar Subscription would expire on December 14, 2014, that she was enrolled in "Continuous Coverage," and that her "Hands-Free Calling" expired on "12/16/2014 (or when OnStar subscription ends, whichever comes first)." See Exs. 10-11. The emails provided no notice that OnStar would charge the debit card information it had retained from Plaintiff's purchase of minutes after expiration of the trial period, let alone the cost of those services. See [\*19] generally *id.* Similarly, the Terms and Conditions mailed to Plaintiff's home address—again, *after* she provided her debit card information to OnStar—indicate that Plaintiff would have to "arrange for payment to [OnStar] after th[e free trial] period of time expires" and that, "[i]f [Plaintiff] ha[d] a payment account on file with [OnStar], [it] w[ould] automatically start charging [Plaintiff] monthly." See Ex. 4. When Plaintiff provided her debit card number to the OnStar agent to activate her free OTS trial period, Plaintiff was not told that her debit card would be kept on file by OnStar or used to pay for the continuance of OTS after the end of the free trial period. See Compl. ¶¶ 22-32. On this record and at this stage, the Court cannot conclude that "Plaintiff consented to being charged." See Mot. at 9. Consequently, the Court concludes that Plaintiff adequately has alleged causation for purposes of standing for her UCL claims.

#### b. Reliance

Because "reliance is the causal mechanism of fraud," the California Supreme Court has required that "a plaintiff 'proceeding on a claim of misrepresentation as the basis of his or her UCL action [to] [\*20] demonstrate actual reliance on the allegedly deceptive or misleading statements, in accordance with well-established principles

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<sup>3</sup>To be clear, the Court does *not* consider the October 14, 2014 email from OnStar, see Tr. at 75:9-83:10, 84:11-85:15, 96:7-101:13; ECF Nos. 35-5 ("Ex. 5"), 35-7 ("Ex. 8"), to which Mr. Nicholis Festa, OnStar's director of marketing, see Tr. at 46:20-47:2, testified at April 19, 2016 evidentiary hearing. Because Plaintiff did not testify to her receipt of the October 14, 2014 email, it is not a judicial admission binding as to her. See, e.g., [Am. Title Ins. Co. v. Laclelaw Corp., 861 F.2d 224, 226 \(9th Cir. 1988\)](#) ("Factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them.") (emphasis added).

regarding the element of reliance in ordinary fraud actions." [Kwikset Corp., 51 Cal. 4th at 326-27](#) (quoting [In re Tobacco II Cases, 46 Cal. 4th 298, 306, 326 \(2009\)](#)). But "[a] consumer's burden of pleading causation in a UCL action should hinge on the nature of the alleged wrongdoing rather than the specific prong of the UCL the consumer invokes." [Durell v. Sharp Healthcare, 183 Cal. App. 4th 1350, 1363 \(2010\)](#). Consequently, a plaintiff "need not plead reliance [where] . . . the alleged . . . violation[s] do not] require[] allegations of fraud or deception." [Franz v. Beiersdorf, Inc., 745 F. App'x 47, 48 \(9th Cir. 2018\)](#) (citing [Medrano, 205 Cal. App. 4th at 12](#) (quoting [In re Tobacco II Cases, 46 Cal. 4th at 326](#))); accord [Kwikset, 51 Cal. 4th at 326 n.9](#) ("[W]e need express no views concerning the proper construction of the cause requirement in [non-fraud-based UCL] cases."); [In re Tobacco II Cases, 46 Cal. 4th at 325 n.17](#) ("We emphasize that our discussion of causation in this case is limited to such cases where, as here, a UCL action is based on a fraud theory . . . There are doubtless many types of unfair business practices in which the concept of reliance, as discussed here, has no application.").")

OnStar claims that "Plaintiff must also plead reliance where, as here, the claims sound in some kind of deception," but that "Plaintiff never states that the alleged omissions or misrepresentations were an immediate cause [\*21] of the injury, or that she did not want to have her subscription renewed automatically." Mot. at 10-11. Plaintiff counters that, "[i]n the 'unlawful' prong context, a plaintiff who paid a fee that the defendant was not authorized by law to charge (as here) has standing to assert that violation under the UCL" and "'reliance' is irrelevant to such statutory claims." Opp'n at 12-13 (citing [Lopez, 307 F. Supp. 3d at 1070](#); [Ivanoff v. Bank of Am., N.A., 9 Cal. App. 5th 719, 732 \(2017\)](#); [Medrano, 205 Cal. App. 4th at 11-14](#)).

A review of Plaintiff's Complaint reveals that her allegations here do not sound in fraud and, consequently, the Court agrees with Plaintiff that she need not plead reliance to establish standing under the UCL. Fundamentally, Plaintiff's UCL claims are based on allegations that OnStar charged Plaintiff's debit card without her consent. See, e.g., Compl. ¶¶ 77, 81, 92, 99, 105-07. Such claims "do not sound in fraud" and therefore do not "require reliance as to . . . allegations of causation." See [Kissel v. Code 42 Software, Inc.](#), No. SACV151936JLSKESX, 2016 WL 7647691, at \*8 (C.D. Cal. Apr. 14, 2016) (declining to require reliance for UCL claim based on violation of ARL). The Court therefore concludes that Plaintiff has adequately alleged standing to assert her UCL claims.

## 2. Third Cause of Action: Unlawful Business Practices

"By proscribing any unlawful business practice, [the UCL] borrows violations [\*22] of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." [Alvarez v. Chevron Corp., 656 F.3d 925, 933 n.8 \(9th Cir. 2011\)](#) (quoting [Cel-Tech Commc'n, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180 \(1999\)](#)). Plaintiff's claims under the unlawful prong of the UCL are predicated on violations of the EFTA; the ARL; the Telemarketing Sales Rule of the Federal Trade Commission, 16 C.F.R. §§ 310 et seq. ("TSR"); and [Section 5](#) of the Federal Trade Commission Act, [15 U.S.C. § 45](#) ("FTC Act").

### a. Violations of the Electronic Funds Transfer Act

Having concluded that Plaintiff's allegations are sufficient to state a violation of the EFTA, see *supra* Section I.A, the Court concludes that Plaintiff's allegations are also sufficient to demonstrate a violation of the unlawful prong of the UCL. See, e.g., [DeForest, 2018 WL 1005300, at \\*3 n.2](#) ("Because Plaintiffs have sufficiently alleged an EFTA claim, they have also stated a claim under the 'unlawful prong' of the UCL."); [Cody v. SoulCycle Inc.](#), No. CV156457GHKJEMX, 2016 WL 11129525, at \*5 (C.D. Cal. Apr. 22, 2016) ("Plaintiffs have stated a plausible claim for violation of the EFTA. . . . Thus, Plaintiffs have sufficiently stated a UCL claim based on unlawful business practices."); [Starks, 2015 WL 12942282, at \\*5](#) ("Because Plaintiff has sufficiently alleged an EFTA claim, the 'unlawful prong' of their UCL claim advances."). The Court therefore **DENIES** OnStar's Motion as to Plaintiff's third cause of action for violation of the unlawful prong of the UCL; however, [\*23] because "[t]he purpose of a motion for judgment on the pleadings is to dispose of issues or unmeritorious controversies," [Provenzano v. United States, 123 F. Supp. 2d 554, 556 \(S.D. Cal. 2000\)](#) (citing [La Jolla Village Homeowners' Ass'n v. Super. Ct.](#), 212 Cal. App. 3d 1131, 1140-41 (1989)), the Court also addresses whether Plaintiff's allegations are sufficient to state a claim based on a violation of the ARL, the TSR, and the FTC Act.

### b. Violations of California's Automatic Renewal Law

Under the ARL, it is "unlawful for any business that makes an automatic renewal offer or continuous service offer to a consumer in this state to . . . [c]harge the consumer's credit or debit card . . . for an automatic renewal or continuous service without first obtaining the consumer's affirmative consent to the agreement containing the automatic renewal offer terms or continuous service offer terms." *Cal. Bus. & Prof. Code § 17602(a)(2)*. But "[i]f a business complies with the provisions of this article in good faith, it shall not be subject to civil remedies." *Cal. Bus. & Prof. Code § 17604(b)*.

OnStar claims that its "good faith compliance immunizes [it], and renders the alleged Automatic Renewal Law violation unable to support a claim under the Unfair Competition Law." Mot. at 13. Plaintiff rejoins that "OnStar's 'good faith,' or lack thereof, is a fact-intensive question requiring discovery," Opp'n at 14, and, in any event, [\*24] OnStar's Acknowledgment "form does not even come close to adhering to the ARL," *id.* at 15, because "[i]t plainly does not meet the font and typeface requirements of [section 17601\(c\)](#)"; "does not constitute an 'explicit' and 'affirmative consent' to the continuous service terms, as [[section 17602\(a\)\(2\)](#)] of the ARL requires"; and "does not state, in a 'clear and conspicuous manner[]' either the amount of the 'recurring' charges or a 'description of the cancellation policy[,]'" as required by [sections 17601\(b\)\(2\)](#) and [\(3\)](#) and 17602(a)(1). Opp'n at 15-16.

"[OnStar] has provided no case law in support of its argument that its actions complied in good faith with the requirements of the ARL, as laid out in [section 17604\(b\)](#)." See [Johnson, 728 F. App'x at 677](#). Further, at this stage, "[OnStar] cannot defeat a claim by referencing an affirmative defense not clearly established by the complaint, and on which [it] bear[s] the burden to demonstrate." [Price v. Synapse Grp., Inc., No. 16-CV-01524-BAS-BLM, 2017 WL 3131700, at \\*7 \(S.D. Cal. July 24, 2017\)](#) (citing [Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687, 690 \(7th Cir. 2012\)](#)). Consequently, for purposes of this Motion, the Court determines that Plaintiff adequately has alleged that OnStar violated the provisions of the ARL for purposes of establishing a violation of the unlawful prong of the UCL.

### c. Violations of the FTC's Telemarketing Sales Rule

Pursuant to the TSR, "[i]t is a deceptive telemarketing act or practice and a violation of [\*25] this Rule for any seller or telemarketer to . . . fail[] to disclose truthfully, in a clear and conspicuous manner, . . . [t]he total costs to purchase, receive, or use . . . any . . . services . . . that are the subject of the sales offer . . . [or] the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s)." [16 C.F.R. §§ 310.3\(a\)\(1\)\(i\), \(vii\)](#). Further, "[i]t is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to . . . [c]aus[e] billing information to be submitted for payment . . . without the express informed consent of the customer" and, "[i]n any telemarketing transaction, the seller or telemarketer must obtain the express informed consent of the customer . . . to be charged for the goods or services . . . and to be charged using the identified account." [16 C.F.R. § 310.4\(a\)\(7\)](#). "Telephone calls initiated by a customer . . . that are not the result of any solicitation by a seller . . . or telemarketer" are "exempt from this Rule." [16 C.F.R. § 310.6\(b\)\(4\)](#). The TSR defines a "telemarketer" as "any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer," [16 C.F.R. § 310.2\(ff\)](#), and "telemarketing" as "a plan, program, [\*26] or campaign which is conducted to induce the purchase of goods or services . . . by use of one or more telephones." [16 C.F.R. § 310.2\(gg\)](#). A "seller" is "any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration." [16 C.F.R. § 310.2\(dd\)](#).

OnStar argues that the TSR is inapplicable because "Plaintiff . . . initiated the call to OnStar" and the TSR "expressly exempts . . . telephone calls the customer initiated." Mot. at 13 (citing [16 C.F.R. § 310.6\(b\)\(4\)](#)). Plaintiff counters that "the exemption applies **only** to customer-initiated calls that are **not** the result of **any solicitation** by a seller . . . or telemarketer." Opp'n at 17 (citing 16 C.F.R. § 310(b)(4)). Plaintiff notes that she alleges that "OnStar **solicited** plaintiff and the class members to press the blue button and become OnStar registrants by offering them a 'free trial'" and that the exemption is therefore inapplicable. *Id.* (citing Compl. ¶¶ 15, 21-22).

Although Plaintiff alleges that she initiated the call to OnStar, see Compl. ¶ 22, she also alleges that she placed the call because the dealer of the Vehicle informed her that "to activate the one year of free OTS, she would have to [\*27] register the Vehicle with OnStar from inside the Vehicle." See *id.* ¶ 21. OnStar argues that this does not qualify as "solicitation" because "an unnamed employee at an independent, third party dealership, and not anyone connected with OnStar, informed Plaintiff" that she would have to register the Vehicle. Reply at 6. And, even if there were solicitation, "Plaintiff's call was not a result of a solicitation by a 'seller'" because "any communications between the dealer and Plaintiff were, by definition, not 'in connection with a telemarketing transaction'" and "the dealer did not 'provide[], offer[] to provide, or arrange[] for others to provide' OnStar services." *Id.* at 6-7 (quoting [16 C.F.R. § 310.2\(d\)](#)) (citing [FTC v. Lifewatch Inc., 176 F. Supp. 3d 757, 782 \(N.D. Ill. 2016\)](#)).

OnStar cannot escape Plaintiff's allegations under the TSR so easily. Plaintiff has alleged that OnStar is "a fully owned subsidiary of General Motors LLC," Compl. ¶ 6, and that "OTS equipment and software comes installed in most General Motors-manufactured vehicles, such as . . . Cadillac." *Id.* ¶ 17. The "GM Customer Incentive and OnStar Acknowledgment" form signed by Plaintiff's husband is signed by an "Authorized Dealer" representative. See Ex. 1-A. At this stage, the Court therefore concludes [\*28] that Plaintiff adequately has alleged that OnStar arranged for its own agents and others—namely, GM and its dealers—to provide OnStar's OTS. See, e.g., [FTC v. Stefanchik, 559 F.3d 924, 930 \(9th Cir. 2009\)](#) (affirming that defendant who entered into agreement with third party to conduct telemarketing sales for defendant was a seller under the TSR); see also [FTC v. MacGregor, 360 F. App'x 891, 894 \(9th Cir. 2009\)](#) (same).

Further, given the dearth of applicable authority, the Court is not prepared to conclude at this time that OnStar's solicitation through GM and its dealers was not "in connection with" telemarketing. Plaintiff alleges that the dealer told her to register the Vehicle for the OTS trial by pressing the blue button in the Vehicle, which connected Plaintiff to a live OnStar agent. See Compl. ¶¶ 21-22. During this call, the OnStar agent advertised and sold AT&T minutes to Plaintiff. See *id.* ¶¶ 24-25. Plaintiff adequately has alleged that OnStar indirectly solicited her to call its own agents, who operated as telemarketers and engaged in telemarketing under the TSR. Consequently, the Court concludes that Plaintiff sufficiently has alleged that OnStar violated the TSR for purposes of Plaintiff's unlawful UCL claims.

#### d. Violations of the Federal Trade Commission Act

Under the FTC Act, [\*29] "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." [15 U.S.C. § 45\(a\)\(1\)](#). "A violation of the TSR constitutes an unfair or deceptive act or practice in or affecting commerce, in violation of [section 5\(a\)](#) of the FTC Act." [FTC v. Lalonde, 545 F. App'x 825, 840 \(11th Cir. 2013\)](#) ([15 U.S.C. §§ 57a\(d\)\(3\), 6102\(c\)](#)); accord [Stefanchik, 559 F.3d at 930 & n.17](#). Because the Court has concluded that Plaintiff adequately has alleged a violation of the TSR,<sup>4</sup> the Court also concludes that she adequately has alleged a violation of [Section 5\(a\)](#) of the FTC Act for purposes of her claim under the unlawful prong of the UCL.

#### 3. Fourth Cause of Action: Unfair Business Practices

"[T]he proper definition of 'unfair' conduct against consumers 'is currently in flux' among California courts." [Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1169 \(9th Cir. 2012\)](#) (quoting [Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 735 \(9th Cir. 2007\)](#)); accord [Hodson v. Mars, Inc., 891 F.3d 857, 866 \(9th Cir. 2018\)](#). Courts therefore apply one or more of three different tests for unfairness: the balancing test, [South Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th \(1999\)](#); the tethering test, [Cel-Tech, 20 Cal. 4th 163](#); and the [Section 5](#) test, [Camacho v. Automobile Club, 142 Cal. App. 4th 1394 \(2006\)](#). Compl. ¶ 104.

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<sup>4</sup> As discussed above, see *supra* pages 12-13 & note 3, the Court also concludes based on the record before it that Plaintiff's alleged injury was not "reasonably avoidable," as advocated by OnStar. See Mot. at 15.

OnStar claims that "a growing number of both Federal and State courts have applied the [Section 5](#) test, demonstrating an emerging consensus." Mot. at 17 (citing [Smith v. Ford Motor Co., 462 F. App'x 660, 665 \(9th Cir. 2011\)](#); [Allred v. Frito-Lay N. Am., Inc., No. 17-CV-1345 JLS \(BGS\), 2018 WL 1185227, at \\*6 \(S.D. Cal. Mar. 7, 2018\)](#); [Simpson v. Cal. Pizza Kitchen, Inc., 989 F. Supp. 2d 1015, 1026 \(S.D. Cal. 2013\)](#); [Daugherty v. Am. Honda Motor Co., 144 Cal. App. 4th 824, 839 \(2006\)](#)). Plaintiff does not advocate for any particular test. See Compl. ¶¶ 104-07; see also Opp'n at 20-23. The Court evaluates each of the tests [\*30] in turn.

#### a. Section 5 Test

"[T]he factors that define unfairness under [section 5](#) are: (1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided." [Camacho, 142 Cal. App. 4th at 1403 \(2006\)](#) ([Orkin Exterminating Co. v. F.T.C., 849 F.2d 1354, 1364 \(11th Cir. 1988\)](#)); see also [15 U.S.C. § 45\(n\)](#).

Although OnStar advocates for use of the [Section 5](#) test, see Mot. at 16-17, it appears that the Ninth Circuit has rejected application of the [Section 5](#) test in recent consumer cases. See, e.g., [Hodsdon, 891 F.3d at 866](#) (applying [Cel-Tech](#) tethering test and [South Bay](#) balancing test to consumer claim under unfair prong of UCL regarding manufacturer's failure to disclose use of child and slave labor in supply chain); [Davis, 691 F.3d at 1170](#) ("The question then is whether we are to apply the [tethering test] in [Cel-Tech](#), or to follow the former balancing test under [South Bay](#)."); [Rubio v. Capital One Bank, 613 F.3d 1195, 1205 \(9th Cir. 2010\)](#) (applying balancing and tethering tests); [Lozano, 504 F.3d at 736](#) ("[W]e decline to apply the FTC standard in the absence of a clear holding from the California Supreme Court."); [McVicar v. Goodman Glob., Inc., 1 F. Supp. 3d 1044, 1054 \(C.D. Cal. 2014\)](#) ("The Ninth Circuit has rejected the [section 5](#) test in the consumer context.") (citing [Lozano, 504 F.3d at 736](#)). The Court therefore declines to apply the [Section 5](#) test here.

#### b. Balancing Test

Under the balancing test, "an 'unfair' business practice occurs when it offends an established [\*31] public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." [S. Bay Chevrolet, 72 Cal. App. 4th at 886-87](#) (quoting [People v. Casa Blanca Convalescent Homes, Inc., 159 Cal. App. 3d 509, 530 \(1984\)](#)). In applying this test, the Court must weigh the practice's "impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer." [Id. at 886](#) (quoting [State Farm Fire & Cas. Co. v. Super. Ct., 45 Cal. App. 4th 1093, 1103-04 \(1996\)](#), abrogated by [Cel-Tech Commc'n, Inc., 20 Cal. 4th 163](#)). "In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." [Id.](#) (quoting [State Farm Fire & Cas. Co., 45 Cal. App. 4th at 1104](#)).

OnStar claims that "Plaintiff reasonably knew and understood that OnStar would charge Plaintiff for the OnStar service, and Plaintiff received numerous forms of notice and warning concerning the charges," Mot. at 17 (citing Compl. ¶¶ 20-21; Ans. ¶¶ 3, 8-11), which "alone is enough to render Plaintiff's claim invalid." [Id.](#) (citing [S. Bay Chevrolet, 72 Cal. App. 4th at 887; Davis, 691 F.3d at 1170](#)). And "[t]he fact that OnStar's Terms and Conditions were readily available online further cautions against finding that any alleged lack of disclosure constituted unfair or immoral conduct." [Id. at 17-18](#) (citing [Hodsdon v. Mars, Inc., 162 F. Supp. 3d 1016, 1027 \(N.D. Cal. 2016\)](#)).

Plaintiff, on the other hand, argues that the Complaint alleges that she did not know or understand that her debit card would be charged and, in any event, the notices and Terms and [\*32] Conditions on which OnStar relies "did not adequately advise plaintiff that her debit card would be charged without her consent." Opp'n at 22 (emphasis in original). In any event, "failing to adequately disclose, or obtain informed consent to, monthly charges benefits neither consumers nor competition." [Id. at 20](#) (citing [FTC v. Amazon.com, Inc., No. C14-1038-JCC, 2016 WL 10654030, at \\*11 \(W.D. Wash. July 22, 2016\)](#)).

Plaintiff's allegations suffice to demonstrate unfair conduct under the balancing test. As discussed above, see *supra* pages 12-13 & note 3, the Court cannot conclude based on the record before it that OnStar adequately advised Plaintiff that her debit card would be charged for continuation of OTS after the expiration of her free trial period. And while the free trial of OTS may benefit consumers, see Mot. at 16, OnStar focuses on the wrong practice for

purposes of this test: Plaintiff alleges not that the free trial itself is unfair to consumers, but rather that OnStar's failure to obtain consumers' authorization or consent prior to charging their stored credit or debit cards for continuation of OTS past the free trial period is. See, e.g., Compl. ¶ 105. Even if OTS itself and/or the free trial period has utility, OnStar's unauthorized charging of its consumers for [\*33] continuation of that service does not. See *Amazon.com, Inc.*, 2016 WL 10654030, at \*10 ("[T]he 'benefit' of ensuring a streamlined experience is not incompatible with the practice of affirmatively seeking a customer's authorized consent to a charge."). The Court therefore determines that Plaintiff adequately has alleged that OnStar engaged in an unfair business practice under the balancing test.

#### c. Tethering Test

Pursuant to the tethering test, "unfairness . . . under [section 17200](#) [must] be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Cel-Tech Commc'nns, Inc.*, 20 Cal. 4th at 186-87. Although *Cel-Tech* was limited to anticompetitive practices between competitors, see *id.*; see also *id. at 187 n.12*, "some courts in California have extended the *Cel-Tech* definition to consumer actions, while others have applied the old balancing test, or borrowed the three-pronged test set forth in the FTC Act." *Davis*, 691 F.3d at 1170 (citing *Lozano*, 504 F.3d at 736; *Durell*, 183 Cal. App. 4th at 1364-66).

OnStar advocates that "Plaintiff does not allege that OnStar's conduct violates the 'letter, policy, or spirit of the antitrust laws, or that it harms competition,' which alone is enough to find that no claim has been stated," Mot. at 18 (quoting *Davis*, 691 F.3d at 1170), and "Plaintiff also fails to identify how OnStar's conduct violates the policy or spirit of any law, and [\*34] fails to identify what those policies and spirits are." *Id.* Plaintiff disputes that the tethering test is limited to *antitrust law*, noting that "[t]he test has been applied in cases in which a defendant's conduct violated the spirit or purpose of a wide range of laws." Opp'n at 21-22 (citing *Candelore v. Tinder, Inc.*, 19 Cal. App. 5th 1138, 1155-56 (2018); *West v. JPMorgan Chase Bank, N.A.*, 214 Cal. App. 4th 780, 806 (2013)). Plaintiff also notes that "[t]he complaint plainly alleges that OnStar violated the spirit, and the letter, of the EFTA, the ARL, the TSR, and the FTC Act—all of which are intended to prevent the very kind of deception in which OnStar engaged, namely, charging consumers' debit and credit cards without obtaining the consumers' prior express and informed consent." *Id.* at 22 (citing Compl. ¶¶ 52, 65, 84, 97, 106).

Here, Plaintiff adequately has alleged that OnStar violated the letter of several laws, including the EFTA, the ARL, and the TSR, see *supra* Sections I.A, I.C.2.a—c, as well as their underlying policies. See Compl. ¶¶ 52, 65, 84, 106. The Court therefore concludes that Plaintiff adequately has alleged that OnStar engaged in an unfair business practice under the unfair prong of the UCL. See, e.g., *Lopez*, 307 F. Supp. 3d at 1073 (concluding that the plaintiff plausibly alleged a claim under the unfair prong of the UCL [\*35] where he plausibly alleged that the defendant's conduct or practices violated the ARL); *Jenkins v. j2 Glob., Inc.*, No. CV139226DSFMRWX, 2014 WL 12687417, at \*5 (C.D. Cal. May 23, 2014) (concluding that the plaintiffs stated a claim under the unfair prong of the UCL where they also stated actionable claims under the CLRA and ARL); *Chavez v. Bank of Am. Corp.*, No. C-10-0653 JCS, 2012 WL 1594272, at \*8 (N.D. Cal. May 4, 2012) (concluding that the plaintiff stated a claim under the unfair prong of the UCL where he alleged that he was charged monthly for a credit monitoring service in which he did not enroll); cf. *Starks*, 2015 WL 12942282, at \*7 (dismissing claim under unfair prong of UCL where the plaintiffs failed to allege violation of public policy behind EFTA in their operative complaint). The Court therefore **DENIES** OnStar's Motion as to Plaintiff's fourth cause of action for violation of the unfair prong of the UCL.

## II. Motion to Modify Class Allegations

Because the Court has declined OnStar's Motion to dismiss Plaintiff's EFTA claims, see *supra* Section I.A, OnStar requests that the Court "delete allegations involving class members residing outside of the state of California" and "eliminate claims under EFTA seeking actual damages." Mot. at 19.

### A. Nationwide Class Allegations

Relying on *Bristol-Myers Squibb Company v. Superior Court*, 137 S. Ct. 1773, 1776 (2017), OnStar argues that it "is not subject to personal jurisdiction with respect to the claims of the unnamed class members" [\*36] who reside outside of California, and those class allegations should be dismissed." Mot. at 19. Plaintiff rejoins that "OnStar waived this defense by failing to raise it in its original and amended *Rule 12(b)* motions," Opp'n at 23, and, "[e]ven if OnStar had not waived its personal jurisdiction defense, the defense fails because *Bristol-Myers* does not apply to federal courts, and even if it did, it does not apply to federal-question cases specifically." *Id.* at 24 (citing *In re Packaged Seafood Prod. Antitrust Litig.*, 338 F. Supp. 3d 1118, 1172-73 (S.D. Cal. 2018); *In re Morning Song Bird Food Litig.*, No. 12-CV-1592 JAH (AGS), 2018 WL 1382746, at \*5 (S.D. Cal. Mar. 19, 2018)).

"District courts in this circuit regularly deny motions to strike class allegations as premature." *Brown v. DIRECTV, LLC*, No. CV1301170DMGCFEX, 2014 WL 12599363, at \*2 (C.D. Cal. May 27, 2014) (collecting cases); see also *Colgate v. JUUL Labs, Inc.*, 345 F. Supp. 3d 1178, 1196 (N.D. Cal. 2018) (motion to strike nationwide class allegations as premature); *Montemayor v. GC Servs. LP*, 302 F.R.D. 581, 588 (S.D. Cal. 2014) (concluding that motion to strike class allegations based on failure to meet commonality and predominance requirements because "[t]he issue is better address[ed] during a motion for class certification"); *In re Wal-Mart Stores, Inc. Wage & Hour Litig.*, 505 F. Supp. 2d 609, 615 (N.D. Cal. 2007) ("[W]hile there is little authority on this issue within the Ninth Circuit, decisions from courts in other jurisdictions have made clear that dismissal of class allegations at the pleading stage should be done rarely and that the better course is to deny such a motion because the shape and form of a class action evolves only through the process [\*37] of discovery.") (internal quotation marks omitted) (collecting cases). Accordingly, the Court **DENIES WITHOUT PREJUDICE** OnStar's Motion insofar as it relates to Plaintiff's nationwide class allegations.

### ***B. Actual Damages Allegations***

OnStar additionally contends that "Plaintiff's EFTA class is improper to the extent it seeks actual damages" because "EFTA allows for recovery of actual damages only to the extent that a consumer sustained damages 'as a result of' violations of EFTA," which "[c]ourts routinely interpret . . . as requiring consumers to show injury, detrimental reliance, and causation." Mot. at 23 (citing *In re TD Bank, N.A. Debit Card Overdraft Fee Litig.*, No. CV 6:15-MN-2613-BHH, 2018 WL 1003548, at \*26 (D.S.C. Feb. 22, 2018); *Brown v. Wells Fargo & Co.*, 284 F.R.D. 432, 447 (D. Minn. 2012); *Stilz v. Glob. Cash Network, Inc.*, No. 10 CV 1998, 2010 WL 3975588, at \*5 (N.D. Ill. Oct. 7, 2010); *Martz v. PNC Bank, N.A.*, No. CIV.A.06-1075, 2007 WL 2343800, at \*8 (W.D. Pa. Aug. 15, 2007)). Consequently, "numerous courts have held that class actions cannot be maintained for actual damages." *Id.* at 24-25 (citing *In re TD Bank*, 2018 WL 1003548, at \*28; *Mabary v. Hometown Bank, N.A.*, 888 F. Supp. 2d 857, 860 (S.D. Tex. 2012); *Brown v. Wells Fargo & Co.*, 284 F.R.D. at 447; *Martz*, 2007 WL 2343800, at \*8).

Plaintiff does not appear to object, arguing only that "[c]laims for EFTA statutory damages are routinely certified for class treatment" and, "if discovery shows that OnStar's EFTA violations are ongoing, plaintiffs will seek injunctive relief." Opp'n at 25 (citing *Kemply v. Cashcall, Inc.*, No. 08-CV-03174-MEJ, 2016 WL 1055251, at \*15-18 (N.D. Cal. Mar. 16), stricken in part on other grounds, 2016 WL 6892693 (Nov. 23, 2016)). Because the parties appear to agree that Plaintiff cannot seek actual damages [\*38] on a class-wide basis, the Court **GRANTS** OnStar's Motion and **STRIKES** Plaintiff's class claim for actual damages under the EFTA.

## **CONCLUSION**

In light of the foregoing, the Court **GRANTS IN PART AND DENIES IN PART** Defendant's Motion (ECF No. 73). Specifically, the Court **DENIES** Defendant's Motion as to Plaintiffs first, third, and fourth causes of action; **DENIES WITHOUT PREJUDICE** Defendant's Motion as to Plaintiff's nationwide class allegations; and **GRANTS** Defendant's Motion as to Plaintiff's second cause of action and class claim for actual damages under the EFTA.

**IT IS SO ORDERED.**

Dated: March 18, 2019

/s/ Janis L. Sammartino

Hon. Janis L. Sammartino

United States District Judge

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## SZ DJI Tech. Co. v. Autel Robotics USA LLC

United States District Court for the District of Delaware

March 18, 2019, Decided; March 18, 2019, Filed

C.A. No. 16-706-LPS

### **Reporter**

2019 U.S. Dist. LEXIS 44057 \*; 2019-1 Trade Cas. (CCH) P80,744; 2019 WL 1244947

SZ DJI TECHNOLOGY CO., LTD. and DJI EUROPE B.V., Plaintiffs-Counterclaim Defendants, v. AUTEL ROBOTICS USA LLC and AUTEL AERIAL TECHNOLOGY CO., LTD., Defendants-Counterclaim Plaintiffs.

**Prior History:** [SZ DJI Tech. Co. v. Autel Robotics USA LLC, 2018 U.S. Dist. LEXIS 28927 \(W.D. Wash., Feb. 22, 2018\)](#)

### **Core Terms**

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prices, allegations, predatory, drones, motion to dismiss, antitrust, counterclaims, below-cost, competitor, monopolization, Technology, quotation, prosumer, marks

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**Judges:** Leonard P. Stark, UNITED STATES DISTRICT JUDGE.

**Opinion by:** Leonard P. Stark

### **Opinion**

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#### **MEMORANDUM OPINION**

/s/ Stark

**STARK, U.S. District Judge:**

Defendants-Counterclaim Plaintiffs Autel Robotics USA LLC and Autel Aerial Technology Co., Ltd. (collectively, "Autel") assert, in their operative Second Amended Answer ("SAA"), antitrust counterclaims against Plaintiffs-Counterclaim Defendants SZ DJI Technology Co., Ltd. ("SZ DJI"), DJI Europe B.V. ("DJI BV"), and DJI Technology Inc. ("DJI US") (collectively, "DJI"). (D.I. 277) DJI has moved to dismiss pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#), contending that Autel has not alleged facts that plausibly support any of its antitrust counterclaims. (D.I. 282) After reviewing the parties' [\*2] briefing (D.I. 283, 291, 301), the Court will grant DJI's motion.

## I. BACKGROUND

On August 11, 2016, DJI filed suit against Autel for patent infringement relating to drone technology and operation. (D.I. 1) Autel filed an amended answer to DJI's complaint on May 23, 2018, which included counterclaims for monopolization in violation of the Sherman Act, attempted monopolization in violation of the [Sherman Act](#), predatory pricing in violation of [sections 17043 and 17044 of the California Unfair Practices Act](#), and predatory pricing in violation of [section 481-3 of the Hawaii Unfair Practices Act](#). (D.I. 241 at ¶¶ 211-41) DJI moved to dismiss these antitrust counterclaims on June 29, 2018 (D.I. 266), to which Autel responded by filing a second amended answer (D.I. 277) ("SAA"), mooting the earlier motion. DJI filed the present motion on September 14, 2018. (D.I. 282)

Autel describes a drone as an "aircraft without a human pilot aboard, controlled by a ground-based operator, with a system of communications between the two." (D.I. 291 at 2) The parties agree that DJI holds a powerful, if not controlling, position in the drone industry. (*Id.* at 3; D.I. 283 at 6) Autel characterizes its antitrust counterclaims as relating specifically [\*3] to the market for "prosumer" drones, which are "[m]ore than toys and less than fully-configured professional units," are "easy to use," "and contain certain 'pro' features, like improved cameras, navigation software and growing intelligence." (D.I. 291 at 3) (citing SAA at ¶ 61) Autel alleges that DJI has captured the majority of the growth of this market, fueling its monopoly power. (*Id.*) Autel further alleges that using this market power, "DJI has repeatedly engaged in predatory pricing to blunt the advance of new competitors and ultimately drive them out of the prosumer drone market entirely or, at a minimum, to its fringes." (*Id.*) "[N]early a dozen companies have attempted to bring new and better 'prosumer' drones to American consumers . . . [b]ut each time DJI has perceived a new threat, DJI has used its dominant market share to maintain and extend its monopoly by predatorily cutting its prices, below cost, to undercut the advent of the competitor drone." (*Id.* at 4) Autel describes "a continuing pattern of DJI's anti-competitive conduct," whereby DJI tactically lowers its price below cost to drive out each new competitor that enters. (*Id.* at 4-7)

Conversely, DJI characterizes its success as stemming [\*4] from "several key advantages over its competitors," namely "the largest research and development team in the industry with a state-of-the-art R&D infrastructure" and a "manufacturing facility in Shenzhen, China . . . with direct access to the best supply chain of electronic components." (D.I. 283 at 6) DJI asserts that, despite its large market share, it does not have monopoly power, as shown by allegations Autel included in its SAA, including that "as many as a dozen companies (including Autel) introduce[ed] new products to the market over the past few years at prices comparable to and often lower than those offered by DJI." (*Id.* at 7) (citing SAA at ¶¶ 62, 70, 100, 112, 115, 124-26, 149) "Thus, according to Autel's own allegations, DJI's years of alleged predatory pricing practices did nothing to deter a steady onslaught of new and persistent competition." (*Id.* at 7) DJI further blames the exit of these competitors on their own "failure and troubles." (*Id.* at 8)

DJI insists that Autel's allegations of below-cost pricing are "nothing more than speculation," pointing out that Autel "does not, for example, identify any of DJI's advertised prices, does not identify any prices offered by DJI resellers, and does [\*5] not identify any transactions in which a purchaser actually paid the prices alleged." (*Id.* at 8-9) (citing SAA at ¶¶ 69(a), 127(a), 127(c), 69(b), 127(d), 69(c), 128) DJI provides the Court with a DJI accounting document that Autel obtained through discovery (on the pending patent claims) and which forms the basis of Autel's pricing and cost allegations.<sup>1</sup> This accounting document provides DJI's revenue, cost, gross profit, and quantity of drones sold by DJI for each month in 2016. Autel replies to DJI's analysis of its accounting document by asking the Court to deny DJI's motion to allow the parties to ascertain "[t]he real meaning of DJI's internal financial analysis, produced

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<sup>1</sup> The Court may properly look to this document (D.I. 284-6; D.I. 284-8) in evaluating the motion to dismiss, even though it is not cited in the SAA, because it is plainly integral to and a basis for Autel's counterclaims. See [In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 \(3d Cir. 1997\)](#) (stating that party "cannot prevent a court from looking at the texts of the documents on which its claim is based by failing to attach or explicitly cite them"); [Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 \(3d Cir. 1993\)](#) ("A court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document."); D.I. 291 at 10 (Autel acknowledging its counterclaims rely on "facts derived from [this] document, among other sources"))

during discovery on DJI's patent claims, which Autel contends demonstrates DJI's predatory pricing." (D.I. 291 at 1) DJI finds further flaws in Autel's counterclaims, including Autel's "measure of cost" and whether DJI had the ability to recoup lost profits.

## II. LEGAL STANDARDS

### A. Rule 12(b)(6) Motion to Dismiss

Evaluating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) requires the Court to accept as true all material allegations of the complaint. See Spruill v. Gillis, 372 F.3d 218, 223 (3d Cir. 2004). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled [\*6] to offer evidence to support the claims." In re Burlington Coat Factory Sec. Litig., 114 F.3d at 1420 (internal quotation marks omitted). Thus, the Court may grant such a motion to dismiss only if, after "accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief." Maio v. Aetna, Inc., 221 F.3d 472, 481-82 (3d Cir. 2000) (internal quotation marks omitted).

A well-pleaded complaint must contain more than mere labels and conclusions. See Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A plaintiff must plead facts sufficient to show that a claim has substantive plausibility. See Johnson v. City of Shelby, 574 U.S. 10, 135 S. Ct. 346, 347, 190 L. Ed. 2d 309 (2014). A complaint may not be dismissed, however, for imperfect statements of the legal theory supporting the claim asserted. See id. at 346.

"To survive a motion to dismiss, a civil plaintiff must allege facts that 'raise a right to relief above the speculative level on the assumption that the allegations in the complaint are true (even if doubtful in fact).'" Victaulic Co. v. Tieman, 499 F.3d 227, 234 (3d Cir. 2007) (quoting Twombly, 550 U.S. at 555). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. At bottom, "[t]he complaint must state enough facts to raise a reasonable expectation that discovery will reveal evidence of [each] [\*7] necessary element" of a plaintiff's claim. Wilkerson v. New Media Tech. Charter Sch. Inc., 522 F.3d 315, 321 (3d Cir. 2008) (internal quotation marks omitted).

The Court is not obligated to accept as true "bald assertions," Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997) (internal quotation marks omitted), "unsupported conclusions and unwarranted inferences," Schuylkill Energy Res., Inc. v. Pa. Power & Light Co., 113 F.3d 405, 417 (3d Cir. 1997), or allegations that are "self-evidently false," Nami v. Fauver, 82 F.3d 63, 69 (3d Cir. 1996).

### B. Predatory Pricing

The Supreme Court has described a two-part framework for analyzing price-based monopolization under the Sherman Act:

First a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs . . . . The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices.

Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-24, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993); see also Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 317 (3d Cir. 2007) ("A claim of attempted monopolization under § 2 of the Sherman Act must allege (1) that the defendant has engaged in predatory or

anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.") (internal quotation marks omitted). Similarly, [\*8] California and Hawaii predatory pricing statutes require Plaintiff to plead (and ultimately prove) below-cost pricing coupled with an intent to destroy competition. See [Cal. Bus. & Prof. Code § 17043](#); [Haw. Rev. Stat. § 481-3](#); see also generally [Varentec, Inc. v. Gridco, Inc., 2017 U.S. Dist. LEXIS 86185, 2017 WL 2438846, at \\*9 \(D. Del. June 6, 2017\)](#) ("Each of defendant's state law claims is based on the same below-cost pricing allegations underlying its federal predatory pricing claims.").

### III. DISCUSSION

#### **Autel Does Not Sufficiently and Plausibly Allege Below-Cost Pricing**

Autel does not sufficiently and plausibly plead that DJI priced its prosumer drones below costs. As DJI argues, Autel's allegations "are not based on the prices DJI actually charged for the drones it sold in a given month." (D.I. 283 at 12) In fact, "Autel does not identify any of DJI's advertised prices, nor any of the prices advertised by any of DJI's many resellers, nor any actual transaction prices." (*Id.* at 14) Instead, Autel merely takes the DJI accounting document it obtained in patent-related discovery, divides revenue by quantity, and alleges the resulting figure to be the monthly price. Autel alleges nothing to plausibly show that this is the method DJI uses to determine price or that Autel's resulting figures are in any way representative of DJI's actual prices. As DJI points [\*9] out, Autel's method does not account for "among other things, refunds and returns on products that were sold in other months." (*Id.* at 14 n. 16) As DJI also argues, "the document records negative 'revenue' in numerous months, which implies — using the math that Autel uses to derive 'price' — that DJI in those months must have paid its customers to take its drones." (D.I. 301 at 6)

Also, unlike the other cases involving allegations of below-cost pricing (on information and belief) and without factual basis and purely speculative. It is insufficient to plead "conclusory allegations in support of . . . predatory pricing claims." [Varentec, 2017 U.S. Dist. LEXIS 86185, 2017 WL 2438846, at \\*5](#).

Finally, the Supreme Court has expressly cautioned against allowing antitrust claims like the ones pled by Autel from proceeding where the allegations are inadequate, as they are here. "[C]utting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect." [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594, 106 S. Ct. 1348, 89 L. Ed. 2d 538 \(1986\)](#). Even if DJI's pricing drove out competitors, this does not constitute a plausible allegation that it was DJU's **below-cost** predatory pricing that caused [\*10] others to fail.

In short, the Court agrees with DJI: "[A]ll of the **facts** alleged in the Counterclaim (as opposed to Autel's conclusory assertions) are fully consistent with robust competition in a growing market, including allegedly declining prices, increasing output, product innovation, and repeated new entry. Because there is no plausibly alleged **anticompetitive** conduct, Autel cannot satisfy the requirements for stating a predatory pricing claim under federal or state **antitrust law**." (D.I. 301 at 1)

Having failed to allege a below-cost price,<sup>2</sup> or other facts demonstrating that DJI sold prosumer drones in a predatory manner, Autel's antitrust counterclaims, both federal and state, will be dismissed.

### IV. CONCLUSION

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<sup>2</sup> Given the Court's conclusions, it is not necessary to address DJI's separate contention that Autel's claims fail also because of the meaning of "cost" as used in the DJI accounting sheet. (See D.I. 283 at 12-14; D.I. 291 at 15-19) Nor will the Court reach DJI's identification of deficiencies in Autel's pleading of intent to monopolize, likelihood of recoupment, or the relevant market.

For the reasons stated above, the Court will grant Plaintiffs' motion to dismiss.

**ORDER**

At Wilmington this **18th** day of **March, 2019**:

For the reasons stated in the Memorandum Opinion issued this same date, **IT IS HEREBY ORDERED** that SZ DJI Technology Co. Ltd.'s motion to dismiss (D.I. 282) is **GRANTED**.

**IT IS FURTHER ORDERED** that the earlier-filed motion to dismiss (D.I. 266) is **DENIED AS MOOT**.

/s/ Leonard P. Stark

UNITED STATES DISTRICT COURT

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## **Patriot Mech. v. Controls**

Business and Consumer Court of Maine, Cumberland County

March 20, 2019, Decided

DOCKET NO. BCD-CV-19-06

**Reporter**

2019 Me. Bus. & Consumer LEXIS 17 \*

PATRIOT MECHANICAL, LLC, Plaintiff, v. MAINE CONTROLS, LLC, et al., Defendants.

### **Core Terms**

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alleges, bid, conspiracy, motion to dismiss, antitrust, Mechanical, defamation, geographic, bidder, economic loss doctrine, fiduciary relationship, monopolize, argues, confidential relationship, oral argument, misrepresentation, defamatory, winning

**Judges:** [\*1] M. Michaela Murphy, Justice, Business and Consumer Court.

**Opinion by:** M. Michaela Murphy

### **Opinion**

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#### **ORDER ON DEFENDANTS' PARTIAL MOTION TO DISMISS**

Pending before the Court is Defendants Maine Controls, LLC and Mechanical Services, LLC's (collectively "Maine Controls") partial motion to dismiss pursuant to M.R. Civ. P. 12(b)(6). Plaintiff Patriot Mechanical, LLC ("Patriot") opposes the motion. The Court heard oral argument on the motion on February 26, 2019. A. Robert Ruesch, Esq. appeared for Maine Controls and Dan Feldman, Esq. appeared for Patriot.

#### **BACKGROUND**

The following facts are taken from Maine Controls' Complaint and for purposes of this motion are treated as admitted. Patriot, an HVAC contractor, requested a quote from Maine Controls on the cost of services and component parts in preparing its bid for a project at the City of Portland, Maine's North Deering fire station (the "Project"). (Pl's Compl. ¶¶ 9, 16.) Patriot assumed that Maine Controls components and services were required to win the contract. (Pl's Compl. ¶¶ 10-12.) Maine Controls quoted a base bid price of \$82,250 (the "Quote") for the services and components necessary for the Project. (Pl's Compl. ¶ 17.) Patriot believed this to be the standardized [\*2] quote given to any and all mechanical contractors who sought a quote for the Project. (Pl's Compl. ¶ 19.) Furthermore, Patriot believed that Maine Controls wanted Patriot to believe that the Quote was a standardized quote given to any and all mechanical contractors who sought a quote for the Project. (Pl's Compl. ¶ 20.) Patriot used the Quote in its bid for the Project. (Pl's Compl. 23.) Patriot's bid was roughly \$25,000 higher than the winning bid for the Project. (Pl's Compl. ¶ 24.) This resulted in damages to Patriot both in the form of lost profits for failing to submit a winning bid for the Project and for damage to Patriot's reputation for submitting an artificially inflated bid. (Pl's Compl. ¶ 36.) Patriot filed an eleven-count complaint against Maine Controls for these alleged misdeeds; in the instant motion, Maine Controls seeks dismissal of eight of those counts.

## STANDARD OF REVIEW

In reviewing a motion to dismiss under Rule 12(b)(6), courts "consider the facts in the complaint as if they were admitted." [Bonney v. Stephens Mem. Hosp., 2011 ME 46, ¶ 16, 17 A.3d 123](#). The complaint is viewed "in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle [\*3] the plaintiff to relief pursuant to some legal theory." *Id.* (quoting [Saunders v. Fisher, 2006 ME 94, ¶ 8, 902 A.2d 830](#)). "Dismissal is warranted when it appears beyond a doubt that the plaintiff is not entitled to relief under any set of facts that he might prove in support of his claim." *Id.* "The legal sufficiency of a complaint challenged pursuant to M.R. Civ. P. 12(b)(6) is a question of law" and thus subject to *de novo* appellate review. [Marshall v. Town of Dexter, 2015 ME 135, ¶ 2, 125 A.3d 1141](#).

## DISCUSSION

### I. Fraud

In Count I, Patriot pleads fraud against Maine Controls. To prevail on a fraud claim, a plaintiff must prove the following elements by clear and convincing evidence:

(1) A party made a false representation, (2) The representation was of a material fact, (3) The representation was made with knowledge of its falsity or in reckless disregard of whether it was true or false, (4) The representation was made for the purpose of inducing another party to act in reliance upon it, and (5) The other party justifiably relied upon the representation as true and acted upon it to the party's damage.

[Barr v. Dyke, 2012 ME 108, ¶ 16, 49 A.3d 1280](#) (citing [Flaherty v. Muther, 2011 ME 32, ¶ 45, 17 A.3d 640](#)). In its motion to dismiss, Maine Controls claims that Patriot's allegation that the Quote contained information that was knowingly false or provided with reckless disregard as to its falsity [\*4] fails as a matter of law because the putative misrepresentation—the Quote—cannot be true or false. Patriot responds that in fact Maine Controls represented that the Quote was for what "the services and parts would cost a bidder" when it knew that the cost was in fact significantly lower. (Pl's Compl. ¶¶ 39-42.)

Although most causes of action are allowed to be pleaded generally, Maine Controls points out that M.R. Civ. P. 9(b) requires "the circumstances constituting fraud" to be "stated with particularity." Under this standard, Patriot's general allegations that the Quote was represented as being the cost (as opposed to the price) of the requested services and components is insufficient to adequately plead the "false representation" element of fraud. The mere fact that Maine Controls' Quote was addressed to "mechanical contractor" rather than Patriot simply does not make the Quote a lie, even if Patriot were to ultimately prove at trial that the Quote is not an accurate representation of the actual cost of the requested parts and services. See [Eaton v. Sontag, 387 A.2d 33, 38 \(Me. 1978\)](#) (Every man has the right to ask any price he sees fit [for his goods or services]).

Patriot has therefore failed to properly allege that Maine [\*5] Controls made a false representation when it issued the Quote under M.R. Civ. P. 9(b). The Complaint therefore fails to allege an essential element of fraud. Maine Controls' motion is granted with respect to Count I.

### II. Negligence

Patriot pleads negligent misrepresentation (Count II) and negligence (Count VI) against Maine Controls. In its motion, Maine Controls does not argue that Patriot has failed to adequately allege the elements of either claim. Instead, Maine Controls argues that these claims are barred by the economic loss doctrine. Patriot responds that the economic loss doctrine is only applicable to actions based on product failure and merely limits "tort recovery for a defective product's damage to itself." [Oceanside at Pine Point Condominium Owners Ass'n v. Peachtree Doors, Inc., 659 A.2d 267, 270 \(Me. 1995\)](#).

In general, the economic loss doctrine prevents recovery in tort for purely economic damages and has been applied to bar tort claims in actions grounded in breach of contract or warranty theories, including claims involving breach of

a service contract. *Oceanside at Pine Point Condo. Owners Ass'n., 659 A.2d at 269-71*. Patriot is correct that the Law Court has not yet recognized application of the economic loss doctrine outside the context of tangible property. Other Maine courts, including the U.S. District Court for the District [\*6] of Maine, the Maine Superior Court, and this Court have applied the doctrine to service contracts as well. See *Me. Rubber Int'l v. Envtl. Mgmt. Grp., Inc., 298 F. Supp. 2d 133, 136 (D. Me. 2004)*; *Twin Homes, Inc. v. Molley*, No. CV-01-298, *2002 Me. Super. LEXIS 209 (Nov. 14, 2002)*; *Bayreuther v. Gardner*, No. CV-99-352, *2000 Me. Super. LEXIS 140 (June 21, 2000)*; *SME Corp. v. Belfast Bridge, LLC*, No. BCD-WB-CV-07-28, *2009 Me. Bus. & Consumer LEXIS 25, at \*26-27* (Bus. & Consumer Ct. Apr. 8, 2009, *Humphrey, C.J.*).

Patriot's negligence claim alleges only that Maine Controls breached a duty. (Pl's Compl. ¶ 83.) Presumably, this duty arose out of Patriot's request for a quote from Maine Controls. As explained in more detail below, Patriot's only other possible alternative basis for imposition of a duty—the existence of a confidential relationship between the parties—is wholly inadequate as a matter of law. The parties are both commercial entities whose relationship could at best be described as a commercial contract.<sup>1</sup> See *Schmid Pipeline Constr. v. Summit Nat. Gas of Me., Inc.*, No. 1:13-cv-464-GZS, *2014 U.S. Dist. LEXIS 100435, at \*10 (D. Me. June 23, 2014)* (where "dispute is over the 'value and quality of what was purchased,' in the absence of any facts of a special relationship between the parties that might give rise to duty in tort (e.g., a fiduciary relationship), an aggrieved party's recourse should be governed by the terms of the contract. Whether a court [\*7] formally extends application of the economic loss doctrine to bar tort recovery, or whether a court determines that recognition of a duty in tort under the circumstances is not appropriate, the result is the same."). Therefore, Plaintiffs' remedy for an alleged breach of the undefined "duty" necessarily sounds only in contract. See *id.*

Several of the cases cited above recognize that the economic loss doctrine bars claims for negligent misrepresentation in actions based on contract or warranty theories. See *id.* at \*5-6, 10; *Me. Rubber Int'l. 298 F. Supp. 2d at 136*; *Peachtree Doors, 659 A.2d at 269-71*. Patriot's complaint alleges Maine Controls "made false statements, misrepresentations and representations;" all related to the Quote that Patriot used in its bid for the Project. (Pl's Compl. ¶ 52.) As with Plaintiffs' negligence claim, this claim is at best a mislabeled contract claim, the recovery for which sounds in contract alone. Plaintiffs' claims for negligence and negligent misrepresentation will be dismissed.

### III. Defamation

In Counts III and IV, Patriot alleges that Maine Controls is liable for defamation and defamation per se. Maine Controls argues that Patriot has failed to allege any of the elements of defamation. A claim for [\*8] defamation requires (1) a false and defamatory statement concerning another, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication. *Cole v. Chandler, 2000 ME 104, ¶ 5, 752 A.2d 1189*.

The supposedly defamatory statement is the Quote. Patriot's opposition devotes several pages to persuading the Court that the Quote is a statement. However, regardless of whether the Quote is a statement, the allegations are insufficient to show that it is either false or defamatory. It is not false because it is incapable of being true or false by its very nature, as explained above. See *Eaton, 387 A.2d at 38*. It is not defamatory because it does not "tend[] so to harm [Patriot's] reputation . . . as to lower [it] in the estimation of the community or to deter third persons from associating or dealing with [it]." *Schoff v. York Cty., 2000 ME 205, ¶ 9 n.3, 761 A.2d 869* (citing *Bakal v. Weare, 583*

<sup>1</sup> Maine Controls has not moved for dismissal of Patriot's breach of contract claim, Count IX, in the instant motion. (Pl's Compl. ¶¶ 96-101.) As noted in *Me. Rubber Int'l*, Patriot still have "the traditional recourse for breach of contract and any damages [it] can prove under contract law standards, given the contract [it] entered into. Contract law allows for foreseeable damages arising from the breach (though these may be limited by the contractual language.)" *298 F. Supp. 2d at 138* & n. 7; see also *Peachtree Doors, 659 A.2d at 271* ("Plaintiffs' claims for economic damages—the costs of all repairs, renovation, corrections and replacements related to the Defendant's defective performance of its contract—are properly addressable under a warranty theory.").

A.2d 1028, 1029 (Me. 1990); Restatement (Second) of Torts § 559(1977)). In fact, the statement says nothing about Patriot whatsoever. "[A] statement is defamatory only if it is of or concerning a plaintiff." Gaudette v. Davis, 2017 ME 86, ¶ 25 n.10, 160 A.3d 1190 (citing Hudson v. Guy Gannett Broad. Co., 521 A.2d 714, 716 (Me. 1987)). Furthermore, there is no allegation that Maine Controls "published" the Quote [\*9] to anyone third party. In paragraph sixty-six of its complaint, Patriot alleges that Maine Controls made statements that "were unprivileged publications to a third party" but provides no further detail; other factual allegations seem inconsistent with the notion that Maine Controls shared the Quote with anyone other than Patriot. (See PI's Compl. ¶¶ 23, 33.) In opposition to Maine Control's motion to dismiss, Patriot clarified that it is relying on an agency theory whereby Maine Controls made Patriot its agent by providing a quote that was designed to be shared with another. Patriot cites no authority for this novel theory of publication and the Court is not aware of any.

In sum, Patriot has failed to state a claim for defamation under either a traditional or "defamation per se" theory. Counts III and IV of Patriot's Complaint must be dismissed.

#### IV. Antitrust

Patriot alleges that Maine Controls violated Maine's antitrust laws, 10 M.R.S. §§ 1101-1102.<sup>2</sup> Maine Controls responds that Patriot has failed to adequately allege necessary elements under both section 1101 and 1102.

In Count VII, Patriot alleges a violation of 10 M.R.S. § 1101, which provides: "Every contract, combination in the form of trusts or otherwise, or conspiracy, in restraint [\*10] of trade of commerce in this State is declared to be illegal. Whoever makes any such contract or engages in any such combination or conspiracy is guilty of a Class C crime." Maine Controls argues that Patriot has not alleged the existence of a "contract, combination in the form of trusts or otherwise, or conspiracy" because the Complaint at most alleges a "conspiracy" between the two Defendants, and because the two Defendants are in fact the same company, that company could not have "conspired with itself." See Podiatrist Ass'n v. La Cruz Azul de P.R., Inc., 332 F.3d 6, 12 (1st Cir. 2003) ("the plaintiff must show concerted action between two or more separate parties" under the federal analog to 10 M.R.S. § 1101).<sup>3</sup> Patriot does not necessarily challenge this requirement, but argues that the alleged conspiracy is not necessarily between the two Defendants<sup>4</sup> but rather between the Defendants and the other bidders on the Project who got a quote from Maine Controls.

The problem with Patriot's argument is that the Complaint does not allege a conspiracy between Maine Controls and anyone else who requested a quote for Maine Controls' services and components for the Project. Patriot only alleges that "[t]he defendants entered into a [\*11] contract, combination or conspiracy regarding the quote for components and service for the [Project]." (PI's Compl. ¶ 86.) There are no allegations with respect to who the Defendants entered into this alleged conspiracy with. Patriot claims that it alleges a conspiracy between Maine Controls and the other bidders on the Project in paragraphs twenty-four through twenty-six and paragraph thirty-two of the Complaint. However, these allegations claim only that Maine Controls offered a lower quote to the winning

<sup>2</sup> Section 1104 gives any person injured directly or indirectly in its business or property by another person's violation of section 1101 or 1101 a private right of action to sue for the injury. 10 M.R.S. § 1104.

<sup>3</sup> Maine courts may consider federal antitrust law as persuasive authority when construing Maine's antitrust statute. McKinnon v. Honeywell Int'l, Inc., 2009 ME 69, ¶ 19, 977 A.2d 420.

<sup>4</sup> Patriot does not object to the Court considering Def's Ex. C, a public filing with the Maine Secretary of State that shows Maine Controls is an assumed name of Mechanical Services. See Moody v. State Liquor & Lott. Comm'n, 2004 ME 20, ¶ 11, 843 A.2d 43. However, in its written opposition, Patriot does argue that it is a question of fact as to whether the two Defendants are in fact the same company, notwithstanding its allegation in paragraph 15 of its Complaint: "The exact relationship between Maine Controls and Mechanical services is unclear but it appears that for all intents and purposes, they are the same entity." (emphasis added). It seems that Def's Ex. C is dispositive of this factual issue, but in any event, it is not really relevant to Patriot's section 1101 claim. The effect of the Defendants' combined control of the market in Maine, and whether that effect is anticompetitive, is more properly considered in the context of a section 1102 claim, which is discussed below.

bidder and that Patriot lost the bid as a result. This is not at all the same as alleging that Maine Controls conspired with the other bidders to "fix" a quote for the winning bidder. Cf. *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300, 336 (3d Cir. 2010) ("Bid rigging—or more specifically, as alleged in this case, bid rotation—is quintessentially collusive behavior subject to per se condemnation under [the federal analog to 10 M.R.S. § 1101]."). At oral argument, Patriot conceded that it is "not aware of a conspiracy in the classic sense" between Maine Controls and any other bidder. In sum, Count VII must be dismissed for failure to allege a contract, combination in the form of trusts or otherwise, or conspiracy, in restraint of trade.

Count VIII alleges an antitrust [\*12] violation under [10 M.R.S. § 1102](#), which provides: "Whoever shall monopolize or attempt to monopolize or combine or conspire with any other persons to monopolize any part of the trade or commerce of this State shall be guilty of a Class C crime." Maine Controls argues that Patriot has not defined the relevant market or alleged an "antitrust injury," both of which are essential elements to state a claim under [section 1102](#). At oral argument, Patriot claimed that discovery will be necessary to define the relevant market and otherwise responds that it has alleged an "antitrust injury" sufficient to state a claim under [section 1102](#).

At least one U.S. District Court in the First Circuit has dismissed an antitrust claim for failure to adequately "allege a relevant geographic and product market in which trade was unreasonably restrained or monopolized." *N. Am. Energy Sys., LLC v. New Eng. Energy Mgmt.*, 269 F. Supp. 2d 12, 16 (D. Conn. 2002) (citing cases). Cf. *Envirnmt'l Exch., Inc. v. Casella Waste Sys.*, No. CV-05-25, [2005 Me. Super. LEXIS 140](#), at \*5-6, 12-14 (Oct. 24, 2005, Hjelm, J.) (denying motion to dismiss plaintiff's [section 1102](#) claim where relevant geographic and product market specifically alleged to be "sources of clean fly ash in northeastern Maine"). Like in *N. Am. Energy Sys., LLC*, and unlike *Envirnmt'l Exch., Inc.*, Patriot's allegations include virtually [\*13] no definition of the relevant market in terms of either geographic scope or products. In paragraph eleven, Patriot alleges that Maine Controls was in a position to "corner the market" because "the North Deering Fire Station already us[ed] its components." Later, Patriot alleges that Maine Controls "monopolize[d] trade for components and services . . . regarding a part of the trade or commerce of the State of Maine." (Pl's Compl. ¶¶ 92-93.) At the oral argument, Patriot suggested "pre-existing boilers with components in them" as the product market and "boilers in the state of Maine, maybe smaller" as the relevant geographic market. The problem with Patriot's suggestion at oral argument is that it goes beyond what was actually alleged in the Complaint, which describes only a single transaction besides a passing reference to "a part of the trade or commerce of the State of Maine." (Pl's Compl. ¶ 93.) Maine Controls is entitled to have notice of what Patriot intends to prove in terms of the geographic and product market that Maine Controls has allegedly monopolized. See *N. Am. Energy Sys., LLC*, 269 F. Supp. 2d at 16. Even if Patriot proves the allegation that Maine Controls was in a position to "corner the market" on the Project, [\*14] i.e. it was the only vendor that could provide the necessary services and components on the Project and therefore could essentially charge whatever it wanted and decide who won the bid, it does not follow that Maine Controls therefore had a monopoly over the servicing of all pre-existing boilers in Maine.

The question of whether Patriot has alleged an antitrust injury is in some ways dependent on whether Patriot can allege a geographic and product market over which Maine Controls has a monopoly. As alleged, Patriot is a would-be customer of Maine Controls who sought to obtain Maine Controls' components and services, and thus a "presumptive proper" plaintiff. See *In re Compact Disc Min. Advertised Price Antitrust Litig.*, 456 F. Supp. 2d 131, 146 (D. Me. 2006). Couched in terms of a single transaction<sup>5</sup>—the Quote on the Project—Patriot's injury seems much more like a claim for breach of contract than antitrust. See *Central Distrib., Inc. v. Labatt US Operating Co.*, No. BCD-CV-12-33, [2012 Me. Bus. & Consumer LEXIS 41](#), at \*15 ("[Plaintiff] has alleged no facts as to how the competition among wholesalers has been weakened or affected. The gist of this claim is really a restatement of a breach of contract action."). In effect, Patriot has pleaded "no more than 'labels and conclusions, and a formulaic

<sup>5</sup> Maine Controls claims that even in relation to this single Project, it could not have "cornered the market" because it was only one of six approved vendors for the Project. (Def's Ex. A.) Patriot alleges, and argues, that regardless of what is reflected in Defendants' Exhibit A, only Maine Control's service and components would have been acceptable. (Pl's Compl. ¶¶ 10-12.) Patriot is entitled to try to prove this allegation at trial; however, as explained above, it was required to allege more—and need to prove more—to prevail on a [section 1102](#) antitrust claim.

recitation of the elements [\*15] of a cause of action," and therefore "fails to state a claim for antitrust statute violations." *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Therefore, Count VIII must be dismissed for failure to allege a definable relevant geographic and product market in which trade was constrained or any injury resulting from Maine Control's purported anticompetitive conduct.

#### V. Breach of Duty of a Confidential Relationship

In Count XI, Patriot alleges the existence of a confidential relationship between Patriot and Maine Mechanical and, further, that Maine Mechanical breached a duty of loyalty that it owed to Patriot by virtue of that relationship. However, Patriot does not allege any specific facts of a particular relationship, only reciting the basic elements of a fiduciary duty. (Pl's Compl. ¶¶ 103-09.)

"To survive a motion to dismiss, the plaintiff must allege facts with sufficient particularity to enable the court to determine whether, if true, such facts could give rise to a fiduciary relationship." *Ramsey v. Baxter Title Co.*, 2012 ME 113, ¶ 6, 54 A.3d 710 (quotations omitted). "Reciting the basic elements of a fiduciary relationship cannot substitute for an articulation in the complaint of the specific facts of a particular relationship." *Id.*; see also *Bryan R. v. Watchtower Bible & Tract Soc. of N.Y., Inc.*, 1999 ME 114, ¶ 21, 738 A.2d 839 ("because the law does [\*16] not generally require individuals to act for the benefit of others, the factual foundations of an alleged fiduciary relationship must be pled with specificity").

In opposition to Maine Controls' motion to dismiss, Patriot does not argue that it has alleged facts necessary to meet the higher pleading standard for breach of fiduciary duty. Instead, Patriot argues that it is entitled to the inference that a fiduciary relationship arose between the parties based on the Quote. See, e.g., *Brown v. Me. State Emples. Ass'n*, 1997 ME 24, ¶ 5, 690 A.2d 956 (motion to dismiss only granted when "treating the material allegations of the complaint as true and examining the complaint in the light most favorable to the plaintiff . . . it alleges the elements of a cause of action against the defendant or alleges facts that could entitle the plaintiff to relief under some legal theory") (quotation omitted). However, this general pleading standard is significantly narrowed when the existence of a fiduciary or confidential relationship is alleged. A plaintiff must plead specific facts for the Court to determine whether those facts could give rise to a fiduciary relationship. *Ramsey*, 2012 ME 113, ¶ 6, 54 A.3d 710; *Bryan R.*, 1999 ME 114, ¶ 21, 738 A.2d 839. The facts alleged here do not meet this standard. Patriot requested a quote from Maine [\*17] Controls in an arms-length transaction; that was the extent of their relationship based on the facts alleged in the complaint. See *Oceanic Inn, Inc. v. Sloan's Cove, LLC*, 2016 ME 34, ¶ 18, 133 A.3d 1021 (fiduciary duty "does not arise merely because of the existence of . . . business relationships"). Patriot has not stated a claim for breach of confidential relationship based on the allegations in the Complaint. Maine Controls motion to dismiss is granted with respect to Count XI.

#### CONCLUSION

Based on the foregoing it is ORDERED:

That Defendants Maine Controls and Mechanical Services' motion for partial dismissal is GRANTED. Counts I, II, III, IV, VI, VII, VIII, and X of Plaintiff Patriot Mechanical's Complaint are dismissed

The Clerk is requested to enter this Order on the docket for this case by incorporating it by reference. M.R. Civ. P. 79(a).

**Dated: March 20, 2019**

/s/ **M. Michaela Murphy**

**Justice, Business and Consumer Court**



## **BanxCorp v. Bankrate, Inc.**

United States District Court for the District of New Jersey

March 21, 2019, Decided; March 21, 2019, Filed

Civil Action No.: 07-3398 (CCC)

**Reporter**

2019 U.S. Dist. LEXIS 48118 \*; 2019-1 Trade Cas. (CCH) P80,719; 2019 WL 2098842

BANXCORP, Plaintiff, v. BANKRATE, INC., Defendant.

**Notice:** NOT FOR PUBLICATION

**Subsequent History:** Reconsideration denied by [Banxcorp v. Bankrate, Inc., 2020 U.S. Dist. LEXIS 93855, 2020 WL 2786925 \(D.N.J., May 29, 2020\)](#)

Affirmed by [BanxCorp v. Bankrate, Inc., 2021 U.S. App. LEXIS 5604 \(3d Cir. N.J., Feb. 25, 2021\)](#)

**Prior History:** [Banxcorp v. Bankrate, Inc., 2008 U.S. Dist. LEXIS 51756 \(D.N.J., July 7, 2008\)](#)

## **Core Terms**

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prices, co-branding, predatory, antitrust, listings, monopoly power, website, summary judgment, acquisition, relevant market, no evidence, monopolization, supracompetitive, bidding, visitor, advertising, barriers, products, Sherman Act, anticompetitive conduct, increased price, interest rate, search engine, competitors, editorial, output, material fact, cross-elasticity, reasons, direct evidence

**Counsel:** [\*1] For Roberto Cuan, Movant: ROBERTO CUAN, LEAD ATTORNEY, BAlestriere, Fariello & Abrams, NEW YORK, NY.

For BANXCORP, Plaintiff: LAWRENCE C. HERSH, LEAD ATTORNEY, Rutherford, NJ; NELSON E. CANTER, LEAD ATTORNEY, McLaughlin & Stern, LLP., New York, NY.

For BANKRATE, INC. a Delaware Corporation, Defendant: ERIC JESSE, LEAD ATTORNEY, LOWENSTEIN SANDLER LLP, ROSELAND, NJ; R. SCOTT THOMPSON, LEAD ATTORNEY, BERNARD COONEY, MICHAEL J. HAHN, LOWENSTEIN SANDLER PC, ROSELAND, NJ.

**Judges:** CLAIRE C. CECCHI, UNITED STATES DISTRICT JUDGE.

**Opinion by:** CLAIRE C. CECCHI

## **Opinion**

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**CECCHI, District Judge.**

### **I. INTRODUCTION**

This matter comes before the Court upon the motions of Plaintiff BanxCorp ("Plaintiff" or "BanxCorp") and Defendant Bankrate, Inc. ("Defendant" or "Bankrate") for summary judgment pursuant to [Federal Rule of Civil Procedure 56](#). ECF Nos. 389, 405, 466. The parties opposed each other's motions (ECF Nos. 413, 417), and filed replies (ECF Nos. 419, 421). In addition, Defendant filed a motion to strike the declaration of Norbert Mehl (ECF No. 416) and a motion to strike the report and opinions of Stan V. Smith, Ph.D (ECF No. 415). Plaintiff opposed both motions (ECF Nos. 422, 423), and Defendant filed replies in response (ECF Nos. 426, 427).<sup>1</sup> Oral argument was heard [**\*2**] on the aforementioned motions in this matter. ECF No. 473. For the reasons set forth below, Defendant's motion for summary judgment is granted and Plaintiff's motion for summary judgment is denied. Further, Defendant's motion to strike the declaration of Norbert Mehl is denied and Defendant's motion to strike the report and opinions of Stan V. Smith, Ph.D is moot.

## **II. BACKGROUND**

### **A. Factual Background**

This action arises from the parties' competition to maintain websites providing information to the general public about interest rates for financial products.

#### **1. The Parties**

Plaintiff BanxCorp was founded by Norbert Mehl in 1984 as a print and online publisher of financial information. See Plaintiff's Statement of Material Facts ("PSMF"), ECF No. 410-1, ¶ 19; Defendant's Statement of Material Facts ("DSMF"), ECF No. 405-2, ¶ 149. In 1995 or 1996, BanxCorp began operating a website, BanxQuote.com, which listed interest rates offered by different financial service providers ("FSPs"). See PSMF ¶¶ 25, 104; DSMF ¶¶ 152, 154. BanxCorp lost its value as a going concern and exited the market by December 31, 2010. See PSMF ¶¶ 463-64.

Defendant Bankrate owns and operates a number of websites that publish [**\*3**] financial data and advice. DSMF ¶ 1; Plaintiff's Responsive Statement of Material Facts ("PRSMF"), ECF No. 417-1, ¶ 1. In 1996, Bankrate began offering information concerning interest rates for various financial products on its flagship website, Bankrate.com. See PSMF ¶ 26; DSMF ¶ 2.

#### **2. The Relevant Product Market**

Plaintiff labels the relevant product market in this litigation the market for "fee-based aggregated bank rate table listings with interactive functionalities on the internet" ("FABRTL"), and contends the relevant geographic market is the whole of the United States. PSMF ¶¶ 1, 3. During the time period at issue, both BanxQuote.com and Bankrate.com offered information concerning bank rates. A visitor to either of those websites could "interact" with the websites by typing in parameters for a particular financial product—such as a mortgage loan in the visitor's zip code—which would cause the website to generate a table listing interest rates for that financial product. See October 14, 2015 Oral Argument Transcript ("Tr.") 21:4-23:5, 90:9-20. Some or all of the bank rate listings in the table were hyperlinked to the FSP's website. See PSMF ¶ 8; DSMF 8. By clicking on the hyperlink [**\*4**] for a rate, a visitor could navigate directly from BanxQuote.com or Bankrate.com to the website of the FSP offering that rate to consumers. PSMF ¶ 8; DSMF ¶ 8; Tr. 23:16. FSPs paid BanxCorp and Bankrate to have their interest rates appear on the rate tables in the form of hyperlinks. PSMF ¶ 7; DSMF ¶ 8.

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<sup>1</sup> In a prior Order (ECF No. 465), the Court addressed Plaintiff's submission (ECF No. 440) regarding discovery disputes and, upon agreement of the parties, reserved certain issues regarding the expert report of Mark Glueck and related sanctions requests. The Court herein addresses those remaining issues.

Defendant Bankrate's rate tables differ from those of Plaintiff BanxCorp in one key respect: Bankrate's tables also contain a sample of competitive interest rates displayed in a form that Bankrate calls "editorial listings." See DSMF ¶ 94-95. Unlike the paid rate listings, these "editorial listings" are not offered for sale nor are they hyperlinked. See DSMF ¶ 95; Tr. 26:4-10.<sup>2</sup> According to Bankrate, the purpose of editorial listings is to provide consumers with additional context to make comparisons with paid rate listings and to make tables with comparatively few paid listings appear fuller. See DSMF ¶¶ 97-98.

### **3. The Parties' Businesses**

#### **a) The Parties' Pricing Models**

Until October 1, 2005, both BanxCorp and Bankrate charged FSPs a flat fee for hyperlinked rate listings to appear on a rate table. See PSMF ¶ 6; DSMF ¶¶ 109, 157. On October 1, 2005, Bankrate adopted a "cost-per-click" model [\*5] where FSPs paid Bankrate each time a visitor to Bankrate.com clicked on the FSP's listing. See PSMF ¶ 6; DSMF ¶¶ 110, 112. In or about February 2006, BanxCorp also adopted a cost-per-click pricing model. PSMF ¶ 6; DSMF ¶ 122; PRSMF ¶ 122.

#### **b) Bankrate's Co-Branding Partnership Agreements**

Defendant Bankrate has developed "co-branding" partnerships with various media outlets, such as Bloomberg.com. See, e.g., PSMF ¶ 272; DSMF ¶ 61-62. Pursuant to those co-branding partnerships, the co-brand partners' websites display financial information provided by Bankrate. DSMF ¶ 62; PRSMF ¶ 62. A visitor to the co-brand partner's website who clicks on Bankrate's financial information content will be directed to a separate "co-brand website" containing FABRTL that Bankrate owns and manages. DSMF ¶¶ 62-65.<sup>3</sup> Bankrate's co-branding agreements typically contain exclusivity provisions that preclude the co-brand partner from displaying a competitor's FABRTL during the term of the agreement. See PSMF ¶ 298; DSMF ¶ 71.

#### **c) Bankrate's Paid Search Engine Marketing**

Bankrate also drives consumer traffic to its website through paid search engine marketing. DSMF ¶ 44; PRSMF ¶ 44. Bankrate bids at auction on certain [\*6] search terms that a consumer might type into a search engine. See DSMF ¶ 45; PRSMF ¶ 45. In general, if Bankrate wins the bid for a search term, an advertisement for Bankrate.com will appear at the top of the search engine's paid search results list whenever a visitor to the search engine types in that search term. See DSMF ¶ 46; PRSMF ¶ 46. Each time a visitor to the search engine clicks on one of Bankrate's advertisements, Bankrate typically pays the search engine. See DSMF ¶ 47; PRSMF ¶ 47.

#### **d) Bankrate's Acquisitions of MMIS/Interest.com and Bankaholic**

In December 2005, Bankrate acquired Mortgage Market Information Services, Inc. ("MMIS") and its subsidiary, Interest.com (collectively, "MMIS/Interest.com"), a website that published and advertised interest rates. See PSMF ¶¶ 252, 254; DSMF ¶¶ 135, 139. In September 2008, Bankrate acquired Bankaholic, which owned Bankaholic.com, a website that provided consumers with non-hyperlinked interest rates. PSMF ¶ 259; DSMF ¶¶ 140, 142.

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<sup>2</sup> Plaintiff contends that "some of Bankrate's [editorial] listings are hyperlinked and others are not," PRSMF ¶ 8, but its evidence does not support that assertion.

<sup>3</sup> Although Plaintiff purports to dispute the foregoing paragraphs in Defendant's Statement of Material Facts, it appears to accept Defendant's description of the basic mechanics of its co-branding partnerships. See PRSMF ¶¶ 62-65.

## B. Procedural Background<sup>4</sup>

Presently before the Court is Plaintiff's Seventh Amended Complaint in this procedurally complex antitrust matter ("7AC" or "Seventh Amended Complaint"). [\*7] ECF No. 378. The Seventh Amended Complaint asserts the following claims against Defendant Bankrate: monopolization in violation of [Section 2](#) of the [Sherman Act](#), [15 U.S.C. § 2](#) (Count I); attempted monopolization in violation of [Section 2](#) of the Sherman Act (Count II);

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<sup>4</sup> The Court notes that Defendant moved to strike the declaration of Plaintiff's witness Norbert Mehl, ECF No. 416. The Court has considered Mr. Mehl's declaration and finds to the extent it was based on his personal knowledge, Defendant's motion to strike the declaration of Mr. Mehl is denied. Nevertheless, insofar as Mr. Mehl speculates about matters beyond his personal knowledge and offers legal conclusions, the Court finds Mr. Mehl's declaration unhelpful and disregards those portions of the declaration. See [S.E.C. v. Adoni, 60 F. Supp. 2d 401, 402 \(D.N.J. 1999\)](#) (denying motion to strike affidavits because "it would be more appropriate to disregard those portions of the affidavits that were not factual recitations based on personal knowledge."); [D.N.J Civ. R. 7.2; Fed. R. Civ. P. 56\(c\)\(4\); Reynolds v. Dep't of Army, No. 08-2944, 2010 U.S. Dist. LEXIS 65600, 2010 WL 2674045, at \\*9 \(D.N.J. June 30, 2010\)](#) (rejecting affidavit that reflected the affiant's "perceived view" of the facts rather than actual knowledge of them); [PNY Techs., Inc. v. Samsung Elecs. Co., Ltd., No. 10-4587, 2011 U.S. Dist. LEXIS 46500, 2011 WL 1630856, at \\*3 \(D.N.J. Apr. 29, 2011\)](#) (noting that a declaration must present a basis in fact for the "conclusory assertion" that it was made on personal knowledge); [Cant Strip Corp. of Am. v. Schuller Int'l Inc., No. 92-2212, 1995 U.S. Dist. LEXIS 21045, 1995 WL 767805, at \\*4 \(D. Ariz. Sept. 27, 1995\)](#) (opinions made by owners of plaintiffs in affidavits regarding relevant antitrust market and market power are not competent evidence but improper legal conclusions). Further, such deficiencies are problematic for lay witness testimony offered pursuant to [Federal Rule of Evidence 701](#). See [Fed. R. Evid. 701](#). Moreover, Plaintiff did not offer Mr. Mehl as an expert witness. See Pl. Opp. to Def.'s Mot to Strike, ECF No. 423, at 4. Therefore, Mr. Mehl may not offer testimony within the scope of [Federal Rule of Evidence 702](#). See, e.g., [Hirst v. Inverness Hotel Corp., 544 F.3d 221, 225, 50 V.I. 1122 \(3d Cir. 2008\)](#).

In addition, Plaintiff requested that this Court strike several of Defendant's declarations and the expert report of Mark Glueck. ECF No. 417-2. In the Court's September 26, 2014 Order deciding a motion to set aside a pretrial order of the Magistrate Judge (ECF No. 438), the parties agreed, and the Court advised, that certain issues regarding the opinions of Mr. Glueck would be decided in conjunction with the parties' summary judgment motions. ECF No. 465, at 2, 4. The Court now decides this issue. The Defendant has informed the Court that it is "not relying upon Mr. Glueck's opinions in any way in connection with the pending summary judgment motions" and has asked this Court to "disregard the few citations to Mr. Glueck's reports contained in the summary judgment briefs." ECF No. 443 at n.2. Accordingly, the Court has disregarded any citation to Mr. Glueck's report in the summary judgment briefing and Plaintiff's motion to strike the expert report of Mr. Glueck is moot. Any related request for sanctions is inappropriate under the circumstances of this case where there appears to be no evidence to show that Defendant had any knowledge of the alleged issues surrounding Mr. Glueck. See Tr. 86:25-87:5; [Ford Motor Co. v. Summit Motor Prod., Inc., 930 F. 2d. 277, 289 \(3d Cir. 1991\)](#) (sanctions are prescribed only in exceptional circumstances where a party's conduct is unreasonable) (citation omitted).

Plaintiff also requested that this Court strike the third-party declarations of Philip N. Mancuso, Alexandra Poison, and John Walsh for failure to identify these witnesses as required by [Rule 26\(a\)](#) or [\(c\)](#). ECF No. 417-2 at 18. Defendant states that Bankrate instead satisfied the requirements of [Rule 26\(e\)\(1\)\(A\)](#) because the additional declarants became known to Plaintiff "during the discovery process." See ECF No. 419-2 at 5. Courts do not exclude statements of witnesses who are made known through discovery. See, e.g., [Newman v. GHS Osteopathic, Inc., 60 F.3d 153, 156 \(3d Cir. 1995\)](#) (no abuse of discretion when district court refused to exclude testimony because other party knew names of witnesses and scope of their knowledge). Thus, the Court will not exclude the declarations of Philip N. Mancuso, Alexandra Poison, and John Walsh. Finally, Plaintiff argues that the declaration of Ms. Poison should be disregarded based on the "sham affidavit doctrine." ECF No. 417-2 at 21. The sham affidavit doctrine states that "a party may not create a material issue of fact or defeat summary judgment by filing an affidavit disputing his or her own sworn testimony without demonstrating a plausible explanation for the conflict." [Baer v. Chase, 392 F.3d 609, 624 \(3d Cir. 2004\)](#). In the instant case, there is no applicable earlier sworn statement or deposition testimony by Ms. Poison. Plaintiff attempts to contradict Ms. Poison's declaration with an internal business document produced to Plaintiff in response to a [Rule 45](#) Subpoena, which is not a sworn statement or deposition testimony. See [Caro Assocs. II, LLC v. Best Buy Co., No 09-97, 2012 U.S. Dist. LEXIS 29155, 2012 WL 762304, at \\*4 \(D.N.J. Mar. 6, 2012\)](#) (sham affidavit doctrine did not apply where sworn testimony contradicted by email). Accordingly, the Court finds that the doctrine does not apply under these circumstances.

anticompetitive mergers or acquisitions in violation of [Section 7](#) of the [Clayton Act](#), [15 U.S.C. § 18](#) (Count III); and violation of the [New Jersey Antitrust Act](#), [N.J. Stat. Ann. § 56:9-1 et seq.](#) (Count IV). 7AC ¶¶ 296-321. Plaintiff seeks a declaratory judgment, injunctive relief, and treble damages. *Id.* at 109-10.

The parties each moved for summary judgment on all counts of the Seventh Amended Complaint. ECF Nos. 389, 405, 466. The Court heard oral argument on the parties' motions. ECF No. 473.

### **III. LEGAL STANDARD**

Summary judgment is appropriate if the "depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . admissions, interrogatory answers, or other materials" demonstrate that there is no genuine issue as to any material fact, and, construing all facts and inferences in a light most favorable to the non-moving party, "the moving party is entitled to a judgment as a matter of law." [Celotex Corp. v. Catrett](#), [477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 \(1986\)](#) (citing [Fed. R. Civ. P. 56](#)); see also [Pollock v. Am. Tel. & Tel. Long Lines](#), [794 F.2d 860, 864 \(3d Cir. 1986\)](#).

The moving party has the initial burden of showing the absence of [\*8] a genuine issue of material fact. See [Celotex](#), [477 U.S. at 323](#). Once the moving party meets this burden, the non-moving party has the burden of identifying specific facts to show that, to the contrary, there exists a genuine issue of material fact for trial. See [Matsushita Elec. Indus. Co. v. Zenith Radio Corp.](#), [475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 \(1986\)](#). In order to meet its burden, the nonmoving party must "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" [Celotex](#), [477 U.S. at 324](#) (citation omitted); see also [Lujan v. Nat'l Wildlife Fed'n](#), [497 U.S. 871, 888, 110 S. Ct. 3177, 111 L. Ed. 2d 695 \(1990\)](#) (stating that "[t]he object of [Rule 56(e)] is not to replace conclusory allegations of the complaint . . . with conclusory allegations of an affidavit"); [Anderson v. Liberty Lobby, Inc.](#), [477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 \(1986\)](#). A fact is "material" if a dispute about that fact "might affect the outcome of the suit under governing [substantive] law," and a "genuine" issue exists as to that fact "if the evidence is such that a reasonable jury could return a verdict for the non[-]moving party." [Anderson](#), [477 U.S. at 248](#). The Court's role is to determine whether there is a genuine issue for trial, not to weigh the evidence and decide the truth of the matter. [Id. at 249](#).

To survive summary judgment on an antitrust claim, "an antitrust plaintiff must produce economically plausible [\*9] evidence supporting the elements of its claim." [Harrison Aire, Inc. v. Aerostar Intl, Inc.](#), [423 F.3d 374, 380 \(3d Cir. 2005\)](#) (citing [Matsushita](#), [475 U.S. at 588](#)). In addition, "[antitrust law](#) limits the range of permissible inferences that can be drawn from ambiguous evidence." *Id.* (citations and internal quotation marks omitted).

### **IV. DISCUSSION**

#### **A. Sherman Act: Monopolization**

[Section 2](#) of the Sherman Act "makes it unlawful to monopolize . . . interstate or international commerce." [Broadcom Corp. v. Qualcomm Inc.](#), [501 F.3d 297, 306 \(3d Cir. 2007\)](#) (citing [15 U.S.C. § 2](#)). "Liability under § 2 requires '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" [Id. at 306-07](#) (quoting [United States v. Grinnell Corp.](#), [384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 \(1966\)](#)).

"Monopoly power is the ability to control prices and exclude competition in a given market." [Id. at 307](#) (internal citation omitted). A hallmark of monopoly power is the ability to "profitably raise prices without causing competing firms to expand output and drive down prices" in that market. *Id.* (citing [Harrison Aire](#), [423 F.3d at 380](#)). For the

reasons set forth below, the Court finds that Plaintiff's evidence does not raise a genuine dispute of material fact as to whether Bankrate unlawfully monopolized interstate commerce in violation of [Section 2](#) of the Sherman Act.

## **1. Possession [\*10] of Monopoly Power**

The existence of monopoly power may be proven through either direct or circumstantial evidence. [See id.](#); [Harrison Aire, 423 F.3d at 381](#). For the reasons set forth below, the Court finds Plaintiff adduces neither direct nor circumstantial evidence that Bankrate possessed monopoly power.

### **a) Direct Evidence**

Monopoly power may be proven through direct evidence of supracompetitive pricing and restricted output. [Broadcom, 501 F.3d at 307](#) (citing [United States v. Microsoft Corp., 253 F.3d 34, 51, 346 U.S. App. D.C. 330 \(D.C. Cir. 2001\)](#)). Plaintiff's evidence does not support a reasonable inference that Bankrate charged supracompetitive prices and restricted output for the following reasons.

First, there is no evidence Bankrate ever charged supracompetitive prices. Supracompetitive prices "are prices that are at least a small but significant amount above competitive levels." [In re K-Dur Antitrust Litig., 338 F. Supp. 2d 517, 537 n.28 \(D.N.J. 2004\)](#); [see also Harrison Aire, 423 F.3d at 380](#). Here, Plaintiff cannot show supracompetitive pricing because there is no evidence establishing a baseline measure of competitive pricing in the market for FABRTL. Plaintiff contends merely that Bankrate increased prices for FABRTL between 2005 and 2009 without experiencing a decline in demand for its product. [See PSMF ¶¶ 32-34](#). Proof of increased prices alone, however, is insufficient to establish supracompetitive pricing. [See Xerox Corp. v. Media Scis., Inc., 660 F. Supp. 2d 535, 549 \(S.D.N.Y. 2009\)](#) (evidence [\*11] of price increases did not establish supracompetitive prices); [In re Ebay Seller Antitrust Litig., No. 07-01882, 2010 U.S. Dist. LEXIS 19480, 2010 WL 760433, at \\*5 \(N.D. Cal. Mar. 4, 2010\)](#) ("Evidence that eBay has raised prices over a period of years, and that several of its employees believe that the company may have raised them too high, proves nothing with respect to whether the prices are supracompetitive."). Cf. [Harrison Aire, 423 F.3d at 381](#) (holding that evidence a defendant charged prices higher than those of its aftermarket competitors is insufficient to support a reasonable inference of monopoly power, as "a firm's comparatively high price may simply reflect a superior product"). Without some quantitative measure of competitive market prices, a factfinder could not determine whether Bankrate's prices exceeded competitive levels.

Second, even if Plaintiff were able to show supracompetitive pricing, its claim would still fail because there is no evidence of decreased output. "A predator has sufficient market power when, by restricting its own output, it can restrict marketwide output and, hence, increase marketwide prices." [Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1434 \(9th Cir. 1995\)](#) (citing Phillip Areeda & Donald F. Turner, [Antitrust Law](#) ¶ 501, at 322 (1978)). Here, Plaintiff's evidence illustrates the converse: from 2002 through February 5, 2008, Bankrate's output grew due to increases [\*12] in the number of advertisers. [See PSMF ¶¶ 32, 35](#).

### **b) Circumstantial Evidence**

The existence of monopoly power may also be inferred through the "structure and composition of the relevant market." [Broadcom, 501 F.3d at 307](#) (citation omitted). To support such an inference, "a plaintiff typically must plead and prove that a firm has a dominant share in a relevant market, and that significant 'entry barriers' protect that market." [Id.](#) (citations omitted). For the reasons set forth below, the Court finds that Plaintiff has also failed to adduce circumstantial evidence of Bankrate's monopoly power.

#### **i. Proposed Relevant Market**

As a threshold matter, the Court must consider whether Plaintiff has met its burden of defining the relevant market. [See U.S. Horticultural Supply v. Scotts Co., 367 F. App'x 305, 309 \(3d Cir. 2010\)](#) (citation omitted). A plaintiff fails to

meet its burden if it does not define its proposed relevant market in terms of "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Id.* (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)). Reasonable interchangeability measures the extent to which "one product is roughly equivalent to another for the use to which it is put." *Id.* (internal citation and quotation marks omitted). "The greater the positive cross-elasticity [\*13] of demand between two products is, the closer substitutes they are." *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1063 (3d Cir. 1978) (citation omitted).

Plaintiff purports to establish a market for FABRTL through (1) a statement that the Federal Trade Commission ("FTC") issued regarding Google's proposed acquisition of DoubleClick; (2) statements by Bankrate's CEO, Thomas Evans, that FSPs were continuing to purchase FABRTL despite Bankrate's price increases; (3) Bankrate's price increases; and (4) "the distinct look and feel" of FABRTL. See Pl. Br. in Support, ECF No. 410, at 11-14; Pl. Br. in Opp., ECF No. 417, at 16 (citing Appendix H8, ECF No. 417-4), 22. This evidence, however, is inadequate to establish interchangeability of use or cross-elasticity of demand.<sup>5</sup>

First, the FTC's statement regarding Google's proposed acquisition of DoubleClick is inadequate to establish Plaintiff's proposed relevant market. The statement explains the FTC's decision to close its investigation into whether the acquisition would violate federal **antitrust law**. Pl.'s Appendix Ex. H8, ECF No. 417-4. To the extent the statement is relevant at all to this Court's inquiry, it appears to undermine rather than support Plaintiff's argument that there is a market limited [\*14] to FABRTL. The statement identifies a discrete advertising sector comprising advertising space sold by "publishers in the online advertising business"—a broad category that could include FABRTL suppliers as well as suppliers of other forms of advertising. *Id.* at 3. Moreover, the FTC's statement is insufficient because it does not purport to test interchangeability or cross-elasticity of demand with regard to FABRTL. Indeed, it does not even reference FABRTL.

Second, Mr. Evans's anecdotal statements that Bankrate was able to raise prices without driving away FSPs do not substitute for quantitative data showing interchangeability or cross-elasticity. See *U.S. Horticultural Supply, Inc. v. Scotts Co.*, No. 04-5182, 2009 U.S. Dist. LEXIS 2327, 2009 WL 89692, at \*18-19 (E.D. Pa. Jan. 13, 2009) (finding that "statements from industry actors" and "marketing documents" were insufficient to establish a relevant market absent quantitative evidence of price increases or price stability in substitute products in response to an increase in the defendant's prices).

Third, evidence of Defendant's price increases alone cannot establish cross-elasticity of demand between Defendant's FABRTL and other products. Plaintiff's analysis lacks necessary information about the prices of potentially substitutable products and the demand for such products. [\*15] See *U.S. Horticultural Supply*, 367 F. App'x at 310-11 (holding the plaintiff's market definition was legally inadequate where the plaintiff's expert report lacked "specific information relating to price increases or price stability for substitute products in relation to a rise in the price of [the defendant's product]").

Fourth, the Court does not find that evidence of the "distinct look and feel" of FABRTL, without more, provides sufficient grounds to identify a distinct FABRTL market. The case on which Plaintiff relies illustrates merely that the "distinct look and feel" of a product may contribute to a finding of a distinct product market when offered in conjunction with other forms of economic evidence. See *F.T.C. v. Staples, Inc.*, 970 F. Supp. 1066, 1075-77 (D.D.C. 1997). As Plaintiff fails to offer such economic evidence, the Court does not find that the purported unique aesthetic qualities of FABRTL support a finding that FABRTL comprises a distinct market. See *Menasha Corp. v.*

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<sup>5</sup> Plaintiff also argues that its expert, Stan V. Smith, provides testimony with respect to issues related to the relevant market. Pl. Br. in Reply, ECF No. 421, at 6. Mr. Smith admits that his knowledge in this regard is limited to the market as defined in the Seventh Amended Complaint, without referring to "other publicly available revenue figures pertaining to the relevant market from other companies identical to Banxcorp or Bankrate." ECF No. 390-3 at 11-12; see also *id.* at 7 ("The evolution of the market for Bank Rate Websites is described in the 7AC . . . I am not providing any opinion regarding these issues."); *id.* ("The structure of the relevant market before and after the alleged monopolization is set forth in the 7AC . . . I am not providing any opinion regarding these issues.").

News Am. Mktg. In-Store, Inc., 354 F.3d 661, 664 (7th Cir. 2004) (noting that physical differences between products do not necessarily create separate economic markets for those products).

Accordingly, Plaintiff's evidence fails to support its proposed FABRTL market with "reference to the rule of reasonable interchangeability and cross-elasticity of demand" and is, therefore, legally insufficient. [\*16] U.S. Horticultural Supply, 367 F. App'x at 310-11 (quoting Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997)).

#### ii. Dominant Share of the Market

Even if Plaintiff's proposed relevant market were legally sufficient, Plaintiff has failed to show Defendant has a dominant share of that market. To prove market share, Plaintiff states that 79 million U.S. households used online banking in 2011 and that Bankrate had 170 million visitors to its sites, from which Plaintiff concludes that Bankrate has a 90% market share. See Pl's Br. in Opp., ECF No. 417, at 18. Not only is the Court unable to decipher Plaintiff's math, but Plaintiff's metrics are irrelevant. Market share must be based on sales of FABRTL to FSP advertisers, not on web visitors, because it is undisputed that FSPs, not web visitors, actually purchase FABRTL. See U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 999 (11th Cir. 1993) ("When assessing market shares for the purpose of ascertaining market power the appropriate measure of a firm's share is the quantity of goods or services actually sold to consumers."); TransWeb, LLC v. 3M Innovative Props. Co., 16 F. Supp. 3d 385, 409-10 (D.N.J. 2014) (expert testimony analyzing the plaintiff's and defendant's "actual costs and sales data" was needed to show the defendant had a dominant share of the relevant market). Moreover, even if the number of web visitors were an appropriate measure of sales of FABRTL to FSPs, [\*17] Plaintiff's evidence concerns Bankrate's website as a whole—which contains various forms of financial information and commentary other than FABRTL<sup>6</sup>—without specifying the proportion of those visitors who visit pages containing FABRTL, specifically.

#### iii. Barriers to Market Entry

Finally, there is no evidence of significant barriers to entry for market competitors. "Barriers to entry are factors, such as regulatory requirements, high capital costs, or technological obstacles, [which] prevent new competition from entering a market in response to a monopolist's supracompetitive prices." Broadcom, 501 F.3d at 307 (internal citations omitted). Plaintiff's argument regarding entry barriers appears to rely on the following statement by Bankrate's CEO, Thomas Evans:

One of the things that is a tremendous gating item for us, we believe is in terms of competition, and barriers for competition, is how does anybody else break into this, if we have tied up all the best newspaper relations, the best co-brand relationships and we've got a dynamic organic traffic website. How does anybody else get into this business and compete with Bankrate? I look at it as both an offensive marketing opportunity, as well as a defensive opportunity. [\*18]

PSMF ¶ 340. Mr. Evans's statement, which, at most, suggests Bankrate may have perceived there to be high barriers to entry, does not substitute for actual evidence of high barriers to entry. "The antitrust statutes do not condemn, without more, such colorful, vigorous hyperbole." Advo, Inc. v. Phila. Newspapers, Inc., 51 F.3d 1191, 1199 (3d Cir. 1995) (rejecting antitrust claim based on isolated statements made in the defendant's business plan). Plaintiff provides no testimony from other market participants, expert testimony, or quantitative data indicating would-be competitors were unable to enter the market due to Bankrate's alleged supracompetitive prices. Moreover, BanxCorp CFO and Senior Vice President Batsheva Mehl conceded that there were in fact low barriers to entry for Banxcorp in the FABRTL market. Certification of R. Scott Thompson, "Thomson Cert," Ex. 9, Tr. 192:13-19. Accordingly, the Court finds Plaintiff has failed as a matter of law to establish circumstantial evidence of monopoly power.

## 2. Willful Acquisition or Maintenance of Monopoly Power

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<sup>6</sup>See DSMF ¶ 1, PSMF ¶ 1.

Willful acquisition or maintenance of monopoly power "must be accompanied by some anticompetitive conduct on the part of the possessor." *Broadcom, 501 F.3d at 308* (citing *Verizon Commc'n Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*). Anticompetitive conduct is "generally defined as conduct [\*19] to obtain or maintain monopoly power as a result of competition on some basis other than the merits." *Id.* (citing *LePage's Inc. v. 3M, 324 F.3d 141, 147 (3d Cir. 2003)*). Conduct is only anticompetitive, however, where it harms "the competitive process itself," not merely a competitor's business. *Id.* (citing *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*).

Plaintiff contends that Defendant engaged in the following forms of anticompetitive conduct: (1) predatory pricing of FABRTL, including offering FSPs free editorial rate listings; (2) predatory bidding of keywords on interne search engines; and (3) entering into co-branding agreements that foreclosed competition.<sup>7</sup> See Pl. Br. in Support, ECF No. 405-1, at 30 (citing 7AC 16). For the reasons set forth below, the Court finds that Plaintiff's evidence is insufficient to raise a question of material fact as to Bankrate's alleged anticompetitive conduct.

#### **a) Predatory Pricing**

A plaintiff asserting a predatory pricing claim must prove two elements: (1) the defendant reduced the prices of its product to below an appropriate measure of its costs; and (2) there is a likelihood that the defendant had a dangerous probability of recouping losses incurred from below-cost pricing. See *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 272 (3d Cir. 2012)* (citing *Brooke Grp., 509 U.S. at 222-24*). "Regardless of the measure of a [\*20] defendant's costs on which a plaintiff premises a predatory pricing claim, a plaintiff cannot anchor its case on theoretical speculation that a defendant is pricing below that measure. Indeed, [a]s a practical matter, it may be that only direct evidence of below-cost pricing is sufficient to overcome the strong inference that rational businesses would not enter into conspiracies . . . ." *Advo, 51 F.3d at 1198* (alteration in original) (quoting *Matsushita, 475 U.S. at 584 n.8* (emphasis added)).

Plaintiff advances three theories of predatory pricing. First, it asserts that Bankrate priced FABRTL below cost when it launched its cost-per-click pricing structure in 2005, driving competitors out of the market and eventually allowing Bankrate to raise prices profitably. Second, it contends that Bankrate provided editorial listings for free, allowing it to undercut competitors. See Pl. Br. in Support, ECF No. 405, at 34-36. Third, it argues that Bankrate's practice of waiving licensing fees as part of its co-branding partnerships was anticompetitive. None of these contentions, however, raises a genuine dispute of material fact because there is no evidence Bankrate priced FABRTL below cost.

First, Plaintiff's contention that Bankrate priced FABRTL [\*21] below cost in 2005 relies on statements by Bankrate's CEO that he believed that Bankrate's product was "underpriced relative to value," or "under market." PSMF ¶ 54. At best, these statements could show Bankrate's prices were below "general market levels," which is insufficient to demonstrate predation. See *Advo, 51 F.3d at 1198* (internal citation and quotation marks omitted); see also *ZF Meritor, 696 F.3d at 273* ("Low, but above-cost, prices are generally procompetitive . . . ." (internal citation omitted)). Plaintiff also asserts that Bankrate priced FABRTL below cost because its cost-per-click pricing for certain keywords was below the average of the top five maximum bids for those same keywords on Yahoo!. See PSMF ¶ 345. However, Plaintiff must demonstrate Bankrate priced FABRTL below some appropriate measure of its own costs; search engines like Yahoo! provide an inappropriate measure of, or comparison to, Bankrate's costs. See *Advo, 51 F.3d at 1198-99* ("Despite extensive discovery, Advo apparently is unable to produce any direct evidence that PNI offered to distribute circulars at prices below any relevant measure of [its] cost . . . . This omission provided sufficient grounds for granting summary judgment.").

Second, Plaintiff's argument that Bankrate [\*22] engaged in predatory conduct by giving away its editorial listings for free also fails as a matter of law. There is no evidence that Plaintiff offered editorial listings to FSPs in connection with the sale of its paid, hyperlinked listings. Even if Plaintiff had proffered such evidence, to

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<sup>7</sup> Plaintiff refers to Defendant's alleged predatory practices as "akin to a price squeeze." Pl. Br. in Opp., ECF No. 410, at 3.

demonstrate that promotional pricing—such as a "free first listing"—is predatory, Plaintiff must demonstrate that Defendant's overall prices were below cost. *Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 614 (6th Cir. 1987); see also *Morgan v. Ponder*, 892 F.2d 1355, 1362 (8th Cir. 1989). As discussed above, Plaintiff has failed to do so and, accordingly, cannot show that Bankrate's editorial listings were predatory.

Plaintiff's third argument fails for the same reason. Plaintiff asserts that Bankrate licensed FABRTL to its co-branding partners for free but offers no evidence that Bankrate's co-branding agreements led to below-cost pricing of Bankrate's FABRTL. Accordingly, Plaintiff's evidence is inadequate to show predatory pricing.

### **b) Predatory Bidding**

Plaintiff next alleges that Bankrate engaged in predatory bidding of search-engine keywords. In a predatory bidding scheme, a monopolist bids up the market price of a critical input to such high levels that rival buyers cannot survive and, as a result, the monopolist [\*23] acquires or maintains monopoly power. See *ZF Meritor*, 696 F.3d at 279 (citing *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007)). "'If all goes as planned,' once rivals have been driven out, the predatory bidder will reap . . . profits to offset the losses that it suffered during the high-bidding stage." *Id.* (quoting *Weyerhaeuser*, 549 U.S. at 321). Therefore, to establish predatory bidding, "[a] plaintiff must prove that the alleged predatory bidding led to below cost pricing of a predator's outputs." *Id.* (alteration in original) (citing *Weyerhaeuser*, 549 U.S. at 325).

There is no evidence that Bankrate's bids on search-engine terms led to below-cost pricing of Bankrate's FABRTL. Plaintiff contends that internal Bankrate documents show that Bankrate's return on investment ("ROI") for its paid search advertising was negative in early 2007. See PSMF ¶¶ 354, 355. That argument, however, relies on incomplete evidence. Specifically, Plaintiff points to a single column in Bankrate's spreadsheets labelled "Partial ROI," which does not include the revenue generated from Bankrate's page views. See *id.*; Pl. Ex. G8 at BR00125297. The entire spreadsheet shows clearly that Bankrate's total return on investment was consistently positive. See Pl. Ex. G8 at BRO0125297. Accordingly, the Court finds no basis on which a rational factfinder [\*24] could conclude Bankrate engaged in predatory bidding.

### **c) Co-Branding Agreements**

Finally, Plaintiff argues Bankrate's co-branding agreements with other online media outlets were anticompetitive because they foreclosed competition in the FABRTL market. To prove foreclosure of competition, "it is not necessary that all competition be removed from the market. The test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit." *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 191 (3d Cir. 2005). To that end, "[c]ourts routinely observe that 'foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent.' *B & H Med., L.L.C. v. ABP Admin., Inc.*, 526 F.3d 257, 266 (6th Cir. 2008) (quoting *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 68 (1st Cir. 2004)).

Plaintiff contends that most of Bankrate's co-branding arrangements were anticompetitive because they lasted from two to eight years, PSMF ¶ 272, and allowed Bankrate to provide rate tables exclusively to its co-branding partners for the duration of the contract. See, e.g., PSMF ¶ 309. These contentions, however, do not raise a genuine issue of material fact regarding anticompetitive conduct.

First, Plaintiff's evidence establishes only that most of Bankrate's co-branding relationships, not the contractual agreements themselves, lasted from [\*25] two to eight years. In fact, it is undisputed that most of the co-branding contracts had one-year terms. See DSMF ¶ 83. Such short-term contracts "present little threat to competition." See *ZF Meritor*, 696 F.3d at 286. Further, Plaintiff does not claim it was barred from entering into co-branding contracts

with Bankrate's former co-branding partners once those partners' contracts with Bankrate expired.<sup>8</sup> Accordingly, there is no evidence indicating that Bankrate's co-branding relationships "effectively foreclosed the business of competitors." [LePage's, 324 F.3d at 157.](#)

Second, the contracts' exclusivity provisions cannot by themselves establish anticompetitive conduct. [See, e.g., Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 76 \(3d Cir. 2010\)](#) ("[E]xclusive supply contracts or exclusive dealing agreements have been frequently upheld when challenged on antitrust grounds."); [Barr Labs., Inc. v. Abbott Labs., 978 F.2d 98, 111 \(3d Cir. 1992\)](#) (noting the "existence of legitimate business justifications for the [exclusive dealing] contracts"); [Menasha, 354 F.3d at 663](#) (explaining that competition to be an exclusive supplier "is a vital form of rivalry, and often the most powerful one, which the antitrust laws encourage rather than suppress" (citation omitted)); [Microsoft, 253 F.3d at 69](#) ("Permitting an antitrust action to proceed any time a firm enters into an exclusive deal would both discourage a presumptively [\*26] legitimate business practice and encourage costly antitrust actions.").<sup>9</sup>

Moreover, the record is devoid of the quantitative evidence necessary to show market foreclosure. There is no evidence, for example, of the scope of possible co-brand partners or the percentage of total FABRTL advertising revenue generated by co-branding partnerships. Without such data, it would be impossible to determine whether Bankrate's co-branding agreements foreclosed a substantial percentage of the market. [See, e.g., B & H Med., 526 F.3d at 266-67](#) (affirming summary judgment on the plaintiff's exclusive dealing claim where the plaintiff lacked evidence of the sales revenue generated by the purported exclusive-dealing agreement).

Accordingly, the Court finds that Plaintiff has failed to raise a genuine issue of material fact regarding the elements of its monopolization claim and, therefore, grants summary judgment to Defendant on that claim.

## B. Sherman Act: Attempted Monopolization

[Section 2](#) of the Sherman Act also prohibits attempted monopolization. [See 15 U.S.C. § 2.](#) A defendant has attempted monopolization under [Section 2](#) of the Sherman Act where it "(1) . . . has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous [\*27] probability of achieving monopoly power." [Broadcom, 501 F.3d at 317.](#) As to the second element, specific intent to monopolize need not be shown through direct evidence; "it may be inferred from predatory or exclusionary conduct." [Penn. Dental Ass'n v. Med. Serv. Ass'n of Penn., 745 F.2d 248, 261 \(3d Cir. 1984\)](#) (citations omitted). As to the third element, "a dangerous probability of monopoly may exist where the defendant firm possesses a significant market share when it undertakes the challenged anticompetitive conduct." [Barr Labs., 978 F.2d at 112](#) (internal quotation marks and citation omitted).

As discussed above, Plaintiff has failed to show Bankrate's conduct was predatory or exclusionary. Accordingly, there is no basis on which to infer Bankrate had specific intent to monopolize. To the extent Plaintiff proffers the foregoing statements by Bankrate's CEO as direct evidence of specific intent, its evidence is insufficient. Again, "[t]he antitrust statutes do not condemn, without more, such colorful, vigorous hyperbole . . . . Isolated and unrelated snippets of such language 'provide no help in deciding whether a defendant has crossed the elusive line

<sup>8</sup> At oral argument, Plaintiff appeared to argue that it had difficulty obtaining co-branding partners because potential co-branding partners preferred to work with Bankrate due to Bankrate's higher web traffic. Tr. 114:17-115:4. However, Plaintiff fails to explain how Bankrate's apparent success at maintaining co-branding partnerships is distinguishable from "development as a consequence of a superior product, business acumen, or historic accident." [See Broadcom, 501 F.3d 297 at 307](#) (internal quotation marks and citation omitted). Moreover, the Third Circuit has rejected the argument, when offered "without some limiting principle," that a defendant's superior market reputation is a barrier to entry. [See Advo, 51 F.3d at 1201-02.](#)

<sup>9</sup> The Court also notes that some of the co-branding agreements Plaintiff identifies relate to advertising in print newspapers and are therefore outside the scope of Plaintiff's proposed FABRTL market. [See PSMF ¶ 237.](#)

separating aggressive competition from unfair competition." *Advo*, 51 F.3d at 1199 (quoting *Morgan*, 892 F.2d at 1359).

Finally, there is no evidence Bankrate had a dangerous probability of achieving monopoly [\*28] power because, as discussed above, there is no evidence of high barriers to market entry. "[W]ithout barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time." *Matsushita*, 475 U.S. at 591 n.15. Accordingly, Plaintiff has failed to proffer evidence from which a reasonable jury could conclude Defendant attempted monopolization.

### C. Clayton Act

Section 7 of the Clayton Act proscribes acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. In order to establish a prima facie violation of Section 7, a plaintiff must demonstrate that the acquisition "produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market . . ." *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963). Thus, "[d]etermination of the relevant product and geographic markets is a necessary predicate to deciding whether a merger contravenes the Clayton Act." *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 618, 94 S. Ct. 2856, 41 L. Ed. 2d 978 (1974) (internal quotation marks and citation omitted).

Plaintiff alleges that Bankrate's acquisition of two firms, MMIS/Interest.com and Bankaholic, violated Section 7 of the Clayton Act. See 7AC ¶¶ 308-312.<sup>10</sup> As discussed above, Plaintiff has failed as a matter of law to establish its proposed [\*29] relevant market. Accordingly, it cannot show Bankrate's acquisitions violated Section 7. See *Marine Bancorporation, Inc.*, 418 U.S. at 618.

Even if Plaintiff had established a relevant market, Plaintiff's evidence is inadequate to show that Bankrate acquired an undue market share. Plaintiff merely estimates the relative values of Bankrate and MMIS/Interest.com at the time of the acquisition. See PSMF ¶ 258. However, because Plaintiff offers no evidence of the total value of the FABRTL market, such estimates cannot establish that Bankrate's share of the FABRTL market became undue as a result of the MMIS/Interest.com acquisition. Moreover, Plaintiff proffers no quantitative evidence regarding Bankrate's acquisition of Bankaholic.<sup>11</sup> Accordingly, the Court finds Plaintiff has failed to raise a genuine issue of material fact as to its Clayton Act claim.

### D. New Jersey Antitrust Act

The New Jersey Antitrust Act is construed in accordance with federal jurisprudence on the Sherman Act. See *N.J.S.A. 56:9-18* (mandating that the New Jersey Antitrust Act "shall be construed in harmony with the ruling judicial interpretations of comparable Federal antitrust statutes and to effectuate, insofar as practicable, a uniformity in the laws of those states which enact [\*30] it"); *St. Clair v. Citizens Fin. Grp.*, 340 F. App'x 62, 65 n.2 (3d Cir. 2009); *Desai v. St. Barnabas Med. Ctr.*, 103 N.J. 79, 510 A.2d 662, 671 (N.J. 1986). "Accordingly, the state law antitrust

<sup>10</sup> Insofar as Plaintiff's summary judgment briefing references other acquisitions, those acquisitions were not pleaded in the Seventh Amended Complaint and are therefore not properly before this Court. The Court notes that a plaintiff "may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment." See *Baklayan v. Ortiz, No. 11-3943, 2012 U.S. Dist. LEXIS 115712, 2012 WL 3560384, at \*3 (D.N.J. Aug. 15, 2012)* ("The Third Circuit has made clear that a plaintiff may not amend his complaint through arguments raised in an opposition brief.") (citation omitted).

<sup>11</sup> Plaintiff also points to a statement by Bankrate's former CEO, Elisabeth DeMarse, that "Bankrate had an acquisition strategy aimed at buying number 1 and number 2 in every category [] in the consumer finance markets." See PSMF ¶ 246. However, Ms. DeMarse's testimony concerns Bankrate's acquisition of creditcards.com, see Pl. Appx. G27 at Tr. 87:14-20, 88:12-24, which is not at issue in the Seventh Amended Complaint, see 7AC ¶¶ 308-312.

claims are only viable if the corresponding federal claims are sufficient." [St. Clair, 340 F. App'x at 65 n.2](#). Banxcorp's claims for relief under the New Jersey Antitrust Act mirror its claims under [Section 2](#) of the Sherman Act and [Section 7](#) of the Clayton Act. As this Court has already found those claims cannot survive summary judgment, it must also grant summary judgment to Defendant on Plaintiff's New Jersey Antitrust Act claim.

## V. CONCLUSION<sup>12,13</sup>

Having reviewed the record, briefing, and the parties' positions as presented at oral argument, the Court grants Defendant's motion for summary judgment and denies Plaintiff's motion for summary judgment. Further, Defendant's motion to strike the declaration of Norbert Mehl is denied and Defendant's motion to strike the report and opinions of Stan V. Smith, Ph.D is moot.

An appropriate Order accompanies this Opinion.

**DATED:** March 21, 2019

/s/ Claire C. Cecchi

**CLAIRE C. CECCHI, U.S.D.J.**

## ORDER

### **CECCHI, District Judge.**

This matter comes before the Court upon the motions of Plaintiff BanxCorp ("Plaintiff" or "BanxCorp") and Defendant Bankrate, Inc. ("Defendant" or "Bankrate") for summary judgment pursuant to [Federal Rule of Civil Procedure 56](#). ECF Nos. 389, 405, 466.<sup>1</sup> In addition, Defendant [\*31] filed a motion to strike the declaration of Norbert Mehl (ECF No. 416) and a motion to strike the report and opinions of Stan V. Smith, Ph.D (ECF No. 415). Oral argument was heard on the aforementioned motions in this matter. ECF No. 473. For the reasons set forth in this Court's corresponding Opinion,

**IT IS** on this 21 day of March, 2019,

**ORDERED** that Defendant's motion for summary judgment, (ECF No. 405), is hereby **GRANTED**; it is further

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<sup>12</sup> Defendant also argues that (1) Plaintiff lacks antitrust injury and therefore standing under the antitrust laws, (2) many of Plaintiff's claims are time barred, and (3) Plaintiff lacks Article III standing to seek injunctive relief. As detailed at length throughout this Opinion, Plaintiff has failed to demonstrate that Defendant engaged in the type of anti-competitive practices barred by [antitrust law](#), and thus Plaintiff cannot establish an antitrust injury in this case. See [Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 \(1990\)](#) ("[A] plaintiff must prove the existence of an antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful . . . injury, although causally related to an antitrust violation, nevertheless will not qualify as an antitrust injury unless it is attributable to an anti-competitive aspect of the practice under scrutiny.") (internal citations and quotation marks omitted). Defendant also raised arguments regarding the timeliness of Plaintiff's claims and Plaintiff's request for injunctive relief. The Court need not consider Defendant's additional arguments because Defendant is entitled to summary judgment on all counts of the Seventh Amended Complaint.

<sup>13</sup> Defendant moved to strike the declaration of Plaintiff's witness, Stan V. Smith. ECF No. 415. Mr. Smith's declaration contains his opinions on damages, which is not relevant given the procedural posture. Thus, Defendant's motion to strike the declaration and opinions of Mr. Smith is moot.

<sup>1</sup> In a prior Order (ECF No. 465), the Court addressed Plaintiff's submission (ECF No. 440) regarding discovery disputes and, upon agreement of the parties, reserved certain issues regarding the expert report of Mark Glueck and related sanctions requests. In the Opinion accompanying this Order, the Court addresses those remaining issues.

**ORDERED** that Plaintiff's motion for summary judgment, (ECF No. 389, 466), is hereby **DENIED**; it is further

**ORDERED** that Defendant's motion to strike the declaration of Norbert Mehl, (ECF No. 416), is hereby **DENIED**; it is further

**ORDERED** that Defendant's motion to strike the report and opinions of Stan V. Smith, Ph.D (ECF No. 415), is hereby **MOOT**; and it is further

**ORDERED** that this case shall be **DISMISSED** and the Clerk of Court shall **CLOSE** the file.

**SO ORDERED.**

/s/ Claire C. Cecchi

**CLAIRE C. CECCHI, U.S.D.J.**

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## CH Liquidation Ass'n Liquidation Trust v. Genesis Healthcare Sys.

United States District Court for the Northern District of Ohio, Eastern Division

March 21, 2019, Decided; March 22, 2019, Filed

Case No.: 5:18 CV 752

### **Reporter**

2019 U.S. Dist. LEXIS 241846 \*; 2019 WL 13150910

CH LIQUIDATION ASSOCIATION LIQUIDATION TRUST, et al., Plaintiffs v. GENESIS HEALTHCARE SYSTEM, et al., Defendants

## **Core Terms**

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antitrust, parties, breach of contract claim, fiduciary relationship, alleges, notice, consumers, prices, recruitment, Healthcare, breach of fiduciary duty, medical services, region, factual allegations, plaintiff's claim, notice provision, fiduciary duty, managed, procedural unconscionability, breach of contract, second sentence, anti trust law, first sentence, Valentine Act, unconscionable, contractor, contends, asserts, argues, output

**Counsel:** [\*1] For Neil Luria, Successor Trustee and Debtor Representative, Plaintiff: Joseph B. Shumofsky, Mark S. Olinsky, William R. Stuart, III, Sills Cummis & Gross, Newark, NJ; Justin S. Greenfelder, Buckingham, Doolittle & Burroughs - Canton, Canton, OH; Matthew H. Matheney, Nathaniel Sinn, Porter, Wright, Morris & Arthur - Cleveland, Cleveland, OH; Tracy A.S. Francis, McCarthy, Lebit, Crystal & Liffman, Cleveland, OH.

For CH Liquidation Association Liquidation Trust, Plaintiff: Andrew H. Sherman, Boris I. Mankovetskiy, Joseph B. Shumofsky, Mark S. Olinsky, William R. Stuart, III, Sills Cummis & Gross, Newark, NJ; John F. Hill, Lewis Brisbois Bisgaard & Smith - Cleveland, Cleveland, OH; Justin S. Greenfelder, Buckingham, Doolittle & Burroughs - Canton, Canton, OH; Matthew H. Matheney, Nathaniel Sinn, Porter, Wright, Morris & Arthur - Cleveland, Cleveland, OH; Tracy A.S. Francis, McCarthy, Lebit, Crystal & Liffman, Cleveland, OH.

For Joseph Oriti, in his capacity as Debtor Representative and Liquidation Trustee, Plaintiff: Andrew H. Sherman, Boris I. Mankovetskiy, Sills Cummis & Gross, Newark, NJ; Justin S. Greenfelder, Buckingham, Doolittle & Burroughs - Canton, Canton, OH; Matthew H. Matheney, [\*2] Nathaniel Sinn, Porter, Wright, Morris & Arthur - Cleveland, Cleveland, OH.

For Genesis Healthcare System, Defendant: Jeffrey R. Corcoran, Richard K. Stovall, Todd H. Neuman, Allen Stovall Neuman Fisher & Ashton, Columbus, OH.

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For Robert Miller, Defendant: Angela Daling Lydon, Brett K. Bacon, Gregory R. Farkas, Frantz Ward, Cleveland, OH.

For Blue & Co., Defendant: Alan G. Starkoff, Daniel M. Anderson, Lydia F. Reback, Ice Miller - Columbus, Columbus, OH.

For Bricker & Eckler LLP, Michael Gire, Defendants: Haley K. Lewis, Kris Banvard, Marion H. Little, Jr., Zeiger, Tigges & Little, Columbus, OH.

For Owens & Manning, Michael Manning, Defendants: David W. Hilkert, Orville L. Reed, III, Stark & Knoll, Akron, OH.

**Judges:** SOLOMON OLIVER, JR., UNITED STATES DISTRICT JUDGE.

**Opinion by:** SOLOMON OLIVER, JR.

## Opinion

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### ORDER

Currently pending before the court in the above-captioned case is Defendants Genesis Healthcare System and Matthew Perry's ("Defendants") Motion [\*3] to Dismiss Counts I, II, V, VI, VII, and VIII of the Complaint (ECF No. 28). For the following reasons, the court grants the Motion in part and denies it in part.

### I. BACKGROUND

In the aftermath of the financial collapse of Coshocton Memorial Hospital Association ("CCMH" or "Debtor"), Plaintiff CH Liquidation Association Liquidation Trust and Joseph Oriti, in his capacity as Debtor Representative and Liquidation Trustee of the estate of CCMH ("Plaintiff"), filed a Complaint seeking redress for the injuries allegedly caused by eight Defendants (ECF No. 1). Relevant to the pending Motion, Plaintiff names Genesis Healthcare System ("Genesis") for breach of contract (Count I), and breach of fiduciary duty (Count II), and Genesis and the CEO of Genesis Matthew Perry ("Perry") for violations of federal and state antitrust law under the Sherman Act and the Valentine Act (Counts V-VIII).

#### A. Factual Background

Debtor operated a general acute care not-for-profit hospital in Coshocton, Ohio, as well as a number of primary care and specialty physician clinics. (Compl. ¶15, ECF No. 1.) Genesis is an integrated health care delivery system that is located in Zanesville, Ohio, approximately thirty miles [\*4] from CCMH. (*Id.* ¶¶ 17, 42.) Plaintiff states that there was overlap between Debtor and Genesis' primary service areas, and the two were considered competitors for market share in the region. (*Id.* ¶ 50.)

Perry is the current President and CEO of Genesis. (*Id.* ¶ 18.) Plaintiff states that in 2007, when Perry became CEO of Genesis, he and Genesis' chief financial officer Paul Masterson ("Masterson") developed a strategic plan for Genesis to capture and control patient market share in Genesis' service region. (*Id.* ¶ 45.) Plaintiff also maintains that Perry and Masterson knew that in order for the plan to succeed, Genesis would need to attract patients from other hospitals and health care systems. (*Id.* ¶ 49.)

As early as the fall of 2008, at a time of financial difficulty for CCMH and other rural hospitals, CCMH began a complicated relationship with Genesis. The relationship started with a representative from Genesis and a representative from CCMH, each serving as equals on a threemember not-for-profit healthcare alliance board. (*Id.* ¶¶ 57-64.) However, in May of 2012, Genesis learned that CCMH was facing severe financial difficulties. (*Id.* ¶ 82.) Shortly thereafter, Perry noted in a Genesis [\*5] Executive Committee meeting that Genesis could face a loss of market share if CCMH affiliated with a competing health care system. (*Id.* ¶ 84.) Around that same time, Genesis approached then-CEO of CCMH Robert Miller ("Miller" or "former CCMH CEO") about a proposal for Genesis to manage CCMH. (*Id.* ¶¶ 90-96.) By the end of May, Perry, with Miller's assistance, met with the full CCMH Board, and the Board agreed to move forward with developing the Management Agreement. (*Id.* ¶¶ 97, 104-105.) Genesis and CCMH executed the Management Agreement on June 18, 2012. (*Id.* ¶ 163.)

The Management Agreement tasked Genesis with improving CCMH's operational and financial performance, enhancing CCMH's quality of patient care, and increasing access to health care for the benefit of the community. (*Id.* ¶ 179.) Plaintiff states that in carrying out CCMH's goals, the Management Agreement gave Genesis full

authority, power, and control to manage, administer, and operate CCMH. (*Id.* ¶ 180.) In particular, the Management Agreement gave Genesis control over CCMH's executive/operations management, financial management, strategic planning, medical staff administration, physician recruitment, facility management, [\*6] most human resources, supply chain management, and management and approval of all of CCMH's hospital-based physician contracts. (*Id.* ¶¶ 181, 190-193.) The Management Agreement also gave Genesis authority to employ and oversee CCMH management personnel, such as the CEO and CFO of CCMH. (*Id.* ¶¶ 182-189.) Finally, Plaintiff maintains that Genesis further controlled CCMH through providing CCMH a \$4 million loan. (*Id.* ¶¶ 313-337.)

During the period in which Genesis managed CCMH, Plaintiff alleges that Genesis, under Perry's leadership: (1) recruited, hired, and employed physicians for Genesis to the detriment of CCMH; (2) took advantage of its relationship with CCMH to increase referrals and transfers to Genesis; (3) engaged in a financial scheme that required CCMH employees to use Genesis' medical network and; (4) negotiated an agreement in bad faith that required CCMH to exclusively use Genesis' laboratory services. (*Id.* ¶¶ 226-246, 261-296, 338-334.) Plaintiff also alleges that Genesis used its control to keep competing healthcare systems out of the market. (*Id.* ¶¶ 247-260.) Plaintiff claims that, because of these actions, Genesis failed to meet its duties and obligations in managing [\*7] CCMH in good faith. (*Id.* ¶ 380.) Plaintiff also contends that Genesis failed to take appropriate action with respect to CCMH staffing and financial management. (*Id.* ¶¶ 380-420.) Thus, Plaintiff claims that CCMH deteriorated under Genesis' control. (*Id.* ¶ 6.)

In the fall of 2015, CCMH's financial situation continued to erode. (*Id.* ¶ 420.) In November of 2015, CCMH and Genesis suspended the Management Agreement and in 2016, the parties terminated the Management Agreement. (*Id.* ¶¶ 423-425.)

## B. Procedural History

On June 30, 2016, CCMH filed its voluntary petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Ohio. (*Id.* ¶ 30.) CCMH continued to operate as debtor-in-possession pursuant to [11 U.S.C. §§ 1107\(a\)](#) and [1108](#) after the Petition Date. (*Id.* ¶¶ 30-31.) On October 3, 2016, the Bankruptcy Court entered an order approving CCMH's sale of substantially all of its assets, and the sale transaction closed on October 31, 2016. (*Id.* ¶¶ 32-33.) On July 12, 2017, the Bankruptcy Court confirmed the Chapter 11 plan (the "Plan"), and the Plan became effective on August 1, 2017. (*Id.* ¶¶ 34, 36.) Plaintiff filed the Complaint in the present action on April 3, 2018. [\*8] On June 11, 2018, Defendants filed a Motion to Dismiss ("Motion") pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) and [Federal Rule of Bankruptcy Procedure 7012\(b\)](#) with respect to Count I (breach of contract against Genesis), Count II (breach of fiduciary duty against Genesis), Count V (violation of [Sherman Act § 1](#) against Genesis and Perry), Count VI (violation of [Sherman Act § 2](#) against Genesis), Count VII (attempted violation of [Sherman Act § 2](#) against Genesis), and Count VIII (violation of Valentine Act against Genesis and Perry).<sup>1</sup> Plaintiff submitted a Response (ECF No. 48) on July 13, 2018, and Defendants replied (ECF No. 55) on July 27, 2018.

## II. LEGAL STANDARD

The United States Supreme Court clarified the law regarding what a plaintiff must plead in order to survive a motion made pursuant to [Rule 12\(b\)\(6\)](#) in [Bell Atl. Corp. v. Twombly](#), [550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#) and in [Ashcroft v. Iqbal](#), [556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#). When determining whether the plaintiff has stated a claim upon which relief can be granted, the court must construe the complaint in the light

<sup>1</sup> Plaintiff also names Genesis and Perry with respect to Count III (breach of fiduciary duty against Perry), Count XIV (recharacterization against Genesis), Count XV (equitable subordination against Genesis), Count XVI (avoidance of preference period transfers against Genesis), Counts XVII and XVIII (avoidance of fraudulent transfers against Genesis), Count XIX (recovery of avoided transfers against Genesis), and Count XX (allowance of all claims against Genesis). However, these claims are not the subject of Defendants' pending Motion.

most favorable to the plaintiff, accept all factual allegations as true, and determine whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. The plaintiff's obligation "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id. at 555*. Even though a complaint [\*9] need not contain "detailed" factual allegations, its "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the Complaint are true." *Id.* A court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986).

The Court, in *Iqbal*, further explained the "plausibility" requirement, stating that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S. at 678. Furthermore, "[t]he plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* This determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id. at 679*.

### III. LAW AND ANALYSIS

#### A. Breach of Contract as to Genesis (Count I)

Plaintiff alleges that Genesis breached the Management Agreement because Genesis managed CCMH for Genesis' own benefit, rather than in CCMH's interest to survive as a standalone hospital. (Compl. ¶ 442.) In particular, Plaintiff claims [\*10] that Genesis breached Sections 1.3, 1.3(b), 1.3, 1.4, 3.3.4, and 6.1 of the Management Agreement because, among other things, Genesis failed to perform its obligations as a manager in good faith, operate CCMH on a financially prudent basis, exercise reasonable efforts to ensure that CCMH maintained a medical staff qualified to meet patient needs, allow the CCMH Board to exercise proper control, maintain a process by which managed care contract information was not shared between CCMH and Genesis, and ensure the confidentiality of CCMH's proprietary information. (*Id.* ¶¶ 443-448.)

Defendants argue that Plaintiff's claim should be dismissed because CCMH failed to provide notice of a breach within ten days of the breach, in accordance with § 9.8 of the Management Agreement ("Notice Provision"). (Mot. 6-7, ECF No. 28.) Section 9.8 of the Management Agreement reads:

Any claim or cause of action against Manager [Genesis] for breach or non-performance under this Agreement shall be presented to Manager in writing within ten (10) days from the date of the breach or non-performance, or shall be forever waived. Otherwise the failure of any Party to exercise any right or enforce any remedy contained [\*11] in this Agreement shall not operate as or be construed to be a waiver or relinquishment of the exercise of such right or remedy, or of any other right or remedy herein contained.

(Opp'n 16, ECF No. 48.) According to Defendants, Plaintiff never provided notice of breach of contract and, therefore, Plaintiff waived this claim. (Mot. at 7-8.).

Plaintiff, on the other hand, contends that the provision should not be enforced because it is ambiguous. Plaintiff does not dispute Defendants' interpretation of the first sentence of the provision to require notice of a breach to Genesis within ten days or else Plaintiff forfeits the claim. However, Plaintiff interprets the second sentence to state that failure to exercise any right shall not operate as a waiver of such right. (Opp'n at 16-17.) Accordingly, Plaintiff argues that the sentences are contradictory, and further discovery is required to understand the parties' intent in drafting this section. (*Id.* at 17.)

The court finds that the two sentences can be read together. Because the two are not in conflict, the section is not ambiguous. See *United States v. Donovan*, 348 F.3d 509, 512 (6th Cir. 2003) (noting that where there is no ambiguity in contractual language, the court should determine the parties' [\*12] intent from the plain language of the contract rather than through extrinsic evidence). Parties do not dispute that the first sentence plainly requires Plaintiff to notify Genesis of a breach of contract claim within ten days of the breach. The second sentence can be

construed to supplement the first sentence. For instance, the second sentence can be read to preserve CCMH's future breach of conflict claims. Thus, even if CCMH failed to notify Genesis of a breach of contract claim in the first instance, the second sentence provides that CCMH's failure to exercise its right to notify Genesis and bring the claim in the first instance does not preclude it from bringing a future claim should another breach occur. The court is not called upon to determine the precise meaning of the second sentence in the disputed provision, but by way of the example provided, the court finds that the two sentences can be read compatibly. Because there is no inherent conflict between the two sentences, the court finds that the plain meaning of the first sentence applies. Therefore, CCMH was required to give notice of a breach of contract pursuant to the first sentence of § 9.8 of the Management Agreement. [\*13] See also [Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co., 210 F.3d 672, 684 \(6th Cir. 2000\)](#) ("If a contract is clear and unambiguous . . . there is no issue of fact to be determined.").

However, Plaintiff also contends that the Notice Provision is unconscionable. (*Id.* at 19.) A provision of a contract is unconscionable where there is "(1) substantive unconscionability, i.e. unfair and unreasonable contract terms, and (2) procedural unconscionability, i.e., individualized circumstances surrounding each of the parties to a contract such that no voluntary meeting of the minds was possible." [Garrett v. Hooters-Toledo, 295 F. Supp. 2d 774, 779 \(N.D. Ohio 2003\)](#). A determination of substantive unconscionability involves "consideration of the terms of the agreement and whether they are commercially reasonable." [Hayes v. Oakridge Home, 122 Ohio St. 3d 63, 2009-Ohio 2054, 908 N.E.2d 408, 414 \(Ohio 2009\)](#). Procedural unconscionability involves the court's assessment of each party's bargaining power, and whether there was such a severe imbalance that a party was not able to meaningfully assess the contract or assert their rights in contract negotiations. [Garrett, 295 F. Supp. 2d at 779](#); [Christ Holdings, L.L.C. v. Schleappi, 2016- Ohio 4664, 67 N.E.3d 47, 54 \(Ohio Ct. App. 7th Dist. 2016\)](#) (noting that in regard to procedural unconscionability, "[c]ourts consider each party's age, education, intelligence, business acumen and experience, who drafted the contract, and whether alterations in the printed terms were possible.").

Plaintiff argues that the provision is substantively [\*14] unreasonable because the conflicts of interest of both CCMH's key personnel and the CCMH Board precluded a breach of contract claim from being raised. (Opp'n at 18.) However, Plaintiff's assertion is irrelevant to whether the Notice Provision is commercially reasonable. See [Hayes, 908 N.E.2d at 408 \(Ohio 2009\)](#). In fact, courts routinely enforce provisions that require a party to provide notice to the other party of a breach of contract even in the absence of conflict of interest issues. See, e.g., [Moraine Materials Co. v. Cardinal Operating Co., No. CA 16782, 1998 Ohio App. LEXIS 5387, 1998 WL 785363, at \\*4-5 \(Ohio Ct. Appl. 1998\)](#) (upholding a 10-day written notice provision for breach of contract); see also [Au Rustproofing Ctr., Inc. v. Gulf Oil Corp., 755 F.2d 1231, 1237 \(6th Cir. 1985\)](#) (enforcing a notice provision because "[a] right of action requiring notice as a condition precedent cannot be enforced unless the notice provided for has been given.").

Plaintiff also fails to show procedural unconscionability. Both Genesis and CCMH are sophisticated business entities and both were represented by counsel. See [Airlink Comms., Inc. v. Owl Wireless, LLC, No. 3:10 CV 2296, 2011 U.S. Dist. LEXIS 106673, 2011 WL 4376123, at \\*4 \(N.D. Ohio Sept. 20, 2011\)](#) (declining to find procedural unconscionability where both parties are sophisticated business entities that were represented by counsel). However, Plaintiff argues that there was a disparity in bargaining power because the Management Agreement was negotiated in bad faith by parties with conflicted interests, such as former [\*15] CCMH CEO Miller, who was employed by Genesis following the execution of the Management Agreement. (Opp'n at 19.) However, Plaintiff's argument rests on unsupported assumptions, including that Genesis' alleged influence was so overpowering that no other CCMH Board member or key personnel at CCMH could have acted adversely to Genesis' interests. Thus, Plaintiff has not alleged plausible allegations that CCMH and CCMH's Board, who ultimately voted to approve the Management Agreement, was at such a disadvantage in these negotiations that "no voluntary meeting of the minds was possible." [Garrett, 295 F. Supp. 2d at 779](#). Accordingly, Plaintiff has not shown that the Notice Provision is unconscionable.

In any case, Plaintiff also argues that CCMH provided Genesis adequate notice through the agreement to terminate Genesis' management of CCMH ("Termination Agreement").<sup>2</sup> (Opp'n at 20.) But even if Genesis' breaches were cumulative and continuous as Plaintiff asserts, CCMH and Genesis suspended their contract in November of 2015. (Compl. ¶ 423.) The Termination Agreement was not executed until June 2016. (*Id.* ¶ 424.) Thus, CCMH still failed to give notice within the ten days required by § 9.8 of the Management Agreement.

For [\*16] the foregoing reasons, Plaintiff has not alleged plausible factual allegations to support the non-enforcement of the Notice Provision on grounds of ambiguity or unconscionability. Accordingly, the court finds the provision to be applicable to Plaintiff's breach of contract claim. [\*Salazar v. Progressive N. Ins. Co., No. 1:13 CV 2653, 2014 U.S. Dist. LEXIS 193253, 2014 WL 12596528, at \\*2-4 \(N.D. Ohio Sept. 30, 2014\)\*](#) (enforcing a valid condition precedent in a contract and dismissing the plaintiff's claim for failure to satisfy that condition precedent). Because CCMH failed to give notice as required by the Management Agreement, the court dismisses Plaintiff's breach of contract claim against Genesis.

## B. Breach of Fiduciary Duty as to Genesis (Count II)

To maintain a claim for breach of fiduciary duty, the plaintiff must prove the existence of a duty arising from a fiduciary relationship, the defendant's failure to carry out the duty, and an injury that resulted proximately from the defendant's failure to observe the duty. [\*Puhl v. U.S. Bank, N.A., 2015- Ohio 2083, 34 N.E.3d 530, 536 \(Ohio Ct. App. 12th Dist. 2015\)\*](#). In Ohio, a fiduciary relationship is defined as one "in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority of influence, acquired by virtue of this special trust." [\*Hope Acad. Broadway Campus v. White Hat Mgmt., L.L.C., 145 Ohio St. 3d 29, 2015-Ohio 3716, 46 N.E.3d 665, 676 \(Ohio 2015\)\*](#). To determine the existence of a fiduciary relationship [\*17] between two parties, courts must consider "whether a party agreed to act primarily for the benefit of another in matters connected with its undertaking." *Id.* Furthermore, the "parties' characterization of their relationship in the contracts is not controlling." *Id. at 675-76*. Courts must look to the parties' actions to determine if a duty exists. See [\*N & G Constr., Inc., v. Lindley, 56 Ohio St. 2d 415, 417 n.1, 384 N.E.2d 704 \(1978\)\*](#) ("[A] description by the parties of their future relationship is not necessarily determinative when viewed in light of their actual subsequent activities."). Consequently, "there is generally no fiduciary relationship between an independent contractor and his employer unless both parties understand that the relationship is one of special trust and confidence." [\*Daly v. New York Life Ins. Co., No. 1:12CV125, 2017 U.S. Dist. LEXIS 162074, 2017 WL 4349032, at \\*5 \(S.D. Ohio Sept. 30, 2017\)\*](#) (quoting [\*Schulman v. Wolske & Blue Co., L.P.A., 125 Ohio App. 3d 365, 708 N.E.2d 753, 758 \(Ohio Ct. App. 1998\)\*](#)). Finally, whether a fiduciary relationship exists is a question of fact dependent upon the circumstances in each case. *Id.*

Genesis asserts that it did not enter into a fiduciary relationship with CCMH because the Management Agreement expressly provides that Genesis was to act and perform as an independent contractor. (Mot. at 8.) Genesis further maintains that a fiduciary relationship requires one party to "act primarily for the benefit of another," but its independent contractor [\*18] status and the Management Agreement's express statements that Genesis and CCMH were not to be considered joint entities is further evidence that Genesis never intended to subvert its own interests to that of CCMH's. (Mot. at 8-9; Reply at 13.) However, Plaintiff has pled sufficient factual allegations to show that Genesis and CCMH entered into a fiduciary relationship.

In a similar case, the Ohio Supreme Court found that a company who was authorized to "operate 'all functions' of [the schools'] day-to-day operations" and "act in key matters on behalf of the schools" owed a fiduciary duty to a group of charter schools even though the company's contract stated that the company was an independent contractor. [\*Hope Acad. Broadway Campus, 46 N.E.3d at 676\*](#). Based on these activities, the Ohio Supreme Court determined that it was "evident that the schools have granted broad discretion to [the company], placing special

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<sup>2</sup> Clause B of the Termination Agreement reads: "Each party reserves all of its rights, remedies, claims, defenses and affirmative defenses arising under, related to, or subject to the provisions of section 9.8 of the Management Agreement. Nothing in this Agreement shall be deemed to affect either Party's rights related to Section 9.8 in any way." (Opp'n at 20.)

confidence and trust in the management companies and placing them in positions of superiority and influence." *Id.* In this case, Plaintiff points to provisions of the Management Agreement authorizing Genesis to oversee the administration of CCMH and its day-to-day operations as evidence that CCMH placed its "trust and confidence" [\*19] in Genesis. *Hope Acad. Broadway Campus, 46 N.E.3d at 676*. Furthermore, Plaintiff's Complaint cites to several instances in which Genesis exclusively managed key areas of CCMH's administration, such as physician recruitment and healthcare plans for CCMH employees. (Compl. ¶¶ 226-246, 281-296.) Thus, despite Genesis' contractual status as an independent contractor of CCMH, its actions, both agreed to in the contract and as executed, are "hallmarks of a fiduciary relationship." *Hope Acad. Broadway Campus, 46 N.E.3d at 675-76*.

In addition, Genesis' independent status and its actions in carrying out its own interests need not be mutually exclusive of a commitment to act for CCMH's benefit, as a fiduciary relationship requires. For instance, the court could infer that Genesis entered into the Management Agreement in the best interest of both Genesis and CCMH in continuing to provide medical services to those in their common primary service area. (Compl. ¶¶ 48, 51-52, 84.) Accordingly, Plaintiff has sufficiently pled factual allegations to support that a fiduciary relationship could have plausibly existed between Genesis and CCMH, such that Genesis owed a fiduciary duty to CCMH.

In addition, Genesis maintains that Plaintiff cannot proceed on its breach of fiduciary duty claim because [\*20] it is duplicative of Plaintiff's breach of contract claim. (Mot. at 9.) Plaintiff contends that its breach of fiduciary duty claim is distinct from its breach of contract claim because it is a claim based in tort. (Opp'n at 26.) In Ohio, "[a] claim of breach of a fiduciary duty is basically a claim of negligence, albeit involving a higher standard of care. *Strock v. Pressnell, 38 Ohio St. 3d 207, 527 N.E.2d 1235, 1243 (Ohio 1988)*. To have a cognizable tort claim, the plaintiff must "allege a breach of some positive legal duty imposed by law because of the relationship of the parties, rather than from a mere omission to perform a contract obligation." *Academic Imaging, LLC v. Soterion Corp, 352 F. App'x 59, 64-65 (6th Cir. 2009)*. In other words, when a duty is imposed by a contract, the tort claim fails. See, e.g., *Infocision Mgmt. Corp. v. Found. for Moral Law, Inc., No. 5:09 CV 951, 2009 U.S. Dist. LEXIS 77033, 2009 WL 2781749, at \*5 (N.D. Ohio Aug. 28, 2009)*; *K & D Farms, Ltd. v. Enervest Operating, L.L.C., No. 2015CA00038, 2015 Ohio App. LEXIS 4364, 2015 WL 6507785, at \*8 (Ohio Ct. App. 5th Dist. 2015)*.

As the court has already determined above, Plaintiff has established a plausible claim that a fiduciary relationship exists even though the duty, as Defendants argue themselves, is not expressly addressed in the Management Agreement. However, Genesis argues that Plaintiff's alleged damages are the same as those that arise from the breach of contract claim. (Mot. at 10.) Genesis asserts that this is evidence that Plaintiff's breach of fiduciary claim cannot be made independent of Plaintiff's breach of contract claim. In [\*21] addition, Genesis contends that Plaintiff plainly references portions of the Management Agreement in arguing that Genesis has a fiduciary duty and Genesis breached that duty. (Reply at 14.) Genesis maintains that Plaintiff's reliance on the Management Agreement also shows that the fiduciary duty claim is based on the contract.

However, Genesis mischaracterizes Plaintiff's assertions. Although Plaintiff refers to the Management Agreement, Plaintiff does so only insofar as to show that there is factual support for its claim that Genesis had a fiduciary duty. While Plaintiff alleges the same injuries here as it did under its breach of contract claim, the source of the injury in its breach of fiduciary claim is distinct from that of its breach of contract claim. In other words, Genesis' fiduciary duty does not arise from a contract. Accordingly, the court finds that Plaintiff has provided sufficient support that its breach of fiduciary duty claim could be maintained separate from its breach of contract claim. Thus, Plaintiff's breach of fiduciary claim survives Defendants' Motion to Dismiss.

### C. Violations of Federal and State Antitrust Laws as to Genesis and Perry (Counts V-VIII)

Plaintiff [\*22] alleges that Genesis and Perry violated *Section 1* of the *Sherman Act, 15 U.S.C. § 1* (Count V) and the *Valentine Act, Ohio Rev. Code § 1331.01 et seq.* (Count VIII). Plaintiff also claims that Genesis violated and attempted to violate *Section 2* of the *Sherman Act, 15 U.S.C. § 2* (Counts VI, VII).

The parties do not dispute that the Valentine Act is interpreted in the same manner as the *Sherman Act*, its federal counterpart. *Johnson v. Microsoft Corp., 106 Ohio St. 3d 278, 2005- Ohio 4985, 834 N.E.2d 791, 795 (Ohio 2005)*.

Thus, Plaintiff's Valentine Act claim rises and falls with its *Sherman Act* claims. See *Nilavar v. Mercy Health Sys. W. Ohio*, 494 F. Supp. 2d 604, 621 (S.D. Ohio 2005) (granting summary judgment to the defendants on a Valentine Act claim based on a grant of summary judgment to the defendants on a *Sherman Act* claim); *Richter Concrete Corp. v. Hilltop Basic Res., Inc.*, 547 F. Supp. 893, 920 (S.D. Ohio 1981) (finding that a failure to prove claims under the *Sherman Act* constitutes a failure to prove the claim under the Valentine Act). However, the parties disagree on the issue of whether Plaintiff has standing to bring claims under **antitrust law**.

Antitrust standing and Article III standing are not one and the same. *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 449 (6th Cir. 2007). Antitrust standing requires a different analysis because antitrust laws were "enacted for the protection of competition, not competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977). The test for antitrust standing consists of five factors: (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff's alleged injury including [\*23] the status of the plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation. *Defiance Hosp. v. Fauster-Cameron, Inc.*, 344 F. Supp. 2d 1097, 1106 (N.D. Ohio 2004) (quoting *Southhaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1085 (6th Cir. 1983)).

Of particular relevance to Defendants' Motion are the first two factors which require that "for an antitrust plaintiff to have antitrust standing, he or she must have suffered an antitrust injury." *MacNealy v. Dayton Osteopathic Hosp. Inc.*, No. C-3-88-402, 1993 U.S. Dist. LEXIS 21312, 1993 WL 1377513, at \*6 (S.D. Ohio Mar. 3, 1993). As the United States Supreme Court has instructed, antitrust injury "should reflect the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation." *Brunswick Corp.*, 429 U.S. at 489. In order to show an antitrust injury, the plaintiff's injury must be aligned with that of consumers. See *Tri-Gen, Inc. v. Int'l Union of Operating Engineers, Local 150, AFL-CIO*, 433 F.3d 1024, 1031 (7th Cir. 2006) ("[A] plaintiff must demonstrate consumer injury to have standing to assert antitrust violations."). In addition, it is generally difficult for a plaintiff-competitor to show that it has antitrust standing because it typically "gains from higher prices and loses from lower prices—just the opposite of the consumer interest." *MacNealy v. Dayton Osteopathic Hosp. Inc.*, No. C-3-88-402, 1993 U.S. Dist. LEXIS 21312, 1993 WL 1377513, at \*8 (S.D. Ohio Mar. 3, 1993); [\*24] see also *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 583, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (noting that when the parties are competitors, both parties stand to gain from any conspiracy to raise the market price, and thus, one party cannot recover for a conspiracy to impose restraints that have the effect of either raising market price or limiting output).

Plaintiff asserts that it suffered an antitrust injury when Genesis controlled and limited physician recruitment, and, thus, increased the prices for medical services in the region which Genesis and CCMH both served. (Opp'n at 29; Compl. ¶¶ 481, 506.) Plaintiff states that Genesis would make hiring and recruitment decisions at CCMH for Genesis' own benefit. For example, Plaintiff states that Genesis would pursue physician candidates first and place candidates at CCMH only if they were not suitable for Genesis. (Compl. ¶¶ 228, 233.) Furthermore, Plaintiff maintains that because CCMH was precluded from any recruitment decisions, it was not able to set physician compensation rates. (Compl. ¶¶ 229, 235, 236.) Genesis, on the other hand, was able to set higher salaries for potential candidates and entice physicians to work at Genesis rather than CCMH. (*Id.*) Therefore, Plaintiff claims that Genesis lowered competition [\*25] because CCMH was not able to adequately hire physicians to compete with Genesis' physicians. (Opp'n at 29-30; Compl. ¶ 229.) Thus, Plaintiff alleges that Genesis' actions "reduced output" and increased the prices for medical services in the region. Presumably, Plaintiff is arguing that as a result of the physician hiring restrictions that Genesis imposed on CCMH which "reduced output" of physicians in the region, CCMH was unable to compete in the market.

The court finds that Plaintiff does not have standing to pursue its antitrust claims. First, Plaintiff has not plausibly alleged that "the nature of the plaintiff's alleged injury" is one that the antitrust laws were intended to protect. *Southhaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1085 (6th Cir. 1983). Although Plaintiff alleges that Genesis reduced the availability of physicians, Genesis only reduced the number of physicians available to

CCMH. Plaintiff does not allege that Genesis reduced the total number of physicians in the market. Thus, Plaintiff's output-restriction allegation fundamentally differs from that of other antitrust cases where the claimed reduction in output *marketwide* leads to higher prices for consumers. See, e.g., *Defiance Hosp. v. Fauster-Cameron, Inc.*, 344 F. Supp. 2d 1097, 1108 (N.D. Ohio 2004) (finding that a hospital had antitrust standing to sue an anesthetic [\*26] services provider who controlled the market in anesthetic services and refused its services to the hospital unless it signed certain exclusivity agreements). Even if CCMH suffered an injury as a result of Genesis' restrictions on CCMH's physician recruitment, Plaintiff has not alleged that such injury was equally suffered by consumers because there were fewer physicians available in the market to consumers.

Second, Plaintiff does not allege a plausible "causal connection between the antitrust violation," *Southhaven Land Co., Inc.*, 715 F.2d at 1085, and the increased medical services costs to consumers, which CCMH claims caused CCMH to be "squeezed out of the Coshocton market." (Opp'n at 31.) Accepting Plaintiff's allegations that Genesis monopolized physician recruitment in the region as true, it is plausible that consumers could have suffered increased market prices for medical services as a result. *Nelson v. Monroe Regional Med. Center*, 925 F.2d 1555, 1566-67 (7th Cir. 1991) (discussing how the anti-competitive effects of a clinic's merger with a medical center could lead to "decreased output, and increased prices"). But it does not follow that CCMH would have necessarily suffered from an increase in medical prices in the region. In fact, CCMH would have benefitted from a rise in prices that it could [\*27] charge for medical services, whether or not it was a knowing or willing participant in the alleged Genesis scheme. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582-83, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). To the extent that Plaintiff alleges that it was driven out of the market by Genesis, Plaintiff has not sufficiently pled facts that this was caused by an increase in the medical services prices, and not, instead, by other alleged acts in Plaintiff's Complaint.

Therefore, Plaintiff does not have standing to pursue its *Sherman Act* claims and these claims are dismissed. Accordingly, the court also dismisses Plaintiff's Valentine Act claims.

#### IV. CONCLUSION

For the foregoing reasons, the court grants Defendants' Motion to Dismiss (ECF No. 28) as to Counts I, VI, and VII against Defendant Genesis Healthcare Systems, and Counts V and VIII against Defendants Genesis Healthcare Systems and Matthew Perry. The court denies Defendants' Motion as to Count II against Defendant Genesis Healthcare Systems.

IT IS SO ORDERED.

/s/ SOLOMON OLIVER, JR.

UNITED STATES DISTRICT JUDGE

March 21, 2019



## **Hetronic Int'l, Inc. v. Hetronic Germany GmbH**

United States District Court for the Western District of Oklahoma

March 22, 2019, Decided; March 22, 2019, Filed

Case No. CIV-14-650-F

### **Reporter**

2019 U.S. Dist. LEXIS 118271 \*

HETRONIC INTERNATIONAL, INC., Plaintiff, -vs- HETRONIC GERMANY GmbH, HYDRONIC STEUERSYSTEME GmbH, ABI HOLDING GmbH, ABITRON GERMANY GmbH, ABITRON AUSTRIA GmbH, and ALBERT FUCHS, Defendants.

**Subsequent History:** Reversed by, in part, Affirmed by, in part, Remanded by [Hetronic Int'l v. Hetronic Germany GmbH, 2021 U.S. App. LEXIS 25354 \(10th Cir., Aug. 24, 2021\)](#)

**Prior History:** [Hetronic Int'l, Inc. v. Hetronic Germany GmbH, 2015 U.S. Dist. LEXIS 126476, 2015 WL 5569035 \(W.D. Okla., Sept. 22, 2015\)](#)

## **Core Terms**

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Lanham Act, defendants', extraterritorial, trademark, sales, damages, attorney's fees, trade name, entities, court concludes, infringing, asserts, trade dress, conspiracy, license agreement, conversion, foreign law, documents, contends, us citizen, ownership, commerce, factors, rights, genuine issue of material fact, partial summary judgment, predecessor, products, fault, substantial effect

**Counsel:** [\*1] For Hetronic International Inc, Plaintiff: John N Hermes, LEAD ATTORNEY, McAfee & Taft, Oklahoma City, OK USA; Debbie L Berman, Wade A Thomson, PRO HAC VICE, Jenner & Block LLP-CHICAGO, Chicago, IL USA; Gianni P Servodidio, PRO HAC VICE, Jenner & Block LLP, New York, NY; Philip R Bruce, McAfee & Taft-OKC, Oklahoma City, OK USA; Samuel R Fulkerson, Ogletree Deakins Nash Smoak & Stewart-OKLAHOMA CITY, Oklahoma City, OK USA.

For Hetronic Germany GmbH, Hydronic-Steuersysteme-GmbH, Abi Holding GmbH, Abitron Germany GmbH, Abitron Austria GmbH, Albert Fuchs, Defendants, Counter Claimants: Anton J Rupert, Geren T Steiner, Rupert & Steiner PLLC, Oklahoma City, OK USA.

For Hetronic International Inc, Counter Defendant: John N Hermes, LEAD ATTORNEY, Philip R Bruce, McAfee & Taft, Oklahoma City, OK USA; Debbie L Berman, Wade A Thomson, PRO HAC VICES, Jenner & Block LLP-CHICAGO, Chicago, IL USA; Samuel R Fulkerson, Ogletree Deakins Nash Smoak & Stewart-OKLAHOMA CITY, Oklahoma City, OK USA.

**Judges:** STEPHEN P. FRIOT, UNITED STATES DISTRICT JUDGE.

**Opinion by:** STEPHEN P. FRIOT

## **Opinion**

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## **ORDER**

Before the court is All Defendants' Motion for Partial Summary Judgment. Doc. no. 262. Upon due consideration of the parties' submissions, the court [\*2] makes its determination.

I.

#### *Introduction*

In the Second Amended Complaint, plaintiff seeks relief against defendants under thirteen claims. Seven of the claims are based upon violations of the Lanham Act and its Oklahoma counterpart. Four claims are tort claims and two claims are for breach of contract. Defendants move for partial summary judgment with respect to all claims except the breach of contract claims.

Initially, defendants assert the court lacks subject matter jurisdiction over the Lanham Act claims to the extent they seek to recover any relief based upon defendants' foreign sales of radio remote control (RRC) products. The total amount of these sales, defendants represent, is 56,608,254.76 euros (€). As to any United States sales, defendants acknowledge the court has subject matter jurisdiction. Defendants, however, argue that Abitron Germany GmbH (ABIG) and Abitron Austria GmbH (ABIA) (collectively Abitron entities) have no liability for infringing on the "Hetronic" trademark because they sold RRCs under the "Abitron" trademark. All defendants assert that they have no liability for infringing on other trade names and trade dress which are the subject of the Lanham Act claims [\*3] because they own the trade names and trade dress.

Next, defendants challenge plaintiff's tort claims, arguing that the specific remedy plaintiff seeks — \$5.4 million in attorneys' fees spent pursuing a civil action against plaintiff's former President, Torsten Rempe (Rempe) — is not recoverable. Defendants contend the attorney's fees are not "collateral damages" for purposes of the conversion claim, and under the Oklahoma Legislature's 2011 enactment of 23 O.S. § 15, they are not responsible for costs incurred pursuing Rempe's share of plaintiff's harm.

Defendants additionally argue that plaintiff has no actionable conversion claim or civil conspiracy claim against the Abitron entities.

Lastly, defendants argue that they are entitled to partial summary judgment on the "breach of indemnity" claim included in plaintiff's expert's report but not alleged by plaintiff in the Second Amended Complaint.

Plaintiff opposes defendants' partial summary judgment motion in all respects.

II.

#### *Standard of Review*

Federal Rule of Civil Procedure 56(a) provides that "[a] party may move for summary judgment, identifying each claim or defense—or part of each claim or defense—on which summary judgment is sought." Rule 56(a), Fed. R. Civ. P. Summary judgment is appropriate under [\*4] Rule 56(a) if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* In deciding whether summary judgment is appropriate, the court does not weigh the evidence and determine the truth of the matter asserted, but only determines whether there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute is "genuine" "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248. A fact is "material" if under the substantive law, it is essential to the proper disposition of the claim. *Id.* In adjudicating a motion for summary judgment, the court views the evidence and draws all reasonable inferences therefrom in the light most favorable to the nonmoving party. McGehee v. Forest Oil Corporation, 908 F.3d 619, 624 (10th Cir. 2018).

III.

*Lanham Act Claims*a. Extraterritorial Application

In Counts 3 through 8 of the Second Amended Complaint, plaintiff alleges claims against defendants under the Lanham Act, [15 U.S.C. § 1051, et seq.](#) Specifically, plaintiff alleges claims of trademark infringement in violation of [sections 32](#) and [43\(a\)](#) of the Lanham Act,<sup>1</sup> unfair competition in violation of [section 43\(a\)](#), false designation of origin in violation of [section 43\(a\)](#), trademark counterfeiting and infringement in violation of [section 32](#), and [\*5] contributory trademark infringement in violation of [sections 32](#) and [43\(a\)](#). In their motion, defendants challenge the extraterritorial application of the Lanham Act to the alleged infringement, unfair competition and false designation of origin involving defendants' foreign sales of RRCs and spare parts.<sup>2</sup> In support of this challenge, defendants rely upon a three-factor test established by the Second Circuit in [Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 642 \(2d Cir. 1956\)](#),<sup>3</sup> for determining whether the Lanham Act can be applied beyond the boundaries of the United States. According to defendants, plaintiff — having the burden of establishing subject matter jurisdiction — cannot prove any of the three factors (defendant's conduct had a substantial effect on United States commerce; defendant is a United States citizen; and there is no conflict with trademark rights established under the foreign law) with respect to their foreign sales. Therefore, defendants argue the court lacks subject matter jurisdiction over plaintiff's Lanham Act claims involving their foreign sales.<sup>4</sup>

Plaintiff responds that defendants' infringing conduct justifies extraterritorial application of the Lanham Act under the [Vanity Fair](#) test. First, plaintiff asserts that defendants' infringing [\*6] conduct has had a substantial effect on United States commerce by diverting sales from plaintiff, causing customer confusion and harming plaintiff's reputation. Additionally, plaintiff points out that defendants have had substantial ties with the United States because they entered into distribution and license agreements governed by Oklahoma law, and while operating under those agreements, received training in Oklahoma, hired Rempe and his company to assist in competing with plaintiff and circulated contact information for a United States distributor. Plaintiff also points out that after termination of the distribution and license agreements, defendants obtained the "Abitron" trademark in the United States, contracted with a United States distributor to sell RRCs, and after the distributorship relationship ended, held themselves out as offering RRCs for sale in the United States. In addition, plaintiff asserts that the Abitron entities have attended trade shows in the United States and exhibited products at foreign trade shows directed at United States citizens. Further, plaintiff maintains that defendants' direct and indirect sales in the United States are substantial in that they [\*7] total over €2 million.

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<sup>1</sup> [15 U.S.C. § 1114\(1\)\(a\) \(section 32\)](#) and [15 U.S.C. § 1125\(a\)\(1\)\(A\) \(section 43\(a\)\)](#).

<sup>2</sup> Defendants assert that 96.9% of their collective sales, totaling €54,858,043.41, were purely foreign sales because they took place in a foreign country, between a foreign buyer and foreign seller, and were designated for destination in a foreign country. They assert that 3.1% of collective sales, totaling €1,750,211.35, took place in a foreign country, between a foreign buyer and foreign seller, but the foreign buyer designated United States as "the ultimate location where the [product was] intended to be used." Doc. no. 262, p. 3. According to defendants, foreign customers purchase RRCs as components for larger pieces of machinery, such as cranes, and the machinery is what is destined for the United States. Defendants argue that neither of these categories of foreign sales fall within the extraterritorial reach of the Lanham Act, but urge that, at the very least, the purely foreign sales are not subject to the Lanham Act.

<sup>3</sup> The [Vanity Fair](#) test was developed from the Supreme Court's decision in [Steele v. Bulova Watch Co., 344 U.S. 280, 73 S. Ct. 252, 97 L. Ed. 319, 1953 Dec. Comm'r Pat. 424 \(1952\)](#), wherein the Court gave the provisions of the Lanham Act extraterritorial application against infringing conduct committed in Mexico by an American citizen.

<sup>4</sup> Defendants concede the court has subject matter jurisdiction over the Lanham Act claims involving direct sales into the United States. According to defendants, these sales were made by ABIG and Hetronic Germany GmbH. These sales, defendants assert, total €219,237.07 (€202,134.12 of RRCs and €17,102.95 of spare parts). Plaintiff challenges defendants' sales figures not only for direct sales to the United States but also for the foreign sales previously noted. For purposes of adjudicating defendants' motion, the court need not address plaintiff's challenge.

Second, plaintiff argues that even though defendants are not United States citizens, they have availed themselves of United States laws. Plaintiff again points out that defendants entered into distribution and license agreements with it. According to plaintiff, the distribution agreements contained Oklahoma choice-of-law and forum-selection clauses. Plaintiff also emphasizes that defendants have had substantial ties with the United States as previously described.

Third, plaintiff contends that extraterritorial application of the Lanham Act is appropriate since there is no conflict with any valid foreign trademark. Plaintiff asserts that defendants do not possess any valid, registered trademark in any foreign country to which they sell. Plaintiff states that it owns the registered trademarks for HETRONIC® and NOVA® in the United States as well as in the European Union. The OHIM<sup>5</sup> proceeding challenging the NOVA® trademark registration in the European Union, plaintiff contends, should not preclude this court from applying the Lanham Act to the foreign sales because that proceeding was filed only after this lawsuit was commenced and it argues subsequent events do not [\*8] oust jurisdiction. Further, plaintiff posits that defendants' bare assertion of a conflict between United States and German trademark laws does not warrant refusal to exercise jurisdiction with respect to the foreign sales.

Although satisfying the Second Circuit's *Vanity Fair* three-factor test, plaintiff points out that the Ninth Circuit has established a similar three-factor test, which incorporates the test it developed to determine the extraterritorial reach of antitrust laws in *Timberlane Lumber Co. v. Bank of America, N.T. and S.A.*, 549 F.2d 597, 613 (9th Cir. 1976). See, *Star-Kist Foods, Inc. v. P.J. Rhodes & Co.*, 769 F.2d 1393, 1395 (9th Cir. 1985). Under this test, in order for the Lanham Act to apply extraterritorially: (1) the alleged violations must create some effect on U.S. foreign commerce; (2) the effect must be sufficiently great to present a cognizable injury to the plaintiff under the Lanham Act; and (3) the interests of and links to U.S. foreign commerce must be sufficiently strong in relation to those of other nations to justify an assertion of extraterritorial authority.<sup>6</sup> According to plaintiff, there is reason to believe the Tenth Circuit would follow the *Timberlane* factors because it previously adopted those factors to determine the extraterritorial application of *antitrust law* in *Montreal Trading Ltd. v. Amex Inc.*, 661 F.2d 864, 869 (10th Cir. 1981). Plaintiff contends that the first two factors [\*9] largely mirror the *Vanity Fair* substantial-effect-on-United States-commerce factor and it has demonstrated that that factor cuts in plaintiff's favor. Plaintiff asserts that the third factor articulated in *Timberlane* weighs in favor of extraterritorial application of the Lanham Act because defendants' infringing conduct has sufficiently strong links to United States foreign commerce.

Defendants, in reply, urge the court to follow the *Vanity Fair* test, and in so doing, find that the Lanham Act does not apply to their foreign sales. They contend that there has been no substantial effect on the United States because they operate in Europe and nearly all of their sales involved foreign customers. Defendants assert that their direct sales of RRCs totaling €202,134.12 are a tiny fraction of the collective sales at issue and argue that most of the direct sales do not even involve the Lanham Act because they were made to plaintiff or its affiliates or were made by ABIG under the "Abitron" name. Although they do not contest jurisdiction over the direct sales to the United States, defendants argue that plaintiff wants to use those sales as a springboard to reach over €56 million in sales, [\*10] which defendants argue should not be permitted. Defendants also assert that the rights to the "NOVA" name are in dispute in European Union and maintain that the dispute belongs there since the trademarks or trade names originated in Germany and were created by a predecessor, Hetronic Steuersysteme GmbH. Moreover, defendants state that ABIG holds the trademark registration in Germany on the NOVA, GL, GR and GA names. They also point out that it is undisputed they are not United States citizens. Further, defendants argue that plaintiff has cited no well-reasoned case to support extraterritorial application of the Lanham Act over their foreign sales.

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<sup>5</sup> Acronym for Office for Harmonization in the Internal Market.

<sup>6</sup> The third factor breaks down into a seven-part test exploring such things as the degree of conflict with foreign law and the nationality and allegiance of the parties. See, *Star-kist Foods, Inc.*, 769 F.2d at 1395.

Defendants therefore seek partial summary judgment limiting the amount of sales to which plaintiff can seek relief under the Lanham Act to €202,134.12 in direct sales of RRCs and €17,102.95 in spare parts.<sup>7</sup>

In determining the extraterritorial application of the Lanham Act, the court finds that it is a "merits question" and not a question of the court's subject matter jurisdiction. See, [\*Morrison v. National Australia Bank Ltd., 561 U.S. 247, 253-254, 130 S. Ct. 2869, 177 L. Ed. 2d 535 \(2010\)\*](#) (extraterritorial reach of §10(b) of the Securities Exchange Act of 1934 is a "merits question" not a "question of subject-matter jurisdiction"); see also [\*11] [\*Trader Joe's Co. v. Hallatt, 835 F.3d 960, 968 \(9th Cir. 2016\)\*](#) ("We hold that the extraterritorial reach of the Lanham Act is a merits question that does not implicate federal courts' subject-matter jurisdiction.") (citing [\*Morrison, 561 U.S. at 253-54\*](#)); and [\*A.O. Smith Corporation v. USA Smith Industry Dev. Inc., 2017 U.S. Dist. LEXIS 77283, 2017 WL 2224539, \\*2 \(D. Colo. May 22, 2017\)\*](#) (agreeing with the conclusion in *Trader Joe's* that "the extraterritorial reach of the Lanham Act goes to the merits of a trademark claim").

As defendants concede that the Lanham Act applies to direct sales into the United States, the court need not address the Act's application to those claims. The question for the court is whether the Lanham Act applies to defendants' foreign sales.

The Supreme Court has made it clear that, in appropriate circumstances, the Lanham Act can be applied extraterritorially to conduct in a foreign country. See, [\*Steele v. Bulova Watch Co., 344 U.S. 280, 73 S. Ct. 252, 97 L. Ed. 319, 1953 Dec. Comm'r Pat. 424 \(1952\)\*](#). The Court, however, has not set forth a specific framework for determining when the extraterritorial application of the Lanham Act is warranted. The Tenth Circuit also has not established a formulation for making that determination, but other circuit courts have. [\*McBee v. Delica Co., Ltd., 417 F.3d 107 \(1st Cir. 2005\)\*](#); [\*Vanity Fair, 234 F.2d at 642\*](#); [\*Nintendo of America, Inc. v. Aeropower Co., Ltd., 34 F.3d 246, 250 \(4th Cir. 1994\)\*](#); [\*American Rice, Inc. v. Arkansas Rice Growers Co-op. Ass'n, 701 F.2d 408, 414 \(5th Cir. 1983\)\*](#); [\*Star-Kist Foods, Inc., 769 F.2d at 1395\*](#); and [\*International Cafe, S.A.L. v. Hard Rock Cafe Intern. \(U.S.A.\), Inc., 252 F.3d 1274, 1278 \(11th Cir. 2001\)\*](#). As has been discussed, defendants urge the court to use the Second Circuit's *Vanity Fair* test and plaintiff applies the *Vanity Fair* test to counter defendants' arguments but also advocates the use of the Ninth [\*12] Circuit's *Timberlane* test. Upon review and out of an abundance of caution, the court will apply both tests. Courts have found the *Vanity Fair* test to be the "most commonly employed test." [\*International Academy of Business and Financial Management, Ltd v. Mentz, 2013 U.S. Dist. LEXIS 7714, 2013 WL 212640, at \\*5 \(D. Colo. Jan. 18, 2013\)\*](#). Nonetheless, as stated by plaintiff, the Tenth Circuit has endorsed the analysis set forth in *Timberlane* as containing the appropriate elements governing consideration of extraterritorial application of the Sherman Act. And that same analysis has been applied by the Ninth Circuit in determining the extraterritorial reach of the Lanham Act. See, [\*Star-Kist Foods, Inc., 769 F.2d at 1395\*](#).

### Vanity Fair Test

The *Vanity Fair* test asks whether (1) the defendant's conduct had a substantial effect on United States commerce; (2) the defendant is a United States citizen; and (3) there exists a conflict with trademark rights established under

<sup>7</sup> Plaintiff has recently filed a request for judicial notice or, in the alternative, motion for leave to supplement opposition to defendants' motion for partial summary judgment. Doc. no. 309. Plaintiff states "the OHIM tribunal just issued its ruling, rejecting defendants' attempt to invalidate Hetronic's EU community NOVA trademark. Moreover, as a result of the OHIM tribunal's ruling, defendants' German NOVA trademark (which was obtained after Hetronic's) is invalid." It also states that "newly acquired evidence shows that defendants continue to actively sell products that they know are intended for use in the United States." *Id.* at ECF p. 2. Plaintiff requests the court to take judicial notice of these facts or permit plaintiff to supplement its opposition to defendants' motion for partial summary judgment "so the record contains complete and accurate facts that did not exist at the time of the summary judgment briefing." *Id.* at ECF p. 6. In light of the court's ruling on the extraterritorial application of the Lanham Act, as subsequently discussed, which favors plaintiff, the court finds it unnecessary to grant the requested relief. The court is also cognizant of plaintiff's representation that "[t]hat the EU Trademark Regulations allow any party adversely affected by a decision to appeal . . . Defendants have filed a notice indicating their intention to appeal." *Id.* at ECF p. 3. n. 1. The court therefore **DENIES** plaintiff's request and motion.

foreign law. *Vanity Fair Mills, Inc.*, 234 F.2d at 642. The Second Circuit, stated, in *Vanity Fair*, that "the absence of one of the above factors might well be determinative," but the absence of two "is certainly fatal" as to the extraterritorial application of the Lanham Act. *Id.* at 643. However, the Second Circuit subsequently noted that it has not applied the Lanham Act extraterritorially, absent a substantial effect on United States commerce. See, *Atlantic Richfield Co. v. Arco Globus Intern. Co., Inc.*, 150 F.3d 189, 192 n. 4 (2d Cir. 1998).

#### *Substantial [\*13] Effect on United States Commerce*

The court finds that plaintiff has proffered evidence, viewed in a light most favorable to plaintiff, sufficient to establish that defendants' alleged infringing conduct has had a substantial effect on United States commerce. As recognized by the First Circuit in *McBee v. Delica Co., Ltd.*, 417 F.3d at 126, "[c]ourts have considered sales diverted from American companies in foreign countries in their analyses." *Id.* (citing *Totalplan Corp. of Am. v. Colborne*, 14 F.3d 824, 830-831 (2d Cir. 1994) and *American Rice, Inc.*, 701 F.2d at 414-415); see also, *Bulova*, 344 U.S. at 283-84 and *Warnaco Inc. v. VF Corp.*, 844 F. Supp. 940, 950-952 (S.D.N.Y. 1994), but see, *Tire Engineering and Distribution, LLC v. Shandong Linglong Rubber Company, Ltd.*, 682 F.3d 292, 311 (4th Cir. 2012) (diversion-of-sales theory applicable only in cases involving defendant United States companies). Plaintiff has demonstrated that the use by Hetronic Germany GmbH (HG) and Hydronic Steuersysteme GmbH (HCEE) of KH parts, while under contract with plaintiff, precluded sales of "Hetronic" parts to HG and HCEE, resulting in a significant drop in revenue. Plaintiff was entitled to revenue from the sale of "Hetronic" parts because of the distribution agreements executed by HG and HCEE. It has also demonstrated that defendants' sales of RRCs, after termination of the distribution agreements and after the formation of the Abitron entities, precluded sales of Hetronic's RRCs in the same markets. The evidence shows that like defendants, Hetronic advertises, [\*14] promotes and sells RRCs worldwide. Hetronic and defendants have competed, and do compete, in many of the same markets.

Courts have also considered customer confusion and harm to reputation in analysis of the substantial effect factor. *Atlantic Richfield Co.*, 150 F.3d at 192-193; *A.V. by Versace, Inc. v. Gianni Versace, S.p.A.*, 126 F. Supp.2d 328, 340-341 (S.D.N.Y. 2001); *Libbey Glass, Inc. v. Oneida Ltd.*, 61 F. Supp.2d 720, 724 (N.D. Ohio 1999); *Warnaco Inc.*, 844 F. Supp. at 951-952. Viewed in a light favorable to plaintiff, the record evidence raises genuine issues of material fact as to customer confusion and harm to reputation to plaintiff in the United States due to defendants' alleged infringing conduct.

In sum, the court finds, after viewing the record evidence in a light most favorably to it, that plaintiff has proffered evidence to satisfy the "substantial effect on United States commerce" factor.

#### *Citizenship of Defendants*

It is undisputed that none of the defendants are citizens of the United States. Plaintiff, however, urges the court to find that this factor nonetheless weighs in favor of plaintiff because defendants have had substantial ties to the United States through the distribution and license agreements, attending training in Oklahoma, hiring Rempe and his company to consult with them, hiring a United States distributor, and obtaining a trademark for "Abitron" in the United States. The court notes that courts [\*15] have treated foreign citizens as United States citizens when these defendants resided in the United States and did business in the United States or controlled a United States company. See, *A.V. by Versace, Inc. v. Gianni Versace, S.p.A.*, 126 F. Supp. 2d 328, 337 (S.D.N.Y. 2001) (finding that defendant, who "resided in and [had] done business in the United States for over forty years" was a "constructive" United States citizen); *Calvin Klein Indus., Inc. v. BFK Hong Kong, Ltd.*, 714 F. Supp. 78, 80 (S.D.N.Y. 1989) (finding that a foreign defendant could be treated as a United States citizen because he "resid[ed] in New York and is the controlling force behind" a New York corporation). In the case at bar, none of the defendants have resided in the United States or conducted business for many years in the United States or controlled a United States corporation. The court recognizes that some courts have also considered agreements or joint ventures between foreign citizens and American citizens as well as foreign citizens' consent to jurisdiction in the United

States in analyzing the United States citizen factor. *NewMarkets Partners LLC v. Oppenheim*, 638 F.Supp.2d 394, 407 (S.D. N.Y. 2009); *Warnaco Inc.*, 844 F. Supp. at 952. However, the court is not convinced that the distribution and license agreements and other domestic activities described by plaintiff suffice to demonstrate (resolving all factual doubts in favor of plaintiff) that defendants are in effect "constructive" [\*16] United States citizens for purposes of the Vanity Fair test. The court therefore concludes that plaintiff has not presented evidence adequate to satisfy the United States citizenship factor.

#### *Conflict of Law*

In Vanity Fair, the Second Circuit concluded that "the remedies provided by the Lanham Act . . . should not be given an extraterritorial application against foreign citizens acting under presumably valid trade-marks in a foreign country." *Vanity Fair Mills*, 234 F.2d at 643. Plaintiff has proffered evidence that it owns the registered trademark for "Hetricnic" in the United States and other countries, including Germany and the European Union. Defendants do not challenge this. The court finds no conflict of law with trademark rights established under foreign law with respect to the "Hetricnic" name.

As to the trade names, other than "NOVA," there is no evidence of valid registrations by defendants for any of the trade names as of the time of filing of this action against defendants. In reply, defendants proffer evidence that ABIG obtained registrations for GL, GR and GA<sup>8</sup> names. Even if the court were to consider these registrations, which were proffered for the first time in reply, the registrations appear to have been [\*17] obtained after suit was filed against ABIG in April of 2015. Consequently, defendants were not operating under any valid registrations under foreign law for the GL, GR and GA names at the times relevant to this action. Although plaintiff seeks injunctive relief on the Lanham Act claims, it also seeks damages. Those damages are calculated from August, 2012. And as to ABIG, damages are sought after it began operations in September of 2014. The court discerns no rights under foreign law with respect to the GL, GR and GA names with which a damage award might conflict. Moreover, there are other trade names at issue, such as ERGO, as to which there is no conflict with any trademark rights established under foreign law.

With respect to "NOVA" trade name, plaintiff has shown that it owns the registered trademark for "NOVA" in the United States and the European Union. Defendants argue that the pending OHIM proceeding, which was commenced in July 2015 after this lawsuit was filed, should preclude the court from applying the Lanham Act extraterritorially. Defendants also point out for the first time in reply that ABIG has obtained registration of the "NOVA" name in Germany. Even if the court were [\*18] to consider that evidence, the trademark registration appears to have been obtained in 2016 after this action was filed. As discussed, while plaintiff seeks injunctive relief for its Lanham Act claims, it also seeks damages. The court discerns no rights under foreign law with respect to the "NOVA" name with which a damage award might conflict. Further, although defendants argue that there are differences between German law and United States law with respect to trademarks or trade names, the Vanity Fair test looks to whether there exists a "conflict with *trade-mark rights established under foreign law*." *Vanity Fair Mills, Inc.*, 234 F.2d at 642 (emphasis added). Lastly, the court finds that even if the OHIM proceeding were to result in a cancellation of plaintiff's registered trademark for "NOVA," defendants have not satisfied the court that application of the Lanham Act would conflict with German trademark law regarding the unregistered trade name of "NOVA." The alleged differences proffered by defendants between German law and United States law do not provide significant guidance for this court so as to enable the court to conclude that an actual conflict exists.<sup>9</sup> Although the court should avoid deciding a case where "the [\*19] exercise of such power is fraught with possibilities of discord and

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<sup>8</sup> According to defendants, the GA product was a predecessor to the HH product, which is one of the products at issue.

<sup>9</sup> The court notes defendants proffer no expert affidavit on the differences between German and United States trademark laws.

conflict with the authorities of another country," see, [Vanity Fair Mills, 234 F.2d at 647](#), the court is not convinced that there is a real prospect of discord and conflict with respect to plaintiff's Lanham Act claims.<sup>10</sup>

In reply, defendants cite [Star-Kist Foods, Inc.](#) and [Pinkberry, Inc. v. JEC Intern. Corp., 2011 U.S. Dist. LEXIS 140669, 2011 WL 6101828 \(C.D. Calif. Dec. 7, 2011\)](#), in opposition to extraterritorial application of the Lanham Act extraterritorially where petitions to cancel trademark proceedings are pending. However, the court notes that the cancellation proceedings in both cases occurred prior to the filing of the infringement cases and in [Star-Kist Foods, Inc.](#), plaintiff was sought only injunctive relief. [Star-Kist Foods, 769 F.2d at 1394-1395; Pinkberry, Inc., 2011 U.S. Dist. LEXIS 140669, 2011 WL 6101828, \\*1](#). Moreover, both cases applied the [Timberlane](#) test, not the [Vanity Fair](#) test, for determining extraterritorial application of the Lanham Act.

In sum, the court finds that the record evidence, viewed favorably in favor of plaintiff, does not indicate a conflict with trademark rights established under foreign law.

### *Applying the Vanity Fair Test*

The record evidence establishes that two of the [Vanity Fair](#) factors have been satisfied and one of those factors includes substantial effect on United States commerce. Balancing those factors against the United States citizen factor, [\*20] the court concludes that extraterritorial application of the Lanham Act to defendants' foreign sales based upon the [Vanity Fair](#) test is appropriate.

### Timberline Test

As a prerequisite to extraterritorial application of the Lanham Act under the [Timberline](#) test, "first, there must be some effect on American foreign commerce; second, the effect must be sufficiently great to present a cognizable injury to plaintiffs under the federal statute; and third, the interests of and links to American foreign commerce must be sufficiently strong in relation to those of other nations to justify an assertion of extraterritorial application." [Star-Kist Foods, Inc., 769 F.2d at 1395.](#)

### *Some Effect on American Foreign Commerce*

The court concludes that plaintiff has presented adequate evidence, viewed in its favor, to establish the first [Timberlane](#) factor—some effect on American foreign commerce.<sup>11</sup> Plaintiff has proffered evidence that HG and HCEE's use of KH parts diverted sales of "Hetricnic" parts and defendants' sales of RRCs diverted sales of plaintiff's RRCs in the same markets. See, [Reebok Intern., Ltd. v. Marnatech Enterprises, Inc., 970 F.2d 552, 555 \(9th Cir. 1992\)](#) and [American Rice, Inc., 701 F.2d at 414-415; see also, Totalplan Corp. of Am., 14 F.3d at 830-831.](#)

### *Cognizable Injury to Plaintiff under the Lanham Act*

The court concludes that plaintiff has satisfied the second [Timberlane](#) requirement because HG [\*21] and HCEE's use of KH parts prevented plaintiff from selling its parts to defendants and defendants' sales of RRCs to customers prevented plaintiff from selling its RRCs to those same customers. Defendants' activities caused economic injury to

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<sup>10</sup> The court further notes that in their motion, defendants represent that the law of Austria would also apply to some foreign sales. However, defendants have provided nothing but a bare assertion that Austrian trademark law is different from United States trademark law. The court finds that a bare assertion is not adequate to show a conflict of law.

<sup>11</sup> The Ninth Circuit has said that "[a] defendant's foreign activities need not have a substantial effect or even significant effect on American commerce, rather, 'some effect' may be sufficient." [Trader Joe's Company v. Hallatt, 835 F.3d 960, 969 \(9th Cir. 2016\).](#)

plaintiff, which injury is cognizable under the Lanham Act. See, *Ocean Garden, Inc. v. Marktrade Co., Inc.*, 953 F.2d 500, 503 (9th Cir. 1991); see also, *Pinkberry, Inc.*, 2011 U.S. Dist. LEXIS 140669, 2011 WL 6101828, at \*4 ("A loss of current and prospective business opportunity is a cognizable injury under the Lanham Act.") *Interests of and Links to American Foreign Commerce in Relation to Others*

The third factor—interests of and links to American foreign commerce must be sufficiently strong in relation to those of other nations—includes examination and balancing of seven relevant factors. They are:

[1] the degree of conflict with foreign law or policy, [2] the nationality or allegiance of the parties and the locations or principal places of business of corporations, [3] the extent to which enforcement by either state can be expected to achieve compliance, [4] the relative significance of effects on the United States as compared with those elsewhere, [5] the extent to which there is explicit purpose to harm or affect American commerce, [6] the foreseeability of such effect, and [7] the [\*22] relative importance[,] to the violations charged[,] of conduct within the United States as compared with conduct abroad.

*Star-Kist Foods, Inc.*, 769 F.2d at 1395 (bracketed material added). "No one factor is dispositive; each factor is just one consideration to be balanced." *Trader Joe's Company v. Hallatt*, 835 F.3d 960, 973 (9th Cir. 2016) (internal quotation omitted).

#### i. Degree of Conflict

The first relevant factor involves the degree of conflict with foreign law or policy. In the court's view, this factor weighs in favor of extraterritorial application. As previously discussed, there is no conflict with foreign law or policy with respect to the registered trademark of "Hetric." With respect to the trade names, other than "NOVA," the court finds that there is no conflict with foreign law or policy. Although ABIG registered the names, GL, GR and GA, in Germany, it did so after this lawsuit was commenced, and the court finds no conflict with respect to plaintiff's requested relief in the form of damages. Defendants also have not shown as a matter of law that application of the Lanham Act to claims involving unregistered trade names would conflict with German law or any other foreign law. And, there is no evidence of any pending or ongoing adversarial proceeding involving the unregistered [\*23] trade names. The Ninth Circuit has noted that if "there are no pending proceedings" abroad, then it would not "be an affront to the foreign country's sovereignty or law." *Ocean Garden*, 953 F.2d. at 503. While defendants have challenged plaintiff's registered trademark for "NOVA" in the OHIM proceeding, any cancellation of the mark would result in plaintiff claiming ownership of the unregistered trade name and defendants have not shown as a matter of law that application of the Lanham Act to claims involving the unregistered trade name would conflict with German law or any other foreign law. (Defendants also claim ownership of the unregistered trade name of "NOVA" for the period relevant to this action.)

#### ii. Nationality and Allegiance of Parties/Locations or Principal Place of Business

As to the second factor, nationality or allegiance of the parties and locations or principal places of business, plaintiff is a United States corporation, headquartered in Oklahoma City. Defendants HG and ABIG are German corporations. ABIG took over HG's operations in September of 2014 and is headquartered in Langquaid, Germany. Defendants HCEE and ABIA are Austrian corporations. ABIA took over HCEE's operations in August of 2014 and [\*24] is headquartered in Altheim, Austria. Defendant, Albert Fuchs, is domiciled in Austria, and defendant, ABI Holding, Inc., is an Austrian corporation.

Plaintiff has proffered evidence that HG was a distributor for plaintiff pursuant to distribution agreements from April of 2010 until June of 2014 and HCEE was a distributor for plaintiff from September of 2008 until June of 2014. And during this same time, HG and HCEE were licensees of plaintiff pursuant to license agreements. The evidence, viewed in a light favorable to plaintiff, reveals that HG and HCEE used their status as distributors and licensees to assist in their alleged infringing conduct. The evidence also shows that HG and HCEE hired plaintiff's former President, a United States citizen, as a consultant to assist them. After the termination of the distribution and license agreements, the evidence, viewed in plaintiff's favor, demonstrates that HG and HCEE continued to hold

themselves out as plaintiff's distributors and licensees. Thereafter, the Abitron companies were formed and took over HG and HCEE's operations, taking all employees but one. They applied for and registered the "Abitron" trademark in the United States and [\*25] hired a United States distributor to sell products in competition with Hetronic. Defendants also sold some products into the United States. The evidence also shows that Fuchs, either directly or through ABI, owned and controlled HG, HCEE and the Abitron companies. Thus, even though defendants are foreign nationals, the evidence, viewed in plaintiff's favor, shows that they also have had substantial ties to the United States and thus exhibited some "allegiance" to the United States. See, e.g., [Best Western Intern. Inc. v. 1496815 Ontario, Inc.](#), 2007 U.S. Dist. LEXIS 18447, 2007 WL 779699, \* 6 n. 13 (D. Ariz. March 13, 2007) (finding "significant importance in the existence of the Arizona forum selection clause when considering 'allegiance to the parties' to a location."). The court concludes that the substantial ties to the United States edges the second factor in favor of extraterritorial application.

#### *iii. Achieving Compliance*

The third factor addresses the extent to which an order by this court can be expected to achieve compliance with the Lanham Act. Plaintiff points out that defendants have complied with all orders of the court in this case and there is no evidence from defendants to suggest that the court cannot achieve defendants' compliance with any final U.S. judgment. There is no indication that a final [\*26] judgment in favor of plaintiff would not be enforceable in Germany or Austria. As a result, the court concludes that the third factor weighs in favor of extraterritorial application.

#### *iv. Relative Significance of Effects on the United States*

With respect to the fourth factor, relative significance of effects on the United States as compared with those elsewhere, the court finds that this factor weighs in favor of extraterritorial application. The alleged illegal use of the "Hetronic" trademark and other trade names and trade dress has significantly impacted a domestic United States corporation. The presence of losses affecting a domestic corporation cuts in favor of extraterritorial application. See, [Ocean Garden](#), 953 F.2d at 504.

#### *v. Explicit Purpose to Harm or Affect United States Commerce and Foreseeability*

Factors five and six evaluate the extent to which there is an explicit purpose to harm or affect American commerce and the foreseeability of such effect. Generally, "[i]ntentional and unauthorized use of a U.S. corporation's trademark abroad amounts to an explicit purpose to harm U.S. commerce." [Pinkberry](#), 2011 U.S. Dist. LEXIS 140669, 2011 WL 6101828, \*7 (citing [Ocean Garden](#), 953 F.2d at 504). Here, the court finds that this factor weighs in favor of extraterritorial application. Plaintiff has proffered [\*27] evidence, viewed in a light most favorable to it, establishing that defendants' alleged infringing acts were intentional and unauthorized. And because defendants' conduct was intentional, "it automatically follows that a negative effect was foreseeable." [MGM Resorts Intern. v. Unknown Registrant of www.imgurcasino.com](#), 2015 U.S. Dist. LEXIS 128397, 2015 WL 5674374, \* 6 (D. Nev. July 8, 2015). Thus, the court concludes that the fifth and six factors favor extraterritorial application of the Lanham Act.

#### *vi. Relative Importance to Violations Charged*

The final relevant factor assesses the relative importance, to the violations charged, of conduct that occurred within the United States as compared with conduct abroad. The evidence reveals the alleged infringing acts with respect to foreign sales occurred overseas. And, arguably, the conduct most important to defendants' operations happened overseas. Because the infringing activity with respect to foreign sales occurred abroad, the court concludes that this factor weighs against extraterritorial application. See, [Trader Joe's Company](#), 835 F.3d at 975.

In sum, balancing the relevant factors, the court concludes that plaintiff has satisfied the third criterion of the Timberlane test — interests of and links to American foreign commerce must be sufficiently [\*28] strong in relation to those of other nations.

#### *Resolving the Timberlane Test*

After consideration and balancing of all three Timberlane criteria, the court concludes that analysis under the Timberlane test supports the extraterritorial application of the Lanham Act to defendants' foreign sales.

#### Ruling

Applying the Vanity Fair and Timberlane tests, the court rules that the Lanham Act reaches extraterritorially to defendants' foreign sales. Therefore, the court finds defendants are not entitled to summary judgment on the Lanham Act claims to the extent that defendants challenge those claims on the ground the Act does not apply extraterritorially to their foreign sales.<sup>12</sup>

#### b. Lanham Act Claims Against Abitron Entities

Defendants also challenge the Lanham Act claims against the Abitron entities to the extent that they are based upon infringement of the "Hetronic" registered trademark. Defendants point out that plaintiff, to establish its claims, must show that the Abitron defendants used the trademark in commerce. However, defendants assert that the evidence shows that neither ABIG nor ABIA ever sold a product labeled "Hetronic." Rather, defendants claim the evidence shows that the Abitron entities [\*29] used the "Abitron" trademark in selling RRCs.

Plaintiff, in response, counters that the record evidence shows that the Abitron entities used the "Hetronic" name on their websites, in metatags, and email domains to sell their products. It points out that the Tenth Circuit, in Australian Gold, Inc. v. Hatfield, 436 F.3d 1228, 1239 (10th Cir. 2006), found that that sort of conduct constituted impermissible infringement. Plaintiff also asserts that ABIG and ABIA sold "Hetronic" parts under their own name, either by covering the "Hetronic" logo with an "Abitron" sticker or scratching the "Hetronic" logo off. This, plaintiff argues, constitutes reverse palming or passing off in violation of the Lanham Act.<sup>13</sup>

Upon review, the court finds that ABIG and ABIA are not entitled to summary judgment on the Lanham Act claims. Plaintiff has proffered evidence to raise a genuine issue of material fact as to whether the Abitron entities infringed on the "Hetronic" registered trademark by using it on their websites, placing it in website metatags and using it in email domains. See, Australian Gold, Inc., 436 F.3d at 1239 (defendants' unauthorized use of manufacturer's trademarks on websites and website metatags constituted infringement in violation of Lanham Act because it caused initial interest confusion for customers). [\*30]

The court also finds that plaintiff has proffered evidence sufficient to raise a genuine issue of material fact as to whether ABIG and ABIA violated section 43(a) of the Lanham Act<sup>14</sup> by placing "Abitron" stickers on previously

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<sup>12</sup> Defendants also appear to challenge extraterritorial application of Oklahoma unfair competition law to their foreign sales. This claim is alleged in Count 9 of the Second Amended Complaint. As defendants rely upon the same authorities to challenge that claim, the court, for the reasons already expressed, finds that defendants are not entitled to partial summary judgment on the common-law unfair competition claim.

<sup>13</sup> In its response, plaintiff claims that ABIG and ABIA sold products with the "Hetronic" trademark to Hydronic Handelsges m.b.H, another Fuchs' owned corporation. The evidence cited in support of the claim (doc. no. 260, ¶ 103), indicates that HG and HCEE sold the Hetronic-labeled parts to Hydronic Handelsges m.b.H.

<sup>14</sup> Section 43(a) precludes any person from using "any false designation of origin" which "is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person." 15 U.S.C. § 1125(a)(1)(A).

labeled "Hetronic" parts and products or carving the "Hetronic" label off and selling the parts and products as "Abitron" parts and products. See, [Arrow United Industries, Inc. v. Hugh Richards, Inc.](#), [678 F.2d 410, 415 \(6th Cir. 1982\)](#) (manufacturer which showed competitor reduced the size of manufacturer's standard product and affixed the competitor's own identifying mark on the result raised sufficiently serious questions going to the merits of a Lanham Act claim to make them fair ground for litigation).<sup>15</sup>

Accordingly, viewing the record evidence in a light most favorable to plaintiff, the court concludes that the Abitron entities, ABIG and ABIA, are not entitled to summary judgment on the Lanham Act claims.

#### c. Ownership of Trade Names and Trade Dress

Lastly, defendants challenge plaintiff's Lanham Act and Oklahoma counterpart claims, arguing that the plaintiff does not own the NOVA, ERGO, EURO, FE, GL, GR, HH, Mini, TG and Pocket products, their trade names and the trade dress. Defendants maintain that HG's predecessor, Hetronic Steuersysteme GmbH (HS), created all [\*31] products, except the Pocket, in the 1990s, prior to plaintiff's predecessor's existence, and the trade names and trade dress were later transferred from HS to Hetronic Deutschland (HD), HG's immediate predecessor. Defendants also maintain that one product, the Pocket, was developed in 2002, after plaintiff's predecessor, Hetronic International, Inc., came into existence, but they assert that that product was governed by the Research & Development Agreement signed by plaintiff's predecessor and HS. The Research & Development Agreement, defendants contend, provided that the trade names and know-how developed under that agreement belonged to HS. Defendants posit that HS also transferred the Pocket product, trade name and trade dress to HD. Although plaintiff purchased the assets of certain Hetronic companies in 2008, defendants contend that HD was not one of those companies. Defendants point out that the purchase agreement specifically excluded HD and its assets. In response to plaintiff's assertion that prior to its purchase of the Hetronic companies, the trade names and trade dress belonging to HD were transferred to plaintiff's predecessor, defendants argue that the transfer was purportedly [\*32] accomplished by a written document but that the only existing written documents addressing trademarks show that the Hetronic name was transferred, but trade names and trade dress were not. Defendants further contend that the trade names and trade dress possessed by HD were transferred to HG in 2010. Thus, defendants argue that there can be no Lanham Act claim based upon defendants' use of the NOVA, ERGO, FE, GL, GR, HH, Mini, TG and Pocket products.

In response, plaintiff contends that defendants are not entitled to summary judgment on the Lanham Act and Oklahoma counterpart claims on the ground of ownership. Plaintiff argues that the evidence shows that it owns all the relevant product marks and trade dress. According to plaintiff, defendants' first-to-use argument is irrelevant because the product marks and trade dress were transferred to plaintiff's predecessor prior to plaintiff's purchase of all the predecessor's assets. Plaintiff contends that by the time HD sold its assets, including intellectual property to HG, it did not have any intellectual property to sell. Further, plaintiff contends that defendants have waived any ownership rights or are estopped from challenging ownership [\*33] by operating as plaintiff's licensee.

Defendants, in reply, argue that plaintiff has not created any factual dispute as to ownership of the relevant trade names and accompanying trade dress. Defendants posit that the written assignment, on which plaintiff's relies to show the transfer of the trade names and trade dress to plaintiff's predecessor, transfers only the "Hetronic" name and nothing else. Defendants contend that under Tenth Circuit authority, the transfer of one trademark does not carry with it the transfer of another, unnamed trademark. Accordingly, defendants maintain that they are entitled to summary judgment on the Lanham Act and Oklahoma counterpart claims based upon plaintiff's lack of ownership.

The court has addressed the issue of ownership of the trade names and trade dress in adjudicating plaintiff's summary judgment motion. In so doing, the court has determined that genuine issues of material fact exist as to the ownership of the trade names and trade dress developed up until 2008. The court remains convinced that genuine

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<sup>15</sup> In response to plaintiff's summary judgment motion on the [section 43\(a\)](#) claim, defendants raise additional arguments to challenge the merits of the claim. Those grounds were not raised in support of defendants' motion, so the court declines to address those arguments here.

issues of material fact exist on the ownership issue. Hence, the court concludes that defendants are not entitled to summary judgment on the Lanham [\*34] Act and Oklahoma counterpart claims due to plaintiff's lack of ownership of the NOVA, ERGO, EURO, FE, GL, GR, HH, Mini, TG and Pocket trade names and trade dress.<sup>16</sup>

#### IV.

##### *Tort Claims*

###### a. Recovery of Attorneys' Fees

Plaintiff's claims against defendants include tort claims of conversion, aiding and abetting Rempe's breach of fiduciary duty, tortious interference with Rempe's employment agreement and civil conspiracy. Defendants represent that during discovery, plaintiff stated that the dollar amount of damages for these claims would be provided by plaintiff's expert. Defendants assert that the only damages calculated by plaintiff's expert is the attorneys' fees paid (\$5.4 million) in pursuing the civil action against Rempe, Hetronic International, Inc. v. Torsten Rempe, Case No. CIV-14-787-F.<sup>17</sup>

Defendants argue that plaintiff may not recover the attorneys' fees as damages for the conversion claim because the fees do not constitute collateral damages. Defendants maintain that to recover the fees, plaintiff must show that the Rempe action had to be filed to obtain relief from the conversion allegedly committed. According to defendants, plaintiff did not need to file the Rempe action for the alleged [\*35] conversion of the documents obtained by virtue of their access to the documents under the distribution agreements. They also argue that plaintiff did not need to file the Rempe action to recover the three documents allegedly stole by Rempe and sent to defendants. Defendants maintain that plaintiff could have obtained complete relief for the alleged conversion of documents by suing these defendants. They also point out that some of the claims alleged against Rempe, as well as counterclaims he filed, were based on conduct for which defendants are not responsible. Defendants further point out that the remedy plaintiff sought in the Rempe action was return of all documents Rempe improperly obtained from plaintiff and only three of those documents are the subject of the conversion claim in this action.

In addition, defendants assert that they are not responsible for the attorneys' fees under the tort theories alleged against Rempe because 23 O.S. § 15 requires plaintiff to recover *from Rempe* for the harm he caused. They assert that under § 15, there is no joint liability; there is only several liability. Consequently, defendants contend that plaintiff cannot recover the attorneys' fees as collateral [\*36] damages.

Plaintiff, in response, argues that its damages for the tort claims are not limited to attorneys' fees incurred in the Rempe action. According to plaintiff, its discovery response to Hetronic Germany GmbH's Interrogatory No. 22, as twice supplemented, details all damages it incurred. See, Ex. 163, attachment 2 to doc. no. 269, pp. 44-50. Plaintiff also points out that it seeks substantial injunctive and other relief in addition to monetary relief.

As to the attorneys' fees, plaintiff asserts that the fees are a permissible component of damages because the fees were caused by defendants' tortious conduct. It asserts that the tortious actions of defendants forced plaintiff to sue Rempe to protect plaintiff's business interests and mitigate future losses due to defendants' conduct. Plaintiff contends that all claims alleged against Rempe related to defendants' scheme to compete with it. Additionally, plaintiff contends that it need not prove the that Rempe action was required in order to obtain complete relief from defendants' wrong. Fees are recoverable under the collateral litigation rule, plaintiff asserts, if they were one of the elements of damages flowing from the original [\*37] wrongful act of defendants.

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<sup>16</sup> The court concludes that to the extent defendants are challenging the state-law unfair competition claim based upon the issue of ownership, defendants are likewise not entitled to partial summary judgment.

<sup>17</sup> Defendants' partial summary judgment record does not contain the paragraphs of plaintiff's expert's report which discuss the \$5.4 million attorneys' fees. See, Attachments 1 and 2 of doc. no. 263. Nonetheless, the referenced paragraphs of the report, ¶¶ 89-91, are in the court's record at Ex. 152, attachment 88 to doc. no. 261, p. 38, and there appears to be no dispute over the expert's statements.

Plaintiff further contends that its claim for fees is not based on the three documents Rempe emailed to defendants. Plaintiff contends that these documents were not the sole basis of plaintiff's claims against Rempe or for the conversion claim against defendants. According to plaintiff, it filed suit against Rempe to protect its interests and mitigate its damages stemming from defendants' misconduct, including tortious interference with Rempe's contract, aiding and abetting Rempe's breach of fiduciary duty, and conspiracy. Further, plaintiff argues that it is not precluded from recovering the attorneys' fees because a few of its allegations against Rempe did not stem from defendants' misconduct. Plaintiff asserts that the bulk of the lawsuit concerned defendants' misconduct and defendants' argument goes, at most, to the amount of damages that should be awarded and not liability. Finally, plaintiff argues that § 15 does not bar recovery of the fees because cases adjudicated since its enactment have continued to acknowledge the collateral litigation exception and the statute only eliminates joint liability for torts "based on fault," not intentional torts.

In reply, [\*38] defendants argue that despite plaintiff's statements, the only dollar amount of damages claimed by plaintiff for the four tort claims is the \$5.4 million of attorneys' fees from the Rempe action. Defendants assert that, although requested, plaintiff's discovery responses to Hetronic Germany GmbH's Interrogatory No. 22 never stated a dollar amount of its damages. Defendants state that in response to Abitron Germany GmbH's Interrogatory No. 22, see, Ex. 3, attachment no. 3 to doc. no. 262, p. 15, plaintiff represented that additional details and calculations for the damages would be provided by its expert, and the expert, in his report, set forth the \$5.4 million attorneys' fees as damages for the tort claims.

Defendants contend that § 15 destroys plaintiff's "collateral damages" theory. They also argue that, even if § 15 does not apply and joint liability still exists as argued by plaintiff, plaintiff can escape the American Rule's prohibition on recovery of attorney's fees only if it shows that it was compelled by defendants' misconduct to file the Rempe action. Defendants assert that if defendants and Rempe are jointly liable as plaintiff avers, then plaintiff was permitted to sue Rempe and [\*39] defendants separately. Separating the tort claims against "jointly" liable parties, defendants posit, does not make attorneys' fees recoverable and since there are no other damages claimed, defendants contend they are entitled to summary judgment.

Upon review, the court finds that defendants are not entitled to summary judgment on the tort claims based upon the relief sought by plaintiff.

Initially, it is not clear from the record, as defendants argue, that plaintiff is only seeking the \$5.4 million in attorneys' fees as relief. The court declines to rule at this stage that plaintiff cannot recover any damages other than the \$5.4 million in attorneys' fees if plaintiff's expert did not provide a dollar amount for all damages plaintiff referenced in response to Hetronic Germany GmbH's Interrogatory No. 22. (That may be a matter for another day.) Further, plaintiff seeks equitable relief in addition to monetary relief for the tort claims of conversion, aiding and abetting Rempe breach of fiduciary duty and tortious interference with Rempe's employment agreement. Defendants have not cited any authority to the effect that plaintiff cannot seek to recover the equitable relief it seeks under [\*40] these tort theories. See, "Wherefore" paragraphs of Count 10, Count 11 and Count 12 of the Second Amended Complaint, requesting "return of all Hetronic materials," "return all confidential Hetronic information and anything downloaded from H-Pro," "return all Hetronic information obtained from Rempe," and "permanently enjoining [defendants] from publicly disclosing or otherwise using Hetronic's confidential and proprietary information," and "enjoining [defendants or their successors] from assisting Rempe in his possessing, accessing, and using Hetronic's information."

To the extent that plaintiff intends to seek the \$5.4 million in attorneys' fees for the claims of aiding and abetting breach of fiduciary duty, tortious interference with employment contract, and civil conspiracy, the court concludes that the fees are recoverable.

At the outset, the court rejects defendants' argument that § 15 applies to the intentional tort claims. The court previously determined in Husky Ventures, Inc. v. B55 Investments, Ltd. and Christopher McArthur, Case No. CIV-15-93-F, that § 15 does not apply to a claim for tortious interference with contract and business relationships. In so doing, the court stated in [\*41] part:

Section 15 only applies when there is a "civil action based on fault and not arising out of contract." The "based on fault" qualification is stated twice in § 15, once in subsection (A) and once in subsection (C). "Fault" is not a concept generally understood as applying to intentional torts. See generally, *Graham v. Keuchel, 1993 OK 6, 847 P.2d 342, 361-362 (Okla. 1993)* (discussing fault in the context of negligence claims). The phrase "based on fault" must mean something. Clearly, the phrase is intended is to qualify the types of civil actions not arising out of contract, to which § 15 applies. The most logical interpretation of "based on fault," is that this phrase excludes from the coverage of § 15, claims like fraud, or intentional tort claims, which do not encompass the concept of degree of fault in the same way that, for example, negligence claims do. The tort of intentional interference with contracts or business relationships is an intentional tort which includes no concept of fault or degree of care. Tortious interference with business or contractual relationships is not a "a civil claim based on fault and not arising out of contract." As a result, the interference is not covered by § 15.

Doc. no. 279, p. 11. Applying the above analysis, the court also concludes that § 15 does not apply [\*42] to plaintiff's claims against defendants for aiding and abetting breach of fiduciary duty, tortious interference with employment contract and civil conspiracy. In the court's view, these torts are intentional torts which include no concept of fault or degree of care. Therefore, the court finds that § 15 does not preclude plaintiff from seeking to recover the \$5.4 million in attorney's fees.

Under Oklahoma law, attorneys' fees are generally not a proper element of damages. However, as stated by the Tenth Circuit, "where the wrongful acts of the defendant have involved the plaintiff in litigation with others, or have placed him in such relation with others as to make it necessary for him to incur attorney fees to protect his interests, attorney fees [are] recoverable in such cases as one of the elements of damages flowing from the original wrongful act of the defendant." *Hetric International, Inc. v. Rempe, 697 Fed. Appx. 589, 590 (10th Cir. 2017)* (quoting *Barnes v. Oklahoma Farm Bureau Mut. Ins. Co., 2000 OK 55, 11 P.3d 162, 181 (Okla. 2000)* (citing *Griffin v. Bredouw, 1966 OK 226, 420 P.2d 546, 547 (Okla. 1966)*). The Tenth Circuit also stated "[w]here the natural and proximate consequence of a wrongful act has been to involve plaintiff in litigation with others, there may, as a general rule, be a recovery in damages against the author of such act of the reasonable expenses incurred in such litigation, together [\*43] with compensation for attorney's fees." *Id.* (quoting *Sec. State Bank of Comanche v. W.R. Johnston & Co., 1951 OK 40, 204 Okla. 160, 228 P.2d 169, 173 (1951)*); see also, *Restatement (Second) of Torts, § 914* ("One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action.)

The court concludes that plaintiff has raised a genuine issue of material fact as to whether the Rempe action was a natural and proximate consequence of the wrongful acts of defendants which are the bases for the aiding and abetting breach of fiduciary duty, tortious interference with contract and civil conspiracy claims. Plaintiff claims that defendants enlisted Rempe's assistance and cooperation and conspired with him to illegally compete with plaintiff. It also claims that defendants sought and received confidential information from Rempe and paid him for consulting services. These wrongful acts, plaintiff asserts, forced it to sue Rempe, among other things, for breach of contract, breach of fiduciary duty and conspiracy to protect its business interests and mitigate future losses due to defendants' misconduct. [\*44] The court concludes that, viewing the evidence in a light most favorable to plaintiff, as the non-moving party, a reasonable jury could conclude that the alleged tortious conduct of defendants required plaintiff to sue Rempe to protect their business rights and mitigate its losses. Thus, the attorneys' fees expended in the Rempe action would be recoverable as damages for the aiding and abetting breach of fiduciary duty, tortious interference with contract and civil conspiracy claims.<sup>18</sup>

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<sup>18</sup>This leaves plaintiff in the position of suing, in this case, to recover more than \$5 million spent pursuing Rempe, to get what would appear to be an uncollectable judgment which included \$3.1 million in attorneys' fees incurred *in this case*. That claim will be measured by at least a minimal standard of reasonableness (see, doc. no. 211 in CIV-14-0787), to say nothing of the jury's consideration of whether that whole exercise made any sense in the first place. Without deciding, at this point, whether Rule 3.7 of the Oklahoma Rules of Professional Conduct (as adopted by this court) would preclude counsel of record in this case from testifying on the first issue (reasonableness of the fees — see, Rule 3.7 (a)(2)), it seems unlikely that counsel in this case would

As to defendants' challenge that plaintiff's attorneys' fees also consist of time spent pursuing wrongs by Rempe unrelated to this action, *i.e.*, dealings with TeleRadio or Genge & Thoma, the court agrees with plaintiff that this challenge goes to the amount of damages recoverable and not to the issue of whether attorneys' fees from the Rempe action themselves would be recoverable.

With respect to defendants' wrongful acts of conversion alleged in Count 10 of the Second Amended Complaint, the court is not convinced that plaintiff has raised a genuine issue of material fact on the question of whether the Rempe action was a natural and proximate consequence of those wrongful acts. In the court's [\*45] view, defendants' "possession" of the materials inconsistent with the rights of plaintiff did not require plaintiff to sue Rempe.<sup>19</sup> Those wrongful acts did not cause plaintiff to sue Rempe to protect its business rights or mitigate its losses. The court therefore concludes that plaintiff is not entitled to recover the \$5.4 million in attorneys' fees as damages on the conversion claim. Even though plaintiff may not recover the attorneys' fees as collateral damages, the court cannot conclude (as previously discussed) that plaintiff has no remedy for the alleged conversion. The court notes that plaintiff states, in response to Hetronic Germany GmbH's Interrogatory No. 22, that it may recover "the fair market value of the documents converted by defendants . . ." Ex. 163, attachment 2 to doc. no. 269, p. 50. Further, plaintiff seeks the return of all Hetronic materials. Accordingly, the court concludes that defendants are entitled to partial summary judgment determining that plaintiff is not entitled to recover, as a remedy for conversion, the \$5.4 million in attorneys' fees expended in the Rempe action. But that is as far in defendants' favor as this ruling goes. Defendants are not entitled [\*46] to partial summary judgment on the ground that plaintiff has no remedy for conversion and therefore cannot establish all the essential elements of the conversion claim.

b. Claims Against Abitron Entities

Defendants assert that it is unclear whether plaintiff is suing ABIG and ABIA, for conversion because the purported conversion occurred before the entities existed. However, defendants point out that the Second Amended Complaint alleges the claim against "the Fuch Companies," suggesting that they are included. Defendants initially contend that the claim is not actionable because the alleged conversion is of "confidential information," see, doc. no. 163, ¶ 254, which Rempe stole or wrongfully obtained, and conversion does not lie for intangible things like "information." Doc. no. 262, p. 62. Although plaintiff previously represented to the court in opposing defendants' dismissal motions that the conversion claim is based on tangible property, such as drawings, schematics and other documents, defendants maintain that the claim is not based upon defendants' possession of the physical items but rather their use of the information. Defendants point out that plaintiff, as part of its relief, [\*47] seeks to enjoin their "use" of the confidential information. Regardless, defendants argue that plaintiff cannot recover against the Abitron entities because conversion requires a taking of personal property and the alleged conversion (three emails sent by Rempe in February of 2014) occurred prior to their existence.

Defendants similarly argue that if the civil conspiracy claim is asserted against the Abitron entities, the claim is not actionable because the conspiracy is alleged to have occurred before the Abitron entities existed. Defendants state that the civil conspiracy claim requires a meeting of the minds on the conspiratorial object or course of action. Defendants point out that the "meeting of the minds" is alleged to have occurred while Rempe was employed by plaintiff and HG and HCEE were plaintiff's distributors. This all occurred, defendants assert, prior to the formation of the Abitron entities. Moreover, defendants contend that the alleged conspiracy was a conspiracy to compete against plaintiff and that the Abitron entities, not being under contract with plaintiff, were entitled to compete against plaintiff.

Plaintiff responds that its conversion claim encompasses much [\*48] more than the documents sent with the emails from Rempe. Plaintiff asserts that it has shown that defendants wrongfully took and retained possession of its

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be eligible to testify on the second issue (whether the whole exercise made any sense in the first place). The exceptions in Rule 3.7 would not appear to go that far.

<sup>19</sup> "Conversion is defined by Oklahoma law as any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his right therein." [American Biomedical Group, Inc. v. Techtrol, Inc., 2016 OK 55, 374 P.3d 820, 825 \(Okla. 2016\)](#) (quotation omitted).

documents, software, drawings, schematics and its RRC parts. It contends that after it terminated HG and HCEE as distributors and licensees, defendants retained materials, belonging to plaintiff, to which the companies had been afforded access because of the contractual relationship. Plaintiff asserts that the companies no longer had authority to sell materials with the "Hetronic" brand or to represent themselves as affiliated with "Hetronic." Plaintiff states that the companies, rather than returning the materials to plaintiff, sold some materials to Hydronic Handelsges mbh, another Fuchs company, and transferred others to the Abitron entities. The materials, plaintiff asserts, included drawings of every "Hetronic" part, and the Abitron entities still have access to those materials. Plaintiff argues that defendants have ignored the fact that as part of the relief requested, plaintiff seeks the return of all "Hetronic" materials, including, but not limited to, documents, software, drawings and equipment.

Plaintiff also contends that [\*49] the Abitron entities are liable for conversion because they improperly obtained and have retained the materials without plaintiff's consent. Moreover, it asserts that the Abitron entities are successors-in-interest making them liable for HG and HCEE's actions.

To the extent that the court concludes that the property defendants took from Hetronic and retained does not constitute tangible property, as required for a conversion claim, plaintiff urges the court to permit the claim to proceed as a claim for misappropriation of confidential business information. Plaintiff maintains that Oklahoma recognizes the tort of misappropriation of business information, a species of intangible property.

With respect to the conspiracy claim, plaintiff points out that courts have ruled that a party who joins an ongoing conspiracy may be held accountable for the acts or statements made prior to his entry into the conspiracy, if such acts or statements were made in furtherance of the conspiracy. Consequently, plaintiff asserts that the fact the conspiracy began before the Abitron entities existed is irrelevant to their liability. Plaintiff contends that the Abitron entities joined the conspiracy in 2014 [\*50] when they took over HG and HCEE's businesses and took steps to further the conspiracy to compete against plaintiff using Hetronic materials.

The court concludes that defendants have not demonstrated that they are entitled to partial summary judgment on the conversion claim against the Abitron entities. "Conversion is defined by Oklahoma law as any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his right therein." [American Biomedical Group, Inc. v. Techtrol, Inc., 2016 OK 55, 374 P.3d 820, 825 \(Okla. 2016\)](#) (quotation omitted). "This definition does not include intangible property." *Id.* "It does require that some form of wrongful possession or act of control over the property must occur." *Id.* (quotation omitted). "It is not necessary that the property wrongfully came into a party's possession, but only that the property was taken or appropriated without the owner's consent." *Id.* (emphasis in original). Further, "[i]t is the law in Oklahoma that where one converts personal property and sells it to another who has knowledge of the conversion, the two may be joined in an action for conversion." [State ex rel. Williams v. Neustadt, 149 F.2d 143, 145 \(10th Cir. 1945\)](#) (citing [Probst v. Bearman, 1919 OK 188, 76 Okla. 71, 183 P. 886, 888 \(Okla. 1919\)](#)).

After the termination of HG and HCEE's distribution agreements, the companies retained plaintiff's materials, including drawings, [\*51] schematics and other materials. Plaintiff has raised a genuine issue of material fact as to whether possession of those materials was wrongful. In addition, plaintiff has raised a genuine issue of material fact as to whether the Abitron entities had knowledge of the alleged conversion by their predecessors when they transferred plaintiff's materials to them.<sup>20</sup>

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<sup>20</sup> The court rejects defendants' argument that the conversion claim as pled is seeking relief based upon a conversion of intangible property. Although Count 10 refers to "confidential information," it also refers to defendants taking "possession" of "confidential information." This can include the drawings, schematics, documents and equipment which plaintiff refers. And although plaintiff does seek to enjoin the "use" of the confidential information, it also seeks the return of the materials.

Because the court concludes that there is evidence, viewed in plaintiff's favor, to support the conversion claim as pled, the court need not decide whether plaintiff's claim should be construed as a claim for misappropriation of confidential business information. The court notes, however, that the issue of whether plaintiff can maintain a conversion claim was originally raised by defendants in their challenge to the First Amended Complaint, and in seeking to file the Second Amended Complaint, plaintiff did not seek to include any misappropriation claim.

Turning to the civil conspiracy claim, the court finds that summary judgment is not appropriate. Plaintiff has cited law, which defendants have not challenged, for the proposition that if a party joins a conspiracy, however late, it becomes in law a party to the acts previously done by others in pursuance of the conspiracy. See, *Chemetron Corp. v. Business Funds*, 682 F.2d 1149, 1181 (5th Cir. 1982); see also, *UnitedHealth Group, Inc. v. Columbia Cas. Co.*, 836 F.Supp.2d 912, 920-21 (D. Minn. 2011). Viewing the evidence in a light most favorable to plaintiff, the court concludes that plaintiff has raised a genuine issue of material fact as to whether a conspiracy existed and as to whether the Abitron entities joined an ongoing conspiracy and then took steps to further it. Therefore, the court finds that defendants' motion as to the conspiracy claim against the Abitron entities should be denied.

V.

#### *Indemnity Claim*

"As a cautionary measure," see, doc. no. 262, ECF p. 65, defendants request [\*52] partial summary judgment on the "breach of indemnity claim," which defendants represent is addressed in plaintiff's expert's report but not alleged as a claim in the Second Amended Complaint. Defendants state that plaintiff's expert's report includes a claim of \$10,319,865 for indemnification under the license agreements. The Second Amended Complaint, defendants assert, does not mention "indemnity" and while it does mention the license agreements, it does not allege a breach of those agreements.

Plaintiff, in response, concedes that it has not brought a claim for breach of indemnity against defendants. It asserts that indemnity is a remedy, not a claim. According to plaintiff, the license agreements clearly entitle Hetronic to indemnification from HG and HCEE for the costs of this litigation, which centers on their misuse of the intellectual property licensed to them — such as improperly using the "Hetronic" mark both while the license agreements were in effect and after they were terminated. Plaintiff also contends that it is entitled to indemnification with respect to the OHIM suit challenging plaintiff's ownership of the "NOVA" trademark registration. Plaintiff asserts that its expert [\*53] "indicates [that] these damages are not from any purported breach of an indemnity obligation, but instead [are] due to Hetronic under the terms of the License Agreement."<sup>21</sup> Doc. no. 269, at 77 — 78. To the extent the court agrees with defendants, plaintiff states that it will file another action against HG and HCEE to have them comply with the indemnity obligations under the license agreements.

Upon review, the court concludes that defendants are entitled to partial summary judgment to the extent that plaintiff seeks to recover indemnification under the license agreements as a measure of damages from HG and HCEE. Although plaintiff asserts that the indemnification sought is a remedy and not a claim, plaintiff does not point to any of the alleged claims for which the indemnification remedy would be available. The Second Amended Complaint makes no mention of seeking indemnification from the defendant companies for the OHIM proceedings or this proceeding. The court therefore concludes that plaintiff is not entitled to seek indemnification under the license agreements in the amount of \$10,319,865 as a measure of damages with respect to any of the claims in this action. The court concludes [\*54] that defendants' motion should be granted as to the indemnification remedy for any of plaintiff's alleged claims.

VI.

#### *Conclusion*

Based upon the foregoing, All Defendants' Motion for Partial Summary Judgment (doc. no. 262) is **GRANTED in part** and **DENIED in part**.

The court determines, under the applicable *Rule 56* standards, that plaintiff is not entitled to seek, as a remedy for conversion, the \$5.4 million in attorneys' fees incurred in pursuing the civil action against its former President,

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<sup>21</sup> Whether this expert, or any other, will be permitted to opine on legal issues is a matter for another day.

Torsten Rempe, or to seek indemnification pursuant to the license agreements as a remedy with respect to any of its claims.

The motion is **DENIED** in all other respects.

IT IS SO ORDERED this 22nd day of March, 2019.

/s/ Stephen P. Friot

STEPHEN P. FRIOT

UNITED STATES DISTRICT JUDGE

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## Shire US, Inc. v. Allergan, Inc.

United States District Court for the District of New Jersey

March 22, 2019, Decided; March 22, 2019, Filed

Civil Action No. 17-7716 (JMV) (SCM)

### **Reporter**

375 F. Supp. 3d 538 \*; 2019 U.S. Dist. LEXIS 49837 \*\*; 2019-1 Trade Cas. (CCH) P80,716; 2019 WL 1349828

SHIRE US, INC., Plaintiff, v. ALLERGAN, INC., ALLERGAN SALES, LLC, and ALLERGAN USA, INC., Defendants.

**Prior History:** [Application for an Order Staying Discovery Shire US, Inc. v. Allergan, Inc., 2018 U.S. Dist. LEXIS 98259 \(D.N.J., June 8, 2018\)](#)

## **Core Terms**

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rebates, plans, formulary, alleges, bundled, products, supplier, patients, drugs, prescription drug, contracts, anticompetitive, antitrust, discounts, customers, anticompetitive conduct, Sherman Act, interchangeable, pharmacies, tortious interference, motion to dismiss, competitors, tape, transmissions, prices, pharmaceutical company, monopolization, negotiations, consisted, offering

**Counsel:** [\[\\*\\*1\]](#) For SHIRE US, INC., Plaintiff: ELINA SLAVIN, WILLIAM C. BATON, CHARLES MICHAEL LIZZA, SAUL EWING ARNSTEIN & LEHR LLP, NEWARK, NJ.

For ALLERGAN, INC., ALLERGAN SALES, LLC, ALLERGAN USA, INC., Defendants: LIZA M. WALSH, LEAD ATTORNEY, CHRISTINE INTROMASSO GANNON, JOSEPH L. LINARES, WALSH PIZZI O'REILLY FALANGA LLP, NEWARK, NJ.

**Judges:** John Michael Vazquez, United States District Judge.

**Opinion by:** John Michael Vazquez

## **Opinion**

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**[\*540]** This matter concerns antitrust allegations in the Medicare Part D ("Part D") prescription drug market. D.E. 64. Plaintiff, Shire US, Inc. ("Shire"), alleges that Defendants are engaged in an "ongoing, overarching, and interconnected scheme" to systematically block Plaintiff from competing with Defendants in the Part D prescription drug market for treatment of dry eye disease in violation of [Sections 1 and 2 of the Sherman Act](#) and state law. D.E. 64 ¶¶ 1, 25. Defendants consist of Allergan, Inc.; Allergan Sales, LLC; and Allergan USA, Inc. (collectively "Defendants" or "Allergan"). The present matter comes before the Court on Defendants' motion to dismiss Plaintiffs First Amended Complaint ("FAC") for failure to state a claim pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). D.E. 14. The Court reviewed all submissions<sup>1</sup> and held oral argument [\[\\*\\*2\]](#) on February 26, 2019. For the reasons that follow, Defendants' motion to dismiss is granted.

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<sup>1</sup> Plaintiff's First Amended Complaint is referred to as "FAC," D.E. 64. Defendants' moving brief is referred to as "Def. Br.," D.E. 14-1. Plaintiff's brief in opposition is referred to as "Pl. Opp'n," D.E. 31. Defendants' reply is referred to as "Def. Reply," D.E. 32.

## I. BACKGROUND<sup>2</sup>

Plaintiff Shire alleges that Allergan is coercing Part D prescription drug plans to effectively exclude Shire's superior dry eye disease ("DED") treatment drug from the market through a combination of anticompetitive bundling and exclusive dealing arrangements. FAC ¶ 1. DED occurs when the eye does not produce enough tears or when tears are not of the correct consistency. *Id.* ¶ 34. The disease is evidenced by inflammation and damage to the ocular surface, resulting in blurry or fluctuating vision and eye fatigue. *Id.* About one million Americans currently receive prescription drug treatment for DED. *Id.* ¶ 36.

### The Parties and Their Products

Shire and Allergan are competitors in the pharmaceutical industry. *Id.* Shire is a [\*541] New Jersey pharmaceutical company that develops, manufactures, markets, and distributes pharmaceutical products worldwide. *Id.* ¶ 26. Allergan is a Delaware pharmaceutical company that engages in research, development, manufacturing, sales, distribution, and marketing of specialty pharmaceutical products. *Id.* ¶ 30.

Both companies offer a prescription drug for the treatment [\*\*3] of DED. Shire offers Xiidra® and Allergan offers Restasis®. *Id.* ¶ 1. Xiidra and Restasis are the only FDA-approved prescription drugs on the market for treatment of DED. *Id.* ¶ 38. There are no reasonably available substitutes to treat DED. *Id.* ¶ 116. Over-the-counter treatments, such as artificial tears, are insufficient to treat the underlying inflammation that causes DED. *Id.*

The FDA approvals for Xiidra and Restasis are different in scope. *Id.* In July of 2016, the FDA approved Shire's Xiidra for treatment of both the symptoms and signs of DED. *Id.* ¶ 8. Clinical studies show that patients taking Xiidra experienced relief from DED symptoms of within as little as two weeks, and from underlying inflammatory conditions within six to twelve weeks. *Id.* ¶ 8. In contrast, the FDA has approved Restasis® only for treatment of a specific symptom of DED — reduced tear fluid volume — which affects only ten percent of those with DED. *Id.* ¶ 38. Restasis has been on the market for fifteen years, during which time patients have reported ocular burning from using the drug. *Id.* ¶¶ 1, 40. One study indicated that 23% of patients discontinued use of Restasis within three months of first using it and 43% [\*4] of patients stopped use within six months. *Id.* ¶ 40. Clinical studies reflect that it typically takes longer than six months for Restasis to become effective. *Id.* ¶ 40.

Given Xiidra's potential advantages over Restasis, it has been referred to by industry officials as a "big game changer." *Id.* ¶ 47. In the two years following its launch in 2016, Xiidra captured approximately 35% of the commercial DED market, and around 10% of the Part D DED market. *Id.* ¶ 122. Restasis maintains approximately 90% of the Part D DED market. *Id.* ¶ 131.

### The Part D DED Market

For purposes of its antitrust claims, Plaintiff identifies the Part D DED market as the relevant product market. *Id.* ¶ 115. Congress passed Medicare to provide affordable medical assistance to the elderly, and enacted Part D specifically as an optional outpatient prescription drug program for senior citizens to receive discounted and subsidized prescription drugs. *Id.* ¶¶ 50-53. Because DED is a condition that progresses with age, it

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Plaintiff's letter providing supplemental authority will be referred to as "Pl. Ltr., D.E. 48. Defendants' response to Plaintiff's letter will be referred to as "Def. Resp., D.E. 50.

<sup>2</sup> The facts are derived from Plaintiff's FAC. D.E. 64. When reviewing a motion to dismiss, the Court accepts as true all well-pleaded facts in the complaint. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). Additionally, a district court may consider "exhibits attached to the complaint and matters of public record" as well as "an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." *Pension Ben. Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

disproportionally affects the elderly. *Id.* ¶ 37. Prescriptions for DED treatment under Part D account for approximately 40% of all DED prescriptions.

Participants in Part D can choose from a variety of plans. **[\*\*5]** *Id.* ¶ 53. The list of drugs covered by a particular plan is called the plan's "formulary." *Id.* ¶ 54. Formularies offer drugs in a number of tiers that dictate the patient's copayment. *Id.* ¶ 61. Drugs with the lowest copayment are listed in the "preferred" tier, followed by the "non-preferred" tier. *Id.* ¶ 61. If a drug is not listed on a formulary, then it is considered "not covered" and the patient must either pay for the drug in full (at a price that is typically two to five times higher than that listed on the formulary) or have his or her physician file a successful appeal with the plan seeking an exception.<sup>3</sup> *Id.* **[\*542]** Hence, drugs not covered on formularies are faced with a competitive disadvantage in the Part D marketplace. *Id.* ¶ 64.

Plaintiff alleges that commercial prescription drug plans are not substitutes for Part D because individuals covered by Part D (individuals aged 65 and older or with permanent disabilities) receive lower premiums for a comprehensive list of prescription drugs. Thus, Part D participants have no need for traditional, commercial prescription drug plans. *Id.* ¶ 117. In fact, Plaintiff alleges that it, Defendants, and other industry participants recognize Part **[\*\*6]** D as its own independent market, often using different staff or hiring third parties to engage with Part D administrators. *Id.* ¶ 118. Plaintiff adds that the Part D administrators also treat the Part D DED market differently than any separate commercial business that they may engage in. *Id.* ¶ 120.

### The Alleged Anticompetitive Conduct

Plaintiff essentially alleges two forms of anticompetitive conduct by Defendants: anticompetitive bundling and exclusive dealing contracts. *Id.* ¶¶ 126-27. First, Plaintiff alleges that Defendants engaged in anticompetitive bundling by contracting with "Plan 1" and "Plan 2" to offer Restasis in a bundled portfolio of drugs at a price below its average variable cost. *Id.* ¶¶ 86, 91, 97. Second, Plaintiff alleges that Defendants engaged in an exclusive dealing contract with "Plan 3" whereby the plan is contractually barred from offering any other DED drug on its formulary for the foreseeable future. *Id.* ¶ 107.

A review of the seller-side of the Part D market is required to properly understand these claims. "Pharmaceutical companies negotiate annually with Part D plans to gain placement of their drugs on the plans' formularies for the coming year." *Id.* ¶ 68. The **[\*\*7]** negotiations usually begin around April of "the preceding plan year and culminate in August of the same year when the plans finalize their formularies for the coming year." *Id.* Certain Part D plans delegate their negotiation and selection process to administrators. *Id.* ¶ 72. For example, "several of the top ten Part D plans and many smaller ones use another top ten plan (Plan 3) to negotiate and administer their formulary coverage." *Id.* As a result, Plan 3 negotiates with pharmaceutical companies on behalf of numerous Part D plans. *Id.* Similarly, "[p]harmaceutical companies typically contract with third party agents to oversee negotiations with plans for placement of their drugs on the plans' formularies," often to "keep[] [their] dealings with Part D plans separate from [their] dealings for commercial business." *Id.* ¶ 71.

During these annual negotiations, a pharmaceutical company seeks to secure its drugs' preferential placement on the Part D plan's formulary by minimizing the Part D plan's costs in offering the drugs. *Id.* ¶ 69. Although pharmaceutical companies do not sell their drugs directly to Part D plans, Part D plans reimburse pharmacies for dispensing covered drugs to participants. **[\*\*8]** *Id.* ¶ 60. Therefore, to lower the plan's reimbursement expenses, pharmaceutical companies offer rebates and discounts to patients who acquire a prescription drug through a particular Part D plan. *Id.* ¶¶ 69-70. Pharmaceutical companies also offer price protection, meaning that if the price for their drug increases during the contractual term, rebates will also proportionally increase, ensuring that the plans do not incur any additional costs. *Id.* ¶ 70.

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<sup>3</sup> For a successful appeal, a physician must establish (i) failure of the drug listed on the formulary to effectively treat the patient's condition, or (ii) the patient's inability to tolerate the side effects or other problems caused by the drug listed on the formulary. *Id.* ¶¶ 63-65.

The top three plans in Part D are Plan [\*543] 1, Plan 2, and Plan 3.<sup>4</sup> About 70% of the Part D prescriptions for DED treatment are derived from the three plans. *Id.* ¶ 109. Despite Plaintiff's view that Xiidra is superior to Restasis, Plaintiff has been unable to secure a "preferred" position for Xiidra on any of the formularies of these plans. *Id.* ¶¶ 87-109. Plaintiff alleges that this is because Defendants have unlawfully engaged in (1) anticompetitive bundling with Plan 1 and Plan 2, and (2) improper exclusionary contracting with Plan 3.<sup>5</sup> *Id.* ¶¶ 86, 91, 97, 107.

Shire alleges that Allergan's technique of "bundling" rebates across its products, including Restasis, to secure exclusivity on top plans' formularies constitutes unlawful anticompetitive [\*\*9] conduct. *Id.* ¶ 148. Allergan offers a number of products in its Part D portfolio aside from Restasis. *Id.* ¶ 74. Among these other products are Lumigan®, Combigan®, and Alphagan P®. *Id.* The FDA approved Lumigan, Combigan, and Alphagan P for treatment of high eye pressure in patients with glaucoma or ocular tension. *Id.* ¶¶ 75-77. The FDA has not approved a generic substitute for any of these three drugs in the United States. *Id.* For the four quarters spanning from the third quarter of 2016 to the second quarter of 2017, the three glaucoma drugs accounted for almost \$750,000,000 of Allergan's sales in Part D plans. *Id.* ¶ 78. Restasis accounted for \$719,000,000 of Allergan's sales in Part D plans during this same period. *Id.* Thus, Plaintiff alleges that Allergan has "more than enough financial wherewithal" to offer Restasis to Part D plans "at an effective price that is below Allergan's average variable cost" and potentially even "for free" given the commercially advantageous positioning of Allergan's other offerings. *Id.*

Regarding Plan 1, which is responsible for nearly 25% of the Part D DED market, Plaintiff offered "substantial rebates and discounts" in attempts to have Xiidra placed [\*\*10] on the plan's formulary. *Id.* ¶ 89. In response, Plan 1 informed Plaintiff that any placement of Xiidra on its formulary would result in the loss of rebates from Allergan, stating that "[y]ou could give [Xiidra] to us for free, and the numbers still wouldn't work." *Id.* ¶ 89. Further, Plan 1 told Plaintiff that it would need Allergan's "permission" for Xiidra to be listed on the formulary. *Id.* ¶ 90. Plan 1 eventually listed Xiidra on its formulary but only in its "non-preferred" tier, resulting in copayments that are two to five times higher than if Xiidra was listed in the "preferred tier" with Restasis. *Id.* Plaintiff believes that if the plan's formulary included Xiidra in any capacity other than "non-preferred," Plan 1 would "lose the price protection, rebates, and discounts on the entirety of Allergan's Part D portfolio." *Id.* ¶ 91. Plaintiff alleges that '[t]his makes it impossible for Shire to offer discounts on Xiidra that compete with the bundled rebates provided by Allergan and keep Xiidra's price above its cost." *Id.*

Regarding Plan 2, which is responsible for over 11% of the Part D DED market, Plaintiff also offered "substantial rebates and discounts" to list Xiidra on its formulary. [\*\*11] [\*544] *Id.* ¶¶ 92-93. Plan 2 stated that listing Xiidra on its formulary would contractually cause Plan 2 to lose all of its "price protection" and "bundled rebates" from Allergan. *Id.* ¶ 93. Plan 2 added that it would need to first "check with Allergan and get its permission[.]" *Id.* ¶ 94. Nevertheless, the Centers for Medicare & Medicaid Services ("CMS"), who contract with Part D administrators, *id.* ¶ 53, later informed Plan 2 that it would have to offer Xiidra given its formulary classifications. *Id.* ¶ 94. Plan 2, however, only placed Xiidra on its formulary as "non-preferred" with prior authorization and "step through" requirements. This means that Plan 2 patients must first try Restasis and experience "failure" before Plan 2 will contribute towards their prescriptions for Xiidra. *Id.* ¶ 94. Additionally, the copay for Xiidra is still two to five times higher than if it was listed in the "preferred" tier. *Id.* ¶ 95. Plaintiff alleges that "[t]his makes it impossible for Shire to offer discounts on Xiidra that compete with the bundled rebates provided by Allergan and keep Xiidra's price above its cost." *Id.* ¶ 97.

Plaintiff alleges that Defendants had an exclusionary agreement with Plan 3. *Id.* [\*\*12] ¶ 107. Plan 3 is responsible for 34% of the Part D DED market. *Id.* ¶ 98. Plaintiff alleges that it met the pricing requirements that Plan 3 had

<sup>4</sup> As noted, Plan 3 actually refers to four separate top-ten plans that are negotiated jointly through one administrator. *Id.* ¶ 98. The FAC does not indicate whether Plan 1 and Plan 2 negotiate through an administrator or through their own representatives.

<sup>5</sup> Plaintiff does not attach the actual contracts between Allergan and these Part D plans but notes that "[a]greements of this nature are not available to the public and typically contain confidentiality provisions that prohibit their disclosure to anyone except the parties to the agreements." *Id.* ¶ 108. Therefore, Plaintiff drew on its own interactions with the Part D plans to form its factual allegations.

indicated would secure Xiidra's listing on Plan 3's formulary. *Id.* ¶ 100. Plan 3 confirmed that the offered pricing would "get it done" and that Plaintiff need not improve its offer. *Id.* ¶ 100. Plan 3 later retracted these statements, explaining that Xiidra could not be added to the formulary because it would create "too much disruption" as Allergan's contract with Plan 3 prohibited offering another DED treatment on the formulary. *Id.* ¶¶ 101-102. A "Shire executive" then asked Plan 3 how it could "get out" of this position in the future, to which Plan 3 responded, "you don't."<sup>6</sup> *Id.* ¶ 102. Therefore, Xiidra is "not covered" by Plan 3's formulary, requiring Plan 3 patients to pay two to five times more for Xiidra than if Xiidra was listed as a "preferred" drug on the formulary like Restasis. *Id.* ¶ 104. Plaintiff alleges that Defendants' agreement with Plan 3 prohibits the plan from contracting with Defendants' competitors (such as Plaintiff) beyond the one-year term, regardless of the offer that the competitor may make. *Id.* ¶ 107.

Plaintiff also [\*\*13] relies on a public statement by Allergan's CEO in mid-2017, stating that Allergan has "blocked" Plaintiff from the Part D DED market. *Id.* ¶ 14. Plaintiff continues that the financial terms (including discounts, rebates, and price protection) that Plaintiff offered the three Part D plans "far exceeded" the discount rates on Xiidra that Plaintiff successfully offered to commercial prescription drug plans. *Id.* ¶ 106. Thus, Plaintiff alleges that Allergan is engaged in an "overarching and interconnected scheme of anticompetitive tactics, which have successfully blocked Shire's access to the Part D market[.]" *Id.* ¶ 108.

Plaintiff alleges that Allergan's conduct will effectively deny or severely limit Part D beneficiaries' access to Xiidra, the only drug approved for the treatment of both the signs and symptoms of DED. *Id.* ¶ 136. Plaintiff asserts that Defendants' conduct forces Part D patients (i) to make higher copayments for Xiidra; (ii) to accept less value for their copayment because Restasis is inferior to Xiidra; and (iii) to incur higher costs for DED treatment by purchasing a topical steroid used in conjunction with Restasis treatment, which is unnecessary when using Xiidra. *Id.* [\*\*14] ¶ 137. Plaintiff continues [\*545] that it "will continue to lose millions of dollars in sales and profits from within the [Part D DED market]" as a result of Defendants' actions. *Id.* ¶ 151.

## II. PROCEDURAL HISTORY

Plaintiff filed its Complaint on October 2, 2017, alleging seven causes of action: (I) monopolization under the Sherman Act, [15 U.S.C. § 2](#); (II) attempted monopolization under the Sherman Act, [15 U.S.C. § 2](#); (III) agreements in restraint of trade under the [Sherman Act](#), [15 U.S.C. § 1](#); (IV) monopolization under the New Jersey Antitrust Act, [N.J.S. § 56:9-4](#); (V) attempted monopolization under the [New Jersey Antitrust Act](#), [N.J.S. § 56:9-4](#); (VI) agreements in restraint of trade under the New Jersey Antitrust Act, [N.J.S. § 56:9-3](#); and (VII) tortious interference with business relationships. Compl. ¶ 25. Defendants filed a motion to dismiss pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) on December 5, 2017. D.E. 14. Plaintiff filed opposition, D.E. 31, to which Defendants replied, D.E. 32. Plaintiff filed a letter of supplemental authority, D.E. 48, and Defendants responded, D.E. 50.

On September 28, 2018, Plaintiff sought leave to amend its Complaint for the sole purpose of including money damages in the relief sought. D.E. 55. Because the proposed amendment did not alter any of the substantive allegations [\*\*15] set forth in the original Complaint, the parties agreed that Defendants' pending motion to dismiss would apply to the FAC. See D.E. 58. On February 26, 2019, the Court held oral argument on the motion. D.E. 70.

## III. STANDARD OF REVIEW

[Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#) permits a defendant to move to dismiss a count for "failure to state a claim upon which relief can be granted[.]" To withstand a motion to dismiss under [Rule 12\(b\)\(6\)](#), a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." [Bell Atl. Corp. v. Twombly](#), [550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#). A complaint is plausible on its face when there is enough

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<sup>6</sup> Plaintiff does not identify who (by position) from Plan 3 made these statements. Similarly, Plaintiff does not indicate the position of the "Shire executive."

factual content "that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Although the plausibility standard "does not impose a probability requirement, it does require a pleading to show more than a sheer possibility that a defendant has acted unlawfully." *Connelly v. Lane Constr. Corp.*, 809 F.3d 780, 786 (3d Cir. 2016) (internal quotation marks and citations omitted). As a result, a plaintiff must "allege sufficient facts to raise a reasonable expectation that discovery will uncover proof of [his] claims." *Id. at 789*.

In evaluating the sufficiency of a complaint, a district court must accept all factual allegations in the complaint as true and draw all reasonable [\*\*16] inferences in favor of the plaintiff. *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008). A court, however, is "not compelled to accept unwarranted inferences, unsupported conclusions or legal conclusions disguised as factual allegations." *Baraka v. McGreevey*, 481 F.3d 187, 211 (3d Cir. 2007). If, after viewing the allegations in the complaint most favorable to the plaintiff, it appears that no relief could be granted under any set of facts consistent with the allegations, a court may dismiss the complaint for failure to state a claim. *DeFazio v. Leading Edge Recovery Sols.*, No. 10-2945, 2010 U.S. Dist. LEXIS 131357, 2010 WL 5146765, at \*1 (D.N.J. Dec. 13, 2010).

#### IV. ANALYSIS

Defendants argue that Plaintiff fails to plausibly plead a relevant product market and fails to sufficiently allege anticompetitive [\*546] conduct. Def. Br. at 2-5, 13-39. Because the antitrust claims fail, Defendants continue, so must the tortious interference claim. *Id.* at 39-40. Plaintiff responds that it has plausibly alleged the relevant market and anticompetitive conduct. Pl. Opp'n at 14-38. It adds that tortious interference can exist separate and apart from the alleged anticompetitive conduct. *Id.* at 38-40.

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. A Section 1 claim consists of two elements: [\*\*17] (1) "the plaintiff must show that the defendant was a party to a contract, combination . . . or conspiracy," and (2) "the plaintiff must show that the conspiracy . . . imposed an unreasonable restraint on trade." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 315 (3d Cir. 2010) (internal quotations omitted).

Section 2 of the Sherman Act prohibits "monopoliz[ing], or attempt[ing] to monopolize, or combin[ing] or conspir[ing] with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 2. Monopolization is demonstrated through "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1062 (3d Cir. 1978) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)). For attempted monopolization, a plaintiff must show that a defendant "(1) had specific intent to monopolize the relevant market, (2) engaged in anti-competitive or exclusionary conduct, and (3) possessed sufficient market power to come dangerously close to success." *Barr Labs., Inc. v. Abbott Labs.*, 978 F.2d 98, 112 (3d Cir. 1992); see also *Phila. Taxi Ass'n, Inc. v. Uber Techs., Inc.*, 886 F.3d 332, 339 (3d Cir.), cert. denied sub nom. *Phila. Taxi Ass'n, Inc. v. Uber Techs., Inc.*, 139 S. Ct. 211, 202 L. Ed. 2d 126 (2018).

Further, "the New Jersey Antitrust Act shall be construed in harmony with ruling judicial interpretations of comparable [\*\*18] federal antitrust statutes." *Eisai, Inc. v. Sanofi Aventis U.S., LLC*, 821 F.3d 394, 402 n.11 (3d Cir. 2016) (quoting *State v. N.J. Trade Waste Ass'n*, 96 N.J. 8, 19 (1984)), 472 A.2d 1050. Both parties agree on this point. Def. Br. at 12 n.6; Pl. Opp'n at 12-37. Therefore, the Court analyzes the antitrust claims pursuant to federal law.

In an antitrust matter, two markets must be defined: the relevant product market and the relevant geographic market. See [LePage's Inc. v. 3M, 324 F.3d 141, 146 \(3d Cir. 2003\)](#) (analyzing a [Section 2](#) claim); [Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 722-27 \(3d Cir. 1991\)](#) (analyzing a [Section 1](#) claim). Defendants contend that Plaintiff's relevant product market — the Medicare Part D DED market — is implausibly narrow. Def. Br. at 14. In support, Defendants argue that because Plaintiff is alleging *supplier* exclusion, the relevant product market must be defined from the *supplier's* perspective. *Id.* at 15. Defendants argue, as a result, that the relevant product market must include the commercial prescription insurance market. *Id.* at 22-23. Defendants also note that there is no allegation that Part D DED sales are essential to Shire's survival. *Id.* at 24.

[\*547] Plaintiff responds that the injury is both to Shire and Part D DED patients, therefore the relevant product market should also take into account the consumer's perspective. Pl. Opp'n at 14-15. Plaintiff also notes that from the supplier's perspective, suppliers treat the [\*19] Part D market independently from the commercial market, and practical indicia also demonstrate that the Part D market is distinct from the commercial market. *Id.* at 15-20.

The Third Circuit has not yet ruled on this issue, that is, the appropriate relevant product market when a supplier alleges that it has been improperly excluded. Although the matter is not free from doubt, the Court finds that under the circumstances alleged (that is, a supplier allegedly excluded from a market), the relevant product market consists of those to whom the supplier can sell unless special circumstances exist. As a result, Plaintiff's proposed relevant market — Medicare Part D — is not plausibly pled because it is too narrow. The proposed market fails to account for others, such as non-government payers, to whom Plaintiff can sell its product.

Before turning to the analysis of the relevant product market, the Court notes the overarching aim of [antitrust law](#) that permeates all aspects of the legal analysis: "[t]he purpose of the Sherman Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market." [Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 518 \(3d Cir. 1998\)](#) (quoting [Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 441 \(3d Cir. 1997\)](#)). Antitrust laws protect competition, not competitors, [\*20] and can relegate an entire class of competitors to "oblivion" unless consumers are also hurt by the lack of competition. *Id.* (citing [Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 494 \(3d Cir. 1992\)](#)).

Plaintiff points to [Brown Shoe Co. v. United States, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 \(1962\)](#), in support of its position. *Brown Shoe* concerned a proposed merger between two large manufacturers and retail sellers of shoes. *Id. at 296-97*. The government challenged the merger under [Section 7 of the Clayton Act](#), which addresses mergers that substantially lessen competition or tend to create a monopoly. *Id.* The Supreme Court discussed the analysis necessary in defining a relevant product market. *Id. at 325-28*. The majority explained that the "outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Id. at 325*. However, the Court in *Brown Shoe* noted that within a broad market, well-defined submarkets can also exist. *Id.* The Court stated that the boundaries of these submarkets depend on "practical indicia" such as "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized [\*21] vendors[]." *Id.* Applying these factors, the Supreme Court upheld the district court's finding that the distinct product markets in *Brown Shoe* were men's, women's, and children's shoes. *Id. at 326*.

In [United States v. Aetna Inc., 240 F. Supp. 3d 1, 8 \(D.D.C. 2017\)](#), another case on which Plaintiff relies, the district court was again faced with a government challenge pursuant to [Section 7](#) of the Clayton Act as to a proposed merger between Aetna and Humana. Aetna and Humana were two of the largest health insurance companies [\*548] in the country. *Id.* One issue that the court confronted was whether the relevant product market consisted of general Medicare or of the narrower Medicare Advantage. *Id. at 11-16*. Medicare is a baseline federal government health insurance program for seniors, while Medicare Advantage plans are private insurance programs offered to Medicare-eligible seniors that typically include a broader scope of coverage than that of traditional Medicare. *Id. at*

11-13.<sup>7</sup> Using the *Brown Shoe* factors, the *Aetna* court concluded that the relevant product market was the narrower Medicare Advantage. *Id. at 29*. The judge in *Aetna* recognized that the healthcare industry and related publications identified Medicare and Medicare Advantage as distinct markets. *Id. at 24*. Further, according to the trial judge, both [\*\*22] Aetna and Humana reported Medicare Advantage results separately in their annual financial reports. *Id.* The court in *Aetna* continued that both companies divided employees into Medicare Advantage-specific groups, used separate IT platforms for Medicare Advantage, and set pricing on a different track for Medicare Advantage. *Id.* The *Aetna* court recognized that "[e]vidence abounds of intense, local competition between Medicare Advantage plans" and therefore "the evidence tends to establish the existence of a market for the sale of individual Medicare Advantage plans."<sup>8</sup> *Id. at 29*.

As noted, the Third Circuit has not expressly addressed the issue before the Court. Yet, in *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494 (3d Cir. 1998), the Circuit engaged in a pertinent analysis as to determining a relevant product market. In *Brokerage Concepts*, "Gary's"<sup>9</sup> consisted of a small chain of pharmacies in Pennsylvania. *Id. at 501*. Defendant U.S. Healthcare, Inc., had a health maintenance organization ("HMO") as well as third-party administrator ("TPA") business, both run through its subsidiaries. *Id. at 501, 504*. A TPA is an organization that provides important services for employers who wish to self-insure for their health benefit insurance needs. *Id. at 504*. An HMO is a network of healthcare [\*\*23] providers (including doctors, hospitals, and pharmacies) in a geographic region that individuals can subscribe to in order to get reduced copayments for healthcare services within the network. *Id. at 505*. Under the defendant's HMO prescription purchase program, the HMO's subscribers selected one pharmacy from a network of providers; the subscribers could thereafter purchase their medications from the selected pharmacy for a small co-pay. *Id.* For participating pharmacies, the defendant's HMO paid "a set monthly amount based on the number of U.S. Healthcare subscribers designating that pharmacy[.]" and pharmacies wanted to be in the HMO network for financial reasons. *Id.*

In 1991, all of Gary's stores were approved providers in the defendant's HMO pharmacy network. *Id.* That same year, [\*549] Gary's decided to self-insure for its own employees' health benefits and was, therefore, in need of a TPA. *Id.* Instead of selecting the defendant's TPA, however, Gary's chose the plaintiff. *Id.* As a result, the defendant retaliated against Gary's in the HMO arena by conducting on-site audits, placing one store on a freeze for three months, and not processing an application for a new store. *Id. at 505-506*. Not surprisingly, Gary's [\*\*24] switched to the defendant's TPA. *Id.* The plaintiff sued the defendant for, among other things, a violation of Section 1 of the Sherman Act. *Id. at 507-08*. The plaintiffs theory of liability was that the defendant improperly used its market power in the HMO area to force Gary to switch to the defendant's TPA. *Id. at 508, 510*.<sup>10</sup>

To evaluate plaintiffs Section 1 claim, Chief Judge Becker explained that the court first had to define the relevant product and geographic markets. *Id. at 513*. As to the product market, the court in *Brokerage Concepts* indicated that "[t]he outer boundaries of a product market are determined by evaluating which products would be reasonably interchangeable by consumers for the same purpose." *Id.* (citations omitted). "Interchangeability implies that one product is roughly equivalent to another[.]" the Circuit observed, and "while there might be some degree of preference for the one over the other, either would work effectively." *Id.* (internal quotations and citations omitted).

<sup>7</sup> The *Aetna* court also had to determine whether the public exchanges under the **Affordable Care Act** could comprise a separate relevant market.

<sup>8</sup> The *Aetna* decision followed trial so that the district court had information not be available at the motion to dismiss state. For example, the court in *Aetna* considered econometric evidence indicating that a merger would substantially dampen competition in the Medicare Advantage market and evidence demonstrating how head-to-head competition in the Medicare Advantage market benefited consumers by lowering premiums and copays. *Id. at 33-45*.

<sup>9</sup> "Gary's" full name was Eagleville Pharmacy, Incorporated d/b/a I Got It at Gary's. *Brokerage Concepts, Inc.*, 140 F.3d at 501, 505.

<sup>10</sup> The plaintiff characterized the defendant's actions as a form of unlawful tying. *Id. at 508, 510*. Ultimately, the Third Circuit disagreed and found that the alleged conduct fell somewhere between a tying arrangement and reciprocal dealing. *Id. at 511*.

Chief Judge Becker continued that a measure of interchangeability is "cross elasticity of demand between the product itself and substitutes for it." *Id. at 513-14* (quoting *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 437 (3d Cir. 1997), which was quoting *Brown Shoe*, 370 U.S. at 325). "When there is cross-elasticity of demand between products in a [\*\*25] market, 'the rise in the price of a good within [the] relevant market would tend to create a greater demand for other like goods in that market.'" *Id. at 514* (quoting *Tunis Bros.*, 952 F.2d at 722).

The plaintiff argued that the relevant product market was a "single brand market[,] meaning only members of the defendant's HMO with prescription drug benefits. *Id.* The Circuit rejected the plaintiffs proposed market as too narrow. *Id.* Chief Judge Becker reasoned that the defendant HMO's members are interchangeable with members from other HMOs as well as uninsured persons who purchase prescription drugs. *Id.* The court in *Brokerage Concepts* found that the fact that pharmacies remained in the defendant's HMO network even when defendant lowered reimbursement amounts did not demonstrate a lack of cross-elasticity of demand. Critically, Chief Judge Becker indicated that the plaintiff's claim had to be analyzed from Gary's perspective and not from the viewpoint of the members of the defendant's HMO. *Id. at 515*; see also *id. at 514* ("Thus the issue is which products, if any, Gary's, the consumer, would find to be reasonably interchangeable with, or substitutable for, [the defendant's] members who purchase prescription drugs."). As noted, the Circuit concluded [\*\*26] that from Gary's perspective, the defendant's HMO members were interchangeable with uninsured persons who buy prescription drugs and other HMOs' members. *Id. at 514-15*.

Although the Third Circuit has not ruled on the pending issue, the Eighth Circuit has. In *Little Rock Cardiology Clinic PA v. Baptist Health*, 591 F.3d 591, 594 (8th Cir. 2009), the plaintiff started its own [\*550] hospital and alleged that defendant, the largest hospital company in the state, used its superior market power to force a large health insurance company to terminate its relationship with the plaintiff. The plaintiff sued for violations of *Section 1* and *Section 2* of the Sherman Act. *Id. at 595*.

The plaintiff defined the relevant product market as patients covered by private insurance, thereby excluding uninsured patients and patients covered by government insurance programs. *Id. at 596-97*. Relying in part on *Brokerage Concepts*, the Eighth Circuit rejected the plaintiff's proposed product market as unduly narrow. *Id.* The *Little Rock* court reasoned as follows:

[The plaintiff] argues that the product market should be limited to patients using private insurance because private insurance and government insurance—the other primary method of payment—are not reasonably interchangeable. *The trouble with this theory is that it analyzes the issue from the wrong side* [\*\*27] *of the transaction. It may be true that, from the patient's perspective, private insurance and Medicare/Medicaid are not reasonably interchangeable.* For a variety of reasons, including age and financial considerations, a person with private insurance may not qualify for these government programs. *But this lawsuit is not about the options available to patients, it is about the options available to shut-out cardiologists.*

*Id. at 597* (emphases added). The *Little Rock* court continued that the plaintiff's claims "boil down to the allegation that, due to [the defendant]'s allegedly unlawful actions, [the plaintiff] has access to fewer patients," therefore, "[t]he relevant question, then, is to whom might the cardiologists at [the plaintiff's hospital] potentially provide medical service?" *Id.* The Eight Circuit recognized that the plaintiff can provide service to patients "from either a government program such as Medicare or Medicaid, or from a private insurer." *Id.* (emphasis in original). Thus, the court concluded, "[p]atients able to pay their medical bill, regardless of the method of payment, are reasonably interchangeable *from the cardiologist's perspective*—the correct perspective from which to [\*\*28] analyze the issue in this case." *Id.* (emphasis added). The court in *Little Rock* emphasized that the key inquiry in shut-out supplier cases is to whom can the supplier sell its product. *Id.*<sup>11</sup>

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<sup>11</sup> The Third Circuit in *Federal Trade Commission v. Penn State Hershey Medical Center*, 838 F.3d 327, 339-41 (3d Cir. 2016), disagreed with the *Little Rock* court's analysis as to relevant geographic market. The Circuit explained that in determining the relevant geographic market, the *Little Rock* court (although not expressly), used the "Elzinga—Hogarty test," which "first, [looks to] the number of customers who come from outside the proposed market to purchase goods and services from inside of it, and, second, [looks to] the number of customers who reside inside the market but leave that market to purchase goods and services."

The First Circuit has reached the same conclusion. See [Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.](#), [373 F.3d 57, 67 \(1st Cir 2004\)](#) (explaining that "the concern in an ordinary exclusive dealing claim by a shut-out supplier is with the available market *for the supplier*" and "for Walgreens and Stop & Shop, their potential customers are presumptively *all* retail customers for prescription drugs—not just that smaller sub-group who are [\*551] insured or reimbursed." (emphasis in original)).

Certain courts have recognized that suppliers may nevertheless establish a special sub-group of buyers if the supplier shows that special circumstances exist. See, e.g., [Stop & Shop](#), [373 F.3d at 67](#) ("Conceivably . . . there might be some special circumstance that ma[kes] separate consideration of [a] sub-group appropriate[] [b]ut . . . there is no hint in this case."). As to health care insurance markets, at least one district court has indicated that special circumstances are met when a supplier can show that if it is shut out of a particular sub-market, the supplier's long-term viability is jeopardized. [\\*\\*29](#) See [Methodist Health Servs. Corp. v. OSF Healthcare Sys., No. 13-01054, 2015 U.S. Dist. LEXIS 37887, 2015 WL 1399229 \(C.D. Ill. Mar. 25, 2015\)](#). In *Methodist Health*, the plaintiff sued the defendant under [Section 1](#) and [Section 2](#) of the Sherman Act. [2015 U.S. Dist. LEXIS 37887, \[WL\] at \\*1](#). The parties were competing hospitals, but only the defendant provided certain essential medical services, such as tertiary pediatric services, Level 3 neonatal intensive care, and Level 1 trauma care. *Id.* The plaintiff alleged that the defendant used these exclusive services as leverage over commercial health insurers, claiming that the defendant threatened to withdraw from these commercial insurers' networks if the insurers included the plaintiff in their networks. [2015 U.S. Dist. LEXIS 37887, \[WL\] at \\*2](#). The plaintiff asserted that they needed the business of these commercial insurers to supplement the comparatively low payments from government insurers. [2015 U.S. Dist. LEXIS 37887, \[WL\] at \\*3](#).

The *Methodist Health* court, at the motion to dismiss stage, permitted the complaint to go forward although the plaintiff defined the relevant product market only as commercial payers, excluding government payers. [2015 U.S. Dist. LEXIS 37887, \[WL\] at \\*7](#). The district judge found that the plaintiff had adequately pled special circumstances; that is, the plaintiff alleged (and the defendant admitted) "that access to privately-insured patients is critical to a healthcare provider's long-term sustainability in light of [\\*\\*30](#) the comparatively low prices providers are required to charge patients covered by government plans for the same services—prices that, in certain cases, may be below cost." *Id.* (internal citations omitted). Later, at the summary judgment stage, the *Methodist Health* court found for the defendant. [Methodist Health Servs. Corp. v. OSF Healthcare Sys., No. 13-1054, 2016 U.S. Dist. LEXIS 136478, 2016 WL 5817176, at \\*9 \(C.D. Ill. Sept. 30, 2016\)](#), aff'd, [859 F.3d 408 \(7th Cir. 2017\)](#). Nevertheless, the court again reiterated that commercial and government payers are "not interchangeable from the perspective of a hospital" as "government payers pay significantly less than commercial payers" so much so that "payments from government insurers do not cover the providers' costs." *Id.* In other words, the *Methodist Health* court permitted the relevant product market to consist solely of commercial insurers due to special circumstances, that is, if the plaintiff relied solely on government insurance, the plaintiff may have gone out of business.

Turning to the matter at hand, the Court finds that when a supplier who is allegedly shut out of a market (or a substantial portion of the market), the relevant product market consists of all persons or entities to whom that supplier can reasonably sell unless special circumstances exist. As a result, Plaintiff's product market of [\\*\\*31](#) Medicare Part D is unduly narrow because it excludes others, notably commercial payers, to whom Plaintiff can sell Xiidra. Plaintiff also has not plausibly alleged special circumstances here. The Court therefore grants Defendants' motion to dismiss on this ground. This ruling follows the Eighth Circuit's decision in [Little Rock](#) and the First Circuit's ruling in [Stop & Shop](#). However, the ruling also finds [\\*552](#) support in the Third Circuit's [Brokerage Concepts](#) decision. There, the Circuit did not limit the relevant market to potential pharmacy customers from the defendant's HMO as the plaintiff had advocated. The Third Circuit found that the defendant's HMO members who purchase prescription drugs were interchangeable with members of other prescription plans and uninsured persons because the proper perspective was that of Gary's, the pharmacy chain in question.

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*Id. at 339-40.* The Circuit recognized that this test is "utilized in non-healthcare markets to define the relevant geographic market" and even "was once the preferred method to analyze the relevant geographic market," but "subsequent empirical research demonstrated that [it] resulted in overbroad markets with respect to hospitals." *Id.* Thus, the Circuit found this test to be "inconsistent" with the hypothetical monopolist test, its preferred test for determining the relevant geographic market. *Id. at 339.*

In other words, perspective is critical. In this case, the proper perspective is from the supplier's vantage point rather than the customer's view. For example, citing *Brown Shoe* and *Aetna*, Plaintiff places great emphasis on the fact it "separate[s]" its sales between commercial payers and government payers, e.g., FAC ¶ 118, and it does [\*\*32] plausibly plead this fact. In addition, the Court would be very surprised if Defendants did not do same. Putting aside price differentials, commercial and government health insurance entails different regulatory schemes. *Id.* ¶¶ 119-120. However, and critically, both *Brown Shoe* and *Aetna* dealt with potential mergers that were going to harm competition vis-a-vis consumers — not suppliers.<sup>12</sup> The same has not been alleged here, and the Court finds that Plaintiff's relevant product market is not plausibly pled.

### Anticompetitive Conduct

As noted, Plaintiff alleges two forms of anticompetitive conduct: Defendants' bundling agreements with Plans 1 and 2, as well as an exclusive dealing agreement with Plan 3. FAC ¶¶ 91, 97, 107. Defendants claim that their conduct is "nothing more than lawful competition on the merits," because (1) Defendants do not have monopoly power over their bundled glaucoma drugs; (2) Defendants' agreements with the plans are only for one-year; and (3) Defendants' combined pricing is not below the collective costs of the relevant drugs. Def. Br. at 25-39. Plaintiff responds that (1) Defendants have monopoly power over Restasis in the Part D market and do not [\*\*33] need to have monopoly power over any of the non-competing glaucoma drugs; (2) Plaintiff lacks comparable glaucoma drugs to compete with Defendants' Part D bundle; and (3) Defendants' one-year contracts can still be anticompetitive. Pl. Opp'n at 24-35.

The Third Circuit has reviewed numerous cases involving bundling agreements and exclusive dealing arrangements. E.g., *Eisai Inc. v. Sanofi Aventis U.S. LLC*, 821 F.3d 394 (3d Cir 2016); *ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir 2012); *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir 2003) (en banc); *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir 1978). *SmithKline* concerned cephalosporins, a class of antibiotics. *SmithKline*, 575 F.2d at 1059. Due to its patents, the defendant enjoyed a monopoly in the cephalosporin market for years. *Id.* In 1973, the plaintiff began selling Ancef, a cephalosporin that competed directly with the defendant's Kefzol. *Id.* In response, the defendant devised a revised marketing program so that if a purchaser bought three of the defendant's cephalosporins, the buyer received a 3% discount. *Id. at 1059-60*. The defendant's bundle included two cephalosporins, Keflin and Keflex, for which the defendant faced no market competition. *Id. at 1060-61*. As a result, the plaintiff had to offer a 16% to 35% discount on its one product, Ancef, to be able to compete with the [\*553] defendant's bundled rebate. *Id. at 1062*. Even with the plaintiff's competition, the defendant's market share had [\*\*34] only been reduced to 88.6% by 1975. *Id. at 1060*.

The plaintiff sued the defendant for a violation of Section 2 of the Sherman Act. *Id. at 1062*. The Third Circuit determined that the defendant's rebate programs insulated Kefzol from true price competition with Ancef. *Id. at 1065*. The *SmithKline* court found that "the act of willful acquisition and maintenance of monopoly power was brought about by linking products on which [the defendant] faced no competition [Keflin and Keflex] with a competitive product, Kefzol." *Id.* The Circuit continued that "[t]he result was to sell all three products on a non-competitive basis in what would have otherwise been a competitive market for Ancef and Kefzol" and that "[t]he effect of the [revised marketing program] was to force [the plaintiff] to pay rebates on one product, Ancef, equal to rebates paid by [the defendant] based on volume sales of three products." *Id.* Thus, the court in *SmithKline* concluded that the defendant's revised marketing plan "associate[d] [the defendant]'s legal monopolistic practices with an illegal activity that directly affected the price, supply, and demand of Kefzol and Ancef," thereby violating Section 2 of the Sherman Act. *Id.*

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<sup>12</sup> Thus, if the Court was confronted with a proposed merger of Plaintiff and Defendants, then the relevant product market might very well be Medicare Part D because the Court would be viewing the issue from the consumer's perspective. The consumer's perspective was the relevant viewpoint in both *Brown Shoe* and *Aetna*.

In *LePage's*, the defendant manufactured Scotch [\[\\*\\*35\]](#) tape and controlled over 90% of the transparent tape market. [324 F.3d at 141](#). The plaintiff entered the private label transparent tape market, meaning that it manufactured transparent tape sold under a retailer's name rather than under the plaintiff's name. *Id.* By 1992, the plaintiff's product accounted for 88% of the private label transparent tape market. *Id.* The defendant then decided to enter the same market. *Id.* The defendant instituted two programs, both consisting of bundled rebates, with major retailers. [Id. at 144-45](#). The products in the bundled rebates consisted of goods from over six of the defendant's product lines. [Id. at 154](#). The rebates were considerable and, importantly, if a retail customer failed to meet the target in any single product line, then it lost the entire rebate. *Id.* The plaintiff sued the defendant for violation of [Section 2](#) of the Sherman Act. [Id. at 145](#).

In evaluating the plaintiff's antitrust claims, the Third Circuit in *LePage's* discussed its earlier opinion in *SmithKline*, where it recognized that the gravamen of the defendant's [Section 2](#) violation was that the defendant "linked a product on which it faced competition *with products on which it faced no competition.*" [Id. at 156](#) (emphasis added) (citing *SmithKline*, [575 F.2d at 1065](#)). Similarly, the Circuit [\[\\*\\*36\]](#) recognized that in *LePage's*, the defendant's bundled rebates exploited its monopoly power over Scotch tape, as Scotch tape was indispensable to any retailer in the transparent tape market. *Id.* The court determined that the defendant thus "used its monopoly in transparent tape, backed by its considerable catalog of products, to squeeze out" the plaintiff from the private label transparent tape market. *Id.* The Circuit also concluded that the defendant's rebate programs were designed to have major retailers deal exclusively with the defendant, as the defendant set targets to force a retailer to either drop any non-Scotch products or lose the maximum rebate. [Id. at 159](#). The Circuit accordingly found the defendant in violation of [Section 2](#). *Id.*

More recently, in *ZF Meritor*, the relevant market was heavy duty ("HD") truck transmissions in North America. [696 F.3d at 263](#). There were only four direct purchasers, referred to as the Original Equipment Manufacturers ("OEMs"), of HD transmissions in North America. [Id. at 264](#). Truck buyers, the ultimate consumers [\[\\*554\]](#) of HD transmissions, could select the transmission and other components of their trucks from OEM catalogues called "data books." *Id.* Data books listed component choices as "standard" or "preferred/preferentially-priced," [\[\\*\\*37\]](#) with the latter being the lowest priced component in the data book among comparable products. *Id.* Data book placement was essential for success in the HD transmissions industry. *Id.*

The defendant was a monopolist in the market for HD transmissions in North America since the 1950s. *Id.* The plaintiff entered the market in 1989, and then joined a joint venture in 1999 to develop another competing transmission. *Id.* In response, the defendant entered into long-term agreements ("LTAs") with each OEM for at least a five-year duration that included a conditional rebate program. [Id. at 265](#). Under the conditional rebate programs, OEMs could only receive rebates if they purchased a specified percentage of their requirements from the defendant (a "market share penetration target"), generally anywhere from 87% to 97.5% of the OEMs' requirements. *Id.* The LTAs also required the OEMs to publish the defendant's product as the standard offering in their data books. *Id.* Moreover, two of the LTAs required OEMs to remove competitors' products from their data books completely. *Id.* Finally, the LTAs required the OEMs to "preferentially price" the defendant's transmissions against its competitors' products, which was [\[\\*\\*38\]](#) sometimes achieved by OEMs raising the price of a competitor's product. [Id. at 266](#).

After the defendant entered into the LTAs with the OEMs, the defendant imposed additional price penalties on customers who selected the plaintiff's product and urged OEMs to "force feed" the defendant's product to customers. [Id. at 267](#). Although the defendant's prices were generally lower than the plaintiff's prices, the defendant's prices were never below its costs. [Id. at 268](#). Due to the defendant's actions, the plaintiff's market share dropped to 8% by 2003 and then to 4% by 2005; ultimately the plaintiff went out of business in 2007. *Id.* The plaintiff sued the defendant pursuant to [Section 1](#) and [Section 2](#) of the Sherman Act as well as [Section 3](#) of the Clayton Act. *Id.*

The *ZF Meritor* court defined an exclusive dealing contract as an "an agreement in which a buyer agrees to purchase certain goods or services only from a particular seller for a certain period of time." [Id. at 270](#). The Third Circuit recognized that such agreements can be procompetitive, as they assure supply, price stability, outlets, investments, and planning. *Id.* Yet, the court in *ZF Meritor* also indicated that exclusive dealing arrangements can

be anticompetitive, especially when "one supplier of [\*39] goods or services unreasonably . . . deprive[s] other suppliers of a market for their goods." *Id.* Anticompetitive effects, the Circuit observed, is of "special concern when [the restraints are] imposed by a monopolist." *Id. at 271.*

The *ZF Meritor* court ruled that "[d]ue to the potentially procompetitive benefits of exclusive dealing agreements, their legality is judged under the rule of reason [test]." *Id.* Under the rule of reason test, the Third Circuit determined that "[t]he legality of an exclusive dealing arrangement depends on whether it will foreclose competition in such a substantial share of the relevant market so as to adversely affect competition." *Id.* (citing *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 328, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)). The Circuit explained that "[i]n other words, an exclusive dealing arrangement is unlawful only if the 'probable effect' of the arrangement is to substantially lessen competition, rather than merely disadvantage [\*555] rivals." *Id.* (citing *Tampa Elec. Co.*, 365 U.S. at 329). The *ZF Meritor* court indicated that the following factors are relevant in conducting the analysis: relative market power, substantial market foreclosure, contract duration, actual anticompetitive effects versus procompetitive effects, coercive behavior, and a customer's ability to terminate agreements. [\*\*\*40] *Id. at 271-72.*<sup>13</sup> The circuit noted that the presence of exclusive dealing is a threshold requirement. *Id. at 282.*

In applying the facts to this framework, the *ZF Meritor* court first explained that the plaintiff established exclusive dealing. *Id. at 282-84.* Although the LTAs did not expressly require exclusive dealing, the Circuit recognized that the LTAs' market penetration targets served, in effect, as mandatory purchase requirements. *Id. at 282.* The Third Circuit likened these agreements to the bundled rebates in *LePage's*, where no express exclusivity requirement existed, but the agreements were designed to, and did, operate as exclusive dealing agreements nonetheless. *Id.* (citing *LePage's*, 324 F.3d at 157-58). Additionally, the court in *ZF Meritor* recognized that exclusive dealing agreements typically cover 100% of the buyer's needs but that "partial" exclusive dealing can still be unlawful. *Id. at 283.* The *ZF Meritor* panel continued the LTAs, as partial exclusive dealing contracts, could be unlawful because there were only four OEMs, the defendant was a long dominant supplier, and the defendant entered into long-term agreements with each OEM covering 90% of the customer base. *Id.* The Circuit concluded that the plaintiff had met the threshold requirement [\*\*\*41] by pleading partial, de facto exclusive dealing arrangements. *Id. at 284.*

The *ZF Meritor* court then turned to market conditions, recognizing that "[e]xclusive dealing will generally only be unlawful where the market is highly concentrated, the defendant possesses significant market power, and there is some element of coercion present." *Id.* (citing *Tampa Elec. Co.*, 365 U.S. at 329). The Circuit recognized that HD transmissions are expensive to produce, must be modified by geographic region, and "must pass through the highly concentrated intermediate market in which the OEMs operate." *Id. at 285.* The court noted that other than the plaintiff, "no significant external supplier ha[d] entered the market for the [preceding] twenty years," as the market had "long been dominated" by the defendant. *Id. at 284.* Thus, the court in *ZF Meritor* found that the defendant had "leveraged its position as a supplier of necessary products to coerce the OEMs into entering into the LTAs" even though "many of the terms of the LTAs were unfavorable to the OEMs and their customers." *Id. at 285.* The Circuit recognized that "a monopolist may use its power to break the competitive mechanism and deprive customers of the ability to make a meaningful choice," and that the case before [\*\*\*42] it "involve[d] precisely the combination of factors" that resulted in "the rare [\*556] case in which exclusive dealing would pose a threat to competition." *Id.*

The court in *ZF Meritor* then examined the extent of market foreclosure, the length of the LTAs, and anticompetitive provisions in the agreements. *Id. at 286-87.* The Circuit recognized that the defendant foreclosed a significant portion of the market, as the defendant entered into a LTA with each of the four OEMs and essentially required them to purchase 80% to 97.5% of their requirements from the defendant. *Id. at 286.* The impact, the court noted,

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<sup>13</sup> The Circuit also discussed the price-cost test for predatory pricing, that is, "pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run." *Id. at 272* (quoting *Cargill, Inc. v. Monfort of Colo.*, 479 U.S. 104, 117, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)). The court in *ZF Meritor* noted that "Nile Supreme Court has expressed deep skepticism of predatory pricing claims." *Id.* Ultimately, the Circuit determined that the price-cost test was not the appropriate standard to apply because the plaintiff did not allege "that the price itself functioned as the exclusionary tool," and instead turned to a rule of reason analysis. *Id. at 281.* Here, Plaintiff has not plausibly pled predatory pricing, so the Court foregoes a price-cost analysis.

was that the plaintiff's overall market share dropped, from 8-14% in 2003, to 4% in 2005. *Id.* The *ZF Meritor* court also observed that the LTAs were not short-term agreements. *Id. at 287*. The Circuit noted that courts have found agreements for under a year to be presumptively lawful and agreements for one to two years to be lawful under certain circumstances. *Id. at 286-87*. Although long-term exclusive dealing contracts are not per se unlawful, the *ZF Meritor* court found that the defendant's five-year exclusive dealing contracts with all four OEMs to secure over 85% of the market were "unprecedented." *Id.* Finally, the Circuit recognized [\*\*43] that "the LTAs were replete with provisions that a reasonable jury could find anticompetitive," recognizing that defendant's provisions barring certain competitors' products from being listed in the OEMs' data books as a "disaster" for the competitors. *Id. at 287*. The *ZF Meritor* court concluded that "there was more than sufficient evidence for a jury to conclude that the cumulative effect of [the defendant]'s conduct was to adversely affect competition." *Id. at 289*.

In *Eisai*, the defendant sold Lovenox, an injectable anticoagulant drug, since 1993. *Eisai*, 821 F.3d at 399. In 2005, the plaintiff purchased a license to sell Fragmin, a competing injectable anticoagulant drug. *Id.* The relevant product market consisted of two other injectable anticoagulant drugs available in the United States from 2005 to 2010. *Id.* Lovenox had the largest market share at 81.5% to 92.3%, and Fragmin had the second largest at 4.3% to 8.2%. *Id.* United States hospitals used group purchasing organizations ("GPOs") to negotiate their drug contracts. *Id. at 400*. The defendant offered the GPOs a program where hospitals received price discounts based on the volume of Lovenox purchased in comparison to other competing drugs. *Id.* If purchases of Lovenox were under 75% [\*\*44] of total anticoagulant purchases, hospitals only received a flat 1% discount. *Id.* Yet, as the percentage of Lovenox increased, hospitals received discounts ranging from 9% to 30%. *Id.* The program also included a formulary access clause that limited a hospital's ability to give competing drugs priority status on its formularies. *Id.*

The plaintiff sued the defendant for violations of [Section 1](#) and [Section 2](#) of the Sherman Act, [Section 3](#) of the Clayton Act, and sections of the New Jersey Antitrust Act. *Id. at 401*. The district court granted summary judgment for the defendant. *Id.* On appeal, the *Eisai* court again recognized that exclusive dealing contracts can have procompetitive benefits such as a consistent supply and price stability, but under the rule of reason, such contracts are unlawful when "the 'probable effect' of the arrangement is to substantially lessen competition, rather than merely disadvantage rivals." *Id. at 403*.

The Third Circuit reviewed its past decisions in *LePage's* and *ZF Meritor*. *Id. at 404-07*. The Circuit described its decision in *LePage's*, in light of *ZF Meritor*, as a matter in which a single-product producer is excluded through a bundled rebate program offered by a producer of multiple products, with the rebates conditioned on purchases across [\*\*45] the multiple product [\*557] lines. *Id. at 405*. The *Eisai* court found the decision in *LePage's* inapposite because nothing in the record indicated that "an equally efficient competitor was unable to compete" with the defendant. *Id. at 406*. The court in *Eisai* also distinguished *ZF Meritor* where noncompliance with the dominant manufacturer's agreements "would jeopardize the [customer's] relations with the dominant manufacturer" and potentially cut off the customer's supply. *Id.* By comparison, in *Eisai*, even if a GPO chose to terminate the defendant's agreement in its entirety, "it could still obtain Lovenox at the wholesale price," it would simply forgo the 1% discount. *Id.* The court in *Eisai* also explained that contracting with "a few dozen hospitals out of almost 6,000 in the United States is not enough to demonstrate 'substantial foreclosure'—particularly, if the reason a hospital did not change to Fragmin was due to price, i.e., the loss of the discounts offered by the Program." *Id. at 404*. Finally, the *Eisai* court noted that the only example of an anticompetitive effect was a price increase in the defendant's drug, but the increase was consistent with the overall market. *Id. at 407*. Therefore, *Eisai* court upheld the district court's [\*\*46] grant of summary judgment for the defendant. *Id. at 408*.

This Court makes a few observations in light of the foregoing cases. At the outset, neither bundled rebates nor exclusive dealing contracts are inherently anticompetitive. In fact, both can be procompetitive and potential anticompetitive effects are subject to a fact-sensitive analysis. One example of anticompetitive conduct, as discussed in *SmithKline*, occurs when a defendant offers a bundled rebate in which it links the competitive product with a product over which the defendant has a monopoly. Here, Plaintiff has not alleged that Defendants have a

monopoly over the glaucoma drugs<sup>14</sup> which it bundles with Restasis, the product competing with Plaintiff's Xiidra. As a result, *SmithKline* does not support Plaintiff's position.

A second scenario was discussed in *Lepage's*, which offered a variation on *SmithKline*. In both cases, the defendant tied its bundled rebate to a product over which it had a monopoly. However, in *LePage's*, the defendant went further and linked its bundled rebate to several product lines. The plaintiff, however, did not have competing product lines with which it could link its private label transparent tape. Here, as noted, [\*\*47] Plaintiff has not plausibly alleged that Defendants have a monopoly over their bundled glaucoma drugs. Moreover, Plaintiff — a large pharmaceutical company — has also not asserted that it did not have other available products that it could offer Plan 1 or Plan 2 as part of a bundled rebate. *LePage's*, therefore, also does not support Plaintiff's position.

Additionally, Plaintiff does not find relief pursuant to *ZF Meritor*. *ZF Meritor* dealt with a highly concentrated market, HD transmissions, that had significant barriers to entry. Plaintiff has not made similar allegations concerning the pharmaceutical drug market in which it operates. Moreover, because the market in *ZF Meritor* was so highly-concentrated and because the defendant had been dominant in the market for decades, the OEMs had to have access to the defendant's products. No similar allegation has been made here as to Restasis; that is, Plaintiff has not asserted that either government or commercial payers must have Restasis (or other Defendant products).

[\*558] More importantly, *ZF Meritor* involved contracts that were at least five years in length. The contracts at issue here are for one year and are open to competitive bidding on an [\*\*48] annual basis. FAC ¶ 68. As the Third Circuit observed in *ZF Meritor*, short-term agreements present little threat to competition. *ZF Meritor*, 696 F.3d at 286 (citing cases where courts found that contracts under one-year in duration are presumptively lawful and contracts for one to two years are lawful). Plaintiff relies on an unnamed person from Plan 3 indicating, in response to Plaintiff's inquiry as to how to compete with Defendants moving forward, that "you don't." FAC ¶ 102. This statement supports Plaintiff's position, but it is not sufficient to carry Plaintiff's plausibility burden. Plaintiff does not indicate who within Plan 3 made the statement, so it is not clear that the speaker had authority to make such a broad pronouncement for Plan 3. Moreover, the statement can be interpreted as business posturing for future negotiations. Most importantly, the statement only pertains to Plan 3 — it fails to account for future dealings with Plans 1 and 2.

In sum, Plaintiff has not plausibly pled the requisite anticompetitive conduct. For this independent reason, the motion to dismiss is granted.

### Tortious Interference

Defendants argue that because Plaintiff's tortious interference count is premised on the alleged [\*\*49] anticompetitive conduct, and because the Plaintiff's anticompetitive conduct is not plausibly pled, the tortious interference count must also be dismissed. Def. Br. at 40. Plaintiff replies that tortious interference can encompass conduct broader than anticompetitive behavior; thus, its claim may stand even if the Court grants Defendants' motion to dismiss as to the antitrust allegations. Pl. Opp'n at 39-40.

Under New Jersey law, tortious interference has four elements: "(1) a reasonable expectation of economic advantage to plaintiff, (2) interference done intentionally and with 'malice,' (3) causal connection between the interference and the loss of prospective gain, and (4) actual damages." *Varrallo v. Hammond Inc.*, 94 F.3d 842, 848 (3d Cir. 1996) (citing *Printing Mart—Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 563 A.2d 31 (1989)). The Court agrees with Plaintiff that, as a matter of law, tortious interference can cover wrongful conduct other than antitrust activity. However, as pled, the only improper conduct on which Plaintiff bases its claim for tortious interference is Defendants' alleged anticompetitive activity. FAC ¶¶ 200-208. As a result, because the Court is dismissing Plaintiff's antitrust counts, it also dismisses Plaintiff's tortious interference count.

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<sup>14</sup> By monopoly, the Court means that Plaintiff has not alleged that Defendants' glaucoma drugs do not face competition from a comparable substitute.

## V. CONCLUSION

In sum, the Court grants **[\*\*50]** Defendants' motion to dismiss Plaintiff's First Amended Complaint, D.E. 14. The Court dismisses all counts without prejudice. Plaintiff has thirty (30) days to file a second amended complaint, if it so chooses, consistent with this Opinion. If Plaintiff fails to file a second amended complaint, the dismissal of Plaintiff's counts will be with prejudice. An appropriate Order accompanies this Opinion.

Date: March 22, 2019

/s/ John Michael Vazquez

John Michael Vazquez, J.S.D.J.

## ORDER

### John Michael Vazquez, U.S.D.J.

For the reasons expressed in the accompanying Opinion, and for good cause shown,

**IT IS** on this 22th day of March, 2019,

**ORDERED** that Defendants' motion to dismiss, D.E. 14, Plaintiff's First Amended Complaint, D.E. 64, pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) for failure to state a claim is **GRANTED without prejudice**; and it is further

**ORDERED** that Plaintiff has thirty (30) days to file a second amended complaint, if it so chooses, consistent with the accompanying Opinion. If Plaintiff fails to file a second amended complaint within thirty (30) days, the dismissal of Plaintiff's counts will be with prejudice.

/s/ John Michael Vazquez

John Michael Vazquez, J.S.D.J.

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## Walgreen Co. v. Johnson & Johnson

United States District Court for the Eastern District of Pennsylvania

March 25, 2019, Decided; March 25, 2019, Filed

CIVIL ACTION No. 18-2357

**Reporter**

375 F. Supp. 3d 616 \*; 2019 U.S. Dist. LEXIS 50206 \*\*; 2019-1 Trade Cas. (CCH) P80,715; 2019 WL 1382765

WALGREEN CO., et al., Plaintiffs, v. JOHNSON & JOHNSON, et al., Defendants.

**Subsequent History:** Reversed by, Remanded by [Walgreen Co v. Johnson & Johnson, 2020 U.S. App. LEXIS 5336 \(3d Cir. Pa., Feb. 21, 2020\)](#)

**Prior History:** [In re Remicade Antitrust Litig., 2018 U.S. Dist. LEXIS 10290 \(E.D. Pa., Jan. 22, 2018\)](#)

## **Core Terms**

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provisions, anti-assignment, rights, antitrust claim, Wholesalers, assign, non-assignment, purchases, void, antitrust, parties, summary judgment, purported assignment, distributor, manifested, affiliate, federal common law, obligations, encompass, cause of action, statutory cause of action, summary judgment motion, contracting parties, statutory claim, contractual, overcharges, indirect, prior written consent, genuine dispute, contracts

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**Judges:** J. CURTIS JOYNER, J.

**Opinion by:** J. CURTIS JOYNER

## **Opinion**

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[\[\\*618\] MEMORANDUM](#)

JOYNER, J.

Before the Court are Defendants' Motion for Summary Judgment (Doc. No. 50), Plaintiffs' Opposition thereto (Doc. No. 54), [\*\*2] Defendants' Reply in Support thereof (Doc. No. 56), and Plaintiffs' Sur-reply thereto (Doc. No. 57). For the reasons set forth below, we grant Defendants' Motion.

This case arises from Plaintiffs' Walgreen Co. and The Kroger Co. ("Retailer Plaintiffs") allegations that Defendants Johnson & Johnson and Janssen Biotech, Inc. (collectively "Janssen") ("J&J") violated federal antitrust laws through an anticompetitive scheme to exclude competition, maintain a monopoly over, and artificially inflate prices for Defendants' biologic infliximab drug, Remicade. Pl. Comp. ¶1. These allegations stem from facts set forth in this Court's Memorandums denying J&J's motion to dismiss Pfizer's complaint and denying in part J&J's motion to dismiss Direct and Indirect Purchasers' amended complaints. See Pfizer [\*619] Inc. v. Johnson & Johnson, 333 F. Supp. 3d 494, 2018 U.S. Dist. LEXIS 135261 (E.D. Pa. 2018); Doc. No. 58. See Direct and Indirect Purchasers v. Johnson & Johnson, No. 17-cv-04326 and No. 18-cv-00303. In the instant case, Plaintiffs, indirect purchasers, allege that inflated prices for Remicade were passed on to them as overcharges on their purchases of the drug from pharmaceutical wholesalers ("Wholesalers"), AmerisourceBergen Drug Corporation [\*\*3] and Cardinal Health, Inc. Wholesalers purportedly assigned to Plaintiffs their "rights" under their distributor agreements with JOM Pharmaceutical Services, Inc., a subsidiary of J&J.

At the heart of the dispute here is Defendants' argument that Plaintiffs lack antitrust standing because Wholesalers' purported assignment of "rights" under the Agreements was void pursuant to an anti-assignment provision. Plaintiffs maintain that their antitrust claims are not encompassed by the purported assignments, and may proceed.

## I. Factual Background

The following facts are undisputed: Defendants manufacture and market Remicade. (Pl. Resp. to Def. Stmt. Facts at ¶2, Doc. No. 54-1). Plaintiffs purchase Remicade from AmerisourceBergen Drug Corporation ("Amerisource") and from Cardinal Health, Inc. ("Cardinal"), pharmaceutical wholesalers who purchase Remicade directly from Defendants. Id. at ¶5. Wholesalers' direct purchases of Remicade are governed by Distribution Agreements (together, "the Agreements") with JOM Pharmaceutical Services, Inc. ("JOM"). Id. at ¶6. The Agreements are governed by New Jersey law. Id. Section 4.4 of the Agreements between Wholesalers and Defendants each includes a non-assignment provision [\*\*4] containing the following language:

Except as provided in this section, neither party may assign, directly or indirectly, this agreement or any of its rights or obligations under this agreement, either voluntarily or involuntarily (whether by merger, acquisition, consolidation, dissolution, operation of law, change of control or otherwise), without prior written consent of the other party. . . . Any purported assignment in violation of this section will be void.

Def. Br. Exs. A and B, Doc. 50-3.

On January 23, 2018, Wholesalers purportedly assigned their claims against Defendants over alleged overcharges for Remicade to Plaintiffs. (Pl. Resp. to Def. Stmt. Facts at ¶10, Doc. No. 54-1 at 3). The purported assignment agreements stated, "[Amerisource] hereby conveys, assigns and transfers to Walgreens all of its rights, title and interest in and to all Direct Purchaser Claims it may have against Defendants under the antitrust laws of the United States." "[Cardinal] hereby conveys, assigns and transfers to Kroger all of its rights, title and interest in and to all Direct Purchaser Claims it may have against Defendants under the antitrust laws of the United States." Id.; See Def. Br. Exs. C [\*\*5] and D.

On June 6, 2018, Plaintiffs filed the underlying action against Defendants. See Pl. Compl., Doc. No. 1. Plaintiffs' complaint asserts federal antitrust claims purportedly assigned to them by Wholesalers, in addition to asserting claims on their own behalf. (Pl. Resp. to Def. Stmt. Facts at ¶12, Doc. No. 54-1). On December 7, 2018, this Court denied Defendants' motion to dismiss Plaintiffs' direct purchaser antitrust claims (those that do not depend on assignments from Wholesalers). See Doc. No. 48, fn 2. Now, Plaintiffs concede that "their purchases of Remicade were indirect" and that any purchases not covered by a purported assignment "will not be [\*620] included in [their] damages model." Pl. Opp. at 54.

In our December 7th, 2018 Order we also converted Defendants' motion to dismiss Plaintiffs' indirect purchaser antitrust claims (Doc. No. 36) into a summary judgment proceeding, pursuant to the Third Circuit's direction that "[i]f matters outside the bounds of the complaint are considered by the district court, the merits of the claim must be tested by way of motion for summary judgment." *JM Mech. Corp. v. United States*, 716 F.2d 190, 197 (3d Cir. 1983). The instant motion for summary judgment is fully briefed and ripe for the Court's adjudication, [\*\*6] now that Plaintiffs have been afforded "a reasonable opportunity to present all material" pertinent under *Fed. R. Civ. P. 56*. See Doc. No. 48.

## II. LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. New Jersey law, which we find applicable to the issue of non-assignment provisions in the distributor Agreements in this case, instructs that "interpretation or construction of a contract is usually a legal question for the court, 'suitable for a decision on a motion for summary judgment.'" *Driscoll Const. Co. v. State Dep't of Transp.*, 371 N.J. Super. 304, 853 A.2d 270, 276 (N.J. App. Div. 2004) (citation omitted).

"As to materiality. . . .[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). For a dispute about a material fact to be "genuine," the evidence must be "such that a reasonable jury" could find for the nonmovant. *In re Tribune Media Co.*, 902 F.3d 384, 392 (3d Cir. 2018) (citing *Anderson*, 477 U.S. at 248). To survive summary judgment, the party opposing it "must set forth specific facts" "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250 (citing *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 288-289, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)). At summary judgment we view the evidence [\*\*7] "in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962)).

## III. DISCUSSION

Defendants, J&J, assert four arguments for summary judgment. First, Defendants argue that they are parties to the Agreements. Second, Defendants argue that the anti-assignment provisions in the Agreements encompass Plaintiffs' statutory antitrust claims. Third, Defendants argue that the anti-assignment provisions are enforceable under New Jersey law. Fourth, Defendants argue that Wholesalers' assignments to Plaintiffs are void because they were made without Defendants' consent, thereby violating the clear and specific anti-assignment provisions. In sum, Defendants argue that Plaintiffs are barred from asserting an antitrust cause of action because these statutory claims would not exist but for the void assignments. Plaintiffs oppose summary judgment on three grounds: first, that Defendants are not parties to the Agreements; second, that Plaintiffs' antitrust claims are outside the scope of the Agreements; and third, that even if the Wholesalers' assignments violated the anti-assignment provisions, [\*\*621] federal common law allowing for valid assignment of antitrust claims should preempt state law enforcing [\*\*8] anti-assignment provisions.

### A. Whether Defendants are Parties to the Agreements

Defendants seek to enforce the anti-assignment provisions of the Agreements, arguing that they are parties to the Agreements. Defendants argue that the Agreement discloses that they are the parent company (Johnson & Johnson) and affiliate (Janssen) of the signatory, JOM, to whom they delegated authority to enter Agreements governing distribution of Defendants' drug, Remicade. Furthermore, Defendants argue, the Agreements explicitly apply to claims involving JOM's parent company, subsidiaries, or affiliates. Exs. A and B §§ 4.21(a). Plaintiffs, on the other hand, argue that JOM signed the Agreements not as Defendants' agent, but as the only party to the

contract. Therefore, Plaintiffs' argument goes, Defendants cannot oppose the purported assignments because they are not parties to the Agreements. Pl. Opp. at 9. Id. We find there is no dispute that Defendants are parties to the Agreements.

"Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent [\*\*9] manifests assent or otherwise consents so to act." [Restat 3d of Agency, § 1.01](#) (3rd 2006). New Jersey law, applying the [Restatement \(Third\) of Agency §6.01](#), has held that a "principal will be bound by contracts with third parties entered into by an agent with actual authority to act on his behalf." Allegheny/AA Bail Bonds, Inc., Atty. in Fact for [Allegheny Cas. Co. v. Wright, Nos. A-2066-07T2, A-2071-07T2, 2011 N.J. Super. Unpub. LEXIS 699 at \\*15 \(Super. Ct. App. Div. Mar. 22, 2011\)](#). To create "[a]ctual authority (express or implied)" the principal need only communicate "written or spoken or other conduct" that, "reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account." Id. (quoting [Jennings v. Reed, 381 N.J. Super. 217, 231, 885 A.2d 482 \(Super. Ct. App. Div. 2005\)](#) (citations omitted)). Generally, in contracts where the principal's identity is known to the other contracting party, "the principal, not the agent, is liable on the contract." [Looman Realty Corp. v. Broad St. Nat'l Bank, 32 N.J. 461, 476, 161 A.2d 247 \(1960\)](#). "Nevertheless, an agent acting for a disclosed principal may agree with the other contracting party that the agent also will be a party to the contract." Id. (citation omitted). Ordinarily, however, "[a] principal who deals with third parties through an agent. . . expects to become a party to transactions entered into on the principal's behalf by the agent. When the third party knows the identity of the [\*\*10] principal, the third party ordinarily expects that the principal, and not the agent, will become a party to the transaction." [Restat 3d of Agency, § 6.01 Cmt b](#) (3rd 2006).

In this case, JOM, the signatory to the Agreements, is a subsidiary of Johnson & Johnson and the agent of Janssen Biotech, Inc. for the purpose of entering distribution contracts. "Schedule A" of the Agreements (Ex. A at 25, Ex. B at 23) names Janssen Biotech, Inc. as an "affiliate" (also referred to as a "Manufacturer," Exs. A and B at 1) of JOM for purposes of the Agreements. The language of the Agreements expressly provides that JOM's affiliates have delegated authority to JOM to enter distribution agreements on their behalf. See Exs. A and B at 1, "[JOM] is an Authorized Distributor of Record for the [\*622] Products with authority delegated by the Manufacturers to designate additional Authorized Distributors of Record (each an "ADR") on their behalf for distribution of Products. . . .[JOM] and its affiliates desire to retain Distributor [Wholesalers] to provide the necessary Services."

Here, we find no genuine dispute that for the purposes of the distribution Agreements, JOM is an agent of Defendants, as JOM was delegated authority to enter the [\*\*11] Agreements on behalf of their named affiliates, the "principals." There is also no dispute that the principals were "disclosed" to the other contracting party in Schedule A of the Agreements. Therefore, applying New Jersey law, we find it is beyond reasonable dispute that Defendants are parties to the Agreements when they are named in the Agreement as an "affiliate" of the signatory and when the Agreements provide that JOM is authorized to enter the Agreement on the affiliates' (Defendants') behalf. See Allegheny/AA Bail Bonds, Inc., Atty. in Fact for Allegheny Cas. Co., 2011 N.J. Super. Unpub. LEXIS 699 at \*15.

#### *B. Applicable Law*

The Parties do not dispute that New Jersey law applies to the anti-assignment provisions. See Pl. Opp. at 6, "[b]oth sides agree that the two Distribution Agreements are governed by state law — in this case, the law of New Jersey. . . . [which] generally follows the Restatement of Contracts." See Bel-Ray Co. v. Chemrite (Pty) Ltd., 181 F.3d 435, 442 (3d Cir. 1999).

The dispute is over whether Plaintiffs' antitrust claims are encompassed by the anti-assignment provisions in the Agreements. Defendants contend that the Agreements' prohibition on assignment of "rights" without consent necessarily includes a prohibition on assignment of statutory causes of action, such as the right to recover overcharge damages. Accordingly, where the anti-assignment [\*\*12] provisions have been violated, under New Jersey law the purported assignments are void, and, as a result, Plaintiffs' have no basis on which to assert their statutory claims. By contrast, Plaintiffs argue that the anti-assignment provisions narrowly prohibit performance of

the contract, while the right to bring a statutory antitrust claim is "in some way independent of, or pre-existing to, the 'rights or obligations'" that the provisions prohibit from being assigned. Def. Br. at 12. If Plaintiffs' statutory claims exist independent of the Agreements, Plaintiffs argue, then federal common law, not New Jersey law, will resolve the issue at summary judgment. We find there is no reasonable dispute that the anti-assignment provisions prohibited assignment of rights under the Agreements, including statutory causes of action; therefore, we grant summary judgment for Defendants, where Plaintiffs' antitrust claims exist by virtue of void assignments.

It is established that "under controlling federal law, . . . antitrust claims are assignable." [Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp., 995 F.2d 425, 431 \(3d Cir. 1993\)](#) (quoting [In re Fine Paper Litig., 632 F.2d 1081, 1090 \(3rd Cir. 1980\)](#)). In [Wallach v. Eaton Corp.](#), the Third Circuit clarified that in the antitrust context, "an effective assignment must directly reference antitrust [\*\*13] claims in order to ensure that any transfer of direct purchaser status is crystal clear, thereby 'eliminating' any problems of split recoveries or duplicative liability." [Wallach v. Eaton Corp., 837 F.3d 356, 370 \(3d Cir. 2016\)](#) (quoting [Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp., 995 F.2d 425, 440 \(3d Cir. 1993\)](#)). The Wallach court went on to hold that under the Restatement, "consideration is not required under [\*623] federal common law to give effect to an otherwise express assignment." [Id. at 371](#).

However, a threshold question is whether the assignment in issue is valid. See [Lehigh Valley Hosp. v. UAW Local 259 Soc. Sec. Dep't, No. 98-4116, 1999 U.S. Dist. LEXIS 12219, at \\*9 \(E.D. Pa. Aug. 10, 1999\)](#) (reasoning that "[b]efore this Court even addresses whether the assignee of a plan participant has standing to sue [on the basis of statutory claims] under ERISA, however, it must first determine if the alleged assignment in this case is valid."). It follows that when considering the validity of an assignment of "rights," the Third Circuit has held, albeit in the context of statutory ERISA claims, not antitrust claims, that there is "no compelling reason to stray from the 'black-letter law that the terms of an unambiguous private contract must be enforced.'" [Am. Orthopedic & Sports Med. v. Indep. Blue Cross Blue Shield, 890 F.3d 445, 453 \(3d Cir. 2018\)](#) (citation omitted). A district court is "correct" to look to the law of the state in the distributor Agreement's choice-of-law provision to determine the effect of the Agreement, and to apply that state's [\*\*14] principles of interpreting assignment provisions. See [Hartig Drug Co. v. Senju Pharm. Co., 836 F.3d 261, 274 \(3d Cir. 2016\)](#).

Furthermore, the Third Circuit made clear in [Wallach](#), in line with §317 of the Restatement, that it rejects the "antiquated distinction" between "rights" under a contract, which may be assigned or contractually prohibited from being assigned, and non-contractual causes of action: "the historical common-law rule that a chose in action could not be assigned has largely disappeared." [837 F.3d at 369](#) (quoting Restat 2d of Contracts, § 317 cmt (c)). See [In re Fine Paper Litig., 632 F.2d at 1090](#) ("[a]lthough the common law did not favor the assignment of causes of action, by and large that attitude has been overcome."). See also [Am. Orthopedic & Sports Med., 890 F.3d at 453](#) (quoting [City of Hope Nat'l Med. Ctr. v. Healthplus, Inc., 156 F.3d 223, 229 \(1st Cir. 1998\)](#)) (holding that statutory causes of action are encompassed by non-assignment provisions when it joined "an overwhelming consensus among Courts of Appeals that 'ERISA leaves the assignability or non-assignability of [statutory rights] under ERISA-regulated welfare plans to the negotiations of the contracting parties.'").

Here, we agree with Defendants that New Jersey law, not federal common law applies to the assignment issue in this case. Plaintiffs' argument that federal common law preempts even an invalid assignment is not supported by Third Circuit law. [Wallach](#) and [Gulfstream](#), holding that antitrust claims [\*\*15] are assignable under federal common law, apply to valid assignments only. Here, there is no valid assignment. The anti-assignment provisions in the distributor Agreements between Wholesalers (direct purchasers) and Defendants (drug manufacturer) clearly manifested an intent to prohibit assignment of any rights or obligations under the Agreements without the consent of either party; indeed, the provisions specified that assignments in violation of the provisions would be void. Wholesalers violated these provisions by purporting to assign their rights under the Agreements to Retailer Plaintiffs, without Defendants' consent. We agree with Defendants that "neither [Wallach](#), nor [Gulfstream](#), nor [In re Fine Paper Litig.](#) (none of which addresses anti-assignment provisions affecting statutory causes of action in the antitrust context) supports the notion that the 'federal common law' of antitrust assignment instruments overrides an anti-assignment clause in the underlying sales contract that is valid as a matter of state law." Def. Rep. Br. at 12.

[\*624] Finally, the Third Circuit has adopted the "plain meaning" approach to whether statutory claims are encompassed within the scope of a non-assignment [\*\*16] provision prohibiting assignment of "rights" under a contract. Here, Plaintiffs try to advance the argument rejected by the First Circuit in City of Hope (whose reasoning the Third Circuit adopted in American Orthopedic), "[i]n effect, [that we] read into ERISA's allowance for the assignability of ERISA-regulated welfare plan benefits a bar to the contractual non-assignability of such benefits." City of Hope Nat'l Med. Ctr., 156 F.3d at 229. Similarly here, Plaintiffs ask us to read into federal common law's allowance for assignability of antitrust claims a bar to the contractual non-assignability of those claims.

Yet, there is no federal common law, nor New Jersey state contract law, nor grounding in the Restatement, to support this view. The First Circuit has held and the Third Circuit has concurred that limiting non-assignment provisions so that they do not pertain to "causes of action" ("as distinguished from 'rights or benefits'") "would strain the plain meaning of the contract language at issue in this case." Id. at 229. We agree. To read the anti-assignment provisions here, which clearly prohibit assignment of "this agreement or any of its rights or obligations under this agreement . . . without the prior written consent" (Exs. A [\*\*17] and B §§4.4) (emphasis added), to limit "rights" as distinguished from "causes of action," would "strain the plain meaning" of the contract. See Wallach v. Eaton Corp., 837 F.3d at 369 (noting that "a distinction" between 'rights' under a contract and 'causes of action' arising by virtue of the existence of the contract has been abandoned by the *Restatement*, §317, and by the Third Circuit.).

Extending this reasoning to non-assignment clauses in the context of statutory ERISA claims, the Third Circuit has recently held that "anti-assignment clauses in ERISA-governed health insurance plans as a general matter are enforceable." Am. Orthopedic & Sports Med. v. Indep. Blue Cross Blue Shield, 890 F.3d 445, 453 (3d Cir. 2018). Plaintiffs argue that American Orthopedic applies only within the ERISA context and only where the statutory claims "aris[e] out of the insurers' breach of the insurance contract, not [to] antitrust claims based on an 'extrinsic legal regime' unrelated to the rights and obligations created by the distribution agreement." Pl. Br. at 17 (citing Hartig Drug, 836 F.3d at 275 n.17). Although the anti-assignment provision in Hartig arises in the antitrust context, while American Orthopedic addresses anti-assignment clauses in the ERISA context, the anti-assignment language in Hartig differs from the anti-assignment language here.

The Hartig anti-assignment clause [\*\*18] states, "[t]his Agreement may not be assigned by either party without the prior written consent of the other party. Notwithstanding the forgoing, either party *may assign its rights and obligations* hereunder *without the consent* of the other party to a subsidiary or affiliate . . . ." 836 F.3d at 275 (emphasis added). Here, by contrast, the assignment provisions state, "neither party may assign. . . this agreement or any of its rights or obligations under this agreement . . . without the prior written consent of the other party," Exs. A and B §§4.4 (emphasis added). Thus, the anti-assignment provision in Hartig prohibits assignment only of the Agreement, while the anti-assignment provision here clearly and specifically prohibits assignment of "rights" under the Agreement without consent of the other contracting party.

[\*625] We find Plaintiffs' argument that the non-assignment provisions here do not encompass rights to bring statutory causes of action untenable. Without the assignment of Wholesalers' rights under the Agreements, Plaintiffs would have no basis from which to assert the Wholesalers' claim for overcharges on purchases of Remicade. Thus, Plaintiffs' antitrust claims flow from the purported assignment [\*\*19] of Wholesalers' rights. Therefore, we find that there is no genuine dispute that Plaintiffs' allegations of anticompetitive overcharges for Remicade (Compl. ¶¶ 1, 60-61) are "assignment-based claims." Def. Br. at 10. Accordingly, New Jersey law applies when interpreting the anti-assignment provisions of the Agreements. See Hartig Drug, 836 F.3d at 274.

### C. Applying New Jersey Law to the Anti-Assignment Provisions

Defendants argue that under New Jersey law, the anti-assignment agreement invalidates Wholesalers' assignment of their rights under the agreement, since Defendants did not consent. We agree with Defendants and grant summary judgment on the grounds that it is beyond reasonable dispute that the anti-assignment provision manifested the parties' intent to prohibit assignment of rights under the Agreement, including antitrust causes of action.

375 F. Supp. 3d 616, \*6251 2019 U.S. Dist. LEXIS 50206, \*\*19

Where an anti-assignment provision unambiguously expresses the clear intent to prohibit assignment of "rights" under a contract, New Jersey law will enforce the provision. See *Torpey v. Blue Cross Blue Shield of Tex., Civil Action No. 12-cv-7618 (JAP), 2014 U.S. Dist. LEXIS 11412 (D.N.J. Jan. 30, 2014)* (holding that "where a plan contains an anti-assignment provision, the provision is enforceable and the assignment is ineffectual."). [\*\*20] For rights to "to 'arise under' an agreement, a claim [based on those rights] need not be identifiable as an issue explicitly covered by the agreement, but merely must be engendered by virtue of the relationship the agreement established." *Am. Fin. Capital Corp. v. Princeton Elecs. Prods., No. 95-4568, 1996 U.S. Dist. LEXIS 3412, at \*27-28 (E.D. Pa. Mar. 19, 1996)* (citing *Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH, 585 F.2d 39 (3d Cir. 1978)*).

"As a general rule of law, where the parties' intent is clear, courts will enforce non-assignment provisions." *Davidowitz v. Delta Dental Plan of Cal., Inc., 946 F.2d 1476, 1478 (9th Cir. 1991)*. See *Med-X Glob., LLC v. Azimuth Risk Sols., LLC, No. 17-13086, 2018 U.S. Dist. LEXIS 60543 at \*6 (D.N.J. Apr. 10, 2018)* (quoting *Somerset Orthopedic Assocs., P.A. v. Horizon Blue Cross & Blue Shield of N.J., 345 N.J. Super. 410, 415, 785 A.2d 457 (Super. Ct. App. Div. 2001)*) ("[a]nti-assignment provisions are generally enforceable under contract law, derived from a contracting party's freedom to place restraints on alienation.").

New Jersey courts interpreting assignment provisions apply the Restatement. See *Somerset Orthopedic Assocs., P.A., 345 N.J. Super. at 415*. Indeed, the New Jersey Supreme Court held in *Owen* that §322 of the Restatement "embodies the general, now-majority rule that contractual provisions prohibiting or limiting assignments operate only to limit the parties' right to assign the contract, but not their power to assign, unless the parties manifest with specificity an intent to the contrary." *Owen v. CNA Ins/Cont'l Cas. Co., 167 N.J. 450, 771 A.2d 1208, 1214 (N.J. 2001)* (citing *Restat 2d of Contracts, § 322 (2nd 1981)*). Thus, as the court held in *Somerset*, "[w]here a contract uses specific and express language [\*626] sufficiently manifesting an intention to prohibit the power of assignment without the consent of one or more of the contracting parties, [\*\*21] courts generally uphold these contractual anti-assignment clauses." *Somerset Orthopedic Assocs., P.A., 345 N.J. Super. at 415*. To manifest an intent to limit a party's power to assign, thereby making an assignment without consent of the other party void, "the non-assignment provision generally must state that non-conforming assignments (i) shall be 'void' or 'invalid,' or (ii) that the assignee shall acquire no rights or the non-assigning party shall not recognize any such assignment." *Id.*

Plaintiffs argue that the anti-assignment provisions in the Agreements do not encompass their "rights" to bring statutory antitrust claims, citing district court opinions, none from the Third Circuit, in support. Yet, in *United Food & Commer. Workers Local 1776 v. Teikoku Pharma United States, Inc., No. 14-md-02521-WHO, 2015 U.S. Dist. LEXIS 94220 (N.D. Cal. July 17, 2015)* ("Lidoderm"); *In re TFT-LCD Antitrust Litig., 2011 U.S. Dist. LEXIS 88723, 2011 WL 3475408 (N.D. Cal. Aug. 9, 2011)* ("Flat Panel"); and *Meijer, Inc. v. Barr Pharms., Inc., 572 F. Supp. 2d 38 (D.D.C. 2008)*, where district courts found that statutory causes of action for antitrust violations were beyond the scope of non-assignment provisions, the non-assignment clauses "[were] limited to the assignment of duties and obligations under the [distributor agreements] themselves." *2015 U.S. Dist. LEXIS 94220 at \*43*. The provisions here were not so limited.

The anti-assignment provision in *Lidoderm* "[did] not clearly prevent wholesalers from assigning [\*\*22] claims arising out of *antitrust law*." *2015 U.S. Dist. LEXIS 94220 at \*42*. Here, by contrast, the non-assignment provisions here do meet the standard for clear and specific manifestation of an intent to limit a party's power to assign. In *Owen*, the New Jersey Supreme Court considered a broad anti-assignment provision stating, "...the aforesaid deferred lump sum payments shall not be subject to assignment. . ." *771 A.2d at 1218*. And the Court viewed the provision's broad language as "merely. . .a covenant not to assign. [Because] [i]t contains no specific prohibition on the power to make an assignment, and it does not specifically state that the assignments are 'void.'" *Id.* (quoting *Bel-Ray, supra, 181 F.3d at 442*). In this case, by contrast, the assignment provisions clearly state, "neither party may assign. . .this agreement or any of its rights or obligations under this agreement. . .without the prior written consent of the other party. . . .Any purported assignment in violation of this section will be void." Exs. A and B §§4.4 (emphasis added). Thus, under New Jersey law interpreting anti-assignment provisions, we find it is beyond genuine dispute that the anti-assignment provisions here manifested a clear intent to prohibit assigning rights under the Agreements [\*\*23] without the parties' consent and expressly indicated such assignments would be void.

Plaintiffs angle for yet another view, arguing that statutory antitrust claims are not contemplated by language in the assignment provision barring assignment of "rights." Yet New Jersey courts have not treated statutory antitrust claims as exempted from a clear and specific non-assignment provision. In this case, the Wholesalers' rights to recover antitrust damages against Defendants, although statutory in nature, exist "by virtue of the relationship,' established by the Agreements—indeed, 'there is no context other than [those] preexisting contractual relationship[s] in which [those rights] could have arisen.'" Def. Br. at 11 (quoting *Am. I\*6271 Fin. Capital Corp. v. Princeton Elecs. Prods.*, 1996 U.S. Dist. LEXIS 3412, at \*27-28). Thus, we find there is no reasonable dispute that the anti-assignment provisions here encompass Plaintiffs' antitrust claims because their claims exist by virtue of the Agreements and that the assignments of "rights" under the Agreements, without consent of Defendants, are void. Therefore, there is no genuine dispute that Plaintiffs' antitrust claims, which they assert by virtue of void assignments, are barred.

#### *D. Plaintiffs' Unassigned Claims*

Plaintiffs "do not dispute [\*\*24] that their purchases of Remicade were indirect." Pl. Opp. at 9. Accordingly, any claim for overcharges on purchases of Remicade by Plaintiffs arose through the unauthorized assignment by Wholesalers of rights under their distributor Agreements. These assignment-based antitrust claims, grounded in invalid assignments, cannot proceed.

### **IV. CONCLUSION**

For the foregoing reasons, Defendants' Motion for Summary Judgment is GRANTED. An appropriate Order will follow.

### **ORDER**

AND NOW, this 25th day of March, 2019 upon consideration of Defendants' Motion for Summary Judgment (Doc. No. 50), Plaintiffs' Opposition thereto (Doc. No. 54), Defendants' Reply in Support thereof (Doc. No. 56), and Plaintiffs' Sur-reply thereto (Doc. No. 57), it is hereby ORDERED as follows:

1. Defendants' Motion for Summary Judgment is GRANTED;
2. Judgment shall be entered in favor of Defendants and against Plaintiffs on all counts contained in Plaintiffs' Complaint.

BY THE COURT:

/s/ J. Curtis Joyner

J. CURTIS JOYNER, J.



## *Spa v. Alcor Sci.*

United States District Court for the District of Rhode Island

March 26, 2019, Decided; March 26, 2019, Filed

C.A. No. 14-440 WES

**Reporter**

2019 U.S. Dist. LEXIS 240271 \*; 2019 WL 13091790

ALIFAX HOLDING SPA, Plaintiff, v. ALCOR SCIENTIFIC INC.; and FRANCESCO A. FRAPPA, Defendants.

### **Core Terms**

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trade secret, summary judgment, Patent, software, infringement, density, constants, misappropriation, undisputed, copying, Defendants', measurement, analyzer, optical, plastic, conversion, elasticity, parameters, viscosity, skill, copyright infringement, source code, sedimentation, algorithm, alleges, blood, blood sample, Counterclaim, disclosure, capillary

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For Sire Analytical Systems Srl, Plaintiff: Michael J. Daly, Pierce Atwood LLP, Providence, RI.

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**Judges:** William E. Smith, Chief United States District Judge.

**Opinion by:** William E. Smith

### **Opinion**

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#### **MEMORANDUM AND ORDER**

WILLIAM E. SMITH, Chief Judge.

Before the Court are the parties' cross motions for summary judgment. Defendants Alcor Scientific Inc. and Francesco Frappa seek summary judgment on Counts I, II and IV of Plaintiff Alifax Holding SpA's Second Amended and Supplemental Complaint and Counts I and II of the Defendants' Amended Counterclaim (ECF Nos. 142, 143). Alifax moves for summary judgment on Count III of the Amended [\*2] Counterclaim (ECF Nos. 159, 166). The Court has closely reviewed this action's voluminous and complex record. After careful consideration, and as set forth herein, the Defendants' Motion for Partial Summary Judgment is DENIED, and Plaintiff's Motion for Partial Summary Judgment is GRANTED.

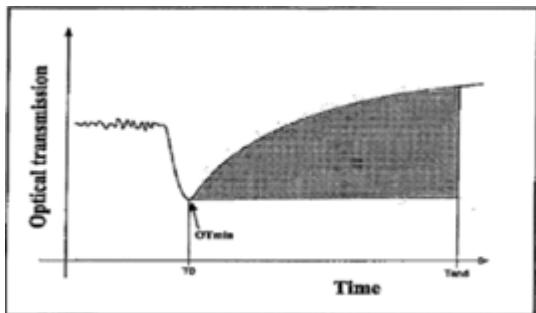
#### I. Background

Alifax is an Italian corporation that develops and produces clinical diagnostic instruments.<sup>1</sup> Pl.'s Statement of Disputed Facts ("PSDF") ¶ 3, ECF No. 167; see also Second Am. & Suppl. Compl. ¶ 1, ECF No. 68. Among Alifax's products are instruments known as erythrocyte sedimentation rate ("ESR") analyzers. ESR measures how quickly red blood cells (erythrocytes) descend and sediment in a patient blood sample and is commonly considered to detect nonspecific inflammation. PSDF ¶¶ 13-14. Whereas the traditional way of calculating ESR — the Westergren method — requires one to two hours of testing, Alifax's instruments produce an ESR value in under one minute. See id.; Pl.'s Statement of Additional Disputed Facts ("PSADF") ¶ 1, ECF No. 176-2; Defs.' Resp. to Pl.'s Statement of Undisputed Facts ("DSDF") ¶ 20, ECF No. 170-4.

Alifax holds two patents [\*3] pertaining to ESR measurement. PSDF ¶¶ 6, 10, 12. U.S. Patent No. 6,632,679 ("679 Patent") protects a diagnostic method for quickly measuring a blood sample's ESR. See Second Am. & Suppl. Compl. Ex. A, ECF No. 68-1. U.S. Patent No. 7,005,107 ("107 Patent") covers the apparatus designed to carry out the patented method. See id. at Ex. B. The Court issued its claim construction ruling concerning these patents in April 2014. See Alifax Holding SpA v. Alcor Sci. Inc. (Alifax I), No. CV 14-440 S, 2017 WL 1533430, at \*1 (D.R.I. Apr. 27, 2017).

Defendant Francesco Frappa is another principal player. It is unnecessary to repeat Frappa's personal history with Alifax and its former subsidiary, Sire Analytical S.r.l., in detail here.<sup>2</sup> See Alifax Holding SpA v. Alcor Sci. Inc. (Alifax II), No. CV 14-440 WES, 2019 WL 317638, at \*1-3 (D.R.I. Jan. 8, 2019). It is enough to understand that Sire employed Frappa for nearly a decade and that his duties included hardware and software development as well as work on Alifax's ESR analyzers, including the development of a plastic capillary photometer sensor. See id. at \*1-2; DSDF ¶ 24; Galiano Aff. ¶ 13, ECF No. 162. Frappa departed Alifax in late 2011 and [\*4] by May 2012 was working with Rhode Island-based competitor Alcor on that company's ESR instrument. Alifax II, 2019 WL 317638, at \*2; see also PSDF ¶ 1. Before leaving, Frappa forwarded certain information concerning an "anemia factor" and myeloma from his Sire email account to a personal account. Alifax II, 2019 WL 317638, at \*2; Defs.' Resp. to Pl.'s Statement of Additional Undisputed Facts ("DSADF") ¶¶ 168-70, ECF No. 171-6.

Within a year of Frappa's arrival, Alcor began promoting and producing its own ESR analyzer: the iSED. See Second Am. & Suppl. Compl. ¶ 43; Defs.' Ans. to Pl.'s Second & Suppl. Am. Compl. & First Am. Countercl. ("Ans.") ¶ 43, ECF No. 71. The iSED applies the principles of syllectrometry and — like Alifax's analyzers — produces an ESR value in just twenty seconds. See PSDF ¶¶ 37, 55; DSADF ¶ 147; Ans. ¶ 43. In layman's terms, the iSED detects changes in optical density as light passes through a blood sample. Blood is pumped through the device's light-measuring component, the flow is abruptly stopped, and red blood cells begin to aggregate. See PSDF ¶¶ 21, 57; DSADF ¶ 140. As aggregation occurs, the device processes the changing optical density data. [\*5] See PSDF ¶¶ 21, 57; DSADF ¶ 140. The graphical depiction of this data (the transmittance of light over time) yields a characteristic shape known as a syllectogram:



<sup>1</sup> The Court presents the undisputed facts herein — as it must — in the light most favorable to the nonmovant. See, e.g., Theriault v. Genesis HealthCare LLC, 890 F.3d 342, 348 (1st Cir. 2018).

<sup>2</sup> Over the course of this litigation Sire merged completely into Alifax. See Alifax II, 2019 WL 317638, at \*1 n.3. Unless otherwise noted, the Court refers herein to both entities simply as "Alifax."

See PSDF ¶¶ 21, 23, 57. Alcor describes the area under the syllectogram's curve (the diagram's shaded portion) as the sample's "aggregation index." Id. ¶¶ 23, 57. The aggregation index can be correlated to reference values from traditional Westergren tests to determine a blood sample's ESR.<sup>3</sup> Id. ¶ 57. It is undisputed that the iSED does not expressly measure, record, or report any measurement for the viscosity, elasticity, or density of blood. Id. ¶¶ 46-54.

Optical density measurements are converted to an ESR value by an algorithm contained in the iSED's software. See id. ¶ 128. Like most computer programs, this software evolved over time. Id. ¶¶ 127-130. It is undisputed, however, that at some early (but as-yet undefined) stage of development the iSED software's source code included in its conversion algorithm the same unusual numerical constants (2.2, 1000, -3 and ^1.9) used in the code for Alifax's ESR analyzers. See id. ¶¶ 124-25, 127; DSADF ¶ 167. This specific software iteration was labeled "Version 104A."<sup>4</sup> See PSDF ¶ [\*6] 127. Alcor contends that the edition of Version 104A containing the Alifax constants was a "pre-production version that never shipped in any functional iSED machine." Defs.' Mem. In Supp. of Mot. for Partial Summ. J. ("Defs.' Mem.") 25-26, ECF No. 142-1. It is undisputed, however, that Alcor sold at least some iSED units to customers with software identified as "Version 104A" installed.<sup>5</sup> See DSADF ¶¶ 175-177.

In the midst of this litigation, Alifax filed three copyright registration applications. See PSDF ¶¶ 111-114. These three applications matured into copyright registrations. See id. The copyrights cover source code and other materials, including its conversion algorithm and constants, that Alifax alleges it uses in its ESR analyzers. Second Am. & Suppl. Compl. ¶ 78.

## II. Legal Standard

In the crucible of summary judgment, the Court must assay the parties' evidence "to ascertain whether a need for trial exists." Theriault, 890 F.3d at 348. A trial may be averted if a movant shows "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Garcia-Garcia v. Costco Wholesale Corp., 878 F.3d 411, 417 (1st Cir. 2017) (quoting [\*7] Ameen v. Amphenal Printed Circuits, Inc., 777, F.3d 63, 69 (1st Cir. 2015)) (quotation marks omitted); see also Fed. R. Civ. P. 56. A fact is "[m]aterial" if it "might affect the outcome of the suit under the governing law." Audette v. Town of Plymouth, 858 F.3d 13, 19-20 (1st Cir. 2017) (quoting Mulloy v. Acushnet Co., 460 F.3d 141, 145 (1st Cir. 2006)). A dispute is "genuine" if "there is evidence that would allow a reasonable jury to find for the non-moving party." Id. at 20. A court may consider the entire factual record in making these decisions. Fed. R. Civ. P. 56(c).

A nonmovant can withstand the scrutiny of summary judgment by producing "definite, competent evidence" of a genuinely disputed material fact of such probative force that, "if it is credited, a factfinder could resolve the case in favor of the nonmovant." Murray v. Kindred Nursing Ctrs. W. LLC, 789 F.3d 20, 25 (1st Cir. 2015) (quotation marks omitted). An examining court is obliged to construe the record "in the light most hospitable to the nonmoving party" and to draw "all reasonable inferences in that party's favor." Theriault, 890 F.3d at 348 (quotation marks omitted). A nonmovant cannot, however, rely on bald assertions, [\*8] improbable inferences, or unsupported speculation to preserve its claims for trial. Garcia-Garcia, 878 F.3d at 417.

## III. Discussion

### A. Alcor's Motion for Summary Judgment

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<sup>3</sup> The iSED production units are specifically correlated to "the Fabry-corrected Westergren result." DSADF ¶ 146.

<sup>4</sup> The parties refer to the disputed code as both "Version 104A" and "Version 1.04A." For consistency, the Court will use the former.

<sup>5</sup> As further explained herein, the record shows that the Version 104A identifier may have been used for multiple early iterations of code, only one or some of which may have contained Alifax's purportedly proprietary constants. See, e.g., DSADF ¶¶ 175-182; Frappa Decl. ¶ 3, ECF No. 171-7; Defs.' Mem. 25-26. Even a cursory review of the docket for this action reveals that source code related discovery has been fraught. Such discovery has continued for months after the parties filed their dispositive motions. The Court's conclusions herein, however, are based solely on the record as it existed when the parties' filed their motions.

Alifax characterizes the Defendants' motion as a "blunderbuss." Pl.'s Mem. in Opp'n to Defs.' Mot. for Partial Summ. J. ("Pl.'s Opp'n") 1, ECF No. 167. The description is apt. The Defendants seek a favorable judgment on almost every claim in this action: patent infringement, invalidity, trade secret misappropriation, and copyright infringement. The Court considers these claims one by one.

## 1. Patent Infringement

Alifax alleges that the iSED infringes on claims 1-3, 6, and 8 of the '679 Patent and claims 1, 2, and 4-6 of the '107 Patent.<sup>6</sup> See PSDF ¶¶ 4, 8; Pl.'s First Supp. Disclosure of Asserted Claims and Infringement Contentions 1, ECF No. 145-2. Infringement allegations require a two-part analysis. See Playtex Prods., Inc. v. Procter & Gamble Co., 400 F.3d 901, 905-06 (Fed. Cir. 2005). First, the Court must interpret the scope and meaning of the asserted patent claims. *Id.* The Court's claim construction ruling for this action is memorialized in Alifax I, 2017 WL 1533430, at \*1 (D.R.I. Apr. 27, 2017). Second, the "properly [\*9] construed claims" must be compared "to the allegedly infringing device." Playtex Prods., 400 F.3d at 906. That is the task at hand. Alcor can only prevail on its motion if such a comparison shows that "on the correct claim construction, no reasonable jury could [find] infringement on the undisputed facts or when all reasonable factual inferences are drawn in favor of [Alifax]." Netword, LLC v. Centraal Corp., 242 F.3d 1347, 1353 (Fed. Cir. 2001).

At trial, Alifax has the burden of showing that the iSED meets each claim limitation of the '679 and '107 patents, either literally or under the doctrine of equivalents. Playtex Prod., 400 F.3d at 906 (Fed. Cir. 2005); Intelllicall, Inc. v. Phonometrics, Inc., 952 F.2d 1384, 1389 (Fed. Cir. 1992) ("[I]nfringement requires that every limitation of a claim be met literally or by a substantial equivalent.") These are factual inquiries. DePuy Spine, Inc. v. Medtronic Sofamor Danek, Inc., 469 F.3d 1005, 1013 (Fed. Cir. 2006). And genuinely disputed factual issues are not appropriate for resolution on summary judgment. Thus, the Court is mindful of the Federal Circuit's admonition to take "great care" when weighing summary judgment on an infringement [\*10] claim. Cole v. Kimberly-Clark Corp., 102 F.3d 524, 528 (Fed. Cir. 1996); see also D.M.I., Inc. v. Deere & Co., 755 F.2d 1570, 1573 (Fed. Cir. 1985) ("[A] motion for summary judgment of infringement or noninfringement should be approached with a care proportioned to the likelihood of its being inappropriate.").

Concerning the '679 Patent, the Court has construed the limitation from the asserted claims "processed to obtain said speed of sedimentation, viscosity, elasticity and density" to mean "processing the acquired optical density or absorbance data to obtain the speed of sedimentation, viscosity, elasticity and density." Alifax I, 2017 WL 1533430, at \*5 (emphasis added). The Court has similarly construed the limitation "determine[ing] the speed of sedimentation, viscosity, elasticity and density" of the asserted claims in the '107 Patent to mean "processing the acquired optical density or absorbance data to obtain the speed of sedimentation, viscosity, elasticity and density, by comparing the data with numerical constants stored in the memory of a processing unit." *Id.* at 6 (emphasis added).

"Obtaining a parameter in the context of the patents-in-suit," Alcor argues, "means obtaining [\*11] a numerical value for that parameter." Defs.' Reply in Supp. of Mot. for Summ. J. ("Defs.' Reply") 5, ECF No. 171-2. It is undisputed that the iSED does not measure, record, or report any measurement for the viscosity, elasticity, or density of blood. PSDF ¶¶ 46-54. Thus, Alcor reasons that the iSED does not "obtain" these parameters and does not infringe on either patent. Defs.' Mem. 11. There is a good measure of logical appeal in this argument. It depends, however, upon reading limitations into the claims that do not exist. None of the asserted claims, as construed by the Court, include the limitation that the iSED measures, calculates, records, reports, or obtains a "numerical value" for the parameters of viscosity, elasticity, and density of blood. See Alifax I, 2017 WL 1533430, at \*5-6. The Court's claim construction simply does not support Alcor's argument.

How then might the iSED "obtain" the viscosity, elasticity, and density of a blood sample? Alifax's expert, Dr. Brian Bergeron, provides an answer that is at least plausible, if oblique. He opines that the "correlated parameters" (viscosity, elasticity, and density) are a "function of data obtained from the [iSED's] optical [\*12] density readings";

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<sup>6</sup> Alifax no longer appears to contend that the iSED infringes on claim 9 of the '107 Patent. See PSDF ¶ 8.

thus by processing optical density measurement data the iSED "obtains the correlated parameters." Expert Report of Brian Bergeron, M.D. ("Bergeron Report") ¶ 21, ECF No. 144-11; DSADF ¶¶ 140-142; see also Pl.'s Opp'n 4. He also purports to explain how these three parameters are functions of optical density data in his sworn report. Bergeron Report ¶ 21. The Court's observation that "the [679 Patent's] specification informs that the viscosity, elasticity, and density of the blood sample are parameters that are considered correlated to the speed of sedimentation of the blood sample" accords with the substance of Dr. Bergeron's proposed conclusion. Alifax I, 2017 WL 1533430, at \*5.

Alcor and its expert reject this rationale and criticize Dr. Bergeron's conclusions. See, e.g., Kyotmaa Decl. ¶¶ 9-12, ECF No. 171-5; Defs.' Reply 5. But Alcor has not moved to exclude Dr. Bergeron's opinions under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), or its progeny. His sworn conclusions are supported by articulated facts and reasoning; the Court has no basis to find that he is unqualified to provide such opinions. See Hayes v. Douglas Dynamics, Inc., 8 F.3d [\*13] 88, 92 (1st Cir. 1993) (holding that to defeat summary judgment an expert affidavit must "include the factual basis and the process of reasoning which makes the conclusion viable"); Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990) (holding "[e]xpert opinion is admissible and may defeat summary judgment" so long as "it appears that the affiant is competent to give an expert opinion." (emphasis omitted)). At this juncture Alifax is entitled to the benefit of all reasonable inferences. Theriault, 890 F.3d at 348. And it is the function of the finder of fact at trial, not the Court at summary judgement, to resolve such evidentiary conflicts. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Scripps Clinic & Research Found. v. Genentech, Inc., 927 F.2d 1565, 1581 (Fed. Cir. 1991) (reversing summary judgment of infringement based on existence of disputed "questions of scientific and evidentiary fact"), overruled on other grounds by Abbott Labs. v. Sandoz, Inc., 566 F.3d 1282, 1293 (Fed. Cir. 2009). Consequently, the Court finds that summary judgment is precluded on the issue of non-infringement. See Fed. R. Civ. P. 56(a).

## 2. Patent Invalidity

Alcor also seeks summary judgement [\*14] on Counts I and II of the Defendants' Counterclaim.<sup>7</sup> Countercl. ¶¶ 39-42. It calls on the Court to declare the '679 and '107 patents invalid because their common specification fails to satisfy the written description and enablement requirements under 35 U.S.C. § 112.<sup>8</sup> Defs.' Mem. 12. Both arguments fail for the same reason: these requirements are measured by an objective standard, and a material dispute exists concerning the knowledge, training, and experience of a "person of ordinary skill in the art."

Succeeding on a claim of invalidity under Rule 56 is an uphill battle. Schumer v. Lab. Computer Sys., Inc., 308 F.3d 1304, 1316 (Fed. Cir. 2002) ("The burden of proving invalidity on summary judgment is high."). Patents are presumed valid. 35 U.S.C. § 282. This presumption can only be overcome if a challenging party produces "such clear and convincing evidence . . . that no reasonable jury could find otherwise." Eli Lilly & Co. v. Barr Lab., Inc., 251 F.3d 955, 962 (Fed. Cir. 2001); see also High Concrete Structures, Inc. v. New Enter. Stone & Lime Co., Inc., 377 F.3d 1379, 1382 (Fed. Cir. 2004). Again, "all justifiable inferences" must be drawn in favor of Alifax. See Schumer, 308 F.3d [\*15] at 1315.

The written description and enablement requirements are two distinct prerequisites mandated by 35 U.S.C. § 112. See Ariad Pharm., Inc. v. Eli Lilly & Co., 598 F.3d 1336, 1340 (Fed. Cir. 2010). The written description requirement "is part of the quid pro quo of the patent grant and ensures that the public receives a meaningful disclosure in exchange for being excluded from practicing an invention for a period of time." Ariad Pharm., 598 F.3d at 1354. A description suffices if "the disclosure . . . reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date." Id. at 1351. Answering this factual question "requires an objective inquiry . . . from the perspective of a person of ordinary skill in the art." Id. As for § 112's second

<sup>7</sup> As the Defendants correctly note, an invalid patent cannot be infringed, thus granting summary judgment on Counts I and II of its Counterclaim would be an alternative basis to grant summary judgment in its favor on Count I of Alifax's Second Amended and Supplemental Complaint. Defs.' Mem. 17.

<sup>8</sup> Alcor moves only on these two grounds for the purposes of summary judgment and reserves the right to assert other bases for invalidity at trial.

requirement, a specification is "enabled" if "one skilled in the art, after reading the specification, could practice the claimed invention without undue experimentation." See AK Steel Corp. v. Sollac, 344 F.3d 1234, 1244 (Fed. Cir. 2003). Thus, with respect to both requirements, the patents must be scrutinized from an objective point of view — that is, from the perspective of a "person [\*16] of ordinary skill in the art." See Ariad Pharm., 598 F.3d at 1354; Nat'l Recovery Techs., Inc. v. Magnetic Separation Sys., Inc., 166 F.3d 1190, 1196 (Fed. Cir. 1999) ("[W]ith respect to enablement the relevant inquiry lies in the relationship between the specification, the claims, and the knowledge of one of ordinary skill in the art."); In re Vaeck, 947 F.2d 488, 496 n.23 (Fed. Cir. 1991) ("The first paragraph of § 112 requires nothing more than objective enablement.").

This common denominator is Alcor's stumbling block. Alcor's expert, Dr. Harri Kytomaa, opines on one hand that a "person having ordinary skill in the art" would have "a bachelor's degree [in] mechanical engineering or a related field" or no degree whatsoever but "at least five years of experience . . . in medical devices . . ." Pl.'s Statement of Additional Undisputed Facts ("PSAUF") Ex. U, Kytomaa Dep. at 42:11-43:9, ECF No. 167. Dr. Bergeron, on the other hand, opines that such a person would have:

a Ph.D. in a field related to medical diagnostic testing, or an M.D. and at least three years of training or experience developing or using medical diagnostic devices, or an M.S. in a field related to medical diagnostic [\*17] testing and at least five years of training or experience developing or using medical diagnostic devices.

Id. at Ex. F, Bergeron Rebuttal Report ¶ 22. These differences are material. "[I]f there is conflicting evidence as to what one of ordinary skill in the art would have known," a multitude of courts have found, "resolution of that conflict is not appropriate on a motion for summary judgment." Scanner Techs. Corp. v. Icos Vision Sys. Corp., N.V., 253 F. Supp. 2d 624, 633 (S.D.N.Y. 2003) (quotation marks omitted) (denying summary judgment on written description and enablement issues); see also Am. Tech. Ceramics Corp. v. Presidio Components, Inc., No. 14-CV-6544(KAM)(GRB), 2018 WL 1525686, at \*15 (E.D.N.Y. Mar. 27, 2018) (finding conflict between expert opinions "alone creates a disputed issue of material fact as to the sufficiency of the written description because a reasonable finder of fact could conclude . . . that defendant cannot prove indefiniteness by clear and convincing evidence"); Intellectual Ventures I, LLC v. Canon Inc., 143 F. Supp. 3d 143, 178 (D. Del. 2015) ("The disagreement between the experts on whether one of ordinary skill could practice the invention without [\*18] undue experimentation and whether the inventors had possession of the invention present genuine disputes of material fact better left to the province of the jury.").<sup>9</sup>

### 3. Trade Secret Misappropriation

Alifax alleges that the Defendants misappropriated three trade secrets in violation of R.I. Gen. Laws § 6-41-1 et seq., the Rhode Island Uniform Trade Secrets Act ("RIUTSA"): (1) the use of a plastic capillary photometer sensor ("CPS") in an automated ESR analyzer; (2) software and firmware concerning the acquisition and conversion of photometric measurements to an ESR value; and (3) certain information concerning myeloma and an "anemia factor." See generally Pl.'s Opp'n 12-20. Under RIUTSA, a "trade secret" is defined as:

- [I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that:
  - (i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
  - (ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

R.I. Gen. Laws § 6-41-1(4). Misappropriation [\*19] includes the acquisition of a trade secret "by a person who knows or has reason to know that the trade secret was acquired by improper means." Id. § 6-41-1(2)(i). "Improper means" are in turn defined as "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means." Id. § 6-41-1(1). RIUTSA also prohibits

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<sup>9</sup> Alifax argues that it is in fact entitled to summary judgment concerning the sufficiency of any written description. Pl.'s Opp'n 8. As Alcor observes, tucking this request into an opposition memorandum is improper. The Court will not entertain Alifax's invitation.

disclosure or use of another's trade secret without consent by a person who (1) used "improper means" to acquire it, or (2) "knew or had reason to know" that the trade secret was "[d]erived from or through a person who owed a duty to the person seeking relief to maintain its secrecy." Id. § 6-41-1(2)(ii)(B).

#### i. The Capillary Photometer Sensor

The Defendants argue that because "[c]lear, plastic photometers used to measure properties of fluids have been on the market for decades," Alcor's particular use of a plastic CPS is "generally known" and not protectable under RIUTSA. Defs.' Mem. 19. The Defendants also repeatedly fault Alifax for failing to produce an expert who opines that the CPS constitutes a trade secret. Id. at 18. The Court is unpersuaded by these arguments.

Alifax's alleged trade secret is [\*20] not, as Alcor describes it, the generic use of a plastic CPS to "measure properties of fluids." Id. at 19. It is narrower: the use of a plastic CPS "in an automated system that takes photometric readings of a blood sample in a capillary tube following the stoppage of a pump—in other words, as part of an automated ESR analyzer."<sup>10</sup> Pl.'s Opp'n 13; see also Pl.'s Second Am. Identification of Misappropriated Trade Secrets ¶ 1, ECF No. 137-27(describing CPS trade secret as "[u]sing a plastic capillary photometer sensor . . . as the place where photometric measurements are taken to be used in the calculation of erythrocyte sedimentation rate ("ESR") and related parameters"). The "generally known" use of a plastic CPS in other fluid-measurement applications does not, in and of itself, vitiate this contention. As the Second Circuit held in its oft-cited ruling in Imperial Chem. Indus. Ltd. v. Nat'l Distillers & Chem. Corp., 342 F.2d 737, 742 (2d Cir. 1965), "a trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage [\*21] and is a protectable secret." See also Water Servs., Inc. v. Tesco Chems., Inc., 410 F.2d 163, 173 (5th Cir. 1969) (holding protectable trade secret consisted of "the application of known techniques and the assembly of available components to create the first successful system in the industry").

Alifax's marshalling of the evidence showing that its use of a plastic CPS in an ESR analyzer was not generally known, and thus had some independent economic value, is relatively anemic. The Court has nevertheless parsed the record and concludes that — drawing, as it must, all reasonable inferences in Alifax's favor — a juror could reasonably find that its use of a plastic CPS as a component of its automated ESR analyzer constituted a trade secret. It is undisputed that the plastic CPS was intended to remedy variables in the optical path created when Teflon tubing was used for the reading chamber. PSDF ¶ 86. Although the record before the Court is meager, Alifax's officers testified that the company "invented capillary photometry" and that its application of the CPS in this case was novel or new. See PSAUF Ex. J, Galiano Dep. at 9:3-19; DSUF Ex. 24, Spezzotti Dep., at 148:5-20. It is undisputed [\*22] that Frappa was Alifax's Senior Manager of hardware and software/firmware design, and Alifax contends that he worked on the CPS project — codenamed "Mecca" — before his departure from Alifax. DSDF ¶ 24; Galiano Aff. ¶ 13. In particular, Frappa worked on a detailed internal report on the development and testing of a plastic reading cell. See PSAUF Ex. I; DSADF ¶ 162.<sup>11</sup>

Despite the Defendants' suggestion to the contrary, expert testimony is not required to show the existence of a trade secret.<sup>12</sup> Such a determination is made "on a case-by-case basis, like any other case arising under any other area of law." BladeRoom Grp. Ltd. v. Emerson Elec. Co., 331 F. Supp. 3d 977, 982 (N.D. Cal. 2018). Trade secret misappropriation claims are commonly pursued without expert testimony. See, e.g., Bimbo Bakeries USA, Inc. v. Botticella, 613 F.3d 102, 110 (3rd Cir. 2010) (affirming order granting preliminary injunction where district court held, without noting reliance on any expert testimony, that recipe for English muffins constituted protectable trade

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<sup>10</sup> Alifax has abandoned any claim that the Defendants misappropriated trade secrets concerning "the means of creating the capillary channel in the plastic block or the use of screws with Teflon washers to connect the block to the Teflon tubing." Pl.'s Opp'n 13 n.2.

<sup>11</sup> The Defendants argue, among other things, that Alifax has no evidence that the iSED "uses" the CPS trade secret it allegedly misappropriated. Use, however, is not required under RIUTSA. § 6-41-1(2)(i) (defining misappropriation to include acquisition by improper means).

<sup>12</sup> The Defendants cite no law whatsoever in support of this argument.

secret as plaintiff "produce[d] bread 'from scratch'"); Patriot Rail Corp. v. Sierra R.R. Co., No. 2:09-cv-0009-TLN-AC, 2015 WL 4662720, at [\*23] \*6-8 (E.D. Cal. Aug. 5, 2015) (finding fact witness testimony and documents supported the jury's determination that trade secrets existed and were misappropriated); StrikePoint Trading, LLC v. Sabolyk, No. SA CV071073DOC(MLGx), 2011 WL 13187269, at \*4 (C.D. Cal. Nov. 21, 2011) (affirming verdict as jury heard sufficient testimony about the amount of time, money, and labor plaintiff expended to develop and maintain its client list, as well as efforts to keep it secret); Henkel Corp. v. Cox, 386 F. Supp. 2d 898, 902 (E.D. Mich. 2005) (finding, without citing expert testimony, that formula for unreleased product had independent economic value and was a trade secret). Alifax's failure to proffer an expert opinion here is therefore not dispositive of its CPS-related trade secret claim.

## ii. The Software/Firmware Trade Secrets

Alifax's claims of software and firmware trade secret misappropriation have dwindled over time. See Pl.'s Opp'n 15 n.3. The Court understands that only two such theories remain: the alleged misappropriation of (1) the "means of [optical] signal acquisition," and (2) the means of converting photometric measurements to an ESR value, i.e. the conversion algorithm and its [\*24] "very unusual constants." See Mot. Hearing Tr. 32:17-33:19, Sept. 25, 2018 (describing remaining software/firmware trade secret claims); Pl.'s Opp'n 14-15.

Alcor presses a preemption defense to nullify both allegations. Section 301(a) of the Copyright Act provides that all state law causes of action that are substantively equivalent to a federal copyright infringement claim are preempted. 17 U.S.C. § 301(a); see also Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1164 (1st Cir. 1994), abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010). However, "if a state cause of action requires an extra element, beyond mere copying, preparation of derivative works, performance, distribution or display, then the state cause of action is qualitatively different from, and not subsumed within, a copyright infringement claim and federal law will not preempt the state action." Data Gen. Corp., 36 F.3d at 1164 (quotation marks omitted).

The First Circuit is one of many courts that have rejected Alcor's argument. A claim of trade secret misappropriation under state law "that requires proof of a breach of a duty of confidentiality" is not preempted by the Copyright [\*25] Act "because participation in the breach of a duty of confidentiality — an element that forms no part of a copyright infringement claim — represents unfair competitive conduct qualitatively different from mere unauthorized copying." Id. at 1165; accord GlobeRanger Corp. v. Software AG U.S., Inc., 836 F.3d 477, 486-87 (5th Cir. 2016) ("Because trade secret law protects against not just copying but also any taking that occurs through breach of a confidential relationship or other improper means, all ten circuits that have considered trade secret misappropriation claims have found them not preempted by the Copyright Act.") (and cases cited therein). The apparent inability of Alifax's Rule 30(b)(6) witness to articulate the factual distinctions between its trade secret and copyright infringement causes of action (Alcor's only support for this defense) is irrelevant. See Defs.' Mem. 23. In Alifax II, the Court found that Frappa owed Alifax "a post-employment duty of loyalty prohibiting the disclosure or use of Alifax's confidential or proprietary information in a manner that was likely to [injure] Alifax's business." Alifax II, 2019 WL 317638, at \*11. Alifax alleges that, at a minimum, [\*26] Alcor knew or had reason to know that Frappa owed such duties to Alifax. See Second Am. & Suppl. Compl. ¶¶ 64-65. The RIUTSA claim is thus not preempted.

Turning to the RIUTSA claims' substance, the Court finds that summary judgment is again inappropriate. The Court disagrees with the Defendants' assertion that Dr. Bergeron "conceded at deposition that acquiring a signal and converting the signal . . . is not a trade secret." Defs.' Mem. 20-21. Dr. Bergeron was asked whether the first sentence of Paragraph 45 of his report "is a trade secret."<sup>13</sup> PSAUF Ex. A, Bergeron Dep. at 94:18-20. His response — "[t]hat statement is not a trade secret as far as I know," id. at 94:21-22 — is hardly an ironclad admission. It is at best susceptible of multiple interpretations, including that the statement in his report was not a trade secret. In any event, Dr. Bergeron opines:

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<sup>13</sup> The statement read: "Assuming that this signal could be acquired, one would then have to convert the signal data into a value that correlates with that of a standard or modified Westergren test." Bergeron Report ¶ 45, ECF No. 145-11.

[I]t was not generally known and would not have been readily ascertainable how to acquire signal data for a blood sample . . . . As one who designs and builds instruments, I expect that it would take a skilled engineer—but with no previous experience designing ESR analyzers based on stop-flow capillary technology—at least one entire [\*27] month working full time just to program the signal acquisition feature of the instrument.

Bergeron Report ¶ 44; see also Bergeron Dep. at 89:1-18. As for whether converting optical signals to an ESR value could constitute a trade secret, Dr. Bergeron's report further belies Alcor's contention, even if it is inconsistent with other evidence. Bergeron Report ¶ 46 ("[A]n algorithm that would produce such commercially acceptable results was not generally known to or readily ascertainable by workers in the field using proper means.") The Court is not poised to resolve such disputes under Rule 56. See Anderson, 477 U.S. at 249; Scripps Clinic & Research Found., 927 F.2d at 1581.

The Defendants' additional argument is that Alifax's conversion algorithm and unique constants could not be used in the iSED device because "specific conversion parameters . . . are device dependent" is also unavailing. Defs.' Mem. 21. Assuming for argument's sake the validity of the Defendants' underlying proposition, this conclusion has no bearing on Alifax's misappropriation claim. It is undisputed that Alifax's conversion algorithm and constants (an alleged trade secret) were incorporated into some iteration of [\*28] the source code for Version 104A of the iSED's software. See PSDF at ¶¶ 124-25, 127, 131; DSADF ¶ 167; see also DSADF Ex. B., Smith Decl. ¶¶ 5-6, ECF No. 171-11. A fact finder could therefore reasonably conclude that Alcor at least acquired this trade secret during the iSED's development. Acquisition by improper means, even without disclosure or use, is actionable under RIUTSA. See R.I. Gen. Laws § 6-41-1(2)(i).

### iii. The Myeloma and Anemia Factor Information

There is uncontested evidence that Frappa sent information concerning myeloma and an "anemia factor" to a personal email account in the waning days of his employment with Alifax. See DSADF ¶ 168; PSAUF Ex. M, Frappa Dep. at 112:13-17. One email attached "a nice memo containing a condensate [sic] of known information available on the Internet" written by an Alifax employee concerning myeloma. Frappa Dep. at 113:5-11; DSADF ¶ 170; PSAUF Ex. N (myeloma email attachment). Another email attached a spreadsheet with "a substantial quantity of data" concerning an "anemia factor" related to tests on an ESR analyzer. Frappa Dep. at 106:21-111:3. As the Court has already explained, whether Frappa or Alcor disclosed or used this information [\*29] to develop the iSED is not dispositive if it was allegedly acquired by "improper means." See R.I. Gen. Laws § 6-41-1(2)(i).

Alcor nevertheless casts doubt on whether the transmitted information, much of which was publicly available, embodies a trade secret. Public availability alone, however, does not disqualify internal compilations from RIUTSA protection. Like the Uniform Trade Secrets Act, the statute specifically contemplates the protection of information formatted as a "compilation." See R.I. Gen. Laws § 6-41-1(4). As the Eighth Circuit explained in AvidAir Helicopter Supply, Inc. v. Rolls-Royce Corp., 663 F.3d 966, 972 (8th Cir. 2011), "[c]ompilations of non-secret and secret information can be valuable so long as the combination affords a competitive advantage and is not readily ascertainable." The quantum of non-public information in the compilation is moreover irrelevant. Id. ("[T]he effort of compiling useful information is, of itself, entitled to protection even if the information is otherwise generally known." (quoting N. Elec. Co. v. Torma, 819 N.E.2d 417, 426 (Ind. Ct. App. 2004)); Penalty Kick Mgmt. Ltd. v. Coca Cola Co., 318 F.3d 1284, 1291 (11th Cir. 2003) ("[E]ven if [\*30] all of the information is publicly available, a unique combination of that information, which adds value to the information, also may qualify as a trade secret.")).

Alifax's evidence supporting this theory of misappropriation is — again — sparse. In late August 2012, Frappa travelled to Rhode Island to meet with Alcor's founder, who was interested in a potential working relationship. See Alifax II, 2019 WL 317638, at \*2. Upon returning to Italy, he notified Alifax of his intent to resign as of September 1, 2011, but explained that he would remain at the company for the two-month notice period set forth in his contract. Id. It was during this period, and just four days before his departure, that Frappa forwarded the disputed information to a personal email account. See DSADF ¶ 168; Frappa Dep. at 112:13-17. Frappa knew when he sent the messages that he was going to work for Alcor, Frappa Dep. at 104:6-9, and he conceded at deposition that the compilations had some value, id. at 106:21-111:3, 113:5-11, 114:24-115:4. This narrative is thin, but the Court cannot say that no juror could reasonably find that, as internally compiled and maintained by Alifax, the myeloma

and anemia factor information [\*31] had some independent economic value conferring a competitive advantage on the company.

#### 4. Copyright Infringement

The Defendants' last salvo targets Alifax's copyright infringement claim. Alifax alleges that Alcor willfully copied the company's conversion algorithm (with its recognizable constants) into the iSED's source code to convert optical signals to an ESR value.<sup>14</sup> PSDF ¶ 124. To prevail, Alifax must prove at trial (1) control of a valid copyright, and (2) copying of the original elements of the work by Alcor. See Airframe Sys., Inc. v. L-3 Commc'n Corp., 658 F.3d 100, 105 (1st Cir. 2011); Coquico, Inc. v. Rodriguez-Miranda, 562 F.3d 62, 66 (1st Cir. 2009). The first prong is not in dispute. Alifax holds copyright registrations for the allegedly duplicated source code at issue. See PSDF ¶¶ 111-114. No party has suggested that Alifax's source code was not copyrightable. The unanswered question is whether Alcor is entitled to a judgment that, as a matter of law, it did not unlawfully copy the protected material.

Not every instance of copying constitutes copyright infringement. Johnson v. Gordon, 409 F.3d 12, 17-18 (1st Cir. 2005) (citing Feist Publ'n, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991)). The copying must be wrongful, and such a finding is based on a two-part test. First, Alifax must demonstrate "actual copying," i.e., "that, as a factual matter, the putative infringer copied the protected work." Coquico, Inc., 562 F.3d at 66-67. Second, Alifax must prove Alcor's coping "was so egregious as to render the allegedly infringing and infringed works substantially similar." Id. at 66. As the First Circuit instructed in Johnson, "[t]he substantial similarity requirement focuses holistically on the works in question and entails proof that the copying was so extensive that it rendered the works so similar that the later work represented a wrongful appropriation of expression." 409 F.3d at 18. This quality ordinarily must be evaluated from the perspective of "the ordinary observer."<sup>15</sup> Airframe Sys., 658 F.3d at 106. De minimis copying — the reproduction of "such a small amount of the plaintiff's work . . . that the two works cannot be said to be substantially similar" — is not actionable infringement. Situation Mgmt. Sys. v. ASP Consulting LLC, 560 F.3d 53, 58-59 (1st Cir. 2009) (citing 2 Nimmer & Nimmer, Nimmer on Copyright § 8.01[G], at 8-26 (2008)). [\*33]<sup>16</sup> Given the fact-intensive nature of these criteria, summary judgment on copyright infringement issues is "unusual." Segrets, Inc. v. Gillman Knitwear Co., 207 F.3d 56, 62 (1st Cir. 2000).

Here, Alifax has produced direct evidence of "actual copying." Dr. Bergeron and Alcor's code expert, Daniel Smith, each observed the Alifax constants in the iSED software's source code. See PSDF ¶¶ 124, 127; DSADF ¶¶ 167, 174; PSAUF Ex. K, Smith Dep. at 121:12-123:20, ECF No. 167. The constants were observed in the source code for software identified as "Version 104A." See PSDF ¶¶ 124-25, 127; DSADF ¶¶ 167, 174; Smith Dep. at 121:12-123:20. Alcor nevertheless contends that it did not infringe Alifax's copyright registration as (1) the constants were only present in a "pre-production" iteration of Version 104A that "never shipped in any functional iSED machine," and (2) due to different electronics and mechanical engineering, conversion constants are necessarily device specific; Alifax's constants are not fungible data and would not work in any device sold to a customer. Defs.' Mem. 26; [\*34] Defs.' Reply 19.

<sup>14</sup> This cause of action is alleged only against Alcor. See Second Am. & Suppl. Compl. ¶¶ 77-85. Furthermore, whatever its original strategy may have been, Alifax no longer alleges a separate theory of infringement based on the so-called "2006 Source Code Module," a section of Alcor's code identifying Frappa as its author and stating "Copyright: Alifax Tech." See Pl.'s Opp'n 20; Defs.' Mem. 24. Alifax suggests that the 2006 Source Code Module is merely evidence of willfulness. Pl.'s Opp'n 20.

<sup>15</sup> As the First Circuit highlighted in Airframe Systems: "Where, as here, the copyrighted work involves specialized subject matter such as a computer program, some courts have held that the ordinary observer is a member of the work's intended audience who possesses specialized expertise." 658 F.3d 106 n.7 (quotation marks omitted). The First Circuit does not appear to have ironed the wrinkles out of this standard, but it is unnecessary to do so here.

<sup>16</sup> Put another way, de minimis copying is "a technical violation of a right so trivial that the law will not impose legal consequences." Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 74 (2d Cir. 1997); see also UpdateCom, Inc. v. FirstBank P.R., Inc., No. CIV. 10-1855 SCC, 2014 WL 346436, at \*3 (D.P.R. Jan. 30, 2014) (finding "11 lines of 5,000, or about 0.22%—constituted de minimis copying in the absence of other evidence.").

After carefully reviewing the record, the Court cannot grant summary judgment on either basis. Regarding Alcor's first argument, there is evidence that an iteration of Version 104A contained the protected work. See PSDF ¶¶ 124, 127; DSADF ¶¶ 167, 174; Smith Dep. at 121:12-123:20. It is also undisputed that Alcor's records show that at least one iSED — and possibly more<sup>17</sup> — was sold with software identified as "Version 1.04A" installed. DSADF ¶ 177; PSAUF Ex. L, ECF No. 167. The parties have produced dueling expert opinions concerning whether the "Version 104A" containing Alifax's protected constants could be the same software installed on one or more iSED units when sold. See DSADF ¶ 185; PSAUF Ex. P, Bergeron Decl.; Smith. Decl. ¶¶ 5-9. It is not the Court's role to select a victor at this stage.

Alcor's argument that conversion constants are device specific (and thus useless to anyone else even if copied) would side-step these complications. However, as the parties should be acutely aware, the record before the Court concerning the evolution of Version 104A is muddy and unsettled. For example, it is undisputed that tests to correlate the iSED's method of measuring [\*35] ESR to the standard Westergren methodology were conducted December 2012 and January 2013 with an iSED prototype. DSADF ¶ 188. It is unclear, and the parties dispute, what software version the prototype device ran.<sup>18</sup> See DSADF ¶¶ 186-191. The test protocol designated the software as "software version 1.00." Id. ¶ 189. But at his deposition, Frappa could not recall what was meant by "software version 1.00" and explained that "[in] the very early stages of development of the software, the tracking of the changes were not kept in a religious way."<sup>19</sup> Frappa Dep. 61:14-62:5. He further described version 1.00 as the "very, very first code written for the analyzer," while noting that the code identified in the test protocol may have been incorrect. Id. at 71:17-72:8. At the same time, it is undisputed that the "first version" of the iSED's software incorporated Alifax's constants. See PSDF ¶¶ 124, 127; DSADF ¶¶ 167, 174; Smith Dep. at 121:12-123:20. Reasonable jurors could interpret these facts to find that Alcor made some use of Alifax's conversion constants. Thus, the record before the Court is not ripe for summary judgment.

The Court perceives the core of Alcor's non-infringement [\*36] arguments to be a de minimis copying defense expressed in technical terms. In other words, any alleged use Alcor could have made of Alifax's protected work was trivial, and "the law does not concern itself with trifles." Ringgold, 126 F.3d at 74. Such a conclusion may reflect a rational interpretation of the evidence, but based on the present state of the record, a final determination must be reserved for a jury.

#### A. Alifax's Motion for Partial Summary Judgment

Alifax moves for summary judgment on Count III of Alcor's counterclaim, which alleges that Alifax intentionally interfered with Alcor's prospective contractual relations by filing this action, which has in turn "caused distributors to withdraw from negotiations with Alcor." Ans. ¶ 47. The gravamen of Alcor's cause of action is that Alifax's claims of patent infringement, trade secret misappropriation, and copyright infringement are "objectively baseless" and that this action was filed to serve anti-competitive ends. Id. ¶ 46; Defs.' Opp'n to Pl.'s Mot. for Summ. J. 1, ECF No. 180. Alifax's principle basis for judgment in its favor is the Noerr-Pennington doctrine — a rule established to protect a litigant's constitutional right [\*37] to petition the government for redress. Pl.'s Mot. for Summ. J. 12-14, ECF No. 166.

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<sup>17</sup> The document Alcor produced listing all the iSED instruments it sold to customers includes the software installed at the time of manufacture or "as [of] the date of service, whichever is later." DSADF Ex. A, Frappa Decl. ¶ 7. Alcor does not appear to genuinely dispute that until October 2013, iSED units were sold with some iteration of Version 104A installed, though it disputes whether Alifax's conversion constants were present in that software. See DSADF ¶ 182.

<sup>18</sup> The dates of these tests appear to predate all the so-called "commit" files submitted by Alcor from its code repository in an attempt to demonstrate that iSED units in March 2013 were not sold with an iteration of Version 104A that contained Alifax's constants. See Frappa Decl. ¶¶ 17-19.

<sup>19</sup> Frappa's affidavit in support of summary judgment is more confident and contends that the prototype ran software that did not include Alifax's constants. See generally Frappa Decl.

The Court agrees that the Noerr-Pennington doctrine should control here. The doctrine was born from twin antitrust cases, see Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) and United Mine Workers v. Pennington, 381 U.S. 657 (1965), but is rooted in fundamental First Amendment principles. Sosa v. DIRECTV, Inc., 437 F.3d 923, 929 (9th Cir. 2006) (stating the doctrine "derives from the First Amendment's guarantee of "the right of the people . . . to petition the Government for a redress of grievances." (quoting U.S. Const. amend. I.)). As described by the Ninth Circuit in Theme Promotions, Inc. v. News America Marketing FSI, 546 F.3d 991, 1006 (9th Cir. 2008), "[t]he essence of the Noerr—Pennington doctrine is that those who petition any department of the government for redress are immune from statutory liability for their petitioning conduct." The protection offered by this form of immunity includes petitioning activities in "all departments of the Government," including bringing legitimate disputes in U.S. courts. Cal. Motor Transp. Co. v. Trucking Unlimited [\*38], 404 U.S. 508, 510 (1972).

Alcor urges the Court to cabin the doctrine's applicability to the facts of its origin — antitrust cases. The Court is unpersuaded. Noerr-Pennington immunity has a broad "constitutional foundation." Sosa, 437 F.3d at 930; Amarel v. Connell, 102 F.3d 1494, 1518 (9th Cir. 1996), as amended (Jan. 15, 1997) (describing Noerr-Pennington as a "general rule" that includes "the approach of citizens . . . to administrative agencies . . . and to courts" (quotation marks omitted); Whelan v. Abell, 48 F.3d 1247, 1254 (D.C. Cir. 1995) ("As Noerr—Pennington rests on the conclusion that the filing of claims in court . . . is part of the protected right to petition, it is hard to see any reason why . . . common law torts . . . might not in some of their applications be found to violate the First Amendment."). As the Third Circuit concluded, "the purpose of Noerr—Pennington as applied in areas outside the antitrust field is the protection of the right to petition." We, Inc. v. City of Phila., 174 F.3d 322, 327 (3d Cir. 1999). Courts across the country have thus applied the doctrine to other causes of action, including common law torts such as tortious interference, that could [\*39] chill the constitutional right of petition.<sup>20</sup> See, e.g., Theme Promotions, 546 F.3d at 1006-07 (9th Cir. 2008) (applying Noerr-Pennington to claim for tortious interference with prospective economic advantage under California law); Pers. Dept', Inc. v. Prof'l Staff Leasing Corp., 297 F. App'x. 773, 779 (10th Cir. 2008) (holding that Noerr—Pennington can provide immunity from liability arising from a tortious interference claim); Int'l Bhd. of Teamsters, Local 734 Health & Welfare Tr. Fund v. Philip Morris Inc., 196 F.3d 818, 826 (7th Cir. 1999) ("Although the Noerr—Pennington doctrine originated in **antitrust law**, its rationale is equally applicable to RICO suits."); Video Int'l Prod., Inc. v. Warner—Amex Cable Commc'nns, Inc., 858 F.2d 1075, 1084 (5th Cir. 1988) (applying Noerr-Pennington to tortious interference with contract claim); Sierra Club v. Butz, 349 F. Supp. 934, 938-39 (N.D. Cal. 1972) (applying Noerr-Pennington to contractual interference claim).<sup>21</sup>

Alcor's contentions that the Rhode Island [\*40] Supreme Court has not fully embraced the Noerr-Pennington principles or that the Rhode Island Limits on Strategic Litigation Against Public Participation ("Anti-SLAPP") statute, R.I. Gen. Laws § 9-33-1 et seq., displaces this doctrine are untenable. Like many of the courts cited above, the Rhode Island Supreme Court recognized in Pound Hill Corp. v. Perl that "[a]lthough the [Noerr-Pennington] doctrine arose in a context of application of the antitrust statutes, it is based upon the First Amendment right to petition the government for redress of grievances." 668 A.2d 1260, 1263 (R.I. 1996). In Hometown Properties, Inc. v. Fleming, the Court unambiguously stated, "This Court has adopted the Noerr—Pennington premise and has applied its protection to common-law tort claims." 680 A.2d 56, 60 (R.I. 1996). Count III of Alcor's counterclaim is a common law tort claim.

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<sup>20</sup> As the U.S. District Court for the District of Massachusetts recently observed, "The First Circuit has not decided whether the Noerr-Pennington doctrine is applicable to state law claims as a matter of federal law." United Food & Commercial Workers Unions & Emp'rs Midwest Health Benefits Fund v. Novartis Pharm. Corp., No. 15-CV-12732, 2017 WL 2837002, at \*9 (D. Mass. June 30, 2017), aff'd, 902 F.3d 1 (1st Cir. 2018).

<sup>21</sup> Alcor cites a statement from this Court's ruling in In re Loestrin 24 Fe Antitrust Litig., 261 F. Supp. 3d 307, 338 (D.R.I. 2017), as support for its position. The Court stated, "Generally, under the Noerr—Pennington doctrine, a Sherman Act violation cannot be predicated upon mere attempts to influence the passage or enforcement of laws." Id. (quotation marks omitted). The Court did not specifically hold that Noerr-Pennington could not apply to state-law tort claims. Id. at 348.

Furthermore, nowhere in the Rhode Island Supreme Court's relevant rulings does the Court purport to limit the applicability of Noerr-Pennington to issues of "public concern," as Alifax suggests. The "private" nature of such cases is commonplace. See, e.g., Theme Promotions, Inc., 546 F.3d at 1006-07 (a dispute between an advertiser [\*41] and a publisher concerning whether right of first refusal agreements between publisher and packaged goods companies violate **antitrust law** or constituted tortious interference with prospective economic advantage). The frequent invocation of this doctrine in actions related to matters of public concern does not necessarily limit its applicability to actions involving such matters. As the Supreme Court acknowledged in Hometown Properties, the Rhode Island Anti-SLAPP statute compliments the Noerr-Pennington doctrine by "protect[ing] valid petitioning activities." 680 A.2d at 61. The statute cannot, however, displace a doctrine drawn from a federal constitutional right to petition. See Theme Promotions, Inc., 546 F.3d at 1007 (holding as "Noerr-Pennington protects federal constitutional rights, it applies in all contexts, even where a state law doctrine advances a similar goal").

The Court also finds that the "sham exception" to Noerr-Pennington immunity is inapplicable as a matter of law. Sham petitioning activities are not entitled to protection. See Noerr Motor Freight, Inc., 365 U.S. at 144. The criteria for identifying such nonsense lawsuits are well-defined. An action is considered [\*42] a "sham" if it is (1) objectively baseless, and (2) subjectively motivated by a desire to abuse process rather than obtain judicial relief. Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60-61 (1993). A lawsuit is only "objectively baseless" if "no reasonable litigant could realistically expect success on the merits," id., and a finding of objective merit obviates the need to inquire as to motive. See id. at 57 ("[A]n objectively reasonable effort to litigate cannot be sham regardless of subjective intent.").

A legion of federal courts, including the Federal Circuit, have held that a denial of summary judgment precludes a finding of objective baselessness as a matter of law. See, e.g., Beckman Instruments, Inc. v. LKB Produkter AB, 892 F.2d 1547, 1551 (Fed. Cir. 1989) ("find[ing] it difficult to agree that [an] inequitable conduct defense was 'baseless' when it survived a motion for summary judgment and was rejected only after findings were made on disputed facts"); Twin City Bakery Workers & Welfare Fund v. Astra Aktiebolag, 207 F. Supp. 2d 221, 224 (S.D.N.Y. 2002) ("[A]llowing claims of infringement of four of the six asserted patents to proceed beyond [\*43] summary and two of the four to proceed through trial, preclude any contention that defendants' litigation is so baseless as not to warrant Noerr-Pennington immunity."); Nobelpharma Ab v. Implant Innovations, Inc., 930 F. Supp. 1241, 1255 (N.D. Ill. 1996) (denial of motion for summary judgment "foreclosed" the argument that the patent infringement lawsuit was objectively baseless); Gen-Probe, Inc. v. Amoco Corp., Inc., 926 F. Supp. 948, 958 (S.D. Cal. 1996) ("A denial of summary judgment means that the nonmoving party has produced enough evidence that a rational jury could find in its favor. A party with sufficient evidence to support a jury finding in its favor has probable cause to bring a lawsuit.").

The Court has denied the Defendants' request for summary judgment on the three claims Alcor contends are unfounded. If reasonable minds can differ concerning the Defendants' liability, the same reasonable minds could not conclude that Alifax could not "realistically expect success on the merits." Prof'l Real Estate Inv'rs, 508 U.S. at 60-61; see also Avitech, LLC v. Embrex, Inc., WMN-04-3082, 2008 WL 11287093, \*5 (D. Md. Aug. 19, 2008) (holding that if a reasonable jury could find infringement, [\*44] "a reasonable jury could not find that [patentee] could not have held a reasonable belief that there was a chance that its infringement claim would succeed"). Accordingly, as a matter of law Alifax is entitled to judgment in its favor on Count III of Alcor's First Amended Counterclaim.

#### IV. Conclusion

Alifax has avoided "the swing of the summary judgment ax," United States v. One Lot of U.S. Currency (\$68,000), 927 F.2d 30, 32 (1st Cir. 1991) (Selya, J.), at times by a whisker. Regardless, having found that reasonable minds could differ as to the veracity of Alifax's claims, this action falls squarely within the First Amendment's petitioning protections as articulated under the Noerr-Pennington doctrine. Consequently, for the foregoing reasons, the Defendants' Motion for Partial Summary Judgment (ECF Nos. 142, 143) is DENIED, and Plaintiff's Motion for Partial Summary Judgment on Count III of the First Amended Counterclaim (ECF Nos. 159, 166) is GRANTED.

IT IS SO ORDERED.

/s/ William E. Smith

William E. Smith

Chief Judge

Date: March 26, 2019

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## Premier Comp Solutions LLC v. UPMC

United States District Court for the Western District of Pennsylvania

March 27, 2019, Decided; March 27, 2019, Filed

2:15cv703

### **Reporter**

377 F. Supp. 3d 506 \*; 2019 U.S. Dist. LEXIS 51409 \*\*; 2019-1 Trade Cas. (CCH) P80,746; 2019 WL 1382717

PREMIER COMP SOLUTIONS LLC, Plaintiff, v. UPMC., a Pennsylvania non-profit non-stock corporation, UPMC BENEFIT MANAGEMENT SERVICES, INC., d/b/a UPMC WORKPARTNERS, UPMC HEALTH BENEFITS, INC., d/b/a UPMC WORKPARTNERS, and, MCMC, LLC a wholly-owned subsidiary of York Risk Management, Defendants.

**Prior History:** [Premier Comp Solutions LLC v. UPMC, 163 F. Supp. 3d 268, 2016 U.S. Dist. LEXIS 19785 \(W.D. Pa., Feb. 18, 2016\)](#)

## **Core Terms**

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provider, repricing, workers' compensation, antitrust, network, relevant market, geographic, Sherman Act, vendor, anticompetitive, panels, insured, competitors, anti trust law, markets, monopolization, containment, generation, monopoly power, medical bill, probability, medical services, market share, contends, concerted action, summary judgment, effects, email, market power, customers

**Counsel:** [\*\*\[\\*\\*1\]\*\* For Premier Comp Solutions, Llc, Plaintiff: Stanley M. Stein, LEAD ATTORNEY, Stanley M. Stein, PC, Pittsburgh, PA USA; Jeffrey S. Jacobovitz, PRO HAC VICE, Arnall Golden Gregory LLP, Washington, DC USA.](#)

For Upmc a Pennsylvania nonprofit non-stock corporation, Upmc Benefit Management Services, Inc. doing business as UPMC WORKPARTNERS, Upmc Health Benefits, Inc. doing business as UPMC WORKPARTNERS, Defendants: Daniel K. Oakes, Richard B. Dagen, LEAD ATTORNEYS, Thomas G. Rohback, Axinn, Veltrop & Harkrider LLP, Washington, DC USA.

For Mcmc, Llc a wholly-owned subsidiary of York Risk Management, Defendant: Curtis M. Schaffner, Paul S. Mazeski, Buchanan Ingersoll & Rooney PC, Pittsburgh, PA USA.

**Judges:** David Stewart Cercone, United States District Judge.

**Opinion by:** David Stewart Cercone

## **Opinion**

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### **[\*514] MEMORANDUM OPINION**

#### **I. INTRODUCTION**

Plaintiff, Premier Comp Solutions, LLC ("Premier" or "Plaintiff"), initiated this action by filing a seven (7) count Amended Complaint against Defendants, UPMC ("UPMC"), UPMC Benefit Management Services, Inc. ("UPMC-

BMS"), UPMC Health Benefits, Inc.<sup>1</sup> ("UPMC-HB") (collectively the "UPMC Defendants"), and MCMC, LLC ("MCMC") (collectively the "Defendants"), alleging (1) violation of Section 2 of the Sherman [\*\*2] Act, 15 U.S.C. §§ 1 et seq., attempted monopolization against UPMC (Count I); (2) violation of Section 1 of the Sherman Act, group boycott, against the UPMC Defendants (Count II); (3) violation of Section 2 of the Sherman Act, attempted monopolization against UPMC (Count III); (4) violation of Section 1 of the Sherman Act, exclusive dealing, against all Defendants (Count IV); (5) violation of Section 1 of the Sherman Act, restraint of trade, against all Defendants (Count V); (6) violation of Section 2 of the Sherman Act, attempted monopolization against UPMC and WorkPartners (Count VI); (7) common law Unfair Competition against [\*515] all Defendants (Count VII). Premier contends, *inter alia*, that the Defendants conspired to drive Premier from the market in workers' compensation cost containment services. The UPMC Defendants and MCMC have filed Motions for Summary Judgment, Premier has responded and the matter is now before the Court.

## II. STATEMENT OF THE CASE

Premier is a limited liability company organized under the laws of the Commonwealth of Pennsylvania, located in Allegheny County, Pennsylvania. UPMC Concise Statement of Undisputed Material Facts ("UPMC CSUMF") ¶¶ 1 & 2. Premier provides cost containment services to workers' compensation insurers and [\*\*3] third party administrative ("TPA") service providers in twenty-one (21) states including Pennsylvania. Am. Compl. ¶¶ 20, 21 & 25; UPMC CSUMF ¶ 10; Premier's Response to UPMC Concise Statement of Undisputed Material Facts ("Premier Resp.") ¶ 10. The services provided by Premier include:

- (1) Medical Bill Review and Repricing — Preferred Provider Organization ("PPO") discount network access, electronic data interface ("EDI") transfer services, and the issuance of savings reports to clients on a monthly, quarterly, and/or annual basis;
- (2) Physical Therapy ("PT") and Diagnostic ("MRI") discount network access — Scheduling of all PT/MRI appointments, verification and tracking of attendance for all appointments, PT utilization review services, obtaining all PT treatment notes and MRI imaging reports, tracking PT appointments and treatment compliance, issuance of detailed PT utilization reports for all active and discharged patients as well as PT outcomes by body part on a monthly, quarterly, and/or annual basis and the issuance of network savings reports to clients on a monthly, quarterly, and annual basis;
- (3) Panel Development - Investigation and vetting of potential panel providers for qualifications, [\*\*4] licensing, and quality of care, providing ongoing panel maintenance, panel implementation, and verification of the accuracy of the panel provider information of all panels every six months and/or when demographic (address, phone number, etc.) changes occur, providing customer service and receiving feedback regarding client satisfaction with all PCS services through the use of written customer surveys;
- (4) Injury Management — Scheduling of all physician, PT and MRI appointments for managed panel clients, obtaining work status information after every appointment and forwarding it to adjuster and/or employer.

UPMC CSUMF ¶ 10; Premier Resp. ¶ 10.

UPMC BMS (d/b/a WorkPartners) is a licensed TPA in Pennsylvania that originally began providing workers' compensation TPA services to UPMC entities in 1997, and later began providing workers' compensation TPA (and other) services to other public and private employers. UPMC CSUMF ¶ 40. UPMC HB (d/b/a WorkPartners) is licensed to provide workers' compensation insurance in the Commonwealth of Pennsylvania, and began selling workers' compensation insurance in Pennsylvania in 2010. UPMC CSUMF ¶¶ 42 & 43. WorkPartners uses vendors to provide *inter alia* [\*\*5] medical bill repricing and panel generation services to its clients. MCMC Concise Statement of Undisputed Material Facts ("MCMC CSUMF") ¶ 5. Both UPMC BMS and UPMC HB are wholly [\*516] owned subsidiaries of UPMC. UPMC CSUMF ¶ 44.

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<sup>1</sup> Both UPMC-BMS and UPMC-HB do business as UPMC WorkPartners (hereinafter "WorkPartners"). Amended Complaint ("Am. Compl.") ¶¶ 17 & 18.

Medical bill review and repricing is the process by which a company reviews medical bills to ensure there are no errors in the billing and to reduce provider charges. Bills from healthcare providers for services rendered to workers' compensation claimants are reviewed to assure the providers' documentation supports their billed charges, and billed charges in excess of the amounts allowed under the appropriate state's workers' compensation fee schedule are disallowed and reduced accordingly. The repricing company then reprices the bill and generates Explanation of Reimbursement ("EOR") forms which reflect the providers' billed charges, workers' compensation fee schedule reductions, medical bill review reductions, PPO discounts, and amounts payable to the provider. The repricing company transmits the EORs to their clients and the clients remit payment to the providers with copies of the EORs. UPMC CSUMF ¶ 15; MCMC CSUMF ¶ 2(b).

Premier performs repricing services for [\*\*6] clients in Pennsylvania and twenty-one (21) states outside of Pennsylvania, according to the workers' compensation laws and fee schedules of those states, including the states with the largest volume, New Jersey, Maryland, Delaware, Ohio, and Utah. UPMC CSUMF ¶ 19. Premier has a PPO network access contract with the Coventry Health Care ("Coventry") workers' compensation PPO network, which is the largest such network in the nation. UPMC CSUMF ¶ 16. Premier also accesses the Prime Health Services Network ("Prime") PPO, located in Brentwood, Tennessee, which includes more than 700,000 medical service providers throughout the United States. UPMC CSUMF ¶ 17. In 2014, approximately 6.84% of Premier's overall revenue was derived from its medical bill review and repricing services. UPMC CSUMF ¶ 21.

MCMC provides medical bill review and repricing services to, among other types of customers, workers' compensation insurers, workers' compensation TPA services providers and self-insured employers. UPMC CSUMF ¶ 53. Medical bill review and repricing services for UPMC WorkPartners have always been provided by MCMC, except that Premier provided bill review and repricing for four (4) of WorkPartners' [\*\*7] TPA clients relevant here: (1) the City of Pittsburgh; (2) Port Authority of Allegheny County; (3) Pennsylvania Turnpike Commission and (4) Allegheny County. UPMC CSUMF ¶ 55; Premier Resp. ¶ 55; MCMC CSUMF ¶¶ 7, 9 & 10. MCMC is not a panel provider and has provided no panel generation services to WorkPartners. MCMC CSUMF ¶ 11.

Though WorkPartners contends that it does not engage in or sell medical bill review and repricing services of workers' compensation medical bills, UPMC CSUMF ¶ 48, Premier contends that WorkPartners bundles services in their TPA bids to include repricing services. Premier Resp. ¶ 48. In that regard, WorkPartners does not give the employer the option to carve out the repricing services to an independent repricing vendor such as Premier. *Id.*

With regard to Premier's physical therapy and diagnostic network, Premier entered into direct discount contracts with a large number of outpatient healthcare providers who render services in the fields of physical therapy and diagnostic imaging (e.g. MRI and CT). UPMC CSUMF ¶ 23. These direct contract relationships form what Premier called its "PT Network" and "MRI Network" which is also referred to as its "PT/MRI Network." UPMC [\*\*8] CSUMF ¶ 24. Premier has the largest and most extensive PT/MRI network in Pennsylvania, [\*517] containing over 995 PT providers and 265 diagnostic imaging providers across the Commonwealth of Pennsylvania. UPMC CSUMF ¶ 25.

Panel development and maintenance, as practiced by Premier, is the process by which Premier develops functional and customized panel listings of healthcare providers to be utilized by employees who incur work-related injuries and illnesses. Premier assists the employer to implement a panel in compliance with Pennsylvania's Workers' Compensation Act and to understand the proper use of the panel. The panels are posted at the employer's workplace and are comprised of healthcare providers who are geographically located near the place of employment and who provide the medical services most likely to be needed by the employees of the particular employer. Premier updates and reissues the employer panels when provider demographics change and at the request of the employer. Premier verifies the accuracy of panel provider information for all its clients' panels every six months and communicates any changes to their employer and insurance carrier clients. Premier also investigates and [\*\*9] vets potential panel providers for qualifications, current licensing and quality of care. Premier Resp. ¶ 29. Premier generally does not earn money for this service separate from its connection with use of its PT/MRI Network. UPMC CSUMF ¶ 32. When providing its panel management product to WorkPartners, Premier earned revenue only when injured employees were scheduled with and received treatment from providers in Premier's PT/MRI Network. UPMC CSUMF ¶ 33.

WorkPartners generated provider panels for certain of its fully-insured and TPA clients located in close proximity to UPMC's hospitals and physician practices across the Commonwealth of Pennsylvania. UPMC CSUMF ¶ 45; Premier Resp. ¶ 45. WorkPartners does not generate or maintain provider panels for any employers other than its workers' compensation insurance and TPA services clients. UPMC CSUMF ¶ 47. WorkPartners contends that it does not market or sell provider panel generation or maintenance services. UPMC CSUMF ¶ 46. Employers have the right under the Workers' Compensation Act to select their own providers, which allows Premier to market its services to those employers, even if such employers are fully insured by or receive TPA services [\*\*10] from WorkPartners. Premier Resp. ¶ 46. To prevent such competition, Premier contends that once an employer makes the decision to purchase workers' compensation insurance from WorkPartners, WorkPartners mandates that such employer use only WorkPartners approved providers. *Id.* Premier further contends that WorkPartners informed their employer-insureds that their workers' compensation premiums were based on the insureds use of WorkPartners' approved panels, which were often panels consisting of UPMC owned and affiliated providers. *Id.*

Premier's injury management services involve providing injured workers with assistance in scheduling appointments for medical treatment with panel providers, assuring the employer and claimed adjuster receive prompt diagnosis, treatment, and work status information, tracking physical therapy ("PT") treatment and reporting utilization information to the client, and scheduling all PT and diagnostic testing ("MRI/CT") with Premier discount network providers whenever possible to maximize the cost savings for employers and insurance carriers. UPMC CSUMF ¶ 35; Premier Resp. ¶ 35. Premier schedules patients for treatment inside and outside of Pennsylvania with network [\*\*11] medical service providers in Pennsylvania and neighboring states who provide medical services to employees of Pennsylvania employers. [\*518] UPMC CSUMF ¶ 36; Premier Resp. ¶ 36.

In April of 2006, Premier entered into a Medical Review and Repricing Agreement (the "Repricing Agreement") with WorkPartners. UPMC CSUMF ¶ 59; Am. Comp. ¶ 52. Premier became a subcontractor to WorkPartners to provide medical bill review and repricing services for three of UPMC WorkPartners' TPA clients: (1) the City of Pittsburgh; (2) Port Authority of Allegheny County; and (3) Pennsylvania Turnpike Commission. UPMC CSUMF ¶ 60.

In August 2010, Premier began generating provider panels for certain of WorkPartners' new commercial insured clients. UPMC CSUMF ¶ 61. In addition to Premier's panel development, its services included appointment scheduling, injury management, and PT/MRI network services. Premier Resp. ¶ 61. During the panel generation relationship with WorkPartners, every panel developed by Premier, and the included providers, required the approval of WorkPartners' Jason Gallagher ("Gallagher"). UPMC CSUMF ¶ 62; UPMC Exs. AD, AE & AF. WorkPartners required that Premier list UPMC owned and affiliated physicians [\*\*12] and other providers whenever geographically feasible. Premier Resp. ¶ 62.

On October 31, 2013, Linda Schmac ("Ms. Schmac"), President and co-owner of Premier, wrote an email to Deborah Mehalik, WorkPartner's Manager of Network Services ("Mehalik"), which, on its face, described inefficiencies she believed were caused by WorkPartner's use of multiple vendors for their medical review and repricing, while using Premier's generated provider panels, but not using Premier for medical review and repricing. Schmac's email also appears to recommend that WorkPartners use MCMC for all its "panel development, implementation and maintenance, and PT/MRI network usage" to remedy the issues caused by multiple vendors. UPMC CSUMF ¶ 64; UPMC Ex. AH. Specifically, Ms. Schmac wrote:

Don<sup>2</sup> and I have discussed this issue at length and we believe the manual processes that [WorkPartners] has had to put into place to accommodate using our panel PT/MRI network program are too prone to human error and are no longer [] in [WorkPartners'] best interest. . .

Because [WorkPartners] does not utilize our repricing service, we do not have the ability to determine if your insureds are complying with the panels we have developed, [\*\*13] implemented manage, and continue to maintain for [WorkPartners.] Further, we do not have the ability to capture our PT/MRI network bills through repricing. Nor do we have the ability to detect if any of our network providers inadvertently bill [WorkPartners] directly for services which could potentially result in [WorkPartners] paying both [Premier] and our network

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<sup>2</sup> Don Schmac ("Mr. Schmac") is the Executive Vice President and co-owner of Premier.

provider directly for the same services. While our network providers are contractually obligated to bill [Premier] for all services we schedule, this does happen from time to time, but can be easily detected through repricing so that our clients do not ever pay double for the services. . .

Due to the growth of [WorkPartners] and since [WorkPartners] will not consider using our repricing service which would automate these manual processes and completely eliminate these problems, we feel it would be in [WorkPartners'] best interest to transition all of [WorkPartners'] panel development, implementation, and maintenance, and PT/MRI network usage to MCMC. [WorkPartners] has grown to the point that [\*519] they need an integrated cost containment solution. Having [Premier] perform the services we do and having MCMC perform the repricing [\*\*14] is cost prohibitive, labor intensive, and inefficient for both our organizations.

Please understand that we absolutely loathe making this recommendation to [WorkPartners] as we sincerely enjoy working with all of you and greatly appreciate the business, and we obviously do not like having to recommend to our clients that they use our competitors' services. However, this recommendation is in the best interest of [WorkPartners] as you need a more integrated cost containment program. As always, you can count on us to make the transition to MCMC as smooth as possible for [WorkPartners].

UPMC Ex. AH. Upon reviewing Ms. Schmac's email, WorkPartners was concerned that Premier would discontinue its panel generation services and began exploring alternatives to Premier's panel generation services. UPMC CSUMF ¶¶ 67 & 68; MCMC CSUMF ¶ 35.

Premier, however, contends that Ms. Schmac wrote the email at Mehalik's request because Mehalik wanted to show WorkPartners' executives the inefficiency of not having one vendor providing the repricing, PT/MRI network provider services and panel generation services. Premier Response ¶ 64. Because MCMC was allegedly double and triple paying bills and paying the full [\*\*15] provider bill amount, Mehalik asked Ms. Schmac to send her the email so Mehalik had some leverage to convince WorkPartners to reconsider the repricing vendor. Premier Ex. 11. pp. 78-86. Though Ms. Schmac was asking WorkPartners to transition the panels to MCMC, both Ms. Schmac and Mehalik knew that was not possible because MCMC did not provide panel generation. *Id.*

The ploy appeared to work as in January 2014, WorkPartners had Mehalik conduct a test audit and prepare an audit report that compared the relative capabilities of Premier, MCMC and another vendor, Align Networks. UPMC CSUMF ¶ 69; MCMC CSUMF ¶ 36. Mehalik, a registered nurse, had never done an audit report before. UPMC CSUMF ¶¶ 70 & 71; MCMC CSUMF ¶ 43. Mehalik, however, had the necessary background, experience and competency to prepare the comparative audit report. Premier Response ¶ 72. In her report, Mehalik recommended that WorkPartners switch from MCMC to Premier and consolidate repricing and panel generation services with Premier. UPMC CSUMF ¶ 73. WorkPartners' CEO, David Weir ("Weir"), not Mehalik, had the authority to make the final decision regarding whether to change the repricing vendor. UPMC CSUMF ¶ 77.

After the [\*\*16] completed audit, WorkPartners continued to review and develop a revised business model for their internal repricing, network, PPO and panel development structure. UPMC CSUMF ¶ 76; MCMC CSUMF ¶¶ 45 & 46. Ms. Schmac was aware that WorkPartners, despite the audit report, continued to review and investigate all of its options. In fact, in an email to James Cottone and Steven Wagner of WorkPartners dated July 10, 2014, Ms. Schmac stated:

I'm very pleased to learn that [Premier] performed well with regard to the repricing test audit and most importantly, that [WorkPartners] is very satisfied with the services we currently provide to some of your TPA clients. . .

If there is anything we can do to help [WorkPartners] with the onerous task of reviewing your entire repricing, network, PPO, and panel development structure, please do not hesitate to let me know. . .

[\*520] We will remain patient while [WorkPartners] works through this grueling process and explores its various options. . .

UPMC Ex. AO. Premier was aware, then, that WorkPartners did not simply rely on Mehalik's audit report and recommendation that Premier be given all the repricing business in its revised business model.

On February 20, 2014, [\*\*17] Jason Gallagher ("Gallagher"), the Medical Delivery Coordinator at WorkPartners, requested that Premier provide WorkPartners a spreadsheet containing a list of the provider panels of

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WorkPartners' insured employer clients. UPMC CSUMF ¶ 78. Prior to requesting the provider panel information in spreadsheet form, WorkPartners already possessed a copy of all the panels generated by Premier for WorkPartners' insured either in paper or PDF. UPMC CSUMF ¶ 78.

Gallagher explained the purpose for his request was to assist with creating a "provider scorecard system" for providers serving WorkPartners' insureds to "better track our providers and which panels they reside on. All part of my project to track outcomes for our providers." UPMC CSUMF ¶ 79. Premier contends, however, that the real reason for WorkPartners' requests for panel provider data was to steal Premier's confidential compilation of such data so that WorkPartners could create its own panel tool capable of allowing it to develop panels itself and terminate the services of Premier. Premier Response ¶¶ 80 & 81.

In August 2014, WorkPartners began referring new workers' compensation insured employers to Align Networks ("Align") for panel [\*\*18] generation. UPMC CSUMF ¶ 82. On November 13, 2014, Mehalik and another WorkPartners' employees met with representatives of Premier during which Premier was informed that: (1) WorkPartners would not switch its repricing vendor for its commercial-insured business from MCMC to Premier; (2) Premier would retain its repricing business for WorkPartners' self-insured TPA clients, Allegheny County, Port Authority of Allegheny County, City of Pittsburgh, and the Pennsylvania Turnpike Commission; (3) there was an opportunity for Premier to work with UPMC WorkPartners' self-insured TPA business in the future; and (4) WorkPartners was trying another vendor for panel formation on new insured clients. UPMC CSUMF ¶¶ 83, 84, 85, 86 & 87; MCMC CSUMF ¶¶ 51 & 52.

During the meeting, Ms. Schmac accused WorkPartners of being dishonest and unethical. UPMC CSUMF ¶ 90. Soon thereafter, Mr. Schmac cut off online access to the provider panels that Premier continued to manage on behalf of WorkPartners. UPMC CSUMF ¶ 91. Because WorkPartners indicated at the meeting that it was not sure if it was going to transition the 1,100 WorkPartners insureds' panels from Premier to Align, Ms. Schmac instructed Premier employees [\*\*19] to cease updating the WorkPartners insureds' panels until WorkPartners confirmed whether or not Premier would maintain this business. UPMC CSUMF ¶ 92; Premier Response ¶ 92. On November 26, 2014, WorkPartners informed Premier that WorkPartners had no present intention to change the current arrangement with Premier regarding the panels Premier managed on behalf of WorkPartners' insured. UPMC CSUMF ¶ 94.

On January 6, 2015, WorkPartners sent an email to Premier requesting additional "panel, provider and provider location data" from Premier for the reasons set forth in the email. UPMC CSUMF ¶ 95; UPMC Ex. AZ. In a response email on that same day, Ms. Schmac, obviously upset at the request for addition panel data, stated:

[\*521] With all due respect, . . . it was our understanding that [WorkPartners] made the decision to use Align to create their panels, and since we have not received a panel request from [WorkPartners] since August, I would have to assume [WorkPartners] continues to use Align. That being said, I can't imagine that [WorkPartners] would expect us [to] invest tens of thousands of dollars to create special IT programs and processes for just the existing panels we manage for UPMC.

[\*\*20] UPMC Ex. AZ. In an internal email dated January 7, 2015, Andrew Yohe ("Yohe"), a WorkPartners Vice President, advised:

[I]f [Premier] refuses to provide the information it leaves me well beyond suspect of the actual performance of their network. As it stands, our relationship with [Premier] is one in which we are **absolutely living in the dark**. We don't know what providers our clients are using, we can't judge the performance of those providers and we don't have an effective methodology of evaluating that we're paying competitive rates within their network. Their rates and provider performance could be top notch, but I have no way of telling that. If we can't come to terms on how to obtain this data, I would suggest that we need to establish an exit strategy.

*Id.* (emphasis in original). In an email dated January 9, 2015, Linda Schmac indicated that Premier would not provide WorkPartners the data it requested, stating:

. . . given that [WorkPartners] has made the decision to discontinue using [Premier] for new panel development in lieu of Align, I have made the decision not to comply with [WorkPartners'] request for us to provide the extensive list of IT services you have outlined in the agenda below.

UPMC Ex. BA.

Premier admits, however, that it provided panel information and data to Wal-Mart, through its wholly owned TPA, Claimed Management Inc. [\*\*21] ("CMI"), that allowed CMI to measure provider outcomes and utilization. UPMC CSUMF ¶ 226; Premier Response ¶ 226. Premier also admits that it provided PT/MRI billing data to an insurer client, Brickstreet, explaining:

the purpose of the transmission was to integrate [Premier] PT/MRI invoices electronically with Brickstreet's claim system. Had [WorkPartners] awarded [Premier] its commercial bill repricing account, [Premier] would have implemented a customized electronic interface to WorkPartners'] specifications for [Premier's] PT and MRI network invoices.

UPMC CSUMF ¶ 240; Premier Response ¶ 240. Premier acknowledged that overutilization can negatively impact cost containment, therefore, it was reasonable for a payer/insurer to be concerned about PT/MRI overutilization. UPMC CSUMF ¶¶ 230, 232; Premier Response ¶ 230.

Dr. Joseph P. Fuhr, Jr. ("Dr. Fuhr"), an economist with experience in analyzing antitrust issues in healthcare markets and identified by Premier as its expert, also agreed that it is appropriate and reasonable for workers' compensation insurers, like WorkPartners, to request such panel information and utilization data in order to: understand provider performance; determine [\*\*22] what drives increasing physical therapy costs; and to analyze provider outcomes. UPMC CSUMF ¶¶ 233, 235. Moreover, Dr. Fuhr agreed that if a repricer, particularly one like Premier that derives revenue from utilization, refused to provide such information, it would be reasonable [\*522] for an insurer to look for a different repricer. UPMC CSUMF ¶ 234.

On February 17, 2015, despite Premier's refusal to provide the data requested, WorkPartners sent Premier a draft of a non-exclusive Master Services Agreement ("MSA") to replace the Agreement that had been in place since 2006,<sup>3</sup> which would allow Premier to service the approximately 1100 panels it generated for WorkPartners' new commercial insured clients. UPMC CSUMF ¶ 100; UPMC Ex. BC. On February 18, 2015, Ms. Schmac replied to WorkPartners, in relevant part:

Given the very short amount of time you have given us to review this one-sided, unreasonable agreement (8 business days), . . . there is no way I could possibly execute this agreement by March 1.

Further, no repricing vendor including your current vendor, MCMC, who accesses the Coventry PPO network and is therefore mandated to use them as a primary network could sign this without significant [\*\*23] revisions. I will forward this agreement to our attorney, the Dept of Justice, our mutual clients, and Coventry, and I will respond back to you when I and they all have had adequate time to review it.

Premier Response ¶ 101. On February 27, 2015, without any attempted negotiation with WorkPartners, Ms. Schmac informed WorkPartners that Premier was not willing to enter into the proposed MSA and requested that the panel provider database requested and sent to WorkPartners "under false pretenses" be returned "along with a statement representing that the data has not been used for any purpose and there are no other [copies]." UPMC CSUMF ¶ 103; Premier Response ¶ 103. On March 26, 2015, WorkPartners provided written notice to Premier that it would terminate the 2006 Repricing Agreement, effective April 30, 2015. UPMC CSUMF ¶ 110.

The crux of Premier's complaint, therefore, arises from WorkPartners' unilateral decision not to consolidate its medical bill repricing and panel generation business with one vendor, but instead, after an evaluation of its repricing and panel generation vendors, chose to consolidate all repricing work with its incumbent provider, MCMC, and to direct its panel generation [\*\*24] work to non-party Align Networks. Premier contends that such decision was made after WorkPartners requested certain confidential panel information from Premier and despite a WorkPartners' generated report indicating that Premier was superior to MCMC as a repricing vendor.

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<sup>3</sup> WorkPartners contends that on March 3, 2015, it sent MCMC and Align Networks each a draft Master Services Agreement that was substantially the same as the MSA sent to Premier. UPMC CSUMF ¶¶ 105, 106.

As an initial matter, this Court must note the Supreme Court's thoughts on vendor selection set forth in [Nynex Corp. v. Discon, 525 U.S. 128, 119 S. Ct. 493, 142 L. Ed. 2d 510 \(1998\)](#):

The freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage. Cf. [Standard Oil Co. v. United States, 221 U.S. 1, 62, 31 S. Ct. 502, 55 L. Ed. 619 \(1911\)](#) (noting "the freedom of the individual right to contract when not unduly or improperly exercised [is] the most efficient means for the prevention of monopoly"). At the same time, other laws, for example, "unfair competition" laws, business tort laws, or regulatory laws, provide remedies for various "competitive practices thought to be offensive to proper standards of business morality." 3 P. AREEDA & H. HOVENKAMP, [ANTITRUST LAW](#) P651d, p. 78 (1996). Thus, this Court has refused to apply *per se* reasoning in cases involving that kind of [\*523] activity. See [Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225, 125 L. Ed. 2d 168, 113 S. Ct. 2578 \(1993\)](#) ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust [\*25] laws"); 3 AREEDA & HOVENKAMP, [ANTITRUST LAW](#) supra, P651d, at 80 ("In the presence of substantial market power, some kinds of tortious behavior could anticompetitively create or sustain a monopoly, [but] it is wrong categorically to condemn such practices . . . or categorically to excuse them").

*Id. at 137.* See also [InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 158 \(3d Cir. 2003\)](#) (finding no antitrust violation where defendant made a unilateral decision not to do business with the plaintiff, but to do business with a competitor of plaintiff).

### III. LEGAL STANDARD FOR SUMMARY JUDGMENT

There is no "special burden on plaintiffs facing summary judgment in antitrust cases." [Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 468, 112 S. Ct. 2072, 119 L. Ed. 2d 265 \(1992\)](#). A court must generally apply "the same summary judgment standards that apply in other contexts." [In re Flat Glass Antitrust Litig., 385 F.3d 350, 357 \(3d Cir. 2004\)](#). Accordingly, a court will enter summary judgment when the evidence shows "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." [Fed. R. Civ. P. 56\(a\)](#). As in other summary judgment contexts, we "review the record as a whole and in the light most favorable to the nonmovant, drawing reasonable inferences in its favor." [In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 396 \(3d Cir. 2015\)](#).

The Third Circuit, however, has recognized "an important distinction" to this general standard in antitrust cases. [In re Flat Glass Antitrust Litig., 385 F.3d at 357](#). "[A]ntitrust law limits the range of permissible inferences from ambiguous [\*26] evidence in a § 1 case." [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 \(1986\)](#). Specifically, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* The "acceptable inferences which can be drawn from circumstantial evidence vary with the plausibility of the plaintiff's theory and the dangers associated with such inferences." [Petrucci's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1232 \(3d Cir. 1993\)](#). When a plaintiff's theory "makes no economic sense," therefore, the plaintiff must produce "more persuasive evidence." [In re Flat Glass Antitrust Litig., 385 F.3d at 357](#). Even with a plausible theory, however, "a plaintiff relying on ambiguous evidence alone cannot raise a reasonable inference of conspiracy sufficient to survive summary judgment." [In re Chocolate Confectionary Antitrust Litig., 801 F.3d at 396-397](#). See also [Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100, 1140 \(E.D. Pa. 1981\)](#) ("It is now settled that summary judgment is appropriate in those antitrust cases where plaintiffs, after having engaged in extensive discovery, fail to produce 'significant probative evidence' in support of the allegations in their complaint.") (citations omitted). The reason for this more rigorous standard is that mistaken inferences are especially costly in antitrust cases, since they could penalize desirable competitive behavior and "chill the very conduct the antitrust laws are designed to protect." [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. at 594](#); See [\*27] also [Valspar Corp. v. E. I. du Pont de Nemours & Co., 873 F.3d 185, 192 \(3d Cir. 2017\)](#).

[\*524] Notwithstanding, when the moving party has carried its burden under [Rule 56\(c\)](#), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. See [Matsushita Elec. Indus. Co. v. Zenith Radio Corp.](#), 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a genuine issue for trial." [Fed. R. Civ. P 56\(e\)](#). Further, the nonmoving party cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion. [Williams v. Borough of W. Chester](#), 891 F.2d 458, 460 (3d Cir. 1989) (citing [Celotex Corp. v. Catrett](#), 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). The non-moving party must respond by pointing to sufficient cognizable evidence to create material issues of fact concerning every element as to which the non-moving party will bear the burden of proof at trial. [Simpson v. Kay Jewelers, Div. Of Sterling, Inc.](#), 142 F. 3d 639, 643 n. 3 (3d Cir. 1998), quoting [Fuentes v. Perskie](#), 32 F.3d 759, 762 n.1 (3d Cir. 1994).

Further, summary judgment is not disfavored in the antitrust context. [Race Tires Am., Inc. v. Hoosier Racing Tire Corp.](#), 614 F.3d 57, 73 (3d Cir. 2010). The entry of summary judgment in favor of an antitrust defendant may actually be required in order to prevent lengthy and drawn-out litigation, which may have a chilling effect on competitive market forces. See, e.g., [Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.](#), 996 F.2d 537, 541 (2d Cir. 1993).

#### IV. DISCUSSION

##### A. General Antitrust Requirements

"For plaintiffs suing under federal antitrust laws, one of the prudential limitations is the requirement of 'antitrust standing.'" [Ethylpharm S.A. Fr. v. Abbott Labs.](#), 707 F.3d 223, 232 (3d Cir. 2013) (quoting [\*28] [City of Pittsburgh v. W. Penn Power Co.](#), 147 F.3d 256, 264 (3d Cir. 1998)). The Supreme Court has articulated several factors that guide our analysis of whether a plaintiff has antitrust standing:

- (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

[Ethylpharm S.A. Fr. v. Abbott Labs.](#), 707 F.3d at 232-33 (citing [Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters](#), 459 U.S. 519, 545, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)). "The second factor, antitrust injury, 'is a necessary . . . condition of antitrust standing.' If it is lacking, [a court] need not address the remaining [] factors." *Id. at 233* (quoting [Barton & Pittinos, Inc. v. SmithKline Beecham Corp.](#), 118 F.3d 178, 182 (3d Cir. 1997)) (citation omitted). To state a viable antitrust injury, a plaintiff must generally show that it is a competitor or a consumer in the relevant product and geographic markets in which competition was adversely impacted. See *id.* Assessing antitrust injury necessarily involves consideration [\*29] of the relevant product and geographic markets. See [Bocobo v. Radiology Consultants of South Jersey, P.A.](#), 305 F. Supp. 2d 422, 425 (D.N.J. 2004), aff'd, 477 F. App'x 890 (3d Cir. 2012). Plaintiff has the burden of defining both of these markets. See [Queen City Pizza v. Domino's Pizza](#), 124 F.3d 430, 436 [\*525] (3d Cir. 1997); [Tunis Bros. Co., Inc. v. Ford Motor Co.](#), 952 F.2d 715, 726 (3d Cir. 1991).

At Counts II, IV, & V of the Amended Complaint, Premier alleges violations of [Section 1](#) of the Sherman Act. [Section 1](#) of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." [15 U.S.C. § 1](#). To establish a [Section 1](#) violation, a plaintiff must prove (1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted action was illegal; and (4) that the plaintiff was injured as a proximate result of the concerted action. [Queen City Pizza, Inc. v. Domino's Pizza, Inc.](#), 124 F.3d at 442. In order to satisfy the requirement of a "contract, combination . . . or

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conspiracy," there must be "some form of concerted action." *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 117 (3d Cir. 1999). "The existence of an agreement is the hallmark of a Section 1 claim." *Id.*; see also *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 999 (3d Cir. 1994) (The "very essence of a section 1 claim . . . is the existence of an agreement.").

Further, a plaintiff must allege that there has been an antitrust injury. An antitrust injury is the type of injury that the antitrust laws were enacted [\*\*30] to prevent - an injury to competition rather than competitors. See *Alberta Gas Chems. Ltd. v. E.I. Du Pont de Nemours and Co.*, 826 F.2d 1235, 1241 (3d Cir. 1987) ("antitrust law aims to protect competition, not competitors"). In order to allege an injury to competition, a plaintiff must allege an injury to competition in a particular relevant market. See *Eichorn v. AT & T Corp.*, 248 F.3d 131, 147-48 (3d Cir. 2001). The plaintiff bears the burden of defining the relevant market. *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d at 436.

In addition to demonstrating an agreement, the § 1 plaintiff must show that "the conspiracy to which the defendant was a party imposed an unreasonable restraint on trade." *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 218 (3d Cir. 2008). In most cases, courts "apply the so-called rule of reason, a case-by-case inquiry designed to assess whether challenged conduct is an anticompetitive practice." *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d at 395.

At Counts I, III, & VI of the Amended Complaint, Premier alleges attempted monopolization in violation of Section 2 of the Sherman Act. To prevail on an attempted monopolization claim under § 2 of the Sherman Act, a plaintiff must prove that the defendant (1) engaged in predatory or anticompetitive conduct with (2) specific intent to monopolize and with (3) a dangerous probability of achieving monopoly power. *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d at 442. As to the first element, "a firm engages in anticompetitive conduct when it attempts to exclude rivals on some basis other than efficiency" [\*\*31] or when it competes "on some basis other than the merits." *West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 108-109 (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)).

As to the second element, a mere intention to prevail over rivals or improve market position is insufficient to show a "specific intent to monopolize." *BanxCorp v. Bankrate Inc.*, 2011 U.S. Dist. LEXIS 149912, \*69 (D. N.J. 2011). "Even an intent to perform acts that can be objectively viewed as tending toward the acquisition of monopoly power is insufficient, [\*\*526] unless it also appears that the acts were not 'predominantly motivated by legitimate business aims.'" *Penn. Dental Ass'n v. Med. Serv. Ass'n of Penn.*, 745 F.2d 248, 260-261 (3d Cir. 1984) (quoting *Times Picayune Publ'g Co. v. United States*, 345 U.S. 594, 627, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)). "Direct evidence of specific intent need not be shown; it may be inferred from predatory or exclusionary conduct." *Penn. Dental Ass'n v. Med. Serv. Ass'n of Penn*, 745 F.2d at 261 (citations omitted).

Determining whether the third element, a "dangerous probability of achieving monopoly power," exists, requires "inquiry into the relevant product and geographic market and the defendant's economic power in that market." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993). As previously stated, the plaintiff has the burden of defining the market. See *Queen City Pizza v. Domino's Pizza*, 124 F.3d at 436; *Tunis Bros. Co., Inc. v. Ford Motor Co.*, 952 F.2d at 726.

## B. Market Definition

The thread common to Premier's required showing of antitrust standing, and violations of Sections 1 and 2 of the Sherman Act is the existence of a properly defined market. Defining the relevant market requires identification of both the product at issue and the geographic market for [\*\*32] that product. *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 276 (5th Cir. 1978). Construction of the relevant market, as well as a showing of monopoly power, must be based on expert testimony. *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1246 (11th Cir. 2002) (citing *Colsa Corp. v. Martin Marietta Servs., Inc.*, 133 F.3d 853, 855 n.4 (11th Cir. 1998)). A relevant product market describes those groups of producers that have the actual or potential ability to take significant amounts of business away from each other because of the similarity of their products. *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056,

1063 (3d Cir. 1978). "A market definition must look at all relevant sources of supply, either actual rivals or eager potential entrants to the market." *Id.*

A court may dismiss a case:

[w]here the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.

Queen City Pizza v. Domino's Pizza, 124 F.3d at 436.

"The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." Queen City Pizza v. Domino's Pizza, 124 F.3d at 436 (quoting Brown Shoe Co. v. U.S., 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)). The relevant "product market" is comprised of "commodities reasonably [\*\*33] interchangeable by consumers for the same purposes." United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 394, 76 S. Ct. 994, 100 L. Ed. 1264 (1956). Interchangeability "implies that one product is roughly equivalent to another . . . [and] while there might be some degree of preference for the one over the other, either would work effectively." Allen-Myland, Inc. v. Int'l Bus. Machs. Corp., 33 F.3d 194, 206 (3d Cir. 1994). When assessing reasonable interchangeability, "[f]actors to be considered include [\*527] price, use and qualities." Tunis Bros. Co. v. Ford Motor Co., 952 F.2d at 722. Factors that may be relevant include "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." Brown Shoe Co. v. U.S., 370 U.S. at 325.

"Cross-elasticity of demand is a measure of the substitutability of products from the point of view of buyers. More technically, it measures the responsiveness of the demand for one product [X] to changes in the price of a different product [Y]." Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd. Co., 838 F.3d 421, 437 (3d Cir. 2016) (citing Queen City Pizza v. Domino's Pizza, 124 F.3d at 438 n.6). Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual [\*\*34] inferences are granted in plaintiff's favor, the relevant market is legally insufficient. Queen City Pizza v. Domino's Pizza, 124 F.3d at 436.

Citing a California District Court case, Premier argues that calculating cross-elasticity of demand is "not an absolute requirement." See In re Live Concert Antitrust Litig., 863 F. Supp. 2d 966, 984 (C.D. Cal. 2011). Instead, Premier contends that there are many other factors and "practical indicia"<sup>4</sup> that may be used to define the boundaries of a relevant market for antitrust purposes. See Brown Shoe Co. v. United States, 370 U.S. at 325 (listing such "practical indicia" as "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors"). The District Court of the District of Columbia has emphasized that evidence other than expert testimony—i.e., documents, testimony, and other forms of qualitative evidence—is relevant to determining the relevant antitrust markets. See FTC v. Sysco Corp., 113 F. Supp. 3d 1, 36-37 (D.D.C. 2015) (taking expert testimony into consideration but ultimately deciding that the relevant market must comport with the "business realities" of the market under consideration); United States v. Anthem, Inc., 236 F. Supp. 3d 171, 197-198 (D.D.C.

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<sup>4</sup> The Live Concert Court specifically noted, however, that the Ninth Circuit has "never expressly held that a plaintiff (and, more specifically, a plaintiff's expert economist) can define the relevant product market exclusively by reference to these 'practical indicia.'" In re Live Concert Antitrust Litig., 863 F. Supp. 2d at 985.

2017) (focusing on such as "defendants' own ordinary course of business operations, and the other practical [\*\*35] indicia" to determine market definition)<sup>5</sup>

In defining the relevant product market, however, Premier fails to direct this Court to any evidence with regard to the *Brown Shoe* factors, any "practical indicia" that defines the boundaries of the relevant market, or the "business realities" of the market. Moreover, without quantitative analysis, Premier's expert, Dr. Fuhr defines the relevant product markets as follows:

In this case, there are two relevant product markets. In the first product [\*528] market, there are two separate markets. The first consists of both insured employers who purchase workers' compensation policies and derivatively cost containment services. Also included in this market are self-insured employers who purchase [workers' compensation] third-party administration services from UPMC WorkPartners ("WP") and cost containment services that are purchased in conjunction with the administration of workers' compensation claims.

Cost containment constitutes a value cluster market. (Memorandum Opinion 2/18/16)<sup>6</sup> The cost containment services consist of panel development, telephonic injury management, PT and Diagnostic network access, and medical bill review services. A detailed [\*\*36] description of these services is set forth in the Amended Complaint, Paragraph 28.

The second relevant product market is medical services consumed by individuals receiving workers' compensation benefits. The provider market is defined by the type of medical services routinely purchased by workers' compensation claimants.

Fuhr Report<sup>7</sup> ECF 274, Ex. B, p. 3. In its Amended Complaint, Premier alleges two (2) relevant product markets:

[B]oth insured employers who purchase workers' compensation policies and derivatively cost containment services sold by firms such as [UPMC-HB] and [UPMC-BMS] and [Premier] and self-insured employers who purchase third party administration (workers compensation) services from [UPMC-BMS] and cost-containment services that are purchased in conjunction with the administration workers compensation claims. Am. Compl. ¶ 43; and

[M]edical services consumed by individuals receiving workers' compensation benefits. This provider market is defined by the types of medical services routinely purchased by workers compensation claimants. Am. Compl. ¶ 44.

Because this Court was uncomfortable dismissing an antitrust case at the pleadings stage, it allowed this case to proceed to [\*\*37] discovery, however, after years of discovery, and allowing Premier every opportunity to establish its claims, Premier offers no justification for the above-stated product markets.

Nor does this Court find any plausible support, factual or analytical, for Premier's proposed "cluster" market. Cluster markets are used as a matter of analytical convenience when all or most relevant market participants sell all or most all of the relevant products, and have similar shares in each of the segments. See *Emigra Grp., LLC v. Fragomen, Del Rey, Bernsen & Loewy, LLP*, 612 F. Supp. 2d 330, 353-55 (S.D.N.Y. 2009) (explaining cluster market rationale and requirement that "market shares and entry conditions are similar for each" clustered product). Moreover, the Supreme Court has stated that competitors "must offer all or nearly all" the types of services in the cluster. *United States v. Grinnell Corp.*, 384 U.S. 563, 572 n.6, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966).

<sup>5</sup> Premier, however, fails to direct this Court to any Third Circuit case holding that non-quantitative *Brown Shoe* factors or the "practical indicia" and/or "real world evidence" of the District of Columbia District Court, are sufficient to define a relevant market with or without an expert.

<sup>6</sup> This Court's Memorandum Opinion denying Defendants' motion to dismiss found at ECF 48.

<sup>7</sup> "When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict." In an antitrust case, an expert opinion generally must "incorporate all aspects of the economic reality" of the relevant market. See *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 290 (3d Cir. 2012).

In this instance, none of the competitors identified by Premier offer the same set of [\*529] services as those Premier included in the "cluster." UPMC CSUMF ¶¶ 145-146; Premier Response ¶¶ 145-146. WorkPartners does not offer itself as a competitor in the market with respect to any cost containment services, and MCMC offers only medical bill repricing in the alleged market. This Court, therefore, finds Premier's attempts to define a relevant [\*\*38] product market necessary to show antitrust standing, and violations of Sections 1 and 2 of the Sherman Act are legally insufficient.

Nor does the Court find that Premier has established a relevant geographic market. The relevant geographic market "is that area in which a potential buyer may rationally look for the goods or services he seeks." Gordon v. Lewistown Hosp., 423 F.3d 184, 212 (3d Cir. 2005). Determined within the specific context of each case, a market's geographic scope must "correspond to the commercial realities of the industry" being considered and "be economically significant." Brown Shoe Co. v. United States, 370 U.S. at 336-337. "Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one." Id. at 336. Courts generally measure:

a market's geographic scope, the "area of effective competition," by determining the areas in which the seller operates and where consumers can turn, as a practical matter, for supply of the relevant product. This approach evaluates the geographic aspect of the elasticity of a specified market—that is, how far consumers will go to obtain the product or its substitute in response to a given price increase and how likely it is that a price increase for the product in a particular location will induce outside suppliers [\*\*39] to enter that market and increase supply-side competition in that location.

Heerwagen v. Clear Channel Commc'ns, 435 F.3d 219, 227 (2d Cir. 2006) (citations omitted); see also Atl. Exposition Servs. v. SMG, 262 Fed. Appx. 449, 452 (3d Cir. 2008). The geographic market, therefore, is not comprised of the region in which the seller attempts to sell its product, but, rather, is comprised of the area where customers would look to buy such a product. Tunis Bros. Co. v. Ford Motor Co., 952 F.2d at 726.

Premier, again without quantitative analysis, defines the relevant geographic market as western Pennsylvania<sup>8</sup>. Premier offers no support for its proposed geographic market, but concludes that "testimony from UPMC's own witnesses create a genuine issue of material fact<sup>9</sup>," stating:

Steve Wagner, the Senior Claims Manager for WP, agreed that panel development by and for [WorkPartners] would generally have been confined to Western PA. (Ex. 73, pp. 157-58.) Also, Defendants' own expert witness, Dr. David Reitman, testified that "[he] would expect someone living in Western PA to be treated by a medical service provider most of the time in Western PA."

Premier Brief, p. 34. Though such statements may be true, such evidence is too simplistic and fails to account for the business realities of either the workers' compensation insurance business or the cost containment services related thereto. [\*\*40] An [\*530] insured of WorkPartner's for example who has business locations in Western Pennsylvania, Ohio and West Virginia would look for panel development in all three states<sup>10</sup> as an injured worker would seek to be treated by a medical provider near his home.

<sup>8</sup> In his report, Premier's expert economist provides only one unsupported sentence stating his "opinion" that the market is western Pennsylvania. Fuhr Report, ECF 274, Ex. B, p. 3.

<sup>9</sup> Premier also suggests that the scope of the relevant geographic market is a question of fact, and therefore an issue for the jury. In U.S. Horticultural Supply v. Scotts Co., 367 Fed. App'x 305 (3d Cir. 2010), however, the Third Circuit affirmed summary judgment where the plaintiff failed to factually support its proposed geographic market. Id. at 311-312.

<sup>10</sup> Premier admits that it has developed provider panels for employers throughout Pennsylvania as well as for employers located in other states, including New Jersey, North Carolina, Ohio, Tennessee, Virginia and others. UPMC CSUMF ¶ 188. Moreover, Premier generated over 2,800 new employer panels between its termination by UPMC and early January 2017, for employers located in Pennsylvania, North Carolina, Ohio, Maryland and West Virginia. See UPMC CSUMF ¶¶ 211 & 212.

The geographic market for workers' compensation insurers is at least the entire state of Pennsylvania. WorkPartners is not limited to sales only to employers located in western Pennsylvania, nor are employers in western Pennsylvania limited to insurers in Premier's proposed geographic market. Employers in western Pennsylvania can and do regularly purchase insurance or TPA services from entities outside of Pennsylvania. See UPMC CSUMF ¶¶ 174-176.

Similarly, the relevant geographic market for TPA services for workers' compensation self-insured employers is more likely nationwide, but in the very least the full state of Pennsylvania. In fact, Premier admits that many of WorkPartners' TPA competitors, including HealthSmart Solutions, Sedgwick, Gallagher Bassett, Broadspire, PMA, York and others, are large, national companies that provide TPA services across the nation. UPMC CSUMF ¶ 179.

The Court also agrees that the relevant geographic market [\*\*41] for the services provided by Premier is broader than western Pennsylvania. Premier provides cost containment services to workers' compensation insurers and TPA services to providers in twenty-one (21) states including Pennsylvania. Am. Compl. ¶¶ 20, 21 & 25; UPMC CSUMF ¶ 10; Premier Resp. ¶ 10. Moreover, Premier's competitors for cost containment services located outside western Pennsylvania compete for customers in this area, across the entire state, and nationally. UPMC CSUMF ¶¶ 180-181. Premier's expert, Dr. Fuhr, testified that the markets for repricing, physical therapy networks, and MRI networks are national in scope. UPMC CSUMF ¶ 186.

Premier has offered no evidence to support its proposed geographic market. Moreover, its proposed geographic market is woefully narrow, and does not represent the business realities of either the workers' compensation insurance business or the cost containment service business. Premier's proposed relevant geographic market is legally insufficient to show antitrust standing, or violations of [Sections 1](#) and [2](#) of the Sherman Act.

Finally, citing [Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 \(3d Cir. 2007\)](#), Premier argues that a definition of the relevant markets in this instance is unnecessary because "there is direct [\*\*42] evidence of monopoly power." Premier Brief at 33. Premier contends that there is sufficient evidence regarding UPMC's possession of monopoly or market power in the second product market, workers' compensation medical services. In support, Premier directs this Court to the testimony of UPMC President and CEO Jeffrey A. Romoff before the Pennsylvania House of Representatives Insurance Committee in 2011 during which Mr. Romoff stated "Let me agree that UPMC and Highmark are both monopolies." Premier Ex. 74, pp., 65, 72-73).

Mr. Romoff's testimony, however, appears to relate to general acute care services [\*531] on both the provider side (hospitals) and the insurance side. *Id.* p. 73. There is no evidence that Mr. Romoff's statement has any relation to the markets alleged in this case. The workers' compensation medical services market proposed by Premier consists mainly of outpatient services, including PT and diagnostic services, not in-patient acute care services. See UPMC CSUMF ¶¶ 163 & 164. As set forth in Section D below, Premier is unable to direct this Court to either direct or circumstantial evidence of the UPMC Defendants' monopoly power in the relevant markets proposed by Premier. Accordingly, [\*\*43] Premier must prove the existence of a properly-defined relevant product and geographic market.

In order to succeed in showing antitrust standing, a [Section 1](#) violation or a [Section 2](#) violation, a plaintiff must prove the existence of a properly-defined relevant product and geographic market. See [Spectrum Sports, Inc. v. McQuillan, 506 U.S. at 454](#); [Pastore v. Bell Tel. Co. of Pennsylvania, 24 F.3d 508, 512-14 \(3d Cir. 1994\)](#); [Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 117 \(3d Cir. 1980\)](#) (holding that proof of relevant market was critical in [Section 2](#) attempted monopolization cases); [United States v. Microsoft Corp., 253 F.3d 34, 81-82, 346 U.S. App. D.C. 330 \(D.C. Cir. 2001\)](#) (holding plaintiff failed to establish a dangerous probability of success because it failed to define the relevant market). Premier's failure to define the relevant markets in this instance dooms its antitrust claims, and will result in summary judgment in favor of Defendants. Notwithstanding, the Court will address the issues regarding antitrust standing and Premiers claims under [Sections 1](#) and [2](#) of the Sherman Act.

### C. Antitrust Standing

In order to assert an antitrust claim, a plaintiff is required to show it has antitrust standing. See [City of Pittsburgh v. W. Penn Power Co., 147 F.3d at 264](#). Antitrust injury, "is a necessary . . . condition of antitrust standing. If it is lacking, [a court] need not address the remaining [] factors." [Ethypharm S.A. Fr. v. Abbott Labs., 707 F.3d at 233](#) (quoting [Barton & Pittinos, Inc. v. SmithKline Beecham Corp., 118 F.3d 178, 182 \(3d Cir. 1997\)](#)) (citation omitted). The threshold element of antitrust injury is "injury of the type the antitrust laws were intended to prevent and that [\*\*44] flows from that which makes defendants' acts unlawful." [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 \(1977\)](#). This requirement ensures that antitrust laws are enforced "for the protection of competition, not competitors." [Id. at 488](#). Moreover, only anti-competitive actions between competitors give rise to Sherman Act liability. [Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 \(1984\)](#); [Novak v. Somerset Hosp., 625 Fed. App'x at 67.](#)

It is well established that an antitrust injury reflects an activity's anti-competitive effect on the competitive market. [Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344, 110 S. Ct. 1884, 109 L. Ed. 2d 333 \(1990\)](#) ("The antitrust injury requirement . . . ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior."). An antitrust plaintiff must allege not only personal harm, but also that the defendant's conduct affected the "prices, quantity or quality of goods or services" in the relevant market. [Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 641 \(3d Cir. 1996\)](#) (citing [Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d at 728](#)); see also [Eichorn v. AT&T Corp., 248 F.3d 131, 140 \(3d Cir. 2001\)](#) ("[T]he antitrust laws were designed to [\*532] protect market-wide anticompetitive activities").

The Third Circuit has consistently held that an individual plaintiff personally aggrieved by an alleged anti-competitive agreement has not suffered an antitrust injury unless the activity has a wider impact on the competitive market. See, e.g., [City of Pittsburgh v. West Penn Power Comp., 147 F.3d 256, 266-67 \(3d Cir. 1998\)](#) (holding action that did not lessen competition in a "marketplace" was not antitrust injury). [\*\*45] Premier must show, therefore, that the anticompetitive effect of WorkPartners' alleged illegal anti-competitive activity created market-wide injury in order to fall within the protections of the Sherman Act. [Eichorn v. AT&T Corp., 248 F.3d at 141](#) ("an individual plaintiff personally aggrieved by an alleged anti-competitive agreement has not suffered an antitrust injury unless the activity has a wider impact on the competitive market.").

Here, Premier has failed to demonstrate that: (1) it is a competitor of the UPMC Defendants; (2) its injury stems from a competition-reducing aspect or effect of the defendants' behavior; (3) it was shut out of the relevant market; and (4) there was harm to competition in the relevant market.

As a vendor/service provider for WorkPartners, Premier was in a vertical relationship with WorkPartners, not a horizontal relationship, and was not a competitor. Premier does not sell workers' compensation insurance or TPA services in competition with WorkPartners. UPMC CSUMF ¶¶ 128, 142-143. Premier is not a licensed provider of health care or medical services. UPMC CSUMF ¶ 14. Further, WorkPartners does not offer any "cost containment" services other than to its own clients, and, thus, WorkPartners [\*\*46] and Premier do not compete. UPMC CSUMF ¶¶ 150-157.

Moreover, the termination of a vendor does not produce an antitrust injury, as such Premier's harm did not result from harm associated with competitive harm to the market. To the contrary, Premier's harm was the direct result of WorkPartner's decision to hire Align to generate panels for its new insureds, and Premier's failure to negotiate and sign the MSA offered by WorkPartners in February of 2015. WorkPartner's failure to replace its incumbent repricing vendor, MCMC, with Premier caused no harm to Premier because it cannot lose business it did not have. Further, the fact that Premier was found to be the more effective repricing vendor in Mehalik's audit report is of no moment. "Paying inflated purchasing prices to vendors, without more does not constitute an injury of the type the antitrust laws were intended to prevent." [Cottman Transmission Sys., LLC v. Kershner, 536 F. Supp. 2d 543, 559 \(E.D. Pa. 2008\)](#) (quoting [2660 Woodley Road Joint Venture v. ITT Sheraton Corp., 369 F.3d 732, 738 \(3d Cir. 2004\)](#)).

Premier has failed to show that it is foreclosed from a properly-defined relevant market. To demonstrate substantial foreclosure, a plaintiff "must both define the relevant market and prove the degree of foreclosure."<sup>11</sup> Although "[t]he test is not total foreclosure," the challenged practices must "bar a [\*\*47] substantial number of rivals or severely restrict the market's ambit." *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 191 (3d Cir. 2005). Dr. Fuhr, Premier's expert, did not opine that Premier was substantially foreclosed from any market. MCMC CSUMF ¶ 69<sup>12</sup> UPMC Ex. Q, p. 318. Further, [\*533] Premier admits that, other than WorkPartners, it is able to work with employers insured by all other insurance carriers and TPA's in Pennsylvania. UPMC CSUMF ¶ 201. Premier also believes that it is the largest panel generator in the Commonwealth of Pennsylvania and it currently manages as many as 20,000 active provider panels in Pennsylvania. UPMC CSUMF ¶¶ 158 & 160. Moreover, Premier generated over 2,800 new employer panels between its termination by UPMC and early January 2017, for employers located in Pennsylvania, North Carolina, Ohio, Maryland and West Virginia. UPMC CSUMF ¶¶ 211 & 212. Further, WorkPartners' termination of Premier did not prevent, or otherwise hinder, its ability to develop its PT/MRI Network either inside or outside of Pennsylvania. UPMC CSUMF ¶ 205. Any contention by Premier that it is foreclosed from any properly-defined relevant market in this matter is pure fantasy.

Finally, Premier has failed to show harm to competition in the relevant [\*\*48] market. Premier's expert, in fact, offers no opinion as to how any relevant market was harmed by WorkPartners' termination of Premier. See *Broadcom Corp.*, 501 F.3d at 308 ("There must be proof that competition, not merely competitors, has been harmed"); See also *Eisai, Inc. v. Sanofi Aventis U.S., LLC*, 821 F.3d 394, 403 (3d Cir. 2016) (An exclusive dealing agreement is illegal under the rule of reason "only if the 'probable effect' of the arrangement is to substantially lessen competition, rather than merely disadvantage rivals."). A court must also analyze the likely or actual anticompetitive effects such as whether there was reduced output, increased price, or reduced quality in goods or services.). Premier's expert described the harm to competition in this matter as follows:

It is clear that [Premier] and competition [sic] have been severely damaged by [WorkPartners'] anticompetitive actions. The **potential elimination** of [Premier], a low-priced competitor **can lead to** less competition, less choice for the consumer and higher prices in the market and thus **has potential to harm consumers**.

Fuhr Report, ECF 274, Ex. B, pp. 10-11 (Emphasis added). Such alleged harm is pure speculation by Dr. Fuhr. Premier, in fact, was not eliminated from the market. Moreover, neither Dr. Fuhr nor Premier [\*\*49] provides any evidence that: (1) insurance premiums have risen; (2) consumers for repricing services have been harmed, either with higher prices or reduced quality or supply; (3) TPA prices have risen; or (4) output has decreased in any relevant market. Dr. Fuhr conducted no analysis of WorkPartners' prices, nor did he show any price effect resulting from WorkPartners' use of MCMC and Align. Premier, therefore, has failed to show it has antitrust standing, and its antitrust claims fail as a matter of law.

Assuming, however, that Premier could demonstrate antitrust standing, the Court finds that its claims under [Section 1](#) and [Section 2](#) of the Sherman fail as a matter of law on substantive grounds.

#### D. [Section 2](#) of the Sherman Act (Counts I & III)

To prevail on an attempted monopolization claim under [§ 2](#) of the Sherman Act, a plaintiff must prove that the defendant (1) engaged in predatory or anticompetitive conduct with (2) specific intent to monopolize and with (3) a dangerous probability of achieving monopoly power. *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d at 442. Focusing on the third element, Premier is unable to demonstrate that WorkPartners has a dangerous probability of obtaining monopoly power in a relevant market.

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<sup>11</sup> Premier has failed to do either in this instance.

<sup>12</sup> Premier failed to respond to ¶ 69 of MCMC's Concise Statement of Undisputed Material Facts, therefore it is deemed admitted. See [LCvR 56\(E\)](#).

[\*534] The question of whether a defendant had a [\*50] dangerous probability of successfully monopolizing is a fact-intensive inquiry. [Broadcom Corp. v. Qualcomm Inc., 501 F.3d at 319](#). Courts are to consider factors such as the defendant's market share, the strength of the competition, likely developments in the industry, entry barriers, the nature of the defendant's anti-competitive conduct, and the elasticity of demand. See, e.g., [Pastore v. Bell Tel. Co., 24 F.3d at 513](#); [Barr Laboratories, Inc. v. Abbott Laboratories, 978 F.2d 98, 112 \(3d Cir. 1992\)](#).

Courts primarily look to the size of a defendant's market power to determine whether a defendant presents a dangerous probability of gaining monopoly power. [Pennsylvania Dental Ass'n v. Medical Serv. Ass'n of Pa., 745 F.2d 248, 260 \(3d Cir. 1984\)](#), cert. denied, 471 U.S. 1016, 105 S. Ct. 2021, 85 L. Ed. 2d 303 (1985). The leading antitrust commentators have stated that "the basic thrust of the classic rule is the presumption that attempt does not occur in the absence of a rather significant market share." 3 PHILLIP AREEDA & DONALD F. TURNER, [ANTITRUST LAW](#) P 820 (1978).

Areeda and Turner have suggested a rule of thumb for determining whether a particular market share may be indicative of a dangerous probability of achieving monopoly power. *Id.* at P 835c. For defendants who control 30% or less of the relevant market, claims of attempted monopolization should be "presumptively" rejected. *Id.*; See [ID Sec. Sys. Can., Inc. v. Checkpoint Sys., Inc., 249 F. Supp. 2d 622, 648 \(E.D. Pa. 2003\)](#) ("As a matter of law, a market share of less than 30 percent is presumptively insufficient to establish [\*51] the market power that is a prerequisite to a defendant's enjoying a dangerous probability of achieving monopoly power."). Where a defendant has a market share in the range of 30-50%, attempt claims should be rejected unless the defendant's conduct strongly suggests an ability to garner monopoly power. 3 PHILLIP AREEDA & DONALD F. TURNER, [ANTITRUST LAW](#) at P 835c; accord [M&M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc., 981 F.2d 160, 168 \(4th Cir. 1992\)](#) (en banc) ("[C]laims involving between 30% and 50% shares should usually be rejected, except when conduct is very likely to achieve monopoly or when conduct is invidious."); See also [Mahaska Bottling Co. v. PepsiCo Inc., 271 F. Supp. 3d 1054, 1076, \(S.D. Iowa 2017\)](#) (Aggregated market share of over 50% figures did not suffice to establish that PepsiCo possesses a dangerous probability of monopolizing any market.).

Although these are not rigid rules of law, the views of these oft-cited commentators, when applied in conjunction with prevailing case law, create a useful framework for analyzing [Section 2](#) claims of attempted monopolization. See [Acme Mkts. v. Wharton Hardware & Supply Corp., 890 F. Supp. 1230, 1241-1242 \(D. N.J. 1995\)](#). Applying this framework to the present case, the Court concludes as a matter of law that the UPMC Defendants do not present a dangerous probability of obtaining monopoly power based upon the undisputed facts, and giving the Premier the benefit of favorable inferences.

Here, [\*52] Premier's market definition for "cost containment" services is defined as being "derivative" to (or supplied "in conjunction with") workers' compensation insurance and/or TPA services. See Am. Compl. ¶ 43. WorkPartners competes with respect to insurance and TPA services. WorkPartners could only harm competition in the Premier-defined "cost-containment" services market if it possessed market power in workers' compensation insurance and TPA services. The record, however, fails to show that that WorkPartners [\*535] has monopoly power or a dangerous probability of achieving it.

Between 2011 and 2016, over 100 insurance carrier groups have sold workers' compensation insurance in Pennsylvania. UPMC CSUMF ¶ 117. WorkPartners competes against all other workers' compensation insurance carriers in Pennsylvania, including Eastern Alliance Group, Highmark Insurance Group, Lackawanna Insurance Group, Liberty Mutual, PMA Insurance and Travelers, for workers' compensation insurance. UPMC CSUMF ¶¶ 118 & 119.

WorkPartners' began selling workers' compensation insurance in 2010 and did not have a market share higher than three percent (3%) in any of the years 2011 - 2015. UPMC CSUMF ¶¶ 120 & 126. In 2015, the [\*53] year Premier was terminated, WorkPartners had a share of Pennsylvania workers' compensation insurance premiums between 2.5% - 2.8%, which was the the twelfth (12th) largest market share in Pennsylvania. UPMC CSUMF ¶¶ 121, 122 & 126. Moreover, even if the relevant geographic market was restricted to "western Pennsylvania," WorkPartners share of workers' compensation insurance premiums in that region was only approximately 6.1%. UPMC CSUMF ¶ 177. This Court finds that such market share is too low to create a dangerous probability of achieving monopoly.

Premier also fails to direct this Court to any evidence in the record of market shares for workers' compensation TPA services, and Dr. Fuhr did not gather any information relating to such shares, either in western Pennsylvania or any other geographic area. UPMC CSUMF ¶ 139. Accordingly, there is no basis for Premier to claim that WorkPartners holds market power or a dangerous probability of achieving a monopoly in TPA services. Similarly, Premier fails to show that the UPMC Defendants have monopoly power in the market for workers' compensation medical services. Dr. Fuhr offered no structural analysis of market for workers' compensation [\*\*54] medical services, and included no estimates of market shares from which market power could be inferred. UPMC CSUMF ¶ 162. Further, the UPMC Defendants' inpatient revenues account for less than 14% of total workers' compensation medical expenses paid in 2015 in western Pennsylvania. UPMC CSUMF ¶ 171; UPMC Exhibit A ¶ 112.

Market share is not all determinative, however, and may be offset by other evidence bearing upon competitive conditions within the industry, such as proof that the market remains highly competitive, that the defendant controls key materials or technology, and the presence or absence of other barriers to new market entry or expansion by existing competitors. *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 660 F. Supp. 2d 590, 603 (W.D. Pa. 2009); See, e.g., *U.S. v. Microsoft Corp.*, 253 F.3d 34, 53, 346 U.S. App. D.C. 330 (D.C. Cir. 2001) (reversing findings that Microsoft had attempted to monopolize an alleged market for internet browser software, where the government failed to either properly define the relevant market or to demonstrate the presence of substantial barriers to entry.). The large number of competitors in Pennsylvania in both the workers' compensation insurance and workers' compensation insurance TPA markets is an indication of the absence of barriers to entry in such markets. Moreover, there is no evidence of record [\*\*55] bearing upon such competitive conditions that would indicate WorkPartners has a dangerous probability of achieving a monopoly in any of the relevant markets. Premiers failure to establish the third element of its attempted monopolization claims under § 2 of the Sherman Act dooms its claims at Counts I & III of the Amended Complaint.

#### [\*536] E. Section 1 of the Sherman Act (Counts II & IV)

To establish a Section 1 violation, a plaintiff must prove (1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets<sup>13</sup> (3) that the concerted action was illegal; and (4) that the plaintiff was injured as a proximate result of the concerted action. *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d at 442. Failure to satisfy any one of these elements precludes a plaintiff from establishing a viable restraint-of-trade claim. *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 207 (3d Cir. 2005) ("Without proof of all of these elements, a Section 1 claim cannot be maintained.").

In order to satisfy the requirement of a "contract, combination . . . or conspiracy," there must be "some form of concerted action." *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 117 (3d Cir. 1999). "The existence of an agreement is the hallmark of a Section 1 claim." *Id.*; see also *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 999 (3d Cir. 1994) (The "very essence of a section 1 claim . . . is the existence of an agreement.").

In addition to demonstrating an agreement, [\*\*56] the § 1 plaintiff must show that "the conspiracy to which the defendant was a party imposed an unreasonable restraint on trade." *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 218 (3d Cir. 2008). In most cases, courts "apply the so-called rule of reason, a case-by-case inquiry designed to assess whether challenged conduct is an anticompetitive practice." *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d at 395. Premier is unable to show either an exclusive contract, concerted action, or an unreasonable restraint of trade.

Premier alleges that WorkPartners and MCMC conspired to exclude Premier from the relevant markets. MCMC was the incumbent repricing vendor for WorkPartners, and WorkPartners refused to replace MCMC with Premier despite a WorkPartners' report that indicated Premier would be the better company to serve as WorkPartners' repricing

<sup>13</sup> This Court has already found that Premier has failed in its attempt to define the relevant product and geographic markets, and has also failed to show an antitrust injury. Further analysis of Premier's alleged Section 1 claims is purely academic.

vendor. The Sherman Act, however, "does not require competitive bidding, and a buyer can conspire with a new supplier to take the place of its present supplier." [Advanced Power Sys., Inc. v. Hi-Tech Systems, Inc.](#), 801 F. Supp. 1450, 1463 (E.D. Pa. 1992). See also, [NYNEX Corp. v. Discon, Inc.](#), 525 U.S. 128, 137, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998) ("the freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage."); [Expert Masonry, Inc. v. Boone Cnty., Ky.](#), 440 F.3d 336, 345 (6th Cir. 2006) (no antitrust injury where winning bid "may not have been best bid"); [2660 Woodley Rd. Joint Venture v. ITT Sheraton Corp.](#), 369 F.3d 732, 738-39 (3d Cir. 2004) (finding plaintiff who alleged kickback scheme lacked antitrust standing because "we do not [\*\*57] think that paying inflated purchasing prices to vendors, without more, is [antitrust injury]").

Premier offers no evidence that would convince this Court that the MSA offered to MCMC, to remain as the repricing vendor, was anything but a unilateral decision made by WorkPartners. There is no evidence of concerted action or a conspiratorial agreement between MCMC and WorkPartners to foreclose Premier from a properly defined market.

"The second requirement of a [Section 1](#) claim, an unreasonable restraint on trade, is analyzed under either the *per se* standard or the rule of reason standard." [Burtch v. Milberg Factors, Inc.](#), 662 F.3d 212, 221 (3d Cir. 2011). The *per se* illegality rule "applies when a business practice 'on its face, has no purpose except stifling competition.'" *Id.* (quoting [Eichorn v. AT & T Corp.](#), 248 F.3d 131, 143 (3d Cir. 2001)). "Per se illegality 'is reserved for only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'" *Id. at 222* (quoting [Deutscher Tennis Bund v. ATP Tour, Inc.](#), 610 F.3d 820, 830 (3d Cir. 2010)); [In re Ins. Brokerage Antitrust Litig.](#), 618 F.3d 300, 317 (3d Cir. 2010)). No *per se* illegality is alleged or supportable on this record.

Agreements that do not fall under *per se* illegality are analyzed under the "rule of reason" to determine whether they are an unreasonable restraint on trade. [Burtch v. Milberg Factors, Inc.](#), 662 F.3d at 222. Premier the initial burden under the rule of reason<sup>14</sup> of showing that [\*\*58] the alleged agreement produced adverse, anticompetitive effects within the relevant product and geographic markets. [Deutscher Tennis Bund v. ATP Tour, Inc.](#), 610 F.3d at 830 (quoting [United States v. Brown Univ.](#), 5 F.3d 658, 668 (3d Cir. 1993)). Premier may satisfy this burden by proving the existence of actual anticompetitive effects, or Defendants' market power. *Id.* As set forth in Sections C and D above, the Court has determined that Premier is unable to demonstrate any anticompetitive effects in a relevant market or that WorkPartners has market power in such market. Premier's Claim at Count IV of the Amended Complaint fails as a matter of law.

Premier also contends that UPMC, UPMC-HB and WorkPartners "have together, in concert, refused to deal with [Premier] for the purpose of monopolizing the market and refused to permit their insureds and self-insureds to deal with [Premier]." See Amended Complaint ¶ 199. [Section 1](#) applies only to concerted action and does not proscribe independent action by a single entity, regardless of its purpose and effect on competition. [Am. Needle, Inc. v. NFL](#), 560 U.S. 183, 130 S. Ct. 2201, 176 L. Ed. 2d 947, 2010 U.S. LEXIS 4166, 2010 WL 2025207, at \*5 (2010); [Monsanto Co. v. Spray-Rite Serv. Corp.](#), 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984). Under [Copperweld Corp. v. Independence Tube Corp.](#), 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984), in certain cases, distinct legal entities are incapable of concerted action for the purposes of [§ 1](#) and must be viewed as a single entity. Specifically, the Supreme Court held "[a parent company]and its wholly owned subsidiary [] [\*\*59] are incapable of conspiring with each other for purposes of [§ 1](#) of the Sherman Act. To the extent that prior decisions of this Court are to the contrary, they are disapproved and overruled." *Id. at 777*. Premier admits that UPMC-HB and

<sup>14</sup> Under the rule of reason, "the plaintiff bears an initial burden . . . of showing that the alleged combination or agreement produced adverse, anticompetitive effects within the relevant product and geographic markets." [United States v. Brown Univ.](#), 5 F.3d 658, 668 (3d Cir. 1993). "The plaintiff may satisfy this burden by proving the existence of actual anticompetitive effects," or defendant's market power. *Id.* "If a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anti-competitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective." *Id. at 669*. "To rebut, the plaintiff must demonstrate that the restraint is not reasonably necessary to achieve the stated objective." *Id.*

UPMC-BMS are wholly owned subsidiaries of UPMC. UPMC CSUMF ¶ 44; Premier Response ¶ 44. Premier's claim under Section 1 of the Sherman Act against the UPMC Defendants (Count II), therefore, fails as a matter of law.

**[\*538] F. Antitrust Claims-Misappropriation of Trade Secrets (Counts V & VI)**

Premier contends that the alleged misappropriation of its trade secrets by MCMC and WorkPartners effectively creates a *per se* violation of the Sherman Act. In support Premier cites to Albert Sauter Co. v. Richard S. Sauter Co., 368 F. Supp. 501, 513 (E.D. Pa. 1973) and SI Handling Sys., Inc. v. Heisley, 658 F. Supp. 362 (E.D. Pa. 1986). The mere commission of an intentional tort, however, does not create a *per se* violation of the Sherman Act which requires a showing of anticompetitive effect and/or a restraint of trade.

The Third Circuit criticized *Sauter* and rejected the proposition that the mere intentional commission of a state tort constitutes a *per se* antitrust violation, finding that a plaintiff was required to show that the commission of a state tort constituted an unreasonable restraint of trade in order to succeed under the Sherman [\*\*60] Act. Franklin Music Co. v. Am. Broad. Cos., 616 F.2d 528, 558 (3d Cir. 1979). Moreover, the *SI Handling Sys., Inc.* court specifically stated that "[t]he intent necessary for a § 1 violation, however, must be an anti-competitive intent and may not simply be inferred from what plaintiff characterizes as unlawful or 'immoral' acts designed to injure." SI Handling Systems, Inc. v. Heisley, 658 F. Supp. at 378. To explain the difference, the court quoted Judge Sloviter's concurrence in *Franklin Music Co.* as follows:

There is a substantial difference between intent to injure a party which supports a tort recovery and the type of anticompetitive intent on which a Sherman Act § 1 claim can be founded. For example, if two disgruntled customers conspire to burn a department store which would, if accomplished, have the effect of destroying its business, it seems improbable that a court would hold that the intent which suffices to support a claim under state tort law is itself also enough to support a claim for violation of Section 1 of the Sherman Act. The anticompetitive intent which acts as a "surrogate for effects" must be targeted directly to the victim in its competitive aspects - injury to the victim *qua* competitor. It follows that plaintiff in this case cannot resurrect its antitrust claim because of its success before the jury [\*\*61] on the intentional state tort claims, even though the necessary predicate of that success was the finding of an intent to injure plaintiff.

SI Handling Systems, Inc. v. Heisley, 658 F. Supp. at 378-379 (quoting Franklin Music Co. v. Am. Broad. Cos., 616 F.2d at 556 (Sloviter, J. concurring)).

More importantly, the Supreme Court agreed that business torts do not create *per se* antitrust violations:

... other laws, for example, "unfair competition" laws, business tort laws, or regulatory laws, provide remedies for various "competitive practices thought to be offensive to proper standards of business morality." 3 P. AREEDA & H. HOVENKAMP, ANTITRUST LAW P651d, p. 78 (1996). Thus, this Court has refused to apply *per se* reasoning in cases involving that kind of activity. See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993) ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws").

Nynex Corp. v. Discon, 525 U.S. at 137.

Therefore, Premier is not excused from its rule of reason obligations, which require proof of relevant market definitions, market power, antitrust injury, harm to competition, and market wide price increases [\*539] and quantity reductions. Because Premier is not able, nor has it attempted to, demonstrate such noncompetitive effects of the alleged misappropriation of its trade secrets, its claims [\*\*62] set forth at Counts V and VI of the Amended Complaint also fail and will be dismissed.

**G. Unfair Competition Under State Law (Count VII)**

Because the Court shall enter Summary Judgment in favor of the Defendants on all of Premier's Federal claims, the Court will decline to exercise supplemental jurisdiction over the lone state law claim. Premier can pursue such claim in the parallel state action filed in the Court of Common Pleas of Allegheny County, Pennsylvania at No. GD-15-007247.

**V. CONCLUSION**

Based on the foregoing, Defendants' motions for summary judgment shall be granted. An appropriate Order follows.

/s/ DAVID STEWART CERcone

David Stewart Cercone

United States District Judge

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## **Best Effort First Time, LLC v. Southside Oil, LLC**

United States District Court for the District of Maryland

March 29, 2019, Decided; March 29, 2019, Filed

Civil Action No. GLR-17-825

### **Reporter**

2019 U.S. Dist. LEXIS 53804 \*; 2019-1 Trade Cas. (CCH) P80,728; 2019 WL 1427741

BEST EFFORT FIRST TIME, LLC, et al., Plaintiffs, v. SOUTHSIDE OIL, LLC, Defendant.

**Prior History:** [Best Effort First Time, LLC v. Southside Oil, LLC, 2018 U.S. Dist. LEXIS 55888 \(D. Md., Mar. 30, 2018\)](#)

## **Core Terms**

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prices, amended complaint, fuel, rack, grade, contracts, competitors, open-price, term contract, Pleadings, negotiated, allegations, products, lower price, distributors, arbitration, antitrust, gasoline, retail, seller, terms of the contract, price discrimination, material difference, supply contract, leave to amend, purchasers, discovery, stations, mark-up, terms

**Counsel:** [\*1] For Best Effort First Time, LLC, HMA, Inc., AJ&R Petroleum, Inc., Fuel Management, Inc., Energy Management, Inc., Duncan Services, Inc., Japan Plus, Inc., Japan Plus Two, Inc., Japan Plus Four, Inc., Jamal & Luqman, Inc., Plaintiffs: Alphonse Michael Alfano, LEAD ATTORNEY, Bassman Mitchell and Alfano Chtd, Washington, DC.

For Southside Oil, LLC, Defendant: Robert Knight Cox, LEAD ATTORNEY, Williams Mullen, McLean, VA; Brendan D O'Toole, Otto Konrad, PRO HAC VICE, Williams Mullen PC, Richmond, VA.

**Judges:** George L. Russell III, United States District Judge.

**Opinion by:** George L. Russell III

## **Opinion**

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### **MEMORANDUM OPINION**

THIS MATTER is before the Court on Defendant Southside Oil, LLC's ("Southside") Motion for Judgment on the Pleadings (the "Motion for Judgment") (ECF No. 43) and Plaintiffs' Motion for Leave to File a Second Amended Complaint (the "Motion to Amend") (ECF No. 47). This action arises from a contract dispute between Southside, a wholesale distributor of ExxonMobil motor fuels, and Plaintiffs, who are ten Maryland retail gasoline stations.<sup>1</sup> The Motions are ripe for disposition, and no hearing is necessary. See [Local Rule 105.6](#) (D.Md. 2018). For the reasons outlined below, the Court will grant Southside's Motion and deny Plaintiffs' [\*2] Motion.

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<sup>1</sup>The ten Plaintiffs are Best Effort First Time, LLC; HMA, Inc.; AJ&R Petroleum, Inc.; Fuel Management, Inc.; Energy Management, Inc.; Duncan Services, Inc.; Japan Plus, Inc.; Japan Plus Two, Inc.; Japan Plus Four, Inc.; and Jamal & Luqman, Inc. (Am. Compl., ECF No. 14).

## I. BACKGROUND<sup>2</sup>

In 2009, ExxonMobil sold its marketing assets, including some gas stations. (Am. Compl. ¶ 6, ECF No. 14). Plaintiffs' stations were some of those sold from ExxonMobil to Southside. (Id.). Southside bought Exxon-branded fuel for resale directly from ExxonMobil under a dealer agreement wherein Southside "step[ped] into the shoes of" ExxonMobil as Plaintiffs' landlord and supplier of fuels. (Id. ¶¶ 5-6). Prior to closing the deal, Plaintiffs, along with others, instituted lawsuits against ExxonMobil and the proposed purchasers, including Southside. (Id. ¶ 7). Those lawsuits settled on the basis of individualized agreements between Southside and each Plaintiff (the "Settlement Agreements"). (Id. ¶ 8).

Included in the Settlement Agreements were terms permitting Plaintiffs to purchase the service stations they had previously leased from ExxonMobil. (Id. ¶ 9). Each Plaintiff's right to purchase was conditioned upon entering into twenty-year fuel supply contracts with Southside (the "Supply Contracts"). (Id.). The Settlement Agreements required each Plaintiff to purchase all of its fuel from Southside for the twenty-year term of the Supply Contracts and to purchase a [\*3] minimum number of gallons every year. (Id.).

The Settlement Agreement negotiations focused on the per-gallon price for each grade of gasoline and diesel fuel in the Supply Contracts. (Id. ¶ 10). Plaintiffs sought a price that would enable their business to be profitable while meeting the minimum volume requirement. (Id.). Plaintiffs also did not want an "open-price term" contract because they wanted to limit the amount Southside could increase the fuel prices. (Id. ¶¶ 10-11). An open-price term contract permits the seller to increase the price to whatever the market will bear. (Id. ¶ 12).

Plaintiffs and Southside ultimately agreed on a "rack plus" pricing formula. (Id. ¶ 13). The "rack plus" pricing formula involves two numbers: the rack price and the mark-up. (Id. ¶ 13). The rack price is the per-gallon price refiners, like ExxonMobil, charge to distributors, like Southside, when distributors purchase fuel in full transport loads. (Id. ¶ 14). The rack price is essentially the distributor's cost for the product. (Id. ¶¶ 13-15). The mark-up is the distributor's built-in profit margin, which when added to the rack price yields the mark-up price. (Id. ¶¶ 16-17).

The Settlement Agreements [\*4] provided that Southside would add a cents-per-gallon mark-up of between 1.5¢ and 6.5¢, and each Plaintiff negotiated its particular rack-plus price in their individual Supply Contracts with Southside. (Id. ¶¶ 17, 26). The parties also agreed that Plaintiffs would pay federal and state taxes, environmental fees, and freight charges on top of the rack-plus per-gallon price. (Id. ¶ 18). The Supply Contracts contained identical arbitration provisions (the "Arbitration Provisions"), which provided that, "[a]ny monetary claim arising out of or relating to this agreement, or any breach thereof, shall be submitted to arbitration . . ." (Id. ¶ 30).

In 2015, Southside began charging Plaintiffs a per-gallon price that was considerably more than the rack price plus the agreed-upon cents-per-gallon mark-up. (Id. ¶ 38). Southside charged Plaintiffs a mark-up of as much as 12¢ or 13¢. (Id.). Southside had negotiated an agreement with ExxonMobil wherein ExxonMobil would sell its fuels to Southside at a per gallon price that was "considerably lower" than the price it charged to other distributors. (Id. ¶ 39). Southside then calculated the rack price based on the non-discounted prices ExxonMobil charged [\*5] other distributors instead of its own discounted price, which it regarded as "something different." (Id.).

When Plaintiffs realized that the prices Southside charged other Maryland ExxonMobil stations with open-price term contracts were "considerably lower than the prices" Southside charged Plaintiffs "for the very same products, at the very same time," they asked Southside to provide ExxonMobil's rack prices so they could determine if Southside was charging them more than the permitted cents-per-gallon amounts. (Id. ¶ 40). Southside provided Plaintiffs with price information, which showed that Southside's prices to Plaintiffs were considerably higher than the applicable cents-per-gallon amount above the rack prices, despite Southside's claim that they were not. (Id. ¶¶ 41, 43).

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<sup>2</sup> Unless otherwise noted, the Court takes the following facts from Plaintiffs' Amended Complaint (ECF No. 14) and accepts them as true. See *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

Southside told Plaintiffs that "rack prices" within the meaning of their contracts were not what Southside paid to ExxonMobil but rather the prices ExxonMobil charged other distributors who did not have a special discounted agreement. (*Id.* ¶¶ 42-43).

In order to earn a profit, Plaintiffs had to raise their retail prices above a competitive level. (*Id.* ¶ 45). As a result, Plaintiffs lost business to their lower-priced [\*6] competitors, including other Maryland Exxon dealers who purchased from Southside at lower prices. (*Id.*).

On March 27, 2017, Plaintiffs sued Southside. (ECF No. 1). In their five-count Amended Complaint, they allege: Breach of Contract - Pricing (Count I); Breach of Contract - Rebates (Count II); violation of [15 U.S.C. § 13 \(2018\)](#) - Price Discrimination (Count III); Lack of Consideration for the Arbitration Provision (Count IV); and Arbitration Provision - Unlawful Waiver of Rights (Count V). (Am. Compl. ¶¶ 48-81).

On March 30, 2018, the Court dismissed Counts IV and V, and compelled Plaintiffs to arbitrate Counts I and II. (Mar. 30, 2018 Mem. Op. at 27, ECF No. 38). The only remaining claim before this Court, therefore, is Count III, for which Plaintiffs request declaratory and injunctive relief. (Am. Compl. at 23).

On April 30, 2018, Southside filed its Motion for Judgment on the Pleadings. (ECF No. 43). On May 14, 2018, Plaintiffs filed an Opposition. (ECF No. 46). Plaintiffs contemporaneously filed their Motion for Leave to File a Second Amended Complaint, seeking to address the deficiencies in Count III of its Amended Complaint. (ECF No. 47). On May 29, 2018, Southside filed its Reply, (ECF [\*7] No. 48), and its Opposition to Plaintiffs' Motion (ECF No. 49). To date, the Court has no record the Plaintiffs filed a Reply.

## II. DISCUSSION

### A. Southside's Motion for Judgment on the Pleadings

#### 1. Standard of Review

Southside moves under [Federal Rule of Civil Procedure 12\(c\)](#) for judgment on the pleadings. "Under [Rule 12\(c\)](#), a party may move for judgment on the pleadings any time after the pleadings are closed, as long as it is early enough not to delay trial." [Prosperity Mortg. Co. v. Certain Underwriters at Lloyd's, No. GLR-12-2004, 2013 U.S. Dist. LEXIS 98286, 2013 WL 3713690, at \\*2 \(D.Md. July 15, 2013\)](#). The pleadings are closed when the defendant files an answer. See [Burbach Broad. Co. of Del. v. Elkins Radio Corp., 278 F.3d 401, 405 \(4th Cir. 2002\)](#).

A [Rule 12\(c\)](#) motion is governed by the same standard as [Rule 12\(b\)\(6\)](#) motions to dismiss. *Id. at 406*. The purpose of a [Rule 12\(b\)\(6\)](#) motion is to "test[ ] the sufficiency of a complaint," not to "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." [King v. Rubenstein, 825 F.3d 206, 214 \(4th Cir. 2016\)](#) (quoting [Edwards v. City of Goldsboro, 178 F.3d 231, 243 \(4th Cir. 1999\)](#)). A complaint fails to state a claim if it does not contain "a short and plain statement of the claim showing that the pleader is entitled to relief," [Fed.R.Civ.P. 8\(a\)\(2\)](#), or does not "state a claim to relief that is plausible on its face," [Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#) (quoting [Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable [\*8] for the misconduct alleged." *Id.* (citing [Twombly, 550 U.S. at 556](#)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing [Twombly, 550 U.S. at 555](#)). Though the plaintiff is not required to forecast evidence to prove the elements of the claim, the complaint must allege sufficient facts to establish each element. [Goss v. Bank of America, N.A., 917 F.Supp.2d 445, 449 \(D.Md. 2013\)](#) (quoting [Walters v. McMahan, 684 F.3d 435, 439 \(4th Cir. 2012\)](#)), aff'd sub nom. [Goss v. Bank of America, NA, 546 F.App'x 165 \(4th Cir. 2013\)](#).

In considering a [Rule 12\(b\)\(6\)](#) motion, a court must examine the complaint as a whole, consider the factual allegations in the complaint as true, and construe the factual allegations in the light most favorable to the plaintiff. [Albright v. Oliver, 510 U.S. 266, 268, 114 S. Ct. 807, 127 L. Ed. 2d 114 \(1994\)](#); [Lambeth v. Bd. of Comm'r's, 407 F.3d 266, 268 \(4th Cir. 2005\)](#) (citing [Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 \(1974\)](#)). But, the court need not accept unsupported or conclusory factual allegations devoid of any reference to actual events, [United Black Firefighters v. Hirst, 604 F.2d 844, 847 \(4th Cir. 1979\)](#), or legal conclusions couched as factual allegations, [Iqbal, 556 U.S. at 678](#).

## 2. Analysis

In Count III, Plaintiffs allege a violation of the [Robinson-Patman Act of 1936 \(the "RPA"\)](#). The RPA, an amendment to [§ 2\(a\)](#) of the [Clayton Antitrust Act](#), prohibits price discrimination by producers. [15 U.S.C. § 13](#). A business violates the RPA when it sells two of the same or similar products at different prices to different buyers within a brief period and those sales cause injury to competition. *Id.* at [§ 13\(a\)](#).<sup>3</sup> There are three categories of [\*9] competitive injuries that give rise to an RPA claim: primary line, secondary line, and tertiary line. See [Volvo Trucks N. America, Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 176, 126 S. Ct. 860, 163 L. Ed. 2d 663 \(2006\)](#). Here, Plaintiffs allege a secondary-line injury, which involves price discrimination that injures competition among the discriminating seller's customers, typically referred to as "favored" and "disfavored" purchasers. *Id.*; see [Texaco Inc. v. Hasbrouck, 496 U.S. 543, 558 n.15, 110 S. Ct. 2535, 110 L. Ed. 2d 492 \(1990\)](#).

To establish a prima facie case of secondary-line injury under the RPA, Plaintiffs must show that: (1) the fuel sales were made in interstate commerce; (2) the fuel sold to them was of "like grade and quality" as that sold to the other buyers; (3) Southside discriminated in price between Plaintiffs and other fuel purchasers; and (4) the effect of such discrimination was "to injure, destroy, or prevent competition" to the advantage of the other purchasers. [\*10] [Volvo Trucks, 546 U.S. at 176](#) (quoting [15 U.S.C. § 13\(a\)](#)).

The Court's March 30, 2018 Memorandum Opinion concluded that Plaintiffs had adequately stated a claim as to the third and fourth elements of the RPA claim. ((Mar. 30, 2018 Mem. Op. at 22-27, ECF No. 38). The Court did not address the second element because Southside did not dispute it in its motion to dismiss. (*See id.*). However, Southside now asserts that Plaintiffs do not state a claim as to the second element of the RPA. It asserts that, "because the gasoline was not purchased on like terms and conditions, pursuant to established case law, the goods themselves cannot be of 'like grade or quality,' an essential element of an RPA claim." (Def.'s Mem. Supp. Mot. J. Pleadings ["Def.'s Mot."] at 2, ECF No. 43-1). The Court agrees.

The Supreme Court has established that the RPA "proscribes unequal treatment of different customers in comparable transactions." [F.T.C. v. Borden Co., 383 U.S. 637, 643, 86 S. Ct. 1092, 16 L. Ed. 2d 153 \(1966\)](#). In [Borden](#), the Court determined that physically or chemically identical products sold under both nationally advertised and private labels are of "like grade and quality," because "economic factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory [\*11] 'like grade and quality' test." *Id. at 645-46* (quoting Report of The Attorney General's National Committee to Study the Antitrust Laws 158 (1955)). The Supreme Court applied this holding in a subsequent case regarding the sale of branded and unbranded gasoline, noting that branded gasoline and unbranded gasoline are "of like grade and quality." [Texaco Inc., 496 U.S. at 556 n.14](#).

<sup>3</sup> [Section 13\(a\) of the RPA](#), in relevant part, states:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition . . . .

While the United States Court of Appeals for the Fourth Circuit has not addressed the standard for determining whether goods sold under different contract terms are of "like grade and quality" for the purposes of the RPA, several other federal circuit courts have. See Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171 (9th Cir. 2016); Cleveland v. Viacom, Inc., 73 F.App'x 736 (5th Cir. 2003) (unpublished); Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp., 990 F.2d 25 (1st Cir. 1993); A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396 (7th Cir. 1989); FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019 (2d Cir. 1976). These cases provide the Court with adequate guidelines by which to evaluate Plaintiffs' allegations. The Court now considers whether the Amended Complaint sufficiently alleges that the fuel sold to Plaintiffs was of like grade or quality as that sold to other buyers under different contract terms.

In A.A. Poultry, the Seventh Circuit determined that eggs crated and sold immediately were not of like grade and quality as eggs segregated from on-line egg production, known as "specials." 881 F.2d at 1407-08. The court reasoned that, "[a]lthough 'special' eggs as delivered may be physically [\*12] indistinguishable to the buyer, they are not fundamentally the same good, for the same reason a seat on the 6:00 a.m. flight from Chicago to New York is not the same as a seat on the 5:00 p.m. flight, and a seat on the 5:00 p.m. flight reserved two weeks in advance is not the same as a seat on that flight for which the passenger had to stand by." Id. at 1408. The court also noted that "[n]o one supposes that a seller must charge the same price on contracts signed at different times, or on long-term contracts and spot sales." Id. at 1407.

Likewise, in Viacom, the Fifth Circuit found no violation of the RPA where retail video stores received a lower price through their agreements to purchase an entire output of videos under long-term purchase obligations, whereas other retailers paid more because they could choose the titles to purchase after learning of the box office results. 73 F.App'x at 741. The court concluded, "[a]s a result of the significant differences . . . between the terms of the agreements, any disparities in amounts paid cannot support a claim for price discrimination." Id.

The Ninth Circuit has also held that "[u]nlawful secondary-line price discrimination exists only to the extent that the differentially priced [\*13] product or commodity is sold in a 'reasonably comparable' transaction." Aerotec, 836 F.3d at 1188 (quoting Tex. Gulf Sulphur Co. v. J.R. Simplot Co., 418 F.2d 793, 807 (9th Cir. 1969)). In Aerotec, the plaintiff, an independent servicer of Honeywell products, alleged that Honeywell discriminated against it under the RPA by giving greater discounts off the catalog price for the same replacement parts to Honeywell-affiliated servicers. Id. at 1187-88. The Ninth Circuit explained that the plaintiff was "mistaken in its premise that any transactional differences are not reflective of materially different terms," because "servicers under an affiliate contract are subject to substantial obligations that are not imposed on independent repair shops like [the plaintiff]." Id. at 1188.

Finally, the Second Circuit has also adhered to the principles outlined above, finding no RPA violations when varying prices were the result of "different terms of sale." FLM Collision Parts, 543 F.2d at 1026 ("The [RPA], as its language indicates, requires equality of treatment among purchasers, but it does not require a seller to adopt a single uniform price under all circumstances."); see Coalition For A Level Playing Field, LLC v. Autozone, Inc., 737 F.Supp.2d 194, 216-17 (S.D.N.Y. Sept. 7, 2010) (noting that the "[RPA] does not prohibit price differences that reflect materially different contract terms" and that "[t]he complaint . . . ignores the possibility that these contract [\*14] differences account for the lower prices paid by the retailer defendants").

In this case, there is no question that the commodities at issue are physically identical: Exxon-branded gasoline and diesel. As the case law from other circuits makes clear, however, physically identical products are not always "of like grade and quality" for the purposes of the RPA. Even if they are physically identical, goods that are sold under "materially different terms" are not "of like grade and quality." Plaintiffs argue that the differences in the contracts—specifically, the Plaintiffs' twenty-year supply contract with "rack plus" pricing versus their competitors' "short-term ([three] year) open-price term contracts"—are not materially different terms, and consequently, do not affect the "grade and quality" of the fuel at issue. (Pls.' Resp. Opp'n Def.'s Mot. J. Pleadings ["Pls.' Opp'n"] at 2-3, ECF No. 47). The Court is not persuaded.

The fuel sold in this case is akin to the eggs sold in *A.A. Poultry* and the videos sold in *Viacom*, where the physically identical eggs and physically identical videos, respectively, were sold under materially different contract terms, rendering the products not of like [\*15] grade and quality. See A.A. Poultry, 881 F.2d at 1407-08; Viacom, 73 F.App'x at 741. Here, the Amended Complaint alleges that Plaintiffs' competitors "purchased under open-price term contracts," which it specifically distinguishes from its own negotiated "rack plus" pricing formula. (Am. Compl. ¶¶ 12-13, 40). Plaintiffs state, "Under an 'open-price term' contract, there is no practical limit on the per gallon profit the seller can earn. That is, the seller can mark up the product over its cost to whatever extent the market will bear, with no per gallon ceiling on the amount of the seller's profit margin." (*Id.* ¶ 12). Under 'rack plus' pricing, by contrast, Southside could only charge Plaintiffs a certain number of cents over and above ExxonMobil's "rack price." (*Id.* ¶¶ 13-15, 26). It is not surprising, then, that these two clearly different pricing terms resulted in different fuel prices for Plaintiffs and their competitors. The difference between the fuels at issue are the result of separately negotiated pricing contracts, as specifically alleged in the Amended Complaint, (Am. Compl. ¶¶ 12-13, 26, 40), and not a result of being branded or unbranded. Borden, 383 U.S. at 640.

In their Opposition to Southside's Motion, Plaintiffs also concede that the contracts contain [\*16] material differences. They state, "[I]long-term and short-term open-price term contracts are fundamentally different." (Pls.' Opp'n at 3). While Plaintiffs attempt to argue that these "fundamental" differences are not "material" differences, they later argue that "the only 'material differences' between Plaintiffs' contracts and the open-price term contracts do not justify the lower prices charged to Plaintiffs' competitors." (*Id.* at 13). Instead "these differences would support lower prices to Plaintiffs." (*Id.*). This argument, however, only supports the notion that the fuel sold to Plaintiffs is not of like grade and quality as that sold to its competitors.

Plaintiffs next argue that, if the lower price had been in their favor, there would be no RPA violation because they bargained for that lower price, but because the lower price is not in their favor, then there is an RPA violation. The RPA and antitrust law are not so fickle, nor are they meant to counteract the effects of knowledgeably negotiated contract terms. The RPA "signals no large departure from antitrust law's primary concern, interbrand competition." Volvo Trucks, 546 U.S. at 168.

In sum, the Court concludes that, based on the Amended Complaint's allegations, [\*17] Plaintiffs fail to plausibly allege that the fuel they bought from Southside is of like grade and quality as the fuel Southside sold to other retailers. Just as the Twombly Court dismissed an antitrust conspiracy complaint in a case "with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support an antitrust claim," the Court sees no "reasonably founded hope" that discovery in this antitrust case will reveal relevant evidence to support Plaintiffs' RPA claim. See 550 U.S. at 559-60 (alteration in original) (internal quotations omitted) (quoting Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005)). Therefore, the Court will grant Southside's Motion for Judgment and dismiss Count III of the Amended Complaint.

## **B. Plaintiffs' Motion for Leave to File a Second Amended Complaint**

### **1. Standard of Review**

Rule 15(a)(2) provides that "[t]he court should freely give leave [to amend a complaint] when justice so requires." Justice does not require permitting leave to amend when amendment would prejudice the opposing party, the moving party has exhibited bad faith, or amendment would be futile. See Edell & Assocs., P.C. v. Law Offices of Peter G. Angelos, 264 F.3d 424, 446 (4th Cir. 2001) (citing Edwards v. Goldsboro, 178 F.3d 231, 242 (4th Cir. 1999)). Leave to amend is futile when an amended complaint could not survive a motion to dismiss for failure to state a claim. See U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc., 525 F.3d 370, 376 (4th Cir. 2008). "Leave to [\*18] amend, however, should only be denied on the ground of futility when the proposed amendment is clearly insufficient or frivolous on its face." Johnson v. Oroweat Foods Co., 785 F.2d 503, 510 (4th Cir. 1986) (citing Davis v. Piper Aircraft Corp., 615 F.2d 606, 613 (4th Cir. 1980)).

## 2. Analysis

Plaintiffs request leave of the Court to file a Second Amended Complaint to cure the identified deficiencies in Count III of their Amended Complaint. Southside contends that granting Plaintiffs leave to amend would be futile because the Second Amended Complaint is deficient on its face and cannot survive a motion to dismiss. The Court agrees with Southside.

In an effort to address the deficiencies in their Amended Complaint, Plaintiffs' new allegations "compare and contrast the contracts, describe their differences and similarities, and the basis on which they do not result [in] non-comparable transactions that affect the grade or quality of the products sold." (Mem. P&A Supp. Pls.' Mot. Leave File 2d Am. Compl. ["Pls.' Mot."] at 7, ECF No. 47-2).<sup>4</sup> Plaintiffs state that they "were not given the opportunity to enter a three-year open-price term contract like the ones entered between Southside and Plaintiffs' competitors." (2d Am. Compl. ¶ 10, ECF No. 47-4). They name the original price ExxonMobil charged Southside—"Posted Price"—and [\*19] the new price ExxonMobil started charging Southside in 2015—"Formula Price." (Id. ¶ 35). Plaintiffs then state their dispute with Southside "centers on the meaning of the term 'Rack.'" (Id. ¶ 36). Specifically, Plaintiffs believe "rack" should mean the Formula Price, whereas Southside maintains it means the Posted Price. (Id.). Further, they allege that their rack-plus price term contracts and competitors' open-price term contracts "are not substantively different from one another with respect to credit, terms of payment, credit card processing, payment of credit card fees, trademark protection, service station image and appearance standards, minimum purchase requirements, taxes and fees associated with the products, and the terms governing resale of the products to consumers." (Id. ¶ 45). Plaintiffs make the argument discussed above that, if anything, the differences between their contracts and those their competitors negotiated mean Southside should them a lower, not a higher, price. (Id. ¶ 46). Plaintiffs argue that because their competitors' open-price contracts vest pricing discretion in Southside, that Southside exercised its discretion to charge Plaintiffs' competitors less [\*20] than Plaintiffs, which has injured Plaintiffs.

While Plaintiffs' new allegations give more context to the formation and substance of their contracts with Southside, they cannot escape the "fundamental" difference that persists between their contracts and their competitors' contracts: the rack-plus price term and the open-price term. The Second Amended Complaint maintains this distinction when it states, "[u]nder Plaintiffs' contracts with Southside, the per gallon price is a certain cents per-gallon (e.g., [three] cents, four cents) over 'Rack,'" and "[t]he open-price term contracts of Plaintiffs' competitors vest discretion in Southside, subject to the UCC's 'good faith' requirement, to set the prices for sales to retailers." (2d Am. Compl. ¶¶ 36-37). Plaintiffs even concede that certain other contractual differences could justify differences in price, but argue that those differences should only be in their favor: "[a]lthough there are non-price differences between the [P]laintiffs' contracts and the open-price term contracts, the differences do not justify a lower per gallon price to [P]laintiffs' competitors." (Id. ¶ 46). As explained above, this argument is incompatible [\*21] with the purpose of antitrust law and the RPA. See Volvo Trucks, 546 U.S. at 176 ("Mindful of the purposes of the [RPA] and of the antitrust laws generally, we have explained that [the RPA] does not 'ban all price differences charged to different purchasers of commodities of like grade and quality'; rather, the Act proscribes 'price discrimination only to the extent that it threatens to injure competition.'") (quoting Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 220, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)). Here, Plaintiffs' "rack-plus price" term is the product of its own negotiation with Southside, a contract term that the Second Amended Complaint identifies as "the most important provision to be negotiated" with Southside. (2d Am. Compl. ¶ 10). The purpose of the RPA or antitrust law is not to undo that negotiation in order to give Plaintiffs the result they expected but did not receive.

In addition, as noted above, there is no "reasonably founded hope" that discovery will reveal relevant evidence to cure Plaintiffs' claim, because the pricing differences are inherent in the contracts themselves, and no amount of

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<sup>4</sup> In their Motion, Plaintiffs list their proposed amendments by paragraph number. (Pls.' Mot. at 2-5). But some of those paragraph numbers and allegations do not line up with those in the proposed Second Amended Complaint. (Compare Pls.' Mot. ¶¶ 38-40, 48-50, with 2d Am. Compl. ¶¶ 35-37, 45-46). Where they conflict, the proposed Amended Complaint controls, not the Motion's summary of the amendments.

fact-finding could change what has already been negotiated and settled. Plaintiffs' amendments simply do not justify the burdensome expense of discovery, particularly in the antitrust context. [\*22] See *Twombly*, 550 U.S. at 558 ("[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.").

After reviewing the proposed Second Amended Complaint, the Court concludes that the amendments are clearly insufficient on their face because the deficiencies present in the Amended Complaint persist. See *Kellogg Brown & Root*, 525 F.3d at 376; *Johnson*, 785 F.2d at 510. Thus, the Court concludes that leave to amend would be futile and will deny Plaintiffs' Motion.

The Court is mindful that the effect of this ruling will be to limit the Plaintiffs' claims for relief to their breach of contract claims in arbitration. (Mar. 30, 2018 Mem. Op. at 27 ("The Court will deny the Motion to Dismiss without prejudice as to Counts I and II because those Counts will be submitted to arbitration.")). This is appropriate because, as Plaintiffs state in their proposed Second Amended Complaint, their dispute with Southside "centers on the meaning of the term 'Rack,'" (2d Am. Compl. ¶ 36), a quintessential question of contract interpretation.

### **III. CONCLUSION**

For the foregoing reasons, the Court will grant Southside's Motion for Judgment on the Pleadings (ECF No. 43) and deny [\*23] Plaintiffs' Motion for Leave to File a Second Amended Complaint (ECF No. 47). A separate Order follows.

Entered this 29th day of March, 2019.

/s/ George L. Russell, III

United States District Judge

### **ORDER**

For the reasons set forth in the foregoing Memorandum, it is this 29th day of March, 2019, by the United States District Court for the District of Maryland, hereby:

ORDERED that Defendant's Motion for Judgment on the Pleadings (ECF No. 43) is GRANTED;

IT IS FURTHER ORDERED that Plaintiffs' Motion for Leave to File a Second Amended Complaint (ECF No. 47) is DENIED; and

IT IS FURTHER ORDERED that the parties FILE a joint status report addressing how this case will proceed within fourteen (14) days of the date of this Order.

/s/ George L. Russell III

United States District Judge



## In re Mylan N.V. Sec. Litig.

United States District Court for the Southern District of New York

March 29, 2019, Decided; March 29, 2019, Filed

16-CV-7926 (JPO)

### **Reporter**

379 F. Supp. 3d 198 \*; 2019 U.S. Dist. LEXIS 54122 \*\*; 2019-1 Trade Cas. (CCH) P80,727; Fed. Sec. L. Rep. (CCH) P100,386; 2019 WL 1427430

### IN RE MYLAN N.V. SECURITIES LITIGATION

**Prior History:** [In re Mylan N.V. Sec. Litig., 2018 U.S. Dist. LEXIS 52084 \(S.D.N.Y., Mar. 28, 2018\)](#)

## **Core Terms**

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allegations, amended complaint, scienter, misleading, generic, drugs, rebate, pleaded, generic drug, omissions, contends, motion to dismiss, anticompetitive, price fixing, corrective, disclosure, prices, failure to disclose, new allegation, price-fixing, disclose, survive, misclassification, stock, fail to disclose, direct evidence, misrepresentation, announcement, misconduct, causation

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For John D. Sheehan, Defendant: Sandra C Goldstein, LEAD ATTORNEY, Stefan H. Atkinson, Cravath, Swaine & Moore LLP, New York, NY.

For Mylan N.V., Mylan, Inc., Heather Bresch, Robert J. Coury, Paul B. **[\*\*2]** Campbell, Kenneth S. Parks, John D. Sheehan, Consolidated Defendants: Sandra C Goldstein, LEAD ATTORNEY, Kevin J. Orsini, Stefan H. Atkinson, Cravath, Swaine & Moore LLP, New York, NY.

**Judges:** J. PAUL OETKEN, United States District Judge.

**Opinion by:** J. PAUL OETKEN

## **Opinion**

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**[\*202] OPINION AND ORDER**

J. PAUL OETKEN, District Judge:

A group of plaintiffs bring this putative securities class action against the drug manufacturer Mylan N.V. and several of its officers, in connection with the alleged misclassification of the EpiPen, a rebate scheme involving the EpiPen, and the alleged inflation of prices for various generic drugs. On March 28, 2018, the Court granted in part and denied in part Defendants' motion to dismiss the prior class action complaint (Dkt. No. 69), and Plaintiffs subsequently filed the operative amended complaint (Dkt. No. 89).

Defendants now move to dismiss the new allegations in the amended complaint. (Dkt. No. 95.) For the reasons that follow, the motion is granted in part and denied in part.

**I. Background****A. Procedural History**

Plaintiffs are purchasers of Mylan's common stock. On October 11, 2016, Plaintiff Stef Van Duppen initiated this action against Mylan N.V., Mylan Inc., and officers Heather Bresch and [\*203] John Sheehan. (Dkt. No. 1.) Separately, Plaintiff Landon W. Perdue filed an action against Mylan N.V., Mylan Inc., and officers Heather Bresch, Paul B. Campbell, Robert J. Coury, Kenneth S. Parks, and John D. Sheehan on October 13, 2016. (See *Perdue v. Mylan N.V.*, No. 16 Civ. 8000, Dkt. No. 1.) On January 9, 2017, the Court consolidated the two cases for pre-trial purposes, appointed Lead Plaintiffs, and approved Lead Counsel. (Dkt. No. 26.) Lead Plaintiffs subsequently filed an Amended Class Action Complaint (Dkt. No. 39) asserting claims under: (1) [Section 10\(b\)](#) of the Securities Exchange Act of 1934 ("Exchange Act"), [15 U.S.C. § 78j\(b\)](#), and [Rule 10b-5](#), [17 C.F.R. § 240.10b-5](#), against all Defendants; (2) [Section 20\(a\)](#) of the Exchange Act, [15 U.S.C. § 78t\(a\)](#), against the individual Defendants; and (3) Section 1 of the Israeli Securities Law of 1968, against all Defendants.

Defendants jointly moved to dismiss the complaint (Dkt. No. 45), and the Court granted the motion in part (Dkt. No. 69). The Court dismissed Plaintiffs' securities claims to the extent they relied on an alleged "pay-for-delay" agreement with Teva Pharmaceuticals, alleged agreements with schools regarding the EpiPen, and an alleged agreement to allocate the market [\*203] for the generic drug doxycycline hydiate delayed [\*204] release ("Dox DR"). (Dkt. No. 69 at 27-30, 34.) The Court also determined that certain statements alleged in the complaint were not actionable. (Dkt. No. 69 at 11-12, 17, 20.) Finally, the Court declined to exercise supplemental jurisdiction over the Israeli securities law claim, given the complex issues and exceptional circumstances presented in this case. (Dkt. No. 69 at 36-40.) Plaintiffs' remaining securities claims—premised on the misclassification of the EpiPen in the Medicaid rebate scheme and the alleged price-fixing agreements concerning five generic drugs—survived the motion to dismiss.

On July 6, 2018, Plaintiffs filed the operative Second Amended Class Action Complaint ("Amended Complaint"). (Dkt. No. 89 ("Compl.")) Defendants now move to partially dismiss the Amended Complaint (Dkt. No. 95), challenging the sufficiency of its new allegations (Dkt. No. 96 at 1 & n.1).

**B. Factual Background**

The facts of this case are described in this Court's prior opinion. See [In re Mylan N.V. Sec. Litig., No. 16 Civ. 7926, 2018 U.S. Dist. LEXIS 52084, 2018 WL 1595985, at \\*1-3 \(S.D.N.Y. Mar. 28, 2018\)](#). Here, the Court recounts background necessary to resolving the instant motion, as well as those new facts alleged for the first time in the Amended Complaint. The factual allegations in the Amended Complaint are [\*205] assumed true for the purposes of this motion.

Mylan is a developer, manufacturer, and distributor of brand-name and generic pharmaceuticals. (Compl. ¶ 2.) This action arises out of Mylan's conduct regarding the drug EpiPen Auto-Injector ("EpiPen") and several generic drugs. (*Id.*) Mylan is a public company, trading on the NASDAQ Global Select Market. (Compl. ¶ 30.) Lead Plaintiffs Menorah Mivtachim Insurance Ltd., Menorah Mivtachim Pensions and Gemel Ltd., Phoenix Insurance Company Ltd., Meitav DS Provident Funds and Pension Ltd., and Dan Kleinerman ("Plaintiffs") bring this action on behalf of themselves and a class of individuals who purchased the common stock of Mylan N.V. or Mylan, Inc. between February 21, 2012, and October 30, 2017. (Compl. ¶¶ 1, 29.) Defendants in this action include Mylan N.V., Mylan, Inc., and various Mylan executives who served during the class period (collectively, "Mylan"). (Compl. ¶¶ 30–37.)

The conduct giving rise to this action falls into two categories of alleged wrongdoing: (1) Medicaid misclassification, and (2) antitrust violations. First, the Amended Complaint alleges that Mylan unlawfully misclassified the EpiPen as a generic drug for purposes of [\*\*6] the Medicaid Drug Rebate Program ("MDRP"). (Compl. ¶ 5; Dkt. No. 69 at 2-3; see generally Compl. ¶¶ 39-97.) The previous complaint outlined the details of this alleged misclassification, along with various statements that Plaintiffs alleged to have misled investors in connection with the misclassification. (See, e.g., Dkt. No. 39 ¶¶ 33-90, 201-04.) Plaintiffs repeat those allegations in the Amended Complaint, and present several additional statements that Plaintiffs contend were also rendered misleading by the failure to disclose the alleged misclassification. (See, e.g., Compl. ¶¶ 242-43, 289-91.)

Second, the Amended Complaint alleges that Mylan entered into a number of anticompetitive agreements to block competitors from the market and inflate the prices of various drugs. (Compl. ¶¶ 12-13, 15-18; see also Dkt. No. 69 at 3-4.) The Amended Complaint repeats allegations from the previous complaint that Mylan schemed to manipulate the market to maintain a supracompetitive price for the generic drug Doxy DR, and schemed to fix prices for the generic drugs albuterol sulfate, benazepril, clomipramine, divalproex, and propranolol. (Compl. ¶ 115; Dkt. No. 39 ¶ 104.) [\*204] Although Plaintiffs' claims [\*\*7] regarding market allocation of Doxy DR were previously dismissed for failure to plausibly allege scienter, the Amended Complaint contains new allegations regarding the agreement of Mylan executives to engage in market allocation with respect to Doxy DR, in an attempt to cure the pleading deficiency. (Compl. ¶¶ 127, 130-31, 134-45.)

The Amended Complaint includes new allegations regarding Mylan's alleged antitrust misconduct. Among these are allegations that Mylan engaged in price fixing in the markets for three other generic drugs: doxycycline monohydrate ("Doxy Mono"), glipizide-metformin, and verapamil. (Compl. ¶¶ 187-200, 405.)

Plaintiffs' new allegations also include claims that Mylan engaged in anticompetitive conduct regarding the EpiPen and a competing epinephrine autoinjector—the Auvi-Q produced by Sanofi-Aventis. (Compl. ¶¶ 12-13.) Specifically, the Amended Complaint alleges that Mylan offered EpiPen at a rebate of 30% or more to third-party payors in the medical insurance market, on the express condition that the payors would decline to reimburse for the Auvi-Q. (Compl. ¶ 104.) As a result, Mylan blocked the Auvi-Q from accessing half of the market for epinephrine autoinjectors, [\*\*8] and caused its market share to drop. (Compl. ¶¶ 107-08, 110.) Sanofi decided not to relaunch Auvi-Q, and is suing Mylan for antitrust violations in connection with the alleged conduct. (Compl. ¶ 113.)

Furthermore, the Amended Complaint adds an additional corrective disclosure relevant to allegations of loss causation: On October 31, 2017, a group of 47 state attorneys general issued a press release publicizing new allegations from an amended complaint that the group would be filing in their ongoing antitrust action against Mylan ("State AG action"). (Compl. ¶ 394.) On that day, Mylan shares fell \$2.53, or 6.62%. (Compl. ¶ 395.)

Finally, the previous complaint brought claims against five of Mylan's executives. (Dkt. No. 39 ¶¶ 28-32.) To that group of individual Defendants, the Amended Complaint also adds Rajiv Malik, who served as the President of Mylan from January 1, 2012, to the present, and has served as an Executive Director of Mylan since 2013. (Compl. ¶ 35.) The Amended Complaint adds allegations about Malik's involvement in the challenged conduct, including six allegedly misleading statements made by Malik and Malik's sale of Mylan stock in a manner potentially evidencing his [\*\*9] scienter. (Compl. ¶¶ 127, 130, 141-42, 307-08, 409.)

## II. Legal Standard

To survive a motion to dismiss for failure to state a claim under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" [Ashcroft v. Iqbal](#), 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." [Wilson v. Merrill Lynch & Co.](#), 671 F.3d 120, 128 (2d Cir. 2011) (quoting [Iqbal](#), 556 U.S. at 678).

The Court must "accept[] as true the factual allegations in the complaint and draw[] all inferences in the plaintiff's favor." [Allaire Corp. v. Okumus](#), 433 F.3d 248, 249-50 (2d Cir. 2006) (quoting [Scutti Enters., LLC v. Park Place Entm't Corp.](#), 322 F.3d 211, 214 (2d Cir. 2003)). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." [Iqbal](#), 556 U.S. at 678.

[\*205] "Securities fraud claims are [also] subject to the heightened pleading standards established by [Federal Rule of Civil Procedure 9\(b\)](#) and the [Private Securities Litigation Reform Act ("PSLRA")], [15 U.S.C. § 78u-4](#)." [Shanawaz v. Intellipharmaceutics Int'l Inc.](#), 348 F. Supp. 3d 313, 322 (S.D.N.Y. 2018). Where a claim alleges "fraud or mistake," [Rule 9\(b\)](#) provides that "a party must state with particularity the circumstances constituting fraud or mistake." [Fed. R. Civ. P. 9\(b\)](#). The PSLRA requires [\*10] a claim for securities fraud to "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." [15 U.S.C. § 78u-4\(b\)\(1\)](#).

### III. Discussion

Under [Rule 10b-5\(b\)](#), it is "unlawful for any person . . . [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . in connection with the purchase or sale of any security." [17 C.F.R. § 240.10b-5](#). To state a claim for relief under [Section 10\(b\)](#) and [Rule 10b-5](#), "a plaintiff must show '(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.'" [Menaldi v. Och-Ziff Capital Mgmt. Grp. LLC](#), 164 F. Supp. 3d 568, 576 (S.D.N.Y. 2016) (quoting [Stoneridge Inv. Partners, LLC v. Scientific-Atlanta](#), 552 U.S. 148, 157, 128 S. Ct. 761, 169 L. Ed. 2d 627 (2008)).

Mylan contends that the new allegations in the Amended Complaint fail to state a claim under this standard for several reasons, including [\*11] that: (1) certain alleged misstatements are not actionable; (2) conduct that Mylan was purportedly required to disclose is not adequately alleged to violate antitrust laws; (3) certain loss causation allegations are deficient; (4) allegations against Defendant Rajiv Malik are not actionable, unsupported by scienter, or time-barred; and (5) allegations regarding the generic drug Doxy DR are unsupported by scienter. The Court addresses each in turn.

#### A. Actionable Statements

As the Court explained in its previous opinion in this case (Dkt. No. 69 at 8), [Section "10\(b\)](#) and [Rule 10b-5\(b\)](#) do not create an affirmative duty to disclose any and all material information," [Matrixx Initiatives, Inc. v. Siracusano](#), 563 U.S. 27, 44, 131 S. Ct. 1309, 179 L. Ed. 2d 398 (2011). Rather, "omissions are actionable under § 10(b) only when a corporation has a duty to disclose." [Menaldi](#), 164 F. Supp. 3d at 579. As relevant here, a company has a duty to disclose material information when "necessary to avoid rendering existing statements misleading by failing to disclose material facts." *Id.*

Mylan identifies two categories of alleged misstatements in the Amended Complaint which it contends are not actionable in light of this Court's previous opinion: (i) statements of historical income; and (ii) statements respecting future regulatory scrutiny. (Dkt. No. 96 [\*\*12] at 11-12.) First, Mylan contends that the Amended Complaint continues to include quantitative statements of earnings from Mylan's Form 10-K and Form 10-Q filings, which the Court previously determined to be "not actionable" in its prior opinion.<sup>1</sup> (Dkt. No. [\*206] 96 at 11; Dkt. No. 69 at 11 ("[T]he mere statement of historical financial information does not give rise to a duty to disclose illegal conduct that may have contributed to that performance.").)

Mylan requests that these statements from 10-K and 10-Q reports about Mylan's financial performance—both those repeated from the prior complaint and alleged for the first time in the Amended Complaint—be dismissed. (Dkt. No. 96 at 12.) As Mylan observes, Plaintiffs do not respond to this argument. (Dkt. No. 101 at 5.) Accordingly, for the reasons given in the Opinion of March 28, 2018 (Dkt. No. 69 at 11), the Court reiterates that quantitative statements of earnings contained in Mylan's Forms 10-K and 10-Q are not actionable misstatements. Mylan's request to dismiss these allegations from the Amended Complaint is granted.

Second, with respect to certain statements about sources of income, Mylan contends that Plaintiffs have merely repackaged [\*\*13] already-dismissed allegations that Mylan misleadingly "failed to disclose an 'acute risk' of fines" (Dkt. No. 69 at 12), as allegations that Mylan misleadingly failed to disclose that its actions were "likely to raise regulatory scrutiny" (Dkt. No. 96 at 12 (quoting Compl. ¶ 320).)<sup>2</sup> Plaintiffs acknowledge the Court's holding "that Mylan was not obligated to disclose *that* its past conduct put it at risk of future regulatory scrutiny" (Dkt. No. 100 at 15), but nonetheless argues that being unable to accurately judge the risk of regulatory scrutiny through Mylan's omissions about past conduct made the omissions material (Dkt. No. 100 at 16).

It appears that the parties do not actually disagree about *whether* certain statements are actionable, but would benefit from clarification about *the grounds on which* they are actionable. The Court thus reiterates that "Mylan's statements explaining income" are actionable because the statements "put its sources of income at issue," and the statements were misleading for failing to disclose the extent to which Mylan's income was inflated by its misclassification of the EpiPen and its other alleged anticompetitive activities. (Dkt. No. 69 at 12.) Although [\*\*14] the concealment of the risk of regulatory scrutiny may contribute to the materiality of the omissions for investors, the statements explaining income were not themselves misleading for failing to disclose a risk of future regulatory scrutiny. As such, insofar as the Amended Complaint could be read to allege that certain statements are *misleading* due to a failure to disclose future regulatory risk, those allegations are dismissed.

## B. Legality of Underlying Misconduct

Corporations are under no general duty "to disclose corporate mismanagement or uncharged criminal conduct." [In re Sanofi Sec. Litig., 155 F. Supp. 3d 386, 403 \(S.D.N.Y. 2016\)](#). However, a corporation's failure to disclose underlying unlawful conduct can be actionable under [Section 10\(b\)](#) and [Rule 10b-5](#) where affirmative statements were made misleading by the corporation's failure to disclose the alleged wrongdoing. See [Menaldi, 164 F. Supp. 3d at 581](#). To state a claim for failure to disclose unlawful conduct, a plaintiff must plead with particularity the statements that were made misleading by the defendant's failure to disclose, and [\*207] must adequately plead that the underlying misconduct occurred and was unlawful. See [id. at 578-79](#).

Here, the Amended Complaint alleges two new sources of unlawful conduct which, Plaintiffs contend, rendered certain of Mylan's [\*\*15] affirmative statements misleading: (1) an anticompetitive rebate scheme whereby Mylan's rebates on the EpiPen excluded Sanofi's Auvi-Q from a large segment of the market for epinephrine autoinjectors, in violation of [Section 2](#) of the Sherman Act (Compl. ¶¶ 103-114); and (2) agreements to fix the prices of three

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<sup>1</sup> For these statements about historical income, see Compl. ¶¶ 249, 254, 259, 262, 271, 274, 277, 281, 290, 293, 296, 299, 310, 315, 322, 328, 337, 343, 349, 355, 359, 361, 365.

<sup>2</sup> For these allegations about future regulatory risk, see Compl. ¶¶ 263, 272, 275, 278, 282, 286, 291, 294, 297, 300, 304, 308, 311, 316, 320, 323, 325, 329, 331, 338, 340, 344, 346, 350, 352, 356, 358, 362, 366.

generic drugs, in violation of [Section 1](#) of the Sherman Act (Compl. ¶¶ 18, 187-200). Mylan contends that Plaintiffs failed to adequately plead the existence and illegality of this underlying misconduct. (Dkt. No. 96 at 5-11.)

As an initial matter, Plaintiffs contend that they need not allege that these two bases of conduct constituted antitrust violations, because in any event Mylan's failure to disclose their existence to investors was misleading. (Dkt. No. 100 at 2, 10-11, 14.) According to Plaintiffs, the Amended Complaint makes clear that "these omissions were misleading regardless of whether or not the conditional rebates" or pricing agreements "constituted antitrust violations." (Dkt. No. 100 at 11.)

The Court disagrees with this construction of the Amended Complaint. Paragraph 14, which Plaintiffs rely on for this argument as to the EpiPen rebate scheme, provides that:

Mylan repeatedly failed [\*\*16] to tell the whole truth about the ways in which it competed and about the reasons for its financial success, including in the market for epinephrine autoinjectors, by failing to disclose this anticompetitive conduct. While Mylan's conduct certainly violated U.S. antitrust laws, including Sherman Act [Section 2](#), investors cared about this conduct in any event due to the significant liability to which it exposed Mylan.

(Compl. ¶ 14.) This paragraph clearly states that the challenged failure "to tell the whole truth" was premised on "anticompetitive conduct." (*Id.*) And such conduct would only "expose[] Mylan" to "significant liability" (*id.*), if it was, indeed, in violation of antitrust laws. Furthermore, the remainder of the allegations in the Amended Complaint involving the Sanofi rebate scheme clearly portray the conduct as an antitrust violation. (See, e.g., Compl. ¶ 114.)

Paragraph 18 contains similar language regarding the alleged price-fixing agreements: "Mylan's statements suggested that it did not compete through collusion with competitors on prices, when in fact it did, and while Mylan's collusion certainly violated U.S. antitrust laws, investors cared about such collusion in any event [\*\*17] due to the significant liability to which it exposed Mylan." (Compl. ¶ 18.) But again, the agreements only exposed Mylan to liability if they were, in fact, unlawful.<sup>3</sup>

Because the Amended Complaint alleges that omissions regarding the EpiPen rebate scheme and generic drug price-fixing agreements were misleading because the underlying conduct violated antitrust laws, then, Plaintiffs must adequately allege that such conduct occurred and was unlawful in order to survive a motion to dismiss. See [Menaldi, 164 F. Supp. 3d at 578](#).

## 1. EpiPen Rebate Scheme

Mylan argues that Plaintiffs have failed to adequately plead that the challenged EpiPen rebate scheme constituted [\*\*208] an antitrust violation.<sup>4</sup> (Dkt. No. 96 at 7-8.) To allege a violation of [Section 2](#) of the Sherman Act, a plaintiff "must show harm to competition in the relevant market." [Solent Freight Servs., Ltd. v. Alberty, 914 F. Supp. 2d 312,](#)

<sup>3</sup> Furthermore, even if the Amended Complaint could be reasonably read to allege *that* the omissions were misleading even if the challenged conduct was not unlawful, the complaint fails to allege with particularity *why*, absent any antitrust violation, such statements would be misleading. (See Dkt. No. 69 at 30 n.10; Dkt. No. 101 at 2.)

<sup>4</sup> Mylan also contends in its opening brief that Plaintiffs improperly "cut[] and past[ed]" their allegations from a complaint in another case. (Dkt. No. 96 at 6-7.) However, Mylan's reply brief states that the other case involved "a different complaint that had different allegations." (Dkt. No. 101 at 3.) The Court thus considers any argument about the improper copying of these allegations to have been abandoned.

In addition, Mylan briefly asserts that Plaintiffs fail to allege scienter with respect to these claims. (Dkt. No. 96 at 8-9.) But because "a 'single, conclusory, one-sentence argument' [] is insufficient to adequately raise an issue," [LG Elecs., Inc. v. Wi-LAN USA, Inc., No. 13 Civ. 2237, 2014 U.S. Dist. LEXIS 99827, 2014 WL 3610796, at \\*3 n.3 \(S.D.N.Y. July 21, 2014\)](#) (quoting [Cuoco v. Moritsugu, 222 F.3d 99, 112 n. 4 \(2d Cir. 2000\)](#)), the Court does not address it.

[323 \(E.D.N.Y. 2012\)](#). As the Court noted in its previous opinion (Dkt. No. 69 at 29), to overcome the presumptive legality of exclusive-dealing agreements, plaintiffs must adequately allege "an actual adverse effect on competition as a whole in the relevant market," [George Haug Co. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 139 \(2d Cir. 1998\)](#), and that the arrangements' "anticompetitive effects outweigh [their] procompetitive effects," [E & L Consulting, Ltd. v. Doman Indus. Ltd., 472 F.3d 23, 29 \(2d Cir. 2006\)](#) (citation omitted).

Mylan contends that Plaintiffs' allegations [\[\\*\\*18\]](#) on both scores are insufficiently conclusory. (Dkt. No. 96 at 8.) The Court disagrees.

Plaintiffs' Amended Complaint adequately alleges both harm to competition in the relevant market, and the predominance of anticompetitive effects, to survive a motion to dismiss. Plaintiffs allege with particularity that the EpiPen rebate scheme blocked Sanofi from accessing a significant portion of the market for epinephrine autoinjectors. (Compl. ¶¶ 106-12; see Dkt. No. 100 at 12.) And Plaintiffs also adequately allege that, despite the rebates offered, the ultimate price of EpiPen actually rose as a result of the rebate scheme, resulting in net anticompetitive effects. (Compl. ¶¶ 100, 105; see Dkt. No. 100 at 13.) The Court agrees with Plaintiffs that these allegations of anticompetitive effects are sufficient to survive a motion to dismiss. See [In re Namenda Direct Purchaser Antitrust Litig., No. 15 Civ. 7488, 2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244, at \\*10 \(S.D.N.Y. May 23, 2017\)](#) (describing burden-shifting framework for [Section 2](#) monopolization claims, whereby plaintiff need initially only "establish[] that a monopolist's conduct is anticompetitive or exclusionary" (citation omitted)).<sup>5</sup>

## [\*209] 2. Generic Drug Price Fixing

Mylan also [\[\\*\\*19\]](#) contends that Plaintiffs have failed to adequately plead allegations of illegal price fixing with respect to the generic drugs Doxy Mono, glipizide-metformin, and verapamil. (Dkt. No. 96 at 9-11.) Under [Section 1](#) of the Sherman Act, plaintiffs can plead an unlawful price-fixing agreement by asserting either (1) "direct evidence" of an unlawful agreement, or (2) "circumstantial facts supporting the inference that a conspiracy existed." [Mayor & City Council of Balt. v. Citigroup, Inc., 709 F.3d 129, 136 \(2d Cir. 2013\)](#). "[T]o survive a motion to dismiss under [Rule 12\(b\)\(6\)](#), a plaintiff need only allege 'enough factual matter (taken as true) to suggest that an agreement was made.'" [Starr v. Sony BMG Music Entm't, 592 F.3d 314, 321 \(2d Cir. 2010\)](#) (quoting [Twombly, 550 U.S. at 556](#)).

Here, Plaintiffs purport to rely on "direct evidence" of an alleged price-fixing agreement. (Dkt. No. 100 at 14-15; Compl. ¶ 405.) Direct evidence includes, "for example, . . . a recorded phone call in which two competitors agreed to fix prices at a certain level." [Citigroup, 709 F.3d at 136](#). But where a "complaint's references to an agreement . . .

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<sup>5</sup> In support of their argument that they have sufficiently alleged an underlying antitrust violation to survive a motion to dismiss, Plaintiffs rely on the fact that a court overseeing an antitrust action challenging the same rebate scheme denied a similar motion to dismiss. (Dkt. No. 100 at 11 (citing [In re EpiPen \(Epinephrine Injection, USP\) Mktg., Sales Practices & Antitrust Litig., No. 17 MD 2785, 2017 U.S. Dist. LEXIS 209710, 2017 WL 6524839, at \\*12 \(D. Kan. Dec. 21, 2017\)\)](#)). Mylan contends that this antitrust case is not relevant, because the pleading standards for antitrust and securities actions differ. (Dkt. No. 101 at 3.)

The particularity pleading requirement in securities actions clearly applies to the facts underlying scienter and the alleged fraud or conspiracy. See [15 U.S.C. § 78u-4\(b\)\(1\)-\(2\); Gamm v. Sanderson Farms, Inc., No. 16 Civ. 8420, 2018 U.S. Dist. LEXIS 9944, 2018 WL 1319157, at \\*3 \(S.D.N.Y. Jan. 19, 2018\)](#). But Mylan cites no authority for the proposition that the particularity requirement also applies to the illegality of underlying misconduct, including the reasons the conduct had greater anticompetitive effects than procompetitive effects. See [Menaldi, 164 F. Supp. 3d at 578 n.5](#) (declining to resolve whether "in securities fraud actions premised on a failure to disclose underlying criminal conduct, the underlying conduct is subject to heightened pleading standards or plausibility pleading analysis").

But the Court need not resolve this question here. Regardless of the applicable pleading standard for antitrust misconduct nestled in a securities case, and in light of the fact that the Court bases its decision primarily on the substance of the complaint *in this case*, the Court considers the result in the *In re EpiPen* antitrust litigation as offering only persuasive support for the conclusion that Plaintiffs' allegations regarding the Sanofi rebate scheme sufficiently allege anticompetitive conduct to survive a motion to dismiss.

mention[] no specific time, place, or person involved in the alleged conspiracies," a plaintiff has failed to allege direct evidence sufficient to put a defendant on notice. *Twombly*, 550 U.S. at 565 n.10.

The Amended Complaint alleges that "[a]n employee at Mylan and the employee at Heritage<sup>6</sup> with primary responsibility [\*\*20] for communicating with Mylan about Doxy Mono pricing reached an agreement on a call on April 23, 2014 to raise prices for Doxy Mono, in addition to glipizide-metformin and verapamil." (Compl. ¶ 190; see also *id.* ¶¶ 193, 197.) The Amended Complaint also alleges that after the call, "the employee at Heritage sent an email to" a specific Mylan executive (Compl. ¶ 190), and that there was "frequent contact" between the sellers of these generic drugs at the time (Compl. ¶ 189; see also Compl. ¶¶ 193, 198).

The Court agrees with Mylan that these allegations of direct agreement are insufficient. (Dkt. No. 96 at 10-11; Dkt. No. 101 at 4.) Plaintiffs' direct evidence boils down to a single April 23, 2014 phone call. But the allegations surrounding the alleged call do not identify which employees were involved, where the call took place, or the contours of the alleged agreements. Plaintiffs' conclusory allegations regarding that single phone call are thus insufficiently detailed to constitute direct evidence suggesting that an agreement was made. See *Iowa Pub. Emps.' Ret. Sys. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 340 F. Supp. 3d 285, 318-19 (S.D.N.Y. 2018) (characterizing four separate pieces of direct evidence—with speakers, dates, and content identified in greater detail—as "slim" but "adequately [\*\*21] pleaded").

Plaintiffs often rely on circumstantial evidence of a price-fixing agreement, as opposed to direct evidence, [\*\*210] because "this type of 'smoking gun' can be hard to come by, especially at the pleading stage." *Citigroup*, 709 F.3d at 136. And Plaintiffs have failed to adequately plead such a smoking gun here. Therefore, because Plaintiffs have failed to adequately plead the existence of unlawful price-fixing agreements involving Doxy Mono, glipizide-metformin, and verapamil, the Amended Complaint's new allegations involving these three generic drugs are dismissed.

### C. Loss Causation

To establish loss causation for a claim under *Rule 10b-5*, a plaintiff must allege "that the subject of the fraudulent statement or omission was the cause of the actual loss suffered,' i.e., that the misstatement or omission concealed something from the market that, when disclosed, negatively affected the value of the security." *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 173 (2d Cir. 2005) (citation omitted). At the motion to dismiss stage, a court must determine whether the complaint has sufficiently pleaded "that the loss [was] foreseeable and that the loss [was] caused by the materialization of the concealed risk." *Id.*

Here, Mylan argues that Plaintiffs have not sufficiently pleaded loss causation [\*\*22] as to statements from Mylan during a certain period, or as to a particular corrective disclosure.

First, Mylan contends that any of its statements made between February 21, 2012 and February 28, 2013, cannot satisfy loss causation because the price paid for stock during the period from February 2012 to March 2013 was lower than at any other point during the class period. (Dkt. No. 96 at 13-14.) Mylan relies on the PSLRA's 90-day bounce-back rule, under which "if the mean trading price of a security during the 90-day period following the [disclosure of information correcting the misstatement] is greater than the price at which the plaintiff purchased his stock then that plaintiff would recover noting." *Acticon AG v. China N.E. Petroleum Holdings Ltd.*, 692 F.3d 34, 39 (2d Cir. 2012) (citation omitted); *15 U.S.C. § 78u-4(e)(1)*.

Plaintiffs respond that the 90-day bounce-back period limitation does not apply to class members who "held shares through a partial corrective disclosure and sold the shares prior to the end of the Class period." (Dkt. No. 100 at 23.)<sup>7</sup> "Aside from imposing the 'bounce back' cap on recoverable damages, Congress did not otherwise disturb the

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<sup>6</sup> Heritage Pharmaceuticals Inc. is another pharmaceutical company, which sells some of the same generic drugs as Mylan and is alleged to have entered various price-fixing agreements with Mylan. (See, e.g., Compl. ¶¶ 125-26, 188-90.)

traditional out-of-pocket method for calculating damages in the PSLRA," a method "under which damages consist of the difference [\*\*23] between the price paid and the 'value' of the stock when purchased." [Action AG, 692 F.3d at 39-40](#) (cleaned up). The Second Circuit has made clear, however, that "a securities [\*211] fraud plaintiff who purchased stock at an inflated purchase price must still prove that she suffered an economic loss, and that that loss was proximately caused by defendant's misrepresentation." [Id. at 40.](#)

Plaintiffs satisfy the requisite pleading requirements here because in addition to alleging purchase at an "inflated price," they "allege[] that the price of [Mylan] stock dropped after the alleged fraud became known." *Id.* Whether certain class members who sold their shares before full corrective disclosures were made can ultimately demonstrate a proximately caused economic loss will be decided at a later stage of this litigation.

Second, Mylan argues that allegations of loss based on an October 31, 2017 announcement about the State AG action must be dismissed, because the announcement was not a corrective disclosure. (Dkt. No. 96 at 14; see Compl. ¶¶ 22, 394-395.) "In order to plead corrective disclosure, plaintiffs must plausibly allege a disclosure of the fraud by which the available public information regarding the company's financial condition [\*\*24] was corrected, and that the market reacted negatively to the corrective disclosure." [Carpenters Pension Tr. Fund of St. Louis v. Barclays PLC, 750 F.3d 227, 233 \(2d Cir. 2014\)](#) (cleaned up). To constitute a corrective disclosure, a statement must "reveal some then-undisclosed fact with regard to the specific misrepresentations alleged in the complaint." [Cent. States Se. & Sw. Areas Pension Fund v. Fed. Home Loan Mortg. Corp., 543 F. App'x 72, 75 \(2d Cir. 2013\)](#) (quoting [In re Omnicom Grp., Inc. Sec. Litig., 597 F.3d 501, 511 \(2d Cir. 2010\)](#)). For that reason, a "negative characterization of already-public information" does not qualify. [In re Omnicom Grp., 597 F.3d at 512.](#)

Here, Mylan contends that the announcement and accompanying amended complaint in the State AG action "did not disclose any new material information relevant to Plaintiffs' claims." (Dkt. No. 96 at 15.) Plaintiffs counter that the announcement and release of the amended complaint contained "never previously revealed" information about (i) the involvement of Defendant Malik in Mylan's "illegal market allocation activity," and (ii) the findings of an investigation about price fixing as to the three new generic drugs. (Dkt. No. 100 at 24.)

Not all of the facts disclosed in the announcement and accompanying amended complaint in the State AG action were previously unknown to the market. For example, as Mylan correctly notes, detailed information about the market allocation of Doxy DR, and existence of investigations into the [\*\*25] three new generic drugs, had indeed been publicly released earlier. (Dkt. No. 96 at 15.) Nevertheless, the October 31, 2017 announcement disclosed new information pertaining to Malik's participation in the Doxy DR scheme, as well as the *findings* of an investigation into the price fixing of the three generic drugs. (Dkt. No. 100 at 24.) The Court concludes that Plaintiffs have sufficiently pleaded that the announcement "reveal[ed] some then-undisclosed fact[s] with regard to the specific misrepresentations alleged in the complaint." [Cent. States, 543 F. App'x at 75.](#) Overall, the Court concludes that these allegations are sufficient, at this stage, "to provide [the] defendant[s] with some indication of the loss and the causal connection that the plaintiff has in mind." [Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC, 783 F.3d 395, 404 \(2d Cir. 2015\)](#) (quoting [Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347, 125 S. Ct. 1627, 161 L. Ed. 2d 577 \(2005\).](#)

<sup>7</sup> Plaintiffs also respond that Mylan's challenge to loss causation for misstatements made during this period is barred by the law of the case doctrine or [Rule 12\(g\)](#). (Dkt. No. 100 at 22.) A court, in its discretion, can decline to allow parties to relitigate "issues expressly or impliedly decided earlier in the proceeding." [In re Initial Pub. Offering Sec. Litig., 544 F. Supp. 2d 277, 284 \(S.D.N.Y. 2008\)](#). And [Rule 12\(g\)](#) prevents a party that has made a [Rule 12](#) motion from "mak[ing] another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." [Fed. R. Civ. P. 12\(g\).](#)

As Mylan correctly notes, however, this particular question was not actually decided in the Court's previous opinion. (Dkt. No. 101 at 6 n.3.) And notwithstanding [Rule 12\(g\)](#), "[a]n amended complaint . . . entitles a defendant to raise substantive arguments aimed at 'judicial resolution of the controversy' in a new responsive pleading, even if those arguments were not raised in response to the original complaint." [In re Parmalat Sec. Litig., 421 F. Supp. 2d 703, 713 \(S.D.N.Y. 2006\)](#). The Court will thus address this argument.

However, as noted above, price-fixing allegations regarding those three generic drugs are dismissed for failure to adequately plead underlying misconduct. The [\*212] October 31, 2017 corrective disclosure thus applies only to statements rendered misleading as to the alleged unlawful market allocation of Doxy DR.

## D. Allegations Against Malik

Next, Mylan seeks to dismiss the allegations against newly added Defendant Rajiv Malik, arguing that: (1) certain [\*\*26] of Malik's statements are not actionable; (2) the Amended Complaint failed to plead a strong inference of scienter; and (3) the Amended Complaint fails to plead control-person liability under [Section 20](#).

### 1. Actionable Statements

Mylan first argues that certain of Malik's statements made during the class period are not actionable as material misrepresentations or omissions. The Amended Complaint adds six statements by Malik during the class period. (Compl. ¶¶ 307, 319, 324, 339, 345, 351.) Mylan characterizes these statements as addressing three topics: (i) historical financial performance; (ii) optimistic characterizations of results and opinions about future performance; and (iii) the performance of Mylan's generics business. (Dkt. No. 96 at 17.)

These first two categories of statements, according to Mylan, are not actionable in light of the Court's prior opinion and relevant precedent. (*Id.*) And Plaintiffs do not dispute that Malik's statements on such topics, as alleged in the Amended Complaint, cannot form the basis for their claims. (Dkt. No. 101 at 7; Dkt. No. 100 at 16.) Accordingly, the Court holds that only Malik's statements in the third category, pertaining to performance of Mylan's [\*\*27] generic drug segment, are potentially actionable.

Mylan also contends that any claims against Malik based on statements made before July 2012 are barred by the Exchange Act's five-year statute of repose. (Dkt. No. 96 at 24-25 (citing [28 U.S.C. § 1658\(b\)\(2\)](#).) Plaintiffs concede this point (Dkt. No. 100 at 2 n.2), and so the Court does not address it further.

### 2. Scienter

As to the statements by Malik that are not inactionable as a matter of law, Mylan contends that the Plaintiffs insufficiently plead scienter. (Dkt. No. 96 at 18-23.)

To adequately plead scienter, a complaint must "state with particularity facts giving rise to a strong inference that the defendant[s] acted with the required state of mind." [15 U.S.C. § 78u-4\(b\)\(2\)](#). "To qualify as 'strong' . . . an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent." [Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 314, 127 S. Ct. 2499, 168 L. Ed. 2d 179 \(2007\)](#).

"The requisite state of mind in a [Rule 10b-5](#) action is 'an intent to deceive, manipulate or defraud.'" [Ganino v. Citizens Utils. Co., 228 F.3d 154, 168 \(2d Cir. 2000\)](#) (quoting [Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12, 96 S. Ct. 1375, 47 L. Ed. 2d 668 \(1976\)](#)). This requisite scienter "can be established by alleging facts to show either (1) that defendants had the motive and opportunity to commit fraud, or (2) strong circumstantial evidence of conscious [\*\*28] misbehavior or recklessness." [ECA & Local 134 IBEW Joint Pension Tr. of Chi. v. JP Morgan Chase Co., 553 F.3d 187, 198 \(2d Cir. 2009\)](#). Circumstances that may "give rise to a strong inference of the requisite scienter" include allegations that the defendants "(1) benefitted in a concrete and personal way from the purported fraud; (2) engaged in deliberately illegal behavior; (3) knew facts or had access to information suggesting that their public statements were not accurate; or (4) failed to check information they had a duty to monitor." [Id. at 199](#) (quoting [\*213] [Novak v. Kasaks, 216 F.3d 300, 311 \(2d Cir. 2000\)](#)) (internal quotation marks omitted).

Here, Plaintiffs attempt to plead scienter as to Defendant Malik through allegations of "conscious misbehavior" (Dkt. No. 100 at 17), *i.e.*, that Malik "knew facts or had access to information suggesting that their public statements were not accurate," [ECA, 553 F.3d at 199](#).

### **a. Scienter as to the EpiPen and Generic Drug Price Fixing**

Plaintiffs contend that they have adequately pleaded scienter as to all Defendants—including Malik—with respect to the EpiPen and generic drug price fixing.<sup>8</sup> (Dkt. No. 100 at 17, 20-21.) Specifically, the Amended Complaint alleges that pricing decisions involved all top executives at Mylan (Compl. ¶¶ 122, 404); that "by virtue of his responsibilities as President," Malik "w[as] privy to, and [\*\*29] participated in the fraudulent conduct described in this Complaint" (Compl. ¶ 397); and that EpiPen is part of Mylan's "core business operations" (Compl. ¶¶ 39, 398).

Mylan contends that there are no allegations—from a confidential witness ("CW") or otherwise—connecting Malik to the alleged price fixing of generic drugs or to EpiPen products. (Dkt. No. 96 at 18 n.13, 20-21.) Plaintiffs respond that the same allegations that are sufficient to plead a strong inference of scienter as to the other individual Defendants are also sufficient as to Malik. (Dkt. No. 100 at 17, 20-21.)

Indeed, the Court concluded in its prior opinion that the allegations from the CW about pricing decisions adequately pleaded scienter as to the individual executive Defendants for generic drug price fixing. (Dkt. No. 69 at 34.) That conclusion was based on allegations that the CW specifically "confirmed that Defendants Coury and Bresch, as successive CEOs, and Defendants Sheehan and Parks, as successive CFOs, each knew of and approved all material drug pricing decisions made by the Company." (Compl. ¶¶ 121, 403.)

But it is not alleged that the CW mentioned the involvement of Malik in such decisions; nor is it alleged [\*\*30] that the CW had any interactions with Malik. See [Glaser v. The9, Ltd., 772 F. Supp. 2d 573, 594 \(S.D.N.Y. 2011\)](#) (discounting allegations from CWs where there was "no allegation that those sources ever had any contact with . . . the Individual Defendants"). And even though the CW attested to "work[jing] with Mylan President Tony Mauro on costing decisions," the Amended Complaint omits whether the CW had the same contact with the subsequent president, Malik. (Compl. ¶ 403.)

The allegations as to the knowledge and involvement of other individual Defendants are insufficient to plead with particularity a strong inference of scienter as to Malik. See [Kinra v. Chi. Bridge & Iron Co., No. 17 Civ. 4251, 2018 U.S. Dist. LEXIS 87548, 2018 WL 2371030, at \\*6 \(S.D.N.Y. May 24, 2018\)](#) ("Scienter must be separately pled and individually supportable as to each defendant; scienter is not amenable to group pleading." (citation omitted)). Furthermore, [\*214] with respect to the EpiPen, the allegation that it is part of Mylan's "core business" is insufficient, by itself, to support a strong inference of scienter as to Malik. See [New Orleans Emps. Ret. Sys. v. Celestica, Inc., 455 F. App'x 10, 14 n.3 \(2d Cir. 2011\)](#) ("[A]llegations of a company's core operations . . . can provide supplemental support for allegations of scienter, [but] they cannot establish scienter independently.").

Overall, Plaintiffs have failed to adequately plead scienter as to Defendant Malik with [\*\*31] respect to the EpiPen, or the alleged price fixing of generic drugs.

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### **b. Scienter as to Doxy DR Market Allocation**

<sup>8</sup> Mylan pointedly does not address "scienter allegations concerning the EpiPen," contending that they "do not apply" to Malik, because his alleged misstatements concern only the generics segment and there are no allegations that he was involved with EpiPen products. (Dkt. No. 96 at 18 n.13.) Plaintiffs do not directly address this point, instead arguing that the Amended Complaint pleads scienter as to all Defendants for the EpiPen rebate scheme. (Dkt. No. 100 at 17.) Because allegations regarding Malik's scienter as to the EpiPen rebate scheme and generic drug price fixing substantially overlap, the Court addresses scienter as to both. Even assuming that Malik had involvement with EpiPen products, the Court concludes that Plaintiffs have failed to adequately plead scienter to establish Malik's primary liability for misstatements pertaining to EpiPen products.

To establish Malik's scienter as to claims that Mylan engaged in illegal market allocation of the market for the generic drug Doxy DR, the Amended Complaint alleges that Malik was personally involved in a conversation with the president of a competing pharmaceutical company, in which Malik agreed to the market allocation. (Compl. ¶¶ 129-131.)

Nevertheless, Mylan argues the Amended Complaint fails to plead scienter because the fact that these allegations were taken from the State AG action means that they cannot be considered as factual allegations in this case and must be disregarded.<sup>9</sup> (Dkt. No. 96 at 21-23.) For this position, Mylan relies on several cases from this District in which courts have held that "unproven allegations" taken from a complaint in another matter "do not constitute factual allegations" and are thus immaterial under [Rule 12\(f\). In re CRM Holdings, Ltd. Sec. Litig., No. 10 Civ. 975, 2012 U.S. Dist. LEXIS 66034, 2012 WL 1646888, at \\*26 \(S.D.N.Y. May 10, 2012\)](#); see, e.g., [Janbay v. Canadian Solar, Inc., No. 10 Civ. 4430, 2012 U.S. Dist. LEXIS 47125, 2012 WL 1080306, at \\*5 \(S.D.N.Y. Mar. 30, 2012\)](#); [Low v. Robb, No. 11 Civ. 2321, 2012 U.S. Dist. LEXIS 6836, 2012 WL 173472, at \\*9 \(S.D.N.Y. Jan. 20, 2012\)](#).

Plaintiffs argue to the contrary that "[t]he weight of authority in this District and others holds that reliance on well-pleaded factual allegations in complaints in other actions is appropriate." (Dkt. No. 100 at 19.) [\*\*32] Indeed, the weight of authority holds that plaintiffs may base factual allegations on complaints from other proceedings because "neither Circuit precedent nor logic supports . . . an absolute rule" against doing so. [Youngers v. Virtus Inv. Partners Inc., 195 F. Supp. 3d 499, 516 n.10 \(S.D.N.Y. 2016\)](#) (brackets and citation omitted); see, e.g., [HSH Nordbank AG v. RBS Holdings USA Inc., No. 13 Civ. 3303, 2015 U.S. Dist. LEXIS 36087, 2015 WL 1307189, at \\*3-4 \(S.D.N.Y. Mar. 23, 2015\)](#); [In re Fannie Mae 2008 Sec. Litig., 891 F. Supp. 2d 458, 471 \(S.D.N.Y. 2012\)](#); [In re Bear Stearns Mortg. Pass-Through Certificates Litig., 851 F. Supp. 2d 746, 768 n.24 \(S.D.N.Y. 2012\)](#).

The Court agrees that "[i]t makes little sense to say that information from such a study—which [a complaint] could unquestionably rely on if it were mentioned in a news clipping or public testimony—is immaterial simply because it is conveyed in [\*215] an unadjudicated complaint." [In re Bear Stearns, 851 F. Supp. 2d at 768 n.24](#). To the extent the cases on which Mylan relies suggest that Second Circuit precedent requires a different result, other cases in this District have cogently explained that those decisions emanate from a misconstruction of Circuit precedent. See *id.*; [In re OSG Sec. Litig., 12 F. Supp. 3d 619, 620-21 \(S.D.N.Y. 2014\)](#); [VNB Realty, Inc. v. Bank of Am. Corp., No. 11 Civ. 6805, 2013 U.S. Dist. LEXIS 132250, 2013 WL 5179197, at \\*3 \(S.D.N.Y. Sept. 16, 2013\)](#).

In a particularly relevant case, one court "permitt[ed] plaintiffs to borrow allegations from the NYAG's complaint," where the "facts [we]re derived from a credible complaint based on facts obtained after an investigation" and counsel "indicated that they ha[d] reached out to attorneys at the NYAG to verify the allegations." [Strougo v. Barclays PLC, 105 F. Supp. 3d 330, 343 \(S.D.N.Y. 2015\)](#). The same circumstances obtain here: Plaintiffs' allegations regarding [\*\*33] Malik's involvement originate from the State AG action, were the result of a government investigation, and were verified by Plaintiffs' counsel in this case. (Compl. ¶¶ 17 n.1, 124; Dkt. No. 100 at 20.) The Court thus treats allegations borrowed from the State AG complaint as a proper basis for the pleadings in this case.

Because the Amended Complaint's reliance on allegations from the State AG action was Mylan's sole argument against scienter as to the Doxy DR market allocation in its opening brief, the Court concludes that Plaintiffs have adequately pleaded Malik's scienter as to this conduct.

<sup>9</sup> Mylan's reply brief also raises "additional reliability problems" with "Plaintiff's scienter allegations." (Dkt. No. 101 at 8; see *id.* at 9.) But Mylan's opening brief does not raise these arguments, or otherwise dispute that the allegations in the Amended Complaint as to Malik's involvement in the Doxy DR allocation are sufficient to raise a strong inference of scienter, if they could be properly considered. (See Dkt. No. 96 at 21 ("Plaintiff's allegations . . . do not create an inference of scienter against Mr. Malik because the Doxy DR allegations are based on the unadjudicated complaint filed by the CTAG.").)

"[A]rguments raised for the first time in reply should not be considered, because the plaintiff[] had no opportunity to respond to those new arguments." [Bertuglia v. City of New York, 839 F. Supp. 2d 703, 737 \(S.D.N.Y. 2012\)](#). As such, the Court will not consider these "additional reliability problems" raised for the first time in Mylan's reply brief.

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Overall, Plaintiff's claims for primary liability under [Section 10\(b\)](#) against Defendant Malik survive Mylan's motion to dismiss to the extent those claims are limited to statements about the performance of the generic segment, and allegations that those statements were misleading for failing to disclose the Doxy DR market allocation conduct.

### **3. Control-Person Liability**

[Section 20\(a\)](#) of the Exchange Act imposes liability on "every person who, directly or indirectly, controls any person liable" for securities fraud. [15 U.S.C. § 78t\(a\)](#). "To establish a prima facie case of control person liability, a plaintiff must show (1) a primary violation [\\*\\*34](#) by the controlled person, (2) control of the primary violator by the defendant, and (3) that the defendant was, in some meaningful sense, a culpable participant in the controlled person's fraud." [ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 108 \(2d Cir. 2007\)](#). Importantly, "there can be no control person liability without a 'primary violation' of the [Exchange Act](#)." [Menaldi, 164 F. Supp. 3d at 576](#) (quoting [Wilson v. Merrill Lynch & Co., 671 F.3d 120, 139 \(2d Cir. 2011\)](#)).

As the Court held above, Plaintiffs have failed to adequately plead a primary violation under [Section 10\(b\)](#) with respect to the alleged price fixing of the three new generic drugs: Doxy Mono, glipizide-metformin, and verapamil. Plaintiffs' [Section 20\(a\)](#) control-liability claims against Malik therefore fail as they relate to those three alleged price-fixing agreements. The Amended Complaint succeeds in pleading a primary violation—and the first element of control liability is thus satisfied—as to the remaining underlying conduct, namely, the EpiPen Medicaid misclassification, the EpiPen rebate scheme, Doxy DR market allocation, and the price fixing of five other generic drugs: albuterol sulfate, benazepril, clomipramine, divalproex, and propranolol.

As to the third element of control liability, "[m]ost courts in this district have held," and the parties agree here, that "culpable participation is a [\\*\\*35](#) scienter requirement for which a plaintiff must allege [\\*216](#) some level of culpable participation at least approximating recklessness in the [section 10\(b\)](#) context in order to survive a motion to dismiss." [In re Inv. Tech. Grp., Inc. Sec. Litig., No. 15 Civ. 6369, 2018 U.S. Dist. LEXIS 48484, 2018 WL 1449206, at \\*7 \(S.D.N.Y. Mar. 23, 2018\)](#) (citation omitted). Mylan contends that the Amended Complaint fails to allege that Malik was a "culpable participant" in the purported primary violations. (Dkt. No. 96 at 24.) Plaintiffs respond that because they adequately allege Malik's scienter with respect to the primary violations, they have adequately alleged Malik's culpable participation. (Dkt. No. 100 at 25.)

Indeed, because Plaintiffs have adequately pleaded Malik's scienter as to the allegations of Doxy DR market allocation, they have adequately pleaded Malik's culpable participation as to the same conduct, and Malik's six statements allegedly rendered misleading by failure to disclose the conduct. But the Court has held that the Amended Complaint fails to adequately plead Malik's scienter as to the other conduct, and Plaintiffs have shown no basis for distinguishing between the scienter required for primary liability and control liability. As such, Plaintiffs have failed to adequately plead Malik's culpable participation regarding the allegations [\\*\\*36](#) involving the EpiPen and generic drug price fixing, and the statements rendered misleading by the failure to disclose that conduct.

Finally, as to the second element of control liability, Mylan concedes that Malik had control over the six statements that he personally made. (Dkt. No. 96 at 24; Dkt. No. 101 at 10.) Accordingly, Plaintiffs have adequately pleaded a control-liability claim against Malik, but only to the extent such a claim is premised on allegations that the six statements made by Malik were misleading for failure to disclose the Doxy DR market allocation.

### **E. Claims Against Mylan Regarding Doxy DR**

In addition to repleading the allegations that survived the earlier motion to dismiss and adding new allegations premised on different underlying misconduct, the Amended Complaint also attempts to cure a particular deficiency in Plaintiffs' previous complaint. Plaintiffs claim that certain of Mylan's statements were misleading because they

failed to disclose that Mylan engaged in anticompetitive behavior, in violation of antitrust law, in allocating the market for the generic drug Doxy DR. (Compl. ¶¶ 123-152.)

The Court held in the Opinion of March 28, 2018 that Plaintiffs had "plausibly [\*\*37] plead[ed] the existence of a market allocation arrangement between Mylan and Heritage" with respect to Doxy DR. (Dkt. No. 69 at 30-31.) However, the Court held that Plaintiff's failed to adequately plead scienter. (Dkt. No. 69 at 34.)

In the Amended Complaint, borrowing from the State AG action, alleges that Defendant Rajiv Malik, Mylan's President, agreed with the president of Heritage on a May 8, 2013 phone call, to allocate the market for Doxy DR between their two pharmaceutical companies. (Compl. ¶¶ 129-132.) Plaintiffs contend that the Amended Complaint adequately pleads scienter as to the Doxy DR agreement, given the involvement of Malik. (Dkt. No. 100 at 2, 18.)

Mylan argues that the complaint again fails to adequately plead scienter solely because "Plaintiffs rely entirely on the unproven allegations copied from the CTAG's complaint to supplement their previously dismissed allegations of scienter as to Doxy DR." (Dkt. No. 96 at 23.) As explained above, the Court rejects this argument and considers the allegations in the Amended Complaint, regardless of whether they originated in the State AG action.

[\*217] From those allegations, the Amended Complaint adequately pleads Malik's scienter [\*\*38] as to the Doxy DR agreement. And because the Court may "readily attribute[] the scienter of management-level employees to corporate defendants," *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 501 F. Supp. 2d 452, 481 (S.D.N.Y. 2006), the Court imputes the scienter of Malik, the president of Mylan, to the corporation. Accordingly, Plaintiffs have overcome the deficiency of their prior complaint and adequately pleaded scienter as to the Doxy DR claims.

#### IV. Conclusion

For the foregoing reasons, Defendants' motion to partially dismiss the Second Amended Class Action Complaint is GRANTED in part and DENIED in part. Defendants shall file an answer to the surviving claims within three weeks from the date of this order.

The Clerk of Court is directed to close the motion at Docket Number 95.

SO ORDERED.

Dated: March 29, 2019 New York, New York

New York, New York

/s/ J. Paul Oetken

J. PAUL OETKEN

United States District Judge



## **Mercedes-Benz USA, LLC v. Nippon Yusen Kabushiki Kaisha**

Superior Court of New Jersey, Law Division, Bergen County

March 1, 2019, Argued; March 29, 2019, Decided

DOCKET NO. BER-L-6325-18

### **Reporter**

2019 N.J. Super. Unpub. LEXIS 770 \*; 2019 AMC 1063; 2019-1 Trade Cas. (CCH) P80,734; 2019 WL 2157545

MERCEDES-BENZ USA, LLC, Plaintiff, v. NIPPON YUSEN KABUSHIKI KAISHA; NYK LINE (NORTH AMERICA), INC.; WALLENIUS WILHELMSEN LOGISTICS AS, a/k/a WALLENIUS WILHELMSEN OCEAN AS; WALLENIUS WILHELMSEN LOGISTICS AMERICAS, LLC; MITSUI O.S.K. LINES, LTD.; MITSUI O.S.K. BULK SHIPPING (USA), LLC; KAWASAKI KISEN KAISHA, LTD.; and "K" LINE AMERICAS, INC. Defendants.

**Notice:** NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS.

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**Subsequent History:** Affirmed by [Mercedes-Benz United States v. Nippon Yusen Kabushiki Kaisha, 2020 N.J. Super. Unpub. LEXIS 1570 \(App.Div., Aug. 10, 2020\)](#)

**Prior History:** [Mercedes-Benz USA, LLC v. Nippon Yusen Kabushiki Kaisha, 2018 U.S. Dist. LEXIS 209448 \(D.N.J., Dec. 12, 2018\)](#)

## **Core Terms**

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Shipping, antitrust, carrier, preempted, service contract, antitrust claim, ocean, state law, flag, class action, investigations, tolling, state law claim, unfiled, common carrier, allegations, purchaser, courts, statute of limitations, transportation, preemption, immunity, reasonable diligence, conflict preemption, federal court, plaintiffs', time-barred, discovery, raids

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**Judges:** HONORABLE ROBERT C. WILSON, J.S.C.

**Opinion by:** ROBERT C. WILSON

## Opinion

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### FACTUAL BACKGROUND AND PROCEDURAL HISTORY

THIS MATTER arises from allegations of antitrust and price-fixing activities related to roll-on, roll-off cargo shipping. Plaintiff Mercedes-Benz USA, LLC ("MBUSA") filed this action on August 30, 2018 against four separate sets of defendants: (1) Nippon Yusen Kabushiki Kaisha and NYK Line (North America), Inc. (collectively, the "NYK Defendants"); (2) Wallenius Wilhelmsen Logistics, AS, a/k/a Wallenius Wilhelmsen Ocean AS, and Wallenius Wilhelmsen Logistics Americas, LLC (collectively, the "WWL Defendants"); (3) Mitsui O.S.K. Lines, Ltd. and Mitsui O.S.K. Bulk Shipping (USA), LLC (collectively, the "MOL Defendants"); and (4) Kawasaki Kisen Kaisha, Ltd. and "K" Line Americas, Inc. (collectively, the "K Line Defendants") (the NYK Defendants, WWL Defendants, MOL Defendants, and K Line Defendants are collectively referred to in this Opinion as "Defendants").

MBUSA purchased roll-on, roll-off shipping services from Defendants to ship new Mercedes-Benz automobiles to or from the United States. Between 1997 and 2013, Defendants agreed not to compete [\*3] for MBUSA's business or agreed to fix the prices they would charge for MBUSA services. This agreement was unknown until September 6, 2012 when the press reported that antitrust authorities from the United States, European Union, and Japan raided Defendants' corporate offices as part of an ongoing criminal price-fixing investigation. Sometime afterwards, Defendants entered into guilty pleas and admitted to their illegal conduct. However, MBUSA was not compensated for the damages it suffered as a result of Defendants' antitrust activities.

On July 26, 2013, direct purchasers of roll-on, roll-off shipping services filed a class action complaint in federal court against Defendants, asserting federal antitrust claims under [Section 1 of the Sherman Act, 15 U.S.C. § 1](#), relating to Defendants' agreements to fix, stabilize, or maintain the prices of, and allocate the market for, vehicle carrier services. In that case, the putative class purported to represent all persons and entities in the United States that purchased vehicle carrier services directly from any one of the Defendants (or any current or former subsidiary or affiliate thereof) or any of their co-conspirators during the class period.

After the direct [\*4] purchaser case was consolidated for discovery with the indirect purchaser cases, the direct purchasers amended their complaint. The direct purchasers' substantive claims and factual allegations were similar to those in their initial complaint, and the putative class was defined as all persons and entities that purchased vehicle carrier services for shipments to or from the United States directly from any of the Defendants or any current or former predecessor, subsidiary, or affiliate of each, at any time during the period from January 1, 2000 to December 31, 2012. While MBUSA was included in the class definition, no class notice was sent, no class was certified, no class settlement notice was sent, and MBUSA did not have the opportunity to opt out of the class.

On August 28, 2015, the United States District Court for the District of New Jersey dismissed the direct purchasers' amended complaint. That dismissal was affirmed by the Third Circuit Court of Appeals on January 18, 2017, and the United States Supreme Court denied certiorari on October 2, 2017. MBUSA filed this case in the Superior Court of New Jersey on August 30, 2018 asserting claims under the New Jersey Antitrust Act. [\*5] MBUSA also asserted claims against each individual defendant for breach of contract, breach of the implied duty of good faith and fair dealing, and tortious interference. Those contract-related claims are allegedly based on different law and different facts than the federal antitrust claims asserted by the putative direct purchaser class.

Defendants removed MBUSA's case to the United States District Court for the District of New Jersey on September 11, 2018. MBUSA subsequently moved to remand the case on October 11, 2018. MBUSA's motion to remand was granted on December 12, 2018 and this matter was remanded to the Superior Court of New Jersey and reopened that same day.

Defendants now jointly move to dismiss Plaintiff's complaint. Defendants argue that the Superior Court of New Jersey lacks jurisdiction to adjudicate this matter, because the Federal Maritime Commission is the proper and exclusive forum for any claims based on the conduct alleged above. The claim that the Shipping Act reflects Congress's clear intent to create a uniform, comprehensive federal regulatory scheme for ocean common carriers, and the same law of conflict preemption that led to the District of New Jersey and [\*6] the Third Circuit to dismiss the putative class plaintiffs' claims under various states' laws requires the dismissal of MBUSA's virtually identical claims under New Jersey law. Plaintiffs oppose the motion, stating that the Shipping Act does not preempt any of MBUSA's claims.

For the reasons set forth below, Defendants' renewed consolidated joint motion to dismiss is GRANTED.

#### RULE OF LAW

##### I. Conflict Preemption and the Supremacy Clause of the United States Constitution

"The preemption doctrine is based on the Supremacy Clause, which provides that 'the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' *In re Vehicle Carrier Servs. Antitrust Litig.*, 846 F.3d 71, 83 (3d Cir. 2017) (quoting U.S. Constitution art. VI, cl. 2); accord Hous. Auth. & Urban Redev. Agency of the City of Atl. City v. Taylor, 171 N.J. 580, 587, 796 A.2d 193 (2002). "Under the Supremacy Clause . . . any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." Gade v. Nat'l Solid Wastes Mgmt. Ass'n., 505 U.S. 88, 108, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992); accord Estate of Brust v. ACF Indus., LLC, 443 N.J. Super. 103, 113, 127 A.3d 729 (App. Div. 2015). Because conflict preemption is rooted in the Supremacy Clause of the United States Constitution, New Jersey courts must apply the same standards as the Supreme Court of the United States and other federal courts.

"[E]ven if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with federal statute." Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000). Federal law is not required to contain an express preemption clause to [\*7] displace state law. *Id.* (under the doctrine of implied preemption, "[e]ven without an express provision for preemption . . . state law must yield to a congressional Act"). Conflict preemption occurs where "compliance with both federal and state regulations is a physical impossibility" or whenever "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Arizona v. United States, 567 U.S. 387, 399, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012).

When Congress creates an exclusive cause of action before a specialized administrative body, the most minor obstacle will not be tolerated. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947). "The test, therefore, is whether the matter on which the State asse[r]ts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State." *Id.* Therefore, whether any federal legislation preempts state law claims requires an examination of Congress's intent in passing the legislation, including its purpose, language, structure, and legislative history.

##### II. The Shipping Act of 1984

The Third Circuit has provided a thorough analysis of Congress's intent in passing the Shipping Act of 1984 (the "Shipping Act") in the related [\*8] federal litigation, *In re Vehicle Carrier Services*. 846 F.3d at 84. Both the federal courts and New Jersey state courts apply the same principles for conflict preemption. Focusing on the purpose of the Shipping Act, the Third Circuit explained the following:

One purpose of the Act is to 'establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs.' [] A second purpose is to ensure that U.S.-flag ships are on a level playing field with foreign vessels.

*Id.* at 85 (citing [46 U.S.C. §§ 40101\(1\), 40101\(2\)](#)).

To help achieve these goals, the Shipping Act broadened the antitrust immunity provisions in the [Shipping Act of 1916](#) that had eroded over time through what Congress viewed as overly narrow judicial interpretations. Specifically, the Shipping Act expressly provides for complete federal antitrust immunity, including immunity from criminal prosecution by the Department of Justice under the Sherman Act and civil suits by private plaintiffs under the [Clayton Act](#), for various agreements between ocean carriers, including those that are filed with the Federal Maritime Commission (the "FMC"). [46 U.S.C. § 40307\(a\)](#) ("The antitrust laws do not apply to . . . an agreement [\*9] (including an assessment agreement) that has been filed and effective under this chapter"); *In re Vehicle Carrier Servs.*, 846 F.3d at 80-81.

Agreements between or among ocean common carriers covered by this grant of immunity specifically include, among others, agreements to: (1) "discuss, fix, or regulate transportation rates, including through rates, cargo space accommodations, and other conditions of service;" (2) "engage in an exclusive, preferential, or cooperative working arrangement between themselves or with a marine terminal operator," (3) "control, regulate, or prevent competition in international ocean transportation," and (4) "discuss and agree on any matter related to a service contract." [46 U.S.C. § 40301\(a\)\(1\)-\(7\)](#).

Even when an agreement is not filed and effective with the FMC, the Shipping Act expressly provides immunity from private antitrust suits under the Clayton Act for any alleged damages resulting from an unfiled agreement. *Id.* at [40307\(d\)](#) ("A person may not recover damages under [section 4 of the Clayton Act \(15 U.S.C. § 26\)](#), for conduct prohibited by this part."); *In re Vehicle Carrier Servs.*, 846 F.3d at 81 (explaining that "[i]f an agreement has not been filed, it cannot become effective and thus operating under such an unfiled agreement is prohibited" and that "[a] party injured by activities occurring under [\*10] such an unfiled, and hence, not effective, agreement may not obtain Clayton Act relief.")

The Shipping Act provides an exclusive remedy for violations of the Shipping Act through administrative proceedings before the FMC. H.R. Rep. No. 98-53(I), at 12. The Shipping Act provides detailed procedures by which the FMC, on its own accord or based on an action commenced by a private party, may investigate, decide, and if appropriate issue relief for violations of the Shipping Act. [46 U.S.C. §§ 41301-41309](#). The Third Circuit provides a clear overview of these procedures:

[The Shipping Act] does provide an avenue for relief before the FMC. Either on a complaint filed by a private party, [46 U.S.C. § 41301\(a\)](#), or its own motion, the FMC may investigate alleged violations of the Shipping Act. In such proceedings, the parties may engage in discovery, and request hearings before the FMC. If a plaintiff shows the Act has been violated, the FMC may assess penalties, award damages of up to double the amount of the actual injury, grant attorneys' fees, and provide a means to obtain equitable relief . . . . Congress gave the FMC this broad authority to, among other things, provide a deterrent effect which has previously been available only by invoking the [\*11] antitrust laws.

*In re Vehicle Carrier Servs.*, 846 F.3d at 85.

As the Third Circuit summarized, "the Shipping Act's text, scheme, and legislative history demonstrate Congress's intent to create a comprehensive, predictable federal framework to ensure efficient and nondiscriminatory international shipping practices." *Id.* at 82.

## DECISION

### I. MBUSA's State Law Claims are Preempted by the Shipping Act

#### A. Claims under the New Jersey Antitrust Act

After examining Congress's intent in passing the Shipping Act, the Third Circuit determined that the multi-district litigation ("MDL") plaintiffs' state law antitrust claims were preempted by the Shipping Act in *In Re Vehicle Carrier Servs.*, 846 F.3d at 85. It stated that "Congress sought to limit the application of the antitrust laws to enable U.S.-flag carriers to compete against their foreign counterparts who may not be subject to similar restrictions." *Id.* Enabling a party to bring state antitrust claims directly conflicts with this goal. *Id.* ("Put simply, to subject the carriers to potential state antitrust liability would essentially undo Congress's work in expanding antitrust immunity and undermine its efforts to assist U.S.-flag ships avoid a competitive disadvantage.").

The Third Circuit's determination that the MDL plaintiffs' state law [\*12] antitrust claims were preempted applies directly to the claims brought by MBUSA under the New Jersey Antitrust Act. Therefore, MBUSA's claims must also be dismissed with prejudice as preempted.

#### *B. State Claims Sounding in Contract and Tort Law*

After holding that the MDL plaintiffs' state antitrust claims were preempted, the Third Circuit further held that the MDL plaintiffs' remaining state law claims, asserted under various states' consumer protection and unjust enrichment laws, were similarly preempted. "While these state laws reflect the exercise of traditional police powers, applying them here would allow the states to impose rules in an area Congress has historically regulated: maritime commerce." *Id.* As with the state antitrust claims, allowing these state consumer protection and unjust enrichment claims to be adjudicated would "thwart Congress's goal of ensuring uniform regulation of ocean common carriers' business practices." *Id.* at 86. The Third Circuit emphasized that Congress created a specific enforcement mechanism and means for private parties to obtain relief before the FMC, and "allowing state laws to impose different standards would upset this carefully crafted scheme." *Id.* at 86-87.

The Third [\*13] Circuit's analysis in *In re Vehicle Carrier Services* regarding miscellaneous state law claims applies equally to MBUSA's remaining state law claims sounding in breach of contract and tortious interference. While these specific claims were not plead in *In re Vehicle Carrier Services*, it is of no relevance, because the Third Circuit focused on the effect the state claims would have on the ability to achieve the purposes of the Shipping Act, not on the particular causes of action themselves.

Upon closer inspection, MBUSA's breach of contract and tortious interference state law claims are based on the same underlying factual allegations as MBUSA's state antitrust claims. Therefore, they would have the same interference with federal law, and should likewise be preempted. *Id.* at 85. The gravamen of each of MBUSA's claims is the same as the claims alleged in *In re Vehicle Carrier Services* — that is alleged harm to purchasers of vehicle carrier services as a result of alleged secret, unfiled agreements among ocean common carriers. All of MBUSA's claims are based on the same underlying factual allegations as alleged by the MDL plaintiffs, and all of which uniquely involved alleged violations of the Shipping [\*14] Act. As such, MBUSA's claims must be similarly dismissed with prejudice, as they conflict with Congress's objectives in enacting the Shipping Act.

#### *C. State Law Claims Related to Service Contracts are Preempted by the Shipping Act*

MBUSA contends that the precedent in *In re Vehicle Carrier Services* does not apply to claims involving service contracts, and therefore, such claims are not preempted by the Shipping Act. However, the Third Circuit clearly held that the Shipping Act preempts state law claims, even when such claims relate to service contracts. As explained in the *In re Vehicle Carrier Services* opinion, under [46 U.S.C. §§ 41102\(b\)](#) and [40302\(a\)](#), ocean common carriers are required to file with the FMC certain agreements enumerated in [46 U.S.C. § 40301\(a\)](#), including, among others, agreements "between and among ocean common carriers" to "discuss, fix, or regulate transportation rates," to "control, regulate, or prevent competition in international ocean transportation," or to "discuss and agree on any matter related to a service contract" in order to comport with the regulatory scheme established by Congress. *In re Vehicle Carrier Servs.*, 846 F.3d at 80 (internal citations omitted).

Furthermore, operating under an unfiled and ineffective agreement is a prohibited act, in which [\*15] injured parties may not obtain antitrust relief under the Clayton Act. *Id. at 81, 83, 85-87.* Instead, the Shipping Act provides that the exclusive private remedy for any alleged harm caused by prohibited conduct is a claim for reparations before the FMC.

MBUSA's complaint alleges that Defendants met and conspired with other providers of vehicle carrier services to agree to overcharge customers, like MBUSA and exchanged competitively sensitive information about prices, customers, and routes in order to rig bids, allocate customers or markets, and fix prices for vehicle carrier services. These allegations are precisely the type of conduct that would constitute a violation of the Shipping Act, as operating under unfiled and ineffective agreements to "discuss and agree on any matter related to a service contract" is prohibited by the Shipping Act. [46 U.S.C. § 40301 \(a\)\(7\)](#); *In re Vehicle Carrier Servs.*, 846 F.3d at 82 ("There is no dispute that operating under unfiled price fixing and/or market allocation agreements is prohibited under [sections 40301](#) and [40302](#) of the Shipping Act.").

Because the Shipping Act is clear that Defendants' alleged operation under unfiled agreements related to service contracts is prohibited by the Act, and the exclusive remedy for any conduct prohibited by the Act is [\*16] a claim for reparations before the FMC, the result is likewise clear: MBUSA's state law claims are preempted and must be dismissed with prejudice.

Footnote 12 in *In re Vehicle Carrier Services* also does not lend support to MBUSA's position that the Third Circuit's opinion is inapplicable to service contracts. In the MDL action, plaintiffs argued that service contracts for the shipping of newly assembled motor vehicles should not be barred by the Shipping Act. However, the Third Circuit held that this argument did not change the outcome of the case, because "[t]his exemption from filing service contracts for newly assembled motor vehicles . . . does not relieve Defendants from their obligation to file the other agreements referred to in [§ 40301\(a\)](#) or [\(b\)](#) with the FMC." *Id. at 83 n. 12.* Therefore, Defendants would have been required to file the agreements concerning service contracts with the FMC. *Id.* This holding directly rebuts MBUSA's position that the aforementioned opinion does not apply to MBUSA's service contract claims.

Finally, MBUSA points to [46 U.S.C. § 40502](#) to support its assertion that its claims are not preempted and that *In re Vehicle Carrier Services* does not apply to its claims regarding service contracts. That [\*17] section provides that "the exclusive remedy for a breach of a service contract is an action in an appropriate court." [46 U.S.C. § 40502\(f\)](#). Such a suggestion, however, is misplaced, and does not save MBUSA's claims from preemption.

The courts and the FMC have both consistently have explained that [46 U.S.C. § 40502\(f\)](#) applies only to allegations involving "mere contract disputes" and not instances where the claims involve issues particular to the Shipping Act. See, e.g. *In re Containership Co. (TCC) A/S*, 466 B.R. 219, 227 (Bankr. S.D.N.Y. 2012) (discussing that the "dividing line between a mere contract dispute and an alleged violation that is 'particular to the Shipping Act'" and noting that "courts have deferred to the FMC to address issues that are specifically and expressly addressed in the Shipping Act, such as whether . . . certain shipping practices are illegal and discriminatory and in violation of the Act"); *CargoOne, Inc. v. COSCO Container Lines, Co., Ltd.*, 28 S.R.R. 1635, 1645 (FMC 2000) ("[T]he test is whether a complainant's allegations are inherently a breach of contract, or whether they also involve elements peculiar to the Shipping Act."). Courts have retained jurisdiction over mere contract disputes that were not peculiar to the Shipping Act, and did not require the FMC's specialized [\*18] expertise. See, e.g., *Mitsui O.S.K. Lines, Ltd. v. Evans Delivery Co.*, 948 F. Supp. 2d. 406, 409 (D.N.J. 2013) (exercising jurisdiction over contract claims regarding failure to deliver goods pursuant to transportation order).

MBUSA's claims are premised on alleged conduct that is "particular to the Shipping Act" and of which are not mere contract disputes, making [§ 40502\(f\)](#) inapplicable, and leaving a claim for reparations before the FMC as the exclusive private remedy. MBUSA's claims involving alleged secret, unfiled agreements among ocean common carriers are among those that Congress specifically reserved for the specialized expertise of the FMC. *In re Vehicle Carrier Servs.*, 846 F.3d at 86. MBUSA's attempt to disguise such claims in the language of state contract law in order to avoid the exclusive Shipping Act remedies designed by Congress "would essentially undo Congress's work

in expanding antitrust immunity" and thus "allowing [such claims] to proceed would pose an obstacle to achieving Congress's objectives in passing the Act." *Id.* at 85-87.

## II. Whether Defendants are U.S.-flag Carriers is Unrelated to Whether the Shipping Act Preempts MBUSA's Claims

MBUSA also argues that its claims are not preempted because Defendants are not U.S.-flag carriers. However, a review of the Shipping Act, as well as the Third Circuit's opinion in [\*19] *In re Vehicle Carrier Services* shows that this assertion is also incorrect. Reading the Shipping Act as a whole discloses that, although one of Congress's purposes in passing the Shipping Act was "to ensure that U.S.-flag ships are on a level playing field with foreign vessels," another purpose of the Act was to "establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs." *In re Vehicle Carrier Servs.*, 846 F.3d at 85 (citing [46 U.S.C. §§ 40101\(1\)-\(2\)](#)).

Congress achieved these purposes by enacting a comprehensive statutory scheme that applies to all ocean common carriers within the jurisdiction of the United States, regardless of their flag. See, [46 U.S.C. § 40102\(6\)](#) (defining "common carrier" as any person, not limited to flag, that "holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation."); see also, H.R. Rep. No. 98-53(I), at 24 (1983) ("[The bill] attempts to provide clearcut rules and procedures applicable to both foreign-flag and U.S.-flag operators within an equitable and competitive commercial environment.").

No relevant provision of the [\*20] Shipping Act creates a different set of rules for U.S. versus non-U.S. flag carriers, and the Third Circuit has never hinted that the Shipping Act exemptions applied only to U.S.-flag carriers. Therefore, this argument against preemption also fails, and MBUSA's claims must be dismissed with prejudice.

## III. MBUSA's Antitrust Claims are Time-Barred by the New Jersey Antitrust Act's Four-Year Statute of Limitations

While the Court has determined that MBUSA's complaint must be dismissed as the claims it sets forth are preempted by the Shipping Act, it also notes that MBUSA's antitrust claims are time-barred by a four-year statute of limitations. Under the [New Jersey Antitrust Act, N.J.S.A. 56:9-1](#), a cause of action "based upon a conspiracy in violation of [the] act" must be commenced "within 4 years after the plaintiff discovered, or by the exercise of reasonable diligence should have discovered the facts relied upon for proof of the conspiracy." [N.J.S.A. 56:9-14](#); see, [Cetel v. Kirwan Fin. Grp., Inc.](#), 460 F.3d 494, 510 n. 11 (3d Cir. 2006) (noting that "the New Jersey Antitrust Act [has a] four-year statute of limitations.").

MBUSA has waited approximately six years after it either knew or should have known of its potential claims in order to file its complaint. While this case was pending [\*21] in federal court, MBUSA conceded that its claims accrued no later than September 6, 2012. This date was when the leading news agencies worldwide reported on global antitrust investigations into alleged price fixing and other alleged anticompetitive conduct by defendants and related investigative raids of Defendants' offices by antitrust authorities in the United States, Europe, and Asia. However, MBUSA did not file its complaint until August 30, 2018 — nearly six years later.

### A. MBUSA Knew or Should Have Known it had Potential Claims No Later than September 6, 2012

Under the New Jersey Antitrust Act, the accrual date for a cause of action sounding in conspiracy is governed by the "discovery rule." Even under that generous rule, the accrual date is only delayed "until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that [it] may have a basis for an actionable claim." [R.L. v. Voytac](#), 199 N.J. 285, 299, 971 A.2d 1074 (2009); see also, [N.J.S.A. 56:9-14](#). MBUSA, as the party "claiming the indulgence of the rule," bears the burden of proving that its application is warranted. [Yarchak v. Trek Bicycle Corp.](#), 208 F. Supp. 2d 470, 487 (D.N.J. 2002).

In New Jersey, the "application of the discovery rule is objective." [Martinez v. Cooper Hosp.-Univ. Med. Ctr.](#), 163 N.J. 52, 747 A.2d 266 (2000). Courts seek to determine "whether the plaintiff knew [\*22] or should have known of sufficient facts to start the statute of limitations running." *Id.* "[K]nowledge of fault for purposes of the discovery

rule has a circumscribed meaning: it requires only the awareness of facts that would alert a reasonable person exercising ordinary diligence that a third party's conduct may have caused or contributed to the cause of the injury[.]). [Savage v. Old Bridge-Sayreville Medical Group, P.A., 134 N.J. 241, 248, 633 A.2d 514 \(1993\).](#)

In this instance, MBUSA would have or should have known that it may have been injured by Defendants on September 6, 2012, the date of the highly-publicized "dawn raids" of Defendants' offices, and high-profile investigations by antitrust authorities around the world. Therefore, MBUSA either had actual knowledge or must be charged with constructive knowledge of the "dawn raids" of Defendants' offices and global antitrust investigations on September 6, 2012. Moreover, as a significant automotive original equipment manufacturer ("OEM") that imports, distributes, and sells Mercedes-Benz automobiles and light trucks in the United States, and as a purported direct purchaser of vehicle carrier services, MBUSA has close, substantial involvement in the vehicle carrier services market on a day-to-day basis. Therefore, MBUSA [\*23] either actually knew or should have known of the antitrust investigations receiving widespread attention in the industry.

Against this backdrop, the Court must conclude that MBUSA simply slept on its potential claims while other, similarly situated automotive OEMs with access to the same widely-reported information as MBUSA acted with reasonable diligence, as the law requires, to pursue their claims. Therefore, MBUSA's claims under the New Jersey Antitrust Act are dismissed as time-barred.

#### *B. A Reasonable Plaintiff Would Have Engaged in Further Inquiry Related to the Widely Reported Antitrust Investigations*

MBUSA is also charged with inquiry notice of any further knowledge discoverable through a reasonable diligent investigation. [County of Hudson v. Janiszewski, 520 F. Supp. 2d, 631, 634, \(D.N.J. 2007\); Mathews v. Kidder, Peabody & Co., 260 F.3d 239, 255 \(3d Cir. 2011\); Cetel, 460 F.3d at 508.](#)

The widespread publicity regarding the September 6, 2012 "dawn raids" and the global antitrust investigations, at a bare minimum, triggered MBUSA's duty to investigate its potential claims with reasonable diligence. MBUSA was "plainly on inquiry notice" as a result of the "multiplicity and specificity" of information available to it about Defendants' alleged wrongdoing. See, e.g., [GO Computer Inc. v. Microsoft Corp., 508 F.3d 170, 179 \(4th Cir. 2007\); Isaak v. Trumbull Sav. & Loan Co., 169 F.3d 390, 400 \(6th Cir. 1999\).](#) Many news reports were widely circulated internationally, [\*24] and were detailed and specific, identifying Defendants by name and highlighting that the government investigations concerned alleged price fixing and other alleged anticompetitive conduct by Defendants.

Despite these reports, MBUSA ignored them, or failed to conduct a reasonable inquiry, if any inquiry at all, and thus "cannot obtain the benefit that a finding of reasonable diligence will confer." [Cetel, 460 F. 3d at 508.](#) Therefore, MBUSA's claims are untimely and must be dismissed.

#### *C. Class Action Tolling does not Apply, and thus Cannot Save MBUSA's Time-Barred Claims*

MBUSA argues that the filing of federal Clayton Act claims by a putative class of direct purchasers in the New Jersey MDL action "tolled" the statute of limitations on MBUSA's putative New Jersey Antitrust Act claim. However, no such class action tolling applies in this instance.

The doctrine of class action tolling that MBUSA seeks to invoke is sometimes referred to as the "*American Pipe*" rule. Under *American Pipe*, "the commencement of a class action [that is ultimately not certified due to a lack of numerosity] suspends the applicable statute of limitations as to all asserted members of the class who would have been [\*25] parties had the suit been permitted to continue as a class action." [American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553-54, 94 S. Ct. 756, 38 L. Ed. 2d 713 \(1974\).](#) The weight of authority holds that *American Pipe* tolling is afforded only to subsequent individual causes of actions or claims *identical* to the ones alleged in the

earlier putative class action. *Johnson v. Ry, Express Agency, Inc.*, 421 U.S. 454, 467, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975).

In adopting class action tolling, New Jersey courts have expressly relied on *American Pipe* and discussed it at length. *Staub v. Eastman Kodak Co.*, 320 N.J. Super. 34, 47-52, 726 A.2d 955 (App. Div. 1999). Relying on *American Pipe*, *Staub* held that "if the pendency of a putative class action does not toll the statute of limitations for individual claimants who would be members of the class if it is certified, potential class members who have 'discovered' their claims would be compelled to file suit to avoid expiration of the period of limitations." *Id. at 56* (internal citations omitted).

MBUSA also misconstrues *American Pipe* in arguing that the statute of limitations on its state antitrust claim should be tolled because a previous federal court action asserted substantially the same claims as those asserted by MBUSA under the New Jersey Antitrust Act in this case. However, mere similarity in claims is not enough to warrant *American Pipe* tolling because "the policies underlying *American Pipe* and like precedents simply [\*26] do not apply in the cross-jurisdiction context," such as between the federal courts and state courts. *In re Copper Antitrust Litig.*, 436 F.3d 782, 794-95 (7th Cir. 2006). "However similar or dissimilar the function of federal **antitrust law** may be with respect to state law, the federal claim is part of a distinct body of law that must be pursued in a wholly different court system. This fact cuts decisively against the application of the policies of *American Pipe* across jurisdictional lines." *Id. at 794*.

When considering the foregoing, it is abundantly clear that class action tolling under the *American Pipe* rule is inappropriate given the circumstances, and MBUSA's state antitrust claims must be dismissed as time-barred.

## CONCLUSION

For the reasons stated above, Defendants' motion to dismiss MBUSA's complaint is GRANTED.

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End of Document



## Gamboa v. Ford Motor Co.

United States District Court for the Eastern District of Michigan, Southern Division

March 31, 2019, Decided; March 31, 2019, Filed

CASE NO. 18-10106

### **Reporter**

381 F. Supp. 3d 853 \*; 2019 U.S. Dist. LEXIS 55111 \*\*; 2019 WL 1441615

LEN GAMBOA, et al., Plaintiffs, v. FORD MOTOR COMPANY, ROBERT BOSCH GMBH, ROBERT BOSCH LLC, Defendants.

**Subsequent History:** Motion denied by [Gamboa v. Ford Motor Co., 2019 U.S. Dist. LEXIS 145259, 2019 WL 4039979 \(E.D. Mich., Aug. 27, 2019\)](#)

Motion granted by [Gamboa v. Ford Motor Co., 414 F. Supp. 3d 1035, 2019 U.S. Dist. LEXIS 189884, 2019 WL 5558502 \(E.D. Mich., Oct. 25, 2019\)](#)

Motion denied by, Without prejudice [Gamboa v. Ford Motor Co., 2020 U.S. Dist. LEXIS 263543 \(E.D. Mich., Nov. 9, 2020\)](#)

Objection overruled by [Gamboa v. Ford Motor Co., 2020 U.S. Dist. LEXIS 222800, 2020 WL 7021690 \(E.D. Mich., Nov. 30, 2020\)](#)

Motion denied by [Gamboa v. Ford Motor Co., 2020 U.S. Dist. LEXIS 223814 \(E.D. Mich., Nov. 30, 2020\)](#)

Magistrate's recommendation at [Gamboa v. Ford Motor Co., 2021 U.S. Dist. LEXIS 257755, 2021 WL 8316982 \(E.D. Mich., Oct. 7, 2021\)](#)

Motion denied by, As moot [Gamboa v. Ford Motor Co., 2021 U.S. Dist. LEXIS 257756, 2021 WL 8315419 \(E.D. Mich., Oct. 7, 2021\)](#)

## **Core Terms**

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Plaintiffs', emissions, argues, fraudulent, omissions, defeat, consolidated, allegations, courts, diesel, consumers, injuries, advertisement, regulations, state law claim, preemption, preempted, Counts, cases, mail, misrepresentations, enterprise, interim, concealment, testing, clean, duty to disclose, manufacture, overpayment, defraud

## **LexisNexis® Headnotes**

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Civil Procedure > Trials > Consolidation of Actions

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

## **HN1** Trials, Consolidation of Actions

Fed. R. Civ. P. 42(a)(2) provides that a court may consolidate actions involving a common question of law or fact. Fed. R. Civ. P. 42(a)(1). The objective of consolidation is to administer the court's business with expedition and economy while providing justice to the parties. Consolidation of separate actions does not merge the independent actions into one suit. The party seeking consolidation bears the burden of demonstrating the commonality of law, facts or both in cases sought to be combined. Once the threshold requirement of establishing a common question of law or fact is met, the decision to consolidate rests in the sound discretion of the district court. The court weighs the interests of judicial economy against the potential for new delays, expense, confusion, or prejudice. Considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial. Consolidation is not justified or required simply because the actions include a common question of fact or law. When cases involve some common issues but individual issues predominate, consolidation should be denied.

Civil Procedure > Trials > Consolidation of Actions

## **HN2** Trials, Consolidation of Actions

In deciding whether to consolidate actions, the trial court must consider whether the specific risks of prejudice and possible confusion are overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on the parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives. Care must be taken that consolidation does not result in unavoidable prejudice or unfair advantage. Even though conservation of judicial resources is a laudable goal, if the savings to the judicial system are slight, the risk of prejudice to a party must be viewed with even greater scrutiny.

Civil Procedure > ... > Class Actions > Class Attorneys > Appointments

## **HN3** Class Attorneys, Appointments

Fed. R. Civ. P. 23(g)(3) provides that the court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action. Fed. R. Civ. P. 23(g)(3). Designation of interim counsel clarifies responsibility for protecting the interests of the class during precertification activities, such as making and responding to motions, conducting any necessary discovery, moving for class certification, and negotiating settlement. Designation of interim counsel is particularly appropriate when a number of lawyers have filed related copycat actions.

Civil Procedure > ... > Class Actions > Class Attorneys > Appointments

## **HN4** Class Attorneys, Appointments

The considerations set out in Fed. R. Civ. P. 23(g)(1), which govern the appointment of post-certification class counsel, are equally applicable to a decision on whom to designate as interim class counsel. In deciding whether to designate plaintiff's counsel as interim class counsel, courts consider: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources that counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A). The court will also consider whether plaintiff's counsel will fairly and adequately represent the interests of the putative class. Fed. R. Civ. P. 23(g)(4).

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

#### **HN5** [down arrow] **Motions to Dismiss, Failure to State Claim**

Fed. R. Civ. P. 12(b)(6) provides for a motion to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). This type of motion tests the legal sufficiency of the plaintiff's complaint. When reviewing a motion to dismiss under Rule 12(b)(6), a court must construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff. A court, however, need not accept as true legal conclusions or unwarranted factual inferences. Legal conclusions masquerading as factual allegations will not suffice.

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

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

#### **HN6** [down arrow] **Motions to Dismiss, Failure to State Claim**

A plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level. To survive dismissal, the plaintiff must offer sufficient factual allegations to make the asserted claim plausible on its face. A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

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

Constitutional Law > Supremacy Clause > Federal Preemption

Environmental Law > Federal Versus State Law > Federal Preemption

#### **HN7** [down arrow] **False Advertising, State Regulation**

Preemption may be either expressed or implied, and is compelled whether Congress's command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. In all preemption cases, and especially where Congress has legislated in a field in which the States have traditionally occupied, courts start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. Environmental regulation is a field that the states have traditionally occupied. The same is true of consumer protection and advertising regulations. Where the statute does not expressly preempt state law, preemption may be implied. The U.S. Supreme Court has recognized two types of implied preemption: field preemption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict preemption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

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

Business & Corporate Compliance > ... > Environmental Law > Air Quality > Emission Standards

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Environmental Law > Federal Versus State Law > Federal Preemption

#### **HN8** [blue download icon] Deceptive & Unfair Trade Practices, State Regulation

The Clean Air Act does not preempt state-law consumer fraud claims because they do not seek to set or enforce any emissions standards or obligations.

Constitutional Law > Supremacy Clause > Federal Preemption

#### **HN9** [blue download icon] Supremacy Clause, Federal Preemption

There are two types of implied preemption. The first, field preemption, occurs where federal regulations are so expansive that Congress has left no room for supplemental state regulation.

Business & Corporate Compliance > ... > Air Quality > Environmental Law > Air Quality

Environmental Law > Federal Versus State Law

#### **HN10** [blue download icon] Environmental & Natural Resources, Air Quality

The Clean Air Act includes a savings clause wherein Congress expressly confirms that states retain the ability to regulate the use, operation, or movement of motor vehicles. [42 U.S.C.S. § 7543\(d\)](#).

Constitutional Law > Supremacy Clause > Federal Preemption

#### **HN11** [blue download icon] Supremacy Clause, Federal Preemption

A kind of implied preemption that courts have recognized is conflict preemption. There are two types of conflict preemption. First, conflict preemption exists when compliance with both federal and state requirements is physically impossible. Second, conflict preemption exists when state law would operate as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

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

Environmental Law > Federal Versus State Law > Federal Preemption

Business & Corporate Compliance > ... > Air Quality > Environmental Law > Air Quality

#### **HN12** [blue download icon] Deceptive & Unfair Trade Practices, State Regulation

A order for a car company to argue that claims arising from state consumer protection statutes are impliedly preempted by the Clean Air Act (CAA), a defendant will have to prove that Congress intended for the CAA to regulate the scope of a vehicle manufacturer's disclosure obligations to consumers.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

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Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Mistake

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

### [HN13](#) [ ] Heightened Pleading Requirements, Fraud Claims

Under [Fed. R. Civ. P. 9\(b\)](#), in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally. [Fed. R. Civ. P. 9\(b\)](#). The purpose of [Rule 9\(b\)](#) is to put defendants on notice of the nature of the claim. It is a principle of basic fairness that a plaintiff should have an opportunity to flesh out her claim through evidence unturned in discovery. [Rule 9\(b\)](#) does not require omniscience; rather the Rule requires that the circumstances of the fraud be pled with enough specificity to put defendants on notice as to the nature of the claim. Although [Rule 9\(b\)](#) heightens the pleading standard, it always must be read against the backdrop of [Fed. R. Civ. P. 8](#), which aims simply to put a defendant on notice of the claims against him so that he may reasonably respond to the allegations in the complaint.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

### [HN14](#) [ ] Heightened Pleading Requirements, Fraud Claims

For purposes of [Fed. R. Civ. P. 9\(b\)](#), the specificity required for allegations of affirmative misrepresentations is necessarily different than the specificity required for allegations of fraudulent omissions. When it comes to claims of fraud by omission or fraudulent concealment, the plaintiff faces a slightly more relaxed pleading burden; the claim can succeed without the same level of specificity required by a normal fraud claim. There is a disparate burden between the two types of fraud because fraudulent acts occur at a specific time, but fraudulent omissions occur over a period of time. While fraudulent acts can be specifically described, fraudulent omissions are, by very definition, more amorphous.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

### [HN15](#) [ ] Heightened Pleading Requirements, Fraud Claims

Even in the context of a fraudulent omission claim, [Fed. R. Civ. P. 9\(b\)](#) requires a plaintiff to set forth the who, what, when, where, and how of the alleged omission. Plaintiffs must set forth: (1) precisely what was omitted; (2) who should have made a representation; (3) the content of the alleged omission and the manner in which the omission was misleading; and (4) what the defendant obtained as a consequence of the alleged fraud.

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

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

### [HN16](#) [ ] False Advertising, Lanham Act

Statements of cleanliness convey inherently subjective concepts and constitute non-actionable opinions. Additionally, promises of efficiency and reliability cannot form the basis for a fraud claim. Courts are much more likely to find representations actionable when assertions make specific representations, especially numerically quantifiable representations. However, representations that merely contain numbers are not necessarily enough to qualify as actionable statements under a fraud theory. Factors that generally demonstrate that a numerical claim is actionable include: (1) if an advertisement expressly states that the product was tested by the advertising company;

and (2) if the advertisement compares the product to a specific competitor by name. This does not apply in actions involving the Lanham Act.

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

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

#### **HN17** [blue icon] **Racketeer Influenced & Corrupt Organizations, Claims**

The Racketeer Influenced and Corrupt Organizations Act (RICO) establishes bases for both criminal and civil suits. A RICO civil suit may be brought by any person injured in his business or property by reason of a violation of [18 U.S.C.S. § 1962](#). [18 U.S.C.S. § 1964\(c\)](#). [Section 1962](#) provides that it shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. [§ 1962\(c\)](#). In other words, a party advancing a civil RICO claim must establish their right to sue and then further allege the following elements: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.

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

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

#### **HN18** [blue icon] **Racketeer Influenced & Corrupt Organizations, Claims**

Plaintiffs may assert a Racketeer Influenced and Corrupt Organizations Act (RICO) claim only if they can identify an injury to their business or property by reason of a violation of [18 U.S.C.S. § 1962](#). [18 U.S.C.S. § 1964\(c\)](#). In so limiting the scope of RICO standing, Congress exhibited an intention to exclude personal injury—that is, an injury to a person, such as a broken bone, a cut, or a bruise or a bodily injury. Similarly, a RICO injury must be concrete, not intangible or speculative. RICO plaintiffs must identify a reasonable and principled basis of recovery which is not based upon mere speculation and surmise. A plaintiff must, at a minimum, show some direct, pecuniary injury to his own pocket that is unrelated to a claimed personal injury.

Antitrust & Trade Law > Clayton Act > Claims

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

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

Antitrust & Trade Law > Clayton Act > Scope

#### **HN19** [blue icon] **Clayton Act, Claims**

Section 4 of the Clayton Act authorizes any person who shall be injured in his business or property by reason of an [antitrust law](#) violation to bring suit. Where a petitioner alleges a wrongful deprivation of her money because the price of the product she bought was artificially inflated by reason of the respondents' anticompetitive conduct, she has alleged an injury in her property under § 4. That commonsense observation about § 4 applies with equal logical force to [18 U.S.C.S. § 1964\(c\)](#).

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Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

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

## [HN20](#) [ ] Claims, Fraud

There is a distinction between damages theories where an ascertainable and reasonably quantifiable overpayment occurred at the time of injury and speculative damages theories which are contingent on some future event, lost profit, or unanticipated future expense. Therefore, a Racketeer Influenced and Corrupt Organizations Act (RICO) plaintiff may recover for money invested on the basis of misrepresentations, but not for loss of the profits, which the plaintiffs expected to receive from an investment. Likewise, a RICO plaintiff may recover for overpayment when they buy a used car after being told it was new, but may not recover for overpayment simply because the tires they purchased may be defective. A RICO plaintiff may recover money paid pursuant to insurance policies that plaintiffs chose because the defendants falsely represented that the potential investors could completely avoid payment of any future federal income taxes, but cannot recover for loans granted to debtors based upon misrepresentations by the debtors because the plaintiffs would suffer damages only if the debtors defaulted and because the amount of damages was speculative until the creditor's bargained for remedies were exhausted.

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

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

## [HN21](#) [ ] Racketeer Influenced & Corrupt Organizations, Claims

In order to state a Racketeer Influenced and Corrupt Organizations Act (RICO) claim, plaintiffs must plausibly allege the existence of an enterprise engaged in a pattern of racketeering activity. [18 U.S.C.S. § 1962\(c\)](#). But, the definition of enterprise for RICO purposes is exceedingly broad. The statute defines enterprise as any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. [18 U.S.C.S. § 1961\(4\)](#). On its face, the definition appears to include both legitimate and illegitimate enterprises within its scope; it no more excludes criminal enterprises than it does legitimate ones. A RICO association-in-fact must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

## [HN22](#) [ ] Claims, Fraud

To state a Racketeer Influenced and Corrupt Organizations Act (RICO) claim based on mail or wire fraud, a plaintiff must allege the following three elements: (1) devising or intending to devise a scheme to defraud (or to perform specified fraudulent acts); (2) involving a use of the mails; and (3) for the purpose of executing the scheme or attempting to do so. The plaintiffs must allege that the defendants possessed the specific intent to deceive or defraud. The scheme to defraud must involve misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension. The plaintiffs need not show actual reliance, but must demonstrate that the misrepresentations or omissions were material. Specific intent to defraud or deceive exists if the defendant by material misrepresentations intends the victim to accept a substantial risk that otherwise would not have been taken.

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

### [\*\*HN23\*\*](#) [] **Wire Fraud, Elements**

A defendant may commit mail fraud even if he personally has not used the mails. A mail fraud conviction requires only a showing that the defendant acted with knowledge that use of the mails would follow in the ordinary course of business, or that a reasonable person would have foreseen use of the mails. In other words, there is no requirement that the defendant have actually intended that the mails (or wire) be used. And, further, the mailings may be innocent or even legally necessary. The use of the mails need only be closely related to the scheme and reasonably foreseeable as a result of the defendant's actions.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

### [\*\*HN24\*\*](#) [] **Claims, Fraud**

For purposes of the Racketeer Influenced and Corrupt Organizations Act, when pleading predicate acts of mail or wire fraud, in order to satisfy the heightened pleading requirements of [\*Fed. R. Civ. P. 9\(b\)\*](#), a plaintiff must (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

### [\*\*HN25\*\*](#) [] **Heightened Pleading Requirements, Fraud Claims**

The U.S. Court of Appeals for the Sixth Circuit has repeatedly confirmed that concealment of material facts can constitute a fraudulent scheme sufficient to establish Racketeer Influenced and Corrupt Organizations Act liability. In relation both to mail fraud and wire fraud, there is no technical or precise definition of an unlawful scheme to defraud. The standard is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society. A fraudulent scheme may be demonstrated by proof that it was reasonably calculated to deceive persons of ordinary prudence and comprehension, and communications of half-truths and concealment of material facts are both actionable. The Sixth Circuit has never articulated a duty to disclose requirement.

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

Civil Procedure > Preliminary Considerations > Justiciability > Standing

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

### [\*\*HN26\*\*](#) [] **Racketeer Influenced & Corrupt Organizations, Claims**

A plaintiff's right to sue requires a showing that the defendant's violation not only was a but for cause of his injury, but was the proximate cause as well. The plaintiff must show some direct relation between the injury asserted and the injurious conduct alleged. Importantly, the causation inquiry must focus on the alleged link between the predicate acts and the asserted injury. A purported link that is too remote, purely contingent, or indirect is insufficient to confer standing. The general tendency of the law, in regard to damages at least, is not to go beyond the first step. An attenuated causation theory creates difficulties in apportioning damages between plaintiffs and

attributing damages to defendants. A challenge to a Racketeer Influenced and Corrupt Organizations Act suit based on asserted lack of proximate causation, however, is often best resolved at summary judgment, not at the pleading stage.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Civil Procedure > ... > Class Actions > Class Members > Named Members

## [\*\*HN27\*\*](#) [blue icon] **Class Actions, Certification of Classes**

Threshold individual standing is a prerequisite for all actions, including class actions. A potential class representative must demonstrate individual standing vis-as-vis the defendant; he cannot acquire such standing merely by virtue of bringing a class action. The growing consensus, however, is that class certification issues are logically antecedent to U.S. Const. art. III concerns, at least when the named plaintiffs possess U.S. Const. art. III standing. In other words, where class certification is the source of the potential standing problems, class certification should precede the standing inquiry.

Civil Procedure > ... > Class Actions > Class Members > Absent Members

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

## [\*\*HN28\*\*](#) [blue icon] **Class Members, Absent Members**

The question of whether state law claims may be advanced on behalf of unnamed plaintiffs is indistinguishable from the [Fed. R. Civ. P. 23](#) analysis. That standing inquiry is more appropriately addressed at the class certification stage when courts consider the commonality and typicality prerequisites of class actions.

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

Constitutional Law > ... > Case or Controversy > Standing > Elements

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

## [\*\*HN29\*\*](#) [blue icon] **Standing, Injury in Fact**

Federal courts have a duty to confirm subject matter jurisdiction in every case pending before them. [U.S. Const. art. III, § 2](#) limits federal court jurisdiction to cases and controversies. The doctrine derived from [U.S. Const. art. III, § 2](#) imposes the requirement of standing: federal jurisdiction exists only if the dispute is one which is appropriately resolved through the judicial process. For standing to exist, three elements must be satisfied: injury in fact, causation, and redressability. Injury in fact exists when the plaintiff has suffered an invasion of a legally protected interest that is both concrete and particularized and actual or imminent, not conjectural or hypothetical. Causation exists if the injury is one that fairly can be traced to the challenged action of the defendant. The redressability

requirement is satisfied if the plaintiff's injury is likely to be redressed by a favorable decision. Standing can exist even if the alleged injury may be difficult to prove or measure.

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

Constitutional Law > ... > Case or Controversy > Standing > Elements

### **HN30** Standing, Injury in Fact

Claims of overpayment, wherein a plaintiff paid a premium but did not receive the anticipated consideration, are cognizable injuries in fact. The causation requirement in standing is not focused on whether the defendant caused the plaintiff's injury in the liability sense; the plaintiff need only allege injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.

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For Robert Bosch LLC, Defendant: Carmine D. Boccuzzi , Jr., Cleary, Gottlieb, New York, NY; Matthew D. Slater, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC; Michael G. Brady, William R. Jansen, Warner, Norcross, Southfield, MI.

For James Hackett, consolidated from 18-11900, Mark Fields, consolidated from 18-11900, Consol Defendants: Joel A. Dewey, DLA Piper LLP (US), Baltimore, MD.

**Judges:** HON. Denise Page Hood, Chief United States District Judge.

**Opinion by:** Denise Page Hood

## Opinion

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**[\*863] ORDER GRANTING PLAINTIFFS' MOTION FOR THE APPOINTMENT OF INTERIM CLASS COUNSEL [#27], DENYING DEFENDANTS' MOTIONS TO DISMISS [#28; #29], GRANTING DEFENDANTS' MOTIONS TO CONSOLIDATE CASES [#39; #46], AND SETTING DATES**

### I. BACKGROUND

#### A. Procedural Background

On January 10, 2018, Plaintiffs Len Gamboa, Jeff Retmier, Nikiah Nudell, David Bates, Pete Petersen, and William Sparks, individually, and on behalf of all other similarly situated individuals (collectively, "Plaintiffs" or the "Gamboa Plaintiffs"), commenced this action (the "Gamboa Action") against Defendants Ford Motor Company ("Ford"), Robert Bosch GmbH ("Bosch GmbH"), **[\*\*5]** and Robert Bosch LLC ("Bosch LLC") (collectively, "Defendants"). (Doc # 1) Plaintiffs allege that Defendants unlawfully manufactured and sold defective vehicles that had defective emissions controls in violation of: the *Racketeer Influenced and Corrupt Organizations Act ("RICO")*, *18 U.S.C. § 1962(c), (d)* (Count 1); and various state consumer protection statutes (Counts 2-57). (*Id.*)

On April 6, 2018, Plaintiffs James Ruston, Vic Sparano, Andreas Alsdorf, Jeffrey Martin, Ken Ryan, Christopher Dieterick, Johnny Tolly, Kohen Marzolf, and Bruce Szepelak, individually, and on behalf of all other similarly situated individuals filed a Complaint (the "Ruston Action")<sup>1</sup> against all Defendants from the Gamboa Action. These plaintiffs are represented by the same attorneys who represented the **[\*864]** Gamboa Plaintiffs. The same attorneys who represented Defendants in the Gamboa Action are representing Defendants in the Ruston Action. In the Ruston Action, the plaintiffs allege that in connection with Ford's vehicles, Defendants were in violation of: RICO (Count 1); and various state consumer protection statutes (Counts 2-63).

On April 20, 2018, Plaintiffs Glenn Goodroad, Jr., Richard Castro, **[\*\*6]** Alan Flanders, Edward Hatten, Michael King, William McKnight, Luther "Ed" Palmer, Don Recker, Ivan Tellez, Brian Urban, Christina Bouyea, Value Additives LLC, and Michael Wilson, individually, and on behalf of all other similarly situated individuals filed a Complaint (the "Goodroad Action")<sup>2</sup> against all Defendants from the Gamboa Action as well as James Hackett

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<sup>1</sup> *Ruston et al. v. Ford Motor Company et al.*, Case No. 2:18-cv-11108.

("Hackett"), Mark Fields ("Fields"), and Volkmar Denner in the United States District Court, Northern District of California. Attorneys Elizabeth J. Cabraser, David Stellings, Gretchen Freeman Cappio, Jason Henry Alperstein, Lynn L. Sarko, and Paul Jeffrey Geller represent the plaintiffs. Ford is represented by Attorneys Jeffrey M. Yeatman, Joel A. Dewey ("Dewey"), Stephanie A. Douglas, and Susan M. McKeever. Attorney Dewey represents Hackett and Fields. Attorney Matthew D. Slater represents Bosch GmbH and Bosch LLC in the Goodroad Action. In the Goodroad Action, the plaintiffs allege that in connection with Ford's vehicles, the defendants were in violation of: RICO (Count 1); and fraud by concealment (Count 2).

On June 14, 2018, the plaintiffs and defendants in the Goodroad Action **[\*\*7]** agreed to stipulate to a transfer of the case to the Eastern District of Michigan. When the parties agreed to this stipulation, they both expressed that once their case was transferred, they would work with the plaintiffs from the Gamboa and Ruston Actions to file a consolidated amended complaint in the Eastern District of Michigan. (Doc # 39-2) On June 14, 2018, the Honorable Beth Labson Freeman signed a Stipulation and Order to Transfer the Class Action Complaint Pursuant to [28 U.S.C. § 1404\(a\)](#). On June 15, 2018, the Goodroad case was transferred from the Northern District of California to the Eastern District of Michigan.<sup>3</sup>

On July 31, 2018, Dina Badagliacco ("Badagliacco") individually, and on behalf of all other similarly situated individuals filed a Complaint (the "Badagliacco Action")<sup>4</sup> against all Defendants from the Gamboa Action. Attorneys Sharon S. Almonrode, Melvin B. Hollowell, and E. Powell Miller represent Badagliacco. The same attorneys who represented Defendants in the Gamboa Action are representing Defendants in the Badagliacco Action. In the Badagliacco Action, Badagliacco alleges that in connection with Ford's vehicles, Defendants were **[\*\*8]** in violation of: RICO (Count 1); New Jersey's Consumer Fraud Act (Count 2); and fraud by concealment under New Jersey common law (Count 3).

On April 9, 2018, Gamboa Plaintiffs filed a Motion for the Appointment of Interim Class Counsel. (Doc # 27) Defendants filed their Response to this Motion on April 23, 2018. (Doc # 31) On April 27, 2018, Gamboa Plaintiffs filed their Reply. (Doc # 33)

On April 9, 2018, Ford filed a Motion to Dismiss Gamboa Plaintiffs' Complaint. **[\*865]** (Doc # 28) Gamboa Plaintiffs filed their Response to this Motion on June 15, 2018. (Doc # 35) On July 18, 2018, Ford filed its Reply. (Doc # 42)

On April 9, 2018, Bosch LLC filed a Motion to Dismiss Gamboa Plaintiffs' Complaint. (Doc # 29) Gamboa Plaintiffs filed their Response to this Motion on June 15, 2018. (Doc # 34) On July 18, 2018, Bosch LLC filed its Reply. (Doc # 43)

On July 9, 2018, Defendants filed a Motion to Consolidate Cases. (Doc # 39) Gamboa Plaintiffs filed their Response to this Motion on July 23, 2018. (Doc # 44) On July 30, 2018, Defendants filed their Reply. (Doc # 45)

On August 17, 2018, Ford filed a second Motion to Consolidate Cases. (Doc # 46) Plaintiffs have not **[\*\*9]** responded to this Motion.

These five Motions are currently before the Court. A hearing on these five Motions was held on September 17, 2018.

## B. Factual Background

<sup>2</sup> *Goodroad, Jr. et al. v. Ford Motor Company et al.*, Case No. 5:18-cv-02403.

<sup>3</sup> *Goodroad, Jr. et al. v. Ford Motor Company et al.*, Case No. 2:18-cv-11900.

<sup>4</sup> *Badagliacco v. Ford Motor Company et al.*, Case No. 2:18-cv-12379.

Plaintiffs are suing Ford, Bosch GmbH, and Bosch LLC for allegedly selling vehicles that were not sold to consumers as advertised. (Doc # 1) According to Plaintiffs, Ford made several claims to consumers regarding its Ford F-250 and F-350 "Super Duty" vehicles that were untrue, including that its: (1) 6.7-liter Power Stroke Diesel is the "Cleanest Super Diesel Ever"; (2) proven technology and innovative strategies were used to meet the latest federal emissions standards; (3) vehicles reduced nitrogen oxide ("NOx") by 80% over previous models; and (4) vehicles were "best-in-class" with respect to fuel economy and that they were the most tested Power Stroke diesel engines ever. (*Id.* at 9.) Plaintiffs contend that scientifically valid emissions testing revealed that Ford's Super Duty vehicles emit levels of NOx that are many times higher than: (1) its gasoline counterparts; (2) what a reasonable consumer would expect; (3) what Ford had advertised; (4) the Environmental Protection Agency's ("EPA") maximum standards; and (5) the levels set **[\*\*10]** for the vehicles to obtain a certificate of compliance, which allows them to be sold in the United States. (*Id.*) Plaintiffs state in their Complaint that exposure to the pollutants from NOx has been linked with "serious respiratory illnesses and premature death due to respiratory-related or cardiovascular-related effects." (*Id.* at 12.)

Plaintiffs' claims are based on the fact that they believe that "Ford's top selling Super Duty vehicles often emit far more pollution on the road than in the emissions-certification testing environment." (*Id.* at 10.) Plaintiffs argue that Ford's vehicles employ "defeat devices" to turn down emissions controls when the vehicles sense that they are not in the certification test cycle. (*Id.*) According to Plaintiffs, Ford benefits by using defeat devices because they allow Ford to reverse the traditional order of the exhaust treatment components and put the selective catalytic reduction in front of the diesel particulate filter. (*Id.* at 11.) Plaintiffs state that in modern vehicles with electronic engine controls, defeat devices are almost always activated by illegal software in each vehicle's engine control module. (*Id.*) Plaintiffs contend that these defeat devices give Ford the ability **[\*\*11]** to obtain and market higher power and fuel efficiency from its engines while still passing cold-start emissions certifications tests. (*Id.*)

Plaintiffs argue that Ford's representations are "deceptive and false" and should cause Ford to be held legally responsible for selling their vehicles while omitting information that would be material to a reasonable consumer. (*Id.* at 16.) It is Plaintiffs' contention that Ford had a duty **[\*866]** to disclose that in real-world driving conditions, Ford's vehicles could "only achieve high fuel economy, power, and durability by reducing emission controls in order to spew NOx into the air." (*Id.* at 18.) Plaintiffs further contend that Ford was responsible for disclosing to consumers that their vehicles may be "clean" diesels in certain circumstances, but are "dirty" diesels under common driving conditions. (*Id.*)

Plaintiffs bring their present lawsuit forward against the named Defendants because they believe that they are all responsible for the harms associated with Ford's alleged misrepresentations. While these are Ford's vehicles, Plaintiffs name Bosch GmbH and Bosch LLC as defendants because Plaintiffs allege that they were active and knowing participants in Ford's scheme. **[\*\*12]** (*Id.* at 18-19.) Plaintiffs claim that Bosch GmbH and Bosch LLC developed, manufactured, and tested electronic diesel controls that allowed Ford to implement the defeat devices. (*Id.*)

Plaintiffs bring this action individually, but also on behalf of all other current and former owners or lessees of the vehicles. (*Id.* at 19.) Plaintiffs are seeking damages, injunctive relief, and equitable relief for Defendants' alleged misconduct related to the design, manufacture, marketing, sale, and leasing of the vehicles. (*Id.*)

## II. MOTION TO CONSOLIDATE CASES

### A. Standard of Review

**HN1**  Rule 42(a)(2) provides that a court may consolidate actions involving "a common question of law or fact." *Fed. R. Civ. P. 42(a)(1)*; *Cantrell v. GAF Corp., 999 F.2d 1007, 1011 (6th Cir. 1993)*. The objective of consolidation is to administer the court's business with expedition and economy while providing justice to the parties. *Advey v. Celotex Corp., 962 F.2d 1177, 1181 (6th Cir. 1992)*. Consolidation of separate actions does not merge the independent actions into one suit. *Id. at 1180*. The party seeking consolidation bears the burden of demonstrating

the commonality of law, facts or both in cases sought to be combined. [Young v. Hamric, 2008 U.S. Dist. LEXIS 43634, 2008 WL 2338606 at \\*4 \(E.D. Mich. 2008\)](#). Once the threshold requirement of establishing a common question of law or fact is met, the decision to consolidate rests in the sound discretion of the district court. *Stemler v. Burke*, 344 F.2d 393, 396 (6th Cir. 1965). The court weighs [\*\*13] the interests of judicial economy against the potential for new delays, expense, confusion, or prejudice. [Banacki v. OneWest Bank, FSB, 276 F.R.D. 567, 571 \(E.D. Mich. 2011\)](#). Considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial. *Id. at 572*. Consolidation is not justified or required simply because the actions *include* a common question of fact or law. *Id.* When cases involve *some* common issues but individual issues predominate, consolidation should be denied. *Id.*

**HN2** The trial court must consider whether the specific risks of prejudice and possible confusion are overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on the parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives. [Cantrell, 999 F.2d at 1011](#) (citations omitted). "Care must be taken that consolidation does not result in unavoidable prejudice or unfair advantage." *Id.* Even though conservation of judicial resources is a laudable goal, if the savings to the judicial system are slight, the risk of prejudice to a party must be viewed with even [\*\*14] greater scrutiny. *Id.*

#### **[\*867] B. Whether Plaintiffs Have Sufficiently Demonstrated That They Will be Prejudiced if the Four Actions are Consolidated**

Defendants request that the Ruston, Goodroad, and Badagliacco Actions be consolidated with the Gamboa Action under [Federal Rule of Civil Procedure 42](#). (Doc # 39; Doc # 46) The Court finds that Defendants have demonstrated that it is necessary to consolidate these four actions. First, Defendants have adequately satisfied their requirement of demonstrating that the four actions share common questions of law and fact. In the four actions, the Gamboa, Ruston, Goodroad, and Badagliacco Plaintiffs allege that Ford was dishonest with regard to the claims that were made about its vehicles that are equipped with 6.7-liter Power Stroke diesel engines. All of the plaintiffs similarly contend that because of these alleged misrepresentations, Ford violated RICO and various consumer protection state statutes. All of the plaintiffs argue that they have been harmed by Ford in the same manner, and request the same relief. Commonality of law and facts exist.

The Court has a legitimate interest in judicial economy here that is not outweighed by potential prejudice. In Plaintiffs' Response, their only [\*\*15] substantial argument raised demonstrating prejudice is insufficient. Plaintiffs argue that they would be unfairly prejudiced by consolidation because it would unfairly give Defendants the opportunity to revise their previously submitted motions to dismiss, which they would then in theory offer this Court in response to a consolidated complaint. (Doc # 44, Pg ID 1876-1877) Due to this "unfairness," Plaintiffs request that this Court only consider consolidating these actions after ruling on the Defendants' pending motions to dismiss. (*Id.* at 1877.)

The Court does not consider Defendants' ability to potentially revise their previous motions prejudicial enough to warrant denying Defendants' Motions to Consolidate Cases. If Defendants were to alter their motions to dismiss, Plaintiffs will still be afforded with the chance to adequately respond to any such filings. Plaintiffs have not shown prejudice that would result from the consolidation. For the sake of efficiency, time, and resources, in this instance, it is in the interest of judicial economy to consolidate the four actions.

### **III. MOTION FOR THE APPOINTMENT OF INTERIM CLASS COUNSEL**

#### **A. Standard of Review**

**HN3** [↑] [Federal Rule of Civil Procedure 23\(g\)\(3\)](#) provides that "[t]he court may designate interim [\*\*16] counsel to act on behalf of the putative class before determining whether to certify the action as a class action." [Fed. R. Civ. P. 23\(g\)\(3\)](#). "[D]esignation of interim counsel clarifies responsibility for protecting the interests of the class during precertification activities, such as making and responding to motions, conducting any necessary discovery, moving for class certification, and negotiating settlement." Manual for Complex Litigation (Fourth) § 21.11. Designation of interim counsel is particularly appropriate when a number of lawyers have filed related "copycat" actions. [Tolmasoff v. Gen. Motors, LLC, No. 16-11747, 2016 U.S. Dist. LEXIS 85101, 2016 WL 3548219, at \\*9 \(E.D. Mich. June 30, 2016\)](#).

**HN4** [↑] Courts have determined that the considerations set out in [Rule 23\(g\)\(1\)](#), which govern the appointment of post-certification class counsel, are equally applicable to a decision on whom to designate as interim class counsel. *Id.* (citing [In re Air Cargo Shipping Servs. Antitrust Litig., 240 F.R.D. 56, 57 \(E.D.N.Y. 2006\)](#)). In [\*868] deciding whether to designate Plaintiff's counsel as interim class counsel, courts consider: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources that counsel will commit to representing the class. [Fed. R. Civ. P. 23\(g\)\(1\)\(A\)](#). The Court will also [\*\*17] consider whether Plaintiff's counsel will "fairly and adequately represent the interests of the [putative] class." [Fed. R. Civ. P. 23\(g\)\(4\)](#).

## B. Whether it is Appropriate to Designate Interim Class Counsel

Plaintiffs request that the Court appoint E. Powell Miller ("Miller") of the Miller Law Firm and Steve Berman ("Berman") of the Hagens Berman Law Firm as interim co-lead class counsel, and an interim executive committee consisting of Miller, Berman, Christopher A. Seeger of the Seeger Weiss Law Firm, and James Cecchi of the Carella Byrne Law Firm to assist them in this case. (Doc # 27, Pg ID 1161) Plaintiffs state that appointment of class counsel is appropriate at this time in order to define the roles and responsibilities of the different law firms presently involved with this case and that are representing the individual plaintiffs. (*Id.*) Plaintiffs have sufficiently demonstrated that each aforementioned attorney has spent a significant amount of time and energy identifying and investigating potential claims in the Gamboa Action. (*Id.* at 1162-1163.) In Plaintiffs' Motion, they thoroughly explain in detail that each aforementioned attorney has extensive experience handling class actions and complex litigation, including [\*\*18] automobile defect cases. (*Id.*) Additionally, Plaintiffs believe that having four law firms lead this litigation will ensure that there are sufficient resources available to handle this high stakes action. (Doc # 27, Pg ID 1163)

Defendants' only argument in response to Plaintiffs' Motion is that Plaintiffs' request is premature because "there are only two lawsuits in this Court," and therefore, there is no need to establish interim class counsel nor an interim executive committee. (Doc # 31, Pg ID 1539-1540) This argument fails however because at this point in the case, there are now four similar lawsuits before this Court. Defendants have not demonstrated that there is any reason to deny Plaintiffs' request to appoint both interim class counsel and an interim executive committee to assist with the complexities involved in this case. The Court grants Plaintiffs' Motion.

## IV. DEFENDANTS FORD MOTOR COMPANY AND ROBERT BOSCH LLC'S MOTIONS TO DISMISS<sup>5</sup>

### A. Standard of Review

**HN5** [↑] [Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#) provides for a motion to dismiss for failure to state a claim upon which relief can be granted. [Fed. R. Civ. P. 12\(b\)\(6\)](#). This type of motion tests the legal sufficiency of the

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<sup>5</sup> Ford and Bosch LLC essentially make the same arguments in their Motions to Dismiss (Doc # 28; Doc # 29). In certain sections however, Bosch LLC makes separate arguments, and the Court has addressed those accordingly.

plaintiff's complaint. *Davey v. Tomlinson*, 627 F. Supp. 1458, 1463 (E.D. Mich. 1986). When reviewing a motion to dismiss under Rule 12(b)(6), a [\*\*19] court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv Inc. v. Treesh*, 487 F.3d 471, 476 (\*869) (6th Cir. 2007). A court, however, need not accept as true legal conclusions or unwarranted factual inferences." *Id.* (quoting *Gregory v. Shelby Cnty.*, 220 F.3d 433, 443, 446 (6th Cir. 2000)). "[L]egal conclusions masquerading as factual allegations will not suffice." *Eidson v. Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007).

As the Supreme Court has explained, [HN6](#) "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level... ." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (citations omitted); see *LULAC v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007). To survive dismissal, the plaintiff must offer sufficient factual allegations to make the asserted claim plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 663, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." (*Id.*)

## B. Clean Air Act

Ford alleges that all of Plaintiffs' state law claims are expressly and impliedly preempted by the [Clean Air Act \("CAA"\)](#), 42 U.S.C. § 7543(a).

[HN7](#) "[Preemption] may be either [\*\*20] expressed or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977)). In all preemption cases, and especially where "Congress has 'legislated...in a field in which the States have traditionally occupied,'...[courts] 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)). "Environmental regulation is a field that the states have traditionally occupied." *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 694 (6th Cir. 2015). The same is true of consumer protection and advertising regulations. See *In re Ford Fusion & C-Max Fuel Econ. Litig.*, No. 13-MD-2450 KMK, 2015 U.S. Dist. LEXIS 155383, 2015 WL 7018369, at \*28 (S.D.N.Y. Nov. 12, 2015); *Gilles v. Ford Motor Co.*, 24 F.Supp.3d 1039, 1047 (D. Colo. 2014). Where the statute does not expressly preempt state law, preemption may be implied. The Supreme Court has recognized:

two types of implied preemption: field preemption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict preemption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle [\*\*21] to the accomplishment and execution of the full purposes and objectives of Congress.

[Gade](#), 112 S.Ct. at 2389 (internal citations omitted).

Ford's preemption arguments are premised on [Section 209 of the CAA](#). That section, codified at [42 U.S.C. § 7543](#), reads as follows:

[\*870] No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

[42 U.S.C. § 7543\(a\).](#)

[Section 7543](#) also specifies, that "[n]othing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles." *Id.* at [§ 7543\(d\)](#).

## 1. Express Preemption

Ford alleges that [Section 209 of the CAA](#) expressly preempts Plaintiffs' state law claims. According to Ford, since the Supreme Court recently decided that there is no longer a presumption against preemption, this Court is required to evaluate [\[\\*\\*22\]](#) Plaintiffs' claims based on the plain language of the CAA. See [Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938, 1946, 195 L. Ed. 2d 298 \(2016\)](#) (explaining that any claim of preemption must be grounded in statutory language). The CAA explicitly preempts "any standard relating to the control of emissions." [42 U.S.C. § 7543\(a\)](#). Ford argues that Plaintiffs' state law claims fall under this CAA provision because they are filled with conclusions pertaining to Ford's vehicles' emission levels. Ford acknowledges that courts have held that plaintiffs' claims are not preempted by the CAA if plaintiffs do not attempt to enforce a numerical standard. See, e.g., [In re Duramax Diesel Litig., 298 F. Supp. 3d 1037, 1058-59 \(E.D. Mich. 2018\)](#) ("Duramax"). However, Ford argues that these rulings are not supported by the CAA's text, and even if they are, Plaintiffs are attempting to enforce a standard "based purely on numeric comparisons between Plaintiffs' own emissions measurements and federal standards."

In response, Plaintiffs argue that the Supreme Court's ruling in *Franklin California Tax-Free* confirms that their state law claims are valid according to the CAA's plain language. Plaintiffs claim that they are not seeking to enforce any numerical emissions levels, and state that their fraud-on-the-consumer claims only seek to redress Ford's deception. Plaintiffs explain [\[\\*\\*23\]](#) that the Supreme Court construes the term "standard" narrowly, and only refers to "requirements such as numerical emissions levels with which vehicles or engines must comply...or emission-control technology with which they must be equipped." [Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 253, 124 S. Ct. 1756, 158 L. Ed. 2d 529 \(2004\)](#).

Courts in this district have recently ruled on claims that are similar to the Plaintiffs'. In [Counts v. General Motors, LLC, 237 F. Supp. 3d 572 \(E.D. Mich. 2017\)](#) ("Counts I") and *Duramax*, courts held that [HN8](#) the CAA does not preempt state-law consumer fraud claims because they do not seek to set or enforce any emissions standards or obligations. [Counts I, 237 F. Supp. 3d at 591](#) ("Plaintiffs' claims...focus on the deceit about compliance, rather than the need to enforce compliance") (internal quotation marks and citation omitted); [Duramax, 298 F. Supp. 3d at 1062](#) ("The gravamen of [plaintiffs'] state law claims is that they purchased a vehicle which polluted at levels far greater than a reasonable consumer would expect."). [\[\\*871\]](#) While this Court is not bound by the rulings from [Counts I](#) and [Duramax](#), it does find those holdings to be persuasive. Ford has not attempted to distinguish [Counts I](#) and [Duramax](#) from this present case. Instead, Ford argues that both the [Counts I](#) and [Duramax](#) courts reached decisions that were inconsistent with the CAA. The Court agrees that Plaintiffs' state [\[\\*\\*24\]](#) law claims pertain to Ford's alleged fraudulent claims and not emissions standards.

Ford also argues that Plaintiffs' state law claims should be dismissed because they are premised on the fact that Ford's vehicles allegedly contain illegal "defeat devices." In Ford's Motion, it mentions that in [Counts I](#), the Court held that when plaintiffs sue defendants for manufacturing a vehicle that emits an excessive amount of NOx or particulate emissions in violation of EPA regulations, or claim that vehicles are not equipped with properly functioning and federally required emission-control technology, their claims are preempted by the CAA. Ford goes on to recognize that in [Counts I](#) and [Duramax](#), the Court found that plaintiffs' claims were not preempted because they did not attempt to define the term "defeat device" using the EPA definition, and therefore, they did not technically allege the existence of a defeat device. Ford argues that those holdings do not apply in the present case. Ford claims that Plaintiffs defined "defeat device" using the exact wording of federal law, and do not make generalized claims like plaintiffs did in [Counts I](#) and [Duramax](#). Ford further claims that Plaintiffs "cannot [\[\\*\\*25\]](#)

simultaneously base their claims on these federal predicates, and then disclaim them in favor of some theoretical parallel state standard in an attempt to evade preemption."

Plaintiffs argue that their claims do not require proof that Ford used a "defeat device" as defined by federal law, and state that they are not seeking to replace existing EPA certification tests. Plaintiffs contend that their claims are analogous to the plaintiffs' claims from *Counts I* and *Duramax* because they are similarly using the term "defeat device" as "shorthand to describe Ford's bait and switch by touting its intentionally defective technology." Furthermore, Plaintiffs have stated that in order to prove their fraud claims, they are not required to demonstrate directly or indirectly that Ford committed fraud on the EPA by using a defeat device. Plaintiffs believe that they can alternatively prove their fraud claims by reference to what a reasonable consumer would have expected of the "clean" vehicles without proof of Ford's regulatory noncompliance.

The Court agrees that Plaintiffs' claims are not contingent on their ability to prove that Ford used defeat devices in its vehicles. Although Ford correctly asserts [\*\*26] that this present case is dissimilar from *Counts I* and *Duramax* because Plaintiffs define "defeat device" using the exact statutory language that Congress has used in its definition,<sup>6</sup> Ford fails to point out that even if Plaintiffs were no longer able to refer to Ford's alleged use of defeat devices, Plaintiffs could still succeed with their fraud claims. The true issue with regard to Plaintiffs' fraud claims is whether or not Ford materially deceived (under the various state laws) its consumers. The Court finds that Plaintiffs have sufficiently stated a claim for fraud, under state laws, without relying on Ford's alleged use of defeat devices.

## 2. Implied Preemption

In addition to express preemption, Ford claims that Plaintiffs' state law claims are impliedly preempted. As explained previously, [HN9](#) [↑] there are two types of [\*872] implied preemption. The first, field preemption, occurs where federal regulations are so expansive that Congress has left no room for supplemental state regulation. Defendants do not advance a field preemption argument. Field preemption is inapplicable in this case because [HN10](#) [↑] the CAA includes a "savings clause" wherein Congress expressly confirms that states retain [\*\*27] the ability to regulate "the use, operation, or movement" of motor vehicles. [§ 7543\(d\)](#). See also [Geier v. Am. Honda Motor Co., 529 U.S. 861, 868, 120 S. Ct. 1913, 146 L. Ed. 2d 914 \(2000\)](#).

[HN11](#) [↑] The second kind of implied preemption that courts have recognized is conflict preemption. [Gade, 505 U.S. at 98](#). There are two types of conflict preemption. First, conflict preemption exists when compliance with both federal and state requirements is physically impossible. *Id.* Ford does not advance that argument. Second, conflict preemption exists when state law would operate as an obstacle to "the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (internal citations omitted). Ford argues that Plaintiffs' claims represent an obstacle to Congress's purpose and objectives in enacting the CAA. Specifically, Ford argues that if this Court grants Plaintiffs relief pursuant to its state law claims, "[t]his would lead to confusion for consumers, place manufacturers in impossible positions, and undermine the federal scheme and plan for consistent information and testing relating to emissions for new automobiles."

Ford's argument fails because it incorrectly addresses Plaintiffs' state law claims. [HN12](#) [↑] The Court in *Duramax* said that in order for a car company to argue that claims arising from state [\*\*28] consumer protection statutes are impliedly preempted by the CAA, a defendant would have to prove that Congress intended for the CAA to regulate the scope of a vehicle manufacturer's disclosure obligations to consumers. [Duramax, 298 F. Supp. 3d at 1064](#). Ford has not provided this Court with any legal authority to support that position. Plaintiffs' state law claims are not impliedly preempted by the CAA.

## C. Rule 9(b)

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<sup>6</sup> Compare Doc # 1, Pg ID 11, 114, 121-122 with [40 C.F.R. § 86.1803-01](#).

Ford argues in its Motion that Plaintiffs' state law claims do not comply with [Rule 9\(b\)](#) because they do not adequately plead an actionable misrepresentation or omission.

**HN13** [↑] Under [Federal Rule of Civil Procedure 9\(b\)](#), "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." [Fed. R. Civ. P. 9\(b\)](#). The purpose of [Rule 9\(b\)](#) is to put defendants on notice of the nature of the claim. See [Williams v. Duke Energy Int'l, Inc., 681 F.3d 788, 803 \(6th Cir. 2012\)](#) ("[I]t is a principle of basic fairness that a plaintiff should have an opportunity to flesh out her claim through evidence unturned in discovery. [Rule 9\(b\)](#) does not require omniscience; rather the Rule requires that the circumstances of the fraud be pled with enough specificity to put defendants on notice as to the nature of the claim." (internal citations omitted)). [\*\*29] "Although [Rule 9\(b\)](#) heightens the pleading standard, it always must be read 'against the backdrop' of [Fed. R. Civ. P. 8](#), which aims simply to put a defendant on notice of the claims against him so that he may reasonably respond [to] the allegations in the complaint." [State Farm Mut. Auto. Ins. Co. v. Pointe Physical Therapy, LLC, 107 F. Supp. 3d 772, 788 \(E.D. Mich. 2015\)](#).

**HN14** [↑] The specificity required for allegations of affirmative misrepresentations is necessarily different than the specificity [\*873] required for allegations of fraudulent omissions. [Duramax, 298 F. Supp. 3d at 1055](#). "When it comes to claims of fraud by omission or fraudulent concealment, the plaintiff faces a slightly more relaxed pleading burden; the claim 'can succeed without the same level of specificity required by a normal fraud claim.'" [Beck v. FCA US LLC, 273 F.Supp.3d 735, 751 \(E.D. Mich. 2017\)](#) (quoting [Baggett v. Hewlett-Packard Co., 582 F.Supp.2d 1261, 1267 \(C.D. Cal. 2007\)](#)). There is a disparate burden between the two types of fraud because fraudulent acts occur at a specific time, but fraudulent omissions occur over a period of time. [Duramax, 298 F. Supp. 3d at 1055](#). While fraudulent acts can be specifically described, fraudulent omissions are, by very definition, more amorphous. *Id.*

**HN15** [↑] Even in the context of a fraudulent omission claim, [Rule 9\(b\)](#) requires a plaintiff to set forth the "who, what, when, where, and how" of the alleged omission. [Republic Bank & Tr. Co. v. Bear Stearns & Co., 683 F.3d 239, 256 \(6th Cir. 2012\)](#). Plaintiffs must set forth: (1) precisely what was omitted; (2) who should have made a representation; [\*\*30] (3) the content of the alleged omission and the manner in which the omission was misleading; and (4) what [defendant] obtained as a consequence of the alleged fraud. [Republic Bank & Tr. Co. v. Bear Stearns & Co., 683 F.3d 239, 256 \(6th Cir. 2012\)](#).

## 1. Whether Plaintiffs Adequately Comply with [Rule 9\(b\)](#)

Ford claims that Plaintiffs are in violation of [Federal Rule of Civil Procedure 9\(b\)](#) because no Plaintiff states with any specificity what deceptive statements they were exposed to before purchasing their vehicles. Ford further argues that it did not deceive Plaintiffs, and distinguished their claims from the claims made by the plaintiffs in *Counts I* and *Duramax*. Specifically, Ford contends that in *Counts I* and *Duramax*, General Motors was responsible for a "pervasive advertising campaign" that focused on the concept of "clean diesel" or "green" "environmentally friendly trucks." According to Ford, it only made the following claims in its advertisements:

- The 29-page 2011 brochure (Doc # 1, Ex. 6) twice refers to the "cleanest Super Duty diesel ever" — a comparative statement relative to Super Duty engines — but none of the individual Plaintiffs claim to have purchased a 2011 model year vehicle. And when discussing emissions, it measures Ford's compliance *strictly against government standards*.
- The 28-page 2012 [\*\*31] brochure (*Id.* at Ex. 7.) refers to the subject vehicles as the "cleanest Super Duty diesel ever" on only one occasion, and again measures compliance *strictly against government standards*. The only individual Plaintiff who claims to have purchased a 2012 vehicle bought it used in 2015, and does not allege that he ever saw this brochure (much less this specific statement in this brochure) prior to his purchase.

- The 30-page 2013 brochure (*Id.* at Ex. 8.) refers to the subject vehicles as the "cleanest Super Duty diesel ever" on one occasion and again measures compliance *strictly against government standards*. No individual Plaintiff claims to have purchased a 2013 model year vehicle.
- The 24-page 2014 brochure (*Id.* at Ex. 9.) does not make any reference to the Super Duty as a "clean diesel" or "low emission" vehicle. One individual Plaintiff claims to have purchased a new 2014 Super Duty vehicle. (*Id.*)
- [\*874]** • The 25-page 2015 brochure (*Id.*) does not refer to the Super Duty as being a "clean diesel" or "low emission" vehicle. It merely mentions that the vehicle's new "high pressure fuel injectors achieve a more efficient, cleaner burn."
- The 25-page 2016 brochure (*Id.* at Ex. 11.) does not refer **[\*\*32]** to the Super Duty as a "clean diesel" or "low emission" vehicle. It merely mentions that the vehicle's "best-in class" diesel fuel economy is "maintained with the help of high-pressure fuel injectors that achieve a clean, efficient burn."
- The 31-page 2017 brochure (*Id.* at Ex. 12.) does not make any reference to the Super Duty as being a "clean diesel" or "low emission" vehicle. No individual Plaintiff claims to have purchased a 2017 model year vehicle.

(Doc # 28, Pg ID 1455-1457) Ford argues that the term "cleanest Super Duty diesel ever," which the Plaintiffs state in their Complaint, was only used sparingly between 2011 and 2013. Ford further argues that no plaintiff alleges that they viewed any of the aforementioned product brochures, or relied upon any advertisements before buying their vehicles.

Plaintiffs argue that they satisfied [Rule 9\(b\)](#)'s standard that applies when plaintiffs' claims are based on fraudulent omissions because they identified the "who, what, when, where, and how" of Ford's alleged omissions and misstatements. Plaintiffs claim that in their Complaint, they stated that:

the "who" is defendants; the "what" is the identified Ford Super-Duty Truck models and the representations **[\*\*33]** and omissions knowingly made by Ford; the "when" is prior to the sale or lease of the Affected Vehicles (including during the production years of the Affected Vehicles and during plaintiffs' selection of their vehicles); the "where" is the various means through which defendants promoted the Affected Vehicles as identified in the Complaint, including through the dealerships where plaintiffs bought or leased their vehicles; the "how" is misrepresentations and omissions resulting in premium payments that would not have otherwise been made; and the "why" is "engine power" and "increased profits."

(Doc # 35, Pg ID 1725-1726) Plaintiffs contend that they are not obligated to address their claims based on Ford's fraudulent omissions with any additional specificity, and claim that Ford has not identified any of their state law claims that require a heightened standard that they are required to abide by. Plaintiffs also rebut Ford's reliance argument by arguing that reliance is not an element for many of their state law claims, where, as here, the omission or misrepresentation is a material part of an extensive campaign. Plaintiffs claim that they sufficiently demonstrated that they bought Ford's **[\*\*34]** vehicles on the reasonable but mistaken belief, due to Ford's omission and concealment of material facts, that each vehicle "was a 'clean diesel' and/or a 'low emission diesel,' complied with U.S. emissions standards, was EPA-certified, and would retain all of its promised fuel economy and performance throughout its useful life."

Plaintiffs' state law claims have satisfied [Federal Rule of Civil Procedure 9\(b\)](#). Plaintiffs have stated: (1) precisely what was omitted—material facts regarding the vehicles' engines; (2) who should have made a representation—Ford; (3) the content of the alleged omission and the manner in which the omission was misleading—the content being that the vehicles had clean diesel engines and low emissions diesel engines, and the manner being that **[\*875]** those claims were false; and (4) what [defendant] obtained as a consequence of the alleged fraud—increased profits. Plaintiffs have sufficiently stated valid fraudulent omissions claims under [Rule 9\(b\)](#).

## 2. Whether Plaintiffs State Actionable Misrepresentations or Omissions

### a. Misrepresentations

Ford argues that affirmative misrepresentation claims fail when they are based on non-actionable puffery upon which no reasonable person would have relied. Ford claims that the [\*\*35] statements it made regarding its vehicles could not have caused individuals to rely on those types of comments, and cannot form the basis of a fraud action. Ford also argues that Plaintiffs did not state in their Complaint what affirmative misrepresentations state the basis of their claims.

Ford is correct in asserting that Plaintiffs' misrepresentations are nonactionable puffery. Courts in the Sixth Circuit have explained that [HN16](#)<sup>7</sup> statements of cleanliness convey "inherently subjective" concepts and constitute non-actionable opinions. [\*Seaton v. TripAdvisor LLC, 728 F.3d 592, 598 \(6th Cir. 2013\)\*](#). Additionally, promises of efficiency and reliability "cannot form the basis for a fraud claim." [\*Ram Int'l Inc. v. ADT Sec. Servs., Inc., No. 11-10259, 2011 U.S. Dist. LEXIS 127263, 2011 WL 5244936, at \\*6 \(E.D. Mich. Nov. 3, 2011\)\*](#), aff'd, [\*555 Fed.Appx. 493 \(6th Cir. 2014\)\*](#). Courts are much more likely to find representations actionable when assertions make specific representations, especially numerically quantifiable representations. [\*Counts I, 237 F. Supp. 3d at 597\*](#). However, representations that merely contain numbers are not necessarily enough to qualify as actionable statements under a fraud theory. *Id.* Factors that generally demonstrate that a numerical claim is actionable include: (1) if an advertisement expressly states that the product was tested by the advertising company; and (2) if the advertisement compares the product to a specific competitor [\*\*36] by name.<sup>7</sup> *Id.* (citing [\*Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1145 \(9th Cir. 1997\)\*](#)).

Here, the only advertisement that Plaintiffs allege contain anything related to a specific, numerically quantifiable statement is found in paragraph 96 of the Complaint. That advertisement states that "[Ford's] cleanest super duty diesel ever reduces nitrogen oxide (NOx) levels by more than 80% compared to last year." (Doc # 1, Pg ID 65) As the *Counts I* court stated, this type of a claim regarding emissions, while a statistic, is not quantifiable by itself. [\*Counts I, 237 F. Supp. 3d at 597\*](#) (holding that an advertisement that stated that an engine generated at least 90% less NOx was non-actionable). Further, Ford does not specifically assert in its advertisement that this claim was based on testing, and does not compare their vehicles' engines to any identifiable competitor's product. Since all of the other representations made by Ford are non-actionable, all of Ford's alleged *affirmative misrepresentations* amount to non-actionable puffery.

### b. Omissions

Ford argues that Plaintiffs' claims based on fraudulent omissions should be dismissed because Plaintiffs have not proven that Ford had a duty to disclose any alleged omitted information that was material. Ford alludes to the fact that the information [\*\*37] that it allegedly omitted was not material because a reasonable consumer would not have behaved differently had the omitted information been disclosed. Additionally, Ford argues that even if it did withhold material information from [\*876] consumers, this material information only relates to EPA regulations, and would be preempted. In *Duramax*, the Court rejected an argument similar to Ford's, but Ford attempts to distinguish *Duramax* from this case. Ford argues that in *Duramax*, GM's advertisements did not expressly reference EPA regulations, but here, Ford explicitly references regulatory requirements in connection with its cars' emissions. Further, Ford states that even if Ford's misrepresentations and omissions were material, Plaintiffs cannot demonstrate that Ford had exclusive knowledge of these facts.

Plaintiffs argue in response that their allegations are not limited to statements concerning federal regulations. Plaintiffs also claim that if Ford had disclosed any relevant information to consumers regarding the presence of defeat devices or unlawful emissions levels to authorized Ford dealerships or to the media, that information would have been passed on to consumers, and Plaintiffs [\*\*38] would have behaved differently. Plaintiffs also argue that Ford's lack of exclusive knowledge argument is without merit because even if it were properly raised, which

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<sup>7</sup> This does not apply in actions involving the [\*Lanham Act\*](#).

Plaintiffs do not believe is the case, Ford did have "exclusive knowledge" of the defeat devices due to their status as the manufacturer of the vehicles involved in this case.

The Court agrees that based on the court's decision in [Counts v. Gen. Motors, LLC, No. 16-CV-12541, 2017 U.S. Dist. LEXIS 60031, 2017 WL 1406938, at \\*4 \(E.D. Mich. Apr. 20, 2017\)](#) ("Counts II"), Ford had a duty to disclose information about the defeat devices that were installed in their vehicles because the omissions were material and not necessarily connected to EPA regulations. In *Counts II*, GM argued that because the plaintiffs' fraudulent concealment claims were premised on GM secretly using defeat devices in its vehicles, plaintiffs could not succeed with those claims because they were inextricably tied to EPA regulations, and so, even if they were material, they would be preempted by federal law. [Counts II, 2017 U.S. Dist. LEXIS 60031, 2017 WL 1406938, at \\*3-4](#). The *Counts II* court ruled that although it would be relevant to the plaintiffs' claims to prove that the vehicles they bought contained defeat devices as defined by federal law, they could prevail without demonstrating that GM did not comply with EPA regulations because [\*\*39] they were attempting to hold GM liable for concealing material facts, specifically the non-functionality of certain technology within the vehicles. [2017 U.S. Dist. LEXIS 60031, \[WL\] at 4](#) The *Counts II* court explained that if GM's argument was to be accepted, "consumers would be unable to hold vehicle manufacturers liable for any intentionally defective technology, if the technology also impacted or concealed the vehicle's emissions levels." *Id.*

Our case is analogous to *Counts II*. Throughout Plaintiffs' Complaint, several Plaintiffs mention that if Ford did not omit information regarding its vehicles' fuel economy, performance, and emissions, they would either not have purchased their vehicles or paid less money for them. Since Ford's alleged fraudulent omissions are material (because these plaintiffs would have behaved differently) and not all connected to EPA regulations (and therefore not preempted by federal law), Ford's argument with regard to materiality fails at this time. Furthermore, Ford's argument pertaining to it lacking exclusive knowledge of defeat devices also fails. Ford was the company responsible for manufacturing its vehicles, and it would be difficult to argue that it was unaware of any defeat devices [\*\*40] in their automobiles. See [Counts I, 237 F. Supp. 3d at 600](#) (ruling that it would be impossible for GM to be unaware about defeat devices in its vehicles because they were in a "superior position to know" about their existence).

## [\*877] D. RICO

[HN17](#) [+] RICO establishes bases for both criminal and civil suits. A RICO civil suit may be brought by "[a]ny person injured in his business or property by reason of a violation of [section 1962](#) of this chapter." [18 U.S.C. § 1964\(c\)](#). [Section 1962](#) provides that: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." *Id.* at [§ 1962\(c\)](#). In other words, a party advancing a civil RICO claim must establish their right to sue and then further allege the following elements: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." [Heinrich v. Waiting Angels Adoption Servs., Inc., 668 F.3d 393, 404 \(6th Cir. 2012\)](#) (quoting [Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 105 S.Ct. 3275, 87 L.Ed.2d 346 \(1985\)](#)).

### 1. Standing

[HN18](#) [+] Plaintiffs may assert a RICO claim only if they can identify an injury to their "business or property by reason of a violation of [section 1962](#)." [18 U.S.C. § 1964\(c\)](#). In so limiting the scope of RICO standing, Congress exhibited an intention [\*\*41] to exclude "personal injury—that is, an injury 'to a person, such as a broken bone, a cut, or a bruise' or a 'bodily injury.'" [Jackson v. Sedgwick Claims Mgmt. Servs., Inc., 731 F.3d 556, 564 \(6th Cir. 2013\)](#) (quoting *Black's Law Dictionary* 857 (9th ed. 2009)). Similarly, a RICO injury must be concrete, not intangible or speculative. See [Saro v. Brown, 11 Fed.Appx. 387, 389 \(6th Cir. 2001\)](#). See also [Fleischhauer v. Feltner, 879 F.2d 1290, 1299 \(6th Cir. 1989\)](#) (explaining that RICO plaintiffs must identify a "reasonable and principled basis of recovery" which is "not based upon mere speculation and surmise"); [Short v. Janssen Pharm., Inc., No. 1:14-CV-](#)

[1025, 2015 U.S. Dist. LEXIS 61123, 2015 WL 2201713, at \\*3 \(W.D. Mich. May 11, 2015\)](#) ("Short must, at a minimum, show some direct, pecuniary injury to his own pocket that is unrelated to the claimed personal injury.").

**HN19** [↑] In *Reiter v. Sonotone Corp.*, the Supreme Court interpreted [§ 4 of the Clayton Act](#), which authorizes "[a]ny person who shall be injured in his business or property" by reason of an [antitrust law](#) violation to bring suit. [442 U.S. 330, 337, 99 S. Ct. 2326, 60 L. Ed. 2d 931 \(1979\)](#). The Supreme Court held that "where petitioner alleges a wrongful deprivation of her money because the price of the hearing aid she bought was artificially inflated by reason of respondents' anticompetitive conduct, she has alleged an injury in her 'property' under [§ 4](#)." *Id. at 342*. That holding did not involve the RICO statute, but the Sixth Circuit has held that "*Reiter's* commonsense observation [\*\*42] about [§ 4](#) applies with equal logical force to [§ 1964\(c\)](#)." [Jackson, 731 F.3d at 564](#).

Ford argues that Plaintiffs lack the standing necessary to bring a RICO action against it because Plaintiffs do not prove that they were "injured in [their] business or property by reason of a violation of [18 U.S.C. § 1964\(c\)](#)." Ford argues that Plaintiffs' injuries are speculative. Ford claims that Plaintiffs' RICO claim should be dismissed in its entirety because their "premium price" theory fails. According to Ford, under RICO, it is not enough for Plaintiffs to allege in a conclusory manner that they have cognizable injuries due to paying a "premium price" of approximately \$8,400 for their vehicles based on false promises of "power, performance, fuel economy, and environment friendliness." Ford contends that Plaintiffs have not articulated how, in a quantifiable manner, [\*878] they did not get the benefit of their bargain.

Plaintiffs respond by stating that they do not lack standing because their claim is in fact cognizable under RICO. Plaintiffs argue that their cognizable injury derives from the fact that they overpaid for their vehicles considering that their vehicles were not sold to them as promised. (Doc # 34, Pg ID 1652-1658) Plaintiffs argue that this [\*\*43] court should reach the same conclusion that the Court did in [In re Chrysler-Dodge-Jeep EcoDiesel Litig., 295 F. Supp. 3d 927 \(N.D. Cal. 2018\)](#) ("EcoDiesel") with regard to the plausibility of their overpayment injury argument. Plaintiffs assert that in *EcoDiesel*, the Court held that the plaintiffs were allowed to use overpayment as a cognizable RICO injury while claiming that their vehicles "could not achieve the advertised towing power, performance, and/or fuel economy without cheating emissions tests." [EcoDiesel, 295 F. Supp. 3d at 946](#).

**HN20** [↑] Courts have held that there is a distinction between damages theories where the (ascertainable and reasonably quantifiable) overpayment occurred at the time of injury and speculative damages theories which are contingent on some future event, lost profit, or unanticipated future expense. [Duramax, 298 F. Supp. 3d at 1070-71](#). Therefore, a RICO plaintiff may recover for money invested on the basis of misrepresentations, but not for loss of the profits, which the plaintiffs expected to receive from that investment. See *Fleischhauer*, 879 F.2d at 1300. Likewise, a RICO plaintiff may recover for overpayment when they buy a used car after being told it was new, see [Bailey v. Atl. Auto. Corp., 992 F. Supp. 2d 560, 579 \(D. Md. 2014\)](#), but may not recover for overpayment simply because the tires they purchased may be defective, see [In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 155 F. Supp. 2d at 1095 \(S.D. Ind. 2001\)](#), rev'd on other grounds [In re Bridgestone/Firestone, Inc., 288 F.3d 1012 \(7th Cir. 2002\)](#). A RICO plaintiff may recover money paid pursuant [\*\*44] to insurance policies that plaintiffs chose because "the defendants falsely represented that the potential investors could completely avoid payment of any future federal income taxes," see [Hofstetter v. Fletcher, 905 F.2d 897, 1988 WL 107371, at \\*6 \(6th Cir. 1988\)](#), but cannot recover for loans granted to debtors based upon misrepresentations by the debtors because the plaintiffs would suffer damages only if the debtors defaulted (and because the amount of damages was speculative until the creditor's bargained for remedies were exhausted), see [First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 768 \(2d Cir. 1994\)](#).

Here, Plaintiffs allege that they overpaid for their vehicles based on Ford's alleged omissions. Plaintiffs claim that if not for learning of Ford's misrepresentations, without knowing what information was omitted (that pollutants were only reduced during testing), they would not have purchased Ford's automobiles. Under [Duramax](#), Plaintiffs' claims are premised on overpayment that occurred at the time of their injuries and are not speculative. Plaintiffs have adequately alleged that they have cognizable injuries, and therefore standing.

## 2. **Prima Facie Elements of a RICO Violation**

As indicated above, plaintiffs alleging that RICO has been violated are required to plead the essential elements of a violation, including: "(1) **[\*\*45]** conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." [Heinrich, 668 F.3d at 404 \(6th Cir. 2012\)](#) (citations omitted). Ford asserts that Plaintiffs have not met two of these essential elements: (1) the existence **[\*879]** of an enterprise; and (2) the required predicate acts.

### a. RICO "Enterprise"

Ford alleges that Plaintiffs are not considered a legal racketeering "enterprise" under RICO. Ford argues that Plaintiffs only offer conclusory allegations suggesting that Ford and Bosch GmbH and Bosch LLC ("Bosch Defendants") constituted an enterprise. Ford claims that RICO does not apply to acts of separate businesses in pursuit of their ordinary business activities, even if those activities cross the line into predicate acts under the statute. Ford further argues that because Ford and Bosch Defendants came together for legitimate purposes (engaging in a manufacturer-supplier relationship), in the ordinary course of business, no RICO enterprise existed as a matter of law. Plaintiffs argue that Ford cannot escape liability for its fraudulent activity solely by claiming that it engaged in a legitimate activity. Plaintiffs assert that even if any legitimate activity excuse were plausible, the purpose of an alleged enterprise's **[\*\*46]** activity is a question for the jury, and not a question to be resolved at this stage. Plaintiffs assert that Ford's arguments are only based on non-binding and distinguishable precedent.

**HN21** [+] In order to state a RICO claim, plaintiffs must plausibly allege the existence of an enterprise engaged in a pattern of racketeering activity. [18 U.S.C. § 1962\(c\)](#). But, the definition of "enterprise" for RICO purposes is exceedingly "broad." [Boyle v. United States, 556 U.S. 938, 944, 129 S. Ct. 2237, 173 L. Ed. 2d 1265 \(2009\)](#). The statute defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." [18 U.S.C. § 1961\(4\)](#). "On its face, the definition appears to include both legitimate and illegitimate enterprises within its scope; it no more excludes criminal enterprises than it does legitimate ones." [United States v. Turkette, 452 U.S. 576, 580-81, 101 S. Ct. 2524, 69 L. Ed. 2d 246 \(1981\)](#). A RICO association-in-fact "must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." [Boyle, 556 U.S. at 946](#).

Case law demonstrates that it is irrelevant whether or not Ford and Bosch Defendants engaged in legitimate activity. A review of Plaintiffs' Complaint shows that all three **[\*\*47]** of the structural features required for a RICO association-in-fact have been alleged: (1) the purpose of the relationship between Ford and Bosch Defendants was to engage in business to manufacture vehicles; (2) the relationship between the parties has been well-documented; and (3) the parties have been in business together for at least ten years. (Doc # 1, Pg ID 34) Plaintiffs have sufficiently alleged a racketeering "enterprise" between Ford and Bosch Defendants for purposes of Plaintiffs' RICO claim.

### b. Mail and Wire Fraud

Ford argues that this Court should dismiss Plaintiffs' RICO claim for failure to sufficiently plead predicate acts of mail or wire fraud for three reasons. First, Ford claims that Plaintiffs' claim is predicated on a preempted fraud-on-the-regulators theory. According to Ford, because Plaintiffs allege that Ford and Bosch Defendants formed an enterprise for the express purpose of fraudulently obtaining certificates of conformity ("COC") from the EPA in order to sell vehicles, this constitutes an attempt to privately enforce the CAA, and is preempted and within **[\*880]** exclusive province of the EPA. Second, Ford asserts that Plaintiffs' claim that are predicated on advertisements **[\*\*48]** to consumers is non-actionable because: "(i) Plaintiffs have failed to identify with any specificity which statements are at issue; (ii) the few supposed misrepresentations they do identify are puffery; and (iii) Plaintiffs have failed to allege that the alleged affirmative misrepresentations and or omissions were material."

Finally, Ford claims that Plaintiffs have not alleged multiple instances of mail and wire fraud that are plead with factual specificity as mandated by [Rule 9\(b\)](#).

Plaintiffs respond by arguing that Ford's assertions regarding their failure to plead predicate acts of mail or wire fraud are unfounded. First, Plaintiffs state that their RICO claim is not predicated on a preempted fraud-on-the-regulators theory because plaintiffs allege they were defrauded. Plaintiffs argue that even though they allege that Ford intended to deceive regulators and made fraudulent mail and wire communications to regulators, neither of those allegations are essential to their RICO claim. Plaintiffs said that those allegations are merely collateral matters. Second, Plaintiffs argue that they do offer their allegations about Ford's concealment with specificity in their Complaint. Plaintiffs specifically [\[\\*\\*49\]](#) point to paragraphs 92 through 110 of their Complaint to find specific allegations. For those reasons, Plaintiffs contend that their allegations are sufficient under [Rule 9\(b\)](#).

**HN22** [↑] To state a claim based on mail or wire fraud, the Plaintiffs must allege the following three elements: "(1) devising or intending to devise a scheme to defraud (or to perform specified fraudulent acts); (2) involving a use of the mails; and (3) for the purpose of executing the scheme or attempting to do so." [United States v. Kennedy, 714 F.3d 951, 958 \(6th Cir. 2013\)](#) (quoting [United States v. Frost, 125 F.3d 346, 354 \(6th Cir. 1997\)](#)). Plaintiffs must allege that Defendants possessed the "specific intent to deceive or defraud." [Frost, 125 F.3d at 354](#). The "scheme to defraud must involve 'misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension.'" [Bender v. Southland Corp., 749 F.2d 1205, 1216 \(6th Cir. 1984\)](#) (quoting [United States v. Van Dyke, 605 F.2d 220, 225 \(6th Cir. 1979\)](#)). Plaintiffs need not show "actual reliance," but must demonstrate that the misrepresentations or omissions were "material." [United States v. Daniel, 329 F.3d 480, 487 \(6th Cir. 2003\)](#). Specific intent to defraud or deceive exists if "the defendant by material misrepresentations intends the victim to accept a substantial risk that otherwise would not have been taken." [Id. at 488](#).

**HN23** [↑] Importantly, "[a] defendant may commit mail fraud even if he personally has not used the mails." [Frost, 125 F.3d at 354](#) (citing [United States v. Griffith, 17 F.3d 865, 874 \(6th Cir. 1994\)](#)). "A mail fraud conviction requires [\[\\*\\*50\]](#) only a showing that the defendant acted with knowledge that use of the mails would follow in the ordinary course of business, or that a reasonable person would have foreseen use of the mails." [Id.](#) In other words, there is no requirement that the defendant have actually intended that the mails (or wire) be used. [Id.](#) And, further, "[t]he mailings may be innocent or even legally necessary." [Id.](#) (quoting [United States v. Oldfield, 859 F.2d 392, 400 \(6th Cir. 1988\)](#)). The use of the mails "need only be closely related to the scheme and reasonably foreseeable as a result of the defendant's actions." [Id.](#) (quoting [Oldfield, 859 F.2d at 400](#)).

**HN24** [↑] "When pleading predicate acts of mail or wire fraud, in order to satisfy the heightened pleading requirements of [Rule 9\(b\)](#), [\[\\*881\]](#) a plaintiff must '(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.'" [Heinrich, 668 F.3d at 404](#) (quoting [Frank v. Dana Corp., 547 F.3d 564, 570 \(6th Cir. 2008\)](#)).

This Court finds that based on a review of Plaintiffs' Complaint, they have sufficiently stated allegations of mail or wire fraud in relation to their RICO claim. First, Plaintiffs have alleged that Ford intended to defraud Plaintiffs based on its undoubted knowledge of its vehicles' defeat devices. [\[\\*\\*51\]](#) Second, Plaintiffs allege that Ford defrauded Plaintiffs by omitting facts through U.S. mail and online. (Doc # 1, Pg ID 164-167) Third, Plaintiffs allege that Ford has engaged in a scheme due to engaging in a course of action to deprive Plaintiffs of their money. See [United States v. Daniel, 329 F.3d 480, 485 \(6th Cir. 2003\)](#) (explaining that a scheme to defraud "includes any plan or course of action by which someone intends to deprive another by...deception of money or property by means of false or fraudulent pretenses, representations, or promises."). According to the relevant standards, Plaintiffs properly alleged the existence of mail or wire fraud.

#### c. Bosch LLC's Duty to Disclose

Bosch LLC argues that in order for Plaintiffs to succeed on a theory of fraud by omission, Plaintiffs must allege that Bosch LLC had an independent duty to disclose information to them. Bosch LLC cites to cases where courts have determined that omissions intended to create fraudulent representations can only constitute a violation of a mail fraud if the defendant had a duty to disclose material information. According to Bosch LLC, Plaintiffs have not alleged any facts that would support that Bosch LLC owed them a duty to disclose.

Plaintiffs argue that they are [\*\*52] not required to allege that Bosch LLC had an independent duty to disclose information to them. Plaintiffs assert that they alleged in their Complaint that Defendants concealed the truth from, and communicated half-truths to, Plaintiffs and class members. Plaintiffs further assert that in those instances, courts have held that plaintiffs need not allege that RICO defendants had an independent duty to disclose.

Some non-controlling cases do appear to support the proposition that in order for plaintiffs to be able to rely on omissions to establish fraud, they need prove that defendants must have a duty to disclose. See [United States v. Skeddle, 940 F.Supp. 1146, 1149 \(N.D. Ohio 1996\)](#) ("Because the "scheme to defraud of property or money" counts are based on what was not said (i.e., omissions), the defendants are culpable under this branch of the mail fraud statute only if the government proves the defendants had a duty to disclose their interest in the transactions."); [Gould, Inc. v. Mitsui Min. & Smelting Co., 750 F.Supp. 838, 843 \(N.D. Ohio 1990\)](#) ("[T]here has been no attempt to delineate what facts were omitted or what duty defendants had to disclose information to Gould, which is necessary when one alleges a material omission."). See also [United States v. Benny, 786 F.2d 1410, 1418 \(9th Cir. 1986\)](#) ("[A] non-disclosure can only serve as a basis for a fraudulent scheme when there exists [\*\*53] an independent duty that has been breached by the person so charged."); [United States v. Rabbitt, 583 F.2d 1014, 1026 \(8th Cir. 1978\)](#).

But, other courts have expressly rejected this rationale. [United States v. Colton, 231 F.3d 890, 901 \(4th Cir. 2000\)](#) ("Concealment often is accompanied by an affirmative misrepresentation or a violation of [\*882] an independent statutory or fiduciary disclosure duty, but neither is "essential" for actionable fraud."); [United States v. Keplinger, 776 F.2d 678, 697 \(7th Cir. 1985\)](#) ("It requires no extended discussion of authority to demonstrate that omissions or concealment of material information can constitute...fraud cognizable under the mail fraud statute, without proof of a duty to disclose the information pursuant to a specific statute or regulation."); [United States v. Allen, 554 F.2d 398, 410 \(10th Cir. 1977\)](#).

**HN25** [+] The Sixth Circuit has, however, repeatedly confirmed that concealment of material facts can constitute a fraudulent scheme sufficient to establish RICO liability. See, e.g., [Daniel, 329 F.3d at 487; Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio, 900 F.2d 882, 885 \(6th Cir. 1990\); Am. Eagle Credit Corp. v. Gaskins, 920 F.2d 352, 354 \(6th Cir. 1990\); Bender, 749 F.2d at 1216](#). See also [United States v. Chew, 497 Fed.Appx. 555, 563 \(6th Cir. 2012\)](#) ("[I]n relation both to mail fraud and wire fraud, there is no technical or precise definition of an unlawful 'scheme to defraud.' The standard is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.") (internal citations omitted); [In re ClassicStar Mare Lease Litig., 823 F.Supp.2d 599, 627 \(E.D. Ky. 2011\)](#) ("A fraudulent scheme may be demonstrated by proof that it was reasonably [\*\*54] calculated to deceive persons of ordinary prudence and comprehension, and communications of half-truths and concealment of material facts are both actionable."). Since to the Court's knowledge, the Sixth Circuit has never articulated a duty to disclose requirement, the Court declines to abide by such a requirement. Therefore, Plaintiffs were not required to prove that Bosch LLC had a duty to disclose any information about the defeat devices.

#### d. Whether Ford Proximately Caused Plaintiffs' Injuries

Ford argues that even if Plaintiffs adequately pleaded a RICO injury and required predicate acts, they have not alleged that the injury was "by reason of" a RICO violation under [Rule 9\(b\)](#)'s heightened pleading requirements. Ford claims that any type of causal link between Ford's alleged "fraud-on-the-regulator" conduct and Plaintiffs' claimed injuries is indirect and attenuated. Ford argues that the court in Duramax incorrectly ruled that the plaintiffs did not fail to plead proximate causation because alleged intervening acts were carried out by co-conspirators, and

not third parties. Ford argues that this conclusion reached in *Duramax* was wrong because the Court overlooked the EPA's acceptance of allegedly [\*\*55] fraudulent COC's, which Ford believes was an intervening factor by a third party that broke the causal link between the violations and the injury.

Plaintiffs respond by contending that the court was not incorrect in *Duramax*. Plaintiffs assert that there is no case law that demonstrates that if a manufacturer defrauds the EPA and the public, it may escape liability as a matter of law by claiming that the EPA's approval of the fraudulent COC breaks the chain of proximate causation. Plaintiffs argue that if the EPA knew that the Defendants' submissions were false, that might constitute an intervening cause. However, Plaintiffs are arguing that the EPA did not know about Defendants' fraud; therefore, their approval of the fraudulent COCs did not constitute an intervening cause.

The Supreme Court has "held that [HN26](#)[<sup>↑</sup>] a plaintiff's right to sue...required a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well." [\*Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 268, 1\\*883\] 112 S. Ct. 1311, 117 L. Ed. 2d 532 \(1992\)\*](#). The plaintiff must show "some direct relation between the injury asserted and the injurious conduct alleged." *Id.* Importantly, the causation inquiry must focus on the alleged link between the "predicate acts" and the asserted [\*\*56] injury. [\*Heinrich v. Waiting Angels Adoption Servs., Inc., 668 F.3d 393, 405 \(6th Cir. 2012\)\*](#). A purported link that is "too remote," "purely contingent," or "indirect" is insufficient to confer standing. [\*Holmes, 503 U.S. at 271\*](#). According to the Supreme Court, "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step." *Id.* (quoting [\*Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 534, 103 S. Ct. 897, 74 L. Ed. 2d 723 \(1983\)\*](#)). An attenuated causation theory creates difficulties in apportioning damages between plaintiffs and attributing damages to defendants. See *id. at 273*. A challenge to a RICO suit based on asserted lack of proximate causation, however, is often best resolved at summary judgment, not at the pleading stage. See [\*Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 615 \(6th Cir. 2004\)\*](#).

The connection between the predicate acts (Ford's alleged deceit) and the asserted injury (Plaintiffs' economic losses) are sufficient to demonstrate that Ford is the proximate cause of Plaintiffs' injuries. Plaintiffs allege that but for Ford's alleged fraudulent omissions, they would not have purchased Ford's vehicles. This connection is not too distant or indirect. There is also no support for Ford's argument that the EPA's approval of the fraudulent conduct broke the chain of causation. As Plaintiffs argue, the EPA did not know about any alleged omissions.

#### e. Whether Bosch LLC Proximately Caused Plaintiffs' Injuries

[\*\*57] Bosch LLC claims that Plaintiffs fail to allege that they were injured "by reason of" a predicate offense committed by Bosch LLC. Bosch LLC argues that Plaintiffs do not sufficiently allege that its actions were a substantial cause of their injuries. Bosch asserts that even though Plaintiffs allege that Bosch LLC produced the Electronic Diesel Control Unit 17 and sold it to Ford, there were additional factors that substantially caused Plaintiffs' alleged injuries, including, but not limited to: (1) the alleged premium that Ford charged for the vehicles; (2) Ford's advertising campaign related to the vehicles; (3) fluctuations in consumer demand for vehicles like Plaintiffs' and other market forces; and (4) potential future modifications to the vehicles. Bosch LLC also argues that Plaintiffs do not allege a direct link between their claimed injuries and Bosch LLC's purported conduct.

Plaintiffs argue that they adequately allege that Bosch LLC's conduct was a substantial factor in causing their purported injuries. Plaintiffs argue that they would not have overpaid for Ford's vehicles if they did not contain the defeat devices that Bosch LLC designed and helped implement as part of Defendants' [\*\*58] unlawful scheme. Plaintiffs argue that the "direct link" between their injuries and Bosch LLC's conduct is that Bosch entities participated not just in the development of the defeat devices, but also in the scheme to prevent U.S. regulators from uncovering the device's true functionality. Plaintiffs further argue that without Bosch LLC's knowing participation, the scheme would not have existed at all.

Based on the above standards that courts have implemented to analyze proximate causation under RICO, Plaintiffs have sufficiently demonstrated that there was a direct link between the injuries that they allege they suffered and Bosch LLC's [\*884] conduct. But for Bosch LLC working with Ford to make the defeat devices, Plaintiffs would not

have overpaid for the vehicles. Further, as courts have noted, Bosch LLC's assertion about proximate causation is best resolved at the summary judgment stage.

## V. Whether Plaintiffs are Permitted to Assert Claims on Behalf of Absent Class Members Under the Laws of Other States

Ford argues that Plaintiffs are not permitted to bring claims under the laws of forty-seven states because there are only six named Plaintiffs who reside in five states, and who allegedly [\*\*59] bought trucks in five states. Those states being: (1) Arizona; (2) California; (3) Illinois; (4) Pennsylvania; and (5) Texas. Ford asserts that this Court should determine that the named Plaintiffs lack standing to assert claims in all of the states where they do not reside or claim to have suffered an injury. Ford acknowledges that federal courts have deferred this question of standing until the class certification stage, but argues that some courts are beginning to address this question sooner in the litigation process in order to refrain from subjecting defendants to the expense and burden of nationwide discovery without first securing plaintiffs who clearly have standing.

In response, Plaintiffs argue that courts have been very clear about not resolving questions regarding the standing of plaintiffs until the class certifications stage. Plaintiffs point to several cases to demonstrate this "growing consensus" among federal courts. Further, Plaintiff argues that the main case that Ford relies on in making its argument is an outlier and runs afoul of many other cases.

[HN27](#) [↑] "Threshold individual standing is a prerequisite for all actions, including class actions." [Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410, 423 \(6th Cir. 1998\)](#). "A potential class representative [\*\*60] must demonstrate individual standing vis-as-vis the defendant; he cannot acquire such standing merely by virtue of bringing a class action." *Id.* The growing consensus, however, is that "class certification issues are...logically antecedent' to Article III concerns," at least when the named plaintiffs possess Article III standing. See [Ortiz v. Fibreboard Corp., 527 U.S. 815, 831, 119 S. Ct. 2295, 144 L. Ed. 2d 715 \(1999\)](#); [Kaatz v. Hyland's Inc., No. 16 CV 237 \(VB\), 2016 U.S. Dist. LEXIS 87348, 2016 WL 3676697, at \\*4 \(S.D.N.Y. July 6, 2016\)](#); [Storey v. Attends Healthcare Prods., Inc., No. 15-CV-13577, 2016 U.S. Dist. LEXIS 72505, 2016 WL 3125210, at \\*3 \(E.D. Mich. June 3, 2016\)](#); [In re Auto. Parts Antitrust Litig., 29 F.Supp.3d 982, 1000 \(E.D. Mich. 2014\)](#). In other words, "where 'class certification is the source of the potential standing problems,' class certification should precede the standing inquiry." [In re Digital Music Antitrust Litig., 812 F.Supp.2d 390, 406 \(S.D.N.Y. 2011\)](#) (quoting [In re Grand Theft Auto Video Game Litig., No. 06 MD 1739, 2006 U.S. Dist. LEXIS 78064, 2006 WL 3039993, at \\*2 \(S.D.N.Y. Oct. 25, 2006\)](#)).

All of the named Plaintiffs in our case have Article III standing. If the class is certified, those Plaintiffs will be able to advance state law claims on behalf of unnamed Plaintiffs. [HN28](#) [↑] The question of whether the state law claims may be advanced on behalf of unnamed Plaintiffs is indistinguishable from the [Federal Rule of Civil Procedure 23](#) analysis. See [Kaatz v. Hyland's Inc., No. 16 CV 237, 2016 U.S. Dist. LEXIS 87348, 2016 WL 3676697, at \\*4 \(S.D.N.Y. July 6, 2016\)](#) ("That standing inquiry is more appropriately addressed at the class certification stage when courts consider the commonality and typicality prerequisites of class actions."). The claims premised on the law of states where no named Plaintiff lives will therefore not be dismissed for lack of [\*\*885] standing. See [Duramax, 298 F. Supp. 3d at 1089](#).

## VI. Article III Standing

Bosch [\*\*61] LLC makes a separate argument in its Motion with regard to Plaintiffs' Article III standing. Bosch LLC argues that Plaintiffs lack Article III standing for three reasons. First, Bosch LLC argues that Plaintiffs seek redress based on hypothetical future events, namely injuries that may occur "when and if" Ford recalls its vehicles and degrades the Ford clean diesel engine performance and fuel efficiency in order to make its vehicles compliant with EPA standards. According to Bosch LLC, Plaintiffs' harms are not "actual" or "imminent" in accordance with Article III. Second, Bosch LLC relies on [Bledsoe v. FCA US LLC, 307 F. Supp. 3d 646 \(E.D. Mich. 2018\)](#), a recent decision

in which the Court held that in the context of Fiat-Chrysler vehicles, the plaintiffs' claims to Article III standing were disregarded for being conclusory, or upon implausible inferences because the plaintiffs injuries were based on their expert's testing of a single vehicle that purportedly showed higher NOx emissions than the federal standards allow. Bosch LLC claims that Plaintiffs' claims are similar since they also failed to put forth any description of the purported defeat device or when and under what circumstances it is triggered in the truck they tested. Third, Bosch LLC argues that Plaintiffs' [\[\\*\\*62\]](#) overpayment theory cannot be traced to Bosch LLC because there is no evidence that Bosch LLC advertised directly to consumers or had any control over the price of Ford's vehicles.

Plaintiffs argue in response that they sufficiently alleged that they suffered economic injuries at the time they purchased their vehicles as a result of overpaying for them due to Defendants' wrongful conduct. Plaintiffs further argue that in nearly identical circumstances, courts have rejected Bosch LLC's argument that such allegations are conjectural. Further, Plaintiffs claim that Bosch LLC misreads the court's standing rule in *Bledsoe*. Plaintiffs claim that in *Bledsoe*, the court held that plaintiffs lacked standing for failure to allege the injury-in-fact prong of the standing analysis because they solely relied on test results for a single vehicle and extrapolations from those results. Plaintiffs argue that here, they assert reasonable, plausible grounds for why their testing indicates that defeat devices were used in Ford's vehicles, and falls within the category of diesel emissions fraud cases that the court in *Bledsoe* distinguished. Plaintiffs also argue that courts have repeatedly rejected Bosch [\[\\*\\*63\]](#) LLC's argument that the lack of a direct connection between itself and plaintiffs who are purchasers of the vehicles in question precludes Article III standing.

[HN29](#) Federal courts have a duty to confirm subject matter jurisdiction in every case pending before them. *Valinski v. Detroit Edison*, 197 Fed.Appx. 403, 405 (6th Cir. 2006). [Article III, § 2 of the U.S. Constitution](#) limits federal court jurisdiction to "Cases" and "Controversies." The doctrine derived from [Art. III, § 2](#) imposes the requirement of standing: federal jurisdiction exists only if the dispute is one "which [is] appropriately resolved through the judicial process." *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990). For standing to exist, three elements must be satisfied: injury in fact, causation, and redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Injury in fact exists when the plaintiff has suffered "an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent," not [\[\\*886\]](#) "conjectural or hypothetical." *Id. at 560* (citations omitted). Causation exists if the injury is one "that fairly can be traced to the challenged action of the defendant." *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 41, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976). The redressability requirement is satisfied if the plaintiff's injury is "likely to be redressed by a favorable decision." *Id. at 38*. Standing can exist even if the alleged injury "may be difficult to prove or measure." *Spokeo, Inc. v. Robins*, U.S. , 136 S.Ct. 1540, 1549, 194 L.Ed.2d 635 (2016).

Plaintiffs' overpayment theory [\[\\*\\*64\]](#) is sufficient to provide standing to sue Bosch LLC because of its role in the use and concealment of a cheat device that allegedly constrained the emissions control system of the vehicles purchased by Plaintiffs. Accepting Plaintiffs' allegations as true, they paid a premium for a "clean diesel" vehicle, which actually polluted at levels dramatically higher than a reasonable consumer would expect. In other words, they paid for a product that did not operate in the way they believed it did. [HN30](#) Claims of overpayment, wherein a plaintiff paid a premium but did not receive the anticipated consideration, are cognizable injuries in fact. See *Wuliger v. Manufacturers Life Ins. Co.*, 567 F.3d 787, 794 (6th Cir. 2009). The alleged injuries are traceable to Bosch LLC's actions, and there is, accordingly, a traceable connection between the plaintiffs' injuries and the complained-of conduct of the defendant. *Id. at 796* (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)). And, financial damages are fully redressable by a favorable decision. *Duramax*, 298 F. Supp. 3d at 1053. Therefore, although Bosch LLC's role in the alleged fraudulent concealment is more indirect than Ford's role, "the causation requirement in standing is not focused on whether the defendant 'caused' the plaintiff's injury in the liability sense; the plaintiff need only allege 'injury [\[\\*\\*65\]](#) that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.'" *Wuliger*, 567 F.3d at 796 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976))). While Bosch LLC may ultimately prevail in its argument that it should not be held liable for Plaintiffs' overpayment, Plaintiffs' allegation that Bosch LLC was intimately involved in the creation of the component that caused the overpayment establishes Article III standing.

## VII. CONCLUSION

For the reasons set forth above,

IT IS HEREBY ORDERED that Defendants' Motions to Consolidate Cases (Doc # 39; Doc # 46) are **GRANTED**.

IT IS FURTHER ORDERED that the following cases are consolidated: *Gamboa et al. v. Ford Motor Company et al.*, Case No. 2:18-cv-10106; *Ruston et al. v. Ford Motor Company et al.*, Case No. 2:18-cv-11108; *Goodroad, Jr. et al. v. Ford Motor Company et al.*, Case No. 2:18-cv-11900; and *Badagliacco v. Ford Motor Company et al.*, Case No. 2:18-cv-12379.

IT IS FURTHER ORDERED that Plaintiffs' Motion for the Appointment of Interim Class Counsel (Doc # 27) is **GRANTED**.

IT IS FURTHER ORDERED that Defendants Ford Motor Company and Robert Bosch LLC's Motions to Dismiss (Doc # 28; Doc # 29) are **DENIED**; although **[\*\*66]** these Motions are denied, as noted above, Plaintiffs are not permitted to proceed with their claims that pertain to Defendants' alleged affirmative misrepresentations.

**[\*887]** IT IS FURTHER ORDERED that Plaintiffs will have 30 days from the date of the entry of this Order to file a single consolidated amended complaint.

IT IS FURTHER ORDERED that Defendants will have 30 days from when Plaintiffs' consolidated amended complaint is filed to file an answer to the consolidated amended complaint.

IT IS FURTHER ORDERED that the parties shall meet and confer and submit a *Rule 26(f)* report with proposed scheduling dates 21 days from when Defendants' answer is filed; after the *Rule 26(f)* report has been filed, the Court will issue a scheduling conference order.

IT IS SO ORDERED.

s/Denise Page Hood

Chief Judge, U. S. District Court

DATED: March 31, 2019

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## **United States v. Aegerion Pharms., Inc.**

United States District Court for the District of Massachusetts

March 31, 2019, Decided; March 31, 2019, Filed

Civil Action No. 13-cv-11785-IT

### **Reporter**

2019 U.S. Dist. LEXIS 55253 \*; 2019 WL 1437914

UNITED STATES OF AMERICA and THE STATES OF CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MONTANA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OKLAHOMA, RHODE ISLAND, TENNESSEE, TEXAS, WASHINGTON, and WISCONSIN, THE COMMONWEALTHS OF MASSACHUSETTS and VIRGINIA, and THE DISTRICT OF COLUMBIA, ex rel. MICHELE CLARKE, TRICIA MULLINS, and KRISTI WINGER SZUDLO, Plaintiffs, v. AEGERION PHARMACEUTICALS, INC., MARC BEER, MELANIE DETLOFF, WILLIAM DULL, GREG FENNER, MARK FITZPATRICK, CRAIG FRASER, JAMES FRIGGE, DANIEL RADER, DAVID SCHEER, MARK SUMERAY, and THE TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA, Defendants.

### **Core Terms**

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patients, allegations, off-label, false claim, marketing, sales, conspiracy, motion to dismiss, reimbursement, prescribed, conspired, argues, public disclosure, Defendants', investor, sales representative, particularity, misleading, scientific, indirect, publicly, details, healthcare program, sales staff, participated, presentation, announced, providers, Notice, Chart

**Counsel:** [\*1] For United States of America, ex rel. Michele Clarke, Tricia Mullins, and Kristi Winger Szudlo, Plaintiff: Gregg D. Shapiro, Office of the United States Attorney, Boston, MA.

For Michele Clarke, Relator, Plaintiff: Ilyas J Rona, LEAD ATTORNEY, Milligan Rona Duran & King, LLC, Boston, MA; Royston H. Delaney, LEAD ATTORNEY, Delaney Kester, LLP, Boston, MA; Bryan A. Wood, Patrick T. Egan, Stephen Ryan, Jr., Berman Tabacco, Boston, MA.

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For The Commonwealth of Massachusetts, Plaintiff: Yeatng Evelyn Tang, Massachusetts Office of the Attorney General, Medical Fraud Division, Boston, MA.

For Craig Fraser, Defendant: William H. Kettlewell, LEAD ATTORNEY, Gregory F Noonan, Julia W. McLetchie, Hogan Lovells US LLP, Boston, MA.

For Marc Beer, Defendant: Melissa B. Tearney, R.J. Cinquegrana, LEAD ATTORNEYS, Sara K. Frank, Choate, Hall & Stewart, Boston, MA.

For Gregg Fenner, Defendant: Michael J. Pineault, LEAD ATTORNEY, Ben T. Clements, Clements & Pineault, LLP, Boston, MA.

For Mark Fitzpatrick, [\*2] Mark Sumeray, Defendants: Ian D. Roffman, Jonathan L. Kotlier, LEAD ATTORNEYS, Nutter, McClellan & Fish, LLP, Boston, MA.

For James Frigge, Defendant: Peter K. Levitt, Donnelly, Conroy & Gelhaar, LLP, Boston, MA.

For William Dull, Defendant: Frank A. Libby, Jr., LEAD ATTORNEY, LibbyHoopes, P.C., Boston, MA.

For David Scheer, Defendant: Stephen G. Huggard, LEAD ATTORNEY, Huggard Law LLC, Boston, MA.

**Judges:** Indira Talwani, United States District Judge.

**Opinion by:** Indira Talwani

## **Opinion**

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### **MEMORANDUM AND ORDER**

TALWANI, D.J.

Pending before the court is Defendants Marc Beer, Melanie Detloff, William Dull, Greg Fenner, Mark Fitzpatrick, Craig Fraser, James Frigge, Daniel Rader, David Scheer, and Mark Sumeray's Joint Motion to Dismiss (the "Joint Motion") [#147] all remaining claims in Relators Michele Clark, Tricia Mullins, and Kristi Winger Szudlo's Second Amended Complaint [#69]. For the following reasons, Defendants' Joint Motion [#147] is ALLOWED as to claims against David Scheer, but is otherwise DENIED.

#### I. Background

##### a. Factual Background<sup>1</sup>

Relators Clarke, Mullins, and Szudlo are former sales representatives at Aegerion Pharmaceuticals, Inc. ("Aegerion"). [\*3] Second Am. Compl. ¶¶ 8-10 [#69]. Defendants Beer, Detloff, Dull, Fenner, Fitzpatrick, Fraser, Frigge, and Dr. Sumeray are former employees of Aegerion; Defendant Scheer was on Aegerion's Board of Directors. Id. ¶¶ 11-21.

In 2000 or 2001, Dr. Daniel Rader, an employee of the University of Pennsylvania (UPenn), approached Bristol-Meyer Squibb Company about donating a drug it had been developing to UPenn. Id. ¶¶ 19, 22, 36-39. Bristol-Meyer Squibb did so, and Dr. Rader began to develop the drug through the Food and Drug Administration's ("FDA") orphan drug program. See id. ¶¶ 40-42. The orphan drug program incentivizes innovation of drugs for patient populations below 200,000 in the United States by allowing a cheaper and easier FDA approval process that does not require the same evidence of safety and efficacy as for non-orphan drugs. Id. ¶ 41.

From June 2003 to February 2004, Dr. Rader conducted a study of the drug on six individuals with Homozygous Familial Hypercholesterolemia ("HoFH"). Id. ¶ 42. HoFH is a life-threatening genetic lipid disorder inherited from both parents.<sup>2</sup> Id. ¶ 30. The FDA and others in the scientific community estimate only one in one million people in the United States, [\*4] or approximately 300 people, have the disorder.<sup>3</sup> Id. ¶¶ 2, 32. Dr. Rader proposed expanding

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<sup>1</sup> To survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), Relators' Second Amended Complaint [#69] must "state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). The court accepts all factual allegations in Relators' Second Amended Complaint [#69] as true and draws all reasonable inference in favor of Relators. See Ashcroft v. Iqbal, 556 U.S. 662, 678-79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

<sup>2</sup> People suffering from HoFH have limited or no ability to remove from their blood the "bad cholesterol" low-density lipoproteins ("LDL-C"). Id. ¶ 28, 30. If untreated, people with HoFH have extremely high LDL-C levels, typically between 500mg/dL and 1,000 mg/dL. Id. ¶ 30. Patients with HoFH develop atherosclerosis, or narrowing and blockage of the arteries, as early as age ten. Id. HoFH patients are at extremely high risk of cardiovascular problems and many are at risk for serious cardiac events starting in their 20s. Id. If left untreated, life expectancy of people with HoFH is 33 years. Id. Historically, HoFH has been difficult to treat because traditional "high cholesterol" treatments are ineffective. Id. ¶ 33.

use of the drug beyond the HoFH population, but the FDA informed Dr. Rader and UPenn "that the expanded use of the product in the additional groups of patients shifts the risk-benefit profile of the development program" in an adverse direction. Id.

Dr. Rader recruited a former colleague, Defendant David Scheer, to incorporate Aegerion in 2005 for the purpose of commercializing the drug. Id. ¶ 46. UPenn granted Aegerion the exclusive right to "research, develop, commercialize, make, have made, offer for sale and sell" the drug, which Aegerion renamed AEGR-733. Id. ¶¶ 49, 52. Dr. Rader was a member of Aegerion's Scientific Advisory Board as early as 2007 and Aegerion sold him a significant amount of stock at a fraction of its value. Id. ¶¶ 51-52.

Aegerion acknowledged in a statement filed with the Securities and Exchange Commission that the HoFH patient population was approximately 300 people, but also claimed that the drug has the potential to treat a much larger population with "severe refractory hypercholesterolemia,"<sup>4</sup> or approximately 30,000 people. Id. at ¶ 50, 54. Aegerion [\*5] renamed AEGR-733 Lomitapide, commercially known as Juxtapid, and Dr. Rader proposed to the FDA that his FDA Phase III clinical trial of Juxtapid be expanded to the "severe refractory hypercholesterolemia" patient population. Id. The FDA told Dr. Rader that if he wished to do so, he would need to expand his then-current trial beyond the thirty-six subjects being proposed and conduct a second—and possibly additional—trials in high risk HeFH patients, as there was "uncertainty regarding the long-term consequences of Lomitapide-associated hepatic steatosis." Id. ¶ 54, 57. Aegerion decided not to conduct the additional trial proposed by the FDA due to "financial constraints," and instead decided to remain with the smaller HoFH population. Id. ¶¶ 54, 57-58.

In October 2007, the FDA formally granted Juxtapid an orphan drug designation for the treatment of HoFH. Id. ¶ 56. In May 2010, the FDA expressed concern to Aegerion executives about potential "off-label use" of Juxtapid. Id. ¶ 58. Aegerion agreed to implement post-approval supply constraints to protect against this risk. Id.

In September 2010, Aegerion appointed a new CEO, Defendant Marc Beer. Id. at 59. Aegerion's Chief Medical Office [\*6] abruptly resigned, and his position remained vacant until July 2011. Id. at ¶¶ 59, 65. Late in 2010, Aegerion announced at a conference that it had adopted a new estimate that the number of adult patients with HoFH in the United States was 3,000 patients instead of 300 patients. Id. ¶ 60. Dr. Rader endorsed this number, even though it was contrary to his prior assertions. Id. ¶¶ 61-62. Dr. Rader and Aegerion attempted to introduce this proposed new "functional" HoFH population to the FDA, but the FDA responded that this expanded "functional HoFH" definition too closely resembled the "severe refractory heterozygous FH population" for which Aegerion had not sought approval, "and expand[ed] the target population almost 10-fold." See id. ¶¶ 54, 57, 62.

In July 2011, Aegerion recruited Defendant Dr. Mark Sumeray as its Chief Medical Officer. Id. ¶ 65. In February 2012, Aegerion submitted to the FDA a New Drug Application for Juxtapid limited solely to HoFH. Id. ¶ 66. In December 2012, the FDA approved Juxtapid for use in patients with HoFH. Id. ¶ 72. Aegerion initially priced Juxtapid at \$235,000 for a year's therapy and increased that price to \$329,587 for a year's therapy by June 2014. [\*7] Id. ¶ 163.

Despite receiving approval for the use of Juxtapid in a limited population, Aegerion<sup>5</sup> trained their sales representatives—including Relators—to aggressively market the drug as an off-label solution for a much larger swath of the public, including individuals with HeFH or simply with high cholesterol, and regularly pushed the inflated assertion that there were 3,000 potential HoFH patients. See, e.g. id. ¶¶ 75-81, 83-91, 93, 95-103, 105-07, 109-10, 114, 134. This off-label marketing scheme included instructing its sales staff that genetic testing was a threat to Juxtapid sales, and they should not mention HoFH when speaking with doctors and patients. See id. ¶¶

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<sup>3</sup> Heterozygous familial hypercholesterolemia, or HeFH, is inherited from one but not both parents. Id. ¶ 35. The prevalence of HeFH is far more widespread than HoFH and is accepted to be around 1 in 500. Id.

<sup>4</sup> Patients with "severe refractory hypercholesterolemia" are patients with high cholesterol who did not respond to other cholesterol-reducing treatments. Id. ¶ 54.

<sup>5</sup> The roles of each Defendant alleged in the Second Amended Complaint [#69] are addressed later in this memorandum.

76-79, 83, 84, 98, 99. Aegerion directed sales staff to ask doctors misleading questions to make them think the drug was suitable for patients with "severe refractory lipids," *id.* ¶ 76, 91, 98, 107-110; *see also id.* ¶¶ 87, 99, and to tell doctors that: there was "no definition" of HoFH, *id.* ¶¶ 76, 77, 78, 99, 107; doctors could determine who had HoFH without genetic testing, *id.* ¶ 100; the disease was not one in one million but rather one in 265, *and* the one in a million figure was outdated, *see id.* ¶¶ 76, 81, 84, 90, [\*8] 91, 102-104, 114; and, Aegerion would not engage them as speakers unless they prescribed Juxtapid, *see id.* ¶¶ 96, 98, 105, 106. Aegerion also told sales staff to go to patients' homes to obtain consent form signatures and suggested that sales people complete medical forms themselves, *id.* ¶ 80. Aegerion encouraged its sales staff to "data mine" patient databases of medical practices for candidates matching Aegerion's definition of the "functional equivalent of HoFH." *Id.* ¶¶ 83, 85, 86, 88, 89. The sales team further set up a so-called "hunting" competition amongst sales staff, aggressively placing pressure on the staff to track down potential Juxtapid patients using this expanded use of the drug. *See id.* ¶¶ 93-95.

In July 2013, Defendant Beer announced that Aegerion would no longer report metrics other than sales of Juxtapid. *Id.* ¶ 120. By the late 2013, about a year after the launch of Juxtapid, Aegerion had 374 Juxtapid patients, over ninety of whom were Medicare patients (24%). *Id.* ¶¶ 121, 149, 150.

Relators filed their initial Complaint in this *qui tam* action under seal on July 26, 2013.

In November 2013, the FDA sent Aegerion a letter warning that Defendant [\*9] Beer's public statements "provide evidence that Juxtapid is intended for new uses, for which it lacks approval and for which its labeling does not provide adequate directions for use," making it in violation of the Federal Food and Drug and Cosmetic Act. *Id.* ¶ 134. The FDA instructed Aegerion to correct the false impressions made by instituting a "comprehensive plan of action to disseminate truthful, non-misleading, and complete corrective messages." *Id.*

On January 9, 2014, Aegerion announced that it was under investigation by the United States Attorney's Office in Boston, and that it was working on responding to a subpoena. *Id.* ¶ 135. Defendants Beer and Fraser resigned effective immediately. *Id.* ¶ 137.

On May 12, 2016, Aegerion announced that it would pay \$40 million over five years to the United States to settle allegations of off-label marketing. *Id.* ¶ 138.

#### b. Procedural History

Relators' initial sealed Complaint [#3], brought on behalf of the United States and various states, alleged that Aegerion's off-label marketing scheme caused false claims for reimbursement to be submitted to the government, in violation of the federal False Claims Act ("FCA"), 31 U.S.C. § 3729, et seq., and various state analogs. Relators [\*10] filed a sealed Amended Complaint [#12] on March 18, 2014, adding Defendants Beer, Fenner, and Fraser. On September 2, 2017, the court granted Relators leave to file their Second Amended Complaint adding Defendants Detloff, Dull, Fitzpatrick, Frigge, Rader, Scheer, Sumeray, and the Trustee of Pennsylvania. *See* Elec. Order [#64].

On September 22, 2018, the United States gave formal notice that the United States, Relators, and Aegerion had reached a settlement agreement to resolve the claims against Aegerion, and that the United States was therefore intervening as to Defendant Aegerion. Notice of Intervention [#63]. Once this notice was filed, the case was unsealed. *See* docket.

Relators filed the operative Second Amended Complaint [69] on September 27, 2017. The United States subsequently filed a Stipulation of Dismissal as to Aegerion Pharmaceuticals, Inc. [#98], and the court entered a corresponding Order of Dismissal [#103]. The United States and the Plaintiff States subsequently declined to intervene as to the individual Defendants. Notice of Election to Decline Intervention [#99]; Notice of Election [#110].<sup>6</sup> Relators dismissed their claims as to Dr. Rader and UPenn, Stipulation of Dismissal [\*11] as to

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<sup>6</sup>The United States noted that a *qui tam* action "may be dismissed only if the court and the Attorney General give written consent to the dismissal . . ." Notice of Election to Decline Intervention 1 [#99] (quoting 31 U.S.C. § 3730(b)(1)). The

Defendants Daniel Rader and the Trustees of the Univ. of Pennsylvania [#141]; Order of Dismissal [#142], and their state claims. Assented to Motion for Voluntary Dismissal of State Claims [#169]; Order of Dismissal [#171].

The Joint Motion to Dismiss [#147] on behalf of the remaining Defendants followed. The court first address the common arguments raised as to all remaining Defendants, before turning to arguments raised on behalf of individual Defendants.

## II. Joint Motion to Dismiss — Counts 1 and 2

In Count 1, Relators allege that the Defendants' marketing scheme caused health care providers to submit claims for Juxtapid coverage to Medicare and other government healthcare programs for unapproved use and non-medically accepted indications, in violation of the False Claims Act, 31 U.S.C. § 3729(a)(1)(A). Second Am. Compl. ¶¶ 2, 200-204 [#69]. In Count 2, Relators allege that the Defendants have knowingly made, used, or caused to be made or used, false records or statements which were material to false or fraudulent claims, in violation of 31 U.S.C. § 3279(a)(1)(B). Id. ¶¶ 205-209.

### a. Rule 9(b)

Defendants first argue that Relators have failed to identify a specific patient [\*12] who was prescribed Juxtapid for an off-label use where the government was billed, or even where the claim was submitted to the government for payment, and therefore fail to meet the particularity requirement required under Fed. R. Civ. P. 9(b). Joint Mem. 7-9 [#152]. Moreover, Defendants argue that the "indirect claim" standard does not apply in this case because Relators failed to plead with specificity that any third parties submitted Juxtapid claims, and even if any such claims were submitted by third parties, that the Defendants induced submission of such claims. Id. at 9-10. Finally, even if the indirect claim standard does apply, Defendants assert that Relators have failed to provide enough facts to support any inference of fraud "beyond possibility." Id. at 11-13.

Federal Rule of Civil Procedure 9(b) requires claims of fraud to be stated with particularity in order to give defendants sufficient notice of plaintiffs' claims, to protect defendants from damage to their reputation by meritless claims, to discourage "strike suits," and to prevent the filing of suits that seek to use the discovery process as a fishing expedition. United States ex rel. Nargol v. Depuy Orthopaedics, Inc., 865 F.3d 29, 38 (1st Cir. 2017); Doyle v. Hasbro, Inc., 103 F.3d 186, 194 (1st Cir. 1996). The rule does so by requiring that, "[i]n alleging fraud . . . a party must state *with particularity* the circumstances constituting [\*13] fraud." Fed. R. Civ. P. 9(b) (emphasis added). This requirement includes "set[ting] forth the 'who, what, when, where, and how' of the alleged fraud." United States ex rel. Ge v. Takeda Pharm. Co. Ltd., 737 F.3d 116, 123 (1st Cir. 2013) (citations omitted). To meet rule 9(b)'s particularity requirement, a relator's allegations must identify particular false claims for payment that were submitted to the government, and include at least some details, such as: dates, content, identification numbers, amounts, services billed, individuals involved, and the length of time between the fraud and the claim submission. Id. (citing United States ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 232-33 (1st Cir. 2004), abrogated on other grounds by Allison Engine Co. v. U.S. ex rel. Sanders, 553 U.S. 662, 128 S. Ct. 2123, 170 L. Ed. 2d 1030 (2008)).

The First Circuit has recognized a distinction between complaints alleging direct submission of false claims and those alleging that defendants induced third parties to file false claims. United States ex rel. Duxbury v. Ortho Biotech Prods., L.P., 579 F.3d 13, 29 (1st Cir. 2009); see also United States ex rel. Rost v. Pfizer, Inc., 507 F.3d 720, 733 (1st Cir. 2007). In the "indirect claim" cases, the First Circuit has applied a "more flexible standard" under which "a relator [can] satisfy Rule 9(b) by providing 'factual or statistical evidence to strengthen the inference of fraud beyond possibility,' without necessarily providing details as to each false claim." Duxbury, 579 F.3d at 29. Instead, in these indirect claim cases, a claim that does not provide particular details of false claims "may nevertheless survive by alleging particular details [\*14] of a scheme to submit false claims paired with reliable

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government thus requested that, "should either the Relators or the Defendants propose that this action be dismissed, settled or otherwise discontinued, this Court solicit the written consent of the United States before ruling or granting its approval." Id. The Plaintiff States made a similar request. Notice of Election 2-3 [#110].

indicia that lead to a strong inference that claims were actually submitted. *Id.* (quoting *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009)). "[W]hile there is no 'checklist of mandatory requirements' that each allegation in a complaint must meet to satisfy *Rule 9(b)*," *Lawton ex rel. United States v. Takeda Pharm. Co., Ltd.*, 842 F.3d 125, 131 (1st Cir. 2016) (quoting *Karvelas*, 360 F.3d at 233), "the evidence necessary to achieve this inference generally requires the relator to plead, *inter alia*, the 'specific medical providers who allegedly submitted false claims,' the 'rough time periods, locations, and amounts of claims,' and 'the specific government programs to which the claims were made,'" *id.* (quoting *United States ex rel. Kelly v. Novartis Pharms. Corp.*, 827 F.3d 5, 13 (1st Cir. 2016)).

The allegations in the complaint show that Relators asserted both direct and indirect claims. Specifically, Relators have alleged that "Defendants' aggressive off-label marketing . . . caused patients, pharmacies and others (including Aegerion sales representatives, like Defendant Detloff) to claim Medicare payments for Juxtapid used in unauthorized and/or unacceptable ways." Second Am. Compl. ¶ 146 [#69]; *see also id.* ¶ 1 ("This case arises from Defendants' scheme to aggressively off-label market Aegerion's core drug, Juxtapid, and cause false claims to be submitted to . . . government healthcare [\*15] programs . . . .") (emphasis added). Accordingly, Relators assert that Aegerion both induced third parties and directly submitted false claims to the government for reimbursement.

To the extent that Relators seek relief for claims directly submitted by Aegerion sales representatives, the more exacting standard under *Rule 9(b)* applies. And, because Relators fail to allege the details of any specific false claim directly submitted by Aegerion or the Defendants for reimbursement from the government, any direct claims against the Defendants are insufficient to state a claim. As to Relators' indirect claims, however, the court must apply the more flexible pleading standard. After doing so, the court finds that Relators have adequately pled a fraudulent scheme and reliable indicia that lead to a strong inference that false claims were submitted.

Unlike in *Rost*, Relators have provided at least some factual or statistical evidence to strengthen the inference of fraud beyond a possibility. Relators have alleged that the Aegerion knew—and that it is accepted in the scientific community—that there are approximately 300 patients in the United States with HoFH, but that approximately one year after Juxtapid's [\*16] launch, Aegerion reported 374 Juxtapid patients, over ninety of whom were Medicare patients (24%). Second Am. Compl. ¶¶ 121, 149, 150 [#69]. Moreover, there were 622 Medicare Part D claims for Juxtapid in 2013, 1,992 in 2014, 2,511 in 2015, and 992 in 2016. *See Decl.* of Benjamin Towbin in Support of Defs.' Joint Mot. to Dismiss ¶ 6 [#152-4].<sup>7</sup> The *Second Amended Complaint* further alleges that Aegerion announced that it would settle allegations of off-label marketing for \$40 million dollars in 2016, Second Am. Compl. ¶ 138 [#69], and that Relators entered into a Settlement Agreement with Aegerion, which Relators have incorporated by reference into the *Second Amended Complaint*, *see id.* at 8 n.2, that provided further evidence that Aegerion engaged in a fraudulent off-marketing scheme, and that "Aegerion knowingly caused false or fraudulent claims for Juxtapid to be submitted to the Federal health care programs."<sup>8</sup>

Relators' other allegations add to the inference of fraud. Chart A contains redacted information about fifteen patients covered by government healthcare programs that were prescribed Juxtapid by March 2013. *Id.* ¶ 153. The chart includes patients' (redacted) dates of birth, their referral dates, [\*17] prescription details, insurance providers, shipment dates, and—for some of the patients—their LDL levels, cholesterol drug history, and whether they

<sup>7</sup> Defendants have asserted that the court can take judicial notice of the exhibits attached to their memorandum because they are referenced in the complaint and are publicly available government documents. Joint Mem. 4 n.5 [#152]. Relators notified the court at the hearing on this motion that they have no objection to the court's consideration of these exhibits.

<sup>8</sup> Defendants argued at the hearing on this motion that they were not parties to the Settlement Agreement and do not agree to the factual basis underlying that settlement. Defendants may certainly address the underlying facts during this litigation, and the court makes no factual determination at this time. At this procedural juncture, the court considers the Settlement Agreement only to the extent that it makes the inference that Aegerion caused the submission of false claims more plausible.

previously received apheresis.<sup>9</sup> Id. Chart B, entitled "Juxtapid Patients Likely Covered by Government Healthcare Programs," provides much of the same information included in Chart A for fourteen more patients. Id. ¶ 159.<sup>10</sup>

Relators allege that average LDL-C levels for patients who been previously treated for HoFH is between 300-700 mg/dL, and for untreated patients is between 500-1,000 mg/dL. Id. ¶¶ 30, 157. Yet, Chart A shows that at least some Juxtapid patients covered by government healthcare programs had LDL-C levels significantly below these levels. Id. ¶ 153. Further, some of those with reduced LCL-C levels were neither on cholesterol medication nor previously had apheresis. Id.

Given these allegations, the complaint satisfies [Rule 9\(b\)](#) purposes of protecting Defendants from meritless claims, discouraging strike suits, and preventing fishing expeditions. Coupled with Relators' allegations outlining Defendants' targeting of individuals covered by government programs, see id. ¶¶ 140, 149-152, and detailing the manner in which Aegerion employees [\*18] promoted the drug, the court finds that Relators have provided adequate factual or statistical allegations at this stage to strengthen the inference of fraud beyond possibility.

#### b. Subjective Medical Judgments

Next, Defendants jointly argue that the claims submitted for reimbursement were based on the doctors' independent medical judgments of the patients' medical necessity and Relators therefore have failed to plead with particularity that claims for reimbursement were false. According to Defendants, Juxtapid could be prescribed by doctors if they complied with the Juxtapid Risk Evaluation and Mitigation Strategy (REMS), which Defendants state only requires that doctors find that the patient has a "clinical or laboratory diagnosis consistent with HoFH." Defendants argue that Relators have not alleged enough facts to show that any of the health care providers' REMS certifications were false, and thus have not sufficiently plead any false claims. Joint Mem. at 13-18 [#152].

For support, Defendants point to United States ex rel. Nowak v. Medtronic, Inc., in which the court stated that the relators could not demonstrate that a claim was false or fraudulent where "[e]ach individual health [\*19] care provider's medical judgment is an essential element" of relator's claim." [806 F. Supp. 2d 310, 354 \(D. Mass. 2011\)](#). Nowak's holding, however, is a narrow one and applies only in the context of medical devices, where claims for Medicare reimbursement are judged under a "reasonable and necessary standard." Id. at 318-19, 354. The Nowak court specifically distinguished that case from cases involving off-label drug use. Id. at 354 ("Nowak's reasoning, however, omits out an important step in the analysis in the *medical device* context. . . . The categorical approach for *off-label drug use* . . . is inapplicable here." (first emphasis in original, second emphasis added)). Nowak is inapposite. Nor does the Defendants' reliance on United States ex rel. Jones v. Brigham & Women's Hosp., [678 F.3d 72 \(1st Cir. 2012\)](#), better serve them. Jones concerned a grant proposal that relied on scientific data alleged to be false. Id. While acknowledging that "scientific judgments . . . about which reasonable minds may differ cannot be false," id. at 87, the court held that it was a matter for the jury to decide whether the scientist at issue had falsified data, id. at 96.

Neither the First Circuit nor any court in this district has found that claims for coverage of drugs cannot be false if supported by the judgment of the prescribing doctor. And, Relators claim here [\*20] is that the Defendants used their off-label marketing scheme to mislead doctors about how to diagnosis HoFH, thereby corrupting the diagnosis process itself. See Second Am. Compl. ¶ 83 [#69]. As in Jones, the court finds that there is a genuine issue about

<sup>9</sup> LDL apheresis is a procedure for individuals with mortally high cholesterol, which, according to Dr. Rader, involves "physical purging of the blood to remove LDL cholesterol. Patients have the 3-4-hour procedure involving two intravenous lines every one to two weeks. This procedure is very taxing on patients and treats the symptoms of the disease as opposed to the disease mechanism itself, and it is also costly. While apparently beneficial, the apheresis treatment merely delays the progress of the disease." SAC ¶ 33 [#69].

<sup>10</sup> At the hearing on this motion, Relators' counsel stated that they have the names of patients and doctors referenced in Charts A and B but did not include them in the complaint in order to maintain those individuals' confidentiality. Although the court could require Relators to amend their complaint to add this information, the court will not require Relators to do so in the interest of patient confidentiality. The court notes, as it did at the hearing, that this evidence can be addressed on summary judgment.

whether the information Defendants gave to medical prescribers, which led to prescriptions for off-label use, was misleading.

c. Causation

Defendants next argue that even if Relators have sufficiently pled that there were offlabel Juxtapid prescriptions that resulted in false claims, they have not pled with particularity that the Defendants' off-label promotion caused any of the false claims to be submitted. Joint Mem. at 18-19 [#151].

Relators must show that at least some subset of claims made for government reimbursement were false as a result of Defendants' actions. See [Ge, 737 F.3d at 124](#); see also [D'Agostino v. ev3, Inc., 845 F.3d 1, 8 \(1st Cir. 2016\)](#) ("[D]efendant's conduct must include not just materiality but also causation."). Here, Relators have alleged numerous efforts made by Aegerion salespeople to expand the definition of HoFH and mislead doctors into prescribing Juxtapid to patients who do not have HoFH, or even a diagnosis consistent with HoFH. The court need not repeat [\*21] its analysis here. Relators' allegations provide sufficient indicia of reliability that Aegerion's off-label marketing scheme caused fraudulent claims for Juxtapid to be submitted to federal health care programs.

d. Materiality

Defendants challenge the sufficiency of Relators' allegations that their purportedly fraudulent representations were material to the government's decision to pay any claims for reimbursement for Juxtapid. Joint Mem. 21-25 [#152]. Relying on the Supreme Court's 2016 decision in [Universal Health Services, Inc. v. United States ex rel. Escobar](#), Defendants say that the complaint fails scrutiny under [Federal Rules of Civil Procedure 8](#) and [9\(b\)](#) because the government was aware of Relators' allegations as of 2013 yet continued to reimburse Juxtapid claims through 2016. *Id.* at 21-25 (citing [136 S. Ct. 1989, 2003-04, 195 L. Ed. 2d 348 \(2016\)](#) ("[I]f the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material.")).

As the First Circuit stated on remand in [Escobar](#), "mere awareness of allegations concerning noncompliance with regulations is different from knowledge of actual noncompliance." [United States ex rel. Escobar v. Universal Health Services, Inc., 842 F.3d 103, 110 \(1st Cir. 2016\)](#) (emphasis added). There is no indication that from 2013 through [\*22] 2016, while the government paid claims for Juxtapid, the government had "actual knowledge" of "actual noncompliance," rather than mere awareness of allegations of noncompliance. Moreover, as this court has previously recognized, actual knowledge may not be determinative of materiality as there may be other reasons why the government continues to pay these claims. See [United States ex re. Williams v. City of Brockton, No. 12-cv-12193, 2016 U.S. Dist. LEXIS 178032, 2016 WL 7429176 \(D. Mass. Dec. 23, 2016\)](#) (Talwani, J.).

e. Public Disclosure

As a final argument pertaining to summary dismissal of Counts 1 and 2, the Defendants contend that Relators' allegations stem from information that was publicly available, and therefore Relators' claims must be dismissed pursuant to the public disclosure bar on *qui tam* actions, [31 U.S.C. § 3730\(e\)\(4\)\(A\)](#). Joint Mem. 25-28 [#152]. Furthermore, Defendants assert that none of the Relators are an "original source" of the publicly available information, and therefore this exception to the public disclosure bar under [31 U.S.C. § 3730\(e\)\(4\)\(A\)\(iii\)](#) does not apply. *Id.* at 28-30.

Under the public disclosure bar, the court shall dismiss a *qui tam* action or claim if the same allegations were publicly disclosed: in a federal criminal, civil, or administrative hearing in which the government is a party; [\*23] in a congressional, Government Accountability Office, or other Federal report, hearing, or investigation; or from the news media. [31 U.S.C. § 3730\(e\)\(4\)\(A\)](#). "That bar is designed to foreclose *qui tam* actions in which a relator . . . attempts to free-ride by merely repastinating previously disclosed badges of fraud. . . . [T]he bar seeks to prevent 'parasitic' suits." [United States ex rel. Ondis v. City of Woonsocket, 587 F.3d 49, 53 \(1st Cir. 2009\)](#) (internal citations omitted). An exception to the public disclosure bar applies if the relator was the "original source" and voluntarily disclosed to the government the information on which the false claim allegations are based, or if the

relator provided "knowledge that is independent of and materially add to the publicly disclosed allegations." [31 U.S.C. § 3730\(e\)\(4\)\(A\), \(B\)](#).

Relators' claims are not barred by public disclosure. Although Aegerion made public its inflated estimate of the prevalence HoFH population, these statements do not by themselves constitute the false claims alleged in the Second Amended Complaint. Rather, it is Aegerion's alleged internal off-label marketing scheme and efforts to convince doctors to prescribe Juxtapid for non-HoFH patients, and the resultant false claim submissions, that make up Relators' claims. "[T]here is no public disclosure when [\*24] the 'essential background information' is publicly available but no allegation of fraud . . . has been made publicly available." [Nowak, 806 F. Supp. 2d at 328](#). Relators may not be the original source of Aegerion's publicly disclosed statements, but they allegedly were the original source of the off-label marketing scheme and purportedly false claim submissions, the information upon which the false claim allegations are based. See Second Am. Compl. ¶ 26.

The Defendants added in the Second Amended Complaint, which was filed after the case was unsealed, also raise the public disclosure bar specifically as it pertains to Relators' allegations against them. See David Scheer's Mem. in support of Joint Mot. to Dismiss ("Scheer Mem.") [#151]; Melanie Detloff and James Frigge's Mem. in support of Joint Mot to Dismiss ("Detloff/Frigge Mem.") [#154]; William Dull's Mem. in support of Joint Mot. to Dismiss ("Dull Mem.") [#159]; Mark Fitzpatrick's Memorandum in support of Joint Mot to Dismiss ("Fitzpatrick Mem.") [#155]; Mark Sumeray's Memorandum in support of Joint Mot. to Dismiss ("Sumeray Mem.") [#156]. But the information that Relators have provided as it pertains to individual Defendants is their alleged involvement within [\*25] Aegerion in the scheme, during a period of time when Relators, who were employed by Aegerion between 2012 and 2014, claim first-hand knowledge. Second Am. Compl. ¶¶ 4, 8-10, 69, 75-76, 81, 83-84, 92-93, 97-99, 104-105, 149, 153, 159 [#69]. Moreover, Relators allege that they provided the government with a copy of their Second Amended Complaint on or about July 27, 2017, *id.* ¶ 26, and they sought leave from this court to file their Second Amended Complaint on September 15, 2017, a week before the case was unsealed. The court does not find any of the claims against the Defendants barred by public disclosure.

Accordingly, for the foregoing reasons, the court declines to summarily dismiss Count 1 and 2 of the Second Amended Complaint.

### III. Joint Motion to Dismiss — Count 3: Conspiracy

Count 3 alleges that the Defendants conspired to commit a breach of the FCA, in violation of [31 U.S.C. § 3729\(a\)\(1\)\(C\)](#). Second Am. Compl. ¶¶ 210-213 [#69]. To prove a defendant is liable for conspiring to defraud the government by getting a false or fraudulent claim allowed or paid, a relator must show that "the defendant conspired with one or more persons to get a false or fraudulent claim allowed or paid by the United States; and [\*26] one or more conspirators performed any act to effect the object of the conspiracy." [United States v. President & Fellows of Harvard College, 323 F. Supp. 2d 151, 196. \(D. Mass. 2004\)](#).

Defendants contend that there can be no conspiracy where all Defendants allegedly were acting as agents of Aegerion, and therefore could not have conspired as Aegerion—including its agents—cannot conspire with itself. Joint Mem. 19-20 [#152]. Moreover, the Defendants assert that Relators' allegations fail to plead any particular facts to show the existence of any agreement between the parties, let alone an agreement to defraud the government. They argue that the conspiracy claims therefore must be dismissed pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) and [9\(b\)](#). *Id.* at 19-21.

The Supreme Court has referred to the doctrine that a corporation cannot conspire with its own employees or agents as "antitrust law's intracorporate conspiracy doctrine." [Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 166, 121 S. Ct. 2087, 150 L. Ed. 2d 198 \(2001\)](#). "Outside of the antitrust context, the scope of the intracorporate conspiracy doctrine is far from settled." [Mass. ex rel. Martino-Fleming v. S. Bay Mental Health Ctr., Inc., 334 F. Supp. 3d 394, 403 n.4 \(D. Mass. 2018\)](#). In Cedric Kushner Promotions, for example, the Supreme Court found an individual to be a separate entity under the Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C. § 1962\(c\)](#), from the closely held corporation of which he was president and sole shareholder. The Supreme Court found no consistency with "antitrust [\*27] law's intracorporate conspiracy doctrine[]," noting that that

doctrine "turns on specific antitrust objectives." The First Circuit, in turn, has shown resistance to extending the doctrine outside of the antitrust context. See Stathos v. Bowden, 728 F.2d 15, 20-21 (1st Cir. 1984) ("We doubt that this 'intracorporate' exception should be read broadly. The cases employing it have rested in large part on precedent drawn from the antitrust field.").

In the FCA context, one court in this district, while not resolving the issue, has noted that "it is questionable whether [the doctrine] would apply . . ." Presidents & Fellows of Harvard Coll., 323 F. Supp. 2d at 198 n. 40. Other district courts have concluded that the doctrine does apply. See Fleming, 334 F. Supp. 3d at 403 (applying the intracorporate conspiracy doctrine in the FCA context); United States ex re. Hagerty v. Cyberonics, Inc., 95 F. Supp. 3d 240, 269 (D. Mass. 2015) (same).

The court does not need to reach the issue here because, in this case, Relators have alleged that Dr. Rader, a non-Aegerion employee, was a part of this conspiracy. See Second Am. Compl. at 8 n.3; ¶¶ 205-209 [#69]. Relators allege that Dr. Rader conspired with the Aegerion employees, and that he was intimately involved in the FDA process and expanding use of Juxtapid to those with "functional HoFH." Id. at ¶ 62. Although Dr. Rader is alleged to have been a member of Aegerion's [\*28] Scientific Advisory Board, Dr. Rader was not an employee of Aegerion and is alleged to have acted as an independent decisionmaker. His alleged interest in the financial success of Aegerion—increased value in the stock that he held and potentially increased royalty payments to his separate employer, UPenn, see id. ¶¶ 51-52, 124-133—is distinct from the company's financial interest. And, the fact that Dr. Rader has been dismissed from this action does not change his inclusion as part of the alleged conspiracy. See, e.g., United States ex rel. Head v. Kane Co., 798 F. Supp. 2d 186, 201 (D.D.C. 2011) ("[I]t is well-settled that 'all co-conspirators need not be joined to permit any one or more to be held liable for an unlawful conspiracy.'" (quoting Ass'n for Intercollegiate Athletics for Women v. Nat'l Collegiate Athletic, 558 F. Supp. 487, 498 (D.D.C. 1093))).

Moreover, as previously noted, the Second Amended Complaint sufficiently pleaded facts that the Defendants worked in concert to devise and implement Aegerion's off-label marketing scheme, and that marketing scheme caused false claims to be made to the United States government. Accordingly, Relators' conspiracy claim (Count III) has been adequately plead such that it survives this motion to dismiss.

#### IV. The Individual Defenses

Each Defendant individually argues that the Second Amended Complaint must be dismissed as to that [\*29] Defendant. The court examines those individual arguments not addressed above.

##### a. David Scheer

Defendant Scheer is President of Scheer & Company, Inc., a venture capital firm. Second Am. Compl. ¶ 20 [#69]. The complaint alleges that Dr. Rader recruited Defendant Scheer to establish Aegerion in order to commercialize Juxtapid, id. ¶¶ 43-48, and that Defendant Scheer served on Aegerion's Board of Directors from 2004 through 2016, id. ¶¶ 20, 196. Defendant Scheer argues that Relators fail to allege with particularity any link between him and the alleged fraud, that any act by him was material to the submission of any false claim, that he entered into an agreement to defraud the government, or that he had actual knowledge or a reckless disregard of any false claim. Scheer Mem. at 5-10 [#151]. Finally, he says he is not responsible for Aegerion's misconduct simply because of his position as a member of the Board. Id. at 8-10.

The Second Amended Complaint outlines Defendant Scheer's prior entrepreneurial endeavors, and his role in establishing and attracting investors to Aegerion prior to it having obtained the rights to develop and sell the drug. Second Am. Compl. ¶¶ 43-49 [#69]. Relators also include [\*30] a number of conclusory allegations regarding Scheer's overall plan and intentions. See, e.g., id. ¶¶ 62 ("expanding the target population tenfold was precisely what Dr. Rader, Scheer, Beer and other Defendants intended"); id. ¶ 196 ("Defendant Scheer conspired with the other Individual Defendants to establish Aegerion as a company ostensibly serving the needs of the HoFH population, but all the while the goal of the conspiracy was to sell Juxtapid in the off-label market. . . . Scheer would have known that Aegerion could not have achieved its peak sales, in excess of the entire patient population in the United States, without trespassing into off-label marketing"). However, the only allegation potentially tying him to the off-label marketing scheme itself, or even alleging any action by Defendant Scheer after the launch of Juxtapid, is

that he attended a Juxtapid launch party in Cabo San Lucas, where he "would have heard [Defendant] Fraser make the presentation on "The Art of Not Defining HoFH," and he "knew that glowing financial predictions ultimately depend on sales for off-label use"); *Id.* ¶ 77 (internal quotation marks removed). Relators allege no facts that Defendant Sheer directed, [\*31] implemented, participated or conspired in the alleged marketing scheme.

The Complaint further alleges that Defendant Scheer traded Aegerion stock for a net gain of \$1,696,000. *Id.* ¶ 199. But the allegation that Defendant Scheer sold Aegerion stock does not provide a sufficient connection between him and the alleged fraud. See id. ¶ 199. "A relator does not satisfy the requirements of [Rule 9\(b\)](#) merely by pleading "fraud by hindsight." *D'Agostino*, 153 F. Supp. 3d at 532 n.9 (quoting *Gross v. Summa Four, Inc.*, 93 F.3d 987, 991 (1st Cir. 1996)); cf. [United States v. St. Michael's Credit Union](#), 880 F.2d 579, 602 (1st Cir. 1989) (noting the prejudicial danger of guilt by association).

Although Relators have a sufficiently alleged that Aegerion employees caused the submission of false claims generally, and that Defendant Scheer benefitted from those submissions, Relators have failed to allege facts showing a connection between Defendant Scheer and the off-label marketing scheme. Accordingly, Relators allegations against Defendant Scheer do not meet even the more-relaxed standard for indirect claims under [Fed. R. Civ. P. 9\(b\)](#). Accordingly, the [Joint Motion to Dismiss](#) [#147] is ALLOWED as to all claims against Defendant Scheer.

b. James Frigge and Melanie Detloff

Defendants Frigge and Detloff were former top selling Aegerion sales representative. Second Am. Compl. ¶¶ 13, 18 [#69]. They argue that [\*32] the allegations against them are not sufficiently particular to meet to satisfy the requirements of [Federal Rule of Civil Procedure 9\(b\)](#). Detloff/Frigge Mem. at 1-9 [#154].

The [Second Amended Complaint](#) alleges that Defendant Detloff presented "best practices" for recruiting Juxtapid patients by going to patients' homes to get them to sign consent forms and attempting to recruit those patients' family members while there. Second Am. Compl. ¶ 80 [#69]. Relators further allege that Defendant Detloff personally filled out a statement of medical necessity form, *id.* ¶¶ 80, 146, 168, and was listed as the salesperson on three Medicare patients on Chart A, one of whom was 64 years old, *id.* ¶ 153. As to Defendant Frigge, Relators allege that Defendant Frigge sent medical providers a misleading letter that Aegerion has "a drug in final review with the FDA for patients with a form of *Familial Hypercholesterolemia*," as opposed to identifying HoFH, and that Aegerion was working with Dr. Rader "to identify the appropriate patient population." *Id.* ¶¶ 67-68 (emphasis added). Relators further allege that Defendant Frigge participated in the internal sales "hunt," which purportedly encouraged Aegerion sales staff to market Juxtapid for [\*33] off-label use. *Id.* ¶¶ 93-94.

When looking at the allegations against Defendants Detloff and Frigge in the context of the entire [Second Amended Complaint](#), the court finds that Relators allegations against the two sales representatives satisfy the requirements of [Rule 9\(b\)](#). Defendant Frigge argues that because the letter he allegedly sent to medical providers states that the drug is for "a form of Hypercholesterolemia," it is therefore truthful and cannot serve as the basis of a false claim. Detloff/Frigge 6-7 [#154] (citing [United States ex rel. Jones v. Brigham and Women's Hosp.](#), 750 F. Supp. 2d 358, 366 (D. Mass. 2010), vacated and remanded, 678 F.3d 72 (1st Cir. 2012)). But whether this language was intended to mislead is a genuine issue of material fact better left for the jury. Cf. [Jones](#), 678 F.3d at 96 ("[C]onstruing all facts in favor of Relator, we conclude that Jones generated a genuine issue of material fact as to whether the Defendants acted knowingly when allegedly making false representations in the Application.").

Defendant Detloff makes a similar argument, averring that she made no misstatements in furtherance of the alleged off-label marketing scheme. Detloff/Frigge Mem. 7-8 [#154]. However, as with Defendant Frigge's letter, there is a genuine issue as to whether her statements were intended to encourage the off-label marketing [\*34] scheme.

Relators have alleged enough facts showing Defendants Detloff and Frigge's knowledge and participation in the off-label marketing scheme to satisfy [Rule 9\(b\)](#)'s particularity requirement. Accordingly, the [Joint Motion](#) is DENIED as to Defendants Frigge and Detloff.

c. Mark Fitzpatrick

Defendant Fitzpatrick was Aegerion's Chief Financial Officer from May 2011 to June 2015. Second Am. Compl. ¶ 15 [#69]. Relators state that Defendant Fitzpatrick was on an investor call when Defendant Beer told investors that Aegerion would no longer offer metrics other than sales, *id.* ¶ 120, and, as CFO, knew the predicted revenue that Aegerion had expected to collect and Aegerion's actual revenue, *see id.* ¶ 174. Defendant Fitzpatrick also presented the company's financial information at quarterly investor calls, including one stating expectations for "U.S. growth" in July 2014 (when the market was presumably already saturated). *Id.* ¶ 176.

Defendant Fitzpatrick argues his participation in quarterly investor calls during which the company's financial condition was discussed is insufficient to show that he had knowledge, or was deliberately ignorant, of the truth or falsity of Juxtapid claims. Fitzpatrick Mem. [\*35] 1-8 [#155]. Accordingly, Defendant Fitzpatrick argues that the Second Amended Complaint must be dismissed against him pursuant to [Rules 12\(b\)\(6\)](#) and [9\(b\)](#). *Id.* at 6-8.

Although a close call, the Second Amended Complaint has alleged enough to survive a motion to dismiss. Although Defendant Fitzpatrick may have been one step removed from the off-label marketing and sales itself, his intimate knowledge of the company's financial situation, the company's rapid growth beyond what would be possible but for the off-label marketing, and his participation in the investor call at which Defendant Beer announced that Aegerion would no longer offer non-sales metrics, is sufficient to show a willful blindness to the fact that Juxtapid was being marketed and sold for off-label use. And, unlike the allegations against Defendant Scheer, Relators allege at least some affirmative act that Defendant Fitzpatrick took in the operation of Aegerion during the time that the off-label marketing scheme was taking place from which a reasonable juror could infer his knowledge and participation in the scheme.

Accordingly, the Joint Motion [#147] is DENIED as to Defendant Fitzpatrick.

d. Mark Sumeray

Defendant Sumeray served as Aegerion's Chief [\*36] Medical Officer from the summer of 2011 through February 2016. Second Am. Compl. ¶ 21 [#69]. Relators have alleged that Defendant Sumeray told investors on several occasions that the HoFH population in the U.S. was 3,000 instead of 300, and that there "may be a more significant population of [HoFH] patients in need of therapy than we had initially anticipated." *Id.* ¶¶ 130, 189-192.

Defendant Sumeray argues that the Second Amended Complaint is void of allegations that he participated in the marketing of Juxtapid or did anything other than attend meetings where others purportedly made false statements having nothing to do with marketing. Sumeray Mem. 1-4 [#156]. He contends that any statements that he made were qualified statements that by their nature cannot be false, and the allegations against him lack the precision necessary to show the falsity of the claims, or any knowledge thereof, under [Federal Rules of Civil Procedure 9\(b\)](#) and [12\(b\)\(6\)](#). *Id.* at 4, 7.

Despite these contentions, Defendant Sumeray's statements that the HoFH population may not just be larger than originally anticipated, but ten-fold what Aegerion originally said to be the actual population of HoFH patients in the United States, lead to the natural inference that he was [\*37] both aware of and participating in the company's strategy to inflate this number to increase sales. These inflated estimates were pivotal to the alleged off-label marketing scheme.

Accordingly, because Relators have sufficiently pled Defendant Sumeray's involvement in the alleged fraud, the court DENIES the Joint Motion [#147] as to Defendant Sumeray.

e. Craig Fraser

Defendant Fraser, an Aegerion employee from October 2011 to August 2015, was Aegerion's President in charge of U.S. Commercial and Global Manufacturing and Supply Chain and Chief Operating Officer ("COO"). Second Am. Compl. ¶ 17 [#69]. The Second Amended Complaint includes various allegations that Defendant Fraser actively participated in the off-label marketing and sales scheme that resulted in false claim submissions. Relators alleged that: Defendant Frasier stated to Relator Clark that "3750 is our target @ label and off label," *id.* ¶ 69 (emphasis in original); Defendant Fraser made a presentation entitled "The Art of Not Defining HoFH" at the Juxtapid Launch

Meeting in January 2013, *id.* ¶ 76; Defendant Fraser instructed sales representative to use misleading techniques to try to convince doctors to prescribe Juxtapid [\*38] for patients without HoFH, *see id.* ¶¶ 76, 93, 100-101; he further instructed the Aegerion sales force to push the theory that the definition of HoFH was debatable, *id.* ¶ 99; Defendant Fraser was present during Defendant Detloff's "best practices" presentation, *id.* ¶ 80; he encouraged sales representatives to "data mine" for Juxtapid candidates by ignoring the FDA-approved indication, *id.* ¶ 85; and Defendant Fraser engaged in a competition with other executives during which he obtained prescriptions for Juxtapid for patients for both on and off-label use, *id.* ¶ 178.

Defendant Fraser argues that none of the facts alleged tie him to any false claims submitted to the government for reimbursement. Fraser Mem. 2 [#157]. But this argument states no more than the joint argument discussed and rejected above. The Joint Motion [#147] is DENIED as to claims against Defendant Fraser.

f. Marc Beer

Defendant Beer is Aegerion's former CEO before his departure in July 2015. Second Am. Compl. ¶ 12 [#69]. Defendant Beer argues that Relators did not point to any specific directions he gave to the Aegerion sales team to promote Juxtapid for off-label use, and therefore fail to meet Rule 9(b)'s heightened standard [\*39] for fraud allegations. Beer Mem. 3-5 [#158]. He asserts the Second Amended Complaint must therefore be dismissed as to the claims against him.

As to Defendant Beer specifically, Relators alleged that the off-label marketing scheme began once Defendant Beer became CEO of Aegerion, *see* Second Am. Compl. ¶¶ 59-60 [#69], and that Defendant Beer promoted Dr. Rader's "functional" HoFH theory, *see id.* ¶¶ 59-64. Defendant Beer made numerous public appearances at which he alleged that the estimate of patients with HoFH was 3,000 as opposed to 300, *id.* ¶¶ 81, 91, 102-104, 106, 114, intentionally misinterpreted scientific data at an investor conference, *id.* ¶¶ 109, 110, and only provided investors with revenue amounts rather than number of sales of Juxtapid, *id.* ¶ 120. Moreover, Relators contend that Defendant Beer placed pressure on the sales representatives to aggressively sell Juxtapid and to "data mine" for Juxtapid candidates by ignoring the FDA-approved indication, *id.* ¶¶ 85-86, 92-94, tracked the number of Juxtapid claims paid by government healthcare programs, while refusing to disclose that information, *id.* ¶ 148, and intentionally sought out medical practices with a high number of Medicare [\*40] and Medicaid patients, *see id.* ¶¶ 152-153.

Relators have asserted particularized allegations against Defendant Beer sufficient to survive a motion to dismiss pursuant to Rule 9(b) or 12(b)(6). Relators sufficiently allege that Defendant Beer was intimately involved with, and participated in, the off-label marketing scheme. Accordingly, the Joint Motion to Dismiss [#147] is denied as to Defendant Beer.

g. William Dull

Defendant Dull is the former Director of the Southeast Region sales territory and Vice President of Global Marketing for Aegerion. Second Am. Compl. ¶ 14 [#69]. Relators allege that Defendant Dull was present while Defendant Detloff made her "best practices" pitch, which outlined many of practices used in Aegerion's off-label marketing scheme. *Id.* ¶ 80. Defendant Dull is alleged to have encouraged the practice of data mining databases for potential Juxtapid patients and encouraging the sales team to target large practices to perform these searches. *Id.* ¶ 89. He is also alleged to have taken a lead role in at least one training session of the Aegerion sales team meetings at which the "best practices" presentation was made. *Id.* ¶ 170.

Defendant Dull argues that the allegations against him are [\*41] inadequate, as a matter of law, to show that he had the requisite scienter to participate in the conspiracy, and that Relators have failed to show that his actions caused false claim submissions or were material to the payment of those claims. Dull Mem. at 1-3 [#159].

Based on the allegations in the Second Amended Complaint and the inferences to be drawn from them, Defendant Dull was at the very least deliberately indifferent to the off-label marketing scheme occurring in his presence, and at worst was an active participant in the alleged conspiracy. Therefore, the Joint Motion to Dismiss [#147] is DENIED as to Defendant Dull.

h. Greg Fenner

Defendant Fenner was National Sales Director during his employment at Aegerion from July 2012 to March 2017. Second Am. Compl. ¶ 15 [#69]. Defendant Fenner argues that the Second Amended Complaint fails to allege with particularity that he caused the submission of false claims, and that he acted with the requisite state of mind for false claims to be submitted. Fenner Mem. 1-5 [#160].

The allegations specific to Defendant Fenner in the Second Amended Complaint are that he was present during Defendant Detloff's "best practices" presentation, Second [\*42] Am. Compl. ¶ 80 [#69]; that he presented HoFH as more prevalent than was supported by accepted literature and urged against genetic testing as a means of diagnosing HoFH, *id.* ¶ 81; that he presented a PowerPoint presentation at the Aegerion National Sales meeting, of which the "Lessons Learned" included "not defining HoFH patients," "case based selling," "REMS not an impediment," and "EMR patient mining," *id.* ¶ 83; *see also id.* ¶ 85. He is further alleged to have set out the bonus incentive for the sales "hunt," *id.* ¶¶ 93-95, and cautioned sales rep that they must choose speakers that "believe in our definition of HoFH" to give speeches about HoFH, *id.* ¶ 96. Defendant Fenner is alleged to have put action to his words, telling one doctor that Aegerion could not engage him as a speaker unless he prescribed more Juxtapid. *Id.* ¶ 105. The Second Amended Complaint also includes allegations that Defendant Fenner told Relator Szudlo that the term HoFH was a faux pas when speaking to doctors' offices, and that she should talk to doctors using misleading generalities about the use of Juxtapid. *Id.* ¶¶ 97-99.

The Second Amended Complaint thus sufficiently alleges that Defendant Fenner was not only [\*43] well informed and aware of the off-label marketing scheme but was pushing the scheme to the sales team. Given these allegations, his mental state while taking these actions is a question for the jury. *See Karvelas, 360 F.3d at 228 (Rule 9(b))* does not require a qui tam relator to "plead with particularity allegations concerning defendants' knowledge, reckless disregard, or deliberate ignorance on the submission of false claims. The characterization of a state of mind, after all, does not lend itself to detailed pleading.").

Accordingly, the court DENIES the Joint Motion to Dismiss [#147] as to claims against Defendant Fenner.

V. Conclusion

For the reasons set foregoing reasons, the court ALLOWS in part and DENIES in part the Joint Motion to Dismiss [#147]. Because the Second Amended Complaint [#69] does not sufficiently allege that Defendant Scheer was a participant in the off-label marketing of Juxtapid that caused the submission of false claims for reimbursement from government health care providers, the joint motion to dismiss is ALLOWED as to Defendant Scheer. All claims against Defendant Scheer are DISMISSED.<sup>11</sup> The joint motion to dismiss is otherwise DENIED.

IT IS SO ORDERED.

Date: March 31, 2019

/s/ Indira Talwani

United States District Judge

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<sup>11</sup> Because of the continuing proceedings against the other Defendants, this interlocutory order does not amount to a final judgment. *Fed. R. Civ. P. 54(b)*. In light of the United States' and the Plaintiff States' requests as to any dismissal, *see Notice of Election to Decline Intervention* [#99], Plaintiff [\*44] States' *Notice of Election to Decline Intervention* [#110], the court anticipates that, unless this order is subsequently revised, judgment as to Defendant Sheer will enter with prejudice as to the Relators and without prejudice as to the United States and the Plaintiff States.



## **Leeds v. Bd. of Dental Exam'rs**

United States District Court for the Northern District of Alabama, Southern Division

April 2, 2019, Decided; April 2, 2019, Filed

Case No.: 2:18-cv-01679-RDP

### **Reporter**

382 F. Supp. 3d 1214 \*; 2019 U.S. Dist. LEXIS 56402 \*\*; 2019-1 Trade Cas. (CCH) P80,724; 2019 WL 1452845

D. BLAINE LEEDS DDS, et al., Plaintiffs, v. BOARD OF DENTAL EXAMINERS OF ALABAMA, et al., Defendants.

**Subsequent History:** Reconsideration granted by, in part [Leeds v. Bd. of Dental Examiners of Ala., 2019 U.S. Dist. LEXIS 65617, 2019 WL 1696845 \(N.D. Ala., Apr. 17, 2019\)](#)

Appeal dismissed by [Leeds v. Bd. of Dental Examiners of Ala., 2021 U.S. App. LEXIS 22474 \(11th Cir. Ala., July 29, 2021\)](#)

**Prior History:** [Leeds v. Bd. of Dental Exam'rs of Ala., 2018 U.S. Dist. LEXIS 235762, 2018 WL 10593812 \(N.D. Ala., Oct. 16, 2018\)](#)

## **Core Terms**

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immunity, regulation, Dental, member of the board, dentist, iTero, teeth, digital, images, quotation, marks, patient's, whitening, state law, nondentist, supervision, purposes, state official, licensed dentist, nonsovereign, sovereign immunity, physical presence, employees, practice of dentistry, dental practice, violating, Dormant, entity, arm, motion to dismiss

## **LexisNexis® Headnotes**

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

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

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

The Federal Rules of Civil Procedure require that a complaint provide a short and plain statement of the claim showing that the pleader is entitled to relief. [Fed. R. Civ. P. 8\(a\)\(2\)](#). The complaint must include enough facts to raise a right to relief above the speculative level. Pleadings that contain nothing more than a formulaic recitation of the elements of a cause of action do not satisfy [Rule 8](#), and neither do pleadings that are based merely upon labels and conclusions or naked assertions without supporting factual allegations. In deciding a [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion to dismiss, courts view the allegations in the complaint in the light most favorable to the nonmoving party.

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

## **HN2** Motions to Dismiss, Failure to State Claim

In considering a motion to dismiss, a court should (1) eliminate any allegations in the complaint that are merely legal conclusions; and (2) where there are well-pleaded factual allegations, assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. That task is context specific, and to survive the motion, the allegations must permit the court, based on its judicial experience and common sense to infer more than the mere possibility of misconduct. If the court determines that well-pleaded facts, accepted as true, do not state a claim that is plausible, the claims must be dismissed.

Constitutional Law > State Sovereign Immunity

Governments > State & Territorial Governments > Claims By & Against

## **HN3** Constitutional Law, State Sovereign Immunity

In *Versiglio*, the Eleventh Circuit held that the Board of Dental Examiners was an arm of the State of Alabama and therefore entitled to [Eleventh Amendment](#) immunity from a claim asserted under the Fair Labor Standards Act. The Eleventh Circuit based its decision on a ruling by the Alabama Supreme Court that the Board was an arm of the state entitled to immunity from a breach-of-contract claim under Alabama's constitution. Although whether an agency qualifies as an arm of the state is a federal question with a federal standard, the Eleventh Circuit observed that whether that standard is met is determined by carefully reviewing how the agency is defined by state law. Because the Alabama Supreme Court had defined the Board as an arm of the state for purposes of immunity under the Alabama constitution, and because federal courts give great deference to how state courts characterize the entity in question, the Eleventh Circuit held the Board immune from suit on a federal claim in federal court.

Constitutional Law > State Sovereign Immunity

Governments > State & Territorial Governments > Claims By & Against

## **HN4** Constitutional Law, State Sovereign Immunity

Under Eleventh Circuit precedent, whether an entity is an arm of the state must be assessed in light of the particular function in which the entity was engaged when taking the actions out of which liability is asserted to arise. In *Walker*, for example, the Eleventh Circuit held that local school boards in Alabama were not arms of the state with respect to employment-related decisions like hiring, assignment, and compensation. Thus, they were not immune under the [Eleventh Amendment](#) from suits challenging those decisions under federal law.

Constitutional Law > State Sovereign Immunity

Governments > State & Territorial Governments > Claims By & Against

## **HN5** Constitutional Law, State Sovereign Immunity

The Eleventh Circuit uses four factors to determine whether an entity is an "arm of the State" in carrying out a particular function: (1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity. Although it did not expressly apply this four-factor test, the Eleventh Circuit in *Versiglio* squarely held that the Board of Dental Examiners of Alabama is immune from suits challenging the Board's payment of overtime wages to its employees. this lawsuit.

Administrative Law > Agency Rulemaking

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing

Governments > State & Territorial Governments > Claims By & Against

Constitutional Law > State Sovereign Immunity

#### **HN6** [down arrow] **Administrative Law, Agency Rulemaking**

The Board of Dental Examiners of Alabama's rulemaking and enforcement authority is constrained by legislative guidelines. [Ala. Code § 34-9-43\(a\)](#). The Alabama Legislature has defined what constitutes the practice of dentistry, [Ala. Code §§ 34-9-6](#) and [34-9-7](#), and Board regulations defining and regulating the practice of dentistry must not conflict with any statute which defines the practice of dentistry, [Ala. Code § 34-9-43.2\(c\)](#). The Legislature has also limited the fine that may be imposed for violating a Board regulation to not more than five thousand dollars for each offense. [Ala. Code § 34-9-5](#). Finally, the Legislature has directed the Legislative Services Agency to engage in some form of review of the Board's regulations. [Ala. Code § 41-22-22.1](#). In short, the state has established a number of mechanisms by which it exercises a degree of control over the Board's rulemaking and enforcement functions. The Eleventh Circuit has found similar considerations relevant in concluding that a state exercised sufficient control over an entity to render it an arm of the state for sovereign immunity purposes.

Administrative Law > Agency Rulemaking

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing

#### **HN7** [down arrow] **Administrative Law, Agency Rulemaking**

A review of the Alabama Code reveals that the state has provided scant guidance to the Board of Dental Examiners of Alabama on the subject of how it should pay its employees. Indeed, the only direction the Legislature has apparently given is that Board members shall receive as compensation a sum to be fixed by the Board; that the secretary and secretary-treasurer shall each receive such compensation as may be fixed by the board; and that the board is authorized to expend such funds as shall be necessary to pay salaries. [Ala. Code § 34-9-41](#). Thus, there can be no doubt that the control Alabama maintains over the Board's rulemaking and enforcement functions is at least as great as (probably greater than) the control it exercises over the Board's payment of its employees.

Administrative Law > Agency Rulemaking

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing

Constitutional Law > State Sovereign Immunity

Governments > State & Territorial Governments > Claims By & Against

#### **HN8** [down arrow] **Administrative Law, Agency Rulemaking**

Because the Eleventh Circuit held in Versiglio that the Board of Dental Examiners of Alabama was immune from a claim based on its payment of employees, that decision compels the conclusion that the Board is also immune from claims based on its rulemaking and enforcement decisions. The four-factor [Eleventh Amendment](#) immunity test does not yield a different result.

Civil Procedure > Parties > Real Party in Interest

Constitutional Law > State Sovereign Immunity

#### **HN9** Parties, Real Party in Interest

In addition to barring suits against the state itself, the [\*Eleventh Amendment\*](#) also bars suits against state officials when the state is the real, substantial party in interest. The state is the real party in interest if the effect of the judgment would be to restrain the government from acting.

Constitutional Law > State Sovereign Immunity

#### **HN10** Constitutional Law, State Sovereign Immunity

The United States Supreme Court has recognized an important exception to [\*Eleventh Amendment\*](#) immunity. Under the doctrine of Ex parte Young, the [\*Eleventh Amendment\*](#) does not bar suits seeking prospective relief against state officials to prevent them from violating federal law.

Constitutional Law > State Sovereign Immunity

#### **HN11** Constitutional Law, State Sovereign Immunity

In determining whether the doctrine of Ex parte Young avoids an [\*Eleventh Amendment\*](#) bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. It is well settled that a plaintiff may properly assert claims for prospective injunctive and declaratory relief against state officials alleged to be violating federal law. Moreover, prospective relief is equally available whether the law that state officials are allegedly violating is a federal statute (like the Sherman Act) or the Constitution.

Constitutional Law > State Sovereign Immunity

#### **HN12** Constitutional Law, State Sovereign Immunity

In *Pennhurst*, the United States Supreme Court held that Ex parte Young was inapplicable in a suit against state officials on the basis of state law. The Court therefore concluded that a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is barred by the [\*Eleventh Amendment\*](#). As a result, though official-capacity suits seeking prospective relief are permissible under Ex parte Young for violations of federal law, they are impermissible under the [\*Eleventh Amendment\*](#) for violations of state law. The *Pennhurst* Court further held that even supplemental state-law claims against state officials brought alongside federal claims are likewise barred by the [\*Eleventh Amendment\*](#).

Constitutional Law > State Sovereign Immunity

#### **HN13** Constitutional Law, State Sovereign Immunity

In *Pennhurst*, the United States Supreme Court reasoned that the [Eleventh Amendment](#) generally bars officer suits where the state is the real party in interest, regardless of the relief sought. Absent state consent to suit or congressional abrogation of immunity, the only route around this general bar to suit is the doctrine of *Ex parte Young*, which permits federal courts to order prospective relief against state officials for ongoing violations of federal law. But *Pennhurst* held that *Ex parte Young* was inapplicable in a suit against state officials on the basis of state law. Without *Ex parte Young*, then, any claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is barred by the [Eleventh Amendment](#). That includes claims for declaratory relief no less than claims for injunctive relief.

Constitutional Law > State Sovereign Immunity

#### [HN14](#) [+] Constitutional Law, State Sovereign Immunity

Although the relief sought in *Pennhurst* was an injunction ordering state officials to conform their conduct to state law, *Pennhurst's* rule applies equally to a suit seeking a declaration that the conduct of state officials violates state law. *Pennhurst's* rule was based on the idea that it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. A judgment declaring that the conduct of state officials violates state law does just that. It is no less an intrusion on state sovereignty than an injunction forbidding the state officials' conduct. Under *Pennhurst*, the [Eleventh Amendment](#) bars declaratory relief based on alleged state-law violations no less than it does injunctive relief.

Constitutional Law > State Sovereign Immunity

#### [HN15](#) [+] Constitutional Law, State Sovereign Immunity

In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself. Individual-capacity claims, on the other hand, seek to impose individual liability upon a government officer for actions taken under color of state law. In an individual-capacity claim, the real party in interest is the individual, not the sovereign.

Antitrust & Trade Law > Sherman Act > Scope

#### [HN16](#) [+] Antitrust & Trade Law, Sherman Act

The federal antitrust laws provide an important safeguard for the United States' free-market economy. Indeed, the antitrust laws are as important to the preservation of economic freedom and the free-enterprise system as the [Bill of Rights](#) is to the protection of the fundamental personal freedoms. To this end, the antitrust laws declare a considered and decisive prohibition by the federal government of cartels, price fixing, and other combinations or practices that undermine the free market.

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

#### [HN17](#) [+] Exemptions & Immunities, Parker State Action Doctrine

Despite the liberal federal policy favoring competition embodied in the Sherman Act, states have long chosen to regulate certain spheres of their economies in ways that restrict competition, in order to promote other important values. For example, states sometimes impose restrictions on occupations, confer exclusive or shared rights to

dominate a market, or otherwise limit competition to achieve public objectives. The United States Supreme Court has long recognized that if every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal **antitrust law** would impose an impermissible burden on the States' power to regulate. For that reason, the Supreme Court in Parker interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity. This doctrine has come to be known as Parker or state-action immunity from the federal antitrust laws.

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

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

Parker immunity exists to avoid conflicts between the federal policy of robust competition embodied in the Sherman Act and a state's sovereign authority to regulate local activities (even in anticompetitive ways) to promote the health, safety, and morals of its citizens. For that reason, an entity may not invoke Parker immunity unless the actions in question are an exercise of the State's sovereign power. State legislation automatically qualifies as an exercise of the state's sovereign power and is ipso facto exempt from the operation of the antitrust laws.

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

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

#### **HN19** [+] **Parker State Action Doctrine, Local Governments & Private Parties**

Parker immunity does not always apply when a state delegates regulatory authority to a nonsovereign actor, instead of regulating itself by legislation. In that case, anticompetitive conduct by the nonsovereign actor receives Parker immunity only if the conduct results from procedures that suffice to make the anticompetitive conduct the State's own. In other words, the question is whether the nonsovereign actor's anticompetitive conduct should be deemed state action and thus shielded from the antitrust laws.

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

#### **HN20** [+] **Parker State Action Doctrine, Local Governments & Private Parties**

For purposes of Parker immunity, a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself. Perhaps counterintuitively, even state agencies may qualify as nonsovereign actors for purposes of Parker immunity, particularly where they are controlled by active participants in the regulated market. Indeed, limits on Parker immunity are most essential when the state delegates its regulatory power to active market participants, because active market participants may be incentivized to regulate in a manner that promotes their own private interests instead of the state's policy goals.

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

#### **HN21** [+] **Parker State Action Doctrine, Local Governments & Private Parties**

Deciding whether a nonsovereign actor is enforcing state policy or furthering private interests can be a difficult task, especially where the nonsovereign actor is controlled by active market participants. Thus, the United States Supreme Court has held that a nonsovereign actor controlled by active market participants enjoys Parker immunity only if it satisfies both elements of the two-part test set forth in Midcal. Under the Midcal test, anticompetitive conduct by a nonsovereign actor receives Parker immunity only if (1) the state has articulated a clear policy to allow the anticompetitive conduct; and (2) the state provides active supervision of the anticompetitive conduct. Midcal's clear-articulation requirement is met where the displacement of competition is the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. And, the active-supervision requirement demands, among other things, that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.

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

#### **HN22** [+] **Parker State Action Doctrine, Local Governments & Private Parties**

For purposes of Parker immunity, the active-supervision inquiry is flexible and context-dependent. The key question is whether the State's review mechanisms provide realistic assurance that a nonsovereign actor's anticompetitive conduct promotes state policy, rather than merely the party's individual interests. The few constant requirements of active supervision are that the state supervisor: review the substance of the anticompetitive decision, not merely the procedures followed to produce it; have the power to veto or modify particular decisions to ensure they accord with state policy; and not itself be an active market participant. Beyond that, however, the adequacy of supervision will depend on all the circumstances of a case.

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

#### **HN23** [+] **Parker State Action Doctrine, Local Governments & Private Parties**

The rule announced in by the U.S. Supreme Court in N.C. Dental -- that certain state entities must satisfy Midcal's two-part test to claim Parker immunity -- applies to nonsovereign actors controlled by active market participants. In N.C. Dental, the Supreme Court squarely held that North Carolina's Dental Board was such a nonsovereign actor, despite its status as a state agency. The powers, duties, and composition of Alabama's Dental Board are nearly identical to those of the North Carolina Dental Board the Supreme Court considered in N.C. Dental. Both Boards are created by state law and empowered by the state to regulate the practice of dentistry and enforce the state's prohibition of the unauthorized practice of dentistry. [Ala. Code §§ 34-9-40, 34-9-43](#). Both Boards are comprised of a controlling number of active participants in the market for dental services, who are in turn selected by other members of the dental profession. [Ala. Code § 34-9-40](#). Neither North Carolina's nor Alabama's Dental Practice Act creates a mechanism by which Board members may be removed from office by other state officials. [Ala. Code § 34-9-40](#). And both Boards are empowered to promulgate rules and regulations governing the practice of dentistry, provided those mandates are not inconsistent with a state statute. [Ala. Code § 34-9-43.2\(c\)](#).

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

#### **HN24** [+] **Parker State Action Doctrine, Local Governments & Private Parties**

The similarities between the North Carolina Dental Board and the Board of Dental Examiners of Alabama compel the conclusion that the Alabama Board is also a nonsovereign actor controlled by active market participants for

purposes of Parker immunity, and that the principles set forth by the United States Supreme Court in N.C. Dental therefore apply to it.

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

#### **HN25[] Parker State Action Doctrine, Local Governments & Private Parties**

The United States Supreme Court has provided little guidance on what entities qualify as nonsovereign actors for purposes of Parker immunity. But in N.C. Dental, the Court did cite Hoover for the following proposition: for purposes of Parker, a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself. The portion of Hoover cited by the Court identified two state entities that were sovereign for purposes of Parker immunity and whose conduct therefore automatically qualified as the conduct of the state: the state legislature and the state supreme court when acting legislatively rather than judicially. The Hoover Court expressly left open the question whether the governor of a state stands in the same position as the state legislature and supreme court for purposes of the state-action doctrine. Thus, sovereign actors for purposes of Parker immunity appear to be limited to governmental bodies like a state legislature or supreme court (or perhaps the governor) that constitute the apex of a coequal branch of state government. But whatever the limits of that category, as N.C. Dental makes abundantly clear, state agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity. Accordingly, their actions are not automatically cloaked in Parker immunity.

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

Constitutional Law > State Sovereign Immunity

#### **HN26[] Parker State Action Doctrine, Local Governments & Private Parties**

The test for determining what state entities are arms of the state entitled to sovereign immunity under the [Eleventh Amendment](#) is different from the test for determining whether a state agency is a nonsovereign actor for purposes of Parker immunity. The Eleventh Circuit employs a four-factor test to determine whether a state agency is an arm of the state with respect to a particular function it performs. Because of the different tests that apply, it is possible for a state agency to be sovereign for purposes of [Eleventh Amendment](#) immunity but nonsovereign for purposes of Parker immunity.

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

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

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

#### **HN27[] Parker State Action Doctrine, Local Governments & Private Parties**

Because Parker immunity is a waivable, nonjurisdictional affirmative defense, a request to dismiss Sherman Act claims is construed as a motion under [Fed. R. Civ. P. 12\(b\)\(6\)](#) rather than [Rule 12\(b\)\(1\)](#).

382 F. Supp. 3d 1214, \*1214L 2019 U.S. Dist. LEXIS 56402, \*\*56402

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

## [\*\*HN28\*\*](#) [L] Exemptions & Immunities, Parker State Action Doctrine

State legislation is ipso facto exempt from the operation of the antitrust laws.

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

## [\*\*HN29\*\*](#) [L] Parker State Action Doctrine, Local Governments & Private Parties

Whether the active-supervision requirement does not apply when a state agency controlled by active market participants is enforcing an express, specific statutory mandate of the legislature, or whether such a mandate satisfies the active-supervision requirement, the result is the same: the agency receives Parker immunity.

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing

## [\*\*HN30\*\*](#) [L] Business Administration & Organization, Facility & Personnel Licensing

The Alabama Dental Practice Act provides that any person who uses a oentgen, radiograph, or digital imaging machine for the purpose of making dental, or digital images shall be deemed to be practicing dentistry. [Ala. Code § 34-9-6](#). The only exception to this rule is if the person makes dental digital images under the supervision of a licensed dentist or physician. [Ala. Code § 34-9-7\(a\)](#). In that case, the Act does not apply.

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

## [\*\*HN31\*\*](#) [L] Parker State Action Doctrine, Local Governments & Private Parties

Although Midcal's active-supervision inquiry is flexible and context-dependent, one of its few constant requirements is that a state supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it.

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

## [\*\*HN32\*\*](#) [L] Motions to Dismiss, Failure to State Claim

A court must accept a plaintiffs' plausible factual allegations as true when considering a [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion to dismiss.

Administrative Law > Agency Rulemaking > Formal Rulemaking

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations

## [\*\*HN33\*\*](#) [L] Agency Rulemaking, Formal Rulemaking

In 2016, shortly after the United States Supreme Court's 2015 N.C. Dental decision, the Alabama Legislature enacted [Ala. Code § 41-22-22.1](#). The statute requires the legal division of the Legislative Services Agency (LSA) to review each rule certified to it by a state board or commission that regulates a profession, a controlling number of the members of which are active market participants in the profession. [§ 41-22-22.1\(a\)](#). The LSA must determine whether the rule may significantly lessen competition. If it concludes the rule will not decrease competition, no further action is required. But if it finds that the rule may significantly lessen competition, it must determine whether the rule was made pursuant to a clearly articulated state policy to displace competition and then certify those determinations to a legislative committee. [§ 41-22-22.1\(b\)](#). The chair of the committee must then call a meeting of the committee to review the substance of the rule, determine whether the rule may significantly lessen competition, and if so, whether it was made pursuant to a clearly articulated state policy to displace competition. If the committee fails to act on a rule, the rule shall not become effective and shall be placed on the agenda of the committee at each subsequent meeting until the committee disposes of the rule.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

#### [HN34](#) [+] **Commerce Clause, Dormant Commerce Clause**

The [Commerce Clause](#) grants Congress the power to regulate commerce among the several states. [U.S. Const. art. I, § 8, cl. 3](#). Although the Clause only expressly speaks of powers granted to Congress, the United States Supreme Court has long held that the Clause also has a dormant aspect, which imposes substantive restrictions on permissible state regulation of interstate commerce. The dormant or negative aspect of the [Commerce Clause](#) prohibits economic protectionism -- that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

#### [HN35](#) [+] **Commerce Clause, Dormant Commerce Clause**

The Eleventh Circuit evaluates Dormant [Commerce Clause](#) challenges using a two-tiered analysis. The first tier applies if a state regulation directly regulates or discriminates against interstate commerce, or has the effect of favoring in-state economic interests. If that showing is made, the regulation is invalid unless shown to advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. The second tier applies if the regulation has only indirect effects on interstate commerce and regulates evenhandedly. In that case, a court applies the balancing test of, which asks whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. The two tiers of analysis are not clearly distinguishable. Under either tier, the critical consideration is the overall effect of the regulation on both local and interstate activity.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

#### [HN36](#) [+] **Commerce Clause, Dormant Commerce Clause**

In Dormant [Commerce Clause](#), bona fide safety regulations bear a strong presumption of validity. Under the tier-two Pike balancing test, if safety justifications are not illusory, federal courts will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce. But a state's mere incantation of a purpose to promote the public health or safety does not insulate a state law from [Commerce Clause](#) attack. Even regulations designed to promote public health and safety may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the [Commerce Clause](#). Courts must therefore weigh the state's asserted safety purpose against the degree of interference with interstate commerce, giving sensitive

consideration to the weight and nature of the state regulatory concern in light of the extent of the burden imposed on interstate commerce.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

### [HN37](#) [+] **Commerce Clause, Dormant Commerce Clause**

A state's mere incantation of a rational basis for a regulation does not preclude Dormant [Commerce Clause](#) scrutiny.

Constitutional Law > Substantive Due Process > Scope

Evidence > Burdens of Proof > Allocation

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

### [HN38](#) [+] **Constitutional Law, Substantive Due Process**

Under equal protection doctrine, rational basis review applies unless the classification at issue infringes fundamental rights or concerns a suspect class. Similarly, rational basis review applies to substantive due process challenges to state professional regulations because the right to practice a particular profession is not a fundamental one. Under rational basis review, state policies enjoy a strong presumption of validity. Courts ask only whether the enacting government body could have been pursuing a legitimate government purpose in enacting the measure. If a legitimate goal for the law conceivably exists, courts ask only whether a rational basis exists for the enacting governmental body to believe that the legislation would further the hypothesized purpose. This inquiry occurs entirely in the abstract because the actual motivations of the enacting governmental body are entirely irrelevant, as is whether the legitimate basis was actually considered by the legislative body. The government has no obligation to produce evidence to sustain the rationality of the challenged measure, and the complaining party has the burden to negate every conceivable basis which might support it. Unsurprisingly, almost every statute subject to the very deferential rational basis standard is found to be constitutional.

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**Judges:** R. DAVID PROCTOR, UNITED [\*\*2] STATES DISTRICT JUDGE.

**Opinion by:** R. DAVID PROCTOR

## Opinion

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### [\*1222] MEMORANDUM OPINION

In September 2018, the Board of Dental Examiners of Alabama ("Board" or "Dental Board") sent a cease-and-desist letter to SmileDirectClub, LLC ("SmileDirect"). The letter and subsequent communications from the Board informed SmileDirect that certain services it performs for customers at its Alabama shop can only be performed at facilities where a licensed dentist is physically present. Because SmileDirect does not have a licensed dentist physically present at its facility, the Board considers SmileDirect's nondentist personnel to be engaged in the unauthorized practice of dentistry. It therefore ordered SmileDirect to immediately cease performing those services without a supervising dentist present at the facility.

SmileDirect and one of its affiliated dentists, Dr. Blaine Leeds, claim that the Board's actions violate federal and state law. They filed this action against the Board and its members (in their official and individual capacities). SmileDirect and Dr. Leeds ("Plaintiffs") seek (1) an injunction forbidding the Board and its members ("Defendants") from requiring SmileDirect to have a dentist physically present at its facility [\*3] and (2) a declaration that Defendants' conduct is unlawful. (Doc. # 29 at 46). Defendants have moved to dismiss Plaintiffs' claims for lack of subject matter jurisdiction and failure to state a claim. (Doc. # 32); see [Fed. R. Civ. P. 12\(b\)\(1\), 12\(b\)\(6\)](#). After careful consideration, and for the reasons explained below, the court concludes that the motion (Doc. # 32) is due to be granted in part and denied in part.

### I. Background<sup>1</sup>

SmileDirect operates a web-based teledentistry platform that connects patients seeking clear aligner therapy with licensed dentists. (Doc. # 29 at ¶ 23). Dentists like Dr. Leeds contract with SmileDirect to provide certain support services that enable them to treat patients remotely, often across state lines. (*Id.*). The platform enables Dr. Leeds, who has an Alabama dental license but resides in Nashville, Tennessee, to provide corrective teeth realignment for patients in Alabama who have mild to moderate malocclusion (*i.e.*, improperly positioned teeth when the jaws are closed). (*Id.*).

SmileDirect's business model operates as follows. A prospective patient considering clear aligner therapy first visits one of [\*1223] SmileDirect's physical locations, known as "SmileShops." (*Id.* at ¶ 29). There, SmileDirect [\*4] employees use an iTero device -- described by Plaintiffs as "essentially a wand with a camera" -- to rapidly take thousands of digital photographs of the patient's teeth and gums. (*Id.* at ¶ 30). The iTero is inserted into the patient's mouth "at varying angles to photograph the teeth and tissue." (*Id.* at ¶ 92).<sup>2</sup> The iTero does not use ionizing radiation, x-rays, or gamma rays; instead, it simply takes digital photographs. (*Id.* at ¶¶ 29-30). After each use of the iTero, SmileDirect employees remove and discard the disposable cover on the device and clean the

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<sup>1</sup> For purposes of ruling on Defendants' motion to dismiss, the court treats the factual allegations of the Amended Complaint (Doc. # 29) as true, but not its legal conclusions. See [Ashcroft v. Iqbal, 556 U.S. 662, 678-79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#).

<sup>2</sup> Though the Amended Complaint does not expressly state that the iTero is inserted into the patient's mouth, Plaintiffs filed an affidavit in support of their motion for a temporary restraining order representing to the court that it is. (Doc. # 3-4 at 5, ¶¶ 8-9). Additionally, other statements in the Amended Complaint strongly imply that the iTero is inserted into the patient's mouth. (Doc. # 29 at ¶ 95) ("The iTero is also easy to clean between uses and thus presents no meaningful risk of cross-contamination as long as the person performing the photography removes and discards the disposable cover and wipes the wand with a disinfecting wipe after each use.").

wand with a disinfecting wipe. (*Id.* at ¶¶ 95-96). SmileDirect employees also take standard digital photographs of the patient's teeth and gums using a regular digital camera. (*Id.* at ¶ 31).

The iTero images are then sent to a dental lab, which creates a three-dimensional model of the prospective patient's teeth, bite, gums, and palate. (*Id.* at ¶¶ 32, 87). Dr. Leeds or another Alabama-licensed dentist then reviews the three-dimensional model -- along with the standard digital photographs, the patient's health and dental histories, and other pertinent information -- to decide whether clear aligner therapy may be appropriate. (*Id.* at [\*\*5] ¶¶ 32-36). The dentist reviews these materials to identify any periodontal disease, cavities, or other conditions that would require further clearance or prevent the patient from receiving clear aligner therapy through SmileDirect. (*Id.* at ¶ 31). If the dentist determines clear aligner therapy is appropriate and the patient agrees, the dentist writes a prescription to a lab to have the clear aligners fabricated and shipped. (*Id.* at 2). The patient then receives a series of custom-made removable plastic retainers that are placed on the patient's teeth to move them in small increments until the desired positioning is achieved. (*Id.* at ¶ 23).

On September 20, 2018, the Board sent SmileDirect a cease-and-desist letter stating that SmileDirect was engaged in the unauthorized practice of dentistry. (*Id.* at ¶ 59). Plaintiffs allege the letter was sent in response to a complaint the Board received from a competing Alabama-licensed dentist about SmileDirect's operations. (*Id.* at ¶ 58). On October 3, 2018, representatives from SmileDirect met with the Board to explain the function of the iTero and their belief that its use does not constitute a dental procedure that would require the presence of a licensed [\*\*6] dentist on site. (*Id.* at ¶ 61). Six days later, the Board emailed the following message to counsel for SmileDirect: "Thank you for coming by the Board office last week to discuss Smile Direct Club. I reviewed the situation with the Board last Friday in detail. I was directed to inform you that your client immediately must cease and desist performing the services that are considered the practice of dentistry (i.e. digital imaging) without a supervising dentist present." (*Id.* at ¶ 62). SmileDirect and Dr. Leeds responded by filing this lawsuit. (Doc. # 1).

The Board's cease-and-desist letter and subsequent communications were based on certain provisions of the [Alabama Dental Practice Act, Ala. Code § 34-9-1 et seq.](#), [\*1224] and a regulation promulgated by the Board pursuant to its authority to "[a]dopt rules and regulations to implement" the Act, *id.*, [§ 34-9-43\(a\)\(10\)](#). The Act defines what constitutes the practice of dentistry in Alabama, stating in relevant part:

Any person shall be deemed to be practicing dentistry who does any of the following:

...

(7) Uses a roentgen, radiograph, or digital imaging machine for the purpose of making dental roentgenograms, radiographs, or digital images . . . .

*Id.*, [§ 34-9-6](#). However, the Act goes on to exempt [\*\*7] certain practices that would otherwise fall within this definition from being considered the practice of dentistry:

Nothing in this chapter shall apply to the following practices, acts, and operations:

...

(5) The use of roentgen machines or other means for making radiographs, digital images, or similar records, of dental or oral tissues under the supervision of a licensed dentist or physician . . . .

*Id.*, [§ 34-9-7\(a\)](#).

The Board contends the iTero is a "digital imaging machine" and that the images it produces are "digital images" within the meaning of [Alabama Code § 34-9-6](#). (Doc. # 29 at ¶¶ 2, 62-68). It therefore understands persons who use the iTero to be practicing dentistry—unless they do so "under the supervision of a licensed dentist or physician." [Ala. Code § 34-9-7\(a\)\(5\)](#).

The Board also claims SmileDirect's use of an iTero violates one of the Board's regulations. (Doc. # 29 at ¶¶ 2, 62-68). The regulation defines dental hygienists, dental assistants, and dental laboratory technicians as "[a]llied dental personnel" and identifies certain dentistry-related duties they are permitted to perform. [Ala. Admin. Code 270-X-3-10](#). Under the regulation, dental assistants and dental hygienists may "[m]ake dental radiographs or digital images." *Id.* Importantly, however, all [\*\*8] of the duties listed—including making digital images—are "[s]ubject to the prohibition that no intra-oral procedure can be performed unless under the direct supervision of a duly licensed

dentist as defined by Board rule." *Id.* "Direct supervision" is defined by another Board regulation as "supervision by a dentist who authorizes the intraoral procedure to be performed, is physically present in the dental facility and available during performance of the procedure, examines the patient during the procedure and takes full professional responsibility for the completed procedure." [Ala. Admin. Code 270-X-3-06](#). Because SmileDirect employees make intraoral digital images using an iTero at a facility where no licensed dentist is physically present, the Board understands them to be engaged in the unauthorized practice of dentistry, in violation of [Alabama Administrative Code 270-X-3-10](#).

Plaintiffs contend that the Board's actions against SmileDirect are not motivated by a desire to protect the public from the unauthorized practice of dentistry. Instead, Plaintiffs argue the Board -- which by statute consists of six dentists and one dental hygienist who are all selected by other members of the dental profession, [Ala. Code § 34-9-40](#) -- seeks to protect Alabama dentists from competition [\[\\*9\]](#) by innovators like SmileDirect and Dr. Leeds, who provide clear aligner therapy at lower prices than traditional dentists. They claim that use of the iTero poses no health or safety risks and that the Board's requirement that SmileDirect have a licensed dentist physically present at its SmileShops cannot be justified by anything besides economic protectionism. Plaintiffs therefore filed this lawsuit against the Board and each of its members (in their individual and official capacities), asserting claims [\[\\*1225\]](#) under the [Sherman Antitrust Act](#), U.S. Constitution, and Alabama Constitution. (Doc. # 29 at ¶¶ 107-185).

The Board and its members, for their part, claim that the physical-presence requirement serves important public health and safety purposes and that all of Plaintiffs' claims are due to be dismissed.

## II. Legal Standard

**HN1** [↑] The Federal Rules of Civil Procedure require that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief." [Fed. R. Civ. P. 8\(a\)\(2\)](#). The complaint must include enough facts "to raise a right to relief above the speculative level." [Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#). Pleadings that contain nothing more than "a formulaic recitation of the elements of a cause of action" do not [\[\\*10\]](#) satisfy [Rule 8](#), and neither do pleadings that are based merely upon "labels and conclusions" or "naked assertion[s]" without supporting factual allegations. *Id. at 555, 557*. In deciding a [Rule 12\(b\)\(6\)](#) motion to dismiss, courts view the allegations in the complaint in the light most favorable to the nonmoving party. [Watts v. Fla. International Univ., 495 F.3d 1289, 1295 \(11th Cir. 2007\)](#).

**HN2** [↑] In considering a motion to dismiss, a court should "1) eliminate any allegations in the complaint that are merely legal conclusions; and 2) where there are well-pleaded factual allegations, 'assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.'" [Kivisto v. Miller, Canfield, Paddock & Stone, PLC, 413 F. App'x 136, 138 \(11th Cir. 2011\)](#) (quoting [ADA v. Cigna Corp., 605 F.3d 1283, 1290 \(11th Cir. 2010\)](#)). That task is context specific, and to survive the motion, the allegations must permit the court, based on its "judicial experience and common sense . . . to infer more than the mere possibility of misconduct." [Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#). If the court determines that well-pleaded facts, accepted as true, do not state a claim that is plausible, the claims must be dismissed. [Twombly, 550 U.S. at 570](#).

## III. Analysis

Plaintiffs assert claims under (1) the Sherman Antitrust Act, (2) the [U.S. Constitution's Dormant Commerce, Equal Protection](#), and [Due Process Clauses](#), and (3) the Alabama constitutional provisions guaranteeing due process of law. They also request a declaratory judgment [\[\\*11\]](#) that the Board's challenged conduct exceeded its authority under the Alabama Dental Practice Act. For the reasons explained below, the court concludes that Plaintiffs may proceed with their Sherman Act and Dormant [Commerce Clause](#) claims against the Board members in their official capacities. Before addressing Plaintiffs' various claims, the court first deals with several threshold issues concerning sovereign immunity.

### A. The Board of Dental Examiners is Entitled to Sovereign Immunity

As a threshold matter, the Board argues it is entitled to sovereign immunity under the Eleventh Circuit's decision in *Versiglio v. Bd. of Dental Examiners of Alabama*, 686 F.3d 1290 (11th Cir. 2012). The court agrees. Plaintiffs' claims against the Board itself are barred by sovereign immunity and must therefore be dismissed.

In *Versiglio*, the Eleventh Circuit held that the Board of Dental Examiners was an arm of the State of Alabama and therefore entitled to *Eleventh Amendment* immunity from a claim asserted under the *Fair Labor Standards Act*. 686 F.3d at 1291-93. **HN3** [↑] The Eleventh Circuit based its [\*1226] decision on a ruling by the Alabama Supreme Court that the Board was an arm of the state entitled to immunity from a breach-of-contract claim under Alabama's constitution. See *Ex parte Bd. of Dental Examiners of Alabama*, 102 So. 3d 368, 370, 386 (Ala. 2012). Though "[w]hether an agency qualifies as an arm of the state is a federal question with a federal [\*\*12] standard," the Eleventh Circuit observed that "whether that standard is met [is] determined by carefully reviewing how the agency is defined by state law." *Versiglio*, 686 F.3d at 1291. Because the Alabama Supreme Court had defined the Board as an arm of the state for purposes of immunity under the Alabama constitution, and because federal courts give "great deference to how state courts characterize the entity in question," the Eleventh Circuit held the Board immune from suit on a federal claim in federal court. *Id. at 1292-93*.

Plaintiffs argue that *Versiglio* does not bar their claims against the Board because the Board's challenged conduct in this case (enforcing a state statute and regulation) differs from its challenged conduct in *Versiglio* (incorrectly paying Board employees and miscalculating overtime wages). Plaintiffs are correct that **HN4** [↑] under Eleventh Circuit precedent, "[w]hether an entity is an 'arm of the state' must be assessed in light of the particular function in which the entity was engaged when taking the actions out of which liability is asserted to arise." *Walker v. Jefferson Cty. Bd. of Educ.*, 771 F.3d 748, 757 (11th Cir. 2014) (quoting *Manders v. Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003) (en banc)) (internal quotation marks and brackets omitted). In *Walker*, for example, the Eleventh Circuit held that local school boards in Alabama [\*\*13] were not arms of the state with respect to employment-related decisions like hiring, assignment, and compensation. *Id.* Thus, they were "not immune under the *Eleventh Amendment* from suits challenging those decisions under federal law." *Id.* But the function-specific nature of *Eleventh Amendment* immunity does not help Plaintiffs in this case.

**HN5** [↑] The Eleventh Circuit "uses four factors to determine whether an entity is an 'arm of the State' in carrying out a particular function: (1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity." *Manders*, 338 F.3d at 1309. Though it did not expressly apply this four-factor test, the Eleventh Circuit in *Versiglio* squarely held that the Dental Board is immune from suits challenging the Board's payment of overtime wages to its employees. See *Versiglio*, 686 F.3d at 1291-93; see also *Versiglio v. Bd. of Dental Examiners of Alabama*, 2010 U.S. Dist. LEXIS 153680, 2010 WL 11520474, at \*1 (N.D. Ala. Aug. 27, 2010) (district court opinion describing *Versiglio*'s claim as one "for alleged unpaid overtime" under the FLSA). Thus, the only question even arguably presented here is whether the four-factor test calls for a different result with respect to the Board's function of enforcing state statutes and regulations, which is the conduct [\*1227] Plaintiffs challenge in this lawsuit.

It is difficult to see how the first, third, and fourth factors could call for a different result when applied to the Board's function of enforcing statutes and regulations instead of paying its employees. Plaintiffs have not suggested that state law defines the Board differently with respect to its regulatory and enforcement functions than it does with respect to its employee-payment functions. Nor have they argued that the source of the Board's funds or the party responsible for judgments against it differ when the challenged conduct is the Board's enforcement of statutes and regulations rather than its payment of employees. Instead, Plaintiffs argue the degree-of-control [\*1227] factor makes all the difference and "weighs decisively against a finding that the Dental Board is an arm of the state" when engaged in the conduct challenged in this lawsuit. (Doc. # 44 at 3). The court is unpersuaded.

Plaintiffs marshal a variety of arguments to show that the State of Alabama exercises little to no control over the Board with respect to the challenged activities in this lawsuit, namely, promulgating regulations and issuing cease-

and-desist letters to enforce [\*\*15] statutes and regulations. (*Id.* at 3-5). But given the Eleventh Circuit's holding in *Versiglio*, the critical issue is not the absolute degree of control the state exercises over the Board's challenged activities, considered in the abstract. The decisive question is whether the state exercises any *less* control over the Board's rulemaking and enforcement functions than it does over the Board's payment of its employees. After all, *Versiglio* necessarily held that whatever degree of control the state exercises over the Board with respect to its wage payments to employees is sufficient to render the Board an arm of the state as to that function.

Plaintiffs have offered no reason to think that the state exercises any less control over the Board's rulemaking and enforcement functions than it does over the Board's payment of employees, such that *Versiglio* can be persuasively distinguished—and the court is unable to think of one. Indeed, if anything, it seems likely that the state exercises *more* control over the Board's rulemaking and enforcement decisions than it does over its wage payments to employees. For example, [HN6](#)[<sup>15</sup>] the Board's rulemaking and enforcement authority is constrained by legislative guidelines. [\*\*16] See [Ala. Code § 34-9-43\(a\)](#) (granting the Board authority to adopt rules and regulations "subject to" the provisions of [Chapter 9 of the Alabama Code](#)). The Alabama Legislature has defined what constitutes the practice of dentistry, *id.*, §§ 34-9-6 and [34-9-7](#), and Board regulations defining and regulating the practice of dentistry must "not conflict with any statute which defines the practice of dentistry," *id.*, [§ 34-9-43.2\(c\)](#). The Legislature has also limited the fine that may be imposed for violating a Board regulation to "not more than five thousand dollars . . . for each offense." *Id.*, [§ 34-9-5](#). Finally, the Legislature has directed the Legislative Services Agency to engage in some form of review of the Board's regulations, though the parties dispute the nature and extent of that review. See *id.*, [§ 41-22-22.1](#); (Docs. # 29 at ¶ 56; 33 at 6-9). In short, the state has established a number of mechanisms by which it exercises a degree of control over the Board's rulemaking and enforcement functions.

The Eleventh Circuit has found similar considerations relevant in concluding that a state exercised sufficient control over an entity to render it an arm of the state for sovereign immunity purposes. See [Miccosukee Tribe of Indians v. Fla. State Athletic Comm'n](#), 226 F.3d 1226, 1232 (11th Cir. 2000) ("[Florida] has provided [legislative] guidelines to limit the Commission's ability [\*\*17] to make regulations and, consequently, has some control over the Commission's rule making powers."). But again, the question is not whether the measures described above would give Alabama sufficient control over the Board to render it an arm of the state as a matter of first principles. The question is how Alabama's control over the Board's rulemaking and enforcement functions compares to its control over the Board's payment of employees, a function for which the Eleventh Circuit has already held that the Board is entitled to sovereign immunity. See *Versiglio*, 686 F.3d at 1291-93. [HN7](#)[<sup>16</sup>] A review of the Alabama Code reveals that the state has provided scant guidance to the Board on the subject of how it should pay its employees. Indeed, the only direction [<sup>1228</sup>] the Legislature has apparently given is that Board members "shall receive as compensation a sum to be fixed by the board"; that the secretary and secretary-treasurer shall each "receive such compensation as may be fixed by the board"; and that "[t]he board is authorized to expend such funds as shall be necessary . . . to pay salaries." [Ala. Code § 34-9-41](#). Thus, there can be no doubt that the control Alabama maintains over the Board's rulemaking and enforcement functions is at least as [\*\*18] great as (probably greater than) the control it exercises over the Board's payment of its employees. *Versiglio* therefore controls this case.

[HN8](#)[<sup>17</sup>] Because *Versiglio* held the Board immune from a claim based on its payment of employees, that decision compels the conclusion that the Board is also immune from claims based on its rulemaking and enforcement decisions. The four-factor [Eleventh Amendment](#) immunity test does not yield a different result. If anything, the Board has a stronger claim to [Eleventh Amendment](#) immunity in this case than it did in *Versiglio*. Accordingly, all of Plaintiffs' claims against the Board itself are due to be dismissed under [Rule 12\(b\)\(1\)](#) for lack of subject matter jurisdiction. See [Edelman v. Jordan](#), 415 U.S. 651, 678, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974) ("[T]he [Eleventh Amendment](#) defense . . . partakes of the nature of a jurisdictional bar . . ."); [Silver v. Baggiano](#), 804 F.2d 1211, 1213 (11th Cir. 1986) (describing [Eleventh Amendment](#) immunity as "a jurisdictional issue"). As discussed below, however, some of Plaintiffs' claims may proceed against the Board members in their official capacities.

## B. Plaintiffs' Federal Claims Against the Board Members in Their Official Capacities Are Not Barred by Sovereign Immunity

**HN9** In addition to barring suits against the state itself, the *Eleventh Amendment* also bars suits against state officials "when the state is the real, substantial party in interest." [\*\*19] *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) (internal quotation marks omitted). The state is the real party in interest "if the effect of the judgment would be to restrain the Government from acting." *Id. at 101 n.11* (internal quotation marks omitted). That is exactly what this lawsuit seeks to do. Plaintiffs seek an injunction forbidding the enforcement of state law against them and a declaration that the Board members' official conduct in this case is unlawful. (Doc. # 29 at 46). Thus, though Plaintiffs have nominally asserted their claims against the Board members, the real party in interest in this lawsuit is the State of Alabama. The *Eleventh Amendment* would ordinarily bar such a suit. *Pennhurst*, 465 U.S. at 100-102. But not here.

**HN10** The Supreme Court has recognized an important exception to *Eleventh Amendment* immunity that applies here. Under the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), the *Eleventh Amendment* does not bar suits seeking prospective relief against state officials to prevent them from violating federal law. *Id. at 102*. Here, even though the *Eleventh Amendment* bars Plaintiffs' claims against the Board itself, Plaintiffs' federal claims may proceed against the individual Board members in their official capacities pursuant to the doctrine of *Ex parte Young*.

**HN11** "In determining whether the doctrine of *Ex parte Young* avoids an *Eleventh Amendment* bar to suit, a court need only conduct a [\*\*20] straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." [\*1229] *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002) (internal quotation marks and brackets omitted). Plaintiffs' Amended Complaint (Doc. # 29) readily satisfies that standard. It seeks an injunction restraining the Board members from enforcing a state statute and regulation in contravention of controlling federal law—specifically, various provisions of the U.S. Constitution and the Sherman Antitrust Act. (Doc. # 29 at 46). It is well settled that a plaintiff may properly assert such claims for prospective injunctive and declaratory relief against state officials alleged to be violating federal law. *Verizon Maryland*, 535 U.S. at 645-46. Moreover, prospective relief is equally available whether the law that state officials are allegedly violating is a federal statute (like the Sherman Act) or the Constitution. See *id.* (permitting suit for prospective relief against state officials alleged to be violating a federal statute and administrative order); *Doe 1-13 By & Through Doe, Sr. 1-13 v. Chiles*, 136 F.3d 709, 720-21 (11th Cir. 1998) (affirming prospective injunctive relief forbidding state officials from continuing to violate a federal statute); *Edelman v. Jordan*, 415 U.S. 651, 664, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974) (explaining that [\*\*21] *Ex parte Young* permits suits to enjoin state officials from prospectively violating the Constitution). Plaintiffs' federal claims against the individual Board members fall squarely within the *Ex parte Young* exception to *Eleventh Amendment* immunity, and may therefore proceed.

Though *Ex parte Young* permits Plaintiffs' federal claims to proceed, it does not avoid an *Eleventh Amendment* bar to Plaintiffs' state-law claims. **HN12** In *Pennhurst*, the Supreme Court held that *Ex parte Young* was "inapplicable in a suit against state officials on the basis of state law." 465 U.S. at 106. The Court therefore concluded "that a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is [barred] by the *Eleventh Amendment*." *Id. at 121*. As a result, though official-capacity suits seeking prospective relief are permissible under *Ex parte Young* for violations of federal law, they are impermissible under the *Eleventh Amendment* for violations of state law. *Id. at 103-06*. The *Pennhurst* Court further held that even supplemental state-law claims against state officials brought alongside federal claims are likewise barred by the *Eleventh Amendment*. *Id. at 117-21*.

Here, *Pennhurst* bars Plaintiffs' state-law claims against the Board members. In Count Nine of the Amended Complaint, Plaintiffs [\*\*22] seek a declaratory judgment that the Board members' enforcement of state law to require nondentists who use an iTero to be directly supervised by an on-site dentist violates Plaintiffs' right to due process under the Alabama Constitution. (Doc. # 29 at ¶ 185). In Count Ten, Plaintiffs seek a declaratory judgment that the Board members exceeded their authority under the Alabama Dental Practice Act by requiring nondentists who use an iTero to be directly supervised by an on-site dentist. (*Id.* at ¶ 192). The only difference between the relief sought here and the relief sought in *Pennhurst* is that Plaintiffs seek a declaratory judgment against the Board

members for violations of state law, rather than an injunction. But that slim difference in the relief sought does not take Plaintiffs' state-law claims against the Board members outside of the *Pennhurst* rule.

**HN13** [↑] In *Pennhurst*, the Court reasoned that the *Eleventh Amendment* generally bars officer suits where the state is the real party in interest, regardless of the relief sought. [465 U.S. at 102](#) [\*1230] ("[A] suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief."). Absent state consent to suit or [\*\*23] congressional abrogation of immunity, the only route around this general bar to suit is the doctrine of *Ex parte Young*, which permits federal courts to order prospective relief against state officials for ongoing violations of federal law. *Id.* But *Pennhurst* held that *Ex parte Young* was "inapplicable in a suit against state officials on the basis of state law." *Id.* Without *Ex parte Young*, then, any "claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is [barred] by the *Eleventh Amendment*." *Id. at 121*. That includes claims for declaratory relief no less than claims for injunctive relief.

**HN14** [↑] Though the relief sought in *Pennhurst* was an injunction ordering state officials to conform their conduct to state law, *Pennhurst's* rule applies equally to a suit seeking a declaration that the conduct of state officials violates state law. *Pennhurst's* rule was based on the idea that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." [Id. at 106](#). A judgment declaring that the conduct of state officials violates state law does just that. It is no less [\*\*24] an intrusion on state sovereignty than an injunction forbidding the state officials' conduct. Under *Pennhurst*, the *Eleventh Amendment* bars declaratory relief based on alleged state-law violations no less than it does injunctive relief.

This conclusion follows inexorably from *Pennhurst's* reasoning and is confirmed by Eleventh Circuit precedent. The Eleventh Circuit's decision in [Silver v. Baggiano, 804 F.2d 1211 \(11th Cir. 1986\)](#) is particularly instructive. *Silver* was a suit against a state official seeking both declaratory and injunctive relief for violations of state law. [Id. at 1213](#). The Eleventh Circuit held that all of the claims based on state law were barred by the *Eleventh Amendment*. [Id. at 1215](#). The court did not distinguish between the plaintiff's claims for injunctive relief and his claims for declaratory relief. [Id. at 1214](#). Instead, it explained that either form of relief would run against the state and was therefore barred by the *Eleventh Amendment*. *Id.* ("A declaratory judgment or injunction against [the state official] would clearly compel the government of Alabama to act . . . .") (emphasis added).<sup>3</sup>

As in *Silver*, a judgment declaring that the Board members' actions violate the Alabama Constitution or an Alabama statute would run against the State of Alabama. The "effect of the judgment would [\*\*25] be to restrain the Government from acting," by preventing the enforcement of state laws against SmileDirect. [Pennhurst, 465 U.S. at 101 n.11](#) (internal quotation marks omitted). That is precisely the type of relief the *Eleventh Amendment* forbids. *Id.* Accordingly, Plaintiffs' claims against the Board members in their official capacities for violating the Alabama Constitution and for exceeding their authority under the Alabama Dental Practice Act (Counts Nine and Ten) must be dismissed for lack of subject matter jurisdiction under [Federal Rule of Civil Procedure 12\(b\)\(1\)](#).

Finally, Plaintiffs' individual-capacity claims against the Board members [\*1231] are also due to be dismissed. **HN15** [↑] "In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself." *Lewis v. Clarke*, 137 S. Ct. 1285, 1291, 197 L. Ed. 2d 631 (2017). Individual-capacity claims, "on the other hand, seek to impose *individual* liability upon a government officer for actions taken under color of state law." *Id.* (internal quotation marks omitted). In an individual-capacity claim, "the real party in interest is the individual, not the sovereign." *Id.*

Here, Plaintiffs' claims against the Board members are clearly of the official-capacity variety. Plaintiffs do not seek to impose personal liability [\*\*26] upon the Board members by, for example, seeking an award of damages against the individual officers for their allegedly unlawful conduct. Cf. [Bivens v. Six Unknown Named Agents of Fed. Bureau](#)

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<sup>3</sup> *Silver* also held that removal of an action from state to federal court by state officials did not waive the officials' *Eleventh Amendment* immunity. [804 F.2d at 1214-15](#). That holding was later abrogated by [Lapides v. Bd. of Regents of Univ. Sys. of Georgia](#), 535 U.S. 613, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002). But *Silver* otherwise remains good law.

of *Narcotics*, 403 U.S. 388, 389-90, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). Nor do they seek to enjoin the Board members with respect to conduct "undertaken by individuals acting independently of their offices." *United States v. Alabama*, 791 F.2d 1450, 1457 (11th Cir. 1986). Instead, Plaintiffs seek injunctive and declaratory relief that would forbid the Board members (or any of their successors, for that matter) from acting in their official capacities to enforce state law in a manner that requires SmileDirect to keep a licensed dentist on site when its employees use an iTero. (Doc. # 29 at 46). As discussed above, Plaintiffs' requested relief would run against the state itself, not merely against the individual Board members. Accordingly, Plaintiffs' individual-capacity claims against the Board members "fail[ ] to state a claim upon which relief may be granted" and must therefore be dismissed under [Rule 12\(b\)\(6\)](#). *Feit v. Ward*, 886 F.2d 848, 858 (7th Cir. 1989).<sup>4</sup>

Plaintiffs argue that their individual-capacity antitrust claims against the Board members are valid and should not be dismissed because the Board members are active market participants with an incentive to pursue their own self-interests under the guise of [\[\\*\\*27\]](#) implementing state policies. (Doc. # 41 at 25). Plaintiffs contend the Board members can therefore "be held individually accountable" for violating the antitrust laws. (*Id.*).

That might well be true. In *North Carolina State Board of Dental Examiners v. F.T.C.*, the Supreme Court left open "the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from [antitrust] damages liability." [574 U.S. 494, 135 S. Ct. 1101, 1115, 191 L. Ed. 2d 35 \(2015\)](#) (emphasis added). Thus, it is at least possible that the Board members could be held personally liable in damages for using their office to violate the antitrust laws. (To be clear, the court takes no position on that question at this time). But the fact remains that, in this case, Plaintiffs have not *sought* relief against the Board members in their individual capacities. Instead, all of Plaintiffs' requested relief (an injunction forbidding the Board members from enforcing state law and a judgment declaring [\[\\*1232\]](#) the Board members' official conduct unlawful) would run against the state, not against the individual Board members. Accordingly, Plaintiffs' individual-capacity antitrust claims must be dismissed under [Rule 12\(b\)\(6\)](#). See *Feit*, [886 F.2d at 858](#).

To sum up: All of Plaintiffs' claims against [\[\\*\\*28\]](#) the Board itself are barred by sovereign immunity. Plaintiffs' state-law claims against the Board members in their official capacities are likewise barred by sovereign immunity under *Pennhurst*. Additionally, because Plaintiffs' requested relief would run against the state, not the individual Board members, all of their individual-capacity claims fail to state a claim and are due to be dismissed. However, Plaintiffs' federal claims for prospective equitable relief against the Board members in their official capacities are not barred by sovereign immunity. The court therefore proceeds to address whether Plaintiffs have stated a claim against the Board members in their official capacities under the various provisions of federal law they claim the Board members are violating.

### C. Plaintiffs Have Stated a Claim Against the Board Members Under the Sherman Act

Both Dr. Leeds and SmileDirect assert [section 1 Sherman Act](#) claims against the members of the Dental Board. (Doc. # 29 at 1, 29, 32). The Board members respond that these claims should be dismissed because they are entitled to state-action immunity from Sherman Act claims under *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943) and its progeny. For the reasons explained below, the court concludes [\[\\*\\*29\]](#) a definitive ruling on *Parker* immunity would be premature at this time. Plaintiffs' Sherman Act claims, as pleaded, are sufficient to survive a [Rule 12\(b\)\(6\)](#) motion to dismiss on *Parker* immunity grounds. Further factual development will be required to determine whether the Board members are entitled to *Parker* immunity. The Board members may therefore raise the *Parker* immunity defense at a later stage in this litigation, in a motion for summary judgment, if appropriate.

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<sup>4</sup> Plaintiffs concede as much with respect to their federal and state constitutional claims against the Board members. In their motion to dismiss, the Board members asked the court to dismiss *all* of Plaintiffs' individual-capacity claims. (Doc. # 33 at 29). In response to that motion, Plaintiffs argued only that their individual-capacity *antitrust* claims should go forward. (Doc. # 41 at 25). They did not dispute that their individual-capacity constitutional claims should be dismissed. (*Id.*). Thus, Plaintiffs have abandoned their non-antitrust individual-capacity claims by failing to address the Board members' arguments that they should be dismissed. See *Chambers v. Cherokee Cty.*, 743 F. App'x 960, 962 (11th Cir. 2018).

## 1. Legal Framework

**HN16** [↑] The federal antitrust laws provide an important safeguard for our free-market economy. *North Carolina State Bd. of Dental Examiners v. F.T.C.*, 574 U.S. 494, 135 S. Ct. 1101, 1109, 191 L. Ed. 2d 35 (2015) ("N.C. Dental"). Indeed, the antitrust laws "are as important to the preservation of economic freedom and our free-enterprise system as the *Bill of Rights* is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972). To this end, "[t]he antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market." *N.C. Dental*, 135 S. Ct. at 1109.

**HN17** [↑] Despite the liberal federal policy favoring competition embodied in the Sherman Act, states have long chosen to regulate certain spheres of their economies in ways that restrict competition, in order to promote other important values. [\*\*30] For example, states sometimes "impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives." *Id.* The Supreme Court has long recognized that "[i]f every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal **antitrust law** would impose an impermissible burden on the States' power to regulate." *Id.* For that reason, the Supreme Court in *Parker* "interpreted the antitrust laws to confer immunity on [\*1233] anticompetitive conduct by the States when acting in their sovereign capacity." *N.C. Dental*, 135 S. Ct. at 1110. This doctrine has come to be known as *Parker* or state-action immunity from the federal antitrust laws.

**HN18** [↑] *Parker* immunity exists to avoid conflicts between the federal policy of robust competition embodied in the Sherman Act and a state's sovereign authority to regulate local activities (even in anticompetitive ways) to promote the health, safety, and morals of its citizens. *Id.* For that reason, "[a]n entity may not invoke *Parker* immunity unless the actions in question are an exercise of the State's [\*\*31] sovereign power." *Id.* (emphasis added). State legislation automatically qualifies as an exercise of the state's sovereign power and is "*ipso facto* . . . exempt from the operation of the antitrust laws." *Id.* (internal quotation marks omitted) (quoting *Hoover v. Ronwin*, 466 U.S. 558, 568, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984)). **HN19** [↑] But *Parker* immunity does not always apply when a state delegates regulatory authority to a nonsovereign actor, instead of regulating itself by legislation. In that case, anticompetitive conduct by the nonsovereign actor receives *Parker* immunity only if the conduct results "from procedures that suffice to make [the anticompetitive conduct] the State's own." *Id. at 1111*. In other words, the question is whether the nonsovereign actor's anticompetitive conduct "should be deemed state action and thus shielded from the antitrust laws." *Id.* (internal quotation marks omitted) (emphasis added).

**HN20** [↑] For purposes of *Parker* immunity, "a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself." *Id.* Perhaps counterintuitively,<sup>5</sup> even state agencies may qualify as nonsovereign actors for purposes of *Parker* immunity, particularly where they are controlled by active participants in the regulated market. *Id. at 1111*. Indeed, limits [\*\*32] on *Parker* immunity "are most essential" when the state delegates its regulatory power "to active market participants," because active market participants may be incentivized to regulate in a manner that promotes their own private interests instead of the state's policy goals. *Id.*

**HN21** [↑] Deciding whether a nonsovereign actor is enforcing state policy or furthering private interests can be a difficult task, especially where the nonsovereign actor is controlled by active market participants. Thus, the Supreme Court has held that a nonsovereign actor controlled by active market participants enjoys *Parker* immunity only if it satisfies both elements of the two-part test set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980). *N.C. Dental*, 135 S. Ct. at 1110-12. Under the *Midcal* test, anticompetitive conduct by a nonsovereign actor receives *Parker* immunity only if (1) the state has articulated a clear policy to allow the anticompetitive conduct; and (2) the state provides active supervision of the anticompetitive conduct. *Id. at 1112*.

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<sup>5</sup> See *N.C. Dental*, 135 S. Ct. at 1117-18 (Alito, J., dissenting).

*Midcal's* clear-articulation requirement is met "where the displacement of competition is the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." *Id.* (internal quotation marks omitted). And, the active-supervision **[\*\*33]** requirement demands, among other things, "that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Id.* (internal quotation marks omitted).

**[\*1234]** The Supreme Court applied these principles in *N.C. Dental* to conclude that the North Carolina State Board of Dental Examiners was not entitled to *Parker* immunity for its regulation of teeth whitening services provided by nondentists. *Id. at 1116-17*. The North Carolina Dental Board was quite similar to Alabama's Dental Board in its powers, duties, and composition. North Carolina's Board was empowered by statute to regulate the practice of dentistry. *Id. at 1107*. North Carolina's Dental Practice Act required six of the Board's eight members to be licensed dentists engaged in the active practice of dentistry. *Id. at 1108*. Those members were elected by other North Carolina dentists in elections conducted by the Board. *Id.* The other two Board members were a practicing dental hygienist (elected by other licensed hygienists) and a nondentist "consumer" (who was appointed by the governor). *Id.*

*North Carolina's Dental Practice Act* authorized the Board to promulgate rules and regulations **[\*\*34]** governing the practice of dentistry in North Carolina, provided they were not inconsistent with the Act and were approved by the North Carolina Rules Review Commission, whose members were appointed by the state legislature. *Id.* The Board was also required to comply with *North Carolina's Administrative Procedure Act*, *Public Records Act*, and open-meetings law. *Id.*

Dentists in North Carolina began offering teeth whitening services in the 1990s. *Id.* By 2003, nondentists began competing with dentists in the teeth whitening market, often charging lower prices for their services than the dentists did. *Id.* Dentists complained to the Board about their new competitors, and the Board opened an investigation into nondentist teeth whitening. *Id.* The investigation did not result in the promulgation of a formal rule or regulation reviewable by North Carolina's Rules Review Commission, even though the Dental Practice Act did not, "by its terms, specify that teeth whitening is 'the practice of dentistry.'" *Id.* Instead, the Board began issuing cease-and-desist letters to nondentist teeth whiteners. *Id.* The letters directed the nondentists to cease their teeth whitening services because teeth whitening **[\*\*35]** constituted the practice of dentistry, which the nondentists were not authorized to engage in. *Id.* As a result of the Board's actions, "[n]ondentists ceased offering teeth whitening services in North Carolina." *Id.*

When the Federal Trade Commission charged the Board with violating federal **antitrust law** through these actions, the Board asserted the defense of *Parker* immunity. *Id. at 1110*. The Supreme Court rejected that argument, however. The Court ruled that the Board, despite its status as a state agency, was a nonsovereign actor controlled by active market participants. *Id. at 1110-11*. The Court therefore held that the Board must satisfy both the clear-articulation and active-supervision prongs of *Midcal* to receive *Parker* immunity for its regulation of nondentist teeth whitening. *Id. at 1110, 1112*. The Court assumed without deciding that the clear-articulation requirement was satisfied but held that the Board "did not receive active supervision by the State when it interpreted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to nondentist teeth whiteners." *Id. at 1110*. Because the Board failed to show active state supervision, it could not invoke *Parker* immunity. *Id.*

In holding **[\*\*36]** that the Board failed to satisfy *Midcal's* active-supervision requirement, the Court relied heavily on the fact that the statute the Board was purportedly enforcing with its cease-and-desist letters said "nothing about teeth whitening, a **[\*1235]** practice that did not exist when it was passed." *Id. at 1116*. Additionally, when the Board decided to take action against nondentist teeth whiteners, it "relied upon cease-and-desist letters threatening criminal liability, rather than any of the powers at its disposal that would invoke oversight by a politically accountable official." *Id. at 1116*. "With no active supervision by the State," the Court concluded that state officials "may well have been unaware that the Board had decided teeth whitening constitutes 'the practice of dentistry' and sought to prohibit those who competed against dentists from participating in the teeth whitening market." *Id.* In short, because there was "no evidence [ ] of any decision by the State to initiate or concur with the Board's actions against the nondentists," the North Carolina Dental Board failed *Midcal's* active-supervision requirement.

**HN22**[<sup>↑</sup>] In reaching this conclusion, the Court explained that the active-supervision inquiry "is flexible and [\*\*37] context-dependent." *Id.* The key question "is whether the State's review mechanisms provide realistic assurance that a nonsovereign actor's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Id.* (internal quotation marks omitted). The "few constant requirements of active supervision" are that the state supervisor: "review the substance of the anticompetitive decision, not merely the procedures followed to produce it"; "have the power to veto or modify particular decisions to ensure they accord with state policy"; and "not itself be an active market participant." *Id. at 1116-17* (internal quotation marks omitted). Beyond that, however, "the adequacy of supervision . . . will depend on all the circumstances of a case." *Id. at 1117.*

## 2. N.C. Dental Applies to the Alabama Dental Board

**HN23**[<sup>↑</sup>] The rule announced in *N.C. Dental* -- that certain state entities must satisfy *Midcal*'s twopart test to claim *Parker* immunity -- applies to "nonsovereign actor[s] controlled by active market participants." *135 S. Ct. at 1110*. In *N.C. Dental*, the Supreme Court squarely held that North Carolina's Dental Board was such a nonsovereign actor, despite its status as a state agency. *Id. at 1110-11*. The powers, duties, and composition [\*\*38] of Alabama's Dental Board are nearly identical to those of the North Carolina Dental Board the Supreme Court considered in *N.C. Dental*. Both Boards are created by state law and empowered by the state to regulate the practice of dentistry and enforce the state's prohibition of the unauthorized practice of dentistry. *Ala. Code §§ 34-9-40, 34-9-43; N.C. Dental, 135 S. Ct. at 1107*. Both Boards are comprised of a controlling number of active participants in the market for dental services, who are in turn selected by other members of the dental profession. *Ala. Code § 34-9-40; N.C. Dental, 135 S. Ct. at 1108*. Neither North Carolina's nor Alabama's Dental Practice Act creates a mechanism by which Board members may be removed from office by other state officials. *Ala. Code § 34-9-40; N.C. Dental, 135 S. Ct. at 1108*. And both Boards are empowered to promulgate rules and regulations governing the practice of dentistry, provided those mandates are not inconsistent with a state statute. *Ala. Code § 34-9-43.2(c); N.C. Dental, 135 S. Ct. at 1108*. **HN24**[<sup>↑</sup>] The similarities between the two Boards compel the conclusion that the Alabama Board is also a "nonsovereign actor controlled by active market participants" for purposes of *Parker* immunity, and that the principles set forth in *N.C. Dental* therefore apply to it. *Id. at 1110.*

[\*1236] There might appear to be some tension in treating Alabama's Dental Board as a *nonsovereign* actor for [\*\*39] purposes of *Parker* immunity while simultaneously holding, as discussed above, that the Board is an arm of the state entitled to *sovereign* immunity under *Versiglio, 686 F.3d at 1291*. But that tension is simply a consequence of the fact that different tests govern whether an entity is considered "sovereign" for purposes of *Parker* immunity and *Eleventh Amendment* immunity, and of the reality that this court is bound by both the Supreme Court's decision in *N.C. Dental* and the Eleventh Circuit's decision in *Versiglio*.

**HN25**[<sup>↑</sup>] The Supreme Court has provided little guidance on what entities qualify as "nonsovereign actors" for purposes of *Parker* immunity. But in *N.C. Dental*, the Court did cite *Hoover, 466 U.S. at 567-68* for the following proposition: "For purposes of *Parker*, a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself." *135 S. Ct. at 1111*. The portion of *Hoover* cited by the Court identified two state entities that were "sovereign" for purposes of *Parker* immunity and whose conduct therefore automatically qualified as the conduct of the state: the state legislature and the state supreme court when acting legislatively rather than judicially. *Hoover, 466 U.S. at 567-68*. The *Hoover* Court expressly left open the question "whether the Governor of a State [\*\*40] stands in the same position as the state legislature and supreme court for purposes of the state-action doctrine." *Id. at 568 n.17*. Thus, sovereign actors for purposes of *Parker* immunity appear to be limited to governmental bodies like a state legislature or supreme court (or perhaps the governor) that constitute the apex of a coequal branch of state government. But whatever the limits of that category, as *N.C. Dental* makes abundantly clear, "[s]tate agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity." *135 S. Ct. at 1111*. Accordingly, their actions are not automatically cloaked in *Parker* immunity.

**HN26**[<sup>↑</sup>] The test for determining what state entities are "arms of the state" entitled to sovereign immunity under the *Eleventh Amendment* is different. As described above, the Eleventh Circuit employs a four-factor test to determine whether a state agency is an arm of the state with respect to a particular function it performs. See

Manders, 338 F.3d at 1309. Because of the different tests that apply, it is possible for a state agency to be "sovereign" for purposes of Eleventh Amendment immunity but "nonsovereign" for purposes of Parker immunity. And, that is precisely the position the Alabama Dental Board is in. As explained above, [\*\*41] the Board is an arm of the state entitled to sovereign immunity under the Eleventh Circuit's controlling decision in *Versiglio*. But, under the equally binding *N.C. Dental* decision, the Board is a "nonsovereign actor" for purposes of Parker immunity.

What is the effect of *Versiglio* and *N.C. Dental* on this case? As explained above, suit against the Board itself is barred by sovereign immunity under *Versiglio*. None of Plaintiffs' claims, including their antitrust claims, may proceed against the Board itself. However, under *Ex parte Young*, Plaintiffs' federal claims for prospective relief against the Board members, including specifically their antitrust claims, are not barred by sovereign immunity. Those claims may therefore proceed, if they are not barred by Parker immunity. The court therefore turns to the Parker immunity issue. Because the Board members are active market participants in the dental profession, the court must analyze their assertion of Parker immunity under *N.C. Dental*.

#### [\*1237] 3. A Rule 12(b)(6) Dismissal on Parker Immunity Grounds Would Be Premature

In light of *N.C. Dental*, it is clear that the Board members' Rule 12(b)(6) motion<sup>6</sup> to dismiss Plaintiffs' Sherman Act claims as barred by Parker immunity is [\*\*42] premature. There are two possible scenarios in which the Board members might be entitled to Parker immunity. But under either scenario, the factual record on a Rule 12(b)(6) motion is insufficient for the court to determine whether the Board members may in fact claim Parker immunity for their challenged conduct in this case. The Board members' motion to dismiss Plaintiffs' official-capacity Sherman Act claims must therefore be denied.

First, the Board members may be entitled to Parker immunity if the Alabama Dental Practice Act by its terms specifies that using an iTero without a dentist on site constitutes the unauthorized practice of dentistry. In *N.C. Dental*, the Supreme Court repeatedly emphasized that, while North Carolina's Dental Practice Act prohibited the unauthorized practice of dentistry, it never mentioned teeth whitening, a practice that did not exist when the Act was passed. 135 S. Ct. at 1108, 1110, 1116. The Act was simply silent on whether teeth whitening constituted the practice of dentistry. Id. at 1110. But North Carolina's Dental Board nonetheless interpreted the Act to apply to teeth whitening and enforced the Act by issuing cease-and-desist letters to nondentist teeth whiteners who competed with dentists. [\*\*43] Id. Because the Board's interpretation and enforcement of the state's broad ban on unauthorized dental practice presented the opportunity for "private self-dealing," the Court required the Board to show its anticompetitive conduct was actively supervised and approved by the state in order to claim Parker immunity. Id. at 1112. In other words, to claim Parker immunity, the Board had to show that its prohibition of nondentist teeth whitening was really the state's prohibition of nondentist teeth whitening. Id. at 1111.

Had North Carolina's Dental Practice Act expressly defined teeth whitening as the practice of dentistry, the Dental Board would plainly have been entitled to Parker immunity in enforcing the state's clear statutory prohibition of nondentist teeth whitening. See id. at 1116. After all, HN28 [↑] state legislation is "*ipso facto . . .* exempt from the operation of the antitrust laws." Id. at 1110 (internal quotation marks omitted); see also Hoover, 466 U.S. at 567 ("We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities *directed by its legislature.*" (internal quotation marks omitted, emphasis added) (quoting Parker, 317 U.S. at 350-51)). If North Carolina's legislature [\*\*44] had expressly defined teeth whitening as the practice of dentistry and directed the state's Dental Board to take action against nondentist teeth whiteners, there would have been no risk of private self-dealing by the Board. Rather, the Board's actions in carrying out the legislature's express directive would have been "an exercise of the State's sovereign power" and

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<sup>6</sup> Defendants have moved to dismiss Plaintiffs' claims pursuant to both Rule 12(b)(1) (lack of subject-matter jurisdiction) and Rule 12(b)(6) (failure to state a claim). (Doc. # 32). HN27 [↑] Because Parker immunity is a waivable, nonjurisdictional affirmative defense, Bolt v. Halifax Hosp. Med. Ctr., 874 F.2d 755, 756 (11th Cir. 1989) (en banc), the court construes Defendants' request to dismiss Plaintiffs' Sherman Act claims as a motion under Rule 12(b)(6) rather than Rule 12(b)(1).

therefore cloaked in *Parker* immunity. [N.C. Dental, 135 S. Ct. at 1110](#). As *N.C. Dental* explained, *Midcal's* active-supervision requirement [\*1238] could have been satisfied by evidence of a "decision by the State to initiate . . . the Board's actions against the nondentists." [Id. at 1116](#). Such a decision -- enshrined in statutory text -- would have shown beyond all dispute that the state had "approve[d]" the Board's actions against the nondentist teeth whiteners, thus cloaking them in *Parker* immunity. [Id. at 1112](#).<sup>7</sup>

The Alabama Board members argue that, by sending a cease-and-desist letter to SmileDirect, they were merely enforcing an express, specific statutory directive of the Legislature that forbids unsupervised nondentists from using a digital imaging [\*\*45] machine to make dental digital images. (Doc. # 29 at ¶¶ 2, 62-68). [HN30](#)↑ The Alabama Dental Practice Act provides that any person who "[u]ses a roentgen, radiograph, or *digital imaging machine* for the purpose of making dental roentgenograms, radiographs, or *digital images*" "shall be deemed to be practicing dentistry." [Ala. Code § 34-9-6](#) (emphasis added). The only exception to this rule is if the person makes dental digital images "under the supervision of a licensed dentist or physician." *Id.*, [§ 34-9-7\(a\)](#). In that case, the Act does not apply. *Id.*

The Board members contend the iTero device is a "digital imaging machine" and that the images it produces are "digital images" within the meaning of [Alabama Code § 34-9-6](#). They therefore assert the Act permits nondentists to use the device only "under the supervision of a licensed dentist or physician." *Id.*, [§ 34-9-7\(a\)](#). And they further take the position that the term "supervision" in [Alabama Code § 34-9-7\(a\)](#) requires the physical presence of a licensed dentist at facilities where an iTero is used.

The Board members might be entitled to *Parker* immunity under this analysis, but only if the iTero and the images it produces clearly qualify as a "digital imaging" [\*1239] machine" and "digital images" as those terms are used in [Alabama Code §§ 34-9-6](#) and [34-9-7\(a\)](#).<sup>8</sup> To make [\*\*46] this determination, a factual record is necessary. The court cannot determine whether the iTero is a "digital imaging machine" (as that term is used in [§ 34-9-6](#)) unless it has more information about the iTero. What type of imaging mechanism does the iTero use? How does that mechanism compare to the mechanisms of roentgens and radiographs, the other two means of creating dental images listed in [§ 34-9-6](#)? What was the meaning of the term "digital imaging machine" when [§ 34-9-6](#) was adopted? Did it have a specialized meaning in the field of dentistry? Did the technology used in the iTero even exist

<sup>7</sup> *N.C. Dental* is susceptible of two different readings concerning when state agencies must show active supervision to claim *Parker* immunity. On the first reading, if a state entity (even one controlled by active market participants) is engaged in anticompetitive conduct mandated by the express statutory instructions of the legislature, that entity need not establish *Midcal's* active-supervision requirement to claim *Parker* immunity. See [Hoover, 466 U.S. at 569](#) ("Where the conduct at issue is in fact that of the state legislature . . . , we need not address the issues of 'clear articulation' and 'active supervision.'"). That reading is based on the fact that the statute the Board was enforcing in *N.C. Dental* said nothing about teeth whitening, a practice that did not exist when the statute was enacted. In other words, the Board in *N.C. Dental* had to show active supervision because the state had never expressly instructed it to prohibit teeth whitening by nondentists. But if the state *had* expressly instructed it to prohibit teeth whitening by nondentists, there would have been no need for the Board to show any further active supervision.

On the other hand, *N.C. Dental* could instead be read broadly to mean that state agencies controlled by active market participants must *always* show active supervision to claim *Parker* immunity, no matter how clear and specific the statutory mandate they are enforcing is. But even on that reading, the *N.C. Dental* decision makes clear that a state agency controlled by active market participants can show active supervision by pointing to a "decision by the State to initiate . . . the [specific anticompetitive conduct at issue]." [135 S. Ct. at 1116](#). An express statutory mandate directing the active market participants to engage in the specific anticompetitive conduct at issue would surely qualify.

The court need not pick between those two readings of *N.C. Dental* because, in either case, the result is the same. [HN29](#)↑ Whether the active-supervision requirement *does not apply* when a state agency controlled by active market participants is enforcing an express, specific statutory mandate of the legislature, or whether such a mandate *satisfies* the active-supervision requirement, the result is the same: the agency receives *Parker* immunity.

<sup>8</sup> The Board members would also have to show that the term "supervision" in [Alabama Code § 34-9-7\(a\)](#) requires a dentist's physical presence at the facility where the digital imaging is performed.

when [§ 34-9-6](#) was adopted? These and numerous other factual questions must be answered before the court can determine whether the iTero counts as a "digital imaging machine" under [§ 34-9-6](#) and whether the images the iTero produces are "digital images" as that term is used in [§§ 34-9-6](#) and [34-9-7\(a\)](#).

To be sure, in their papers, both Plaintiffs and Defendants have offered their answers to some of these questions. But the answers are either contained in pleadings (Doc. # 29 at ¶¶ 29-30, 32, 64) or are derived from matters outside the pleadings that the court may not consider on a [Rule 12\(b\)\(6\)](#) motion (Doc. # 33 at 9-11). See [Fed. R. Civ. P. 12\(d\)](#). Fact discovery will be necessary to determine [\*\*47] the veracity of Plaintiffs' and Defendants' competing claims about the nature of the iTero procedure and whether it is covered by the Alabama Dental Practice Act. The ultimate question for purposes of *Parker* immunity is whether the Alabama Legislature clearly proscribed the use of an iTero without a dentist physically present when it enacted the Alabama Dental Practice Act. That question cannot be answered on the record accompanying a [Rule 12\(b\)\(6\)](#) motion to dismiss.

Second, even if the Alabama Dental Practice Act does not expressly authorize the Board's challenged conduct in this case, the Board members may still be entitled to *Parker* immunity if the state actively supervised their decision to interpret and enforce the Act as prohibiting the use of an iTero without a dentist physically present.<sup>9</sup> Unlike the Board in *N.C. Dental*, which never issued "a formal rule or regulation reviewable by the independent Rules Review Commission," [id. at 1108, 1116](#), Alabama's Dental Board did promulgate a formal regulation forbidding nondentists from performing any intraoral procedures unless under the direct supervision of a dentist. See [Ala. Admin. Code 270-X-3-10](#). Additionally, the Board's regulation received some type of statutorily authorized review and [\*\*48] approval by the Legislative Services Agency, though the parties dispute the nature and extent of that review. See [Ala. Code § 41-22-22.1](#); (Docs. # 29 at ¶ 56; 33 at 6-9). These procedures may "suffice to make [the Board's anticompetitive conduct] the State's own" and therefore immunize the Board from antitrust liability. [N.C. Dental, 135 S. Ct. at 1111](#). But making that determination will require a factual record that is simply not present on a [Rule 12\(b\)\(6\)](#) motion to dismiss.

[\*1240] [HN31](#)[] Although *Midcal*'s active-supervision inquiry "is flexible and context-dependent," one of its "few constant requirements" is that the state supervisor must "review the substance of the anticompetitive decision, not merely the procedures followed to produce it." [Id. at 1116](#). Here, Plaintiffs have alleged that "any review pursuant to an Alabama statute of the Board's [challenged] regulation, . . . if it occurred at all, was perfunctory, ministerial, and nonsubstantive." (Doc. # 29 at ¶ 56). That allegation is enough to defeat the Board members' claim to *Parker* immunity at the motion-to-dismiss stage. [HN32](#)[] The court must accept Plaintiffs' plausible factual allegations as true when considering a [Rule 12\(b\)\(6\)](#) motion to dismiss. [Iqbal, 556 U.S. at 678-79](#). If Plaintiffs' allegation turns out to be true and no state supervisor [\*\*49] in fact reviewed the substance of the Board's anticompetitive policy, the Board members will not be entitled to *Parker* immunity. Dismissal on *Parker* immunity grounds would therefore be improper at this time.

The Board members attach to their motion to dismiss certain documents that they claim establish *Midcal*'s active-supervision requirement. (Doc. # 33-1). The parties dispute whether the court may properly consider these extrinsic documents in ruling on the Board members' motion to dismiss. (Docs. # 41 at 12-14; 46 at 2-3). But the court need not resolve that issue because, even if it were to consider the documents, they are insufficient to establish that the Board members are entitled to *Parker* immunity.

The documentary evidence submitted by the Board members includes certified records relating to the promulgation of the Board regulation that prohibits taking intraoral digital images without a dentist on site. (Doc. # 33-1 at 3-13). It also includes a "memo to file" showing that the Legislative Services Agency ("LSA") conducted an antitrust review of the regulation and found it would not affect competition. (*Id.* at 14-16). Finally, an affidavit of the director of the LSA's Legal Division authenticates [\*\*50] the documents. (*Id.* at 2).

<sup>9</sup>Of course, in this scenario, the Board members must also establish *Midcal*'s clear-articulation requirement to receive *Parker* immunity. [N.C. Dental, 135 S. Ct. at 1110](#). The court does not address that requirement at this time because the Board members cannot show active supervision on the limited [Rule 12\(b\)\(6\)](#) record.

Even assuming the LSA qualifies as a "state supervisor" under *N.C. Dental*, 135 S. Ct. at 1117 (and, to be clear, the court takes no position on that question at this time), the "memo to file," standing alone, cannot establish that the LSA "review[ed] the substance of the [Board's] anticompetitive decision, not merely the procedures followed to produce it." *Id. at 1116*. The memo to file spends a mere four sentences discussing the Board's challenged regulation, *Alabama Administrative Code 270-X-3-10*. Indeed, in its entirety, the memo's discussion of the challenged provision reads as follows:

Rule 270-X-3-10, Duties of Allied Dental Personnel, lists the procedures that may be performed by dental hygienists, dental assistants, and dental laboratory technicians. The amendment adds to the list of procedures the making of digital images. . . . [The Rule] do[es] not significantly lessen competition. [It] do[es] not affect competition at all.

(Doc. # 33-1 at 15-16). These four sentences alone do not establish that the state reviewed and approved the substance of the Board's anticompetitive policy in this case. In fact, because the LSA found the regulation would "not affect competition at all" (Doc. # 33-1 at 16), the regulation apparently never reached the stage of [\*\*51] Alabama's statutory review process at which its substance would have been reviewed.

**HN33** [↑] In 2016, shortly after the Supreme Court's 2015 *N.C. Dental* decision, the Alabama Legislature enacted *Alabama Code § 41-22-22.1*. See S.B. 80, 2016 Leg., Reg. Sess. (Ala. 2016). The statute requires the LSA's Legal Division to "review each rule certified to it by a state board or commission" [\*1241] that regulates a profession, a controlling number of the members of which are active market participants in the profession." *Ala. Code § 41-22-22.1(a)*. The LSA must "determine whether the rule may significantly lessen competition." *Id.* If it concludes the rule will not decrease competition, no further action is required. *Id.* But if it finds that the rule "may significantly lessen competition," it must "determine whether the rule was made pursuant to a clearly articulated state policy to displace competition" and then "certify those determinations" to a legislative committee. *Id.*, *S 41-22-22.1(b)*. The chair of the committee must then "call a meeting of the committee to *review the substance of the rule*, determine whether the rule may significantly lessen competition, and if so, whether it was made pursuant to a clearly articulated state policy to displace competition." *Id.* (emphasis [\*\*52] added). The committee shall then "approve, disapprove, disapprove with a suggested amendment, or allow the agency to withdraw the rule for revision." *Id.* If the committee fails to act on a rule, "the rule shall not become effective and shall be placed on the agenda of the committee at each subsequent meeting until the committee disposes of the rule." *Id.*

The memo to file submitted by the Board members suggests that the challenged regulation in this case never received the substantive review by a legislative committee provided for in *Alabama Code § 41-22-22.1(b)*. Instead, the LSA determined that the Board's regulation would "not affect competition at all," and that determination evidently ended the review process. (Doc. # 33-1 at 16). In other words, the LSA did not understand the policy embodied in the Board's regulation to have any anticompetitive effects. The memo to file, standing alone, is therefore insufficient to show that the Board received active state supervision when it interpreted the Dental Practice Act as applying to SmileDirect and enforced that policy by issuing a cease-and-desist letter. For that reason, the Board members have not yet shown they are entitled to *Parker* immunity. Their motion to [\*\*53] dismiss Plaintiffs' Sherman Act claims on that basis is accordingly due to be denied.

#### D. Plaintiffs Have Stated a Claim Against the Board Members Under the Dormant *Commerce Clause*

Pursuant to *42 U.S.C. § 1983*, both Dr. Leeds and SmileDirect assert claims under the Dormant *Commerce Clause* against the members of the Dental Board. (Doc. # 29 at 26-27). They claim the Board members' interpretation and enforcement of *Alabama Code § 34-9-6* and *Alabama Administrative Code 270-X-3-10* burden out-of-state economic interests without serving any legitimate local purpose. Because Plaintiffs have adequately alleged a Dormant *Commerce Clause* violation, the Board members' motion to dismiss this claim will be denied.

**HN34** [↑] The *Commerce Clause* grants Congress the power "[t]o regulate Commerce . . . among the several States." *U.S. Const. art. I, § 8, cl. 3*. Though the Clause only expressly speaks of powers granted to Congress, the Supreme Court has long held that the Clause also has a "dormant" aspect, which imposes "substantive

restriction[s] on permissible state regulation of interstate commerce." *Dennis v. Higgins*, 498 U.S. 439, 447, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991) (internal quotation marks omitted). The dormant or negative aspect of the *Commerce Clause* "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273, 108 S. Ct. 1803, 100 L. Ed. 2d 302 (1988).

[\*1242] **HN35**<sup>↑</sup> The Eleventh Circuit evaluates Dormant *Commerce Clause* challenges using a two-tiered [\*\*54] analysis. *Bainbridge v. Turner*, 311 F.3d 1104, 1108 (11th Cir. 2002). The first tier applies if a state regulation "directly regulates or discriminates against interstate commerce, or has the effect of favoring in-state economic interests." *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 846 (11th Cir. 2008) (internal quotation marks omitted). If that showing is made, the regulation is invalid unless "shown to advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* (brackets omitted). The second tier applies if the regulation "has only indirect effects on interstate commerce and regulates evenhandedly." *Bainbridge*, 311 F.3d at 1109 (internal quotation marks omitted). In that case, a court applies the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970), which asks "whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Bainbridge*, 311 F.3d at 1109 (internal quotation marks omitted). "[T]he two tiers of analysis are not clearly distinguishable." *Id.*; see also *Amerijet Int'l, Inc. v. Miami-Dade Cty.*, 627 F. App'x 744, 752 (11th Cir. 2015). Under either tier, "the critical consideration is the overall effect of the [regulation] on both local and interstate activity." *Bainbridge*, 311 F.3d at 1109 (internal quotation marks omitted).

Plaintiffs argue the allegations of their Amended Complaint are sufficient to survive a *Rule 12(b)(6)* motion under either tier of analysis. The court concludes [\*\*55] Plaintiffs have adequately alleged a Dormant *Commerce Clause* violation under the second tier. It therefore need not address the first tier at this time.

The regulation Plaintiffs challenge requires a licensed dentist to be physically present at facilities where nondentists perform intraoral procedures, including using an iTero to make digital images of teeth. Plaintiffs allege that the regulation burdens interstate commerce: it prevents out-of-state dentists like Dr. Leeds from serving patients across state lines, and it impedes SmileDirect's ability to offer a platform to out-of-state dentists who wish to serve Alabama patients. (Doc. # 29 at ¶¶ 68, 71-72, 79, 83-85, 90-91). According to Plaintiffs, requiring SmileDirect to employ highly paid licensed dentists at its SmileShops would prove prohibitively expensive and would effectively prevent SmileDirect from partnering with out-of-state dentists to serve Alabama patients. (*Id.*). In other words, Plaintiffs argue, the regulation burdens the practice of dentistry across state lines and protects those in-state dentists who provide clear aligner therapy at their offices from competition by out-of-state dentists who, using SmileDirect's platform, could [\*\*56] provide the same treatment to Alabama patients at a lower cost. (*Id.*).

Plaintiffs also allege that the regulation serves no legitimate state interest and produces no local benefits. They allege that using an iTero to make digital images of a person's teeth is a simple, safe procedure. (*Id.* at ¶¶ 86-88). The iTero is the size and shape of a pen and is covered with a disposable sheathe to ensure that no germs are transmitted between patients. (*Id.* at ¶ 86, 95). SmileDirect staff also wipe the iTero wand with a disinfecting wipe after each use. (*Id.* at ¶¶ 95-96). The iTero does not use any radiation, but instead uses digital camera technology to create a digital model of a person's teeth and gums. (*Id.* at ¶¶ 92-94). Additionally, SmileDirect staff wear non-allergenic nitrile gloves when using the iTero. (*Id.* at ¶ 97). SmileDirect has performed hundreds of thousands of digital scans nationwide, and hundreds of scans in Alabama alone, [\*1243] without receiving a single complaint of physical injury, infection, or other adverse patient outcome associated with the use of the iTero. (*Id.* at ¶ 99). Based on these allegations, Plaintiffs claim that the use of an iTero presents no risk to consumers that [\*\*57] would be eliminated by a dentist's physical presence at SmileDirect's facilities. (*Id.* at ¶ 980). Plaintiffs therefore argue that the state has no legitimate interest in imposing the regulation besides economic protectionism and that the burdens on interstate commerce imposed by the regulation clearly exceed any local benefits it affords.

The Board responds that its regulation provides important health and safety benefits to Alabama consumers and that Plaintiffs therefore have failed to state a claim under the Dormant *Commerce Clause*. (Doc. # 33 at 25-26). The Board argues that requiring the physical presence of a licensed dentist when the iTero is used provides the

following local benefits: (1) dentists can ensure that sterilization procedures are followed to prevent the spread of illness; (2) dentists can use their skill and training in the event of a sudden medical emergency, such as a patient experiencing an allergic reaction from contact with latex gloves, or the iTero inadvertently dislodging a patient's crown; (3) dentists can diagnose preexisting conditions that contraindicate the use of clear aligner therapy in the first place, such as gum disease; and (4) dentists can verify in real time [\*\*58] that a patient's oral cavity is being accurately imaged by the iTero device. (*Id.* at 24).

**HN36**[<sup>↑</sup>] In Dormant Commerce Clause challenges, "bona fide safety regulations" bear "a strong presumption of validity." Kassel v. Consol. Freightways Corp. of Delaware, 450 U.S. 662, 670, 101 S. Ct. 1309, 67 L. Ed. 2d 580 (1981). Under the tier-two *Pike* balancing test, "[i]f safety justifications are not illusory, [federal courts] will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce." Locke v. Shore, 634 F.3d 1185, 1194 (11th Cir. 2011) (quoting Kassel, 450 U.S. at 670). But a state's mere "incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack." Kassel, 450 U.S. at 670. Even regulations designed to promote public health and safety "may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause." *Id.* Courts must therefore weigh the state's asserted safety purpose against the degree of interference with interstate commerce, giving "sensitive consideration" to the "weight and nature of the state regulatory concern in light of the extent of the burden imposed" on interstate commerce. *Id.* at 670-71 (internal quotation marks omitted).

The court cannot conduct the "sensitive" balancing test mandated by the Supreme Court's Dormant Commerce Clause precedents without a factual record. *Id.* at 670. The state's [\*\*59] asserted safety justifications for requiring the physical presence of a dentist at SmileDirect's facilities may well not be illusory, but Plaintiffs have plausibly alleged that they are, and that the real reason for the regulation is economic protectionism. Discovery will be necessary to determine whether the Board's regulation serves its asserted safety purposes and how severely the regulation burdens interstate commerce. Only then will the court be able to determine whether the Board's regulation passes muster under the Dormant Commerce Clause. **HN37**[<sup>↑</sup>] A state's mere incantation of a rational basis for a regulation does not preclude Dormant Commerce Clause scrutiny. *Id.* Accordingly, dismissal of Plaintiffs' [\*1244] Dormant Commerce Clause claims on Rule 12(b)(6) review would be improper.

## E. Plaintiffs Have Failed to State an Equal Protection or Substantive Due Process Claim

Pursuant to 42 U.S.C. § 1983, both Dr. Leeds and SmileDirect assert claims under the Fourteenth Amendment's Equal Protection and Due Process Clauses. (Doc. # 29 at 36-37, 39-40). Dr. Leeds claims the Board's regulation unlawfully distinguishes between Alabama-licensed dentists practicing in Alabama and Alabama-licensed dentists practicing out of state, without a rational basis for such a distinction. (*Id.* at ¶ 153). Dr. Leeds also argues that [\*\*60] he has a substantive due process right to practice his profession across state lines and that the Board's regulation burdens this right without any rational basis for doing so. (*Id.* at ¶¶ 167-69). SmileDirect claims the Board's regulation unlawfully distinguishes between persons who use an iTero without a dentist physically present and persons who use an iTero with a dentist physically present, without a rational basis for that distinction. (*Id.* at ¶¶ 160-62). SmileDirect also argues that it has a substantive due process right to offer a teledentistry platform to dentists who wish to remotely provide clear aligner therapy and that the Board's regulation burdens this right without any rational basis for doing so. (*Id.* at ¶¶ 174-76). For the reasons explained below, Plaintiffs' equal protection and substantive due process claims are due to be dismissed.

The parties agree (correctly) that rational basis review applies to Plaintiffs' equal protection and substantive due process claims. **HN38**[<sup>↑</sup>] Under equal protection doctrine, rational basis review applies unless the classification at issue "infringes fundamental rights or concerns a suspect class." United States v. Castillo, 899 F.3d 1208, 1213 (11th Cir. 2018) (internal quotation marks omitted). Similarly, [\*\*61] rational basis review applies to substantive due process challenges to state professional regulations "because the right to practice a particular profession is not a fundamental one." Locke, 634 F.3d at 1195. As neither fundamental rights nor suspect classifications are at issue in this case, rational basis review applies.

Under rational basis review, state policies enjoy "a strong presumption of validity." [Castillo, 899 F.3d at 1213](#) (internal quotation marks omitted). Courts ask only whether "the enacting government body *could* have been purs[u]ing a legitimate government purpose" in enacting the measure. *Id.* (internal quotation marks omitted). If a legitimate goal for the law conceivably exists, courts "ask only whether a rational basis exists for the enacting governmental body to believe that the legislation would further the hypothesized purpose." *Id.* (internal quotation marks omitted). "This inquiry occurs entirely in the abstract because the actual motivations of the enacting governmental body are entirely irrelevant, as is whether the legitimate basis was actually considered by the legislative body." *Id.* (internal quotation marks and brackets omitted). "[T]he government has no obligation to produce evidence to sustain the rationality" [\*\*62] of the challenged measure, "and the complaining party has the burden to negate every conceivable basis which might support it." *Id.* (internal quotation marks and brackets omitted). "Unsurprisingly, almost every statute subject to the very deferential rational basis standard is found to be constitutional." *Id.* (internal quotation marks and brackets omitted).

Plaintiffs cannot possibly mount a successful challenge to the Board's regulation under the deferential rational basis standard, and their equal protection and substantive [\*1245] due process claims therefore necessarily fail. Defendants and their *amicus* have identified several legitimate goals for requiring the physical presence of a licensed dentist at facilities where an iTero is used. Using an iTero to make digital images of teeth is an intraoral procedure that involves inserting the device into patients' mouths. Hypothetical legitimate goals for requiring a dentist's physical presence at facilities where an iTero is used include: (1) ensuring proper sterilization procedures are followed to prevent the spread of illness; (2) ensuring that a skilled, trained dentist is available in the event of a sudden medical emergency caused by the [\*\*63] iTero inadvertently dislodging a patient's crown; (3) ensuring that a licensed dentist has the opportunity to diagnose preexisting conditions that contraindicate the use of clear aligner therapy in the first place, such as gum disease; and (4) ensuring that a dentist can verify in real time that the iTero is accurately capturing a patient's oral cavity, to avoid having the procedure repeated and to prevent patients from receiving clear aligners that were fabricated based on inaccurate images. (Docs. # 33 at 24; 47-1 at 21).

All of these purposes are legitimate state interests that *could* justify the Board's regulation. Moreover, a rational basis undoubtedly exists for believing that the regulation would further those hypothesized purposes. Rational arguments exist that requiring a licensed dentist to be physically present at facilities where an iTero is used would advance each of the interests identified above. And importantly, that is all that is required under rational basis review. It does not matter if the challenged law is based only on "rational speculation unsupported by evidence or empirical data" or even if the law "seems unwise or if the rationale for it seems tenuous." [Locke, 634 F.3d at 1196](#) (internal [\*\*64] quotation marks and ellipses omitted). The challenged regulation in this case readily meets the low bar of rational basis review.

Because the rational basis inquiry occurs entirely in the abstract, no evidentiary record is necessary for the court to assess this challenge. And, no evidence that Plaintiffs might uncover through discovery could change the court's analysis above. Plaintiffs have simply failed to plausibly allege an equal protection or substantive due process claim, and the Board members' [Rule 12\(b\)\(6\)](#) motion to dismiss those claims will therefore be granted.

#### **IV. Conclusion**

For the reasons explained above, Defendants' motion to dismiss (Doc. # 32) is due to be granted in part and denied in part. Plaintiffs' Sherman Act and Dormant [Commerce Clause](#) claims against the Board members in their official capacities may proceed. But all claims against the Board itself are barred by [Eleventh Amendment](#) sovereign immunity. Plaintiffs' state constitutional and statutory claims against the Board members in their official capacities are likewise barred by [Eleventh Amendment](#) sovereign immunity under *Pennhurst*. And though Plaintiffs' federal claims for prospective relief against the Board members are not barred by sovereign immunity, their equal protection [\*\*65] and substantive due process claims fail to state a claim upon which relief may be granted. Finally, all of Plaintiffs' individual-capacity claims fail to state a claim upon which relief may be granted. A separate order will be entered.

**DONE** and **ORDERED** this April 2, 2019.

382 F. Supp. 3d 1214, \*1245 (2019 U.S. Dist. LEXIS 56402, \*\*65

/s/ R. David Proctor

**R. DAVID PROCTOR**

UNITED STATES DISTRICT JUDGE

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## In re Keurig Green Mt. Singleserve Coffee Antitrust Litig.

United States District Court for the Southern District of New York

April 3, 2019, Decided; April 22, 2019, Filed

14-MD-2542 (VSB)

### **Reporter**

383 F. Supp. 3d 187 \*; 2019 U.S. Dist. LEXIS 69487 \*\*; 2019-1 Trade Cas. (CCH) P80,758; 2019 WL 1789789

IN RE: KEURIG GREEN MOUNTAIN SINGLESERVE COFFEE ANTITRUST LITIGATION. This Document Relates to All Actions

**Subsequent History:** Reconsideration denied by [In re Keurig Green Mt. Single-Serve Coffee Antitrust Litig., 2019 U.S. Dist. LEXIS 106199, 2019 WL 2603187 \(S.D.N.Y., June 25, 2019\)](#)

**Prior History:** [In re Keurig Green Mt. Single-Serve Coffee Antitrust Litig., 2014 U.S. Dist. LEXIS 199493, 2014 WL 12778832 \(S.D.N.Y., Sept. 19, 2014\)](#)

## **Core Terms**

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Keurig, Competitor, Brewer, Cup, allegations, antitrust, Compatible, factors, amended complaint, consumers, unjust enrichment, purchasers, Packs, anti trust law, indirect, antitrust claim, anticompetitive, manufacturers, argues, motion to dismiss, courts, patent, foreclosure, brands, marks, quotation, survive, distributors, Sherman Act, monopolization

## **LexisNexis® Headnotes**

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

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

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

To survive a motion to dismiss under [Fed. R. Civ. P. 12\(b\)\(6\)](#), a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim will have facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. This standard demands more than a sheer possibility that a defendant has acted unlawfully. Plausibility depends on a host of considerations: the full factual picture presented by the complaint, the particular cause of action and its elements, and the existence of alternative explanations so obvious that they render plaintiff's inferences unreasonable.

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

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## **HN2** [down arrow] Motions to Dismiss, Failure to State Claim

In considering a motion to dismiss, a court must accept as true all well-pleaded facts alleged in the complaint and must draw all reasonable inferences in the plaintiff's favor. A complaint need not make detailed factual allegations, but it must contain more than mere labels and conclusions or a formulaic recitation of the elements of a cause of action. Finally, though all allegations contained in the complaint are assumed to be true, this tenet is inapplicable to legal conclusions.

Antitrust & Trade Law > Procedural Matters

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

## **HN3** [down arrow] Antitrust & Trade Law, Procedural Matters

Antitrust claims in particular must be reviewed carefully at the pleading stage because false condemnation of competitive conduct threatens to chill the very conduct the antitrust laws are designed to protect. However, there are no heightened pleading requirements for antitrust cases, and dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.

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

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

## **HN4** [down arrow] Scope, Monopolization Offenses

Section 2 of the federal Sherman Act, 15 U.S.C.S. § 2, makes it unlawful for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations. 15 U.S.C.S. § 2. To state a § 2 claim of monopolization, a plaintiff must allege (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. To state a claim for attempted monopolization in violation of § 2, a plaintiff must allege (1) that the defendant has engaged in predatory or anticompetitive conduct; with (2) a specific intent to monopolize; and (3) a dangerous probability of achieving monopoly power. To successfully plead a claim of conspiracy to monopolize in violation of § 2, a plaintiff must allege (1) concerted action; (2) overt acts in furtherance of the conspiracy; and (3) specific intent to monopolize.

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

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Constitutional Law > ... > Case or Controversy > Standing > Elements

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

Civil Procedure > ... > Justiciability > Standing > Personal Stake

## **HN5** [down arrow] Standing, Requirements

Standing is a threshold, pleading-stage inquiry, and a complaint that fails to allege standing must be dismissed. An antitrust plaintiff must establish constitutional standing under U.S. Const. art. III as well as antitrust standing. To plead antitrust standing, a plaintiff must allege more than just an injury causally linked to unlawful conduct. Several factors have been identified that courts should consider in determining whether a plaintiff has antitrust standing: (1) the causal connection between the violation and the harm; (2) the presence of an improper motive; (3) the type of injury and whether it was one Congress sought to address; (4) the directness of the injury; (5) the speculative nature of the damages; and (6) the risk of duplicative recovery or complex damage apportionment.

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

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

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

Civil Procedure > ... > Justiciability > Standing > Personal Stake

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

## **HN6** [down] Standing, Requirements

The Second Circuit has applied the factors for determining antitrust standing using a two-pronged analysis. First, a plaintiff must allege that it suffered antitrust injury. Second, the plaintiff must demonstrate that it meets the efficient enforcer factors that make it a proper antitrust plaintiff.

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

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

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

Civil Procedure > ... > Justiciability > Standing > Personal Stake

## **HN7** [down] Standing, Requirements

To establish antitrust injury, a plaintiff must allege facts showing that it suffered injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. Courts in the Second Circuit employ a three-step analysis to determine whether a plaintiff has plausibly alleged antitrust injury. First, the plaintiff must identify the practice complained of and the reasons the practice is or might be anticompetitive. Second, the court must identify the actual injury alleged by the plaintiff. Third, the court must compare the anticompetitive effect of the practice at issue to the actual injury alleged by the plaintiff.

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

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

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

Civil Procedure > ... > Justiciability > Standing > Personal Stake

## [HN8](#) Standing, Requirements

It is not enough for a plaintiff to allege that it has suffered antitrust injury. It must also establish that it is an efficient enforcer of the antitrust laws. The four efficient enforcer factors require a court to consider:(1) the directness or indirectness of the asserted injury; (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the speculative nature of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries.

[Antitrust & Trade Law](#) > [Sherman Act](#) > [Remedies](#) > [Injunctions](#)

[Civil Procedure](#) > ... > [Justiciability](#) > [Standing](#) > [Burdens of Proof](#)

[Civil Procedure](#) > ... > [Justiciability](#) > [Standing](#) > [Injury in Fact](#)

[Civil Procedure](#) > ... > [Justiciability](#) > [Standing](#) > [Personal Stake](#)

[Antitrust & Trade Law](#) > ... > [Private Actions](#) > [Standing](#) > [Requirements](#)

## [HN9](#) Remedies, Injunctions

Plaintiffs must demonstrate antitrust standing whether they seek monetary or injunctive relief. The extent to which the efficient enforcer factors apply when plaintiffs sue for injunctive relief depends on the circumstances of a case. Because one injunction is as effective as 100, and, concomitantly, 100 injunctions are no more effective than one, some of these factors are not relevant in suits for injunctive relief. Although the efficient enforcer factors related to damages may not be directly relevant to an action for injunctive relief, the principles underlying those factors still inform the analysis.

[Antitrust & Trade Law](#) > [Sherman Act](#) > [Remedies](#) > [Injunctions](#)

[Civil Procedure](#) > ... > [Justiciability](#) > [Standing](#) > [Injury in Fact](#)

[Civil Procedure](#) > ... > [Justiciability](#) > [Standing](#) > [Personal Stake](#)

[Antitrust & Trade Law](#) > ... > [Private Actions](#) > [Standing](#) > [Requirements](#)

## [HN10](#) Remedies, Injunctions

In regard to the efficient enforcer of the antitrust laws factors in an action for injunctive relief, issues with complex and speculative damages concern the fact and nature of harm (that is, damage) as much as a calculation of dollars and cents. Is determining the fact of damage complex? Does remedying plaintiff's injury through injunctive relief present complex issues? Similarly, to assess the potential for duplicative recovery, a court must reasonably ask not only whether there is another plaintiff who will recover a quantum that would account for monetary damage, but also whether the relief one plaintiff seeks more generally (such as injunctive relief), is being adequately pursued by another, better situated-party. Thus, the factors are reasonably applicable to actions in which only injunctive relief is sought. Finally, in all cases a court is cautioned to be mindful the manageability of litigation. That is, allowing actions to proceed in which plaintiffs seek overlapping relief and in which their presence provides no additional benefit may well add to manageability issues.

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

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

### **HN11**[ **Standing, Requirements**

Private antitrust plaintiffs must demonstrate antitrust standing whether they seek monetary or injunctive relief.

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

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

Civil Procedure > ... > Justiciability > Standing > Personal Stake

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

### **HN12**[ **Standing, Requirements**

The use of pass-on theories to establish standing in treble damages actions is admonished, in part due to the concern that the massive evidence and complicated theories involved in tracing the effect of an overcharge through the distribution chain would impose burdens on the effective enforcement of the antitrust laws. That concern is no less present in the context of an action for an injunction, as the question of whether a party several levels down in the distribution chain suffered an injury at all may be as complicated and indeed intertwined with quantifying the damages associated with the injury.

Antitrust & Trade Law > Sherman Act > Claims

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

### **HN13**[ **Sherman Act, Claims**

Under the first prong of a claim under [§ 2](#) of the federal Sherman Act, [15 U.S.C.S. § 2](#), to make out an antitrust claim, a plaintiff must allege a relevant product market in which the anti-competitive effects of the challenged activity can be assessed. Monopoly power is the power to control prices or exclude competition in a given market. It can be pleaded directly through allegations of control over prices or the exclusion of competition, or it may be inferred from a defendant's large share of the relevant market. A plaintiff pleading monopolization, or attempted monopolization, generally must define the relevant market, because without a definition of that market there is no way to measure the defendant's ability to lessen or destroy competition. It is important to recognize that, because market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market.

Antitrust & Trade Law > Sherman Act > Claims

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

### **HN14**[ **Sherman Act, Claims**

Courts have found that functionality and consumer perspective is an important part of a market evaluation.

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Antitrust & Trade Law > Sherman Act > Claims

Evidence > Admissibility > Circumstantial & Direct Evidence

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

Evidence > Inferences & Presumptions > Inferences

#### **HN15** [blue icon] Sherman Act, Claims

Monopoly power can be proven directly through evidence of control over prices or the exclusion of competition, or it may be inferred from a firm's large percentage share of the relevant market.

Antitrust & Trade Law > Sherman Act > Claims

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

#### **HN16** [blue icon] Sherman Act, Claims

Adopting any exception to the usual antitrust analysis when assessing monopoly power in an aftermarket is rejected, derivative after markets always have been treated as have every other separate market.

Antitrust & Trade Law > Sherman Act > Claims

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

#### **HN17** [blue icon] Sherman Act, Claims

The law does not require a complete lack of growth to sustain a claim under [§ 2](#) of the federal Sherman Act, [15 U.S.C.S. § 2](#).

Antitrust & Trade Law > Sherman Act > Claims

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

#### **HN18** [blue icon] Sherman Act, Claims

There are three elements to a claim for monopolization, the second of which requires that a plaintiff allege the willful acquisition or maintenance of monopoly power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. A monopolist's conduct violates [§ 2](#) of the federal Sherman Act, [15 U.S.C.S. § 2](#), if it (1) tends to impair the opportunities of rivals; and also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.

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

#### **HN19** [blue icon] Scope, Monopolization Offenses

When it comes to product design, a firm may generally bring its products to market whenever and however it chooses, and the only narrow exception to this rule would arise when a monopolist coerces consumers into buying a new product.

Antitrust & Trade Law > Sherman Act > Claims

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

#### [HN20](#) [] Sherman Act, Claims

A monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits, and any success it may achieve solely through the process of invention and innovation is necessarily tolerated by the antitrust laws. It follows then that, as a general rule, courts are properly very skeptical about claims that competition has been harmed by a dominant firm's product design changes. However, changes in product design are not immune from antitrust scrutiny and in certain cases may constitute an unlawful means of maintaining a monopoly under [§ 2](#) of the federal Sherman Act, [15 U.S.C.S. § 2](#). It is not the product introduction itself, but some associated conduct, that supplies the violation. Under the case law, when a monopolist combines product withdrawal with some other conduct, the overall effect of which is to coerce consumers rather than persuade them on the merits, and to impede competition, its actions are anticompetitive under the Sherman Act.

Antitrust & Trade Law > Sherman Act > Claims

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

#### [HN21](#) [] Sherman Act, Claims

Intent is relevant to the question whether challenged conduct is fairly characterized as exclusionary or anticompetitive. Considerations of subjective intent are sometimes essential, such as when innovations both harm rivals and fail to benefit consumers.

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

#### [HN22](#) [] Scope, Monopolization Offenses

A single lawsuit can violate [antitrust law](#) as long as it is both an objective and subjective sham. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. Second, a court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor.

Antitrust & Trade Law > Sherman Act > Claims

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

#### [HN23](#) [] Sherman Act, Claims

Litigation costs incurred in defending against a sham litigation are a well recognized type of antitrust injury.

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Antitrust & Trade Law > Sherman Act > Claims

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

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

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

#### [HN24](#) [blue icon] Sherman Act, Claims

Patent misuse relates primarily to a patentee's actions that affect competition in unpatented goods or that otherwise extend the economic effect beyond the scope of the patent grant. Misuse is closely intertwined with antitrust law, and most findings of misuse are conditioned on conduct that would also violate the antitrust laws. The key inquiry under this fact-intensive doctrine is whether, by imposing an express condition on the post-sale use of a patented product, the patentee has impermissibly broadened the physical or temporal scope of the patent grant with anticompetitive effect. A common example of such impermissible broadening is the use of a patent which enjoys market power in the relevant market to restrain competition in an unpatented product.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Clayton Act > Scope

#### [HN25](#) [blue icon] Clayton Act, Claims

Substantial foreclosure is an element of an exclusive dealing claim whether that claim is brought pursuant to § 1 or § 2 of the federal Sherman Act, 15 U.S.C.S. §§ 1 and 2, or § 3 of the federal Clayton Act, 15 U.S.C.S. § 14.

Antitrust & Trade Law > Sherman Act > Claims

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

#### [HN26](#) [blue icon] Sherman Act, Claims

To state a claim under § 2 of the federal Sherman Act, 15 U.S.C.S. § 2, based on exclusive dealing arrangements, a plaintiff must allege as a threshold matter a substantial foreclosure of competition in the relevant market.

Antitrust & Trade Law > Sherman Act > Claims

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

#### [HN27](#) [blue icon] Sherman Act, Claims

The law on substantial foreclosure does not require a complete lack of growth to sustain a claim under § 2 of the federal Sherman Act, 15 U.S.C.S. § 2. Of course, the law has never required complete market exclusion as a prerequisite to suit. Indeed, some successful § 2 plaintiffs have both grown their market shares and earned high

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profits even through the period that the exclusionary practices were occurring. Under [§ 2](#) of the Sherman Act, it is not necessary that all competition be removed from the market. The test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit. Suppose an established manufacturer has long held a dominant position but is starting to lose market share to an aggressive young rival. A set of strategically planned exclusive-dealing contracts may slow the rival's expansion by requiring it to develop alternative outlets for its product, or rely at least temporarily on inferior or more expensive outlets. Consumer injury results from the delay that the dominant firm imposes on the smaller rival's growth.

Antitrust & Trade Law > Sherman Act > Claims

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

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

### [HN28](#) [L] Sherman Act, Claims

The extent to which competitors are excluded, and whether it is sufficient to support an antitrust claim, is fact-dependent and not properly disposed of on a motion to dismiss.

Antitrust & Trade Law > Sherman Act > Claims

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

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

### [HN29](#) [L] Sherman Act, Claims

A numerator and denominator need not be alleged for a plaintiff to survive a motion to dismiss a claim under [§ 2](#) of the federal Sherman Act, [15 U.S.C.S. § 2](#). At the motion to dismiss stage, such specific mathematical pleading is unnecessary.

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

### [HN30](#) [L] Scope, Monopolization Offenses

The federal antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws.

Antitrust & Trade Law > Sherman Act > Claims

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

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

### [HN31](#) [L] Sherman Act, Claims

Competitive and exclusionary conduct look alike. The metes and bounds of when such behavior impermissibly crosses the line from competitive to violative of the federal Sherman Act, [15 U.S.C.S. §§ 1 and 2](#), is a highly

contextual analysis. Similarly, any pro-competitive justification for such restrictions is not appropriately weighed on a motion to dismiss.

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

### **HN32** [blue icon] **Scope, Monopolization Offenses**

Exclusive dealing violates the law when it has the effect of raising rivals' costs by foreclosing efficient means of distribution to actual or potential competitors. Even if alternative means of reaching consumers are viable, that is not the test: the question is whether any alternative channels provide effective means of competition and whether those alternative channels pose a real threat to defendant's monopoly. Further, the requisite foreclosure may be found even if only a segment of the market is foreclosed.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

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

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

### **HN33** [blue icon] **Sherman Act, Claims**

A plaintiff asserting a monopolization claim based on misleading advertising must overcome a presumption that the effect on competition of such a practice was de minimis. However, courts recognize that false and misleading statements may provide a basis for antitrust claims. The Second Circuit has adopted several factors for a court to consider in determining whether a plaintiff has overcome the presumption of de minimis effect. These include whether the representations were (1) clearly false; (2) clearly material; (3) clearly likely to induce reasonable reliance; (4) made to buyers without knowledge of the subject matter; (5) continued for prolonged periods; and (6) not readily susceptible of neutralization or other offset by rivals. At the motion to dismiss stage, an allegation that a representation was false and misleading in certain respects is sufficient to go forward with the discovery process to substantiate a claim that the representation was clearly false, clearly material, and clearly likely to induce reasonable reliance.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Burdens of Proof > Allocation

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

### **HN34** [blue icon] **Sherman Act, Claims**

The federal Sherman Act, [15 U.S.C.S. §§ 1](#) and [2](#), prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. [15 U.S.C.S. § 1](#). A plaintiff claiming a [§ 1](#) violation under the Act must first establish a combination or some form of concerted action between at least two legally distinct economic entities. If a [§ 1](#) plaintiff establishes the existence of an illegal contract or combination, it must then proceed to demonstrate that the agreement constituted an unreasonable restraint of trade either per se or under the rule of reason. In addition, a plaintiff must independently show antitrust injury, to ensure that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior.

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

### [HN35](#) [blue icon] **Scope, Monopolization Offenses**

Conduct considered illegal per se is invoked only in a limited class of cases, wherein a defendant's actions are so plainly harmful to competition and so obviously lacking in any redeeming pro-competitive values that they are conclusively presumed illegal without further examination. However, most antitrust claims are analyzed under a rule of reason, according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect.

Antitrust & Trade Law > Sherman Act > Claims

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

### [HN36](#) [blue icon] **Sherman Act, Claims**

Conduct that stems from independent decisions is permissible under **antitrust law**, as are independent responses to common stimuli, and interdependence unaided by an advance understanding among the parties. To establish a conspiracy in violation of § 1 of the federal Sherman Act, 15 U.S.C.S. § 1, then, proof of joint or concerted action is required. Overall, circumstances must reveal a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Burdens of Proof > Allocation

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

Evidence > Admissibility > Circumstantial & Direct Evidence

Evidence > Inferences & Presumptions > Inferences

### [HN37](#) [blue icon] **Sherman Act, Claims**

Because unlawful conspiracies tend to form in secret, such proof will rarely consist of explicit agreements. Rather, conspiracies nearly always must be proven through inferences that may fairly be drawn from the behavior of the alleged conspirators. Therefore, to prove an antitrust conspiracy, an antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the defendant and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

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

#### [\*\*HN38\*\*](#) [blue icon] Sherman Act, Claims

At the pleading stage, a complaint claiming conspiracy must contain enough factual matter (taken as true) to suggest that an agreement was made. This standard does not impose a probability requirement; a claim may survive a motion to dismiss even if a judge believes the chances of recovery to be very remote or unlikely. It also does not require a plaintiff to show that the allegations suggesting agreement are more likely than not true or that they rule out the possibility of independent action. A court ruling on a motion to dismiss need not choose among plausible interpretations of the evidence. A complaint must contain enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

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

#### [\*\*HN39\*\*](#) [blue icon] Scope, Monopolization Offenses

**Antitrust law** distinguishes vertical and horizontal price restraints. Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints. Courts have long recognized the existence of hub-and-spoke conspiracies in which an entity at one level of the market structure, the hub, coordinates an agreement among competitors at a different level, the spokes. These arrangements consist of both vertical agreements between the hub and each spoke and a horizontal agreement among the spokes to adhere to the hub's terms, often because the spokes would not have gone along with the vertical agreements except on the understanding that the other spokes were agreeing to the same thing.

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

#### [\*\*HN40\*\*](#) [blue icon] Scope, Monopolization Offenses

Existing case law makes clear that a hub-and-spoke theory is cognizable under [§ 1](#) of the federal Sherman Act, [15 U.S.C.S. § 1](#), only if there are both vertical agreements between the hub and each spoke, and also a horizontal agreement among the various spokes with each other.

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

#### [\*\*HN41\*\*](#) [blue icon] Scope, Monopolization Offenses

Parties can be horizontal competitors regardless of whether they currently compete in the same market.

Antitrust & Trade Law > Sherman Act > Claims

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

#### [\*\*HN42\*\*](#) [blue icon] Sherman Act, Claims

A plaintiff is not required to show, at the pleading stage, that the allegations suggesting agreement are more likely than not true or that they rule out the possibility of independent action.

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

#### **HN43** [blue icon] **Scope, Monopolization Offenses**

Certain concerted refusals to deal or group boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as per se violations of [§ 1](#) of the federal Sherman Act, [15 U.S.C.S. § 1](#). A concerted refusal to deal or group boycott is an agreement to pressure a supplier or customer not to deal with another competitor.

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

#### **HN44** [blue icon] **Scope, Monopolization Offenses**

Vertical refusals to deal are agreements among persons or organizations at different levels of the market structure not to deal with other market participants.

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

Evidence > Burdens of Proof > Allocation

#### **HN45** [blue icon] **False Advertising, Lanham Act**

To prevail on a false-advertising claim under § 43(a) of the federal Lanham Act, [15 U.S.C.S. § 1125\(a\)](#), a plaintiff must show that either: (1) the challenged advertisement is literally false; or (2) while the advertisement is literally true it is nevertheless likely to mislead or confuse consumers. In addition to proving falsity, the plaintiff must also show that the defendants misrepresented an inherent quality or characteristic of the product. This requirement is essentially one of materiality.

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

#### **HN46** [blue icon] **False Advertising, Lanham Act**

Subjective claims about products, which cannot be proven either true or false, are not actionable under the federal Lanham Act, [15 U.S.C.S. § 1125\(a\)](#).

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

#### **HN47** [blue icon] **False Advertising, Lanham Act**

Whether or not the statements made in advertisements are literally true, § 43(a) of the federal Lanham Act, [15 U.S.C.S. § 1125\(a\)](#), encompasses more than blatant falsehoods. It embraces innuendo, indirect intimations, and ambiguous suggestions evidenced by the consuming public's misapprehension of the hard facts underlying an advertisement.

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

#### **HN48** [ ] False Advertising, Lanham Act

In certain contexts, what appears to be puffery is no longer mere opinion, but rather takes on the characteristics of a statement of fact.

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

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

#### **HN49** [ ] False Advertising, Lanham Act

At the motion to dismiss stage, an allegation that a representation was false and misleading in certain respects is sufficient to go forward with the discovery process to substantiate a plaintiff's claim that the representation was clearly false, clearly material, and clearly likely to induce reasonable reliance.

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

#### **HN50** [ ] False Advertising, Lanham Act

The Second Circuit has adopted a three-part test to determine if statements at issue are covered by the federal Lanham Act, [15 U.S.C.S. § 1125\(a\)](#): the speech is covered if it is (1) commercial speech; (2) for the purpose of influencing consumers to buy defendant's goods or services; and, (3) although representations less formal than those made as part of a classic advertising campaign may suffice, they must be disseminated sufficiently to the relevant purchasing public.

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

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

Evidence > Burdens of Proof > Allocation

#### **HN51** [ ] False Advertising, Lanham Act

To invoke a cause of action for false advertising under the federal Lanham Act, [15 U.S.C.S. § 1125\(a\)](#), a plaintiff must plead (and ultimately prove) an injury to a commercial interest in sales or business reputation proximately caused by the defendant's misrepresentations.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

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

#### **HN52** [ ] Private Actions, State Regulation

California's Cartwright Act, codified at [California Business and Professions Code § 16720](#), prohibits, among other things, any combination to prevent competition in the sale or purchase of any commodity or to agree in any manner to keep the price of any commodity at a fixed or graduated figure. The Cartwright Act is modeled after [§ 1](#) of the

federal Sherman Act, [15 U.S.C.S. § 1](#), and to state a claim under the Cartwright Act, plaintiffs must allege that (1) there was an agreement, conspiracy, or combination between two or more entities; (2) the agreement was an unreasonable restraint of trade under either a per se or rule of reason analysis; and (3) the restraint affected interstate commerce.

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

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

### [\*\*HN53\*\*](#) [ ] **Deceptive & Unfair Trade Practices, State Regulation**

California's Unfair Competition Law (UCL), [Cal. Bus. & Prof. Code § 17200 et seq.](#), bans any unlawful, unfair, or fraudulent business act or practice. [Cal. Bus. & Prof. Code § 17200](#). To state a claim under the UCL, a plaintiff must show a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and that the economic injury was the result of, i.e. caused by, the unfair business practice. Under the unlawful prong, the UCL borrows violations from other laws by making them independently actionable as unfair competitive practices. Courts in the Southern District of New York have allowed parties to plead UCL claims predicated on antitrust violations.

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

### [\*\*HN54\*\*](#) [ ] **False Advertising, State Regulation**

California's False Advertising Law bans untrue or misleading advertisements. [Cal. Bus. & Prof. Code § 17500](#).

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

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

### [\*\*HN55\*\*](#) [ ] **Complaints, Requirements for Complaint**

To state a claim for tortious interference with contractual relations under California law, a plaintiff must plead: (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.

Evidence > Burdens of Proof > Allocation

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

Evidence > Inferences & Presumptions > Inferences

### [\*\*HN56\*\*](#) [ ] **Burdens of Proof, Allocation**

Under California law, a plaintiff does not have to identify the specific contractual relations which have allegedly been disrupted. If a potential defendant is completely unaware of contractual relations with a third party, then it would be impossible to infer any intent to interfere on the defendant's part. However, such intent can certainly be inferred if

the defendant knows that contractual relations with a third party exist, but does not know the specific identity of the contractual party.

Torts > ... > Business Relationships > Intentional Interference > Defenses

Torts > ... > Business Relationships > Intentional Interference > Elements

#### **HN57[] Intentional Interference, Defenses**

There exists a broad privilege afforded to a competitor to divert a prospective relationship to itself. However, such a privilege does not defeat a claim when the plaintiff has already effectively alleged that the defendant used fraud or any other unlawful means to accomplish its goal.

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

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

#### **HN58[] False Advertising, Lanham Act**

The standards for bringing a claim under § 43(a) of the federal Lanham Act, [15 U.S.C.S. § 1125\(a\)](#), are substantially the same as those applied to New York false advertising claims.

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

Torts > ... > Business Relationships > Intentional Interference > Elements

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

#### **HN59[] Complaints, Requirements for Complaint**

A plaintiff asserting a claim for tortious interference with business relations under New York law must plead the defendant's interference with business relations existing between the plaintiff and a third party, either with the sole purpose of harming the plaintiff or by means that are dishonest, unfair or in any other way improper. A plaintiff's valid antitrust claims provide the unlawful purpose and unjustifiable cause element of its claim of tortious interference with contract.

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

#### **HN60[] Intentional Interference, Elements**

Under New York law, the elements of tortious interference with contract are (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's intentional procurement of the third-party's breach of the contract without justification; (4) actual breach of the contract; and (5) damages resulting therefrom. Tortious interference with contract under Illinois and Wisconsin law require similar showings.

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

### [\*\*HN61\*\*](#) [L] Complaints, Requirements for Complaint

At the pleading stage, a plaintiff is required to give a defendant fair notice of what the claim is and the grounds upon which it rests.

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

### [\*\*HN62\*\*](#) [L] Intentional Interference, Elements

Under a claim for tortious interference under Illinois law, the competition is a complete defense exception applies only if the defendant's actions are not anti-competitive.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

### [\*\*HN63\*\*](#) [L] Types of Contracts, Quasi Contracts

The laws governing claims for unjust enrichment vary from state to state. Some states recognize unjust enrichment as a separate free-standing claim, while others do not.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Class Members > Named Members

Civil Procedure > Preliminary Considerations > Justiciability > Standing

### [\*\*HN64\*\*](#) [L] Class Actions, Certification of Classes

While it is true that courts have held that named plaintiffs lack standing to bring claims on behalf of a class under the laws of states where the named plaintiffs have never lived or resided, it is also true that because class certification is logically antecedent to the question of standing to assert state-law claims, many courts in the Southern District of New York have deferred determination of the standing issue until the class certification issues have been fully resolved.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Constitutional Law > ... > Case or Controversy > Standing > Elements

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

Civil Procedure > ... > Justiciability > Standing > Personal Stake

### [\*\*HN65\*\*](#) [L] Class Actions, Certification of Classes

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The case law has preserved the logical antecedence exception to the general rule that U.S. Const. art. III standing is a prerequisite to class certification. In addition, a plaintiff does not have standing to bring a class action against defendants that did not injure her.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships

Governments > Courts > Creation & Organization

Governments > Courts > Judicial Precedent

### **HN66** [blue icon] Preliminary Considerations, Federal & State Interrelationships

The role of a federal district court adjudicating a state law claim is to determine the content of state law and apply it appropriately. To do so, the court looks to the state's decisional law, as well as to its constitution and statutes. When the content of state law is unsettled, the court is obligated to carefully predict how the state's highest court would resolve the uncertainty or ambiguity. The court must give the fullest weight to the pronouncements of the state's highest court while giving proper regard to the rulings of the state's lower courts.

Antitrust & Trade Law > Procedural Matters

Governments > Courts > Judicial Precedent

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Antitrust & Trade Law > Regulated Practices > Private Actions > Standing

### **HN67** [blue icon] Antitrust & Trade Law, Procedural Matters

The highest courts of both Iowa and Nebraska have held that the factors for determining antitrust standing under federal case law apply to a determination of whether a plaintiff has antitrust standing.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Courts > Judicial Precedent

### **HN68** [blue icon] Private Actions, State Regulation

*Kan. Stat. Ann. § 50-163(b)* states that, except as otherwise provided in *Kan. Stat. Ann. §§ 50-163(d)* and *50-163(e)*, the Kansas Restraint of Trade Act shall be construed in harmony with ruling judicial interpretations of federal **antitrust law** by the United States Supreme Court. *Kan. Stat. Ann. § 50-163(d)* states that the Kansas Restraint of Trade Act shall not be construed to prohibit actions or proceedings by indirect purchasers pursuant to *Kan. Stat. Ann. § 50-161*, and amendments thereto.

Antitrust & Trade Law > Regulated Practices > Private Actions > Remedies

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

### **HN69** [blue icon] Private Actions, Remedies

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Maine's Illinois Brick repealer statute, [Me. Rev. Stat. Ann. tit. 10, § 1104\(1\)](#), provides a private antitrust treble damage remedy for any person injured either directly or indirectly in his business or property.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Courts > Judicial Precedent

#### [HN70](#) [blue arrow] **Private Actions, State Regulation**

The Oregon antitrust statute states that federal precedents are persuasive, but not binding. [Or. Rev. Stat. § 646.715\(2\)](#).

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Courts > Judicial Precedent

#### [HN71](#) [blue arrow] **Private Actions, State Regulation**

South Dakota has instructed that great weight should be given to the federal cases interpreting the federal antitrust statute.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Courts > Judicial Precedent

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

#### [HN72](#) [blue arrow] **Private Actions, State Regulation**

Nowhere in the Vermont Consumer Fraud Act is there any requirement that the definition of who may sue under the Act must be consistent with the definition of who may sue under federal [antitrust law](#). Rather, the Vermont Legislature clearly has intended the Act to have as broad a reach as possible to best protect consumers against unfair trade practices. This intent underlies a private remedy section that allows suits by any consumer with no suggestion of a distinction between direct and indirect purchasers.

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

Governments > Legislation > Interpretation

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

#### [HN73](#) [blue arrow] **Standing, Requirements**

There is no need to make the direct-indirect distinction under the Wisconsin antitrust statute. [Wis. Stat. § 133.18\(1\)](#) explicitly allows any person injured directly or indirectly to sue upon the statute. Similar language is not found in the federal law. This, coupled with the Wisconsin Legislature's instruction that courts give the most liberal construction to achieve the aim of competition, compels the conclusion that an ultimate consumer who pays a higher price for goods and services indirectly due to a secret rebate comes within the ambit of the statute.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Interpretation

Governments > Courts > Judicial Precedent

#### **HN74** [L] **Private Actions, State Regulation**

Arizona's harmonization provision permits, but does not require, interpretation of Arizona antitrust law in accordance with federal precedents. [Ariz. Rev. Stat. Ann. § 44-1412](#).

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

#### **HN75** [L] **Standing, Requirements**

New Hampshire has a permissive harmonization provision, [RSA § 356:14](#). however, New Hampshire expressly has adopted the rule against indirect purchaser suits.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

#### **HN76** [L] **Standing, Requirements**

Indirect purchasers may not bring claims under the New Hampshire antitrust statute.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Courts > Judicial Precedent

#### **HN77** [L] **Private Actions, State Regulation**

The Nevada harmonization provision states the provisions of the chapter shall be construed in harmony with prevailing judicial interpretations of the federal antitrust statutes. [Nev. Rev. Stat. § 598A.050](#).

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

Governments > Legislation > Interpretation

Governments > Courts > Judicial Precedent

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

#### **HN78** [L] **Standing, Requirements**

West Virginia's harmonization provision states that the article shall be construed liberally and in harmony with ruling judicial interpretations of comparable federal antitrust statutes. [W. Va. Code § 47-18-16](#). The Attorney General of West Virginia has issued a legislative rule providing that any person who is injured directly or indirectly by reason of a violation of the West Virginia Antitrust Act may bring an action for damages. W. Va. Code R. § 142-9-2 The legislative rule further provides that the purpose of the rule is to allow persons who are indirectly injured by violations of the West Virginia Antitrust Act to maintain an action for damages. § 142-9-1. It requires that the rule shall be liberally construed to effectuate the beneficial purposes of the West Virginia Antitrust Act.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Validity

### [HN79](#) [+] Rule Application & Interpretation, Validity

West Virginia has held that once a disputed regulation is legislatively approved, it has the force of a statute itself. Being an act of the West Virginia Legislature, it is entitled to more than mere deference; it is entitled to controlling weight.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

### [HN80](#) [+] Private Actions, State Regulation

The courts of Tennessee and Wisconsin apply a substantial effects standard requiring that plaintiffs allege that a defendant's anticompetitive conduct had a substantial effect on intrastate commerce. The analysis does not involve mathematical nicety. Rather, the test is pragmatic, turning on the particular facts of a case.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

### [HN81](#) [+] Standing, Requirements

The [antitrust law](#) of Mississippi focuses on the location where the anticompetitive conduct occurred rather than the effects of such anticompetitive conduct or the broader nexus between the conduct and the state in question. Mississippi law requires that plaintiffs allege at least some conduct by the defendant which was performed wholly intrastate.

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

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

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

### [HN82](#) [+] State Regulation, Claims

According to the California federal court, to state a claim under the North Carolina Unfair Trade Practices Act (NCUTPA) a plaintiff must allege: (1) an unfair or deceptive act or practice, or unfair method of competition; (2) in or

affecting commerce; and (3) which proximately caused actual injury to the plaintiff or his business. The NCUTPA is a comprehensive law designed to include within its reach the federal antitrust laws.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

#### **HN83**[] **Types of Contracts, Quasi Contracts**

The elements required to plead an unjust enrichment claim are generally the same under the laws of states. A claim for unjust enrichment requires (1) a benefit conferred upon defendant; (2) appreciation or knowledge of the benefit by defendant; and (3) acceptance of the benefit by the defendant under circumstances that make such acceptance inequitable.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

#### **HN84**[] **Types of Contracts, Quasi Contracts**

Arizona law does not require either a direct causal connection between the enrichment and the impoverishment, or the transference of a direct enrichment from the plaintiff to the defendant.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

#### **HN85**[] **Types of Contracts, Quasi Contracts**

An unjust enrichment claim requires only that a plaintiff confers a benefit on a defendant, the defendant retains the benefit, and that retention was unjust.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

#### **HN86**[] **Types of Contracts, Quasi Contracts**

Kansas law holds that a sub-subcontractor may not bring an unjust enrichment claim against a contractor without privity of contract except in certain circumstances. A direct relationship is not necessary to establish an unjust enrichment claim.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

**HN87** [+] **Types of Contracts, Quasi Contracts**

Courts interpreting Kansas law have held that failure to plead a direct benefit is not grounds for dismissal of a Kansas unjust enrichment claim.

Civil Procedure > Appeals > Appellate Briefs

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

**HN88** [+] **Appeals, Appellate Briefs**

As a general rule, courts will not consider arguments raised for the first time in a reply brief.

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For Defendant Keurig Green Mountain, Inc.: Lev Dassin, **[\*\*2]** George S. Cary, Leah Brannon, Elaine Ewing, Cleary Gottlieb Steen & Hamilton LLP, New York, New York; Wendelynne Newton, Buchanan Ingersoll & Rooney PC, Pittsburgh, Pennsylvania.

**Judges:** Vernon S. Broderick, United States District Judge.

**Opinion by:** Vernon S. Broderick

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## **Opinion**

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**[\*208] OPINION & ORDER**

VERNON S. BRODERICK, United States District Judge:

Before me are four motions to dismiss filed by Defendant Keurig Green Mountain, Inc. ("Keurig" or "Defendant"),<sup>1</sup> formerly known as Green Mountain Coffee Roasters, Inc. and as successor to Keurig, Incorporated, in this multi-district litigation. This Opinion & Order addresses all pending motions, which seek dismissal of four separate amended complaints: (1) the First Amended and Supplemental Complaint of Plaintiff JBR, Inc. (d/b/a Rogers Family

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<sup>1</sup> Keurig, Inc. became a wholly-owned subsidiary of Defendant Keurig Green Mountain, Inc. in 2006, which merged into Green Mountain Coffee Roasters, Inc. on December 31, 2013. (TreeHouse AC 1 n.1.) I will refer to Defendant as Keurig throughout this Opinion & Order whether referring to Defendant, Green Mountain Coffee Roasters, or Keurig, Inc. unless otherwise noted.

Company) ("Rogers"), a privately held roaster, packager, and seller of coffee products, which alleges that Keurig has engaged in anticompetitive practices that had the effect of excluding Rogers from the market for cups or pods used in Keurig's single-server brewer machines, (No. 14-CV-4242, Doc. 83 (the "Rogers Amended Complaint" or "Rogers AC")); (2) the Amended and Supplemental Complaint of Plaintiff TreeHouse Foods, Inc., a food manufacturer **[\*\*3]** operating in the United States, as well as its wholly-owned subsidiaries Plaintiff Bay Valley Foods, LLC ("Bay Valley") and Plaintiff Sturm Foods, **[\*209]** Inc. ("Sturm") (collectively, "TreeHouse"), which claims that Keurig's allegedly anticompetitive practices excluded TreeHouse from the same market, (No. 14-CV-905, Doc. 86; (the "TreeHouse Amended Complaint" or "TreeHouse AC")); (3) the Consolidated Amended Class Action Complaint of direct purchaser Plaintiffs Kenneth B. Burkley, Roger Davidson, Judy Hoyer, Benjamin Krajcir, James G. Long, Linda Major, Sally Rizzo, Henry A. Rocker, David Rosenthal, and Todd W. Springer (collectively, the "DPP Named Plaintiffs"), individually and on behalf of a class of direct purchaser plaintiffs, (collectively, the "DPPs"), which claims that Keurig's allegedly anticompetitive practices caused the DPPs to be overcharged for their purchases of cups or pods used in Keurig's single-server brewer machines, (Doc. 237 (the "DPP Amended Complaint" or "DPP AC")); and (4) the Second Consolidated Amended Class Action Complaint of indirect purchaser Plaintiffs Yelda Mesbah Bartlett, Lavinia Simona Biasell, Linda Bouchard, Bouchard & Sons Garage, Inc., Jessica Searles **[\*\*4]** Cristani, Kathryn Pauline D'Agostino, Jonna Dugan, Michael J. Flanagan, Larry Gallant, Patricia Hall, Joseph Hurvitz, Jackson & Runyan, Certified Public Accountants, PLLC, Teena Marie Johnson, Darlene M. Kennedy, Lori Jo Kirkhart, John Lohin, Betty Ramey, Brier Miller Minor, David W. Nation, Patricia J. Nelson, Joyce E. Reynolds, Lauren Jill Schneider, Shirley Anne Schroeder, Rhett Montgomery Tanselle, Carey Rei Varnado, Constance Werthe, and Toni Williams (collectively, the "IPP Named Plaintiffs"), individually and on behalf of a class of indirect purchaser plaintiffs, (collectively, the "IPPs"), which claims that Keurig's allegedly anticompetitive practices caused the IPPIs to be overcharged for their purchases of cups or pods used in Keurig's single-server brewer machines, (Doc. 238 (the "IPP Second Amended Complaint" or "IPP SAC")).<sup>2</sup>

The Rogers Amended Complaint, TreeHouse Amended Complaint, DPP Amended Complaint, and IPP Second Amended Complaint all allege violations of [Sections 1](#) and [2](#) of the Sherman Act, [15 U.S.C. §§ 1, 2](#), and the Clayton Act, [15 U.S.C. § 14](#). (Rogers AC ¶¶ 294-331, 338-82; TreeHouse AC ¶¶ 569-602, 611-38; DPP AC ¶¶ 254-89; IPP SAC ¶¶ 251-94.) The Rogers Amended Complaint and TreeHouse Amended Complaint **[\*\*5]** also allege claims for violations of the Lanham Act, [15 U.S.C. § 1125\(a\)](#), (Rogers AC ¶¶ 383-88; TreeHouse AC ¶¶ 639-43), and for patent misuse, (Rogers AC ¶¶ 332-37; TreeHouse AC ¶¶ 603-10). The DPP Amended Complaint alleges claims for common law unjust enrichment under the laws of the fifty states and the District of Columbia, (DPP AC ¶¶ 290-300), and the IPP Second Amended Complaint raises claims for common law unjust enrichment under the laws of seventeen states and the District of Columbia, (IPP SAC ¶¶ 481-516).

The Rogers Amended Complaint also alleges claims for violation of the [California Cartwright Act](#), (Rogers AC ¶¶ 389-90), and for: (1) violation of the California False Advertising Law, (*id.* ¶¶ 393-97); (2) violation of the California Unfair Competition **[\*210]** Law, (*id.* ¶¶ 398-406); (3) violation of California common law unfair competition, (*id.* ¶¶ 391-92); (4) intentional interference with prospective economic advantage under California law, (*id.* ¶¶ 407-11); and (5) intentional interference with contractual relations under California law, (*id.* ¶¶ 412-14). The TreeHouse Amended Complaint also alleges claims for violations of: (1) the [Illinois Antitrust Act](#), (TreeHouse AC ¶¶ 569-602, 611-38, 650-53); **[\*\*6]** (2) the [Wisconsin Antitrust Act](#), (*id.* ¶¶ 569-602, 611-38, 654-57); (3) the [New York Donnelly Act](#), (*id.* ¶¶ 577-84, 625-38, 644-45); (4) the [Illinois Consumer Fraud and Deceptive Business Practices Act](#), (*id.* ¶¶ 639-43); (5) the [New York Consumer Protection Act](#), (*id.*); (6) the [Illinois Uniform Deceptive Trade Practices Act](#), (*id.* ¶¶ 639-43, 646-49); and (7) Wisconsin common law unfair competition, (*id.* ¶¶ 658-61). The TreeHouse Amended Complaint also alleges claims for negligent and intentional interference with business relations under New York law, (*id.* ¶¶ 662-70), tortious interference with contract under New York Law, (*id.* ¶¶ 671-77), tortious interference with contract under Wisconsin law, (*id.* ¶¶ 678-80), tortious interference with prospective business expectancy under

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<sup>2</sup> The Rogers Amended Complaint was filed under seal; a redacted version was filed on the docket. (No. 14-CV-4242, Doc. 83.) The TreeHouse Amended Complaint was filed under seal; a redacted version was filed on the docket. (No. 14-CV-905, Doc. 86.) The DPP Amended Complaint was filed under seal; a redacted version was filed on the docket. (Doc. 237.) The IPP Second Amended Complaint was filed under seal; a redacted version was filed on the docket. (Doc. 238.) All references to documents filed on the docket are designated "Doc." and refer to the MDL Docket, No. 14-MD-2542, unless otherwise noted.

Illinois law, (*id.* ¶¶ 681-84), and tortious interference with contract under Illinois law, (*id.* ¶¶ 685-91). The IPP Second Amended Complaint alleges violations of the antitrust and unfair competition laws of twenty-one states and the District of Columbia, (IPP SAC ¶¶ 225-50, 295-447), and the consumer protection and unfair trade practices laws of six states, (*id.* ¶¶ 448-80). Keurig purports to move to dismiss the amended [\*\*7] complaints in each action in their entirety under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#).<sup>3</sup> I held oral argument on these motions on July 9, 2015.

For the reasons stated herein, Keurig's motions are granted in part and denied in part.

## **I. Background<sup>4</sup>**

### **A. Keurig's Products and the Relevant Markets**

Keurig manufactures and sells Single Serve Brewers<sup>5</sup> and Portion Packs<sup>6</sup> in, [\*211] among other places, the United States. (Rogers AC ¶¶ 9, 82; TreeHouse AC ¶ 3; DPP AC ¶¶ 1, 7; IPP SAC ¶ 7.) Keurig introduced the K-Cup Brewer,<sup>7</sup> the first commercially successful Single Serve Brewer, to the United States market in or around 1998. (Rogers AC ¶ 19; see also IPP SAC ¶ 110.) While Portion Packs come in many different forms, to be usable with a particular Single Serve Brewer, a Portion Pack must be compatible with that Single Serve Brewer. (DPP AC ¶ 8.)

<sup>3</sup> Although Keurig moves to dismiss the amended complaints in their entirety, its briefing does not address every cause of action specifically. In this Opinion & Order, I address only those causes of action that have been briefed by the parties. Arguments concerning causes of action not addressed in Keurig's briefing are considered waived, and those claims survive.

<sup>4</sup> Unless otherwise noted, the facts set forth herein are drawn from the allegations of the various amended complaints. I assume those allegations to be true for purposes of ruling on these motions. See [Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 n.1, 122 S. Ct. 992, 152 L. Ed. 2d 1 \(2002\)](#). My references to these allegations should not be construed as a finding as to their veracity, and I make no such findings. In addition, this section is not an exhaustive review of the factual allegations made by the parties; rather, it merely provides a summary of the facts relevant to this case in general. Therefore, to the extent necessary, additional facts are elaborated upon in the legal discussion below.

<sup>5</sup> For ease of reference, this footnote and the five that follow establish unifying definitions for certain types of products and/or technologies that are referred to by varying terms across the four amended complaints. "Single Serve Brewers" refers to what Plaintiffs have referred to as "Single Serve Brewers," (Rogers AC ¶ 9 ("pressurized hot water brewing equipment that is capable of brewing at least a single serving of coffee or other hot beverages")), "Single-Serve Brewers," (TreeHouse AC ¶ 3 ("pressurized hot water brewing equipment that can be used to brew one or more servings at a time of coffee, tea, cider, hot cocoa, or other hot beverages or food products, such as soups and oatmeal, from a portion pack that is inserted into the brewer")); DPP AC ¶ 7 ("electronic low-pressure brewer which runs hot water through a disposable, single-use portion pack containing coffee and to a far lesser extent, other hot beverage components (like tea or hot chocolate) . . . to make beverages in small quantities (i.e., one or two-serving cups"))), and "Portion Pack Brewers," (IPP SAC ¶ 5 ("machines designed to be capable of brewing a variety of hot beverages, such as coffee, tea, and hot chocolate, in predefined portions from sealed portion packs"))).

<sup>6</sup> "Portion Packs" refers to what Plaintiffs have referred to as "Portion Packs." (Rogers AC ¶ 9 ("disposable cartridges, capsules, pods, or packs containing pre-measured beverage portions that are used in Single Serve Brewers to prepare a wide variety of beverages and food products"); TreeHouse AC ¶ 3 ("disposable cartridges, capsules, pods, or packs containing prepared beverage or food product portions that are used in Single-Serve Brewers to make a wide variety of beverages and food products")); DPP AC ¶ 7 ("disposable, single-use portion pack containing coffee and to a far lesser extent, other hot beverage components (like tea or hot chocolate").) Although the IPPs do not use it as a defined term, they refer to "portion packs" as "cartridges, disks, or cups" that "hold[] coffee grounds and other material for brewing hot beverages" in a Single Serve Brewer. (IPP SAC ¶¶ 5-6.)

<sup>7</sup> "K-Cup Brewer" refers to what Plaintiffs have referred to as "K-Cup Brewers," (Rogers AC ¶ 9 ("Single Serve Brewers manufactured or licensed by Keurig for use with K-Cups")); TreeHouse AC ¶ 3 (same); DPP AC ¶ 9 ("Keurig's most popular Single-Serve Brewer")), and "Keurig Portion Pack Brewers," (IPP SAC ¶ 7).

The same year it introduced the K-Cup Brewer, Keurig introduced its branded Portion Packs, or K-Cups,<sup>8</sup> which are compatible with and used in K-Cup Brewers. (See TreeHouse AC ¶¶ 3, 110.) Today, K-Cups also include Portion Packs licensed by Keurig that are compatible with K-Cup Brewers. (Rogers AC ¶ 31; TreeHouse AC ¶ 4; DPP AC ¶ 9; IPP SAC ¶ 9.)

K-Cups are not the only Portion Packs that are compatible [\*\*8] with K-Cup Brewers. Keurig's competitors, including Rogers and TreeHouse, manufacture, distribute, and sell their own Competitor Cups,<sup>9</sup> which are Portion Packs that are compatible with K-Cup Brewers. (Rogers AC ¶ 31; TreeHouse AC ¶¶ 105-06; DPP AC ¶ 9; IPP SAC ¶¶ 8-11.) Compatible Cups<sup>10</sup>—Portion [\*212] Packs that are compatible with K-Cup Brewers—thus include (i) K-Cups, and (ii) Competitor Cups. (Rogers AC ¶ 31; TreeHouse AC ¶¶ 105-06; DPP AC ¶ 9; IPP SAC ¶¶ 8-11.)

Since Keurig's initial introduction, Keurig has designed, manufactured, and sold a variety of different K-Cup Brewers marketed either for use in the individual consumer's home or for use outside the home at locations such as office buildings, hotels, and gas stations. (Rogers AC ¶ 19.) K-Cup Brewers are compatible only with Compatible Cups, and Portion Packs designed to work in other Single Serve Brewers are not compatible with K-Cup Brewers. (IPP SAC ¶ 93.) Keurig has dominated the markets for the design, manufacture, and sale of Single Serve Brewers, Portion Packs, and Compatible Cups. Specifically, in the United States, Keurig controls at least 89% of the market for Single Serve Brewers (the "Single Serve Brewer Market"), 73% of [\*\*9] the market for Portion Packs (the "Portion Pack Market"), and 95% of the market for Compatible Cups (the "Compatible Cup Market"). (Rogers AC ¶¶ 27, 46, 59; TreeHouse AC ¶¶ 6, 83, 128, 151; DPP AC ¶¶ 9, 10; IPP SAC ¶¶ 69, 87.)

## **B. Growing Competition Against Keurig**

Until 2012, Keurig had patents covering the filter technology used in its K-Cups ("K-Cup Filter Patents"). (TreeHouse AC ¶ 4; DPP AC ¶¶ 4, 15; IPP SAC ¶ 125.) Virtually all Compatible Cups on the market were K-Cups until 2010. (Rogers AC ¶ 34.) In 2010, TreeHouse decided to undertake a substantial investment in order to enter the Compatible Cup market, (TreeHouse AC ¶ 210), but because the K-Cup Filter Patents covering the use of filters in Portion Packs had not yet expired, TreeHouse decided to manufacture and sell Competitor Cups that did not contain filters. (*Id.* ¶ 214.) In August 2010, TreeHouse subsidiary Sturm introduced the first Compatible Cups for use in K-Cup Brewers that were neither sold by Keurig nor under a Keurig license. (*Id.* ¶ 215; Rogers AC ¶ 35; DPP AC ¶¶ 126-27; IPP SAC ¶ 128.)

In October 2011, Rogers introduced to the market its first Compatible Cups for use in K-Cup Brewers, in its proprietary OneCup format [\*\*10] under its "San Francisco Bay" and "Organic Coffee Company" brands. (Rogers AC ¶ 36.) Rogers' initial version of OneCup reduced the environmental footprint and contained 30% to 35% less packaging than other Compatible Portion Packs. (*Id.*) In October 2013, Rogers introduced a unique 97% biodegradable Compatible Cup. (*Id.*) Rogers sells or has sold its packs through retailers such as Costco and

<sup>8</sup> "K-Cups" refers to what Plaintiffs have referred to as "K-Cups," (Rogers AC ¶ 31 ("single-serve Portion Packs sold by Keurig under its brand name as well as those sold under its licensees' brand names"); TreeHouse AC ¶ 4 ("Compatible Cups that are made by, or under a license from, [Keurig]")); DPP AC ¶ 9 ("Portion Packs sold by Keurig under its brand name as well as those sold under its licensees' brand names")), and "Keurig K-Cups," (IPP SAC ¶ 9 ("Keurig Compatible Cups that are made or licensed by Keurig"))).

<sup>9</sup> "Competitor Cups" refers to what Plaintiffs have referred to as "Competing Portion Packs," (Rogers AC ¶ 31 ("Portion Packs [compatible with K-Cup Brewers that are] manufactured, distributed and sold by Keurig's competitors"), "Competitive Cups," (TreeHouse AC ¶ 4 ("K-Cup-format Portion Packs made by [Keurig's] competitors")); IPP SAC ¶ 12 ("Portion packs made, distributed, or sold by Cup Competitors for use in Keurig Portion Pack Brewers")), and "Competitor Cups," (DPP AC ¶ 9 ("Portion Packs [that are compatible with K-Cup Brewers that are] manufactured, distributed and sold by Keurig Competitors"))).

<sup>10</sup> "Compatible Cups" refers to what Plaintiffs have referred to as "Compatible Portion Packs," (Rogers AC ¶ 9 ("disposable pods or cups that are compatible with [K-Cup Brewers]")), "Compatible Cups," (TreeHouse AC ¶ 4 ("disposable pods or cups that are compatible with [K-Cup Brewers]")); DPP AC ¶ 9 ("Portion Packs that are compatible with the K-Cup Brewer")), and "Keurig Compatible Cups," (IPP SAC ¶ 8 ("The only type of portion packs that will work in the [K-Cup Brewer]")).

Amazon. (*Id.* ¶¶ 70, 289.) Sales of its OneCup Portion Pack account for more than 40% of Rogers' business. (*Id.* ¶ 277.)

When the K-Cup Filter Patents expired in 2012, a number of companies launched, or announced plans to launch, Portion Packs compatible with K-Cup Brewers. (TreeHouse AC ¶¶ 15, 216-18.) TreeHouse launched its first filtered Competitor Cups in the Fall of 2012, which were sold at a lower price than Keurig's filtered K-Cups. (*Id.* ¶ 219.) Between September 2012 and December 2013, TreeHouse subsidiary Bay Valley entered into supply arrangements with dozens of retailers for filtered Competitor Cups. (*Id.* ¶ 220.)

### **C. Keurig's Anti-Competitive Conduct**

Threatened by this competitive pressure, Keurig took various steps to regain [\*213] its "complete control" of the market for Competitor Cups, including [\*\*11] (i) filing baseless lawsuits against Rogers and TreeHouse, (Rogers AC ¶¶ 158-75; TreeHouse AC ¶¶ 226-40; DPP AC ¶¶ 125-38; IPP SAC ¶¶ 124-35); (ii) entering into "non-competition," tying, and exclusive dealing agreements and threatening companies who would do business with Compatible Cup manufacturers, (Rogers AC ¶¶ 87-154; TreeHouse AC ¶¶ 225, 241-397; DPP AC ¶¶ 139-96; IPP SAC ¶¶ 141-206); (iii) redesigning K-Cup Brewers and introducing the Keurig 2.0 K-Cup Brewer (the "2.0 Brewer") to lock out Competitor Cups and misinforming customers about the motivation for, and the abilities of, this lock-out technology, (Rogers AC ¶¶ 176-232; TreeHouse AC ¶¶ 225, 398-458; DPP AC ¶¶ 221-35; IPP SAC ¶¶ 136-40); and (iv) maligning Competitor Cups and otherwise interfering with competitors' business relationships, (Rogers AC ¶¶ 233-67; TreeHouse AC ¶¶ 225, 459-548; DPP AC ¶¶ 197-220).

#### **1. Patent Litigations**

Within a matter of weeks after Sturm's introduction of its Competitor Cups, Keurig sued Sturm for patent and trademark infringement and false advertising, (the "TreeHouse Litigation"). (Rogers AC ¶ 158; TreeHouse AC ¶¶ 228-30; DPP AC ¶ 128; IPP SAC ¶ 129.) The District Court for the District of [\*\*12] Delaware dismissed Keurig's patent claims on summary judgment, which Keurig appealed. (Rogers AC ¶ 163; TreeHouse AC ¶ 235; DPP AC ¶¶ 131-33; IPP SAC ¶¶ 130-31.) The Federal Circuit affirmed the District Court's ruling, reasoning that Keurig was attempting to make an "end-run" around the patent laws with "a tactic that the Supreme Court has explicitly admonished," and that it was attempting "to impermissibly restrict purchasers of Keurig brewers from using non-Keurig [Competitor Cups] by invoking patent law." (Rogers AC ¶ 170 (quoting *Keurig, Inc. v. Sturm Foods, Inc.*, 732 F.3d 1370, 1374 (Fed. Cir. 2013)); TreeHouse AC ¶¶ 236-37 (same); DPP AC ¶¶ 133, 137 (same); IPP SAC ¶ 131 (same).)

Similarly, in 2011, Keurig sued Rogers, just weeks after Rogers began selling its Competitor Cups. (Rogers AC ¶ 158; TreeHouse AC ¶ 239; DPP AC ¶ 136; IPP SAC ¶ 133.) In May 2013, the District Court for the District of Massachusetts granted Rogers' motion for summary judgment, holding that Rogers' designs were "sufficiently distinct" and quoted the district court's decision in the TreeHouse Litigation in admonishing Keurig for "attempting to institute a postsale restriction that prevents non-Keurig cartridges from being used in Keurig brewers." (Rogers AC ¶ 321 (quoting [\*\*13] *Keurig, Inc. v. JBR, Inc.*, No. 11-11941-FDS, 2013 U.S. Dist. LEXIS 73845, 2013 WL 2304171, at \*12 (D. Mass. May 24, 2013), aff'd, 558 F. App'x 1009 (Fed. Cir. 2014)); TreeHouse AC ¶ 239 (same); DPP AC ¶ 136; IPP SAC ¶ 134 (same).) After Keurig appealed, the Federal Circuit Court affirmed the district court's grant of summary judgment in Rogers' favor. (Rogers AC ¶¶ 171, 322; IPP SAC ¶ 135.)

Keurig pursued its claims relying on a theory of liability that had been previously rejected by the United States Supreme Court, as noted by the Federal Circuit in denying Keurig's appeal of the District Court's ruling in the TreeHouse action. (Rogers AC ¶ 170; TreeHouse AC ¶ 236; DPP AC ¶ 133; IPP SAC ¶ 131.) Plaintiffs allege that Keurig's patent claims had no objective basis, and they imposed costs on competitors and cast a cloud over the legality and legitimacy of competitors' products, which impeded market acceptance of those products and deterred

other competitors from entering the market. (Rogers ¶¶ 172-74; TreeHouse AC ¶¶ 238-40; DPP AC ¶ 138; IPP SAC ¶¶ 124-27.)

## 2. Exclusive and Restrictive Agreements

Plaintiffs allege that Keurig has entered into over 600 exclusive and restrictive agreements with various entities involved in the line of manufacture and distribution of Compatible Cups, as well as with [\*\*14] potential competitors. For example, Keurig entered into exclusive agreements with, or otherwise coerced, suppliers of the machinery required to manufacture Compatible Cups; suppliers of the cups, lids, and filters required in Compatible Cups; and suppliers of the lock-out technology, a special taggant ink that is included on the lid of the Compatible Cup, incorporated in the 2.0 Brewer, to keep competitors from sourcing the technology. (Treehouse AC ¶¶ 2, 54, 143, 244-85, 401; DPP AC ¶¶ 169-91; IPP SAC ¶¶ 141-52.)

In addition, Keurig has locked up virtually all of the distributors who provide Compatible Cups for use outside of the home (the "Away-From-Home Market Segment") in long-term exclusive contracts. (Rogers AC ¶¶ 87-106; DPP AC ¶¶ 162-68; IPP SAC ¶¶ 173-200.) Keurig—in an apparent effort to foreclose the entry of or expansion by competitors in the home use market—entered into exclusive contracts with large retailers that serve the consumers who use Compatible Cups at home (the "At-Home Market Segment"), (Rogers AC ¶¶ 107-11; DPP AC ¶¶ 162-68; IPP SAC ¶¶ 173-200). That effort has been aided by Keurig's exclusive contracts with numerous major coffee brands ("Roasters"), which limited [\*\*15] the ability of Roasters to provide inputs to or enter into other agreements with Competitor Cup manufacturers, as well as prevent Roasters from entering the Single Serve Brewer Market. (Rogers AC ¶¶ 112-54; Treehouse AC ¶¶ 286-330; DPP AC ¶¶ 139-61; IPP SAC ¶¶ 153-72.) As of November 2014, Keurig admitted that it has "now signed the large majority of previously unlicensed portion pack volume to our system and we're in the process of transitioning these brands." (Rogers AC ¶ 201 (quoting *Keurig Green Mountain's (GMCR) CEO Brian Kelley on Q4 2014 Results - Earnings Call Transcript*, Seeking Alpha (Nov. 20, 2014),

## 3. False Advertising and Promotional Efforts

Keurig has engaged in false, deceptive, and/or misleading advertising and promotional efforts directed at consumers and retail customers regarding the key qualities and characteristics of its K-Cup Brewers, K-Cups, [\*\*16] and Competitor Cups made by TreeHouse, Rogers, and others. (Rogers AC ¶ 233; TreeHouse AC ¶¶ 459-62; DPP AC ¶¶ 197-220.) Those efforts were intended to and did drive up Keurig's own sales while eliminating or diminishing competition from Competitive Cup makers by sullyng their reputations. (TreeHouse AC ¶ 459.)

For example, despite learning that competitors had developed Compatible Cups that worked in the 2.0 Brewer, Keurig has continued to convey to purchasers of the 2.0 Brewers through the packaging and the promotional materials provided with the brewers that only Keurig brand cups would work with the 2.0 Brewer. (*Id.* ¶ 471.) The packaging of the 2.0 Brewer states "Works only with Keurig Brand Packs," and the user manual warns consumers that their "Keurig 2.0 brewer will [\*\*215] not work with packs that don't have the Keurig logo," among other misrepresentations. (*Id.* ¶ 472.) The 2.0 Brewer itself displays the misleading message that "[t]his pack wasn't designed for this brewer" when a consumer attempts to use a Competitive Cup in it. (Rogers AC ¶ 251; see also TreeHouse AC ¶ 472.) In addition, Keurig through its websites, social media, and customer service representatives, disseminated [\*\*17] false and misleading messaging regarding quality and safety issues with respect to Competitor Cups. (Rogers AC ¶¶ 246-47, 253; TreeHouse AC ¶ 473; DPP AC ¶¶ 199, 202-11.) Such statements caused or likely will cause consumers to mistakenly believe that only K-Cups work with 2.0 Brewers, and therefore that they have to buy higher priced K-Cups rather than Competitor Cups to use their 2.0 Brewers. (TreeHouse AC ¶ 478; DPP AC ¶¶ 218-20.) Keurig has also made misstatements to consumers about quality and safety issues with the use of non-Keurig cups in the 2.0 Brewer, (Rogers AC ¶¶ 234-37, 240-42; TreeHouse AC ¶¶ 479-92), about how use of unlicensed Compatible Cups affects the brewer warranty, (Rogers AC ¶ 238; TreeHouse AC ¶¶ 493-99; DPP

AC ¶¶ 213-15), as well as misrepresentations made to both consumers and retailers about compatibility and quality issues, (Rogers AC ¶¶ 256-67; TreeHouse AC ¶¶ 501-28).

#### 4. 2.0 Brewer

Keurig successfully implemented a plan, known as "Project Squid," to recapture market share lost to unlicensed Competitive Cup makers by designing a brewer that would only function with K-Cup and Keurig-licensed Compatible Cups. (Rogers AC ¶¶ 176-91; Treehouse AC ¶¶ 398-403; **\*\*18** see also DPP AC ¶¶ 221-35; IPP SAC ¶¶ 136-40.) The new brewer, referred to as the "2.0 Brewer," was solely intended to further lock out competitors. (Rogers AC ¶¶ 183, 190; TreeHouse AC ¶¶ 398, 401; IPP SAC ¶ 136.)

In or about July 2012, Keurig began working on an "authentication" mechanism with Sagentia, a global product development firm, that would enable Keurig to manufacture Single Serve Brewers that provide degraded or non-functionality when used with competitors' Portion Packs. (Rogers AC ¶ 177; Treehouse AC ¶ 400.) Keurig thus developed a "taggant," a special kind of ink, which could be identified by the 2.0 Brewer's sensors to authenticate that the Portion Pack was a Keurig or Keurig-licensed pack. (Rogers AC ¶ 184; TreeHouse AC ¶ 503.) Keurig announced the 2.0 Brewer in November 2013. (Rogers AC ¶ 192.) In connection with the rollout, Keurig knowingly made false representations that its lockout technology had consumer benefits, (*id.* ¶¶ 214-32; TreeHouse AC ¶¶ 404-31; DPP AC ¶ 271), and disparaged all Competitor Cups, including those of Rogers and TreeHouse, to retailers, distributors, consumers, and the general public, (Rogers AC ¶¶ 233-67; TreeHouse AC ¶¶ 463-548; DPP AC ¶¶ **\*\*19** 197-220). Although advertised as a closed system with technology that would not allow the brewer to function with non-Keurig or Keurig-licensed Portion Packs, (Rogers AC ¶ 192), some competitors have reverse-engineered 2.0 Brewer-compatible Portion Packs, (*id.* ¶ 47; TreeHouse AC ¶¶ 457, 465).

#### D. Effects of Keurig's Anti-Competitive Conduct

Keurig's anti-competitive conduct has negatively impacted competition in the Portion Pack Market, and the Compatible Cup Market. (Rogers AC ¶ 268; TreeHouse AC ¶ 549.) This has resulted in harm to manufacturers of Competitor Cups, including Rogers and TreeHouse, potential market entrants, distributors, retailers, **[\*216]** and consumers. (Rogers AC ¶¶ 268-89; TreeHouse AC ¶¶ 551-68.)

More specifically, through its anti-competitive conduct, Keurig is able to sell its K-Cup Brewers at or below cost to create a captive base of consumers while at the same time selling its K-Cups to those consumers at supra-competitive prices. (TreeHouse AC ¶¶ 131, 196, 587; DPP AC ¶ 11; see also Rogers AC ¶ 314.) Keurig's anti-competitive conduct has thus caused consumers to pay supra-competitive prices for K-Cups. (IPP SAC ¶¶ 32-35.) In particular, Keurig's conduct has had the effect **\*\*20** of overcharging the DPPs, who are direct purchasers of K-Cups. (*Id.* ¶ 30.) Direct purchasers, in turn, passed these overcharges on to the IPPs, who are end-user consumers of K-Cups, either directly or through intermediaries. (IPP SAC ¶ 30.) The IPPs claim that because the distribution channel for K-Cups "is not complex, generally involving only one or two intermediaries between Keurig and the [IPPs]," and because K-Cups are individual products that remain unaltered through the distribution chain, "the chain of commerce for this market allows for the tracing of overcharges that have passed through the chain of commerce to [IPPs]." (*Id.* ¶ 31.)

#### II. Procedural History

On February 11, 2014, TreeHouse filed a complaint against Keurig alleging antitrust and related violations. (No. 14-CV-905, Doc. 2.) Shortly thereafter, on March 13, 2014, Rogers filed its complaint in the Eastern District of California. (No. 14-CV-4242, Doc. 1.) The Rogers and TreeHouse lawsuits were two of many similar actions filed in early 2014 in federal district courts around the country alleging that Keurig engaged in unlawful anticompetitive

conduct related to the 2.0 Brewer.<sup>11</sup> Among those suits were numerous actions [\*\*21] filed by individual direct purchasers and individual indirect purchasers. On March 20, 2014, the named plaintiff in one of the related cases moved the Judicial Panel on Multidistrict Litigation ("JPML") to centralize all of the cases concerning the 2.0 in a single multidistrict litigation ("MDL") in this District. (See Doc. 1.) The proposed MDL encompassed three types of actions: direct purchaser class actions, indirect purchaser class actions, and individual actions by Competitor Plaintiffs. (*Id.* at 1.) Although the Competitor Plaintiffs opposed centralization, (*id.*), the JPML concluded that all of the related actions, including those filed by the direct purchasers and indirect purchasers, raised "virtually identical factual questions concerning the conduct of Keurig." (*Id.* at 2.) On June 3, 2014, pursuant to [28 U.S.C. § 1407](#), the JPML transferred these related actions to this District and assigned the action to me for consolidated pretrial proceedings as part of the MDL. (*Id.* at 3.) On May 28, 2014, I appointed interim co-lead counsel for the Named Plaintiffs and proposed direct purchaser Plaintiff class. (No. 14-CV-1609, Doc. 19.) On June 26, 2014, I appointed interim co-lead counsel for the Named Plaintiffs and proposed [\*\*22] indirect purchaser Plaintiff class. (Doc. 36.) On July 24, 2014, the DPPs filed a Consolidated Class Action Complaint, (Doc. 65), and the IPPs filed a Consolidated Amended Indirect Purchaser Class Action Complaint, (Doc. 61).

On August 11, 2014, Rogers filed a motion seeking a preliminary injunction. (Doc. 84.) I denied the motion on September 19, 2014, finding that Rogers had not made a clear showing that it is imminently likely to suffer irreparable harm in the absence of the requested injunction. (Docs. [\*217] 145, 160.) On August 5, 2014, I issued an order setting the schedule for Keurig's anticipated motions to dismiss. (Doc. 70.) In accordance with that schedule, Keurig filed motions to dismiss the four consolidated actions, (Docs. 162, 165, 168, 171), on October 6, 2014.

Rogers filed its Amended Complaint on December 8, 2014, (No. 14-CV-4242, Doc. 83), TreeHouse filed its Amended Complaint on December 2, 2014, (No. 14-CV-905, Doc. 86), the DPPs served their Amended Complaint on November 25, 2014, (No. 14-CV-1609, Doc. 42),<sup>12</sup> and the IPPs served their Second Amended Complaint on November 25, 2014, (Doc. 206).<sup>13</sup> Thereafter, consistent with the briefing schedule proposed by the parties, (Doc. [\*\*23] 215), on February 2, 2015, Keurig filed its motions to dismiss (1) Rogers' Amended Complaint, (Docs. 226-28); (2) TreeHouse's Amended Complaint, (Docs. 223-25); (3) the DPPs' Amended Complaint, (Docs. 229-30), and (4) the IPPs' Second Amended Complaint, (Docs. 231-32). On April 13, 2015, Rogers filed a memorandum in opposition to Keurig's motion to dismiss, (Doc. 253), as did TreeHouse, (Doc. 254), the DPPs, (Docs. 251-52), and the IPPs, (Doc. 255).<sup>14</sup> Keurig filed replies in further support of its motion to dismiss the DPPs' Amended Complaint on May 11, 2015, (Doc. 261), and in further support of its motions to dismiss the Rogers' Amended Complaint, (Docs. 265-66), the TreeHouse Amended Complaint, (Doc. 264), and the IPPs' Second Amended Complaint on May 13, 2015, (Doc. 267). The parties have also submitted various letters regarding supplemental authority. (E.g., Docs. 276-77, 282, 284, 292, 298-99, 362-63.)

### **III. Legal Standard**

**HN1** To survive a motion to dismiss under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" [Ashcroft v. Iqbal](#), 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A claim will have "facial plausibility when the plaintiff pleads factual

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<sup>11</sup> I refer to Rogers and TreeHouse collectively as the "Competitor Plaintiffs."

<sup>12</sup> The certificate of service of the DPP Amended Complaint was filed on one of the individual case's dockets. (No. 14-CV-1609.) The DPP Amended Complaint was filed under seal, and a redacted version was filed on the MDL docket on February 11, 2015. (Doc. 237.)

<sup>13</sup> The IPP Second Amended Complaint was filed under seal, and a redacted version was filed on the MDL docket on February 11, 2015. (Doc. 238.)

<sup>14</sup> Rogers', TreeHouse's, the DPPs', and the IPPs' memoranda in opposition include redactions, permitted by my order of April 13, 2015. (Doc. 249.) Unredacted versions of the memoranda were filed under seal.

content [\*\*24] that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This standard demands "more than a sheer possibility that a defendant has acted unlawfully." *Id.* "Plausibility . . . depends on a host of considerations: the full factual picture presented by the complaint, the particular cause of action and its elements, and the existence of alternative explanations so obvious that they render plaintiff's inferences unreasonable." *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 430 (2d Cir. 2011).

**HN2**[] In considering a motion to dismiss, a court must accept as true all well-pleaded facts alleged in the complaint and must draw all reasonable inferences in the plaintiff's favor. *Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 237 (2d Cir. 2007). A complaint need not make "detailed" [\*218] factual allegations," but it must contain more than mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). Finally, though all allegations contained in the complaint are assumed to be true, this tenet is "inapplicable to legal conclusions." *Id.*

**HN3**[] Antitrust claims in particular must be reviewed carefully at the pleading stage because false condemnation of competitive conduct threatens to "chill the very conduct [\*\*25] the antitrust laws are designed to protect." *Verizon Commc's Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004) (internal quotation marks omitted). However, "[t]here are no heightened pleading requirements for antitrust cases," *Commercial Data Servers, Inc. v. Int'l Bus. Machines Corp.*, No. 00CIV5008(CM)(LMS), 2002 U.S. Dist. LEXIS 5600, 2002 WL 1205740, at \*2 (S.D.N.Y. Mar. 15, 2002) (citing *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001)), and "dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly," *Todd*, 275 F.3d at 198 (quoting *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)).

#### IV. Discussion

The claims brought by Rogers, TreeHouse, the DPPs, and the IPPs overlap to a significant degree, as do, in certain respects, the motions to dismiss those claims. Rogers brings seventeen causes of action pursuant to (1) the *Sherman Act Section 2*, [15 U.S.C. § 2](#); (2) the Sherman Act *Section 1*, [15 U.S.C. § 1](#); (3) the Clayton Act, [15 U.S.C. § 14](#); (4) federal patent law; (5) the Lanham Act, [15 U.S.C. § 1125\(a\)](#); (6) common law tort; and (7) California state antitrust and consumer protection laws. (Rogers AC ¶¶ 294-414.) TreeHouse's Amended Complaint raises twenty causes of action pursuant to (1) the Sherman Act *Section 2*, [15 U.S.C. § 2](#); (2) the Sherman Act *Section 1*, [15 U.S.C. § 1](#); (3) the *Clayton Act*, [15 U.S.C. § 14](#); (4) federal patent law; (5) the Lanham Act, [15 U.S.C. § 1125\(a\)](#); and (6) various state laws. (TreeHouse AC ¶¶ 569-691.) The DPPs' Amended Complaint raises six causes of action pursuant to (1) the Sherman Act *Section 2*, [15 U.S.C. § 2](#); (2) the Sherman Act *Section 1*, [15 U.S.C. § 1](#); (3) the Clayton Act, [15 U.S.C. § 14](#); and (4) common law unjust enrichment laws of the fifty states [\*\*26] and the District of Columbia. (DPP AC ¶¶ 254-300.) The IPPs' Second Amended Complaint raises eleven causes of action pursuant to (1) the Sherman Act *Section 1*, [15 U.S.C. § 1](#); (2) the Sherman Act *Section 2*, [15 U.S.C. § 2](#); (3) the Clayton Act, [15 U.S.C. § 14](#); (4) the antitrust and unfair competition laws of twenty-one states and the District of Columbia;<sup>15</sup> (5) the consumer protection and unfair trade practices laws of seven states;<sup>16</sup> (6) and the common law unjust enrichment laws of seventeen states and the District of Columbia.<sup>17</sup> (IPP SAC ¶¶ 225-516.)

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<sup>15</sup> These states include Arizona, California, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, South Dakota, Tennessee, Vermont, West Virginia, and Wisconsin.

<sup>16</sup> These states include Arkansas, California, Massachusetts, Nebraska, New Mexico, North Carolina, and Vermont.

<sup>17</sup> These states include Arizona, Arkansas, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Mexico, New York, Oregon, South Dakota, Vermont, and Wisconsin.

Keurig moves to dismiss the amended complaints in their entirety with prejudice. [\*219] (See Rogers Def. Mem. 2; TreeHouse Def. Mem. 3; DPP Def. Mem. 1; IPP Def. Mem. 2.)<sup>18</sup> For the sake of clarity and efficiency, where possible, I address the applicable law pertaining to the respective motions to dismiss together. Keurig also challenges the standing of the DPPs and the IPPs to raise the antitrust claims.

#### **A. Sherman Act Section 2 Claims**

Rogers, TreeHouse, and the DPPs bring four overlapping causes of action pursuant to Section 2 of the Sherman Act: (1) monopolization, (Rogers AC ¶¶ 294-303; TreeHouse AC ¶¶ 569-76; DPP AC ¶¶ 254-59); (2) exclusive dealing (Rogers AC ¶¶ 304-11; TreeHouse AC ¶¶ 577-84; DPP AC ¶¶ 260-67); (3) monopoly [\*\*27] leveraging, (Rogers AC ¶¶ 312-17; TreeHouse AC ¶¶ 585-93; DPP AC ¶¶ 268-73); and (4) attempted monopolization in the alternative, (Rogers AC ¶¶ 377-82; TreeHouse AC ¶¶ 619-24; DPP AC ¶¶ 274-78). The IPPs bring causes of action seeking injunctive relief only for monopolization and attempted monopolization. (IPP SAC ¶¶ 277-94.) Rogers and TreeHouse bring three additional overlapping claims for: (1) sham litigation (Rogers AC ¶¶ 318-31; TreeHouse AC ¶¶ 594-602); (2) tying, (Rogers AC ¶¶ 338-53; TreeHouse AC ¶¶ 611-18); and (3) conspiracy to monopolize, (Rogers AC ¶¶ 363-69; TreeHouse AC ¶¶ 625-31). Rogers also asserts an eighth cause of action for anticompetitive product design, (Rogers AC ¶¶ 354-62), and the DPPs allege a fifth cause of action for declaratory and injunctive relief, (DPP AC ¶¶ 279-89).

**HN4** [↑] Section 2 of the Sherman Act, 15 U.S.C. § 2, ("Section 2"), makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . ." 15 U.S.C. § 2. To state a Section 2 claim of monopolization, a plaintiff must allege "(1) the possession of monopoly power in the relevant market [\*\*28] and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 105 (2d Cir. 2002) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)). To state a claim for attempted monopolization in violation of Section 2, a plaintiff must allege "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." Spectrum Sports, Inc., v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993). To successfully plead a claim of conspiracy to monopolize in violation of Section 2, a plaintiff "must allege (1) concerted action, (2) overt acts in furtherance of the conspiracy, and (3) specific intent to monopolize." [\*220] Discover Fin. Servs. v. Visa U.S.A. Inc., 598 F. Supp. 2d 394, 405 (S.D.N.Y. 2008) (quoting Elec. Commc'n Corp. v. Toshiba Am. Consumer Prods., Inc., 129 F.3d 240, 246 (2d Cir. 1997)).

Keurig raises myriad challenges to the Section 2 claims, which I analyze in turn below as related to each individual motion. However, before I reach Keurig's challenges to the Section 2 claims, I first address Keurig's challenge to the DPPs' and the IPPs' standing to raise these claims.

#### **1. Standing**

##### **a. Applicable Law**

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<sup>18</sup> "Rogers Def. Mem." refers to the Memorandum of Law in Support of Defendant's Motion to Dismiss First Amended and Supplemental Complaint filed by JBR, Inc. (Doc. 227.) "TreeHouse Def. Mem." refers to the Memorandum of Law in Support of Defendant's Motion to Dismiss Amended and Supplemental Complaint filed by TreeHouse Foods, Inc., Bay Valley Foods, LLC, and Sturm Foods, Inc. (Doc. 224.) "DPP Def. Mem." refers to the Memorandum of Law in Support of Defendant's Motion to Dismiss the Direct Purchaser Plaintiffs' Consolidated Amended Class Action Complaint. (Doc. 230.) "IPP Def. Mem." refers to the Memorandum of Law in Support of Defendant's Motion to Dismiss the Indirect Purchaser Plaintiffs' Second Consolidated Amended Class Action Complaint. (Doc. 232.)

**HN5** Standing is "a threshold, pleading-stage inquiry," and a complaint that fails to allege standing must be dismissed. *Gatt Commc'n's, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 75-76 (2d Cir. 2013) (quoting *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 450 (6th Cir. 2007) (en banc)). An antitrust plaintiff must establish constitutional standing [\*\*29] under Article III as well as antitrust standing. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 n.31, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983) (hereinafter, "AGC"); *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 688 (2d Cir. 2009). To plead antitrust standing, a plaintiff must allege more than just an injury causally linked to unlawful conduct. *Gatt*, 711 F.3d at 76. The Supreme Court has identified several factors that courts should consider in determining whether a plaintiff has antitrust standing: (1) the causal connection between the violation and the harm; (2) the presence of an improper motive; (3) the type of injury and whether it was one Congress sought to address; (4) the directness of the injury; (5) the speculative nature of the damages; and (6) the risk of duplicative recovery or complex damage apportionment. *AGC*, 459 U.S. at 537-44.

**HN6** The Second Circuit has applied the AGC factors using a two-pronged analysis. First, a plaintiff must allege that it suffered antitrust injury. *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 443 (2d Cir. 2005). Second, the plaintiff must demonstrate that it meets the "efficient enforcer" factors that make it a "proper antitrust plaintiff." *Id.*

**HN7** To establish antitrust injury, a plaintiff must allege facts showing that it suffered "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977). Courts in this circuit employ a three-step analysis [\*\*30] to determine whether a plaintiff has plausibly alleged antitrust injury. *Gatt*, 711 F.3d at 76. First, the plaintiff must identify the practice complained of and the reasons the practice is or might be anticompetitive. *Id.* Second, the court must identify the actual injury alleged by the plaintiff. *Id.* Third, the court must compare the anticompetitive effect of the practice at issue to the actual injury alleged by the plaintiff. *Id.*

**HN8** It is not enough for a plaintiff to allege that it has suffered antitrust injury. It must also establish that it is an "efficient enforcer" of the antitrust laws. The four "efficient enforcer" factors require the court to consider:

- (1) the directness or indirectness of the asserted injury; (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries.

*In re DDAVP*, 585 F.3d at 688 (quoting [\*221] *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 66 (2d Cir. 1988)).

**HN9** Plaintiffs must demonstrate antitrust standing whether they seek monetary or injunctive relief. *Paycom Billing Servs., Inc. v. Mastercard Int'l, Inc.*, 467 F.3d 283, 290 (2d Cir. 2006). "The extent to which [the efficient enforcer] [\*\*31] factors apply when plaintiffs sue for injunctive relief depends on the circumstances of the case." *Daniel*, 428 F.3d at 443; see also *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 111 n.6, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986) ("Thus, because standing under § 16 raises no threat of multiple lawsuits or duplicative recoveries, some of the factors other than antitrust injury that are appropriate to a determination of standing under § 4 are not relevant under § 16."); *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 52 (2d Cir. 2010) ("In the antitrust context, courts have articulated several 'efficient enforcer' factors to avoid the 'duplicative recoveries' that would result from allowing 'every person tangentially affected by an antitrust violation' to sue for treble damages." (quoting *Blue Shield of Va. v. McCready*, 457 U.S. 465, 475-77, 102 S. Ct. 2540, 73 L. Ed. 2d 149 & n.11 (1982))). Because "one injunction is as effective as 100, and, concomitantly, . . . 100 injunctions are no more effective than one," *Standard Oil Co.*, 405 U.S. at 261, some of these factors are "not relevant" in suits for injunctive relief, *Cargill*, 479 U.S. at 111 n.6. Although the efficient enforcer factors related to damages may not be directly relevant to an action for injunctive relief, the principles underlying those factors still inform the analysis. As District Court Judge Katherine Forrest articulated when applying the AGC factors to dismiss a claim by a class of indirect purchasers seeking injunctive relief in an antitrust case:

**HN10** [↑] In this regard, issues [\*\*32] with complex and speculative damages concern the fact and nature of harm (that is, damage) as much as a calculation of dollars and cents. Is determining the fact of damage complex? Does remediating plaintiff's injury through injunctive relief present complex issues?

Similarly, to assess the potential for duplicative recovery, the Court must reasonably ask not only whether there is another plaintiff who will recover a quantum that would account for monetary damage, but also whether the relief one plaintiff seeks more generally (such as injunctive relief), is being adequately pursued by another, better situated-party. Thus, the AGC factors are reasonably applicable to actions in which only injunctive relief is sought. Finally, in all cases the court is cautioned to be mindful the manageability of litigation. That is, allowing actions to proceed in which plaintiffs seek overlapping relief and in which their presence provides no additional benefit may well add to manageability issues.

*In re Aluminum Warehousing Antitrust Litig., No. 13-md-2481 (KBF), 2014 U.S. Dist. LEXIS 121435, 2014 WL 4277510, at \*17-18 (S.D.N.Y. Aug. 29, 2014), supplemented, 2014 U.S. Dist. LEXIS 140765, 2014 WL 4743425 (S.D.N.Y. Sept. 15, 2014), aff'd, 833 F.3d 151 (2d Cir. 2016).*

#### b. Application to DPPs

Here, the DPPs are direct purchasers of the defendant's product, the K-Cups, and allege that Keurig's [\*\*33] anticompetitive conduct caused them to pay supra-competitive prices. (DPP AC ¶¶ 5-6, 23-24.) Such an injury plainly is "of the type the antitrust laws were intended to prevent." *Brunswick Corp.*, 429 U.S. at 489. Although the conduct of which the DPPs complain largely targeted Keurig's direct competitors, such as TreeHouse and Rogers, the DPPs' alleged injury [\*\*222] of overcharge was "inextricably intertwined" with the conduct's anti-competitive effects and thus "flow[ed] from that which makes defendants' acts unlawful." *McCready*, 457 U.S. at 484 (internal quotation marks omitted). The DPPs have therefore pled antitrust injury.

With regard to the "efficient enforcer" factors that bear on whether the DPPs are "proper" antitrust plaintiffs, each factor supports the DPPs' antitrust standing. With regard to the directness of the injury, Keurig argues, citing to specific allegations of Keurig's anticompetitive scheme aimed at its competitors, that the claims of harm are "attenuated." (DPP Def. Mem. 5-6.) Keurig's focus on the allegations related to the scheme is misplaced and misstates the DPPs' alleged harm: the payment of supra-competitive prices, set by Keurig, for K-Cups bought directly from Keurig or its agents. (DPP AC ¶¶ 245, 258.) As an initial [\*\*34] matter, the DPPs' injury—like the direct purchaser plaintiffs in *DDAVP*—was that they were forced to pay "supra-competitive prices as a result of defendants' anticompetitive conduct" thereby preventing the competitive market entry of others and the lower prices that would have resulted for the direct purchasers. *In re DDAVP*, 585 F.3d at 688. The defendants in *DDAVP*—like Keurig here—argued that anticompetitive conduct targeted defendants' competitors and therefore the harm to the direct purchaser plaintiffs was too far removed. The Second Circuit rejected that argument. As was the case with the direct purchaser plaintiffs in *DDAVP*, even though the injuries to the DPPs were "derivative of the direct harm experienced by the defendants' competitors, harming competitors was simply a means for the defendants to charge the plaintiffs higher prices." *Id.* The directness of the injury to DPPs—the payment of supra-competitive prices—supports the DPPs' antitrust standing.

As to the second factor, motivation and alternative enforcers, Keurig argues that TreeHouse and Rogers have filed lawsuits and are motivated to vindicate the public interest in antitrust enforcement. (DPP Def. Mem. 6.) Here, Keurig attempts to argue that [\*\*35] TreeHouse and Rogers are more motivated than the DPPs and that, therefore, the DPPs should not enjoy antitrust standing. This misstates the law; the issue is not what plaintiff is the most motivated. "The second factor simply looks for a class of persons naturally motivated to enforce the antitrust laws . . . Even if the competitors might be the most motivated, the plaintiffs are also significantly motivated due to their 'natural economic self-interest' in paying the lowest price possible." *In re DDAVP*, 585 F.3d at 689 (citing *Daniel*, 428 F.3d at 444). Moreover, because TreeHouse and Rogers are seeking lost profits while the DPPs are seeking overcharges, "[d]enying the plaintiffs a remedy in favor of a suit by competitors would thus be 'likely to leave a significant antitrust violation undetected or unremedied.'" *Id.* (quoting *AGC*, 459 U.S. at 542). The DPPs are motivated enforcers, and therefore this factor supports their antitrust standing.

Keurig argues further that the third and fourth factors, speculative nature of injury and difficulty of apportionment, weigh against the DPPs' standing because "[t]he injury DPPs allege is highly speculative, with alleged damages that would be nearly impossible to determine." (DPP Def. Mem. 7.) However, I find that [\*\*36] the nature of the alleged injury—the overpayment for K-Cups purchased directly from Keurig or its agents—is not speculative. With regard to apportionment, lost profits—sought by Keurig's competitors—are separate from the overcharges the DPPs seek to recover. However, "[e]ven assuming some overlap [\*223] between lost profits and overcharges . . . , the two are conceptually different measures that we think can be fairly apportioned in order to avoid duplicative recoveries." *In re DDAVP*, 585 F.3d at 689. These factors also weigh in favor of the DPPs' standing.

Therefore, all four efficient enforcer factors support the DPPs antitrust standing.<sup>19</sup>

### c. Application to the IPPs

**HN11** [+] Although the IPPs assert only a claim for injunctive relief under the federal antitrust laws, they must still demonstrate antitrust standing to assert such a claim. *Paycom*, 467 F.3d at 290 (holding that private antitrust plaintiffs must demonstrate antitrust standing whether they seek monetary or injunctive relief). Unlike the DPPs, the IPPs fail to sufficiently allege that they are efficient enforcers, and therefore, they lack antitrust standing.

First, the IPPs' alleged injury is, by definition, indirect. The IPPs allege that they were "end-user[s]" who purchased Keurig K-Cups through [\*\*37] distribution channels "generally involving only one or two intermediaries" between the IPPs and Keurig. (IPP SAC ¶ 28.) They do not allege that Keurig directly overcharged them, but rather that one or more intermediaries passed on overcharges to the IPPs. **HN12** [+] The Supreme Court clearly admonished the use of pass-on theories to establish standing in treble damages actions, in part due to the concern that "the massive evidence and complicated theories" involved in tracing the effect of an overcharge through the distribution chain would impose "burdens . . . on the effective enforcement of the antitrust laws." *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 741, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977) (internal quotation marks omitted). That concern is no less present in the context of an action for an injunction, as the question of whether a party several levels down in the distribution chain suffered an injury at all may be as complicated and indeed intertwined with quantifying the damages associated with the injury.

Second, there are alternative enforcers that are better situated to bring suit, and have brought suit. The DPPs in particular seek injunctive relief that largely, if not completely, overlaps with the injunctive relief sought by the IPPs. (Compare DPP AC ¶ 302(f)-(h), [\*\*38] with IPP SAC at 116.) Given the claims brought by the DPPs and the Competitor Plaintiffs, denying the IPPs' federal claims is not "likely to leave a significant antitrust violation undetected or unremedied." *AGC*, 459 U.S. at 542. Although it is true that an efficient enforcer need not be the "most motivated" enforcer, *In re DDAVP*, 585 F.3d at 689, the existence of the DPPs and the Competitor Plaintiffs "diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general," *AGC*, 459 U.S. at 542. This factor, therefore, weighs against a finding of antitrust standing.

Third, and related to the directness inquiry, the IPPs' alleged injury is speculative [\*224] "because the claimed damages are too indirect and may have been produced by factors independent from any alleged overcharge." *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-2420 YGR, 2014 U.S. Dist. LEXIS 141358, 2014 WL 4955377, at \*15 (C.D. Cal. Oct. 2, 2014). The IPP Second Amended Complaint alleges that "[t]he distribution channel for Keurig K-Cups is not complex, generally involving only one or two intermediaries between Keurig and the end-user consumer Plaintiffs," (IPP SAC ¶ 28), and that "Keurig's anticompetitive conduct resulted in direct purchasers being overcharged for Keurig K-Cups, and such overcharges were passed on by direct purchasers [\*\*39] to Plaintiffs and

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<sup>19</sup> Keurig also argues that the DPPs lack standing to bring claims related to the 2.0 Brewer because, in part, they do not allege they purchased the 2.0 Brewer and because, if the DPPs had issue with the limited choice of Compatible Cups afforded by the 2.0 Brewer, they simply need not buy it. (DPP Def. Mem. 7-8.) However, the DPPs allege that Keurig engaged in a multi-dimensional monopolization scheme designed to frustrate competition on the merits in order for Keurig to maintain, if not increase, the supra-competitive prices Keurig charges the DPPs for the K-Cups the DPPs purchased directly from Keurig. (DPP AC ¶¶ 245, 258.) Conduct related to the 2.0 Brewer is relevant to the DPPs' claims to the extent it allowed Keurig to maintain supra-competitive pricing.

the members of the Classes in whole or in part," (*id.* ¶ 30). These conclusory allegations fail to describe with sufficient factual detail the chain of distribution between Keurig and the IPPs, leaving numerous questions unanswered. Who were the intermediaries? How often was there one intermediary versus two or more? How does one know to what extent, if at all, any of the intermediaries passed on the overcharges to the next link in the chain? The IPPs' Second Amended Complaint sheds no light on any of these questions, and thus, this factor weighs against a finding of antitrust standing. See *In re Aluminum Warehousing Antitrust Litig.*, 2014 U.S. Dist. LEXIS 121435, 2014 WL 4277510, at \*22 (dismissing claims when "plaintiffs [were] one or more levels down the supply/distribution chain").

The IPPs emphasize that they "purchased the exact product sold by Keurig," but just not directly from Keurig. (IPP Def. Mem. 11-12.) However, the fact that the product did not change as it flowed down the line of distribution does not preclude the possibility that independent factors, such as costs for transportation, handling, storage, or any other service—rather than overcharges passed down from Keurig—could have led to the IPPs' purported damages. The vague allegation that "[t]he [\*\*40] distribution channel for Keurig K-Cups is not complex," (IPP SAC ¶ 28), does not cure the speculative nature of the alleged harm. Moreover, if the allegation is accurate the IPPs should have provided the details of the distribution channel—including its length—with more specificity since the IPPs have had ample opportunities to do so.

Finally, while the difficulty in apportioning damages would not hinder a finding of antitrust standing in this action for injunctive relief, the IPPs do request relief that is largely duplicative of the relief requested by the DPPs, as discussed above. The IPPs' "roles as plaintiffs thus compounds manageability issues without providing any clear benefit." *In re Aluminum Warehousing Antitrust Litig.*, 2014 U.S. Dist. LEXIS 121435, 2014 WL 4277510, at \*23.

Because each of the efficient enforcer factors weighs against the IPPs' federal antitrust standing, their federal antitrust claims are dismissed.<sup>20</sup> The DPPs, however, adequately pled antitrust standing. As such, I will move on to address Keurig's remaining challenges to the federal antitrust claims of Rogers, TreeHouse, and the DPPs.

## 2. Monopoly Power

### a. Applicable Law

**HN13** Turning to the first prong of a Section 2 claim, "to make out an antitrust [\*225] claim, '[a] plaintiff must allege a relevant product market in which [\*\*41] the anti-competitive effects of the challenged activity can be assessed.'" *Commercial Data Servers*, 2002 U.S. Dist. LEXIS 5600, 2002 WL 1205740, at \*4 (quoting *Carrell v. The Shubert Org., Inc.*, 104 F. Supp. 2d 236, 264 (S.D.N.Y. 2000)). Monopoly power is the power to control prices or exclude competition in a given market. *Grinnell*, 384 U.S. at 571. It can be pled directly through allegations of control over prices or the exclusion of competition, or it may be inferred from a defendant's large share of the relevant market. *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 500 (2d Cir. 2004). A plaintiff pleading monopolization, or attempted monopolization, generally must define the relevant market, because "without a definition of that market there is no way to measure the defendant's ability to lessen or destroy competition." *Spectrum Sports*, 506 U.S. at 455-56 (quoting *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)). It is important to recognize that, "[b]ecause market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market." *Todd*, 275 F.3d at 199-200 (citing *Found. for Interior Design Educ. Research v. Savannah Coll. of Art & Design*, 244 F.3d 521, 531 (6th Cir. 2001) ("Market definition is a highly fact-based analysis that generally requires discovery.")).

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<sup>20</sup> I note that some courts analyze antitrust standing separately under Section 1 and Section 2. See *In re Zinc Antitrust Litig.*, 155 F. Supp. 3d 337, 360-65 (S.D.N.Y. 2016). Both Keurig and the IPPs conflate the analysis. (See IPP Def. Mem. 5-9; IPP Opp. 9-13.) At any rate, I find that, for the same reasons that the efficient enforcer factors weigh against the IPPs' federal antitrust standing under Section 2, they also weigh against the IPPs' federal antitrust standing under Section 1, and their Section 1 claims are also dismissed.

b. Application to the Competitor Plaintiffs and the DPPs

Keurig attacks the [Section 2](#) claims of Rogers, TreeHouse, and the DPPs by arguing that they failed to allege monopoly power in a properly defined relevant market. (Rogers Def. Mem. 16-22; TreeHouse Def. Mem. 27-32; DPP Def. Mem. 18-24.) Rogers, TreeHouse, [\[\\*\\*42\]](#) and the DPPs allege two separate relevant product markets in which Keurig's anticompetitive conduct arose: (1) the Single Serve Brewer Market; and (2) the Compatible Cup Market. (Rogers AC ¶ 17; TreeHouse AC ¶ 64; DPP AC ¶ 53.) The Competitor Plaintiffs also allege the Portion Pack Market as a third relevant product market. (Rogers AC ¶ 17; TreeHouse AC ¶ 64.)

i. *Single Serve Brewers Market*

Keurig attacks Plaintiffs' Single Serve Brewers Markets in several ways. First, with respect to Rogers' market—which it defines as the market for the design, manufacture, and sale of "pressurized hot water brewing equipment that is capable of brewing at least a single serving of coffee or other hot beverages," (Rogers AC ¶¶ 9, 17)—Keurig argues that Rogers does not define what "pressurized" means and, because "[a]ny brewer can brew 'at least one serving,' . . . [Rogers is] gerrymandering a market definition to suit its case," (Rogers Def. Mem. 16). However, as Rogers alleges, Keurig itself defines "competing systems" as Rogers does in defining Single Serve Brewers. Specifically, Keurig's licensing agreements describe "competing systems" as having the following characteristics: (1) "A brewing chamber [\[\\*\\*43\]](#) designed to be pierced during the brewing process to allow hot water in and the brewed beverage out;" and (2) "[a] pressurized brewing process that takes place at pressures less than 30 psi inside the brewing chamber." (Rogers AC ¶ 13). Further, in these agreements, Keurig clarifies that it does not compete with "hopper-based single-cup coffee systems" and "espresso pod-based systems," (*id.* ¶ 14), let alone standard drip brew coffee systems. In this vein, Rogers has sufficiently pled a market for Single Serve Brewers. See [Todd, 275 F.3d at 199-200](#).

Second, Keurig attempts to attack the market definition alleged by Rogers, [\[\\*226\]](#) TreeHouse, and the DPPs by highlighting their allegations that Keurig sells its Single Serve Brewers at or below cost, (Rogers Def. Mem. 16 (citing Rogers AC ¶ 314); see also TreeHouse Def. Mem. 27-28; DPP Def. Mem. 19 (citing DPP AC ¶ 193)), and arguing that "[n]o firm would price at or below cost unless it faced competition," (Rogers Def. Mem. 16 (citing Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* 88 (4th ed. 2005) ("A monopolist . . . sets a price above marginal cost.")); see also DPP Def. Mem. 19). Keurig cites no case law, and I am aware of none, in which a [\[\\*\\*44\]](#) court has found that a monopolist charging at or below cost forecloses [Section 2](#) claims as a matter of law. Indeed, Keurig cites in support of its proposition [Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 \(2d Cir. 1979\)](#), in which the court notes that "the differential between price and marginal cost is used as an indication of the degree of monopoly power," *id. at 275 n.12*, but immediately goes on to note that "high prices, far from damaging competition, invite new competitors into the monopolized market," *id.*

It is clear that, when there are allegations of monopolization of a tied market, a monopolist might in fact charge at or below cost for the tying product to extract monopoly surplus from the tied product. Monopolists may "evade price control in the tying product through clandestine transfer of the profit to the tied product." [Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 487, 112 S. Ct. 2072, 119 L. Ed. 2d 265 \(1992\)](#) (Scalia, J., dissenting) (quoting [Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 513-14 \(1969\), 89 S. Ct. 1252, 22 L. Ed. 2d 495](#) (White, J., dissenting)); see [Berkey Photo, 603 F.2d at 272](#) ("It is not a defense to liability under § 2 that monopoly power has not been used to charge more than a competitive price . . . ."); [Xerox Corp. v. Media Scis., Inc., 660 F. Supp. 2d 535, 539 \(S.D.N.Y. 2009\)](#) (denying dismissal where sales were "at a low margin or a loss, hoping to earn a profit through later [aftermarket] sales") ("Xerox III"); see also Rogers AC ¶¶ 131, 195-209; TreeHouse AC ¶¶ 131, 195-209, 587; DPP AC ¶ 192 ("Keurig's business [\[\\*\\*45\]](#) model depends upon its ability to leverage its Single-Serve Brewer monopoly in order to restrain competition and extract monopoly profits from the K-Cups it sells in the Compatible Cup Market."). In sum, pricing Single Serve Brewers at or below cost in no manner suggests that the Single Serve Brewer Market is somehow broader than defined, or that Keurig does not in fact enjoy monopoly power in that market.

Third, the DPPs allege a Single Serve Brewers Market that is distinct from traditional coffee in that it is more convenient and efficient. Keurig argues that the DPPs' market definition fails because "a difference in process or

convenience does not create a plausible inference that end products do not compete." (DPP Def. Mem. 19.) However, the DPPs do not simply allege a difference in process but describe a difference in fact—the DPP Amended Complaint details why traditional drip coffee machines are not interchangeable with and do not compete with Single Serve Brewers. (See DPP AC ¶¶ 55-58.) [HN14](#)<sup>21</sup> Further, Keurig's recitation of the law misses the mark because courts have found that functionality and consumer perspective is an important part of a market evaluation. See *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 562 F. Supp. 2d 392, 399 (E.D.N.Y. 2008) ("The contours of [\*\*46] the relevant market track the cross-elasticity of demand: the extent to which products or services are perceived by consumers to be reasonably interchangeable for the same purposes . . . The cross-elasticity of demand analysis depends on information about consumer behavior and perceptions [\*227] and is accordingly 'a deeply fact-intensive inquiry.'" (quoting [Todd, 275 F.3d at 199](#))).<sup>21</sup>

Therefore, at this stage, Plaintiffs' plausibly allege a market covering Single Serve Brewers. For example, the Rogers Amended Complaint alleges that Keurig "controls approximately 89% of total unit sales and 93% of total dollar sales in the Single Serve Brewer Market." (Rogers AC ¶ 27.) Similarly, the TreeHouse Amended Complaint alleges that Keurig "controls approximately 93% of the Single-Serve Brewer Market." (TreeHouse AC ¶¶ 83, 87-88, 90-94.) The DPPs, in turn, allege that during the entire relevant time period,<sup>22</sup> Keurig has dominated the Single-Serve Brewer market with at least 88% market share. (DPP AC ¶¶ 9, 75, 101.) [HN15](#)<sup>21</sup> These allegations support an inference of a "substantial monopoly" and monopoly power. See [Grinnell, 384 U.S. at 571](#) (87% is a "substantial monopoly"); [Am. Tobacco Co. v. United States, 328 U.S. 781, 797, 66 S. Ct. 1125, 90 L. Ed. 1575 \(1946\)](#) ("over 80%" constitutes "a substantial monopoly"). Indeed, while unnecessary, see [\*\*47] [Geneva Pharms., 386 F.3d at 500](#) ("Monopoly power . . . can be proven directly through evidence of control over prices or the exclusion of competition, or it may be inferred from a firm's large percentage share of the relevant market."), the Competitor Plaintiffs go on to allege that Keurig has exercised this monopoly power to restrain competition in the Single Serve Brewer Market, (see Rogers AC ¶ 30; TreeHouse AC ¶ 89).

## ii. Compatible Cup and Portion Pack Markets

Keurig also challenges the Plaintiffs' allegations of Keurig's monopoly power in the Compatible Cup and Portion Pack Markets and, relatedly, the Competitor Plaintiffs' allegations of a Portion Pack Market. In particular, Rogers alleges that, after taking steps to regain market share it lost to market entrants, as of November 2014, Keurig controls approximately 95% of the Compatible Cup Market. (Rogers AC ¶ 46.) According to Rogers, the alternative Portion Pack Market, in addition to Compatible Cups, includes portion packs that do not fit in or work with K-Cup Brewers. (See *id.* ¶ 53.) Rogers alleges that, "[a]s of early 2013, Keurig controls approximately 73% of the Portion Packs Market." (*Id.* ¶ 58.) TreeHouse alleges that in 2014, Keurig controlled 86% of [\*\*48] the Compatible Cup Market and after taking steps to regain market share it lost to market entrants, Keurig now controls approximately 95% of the Compatible Cup Market. (TreeHouse AC ¶¶ 125-30.) TreeHouse also alleges the same alternative Portion Pack Market, (see *id.* ¶¶ 145-57), and similarly claims that Keurig "possesses and exercises monopoly power over the Portion Pack Market" and "controls over 73% of the Portion Pack Market," (*id.* ¶ 151). The DPPs allege that Keurig, through outright brand ownership or exclusive licensing, controlled, at its lowest point, an 86% share of the Compatible Cup Market, which has grown to a 95% share as a result of Keurig's purported anticompetitive [\*228] conduct. (See DPP AC ¶¶ 105-07, 113, 169, 242.)

Keurig argues that both the Compatible Cup and Portion Pack Markets are "aftermarkets" for consumables, sold for use with the primary product, Single Serve Brewers, and therefore the allegations of market share alone are insufficient. (See, e.g., DPP Def. Mem. 21-23.) Keurig relies upon the Court's holding in *Xerox III*, which provided that:

<sup>21</sup> Keurig also argues that the DPP Amended Complaint lacks allegations concerning the 2.0 Brewer specifically. (DPP Def. Mem. 20-21.) These arguments are irrelevant to the definition of the Single Serve Brewer Market as all Keurig's Single Serve Brewers fit into this market definition, and the law does not require the DPPs to allege how much of that market is claimed specifically by the 2.0 Brewer.

<sup>22</sup> The DPPs define the Class Period as encompassing all persons or entities that purchased at least one K-Cup between September 7, 2010 and the present. (DPP AC ¶ 245.)

[F]or a *nonmonopolist* producer of a durable good to be held to have monopoly power in the aftermarket for parts, service, [\*\*49] or supplies, a plaintiff generally must show that (i) customers who own the good are "locked in" by the prohibitive costs of switching to an alternate product, and (ii) the lock-in permitted those customers to be exploited, either because (a) some limitation on information undermined their ability to know that the aftermarket goods and services were being sold at high prices, or (b) the defendant changed its aftermarket prices after the lock-in occurred.

*Xerox III, 660 F. Supp. 2d at 547* (emphasis added). As is clear, this case applies only to a "nonmonopolist" producer in the primary market; in other words, for *Xerox III* to apply, the Single Serve Brewer Market must be competitive. As discussed above, Plaintiffs have clearly alleged it is not.<sup>23</sup> Applying the correct standard to Plaintiffs' allegations, they have clearly alleged a plausible Compatible Cup Market and a plausible Portion Pack Market, in the alternative.<sup>24</sup>

### 3. Maintenance of Monopoly Power

#### a. Applicable Law

**HN18** [↑] As noted above, there are three elements to a claim for monopolization, the [\*229] second of which requires that a plaintiff allege "the willful acquisition or maintenance of [monopoly] power as distinguished from growth [\*\*50] or development as a consequence of a superior product, business acumen, or historic accident." *Grinnell Corp., 384 U.S., at 570-71*. A monopolist's conduct violates *Section 2* if it "(1) tends to impair the opportunities of rivals, [and] also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)* (internal quotation marks omitted).

#### b. Application to Rogers, TreeHouse, and the DPPs

Plaintiffs have pled similar facts relevant to these elements and, therefore, many of Keurig's challenges to those allegations overlap.

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<sup>23</sup> **HN16** [↑] I also note that in *Eastman Kodak*, the Supreme Court expressly rejected "adopt[ing] any exception to the usual antitrust analysis" when assessing monopoly power in an aftermarket, noting that the Court has always "treat[ed] derivative aftermarkets as it has every other separate market." *504 U.S. at 479 n.29*.

<sup>24</sup> The Competitor Plaintiffs allege that because Portion Packs that do not work in K-Cup Brewers are not interchangeable with Compatible Cups, the Compatible Cup Market "is the appropriate relevant market in which to evaluate the harm caused by Keurig's unlawful and anticompetitive conduct to competition for the manufacturing, licensing, and sale of Portion Packs that compete with K-Cups, i.e., Competing Portion Packs." (Rogers AC ¶ 54; see also TreeHouse AC ¶ 149.) For purposes of the current motion, it suffices that the Competitor Plaintiffs have plausibly alleged both Compatible Cup and Portion Pack Markets; discovery will illuminate which market is appropriate in which to analyze the alleged anticompetitive conduct. See *Found. for Interior Design Educ. Research, 244 F.3d at 531*.

With respect to the DPPs, Keurig also argues that, because its competitors have enjoyed some growth, there is no dangerous probability of monopoly, an element for the claim of attempted monopolization. (DPP Def. Mem. 23-24.) This argument fails. First, the DPPs have adequately alleged direct evidence of Keurig's market power and its exercise thereof. (See, e.g., DPP AC ¶ 103 ("Keurig has the power to exclude competition in the Single-Serve Brewer Market. Keurig has unlawfully exercised its power to exclude competition in the Single-Serve Brewer Market by coercing distributors and retail customers to enter into exclusive agreements, which require that only Keurig Single-Serve Brewers be sold or used by these entities.").) Further, the presence of limited competitor growth does not, as Keurig states, "negate[] any attempted monopolization claim. See *Berkey Photo, 603 F.2d at 273 n.11* ("The precipitous decline [of defendant's market share is] not dispositive."). **HN17** [↑] As discussed further below, the law does not require a complete lack of growth to sustain a *Section 2* claim. See *Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 784 (6th Cir. 2002)* (affirming monopoly maintenance where plaintiff's market share was increasing and market was expanding).

In particular, Rogers has pled facts showing that Keurig "has engaged and continues to engage in a scheme of anticompetitive acts to block independent competitors from the markets in which it operates." (Rogers AC ¶ 8.) Specifically, Rogers has alleged that Keurig has effectively restrained the Portion Pack and Compatible Cup Markets by (1) coercing distributors and retailers to enter into anticompetitive exclusive agreements that restrain market entry, exclude competitors, and unreasonably restrain competition; (2) conspiring with competitor roasters and coffee brands to enter into anticompetitive agreements to exclude competitors, unreasonably restrain competition, allocate **[\*\*51]** markets, and limit output; (3) filing objectively and subjectively baseless litigations and appeals against manufacturers of Competitor Cups, including Rogers; (4) tying the purchase of K-Cups to the purchase of K-Cup Brewers in order to unreasonably restrain competition from Competitor Cup manufacturers; (5) interfering with Rogers' business relationships by making false and disparaging comments to customers and potential customers regarding Rogers' products; (6) threatening to unreasonably restrain competition through the introduction of technology that unnecessarily and unjustifiably excludes competitors from the Compatible Cup Market; (7) raising competitors' costs above those that would exist under competitive conditions by requiring the manufacturers of Competitor Cups to enter restrictive licensing agreements; and (8) making material misrepresentations to retailers, distributors, and consumers regarding the compatibility, performance, safety, and quality of Competing Portion Packs as compared to K-Cups. (Rogers AC ¶ 297.) TreeHouse and the DPPs have asserted very similar, and often identical, allegations. (TreeHouse AC ¶¶ 2, 45, 572; DPP AC ¶¶ 8, 257.) To the extent that there **[\*\*52]** are differences in the allegations among the three, I find the differences are not material to my consideration of this issue.

I review Keurig's challenges to the sufficiency of these allegations in turn.

#### i. Product Design

Keurig argues that Plaintiffs' product design claims fail to allege anticompetitive conduct. (See, e.g., Rogers Def. Mem. 4-6.) **HN19**<sup>↑</sup> Keurig notes that, "[w]hen it comes to product design, a firm 'may generally bring its products to market whenever and however it chooses,'" and that the only narrow exception to this "rule" would arise when a monopolist coerces consumers into buying a new product, (*id.* at 5 (quoting *Berkey Photo, 603 F.2d at 287*); see also DPP Def. Mem. 15-17). Rogers "cannot allege that consumers have been coerced into buying the 2.0 brewer **[\*230]** here," according to Keurig, because "Keurig continues to make K-Cups that work in 1.0 brewers," and because Keurig did not and does not hide the fact that the 2.0 Brewer is designed to lock-out Competitor Cups. (Rogers Def. Mem. 5-6.) In connection with TreeHouse's allegations that the introduction of the 2.0 Brewer was intended to lock competitors out of the market for Compatible Cups and maintain its monopoly, to the detriment of consumers, (TreeHouse AC **[\*\*53]** ¶¶ 10-13, 373, 385, 402-03, 422-32), Keurig also argues that it was not required to pre-disclose to its competitors how the 2.0 Brewer would function to facilitate their ability to reverse engineer Compatible Cups that would function with the machine and that it would be improper for me to consider whether the innovations in the 2.0 Brewer were necessary or if alternatives existed, (TreeHouse Def. Mem. 16-17).

**HN20**<sup>↑</sup> "A monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits, and any success it may achieve solely through 'the process of invention and innovation' is necessarily tolerated by the antitrust laws." *Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 544-45 (9th Cir. 1983)*, overruled on other grounds as recognized in *Chroma Lighting v. GTE Prods. Corp., 111 F.3d 653, 657 (9th Cir. 1997)* (quoting *Berkey Photo, 603 F.2d at 281*). It follows then that, "[a]s a general rule, courts are properly very skeptical about claims that competition has been harmed by a dominant firm's product design changes." *United States v. Microsoft Corp., 253 F.3d 34, 65, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*. However, "changes in product design are not immune from antitrust scrutiny and in certain cases may constitute an unlawful means of maintaining a monopoly under *Section 2*." *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 998 (9th Cir. 2010)*. As recognized by the Second Circuit, "it is not the product introduction itself, but some associated conduct, that supplies the **[\*\*54]** violation." *Berkey Photo, 603 F.2d at 286 n.30*. "[U]nder *Berkey Photo*, when a monopolist combines product withdrawal with some other conduct, the overall effect of which is to coerce consumers rather than persuade them on the merits, and to impede competition, its actions are anticompetitive under the Sherman Act." *N.Y. ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638, 654 (2d Cir. 2015)*, cert. dismissed sub nom. *Allergan PLC v. New York*, 136 S. Ct. 581, 193 L. Ed. 2d 421 (2015) (internal citations omitted).

With this law in mind, if Rogers, TreeHouse, and the DPPs had only alleged anticompetitive product design, such allegations would likely not withstand Keurig's motion to dismiss; however, the amended complaints are filled with allegations of "associated conduct"—including, for example, allegations of exclusive dealing, tying agreements, and product disparagement—the overall effect of which is to coerce customers to purchase K-Cups over Competitor Cups, rather than to compete on the merits.

Further, Plaintiffs' allegations detailing Keurig's intent in developing the 2.0 Brewer support their product design claims. Rogers' Amended Complaint alleges that a stated objective in redesigning its brewer in 2012 was to "redesign the K cup holders in new brewers to lock out the competitors." (Rogers AC ¶ 183.) TreeHouse's Amended Complaint points to Keurig's Project [\[\\*\\*55\]](#) Squid and the "My K-Cup" redesign project, with the stated objective to "redesign the Kcup holders in new brewers to lock-out the competitors." (TreeHouse AC ¶ 14.) The DPP Amended Complaint alleges that a stated objective in [\[\\*231\]](#) redesigning the 2.0 Brewer in 2012 was to "redesign the K-cup holders and new brewers to lock out the competitors." (DPP AC ¶ 228.) [HN21](#)<sup>15</sup> While Keurig argues to the contrary, the Supreme Court has made clear that "intent is . . . relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive.'" [Aspen Skiing, 472 U.S. at 602](#). "[C]onsiderations of subjective intent are sometimes essential," such as when "innovations both harm rivals and fail to benefit consumers." 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 651c2, at 115 (3d ed. 2008) ("The real question is what the innovator had in mind."). At this stage, Plaintiffs' allegations that the 2.0 Brewer and its innovations were not intended to benefit consumers, but rather were intended to harm competition in the Compatible Cup Market, support their [Section 2](#) monopolization claims. (See Rogers AC ¶¶ 214-32; DPP AC ¶¶ 221-35; TreeHouse AC ¶ 398 ("[T]he 2.0 KCup Brewer was not developed for any [\[\\*\\*56\]](#) purported consumer benefit; rather 'the new Keurig 2.0 brewer with its lock-out technology was developed solely for the purpose of locking out competition'" (quoting the Declaration of Andrew Gross in Support of Rogers' Motion for a Preliminary Injunction ¶ 8, attached as Ex. 12 to the Rogers Amended Complaint)).

## ii. Patent Litigation and Patent Misuse

The Competitor Plaintiffs and the DPPs claim that the Patent Litigation constitutes illegal monopolization arising under [Section 2](#) of the Sherman Act. [HN22](#)<sup>16</sup> "A single lawsuit can violate *antitrust law* as long as it is both an objective and subjective sham." [In re DDAVP, 585 F.3d at 686](#). "First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits . . . . [S]econd[,] the court should focus on whether the baseless lawsuit conceals an attempt to interfere *directly* with the business relationships of a competitor." *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993) (internal quotation marks omitted).

Keurig argues that Plaintiffs fail to allege objective and subjective baselessness or antitrust injury resulting from the Patent Litigation. I analyze each prong in turn.

First, the Competitor Plaintiffs have alleged that the Patent Litigation was objectively [\[\\*\\*57\]](#) baseless. *Id.*; see Rogers AC ¶¶ 174, 330 ("Keurig initiated the suits against Sturm and Rogers knowing that it could not prove infringement due to patent exhaustion."); TreeHouse AC ¶ 41 ("These Competitive Cups did not infringe any of [Keurig]'s patents because they did not contain a filter. But that did not stop [Keurig] from pursuing a baseless lawsuit to try to keep Competitive Cups off the market."), ¶¶ 43, 227-28, 230-31. In addition, contrary to Keurig's argument, the DPPs do not merely allege "that Keurig lost the prior [patent infringement] litigations." (DPP Def. Mem. 14.) Rather, the DPPs allege, consistent with their argument that the Patent Litigation was objectively baselessness, that "[n]o reasonable litigant could have realistically expected to succeed on the merits of such claims, and, thus, Keurig's complaint was objectively baseless." (DPP AC ¶ 129.) The DPPs go on to detail the deficient bases for the failed patent suits. (See *id.* ¶¶ 125-38.) For example, Keurig alleged that Sturm's Compatible Cups infringed Keurig's patents directed at brewers and methods of brewing, not even asserting any patents covering K-Cups themselves. (See *id.* ¶ 128.) These assertions are [\[\\*\\*58\]](#) sufficient to allege objective baselessness, and therefore Plaintiffs have met the first prong of stating a sham [\[\\*232\]](#) litigation claim. While Keurig attempts to argue that Rogers' allegations fail because it did not file a motion to dismiss the Patent Litigation and because the Federal Circuit heard argument on the appeal, which it would not have done if the appeal were frivolous, (Rogers Def. Mem. 7), neither of these facts are fatal to a sham litigation claim, see, e.g., [Mitsubishi](#)

Heavy Indus., Ltd. v. Gen. Elec. Co., 720 F. Supp. 2d 1061, 1067 (W.D. Ark. 2010) (concluding that defendant's failure to file a motion to dismiss does not indicate that the defendant thought that the action was not a sham because "[a] complaint can meet all the pleading requirements of the Federal Rules of Civil Procedure and still, as a factual matter, be frivolous").<sup>25</sup>

Second, the Competitor Plaintiffs allege that Keurig embarked upon the Patent Litigation in "an attempt to interfere directly with the business relationships of a competitor." *Profl Real Estate Inv'rs*, 508 U.S. at 60-61 (internal quotation marks omitted). Rogers alleges that:

[R]ather than attempting to prove infringement, the real reason that Keurig initiated [the Patent Litigation] was to harm Rogers' and Sturm's ability to compete with Keurig's Compatible Portion Packs business [\*\*59] by causing Rogers and Sturm to divert resources from marketing their respective Compatible Portion Packs businesses to defend against Keurig's claims and to incur substantial legal fees associated with their defenses, thereby increasing . . . the costs [of] Rogers' and Sturm's Compatible Portion Pack products. On information and belief, Keurig initiated these suits to harm Rogers' and Sturm Foods' ability to compete with Keurig's Compatible Portion Packs business also by creating confusion and doubt among Rogers' and Sturm's potential and existing customers about the commercial viability of Rogers' and Sturm's Compatible Portion Pack products, and by delaying Rogers' and Sturm's ability to grow their respective Compatible Portion Pack businesses.

(Rogers AC ¶ 174.) Similarly, TreeHouse alleges that the Patent Litigation:

[W]as instituted in an attempt to interfere with TreeHouse's ability to compete in the Compatible Cup Market, to intimidate market entrants, to raise a rival's costs, to harm TreeHouse's reputation, to sow doubt and confusion as to the legality of purchasing and selling Competitive Cups, and to deprive TreeHouse of resources that would have otherwise been spent on bringing [\*\*60] more Competitive Cups to consumers at favorable prices.

(TreeHouse AC ¶ 238.) The DPPs also allege that Keurig filed the sham suits against its competitors "for the purpose of interfering with their ability to compete in the Compatible Cup Market." (DPP AC ¶ 257.) The Competitor Plaintiffs and the DPPs have therefore adequately pled objective baselessness and direct interference with their business relationships. See *Profl Real Estate Inv'rs*, 508 U.S. at 60.

[\*233] In connection with the DPPs, Keurig also argues that the DPPs' allegations that the patent suits were subjectively baseless are conclusory. (DPP Def. Mem. 15.) However, the DPPs point specifically to language in the opinions of the district and circuit courts positing that Keurig was misusing patent law to improperly interfere with competitors and take control of the Compatible Cup Market. (See DPP AC ¶¶ 132, 137.) For example, the DPPs quote the Federal Circuit: "Keurig is attempting to impermissibly restrict purchasers of Keurig brewers from using non-Keurig [Compatible Cups] by invoking patent law." (*Id.* ¶ 137 (quoting Keurig, Inc. v. Sturm Foods, 732 F.3d at 1374).)

Keurig next argues that the Competitor Plaintiffs and the DPPs failed to allege antitrust injury. (See, e.g., Rogers Def. Mem. 8.) However, Rogers [\*\*61] alleges that it "devoted significant resources to the defense against these baseless claims, including approximately \$2 million in legal costs and fees," (Rogers AC ¶¶ 173, 329), and TreeHouse alleges that, "[a]s a result of this sham litigation and appeal, Plaintiffs were forced to incur three years' worth of litigation fees and costs, rather than use those resources to compete against [Keurig]. Competition in the market for Compatible Cups has thus been harmed," (TreeHouse AC ¶ 602). **HN23** Litigation costs incurred in defending against a sham litigation are "a well recognized type of antitrust injury . . ." Bio-Tech. Gen. Corp. v.

<sup>25</sup> Keurig has cited no case law, and I have found none, in which a court finds a sham litigation claim to fail as a matter of law when a court of appeals grants oral argument on an appeal, especially where, as here, the only decisions on the merits were the summary judgment decision which admonished Keurig that "patent holders may not invoke patent law to enforce restrictions on the postsale use of their patented products," Keurig, Inc. v. JBR, Inc., 2013 U.S. Dist. LEXIS 73845, 2013 WL 2304171, at \*15, and the decision by the Federal Circuit summarily affirming the district court's grant of summary judgment, 558 F. App'x 1009 (Fed. Cir. 2014).

Genentech, Inc., 886 F. Supp. 377, 380 (S.D.N.Y. 1995), aff'd, 66 F.3d 344 (Fed. Cir. 1995). Additionally, the DPP Amended Complaint makes clear that Keurig filed the sham suits against its competitors "for the purpose of interfering with their ability to compete in the Compatible Cup Market." (DPP AC ¶ 257.) Therefore, the Competitor Plaintiffs, and the DPPs have adequately alleged antitrust injury in connection with this claim.<sup>26</sup>

Keurig also challenges the Competitor Plaintiffs' patent misuse claim for lack of a live controversy. Keurig argues that to state a claim for patent misuse, requires an "affirmative act" to enforce patents; a subjective fear of harm [\*\*62] will not suffice. (Rogers Def. Mem. 8 (quoting Prasco LLC v. Medicis Pharm. Corp., 537 F.3d 1329, 1338-39 (Fed. Cir. 2008)).) Keurig also contends that because the Patent Litigation was resolved there is no live controversy to adjudicate, (TreeHouse Def. Mem. 26), and, to the extent the patent misuse claim arises from the introduction of the 2.0 Brewer, that TreeHouse has not alleged any attempted patent use or threat of patent litigation connected to the 2.0 Brewer, (*id.* at 27).

**HN24** [↑] "Patent misuse relates primarily to a patentee's actions that affect competition in unpatented goods or that otherwise extend the economic effect beyond the scope of the patent grant." C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1372 (Fed. Cir. 1998), cert. denied, 526 U.S. 1130, 119 S. Ct. 1804, 143 L. Ed. 2d 1008 (1999); see also Mallinckrodt, Inc. v. Medipart, Inc., 976 F.2d 700, 703-04 (Fed. Cir. 1992). Abrogated on other grounds, 137 S. Ct. 1523, 198 L. Ed. 2d 1 (2017) ("The concept of patent misuse arose to restrain practices that did not in themselves violate any law, but that [\*234] draw anticompetitive strength from the patent right, and thus were deemed to be contrary to public policy."). "Misuse is closely intertwined with antitrust law, and most findings of misuse are conditioned on conduct that would also violate the antitrust laws." Linzer Prod. Corp. v. Sekar, 499 F. Supp. 2d 540, 552 (S.D.N.Y. 2007) (internal quotation marks omitted). "The key inquiry under this fact-intensive doctrine is whether, by imposing [an express condition on the post-sale use of a patented [\*\*63] product], the patentee has impermissibly broadened the physical or temporal scope of the patent grant with anticompetitive effect." B. Braun Med., Inc. v. Abbott Labs., 124 F.3d 1419, 1426 (Fed. Cir. 1997) (internal quotation marks omitted). A common example "of such impermissible broadening [is the use of] a patent which enjoys market power in the relevant market . . . to restrain competition in an unpatented product . . ." *Id.* (citing 35 U.S.C. § 271(d)(5)).

The Competitor Plaintiffs allege that Keurig has sought to extend the protections afforded its K-Cup Brewer patents by restricting purchasers of Keurig's Single Serve Brewers from using Competing Portion Packs and that Keurig has engaged in patent misuse by tying unpatented products, K-Cups, to patented products, Keurig's Single Serve Brewers. (Rogers AC ¶ 336; TreeHouse AC ¶ 607.) They also allege that Keurig has monopoly power in the tying market, the Single Serve Brewer Market. (Rogers AC ¶ 27; TreeHouse AC ¶ 83); see III. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 43, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006). This is an affirmative act and is, at this stage, sufficient to state a claim for patent misuse.

In sum, the Competitor Plaintiffs and the DPPs have stated a claim for sham litigation and for patent misuse, and Keurig's motions to dismiss these claims are denied.

### iii. Exclusive Dealing and Substantial [\*\*64] Foreclosure

Keurig next argues that the exclusive dealing claims fail because the Competitor Plaintiffs and the DPPs have failed to allege substantial foreclosure required to support a Section 2 claim. (Rogers Def. Mem. 8-12; TreeHouse Def. Mem. 6-15; DPP Def. Mem. 8-14).<sup>27</sup>

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<sup>26</sup> Although its allegations are sufficient, Rogers also alleges that the Patent Litigation was designed to and did slow Rogers' entry into the market by casting a pall of illegitimacy over the Rogers products. (See Rogers AC ¶ 172 ("Moreover, the lawsuits were used by Keurig to sow doubt and confusion amongst consumers about the viability of Competing Portion Packs. On information and belief, Keurig used the existence of the lawsuit in order to convince distributors and third parties to stop doing business with Rogers and Sturm.").)

<sup>27</sup> **HN25** [↑] As Keurig notes, substantial foreclosure is an element of an exclusive dealing claim whether that claim is brought pursuant to Section 1 or Section 2 of the Sherman Act, or Section 3 of the Clayton Act. (See Rogers Def. Mem. 9 n.9.; TreeHouse Def. Mem. 7 n.4; DPP Def. Mem. 8 n.8.) Keurig's anticompetitive exclusive dealing conduct supports the following

**HN26**[] To state a [Section 2](#) claim based on exclusive dealing arrangements, a plaintiff "must allege as a threshold matter a substantial foreclosure of competition in the relevant market." [Commercial Data Servers, 2002 U.S. Dist. LEXIS 5600, 2002 WL 1205740, at \\*7](#) (internal quotation marks omitted); see also [Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 328, 81 S. Ct. 623, 5 L. Ed. 2d 580 \(1961\)](#) (holding that the competition foreclosed must "constitute a substantial share of the relevant market").

As noted above, the DPPs allege two relevant markets, the Single Serve Brewer Market and the Compatible Cup Market. The Competitor Plaintiffs allege the same, [\*235] as well as a Portion Pack Market in the alternative to a Compatible Cup Market. Rogers alleges that Keurig's exclusive agreements with "Keurig Authorized Re-Distributors" and large distributors foreclose Competitor Cup manufacturers' access to approximately 80% of the Compatible Cup Market sales to Away-From-Home customers, (Rogers AC ¶ 98); that Keurig has exclusive agreements with retailers and distributors for the At-Home Market Segment that prohibits [\*\*\*65] them from marketing any Competitor Cups, (*id.* ¶¶ 107-08); and that Keurig has exclusive agreements with competitor brands and roasters that restrict them from selling products to, licensing brands to, or allowing Competitor Cup manufacturers to manufacture Competitor Cups for the brand, (*id.* ¶¶ 120-21). TreeHouse alleges that Keurig "has entered into unduly restrictive, anticompetitive, and exclusionary agreements with companies at every level of the Compatible Cup distribution system" which "are not only unduly restrictive and unreasonable in length, but also serve the anticompetitive purpose of substantially foreclosing competitors from access to resources they need to compete with." (TreeHouse AC ¶¶ 241-42; see also *id.* ¶¶ 7, 185.) The DPPs allege that Keurig dominates the Single Serve Brewer and Compatible Cup Markets, with an 88% and 95% share, respectively, of each. (DPP AC ¶¶ 101, 107.) The DPPs allege that:

Keurig, at its lowest market-share point, controlled approximately 86% of the Compatible Cup Market. The remaining 14% of the Compatible Cup Market was then composed of sellers of unlicensed and private label Competitor Cups. Responding to this market share loss to Competitor [\*\*\*66] Cups, Keurig reinforced its anti-competitive scheme by, among other actions, furthering its web of exclusionary arrangements throughout the Compatible Cup supply and distribution chain. As a result, Keurig has almost entirely recouped its lost market share and now controls roughly 95% of the Compatible Cup Market.

(*Id.* ¶ 107 (internal footnote omitted).)

These allegations notwithstanding, Keurig points to Plaintiffs' allegations that they and other competitors have continued selling Competitor Cups and, in some circumstances, have increased sales of Competitor Cups despite Keurig's alleged anti-competitive conduct. (Rogers Def. Mem. 9; TreeHouse Def. Mem. 7; DPP Def. Mem. 8-9.) Keurig argues that "courts in this Circuit and others have found no foreclosure where competitors experienced a 'sales increase,' and even where competitors simply 'remained in the market and successfully competed.'" (Rogers Def. Mem. 9 (quoting [CDC Techs. v. IDEXX Labs., Inc., 186 F.3d 74, 80 \(2d Cir. 1999\)](#) and [Bowen v. N.Y. News, Inc., 366 F. Supp. 651, 679 \(S.D.N.Y. 1973\), aff'd in part and rev'd in part on other grounds, 522 F.2d 1242 \(2d Cir. 1975\)](#)); see also TreeHouse Def. Mem. 7; DPP Def. Mem. 8-9.)

This argument fails for two main reasons. First, it ignores the allegations that Keurig's exclusionary contracts have substantially foreclosed competition in the [\*\*\*67] Portion Pack and Compatible Cup Markets causing the Competitor Plaintiffs to lose significant sales and profits, Keurig's profits to increase, and the DPPs to pay supra-competitive prices for K-Cups. (See Rogers AC ¶ 310; TreeHouse AC ¶¶ 6, 130, 366-72; DPP AC ¶¶ 107, 112.) **HN27**[] Second, it misreads the law on substantial foreclosure, which does not require a complete lack of growth to sustain a [Section 2](#) claim. "Of course, the law has never required complete market exclusion as a prerequisite to suit. Indeed, some successful § 2 plaintiffs have both grown their market [\*236] shares and earned high profits even through the period that the exclusionary practices were occurring." 3 Phillip E. Areeda & Herbert Hovenkamp,

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claims raised by Rogers: claim 1 (monopolization); claim 2 (exclusive dealing); claim 3 (monopoly leveraging); claim 8 (conspiracy to monopolize); claim 9 (conspiracy and group boycott); claim 10 (attempted monopolization); claim 12 (violation of the Cartwright Act); claim 13 (unfair competition); and claim 15 (violation of California's Unfair Competition Law). Additionally, TreeHouse alleges exclusive dealing in violation of [Sections 1](#) and [2](#) of the Sherman Act, [Section 3](#) of the Clayton Act, and Illinois, Wisconsin, and New York law. (TreeHouse AC ¶¶ 577-84.)

**Antitrust Law** ¶ 651b5, at 108-09 (3d ed. 2008) (citing *Conwood, 290 F.3d at 784* (affirming monopoly maintenance where plaintiff's market share was increasing and market was expanding)). "Under [Section 2] of the Sherman Act, it is not necessary that all competition be removed from the market. The test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit." *United States v. Dentsply Int'l, Inc., 399 F.3d 181, 191 (3d Cir. 2005)*, cert. denied 546 U.S. 1089, 126 S. Ct. 1023, 163 L. Ed. 2d 853 (2006).

Suppose an established manufacturer has long held a dominant position but [\*\*68] is starting to lose market share to an aggressive young rival. A set of strategically planned exclusive-dealing contracts may slow the rival's expansion by requiring it to develop alternative outlets for its product, or rely at least temporarily on inferior or more expensive outlets. Consumer injury results from the delay that the dominant firm imposes on the smaller rival's growth.

*ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 271 (3d Cir. 2012)* (internal quotation marks omitted).<sup>28</sup> The Competitor Plaintiffs and the DPPs have adequately alleged substantial foreclosure from the relevant markets, and the Competitor Plaintiffs' allegations that they have managed to grow their businesses, as well as any suggestions that competitors may have still been able to reach consumers, are not fatal to these allegations. *HN28*[↑] The extent to which competitors were excluded, and whether it is sufficient to support an antitrust claim, is fact-dependent and not properly disposed of on a motion to dismiss.<sup>29</sup>

Next, Keurig raises five specific challenges to Rogers', TreeHouse's, and the DPPs' allegations of substantial foreclosure, which [\*\*69] overlap to some extent and to which I now turn.

#### 1) Substantial Foreclosure Based on Licensing Agreements

Plaintiffs allege that Keurig's exclusive licensing agreements with various brand owners, including coffee roasters, food [\*237] manufacturers, and celebrity chefs, are unlawful. (See Rogers AC ¶¶ 112-54; TreeHouse AC ¶¶ 286-339; DPP AC ¶¶ 139-61.) Keurig challenges the Plaintiffs' allegations by arguing that "alleging substantial foreclosure requires both a numerator (the partners allegedly locked up) and a denominator (all of the available partners)." (Rogers Def. Mem. 9 (citing *Wellnx Life Scis., Inc. v. Iovate Health Scis. Research, Inc., 516 F. Supp. 2d 270, 295 n.8 (S.D.N.Y. 2007)*); see also TreeHouse Def. Mem. 8 (same); DPP Def. Mem. 9 (same).)

Wellnx does not support Keurig's argument. The court in that case noted, in the cited footnote, that "[t]he amended complaint contains no facts relating to the named distributors' shares of the consumer market. There are no allegations from which significant foreclosure could be reasonably inferred." *516 F. Supp. 2d at 295 n.8*. *HN29*[↑] Nowhere is there mention that a numerator and denominator must be alleged for a Plaintiff to survive a motion to dismiss a Section 2 claim. At the motion to dismiss stage, such specific mathematical pleading is unnecessary. See

<sup>28</sup> The cases cited by Keurig in support of its argument that any growth of a competitor is fatal, as a matter of law, to any claims of substantial foreclosure, are easily distinguishable on their facts. In *CDC Technologies v. IDEXX Laboratories, Inc.*, which Keurig argues is "fatal to all of [Rogers'] exclusive dealing claims," (Rogers Def. Mem 9), the court found, on a motion for summary judgment, that plaintiff failed to show that the exclusive distributorship arrangements at issue had an actual adverse effect on competition in the market. *186 F.3d 74, 80 (2d Cir. 1999)*. Unlike the court in *CDC Technologies*, the motions before me are motions to dismiss not motions for summary judgment. Moreover, Rogers here alleges clearly adverse effects stemming from Keurig's exclusive dealing arrangements. In *Bowen v. New York News, Inc.*, after trial, the court determined that the defendant's exclusive agreements did not prevent alternative channels of access to the market. *366 F. Supp. 651, 679-80 (S.D.N.Y. 1973)*, aff'd in part and rev'd in part on other grounds, *522 F.2d 1242 (2d Cir. 1975)*. Here, at this stage of the litigation, I need not consider whether or not their might be alternative channels of access to the market by the Competitor Plaintiffs.

<sup>29</sup> I note also that allegations of substantial foreclosure have been upheld where a plaintiff alleges exclusion from two retailers. See *Commercial Data Servers, Inc. v. IBM Corp., No. 00-CV-5008, 2002 U.S. Dist. LEXIS 5600, 2002 WL 1205740, at \*7 (S.D.N.Y. Mar. 15, 2002)* (finding that plaintiff's allegations of foreclosure from two resellers "may indeed be sufficient to substantially foreclose competition, depending on the particular facts relating to those resellers" and denying defendant's motion to dismiss based on lack of alleged substantial foreclosure).

Xerox v. Media Scis. Int'l., Inc., 511 F. Supp. 2d 372, 390 (S.D.N.Y. 2007) ("Xerox I") (holding that plaintiff's [\*\*70] allegations that it was "exclud[ed] from much of the market" was sufficient to allege substantial foreclosure and survive defendant's motion to dismiss); see also E.I. DuPont de Nemours & Co. v. Kolon Indus., 637 F.3d 435, 452 n.12 (4th Cir. 2011) ("While Kolon did not allege a specific percentage of market foreclosure in its Counterclaim, it would be problematic to reject its Counterclaim, with its extensive factual allegations, solely on that basis at the pre-discovery, motion-to-dismiss stage, when Kolon likely has insufficient information to calculate a precise number."); LePage's Inc. v. 3M, 324 F.3d 141, 158-59 (3d Cir. 2003) (upholding a verdict despite the fact that plaintiff had not alleged specific percentage of foreclosure; it was sufficient that the dominant competitor had created the strong incentives for consumers to deal with it exclusively); Synergetics USA, Inc. v. Alcon Labs., Inc., No. 08 Civ. 3669(DLC), 2009 U.S. Dist. LEXIS 47466, 2009 WL 1564113, at \*3 (S.D.N.Y. June 4, 2009) (holding that plaintiff asserting a tying claim need only "identi[fy] a plausible theory of impact on a substantial volume of commerce").

Next, Keurig argues that there are other brands with which competitors could partner, and that Rogers, TreeHouse, and the DPPs admit that having access to an established brand is not necessary to win business. (Rogers Def. Mem. 10; TreeHouse Def. Mem. 11; DPP Def. Mem. 12.) Similarly, Keurig maintains that there [\*\*71] are no allegations that competitors are foreclosed from competing to work with Keurig's established partners, such as Kroger or BJ's, who contracted with Keurig after working with Rogers, (Rogers Def. Mem. 10), or Starbucks and Wolfgang Puck, with whom TreeHouse competed for deals, (DPP Def. Mem. 12), and that "[w]hen a plaintiff loses business due to competition, that loss is 'not of concern under the antitrust laws,'" (Rogers Def. Mem. 10 (quoting Cargill, 479 U.S. at 116); see also TreeHouse Def. Mem. 12; DPP Def. Mem. 12). These arguments are irrelevant. HN30 [+] As the Supreme Court in Cargill went on to clarify, "the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws." Cargill, Inc., 479 U.S. at 116. As discussed in detail, Plaintiffs have alleged various practices that run afoul of the antitrust laws and that Keurig has undertaken a scheme of various anticompetitive and unlawful acts to restrict the normal functioning [\*238] of a healthy competitive market. (See Rogers AC ¶ 8; TreeHouse AC ¶ 2; DPP AC ¶ 13.)

## 2) Substantial Foreclosure Based on Input Contracts<sup>30</sup>

Keurig argues that TreeHouse and [\*\*72] the DPPs improperly limit their allegations to domestic suppliers of inputs. (TreeHouse Def. Mem. 9; DPP Def. Mem. 9-10.) To the contrary, however, TreeHouse and the DPPs have plausibly alleged a national geographic market based on the "area to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition." Heerwagen v. Clear Channel Commc'ns, 435 F.3d 219, 228 (2d Cir. 2006), abrogated on other grounds by In re Initial Pub. Offerings Sec. Litig., 471 F.3d 24 (2d Cir. 2006). TreeHouse clearly alleges that:

The relevant geographic market is the United States. To compete effectively within the United States, Compatible Cup manufacturers and sellers need distribution assets and relationships within the United States. Compatible Cup manufacturers and sellers located outside of the United States that lack such assets and relationships are unable to constrain the prices of Compatible Cup manufacturers and sellers that have such domestic assets and relationships.

(TreeHouse AC ¶ 191.) TreeHouse further alleges, with regard to machinery, that "[b]eing forced unnecessarily to obtain large machinery from overseas . . . substantially raises TreeHouse's and other Competitive Cup makers' costs, thereby depriving Competitive Cup makers of fair competition on the merits." [\*73] (*Id.* ¶ 256.) In sum, TreeHouse has adequately alleged a national geographic market.

Finally, Keurig challenges TreeHouse's and the DPPs' exclusive dealing claims by noting that although TreeHouse and other competitors had to expend resources to train suppliers when they were not able to contract with existing input suppliers, TreeHouse has no right to freeride on Keurig's developments and investments, and that this does not harm competition generally. (TreeHouse Def. Mem. 9-10; DPP Def. Mem. 11.) First, Keurig indeed may seek to

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<sup>30</sup> Keurig opposes TreeHouse's and the DPPs' substantial foreclosure claims related to the inputs of Compatible Cups—at least in part—by arguing that such claims require Plaintiffs to allege a numerator and denominator. For the reasons stated above, that argument is unpersuasive and I will not repeat my analysis here.

limit how competitors or potential competitors might free-ride on its investments. However, Keurig may not unlawfully restrict other parties in its manufacturing and distribution chain from contracting with competitors—TreeHouse and the DPPs allege that Keurig is not protecting against free-riding on its own investments, but is rather blocking competitors from accessing inputs and distribution networks that others created. (See TreeHouse AC ¶¶ 242, 581 (Keurig's exclusive dealing agreements "serve the anticompetitive purpose of substantially foreclosing competitors from access to resources they need to compete with [Keurig]"); DPP AC ¶ 170 ("Keurig restricts **[\*\*74]** the ability of machinery manufacturers to sell machinery to Keurig competitors who intend to use it to make Compatible Cups, but allows machinery manufacturers to sell the same machinery for other purposes. Thus, these anticompetitive agreements cannot be justified by any purportedly procompetitive purpose, such as to ensure a reliable supply of materials used in K-Cups.").)

**HN31**  Regardless, Keurig's arguments are premature; as Circuit Judge Frank H. Easterbrook has noted, "competitive **[\*239]** and exclusionary conduct look alike." *Dial Corp. v. News Corp.*, 165 F. Supp. 3d 25, 36 (S.D.N.Y. 2016) (quoting *On Identifying Exclusionary Conduct*, 61 *Notre Dame L. Rev.* 972, 972 (1986)). The metes and bounds of when such behavior impermissibly crosses the line from competitive to violative of the Sherman Act is a highly contextual analysis. See *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1087, 331 U.S. App. D.C. 226 (D.C. Cir. 1998). Similarly, any procompetitive justification for such restrictions is not appropriately weighed on a motion to dismiss. See *Maxon Hyundai Mazda v. Carfax, Inc.*, No. 13-cv-2680 (AJN), 2014 U.S. Dist. LEXIS 139480, 2014 WL 4988268, at \*9 (S.D.N.Y. Sept. 29, 2014) ("[T]o survive a motion to dismiss they must plead plausible allegations that, if true, would show such an adverse effect; if Plaintiffs then provide evidence of anticompetitive effects, Defendant will later have the opportunity to show the procompetitive effects of the agreements.").

### 3) **[[\*\*75]] Substantial Foreclosure Based on Distribution**

Keurig next challenges Rogers's, TreeHouse's, and the DPPs' claims of substantial foreclosure from distributors. Keurig argues that Rogers, TreeHouse, and other competitors were able to utilize alternative channels of distribution to reach consumers, thereby precluding a substantial foreclosure claim. (Rogers Def. Mem. 11-12; TreeHouse Def. Mem. 13-14; DPP Def. Mem. 13-14.) Keurig further argues that Plaintiffs' allegations that Keurig locked up distributors to the Away-From-Home Market Segment do not support a substantial foreclosure claim because Plaintiffs failed to allege substantial foreclosure from the defined relevant market. (Rogers Def. Mem. 11-12; TreeHouse Def. Mem. 13-14; DPP Def. Mem. 13-14.)

**HN32**  Exclusive dealing violates the law when it has the effect of raising rivals' costs by foreclosing efficient means of distribution to actual or potential competitors. *Dentsply*, 399 F.3d at 193-95. Contrary to Keurig's arguments, even if alternative means of reaching consumers are "viable," that is not the test: the question is whether any alternative channels provide "effective means of competition" and whether those alternative channels "pose a real threat to defendant's **[\*\*76]** monopoly." *Id. at 193* (internal quotation marks omitted). Further, the requisite foreclosure may be found even if only a segment of the market is foreclosed, such as the Away-From-Home Market Segment here. See *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 240 (2d Cir. 2003) (upholding verdict for plaintiff based on foreclosure in a market "segment"); *United States v. Microsoft Corp.*, 253 F.3d 34, 70-71, 346 U.S. App. D.C. 330 (D.C. Cir. 2001) (finding Section 2 violated by substantial foreclosure of a "majority" of competition in only "one of the two major [distribution] channels"). Because Rogers and TreeHouse allege that no other viable means of distribution exist outside of those foreclosed by Keurig, (see, e.g., Rogers AC ¶¶ 86, 97, 311; TreeHouse AC ¶¶ 186, 344, 346, 348), and the DPPs allege that "consumers and commercial customers have been impeded or entirely prevented from accessing the types and flavors of beverages offered by competitor Compatible Cup manufacturers," (DPP AC ¶ 239; see also *id.* ¶¶ 162-68), and because foreclosure can be measured in a particular segment, Plaintiffs have adequately alleged substantial foreclosure of distribution.

### 4) **Substantial Foreclosure Based on Retailers**

Keurig challenges Rogers's, TreeHouse's, and the DPPs' substantial foreclosure allegations related to retailers. Keurig contends that Rogers and TreeHouse **[\*240]** only **[\*\*77]** allege purportedly exclusive agreements with two retailers, which is insufficient to support a substantial foreclosure argument. (Rogers Def. Mem. 12; TreeHouse Def.

Mem. 14-15.) Keurig also argues that the DPPs' claim on this issue fails because Keurig's competitors were able to reach consumers, and because the DPPs fail to allege a denominator to determine the extent of alleged exclusion. (DPP Def. Mem. 13-14.)

As an initial matter, allegations of substantial foreclosure have been upheld where a plaintiff alleges exclusion from only two retailers. See [Commercial Data Servers, 2002 U.S. Dist. LEXIS 5600, 2002 WL 1205740, at \\*7](#) (finding that plaintiff's allegations of foreclosure from two resellers "may indeed be sufficient to substantially foreclose competition, depending on the particular facts relating to those [resellers]" and denying defendant's motion to dismiss based on lack of alleged substantial foreclosure). Moreover, as discussed above, precise mathematical allegations are not required at the pleading stage. See [Xerox I, 511 F. Supp. 2d at 390](#). Rogers', TreeHouse's, and the DPPs' allegations of substantial foreclosure from retailers are sufficient to warrant allowing the case to proceed.

#### iv. Marketing

Keurig's final challenge to Rogers's, TreeHouse's, and the DPPs' [Section 2](#) claims concerns [\[\\*\\*78\]](#) allegations that Keurig's marketing violated [Section 2](#). (Rogers Def. Mem. 13-16; TreeHouse Def. Mem. 19-23; DPP Def Mem. 17-18.)

[HN33](#) [A] plaintiff asserting a monopolization claim based on misleading advertising must 'overcome a presumption that the effect on competition of such a practice was *de minimis*.'" [Nat'l Ass'n of Pharm. Mfrs., Inc. v. Ayerst Labs., Div. of & Am. Home Prod. Corp., 850 F.2d 904, 916 \(2d Cir. 1988\)](#) (quoting [Berkey Photo, 603 F.2d at 288 n.41](#)). However, "courts recognize that false and misleading statements may provide a basis for antitrust claims." [Alternative Electrodes, LLC v. Empi, Inc., 597 F. Supp. 2d 322, 332 \(E.D.N.Y. 2009\)](#) (citing [Ayerst, 850 F.2d at 916](#) (stating that "[a]dvertising that emphasizes a product's strengths and minimizes its weaknesses does not, at least unless it amounts to deception, constitute anticompetitive conduct violative of [§ 2](#) [of the Sherman Act]")). The Second Circuit has adopted several factors for a court to consider in determining whether a plaintiff has overcome the presumption of *de minimis* effect. These include whether the representations "were (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization or other offset by rivals." [Ayerst, 850 F.2d at 916](#) (internal quotation marks omitted). The Second Circuit in *Ayerst* found that, at the [\[\\*\\*79\]](#) motion to dismiss stage, an allegation that the representation was "false and misleading in certain respects" was sufficient "to go forward with the discovery process to substantiate its claim that the [representation] was clearly false, clearly material, and clearly likely to induce reasonable reliance." *Id.*

Although Keurig attacks certain specifics of the Competitor Plaintiffs' allegations, for example by claiming that statements were not susceptible to neutralization, (Rogers Def. Mem. 13), that retailers are not buyers without knowledge of the subject matter, (*id.* at 14), and that statements concerning how the 2.0 Brewer operates were not clearly false, (TreeHouse Def. Mem. 23), these challenges are more appropriately raised on summary judgment, after discovery has illuminated the truth or falsity of the statements in question, the time frame of their dissemination, and [\[\\*241\]](#) whether the statements were susceptible to neutralization. Similarly, Keurig's challenges to certain of the DPPs' allegations—including by claiming that the DPPs concede that the statements are susceptible to neutralization, (DPP Def. Mem. 17-18), and that statements that non-approved products may void the warranty are true, [\[\\*\\*80\]](#) (*id.* at 18)—are more properly addressed at summary judgment.<sup>31</sup>

Here, the Competitor Plaintiffs and the DPPs have sufficiently alleged that Keurig made statements that were false and misleading to customers and that those statements have cost competitors' businesses or had a supra-competitive effect. (Rogers AC ¶¶ 268-73; TreeHouse AC ¶¶ 462, 459-548; DPP AC ¶¶ 197-220.) Therefore, Plaintiffs are entitled to discovery in order to substantiate their disparagement claims.

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<sup>31</sup> Keurig's argument that the DPPs concede the purported misstatements are susceptible to neutralization points only to allegations that Rogers, "had the opportunity to take steps to neutralize many of the statements." (DPP Def. Mem. 18.) This is insufficient to find, as a matter of law, that the statements were in fact susceptible to neutralization.

## B. Sherman Act Section 1 Claims

### 1. Applicable Law

**HN34** [↑] The Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." [15 U.S.C. § 1](#). "[A] plaintiff claiming a [§ 1](#) violation must first establish a combination or some form of concerted action between at least two legally distinct economic entities." [Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.](#), 996 F.2d 537, 542 (2d Cir. 1993). "If a [§ 1](#) plaintiff establishes the existence of an illegal contract or combination, it must then proceed to demonstrate that the agreement constituted an unreasonable restraint of trade either per se or under the rule of reason." [Id. at 542](#). "In addition, a plaintiff must independently show antitrust injury, in order to ensure that a plaintiff can recover only if the loss stems from a competition-reducing [\*\*81] aspect or effect of the defendant's behavior." [Primetime 24 Joint Venture v. Nat'l Broad. Co.](#), 219 F.3d 92, 103 (2d Cir. 2000) (internal quotation marks omitted).

**HN35** [↑] "Conduct considered illegal per se is invoked only in a limited class of cases, where a defendant's actions are so plainly harmful to competition and so obviously lacking in any redeeming pro-competitive values that they are conclusively presumed illegal without further examination." [Capital Imaging](#), 996 F.2d at 542 (internal quotation marks omitted). However, "most antitrust claims are analyzed under a 'rule of reason,' according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." [State Oil Co. v. Khan](#), 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997).

**HN36** [↑] Conduct that stems from independent decisions is permissible under [antitrust law](#), see [Starr v. Sony BMG Music Entm't](#), 592 F.3d 314, 321 (2d Cir. 2010), as are "independent responses to common stimuli," and "interdependence unaided by an advance understanding among the parties," [Twombly](#), 550 U.S. at 556 n.4 (internal quotation marks omitted). To establish a conspiracy in violation of [Section 1](#), then, proof of joint or concerted action is required. [Monsanto Co. v. Spray-Rite Serv. Corp.](#), 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984). Overall, "[c]ircumstances must [\*\*82] reveal a unity of purpose or a common design and understanding, [\*242] or a meeting of minds in an unlawful arrangement." [Id. at 764](#) (internal quotation marks omitted).

**HN37** [↑] "Because unlawful conspiracies tend to form in secret, such proof will rarely consist of explicit agreements. Rather, conspiracies 'nearly always must be proven through inferences that may fairly be drawn from the behavior of the alleged conspirators.'" [In re Elec. Books Antitrust Litig.](#), 859 F. Supp. 2d 671, 681 (S.D.N.Y. 2012) (quoting [Anderson News, L.L.C. v. Am. Media, Inc.](#), 680 F.3d 162, 183 (2d Cir. 2012)). Therefore, to prove an antitrust conspiracy, "the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the [defendant] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." [Monsanto](#), 465 U.S. at 764 (internal quotation marks omitted).

**HN38** [↑] At the pleading stage, a complaint claiming conspiracy must contain "enough factual matter (taken as true) to suggest that an agreement was made." [Twombly](#), 550 U.S. at 556; accord [In re Elevator Antitrust Litig.](#), 502 F.3d 47, 50 (2d Cir. 2007). This standard does not impose a "probability requirement"; a claim may survive a motion to dismiss even if a judge believes the chances of recovery to be very remote or unlikely. [Twombly](#), 550 U.S. at 556; see also [Anderson News](#), 680 F.3d at 184 ("Because plausibility is a standard lower than probability, a given set of actions may well be subject to diverging interpretations, [\*\*83] each of which is plausible. The choice between or among plausible inferences or scenarios is one for the factfinder." (internal citations omitted)). It also does not require a plaintiff to show that the allegations suggesting agreement "are more likely than not true or that they rule out the possibility of independent action." [Anderson News](#), 680 F.3d at 184. "A court ruling on a motion to dismiss need not choose among plausible interpretations of the evidence." [In re Elec. Books Antitrust Litig.](#), 859 F.

Supp. 2d at 681 (citing [Anderson News, 680 F.3d at 189-90](#)). A complaint must contain "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." [Twombly, 550 U.S. at 556](#).

[HN39](#)[] **Antitrust law** distinguishes vertical and horizontal price restraints. "Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints." [Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 730, 108 S. Ct. 1515, 99 L. Ed. 2d 808 \(1988\)](#). "[C]ourts have long recognized the existence of 'hub-and-spoke' conspiracies in which an entity at one level of the market structure, the 'hub,' coordinates an agreement among competitors at a different level, the 'spokes.'" [United States v. Apple, Inc., 791 F.3d 290, 314 \(2d Cir. 2015\)](#) (quoting [Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 255 \(3d Cir. 2010\)](#)). "These arrangements consist of *both* vertical agreements between the hub and each spoke and [\*\*84] a horizontal agreement among the spokes 'to adhere to the hub's terms,' often because the spokes 'would not have gone along with the vertical agreements except on the understanding that the other spokes were agreeing to the same thing.'" *Id.* (quoting VI Phillip E. Areeda & Herbert Hovenkamp, [Antitrust Law](#) ¶ 1402c (3d ed. 2010)). [HN40](#)[] "Existing case law makes clear that a hub-and-spoke theory is cognizable under [Section 1](#) only if there are both vertical agreements between the hub and each spoke, and also a [\*243] horizontal agreement among the various spokes with each other." [In re Zinc Antitrust Litig., 155 F. Supp. 3d 337, 376 \(S.D.N.Y. 2016\)](#) (citing [United States v. Apple, 791 F.3d at 314](#)).

## 2. Application to Rogers and TreeHouse

The Competitor Plaintiffs allege that Keurig has violated [Section 1](#) through its purported exclusive dealing, (Rogers AC ¶¶ 304-11; TreeHouse AC ¶¶ 577-84); tying arrangements, (Rogers AC ¶¶ 338-53; TreeHouse AC ¶¶ 611-18); conspiracy to monopolize, (Rogers AC ¶¶ 363-69; TreeHouse AC ¶¶ 625-31); and concerted refusals to deal and group boycott, (Rogers AC ¶¶ 370-76; TreeHouse AC ¶¶ 632-38). In short, the Competitor Plaintiffs allege that Keurig entered into horizontal and hub-and-spoke conspiracies to restrain competition with coffee brands, distributors, and retailers.

Keurig challenges the Competitor [\*\*85] Plaintiffs' [Section 1](#) claims, arguing that the Competitor Plaintiffs have not alleged any facts to support the existence of any unlawful horizontal agreements, nor the existence of any agreement among the spokes in the purported hub-and-spoke conspiracy. Further, as Keurig attempts to characterize the agreements at issue as vertical in nature, Keurig argues that any such vertical agreements were not unlawfully anticompetitive. (Rogers Def. Mem. 22-24; TreeHouse Def. Mem. 32-34.)

### a. Horizontal Conspiracy

[HN41](#)[] The Supreme Court has held that parties can be horizontal competitors regardless of whether they currently compete in the same market. [Palmer v. BRG of Ga., Inc., 498 U.S. 46, 46-48, 111 S. Ct. 401, 112 L. Ed. 2d 349 \(1990\)](#); see also [Otter Tail Power Co. v. United States, 410 U.S. 366, 378, 93 S. Ct. 1022, 35 L. Ed. 2d 359 \(1973\)](#). Here, Rogers has alleged that, through various anticompetitive agreements Keurig has removed the potential for competition from the largest roasters and brands that would be the most likely to compete against Keurig-branded Portion Packs.

For example, the 2013 "Noncompetition Agreement Between Green Mountain Coffee Roasters, Inc. and Global Baristas, LLC" provides that [Keurig's brand] Tully's "will not, and will cause its respective subsidiaries and Affiliates not to, directly or indirectly, operate in the Coffee Business in [the] United States of [\*\*86] America, Canada, Mexico and the Islands of the Caribbean" for five years. Although Global Baristas concurrently entered into a supply and license agreement for Keurig to supply K-Cups using the Tully's brand, the broad prohibition on competition is not reasonably necessary or tailored to achieve any procompetitive effects associated with that arrangement.

(Rogers AC ¶ 122 (internal citation omitted).) Use of such agreements has permitted Keurig to "eliminate[] competition with the largest roasters and brands that would otherwise have the most financial incentives to enter

into the Single Serve Brewer Market and to work with Competing Portion Pack manufacturers to increase output or decrease prices." (*Id.* ¶ 123.)

Similarly, TreeHouse alleges that:

[Keurig] itself is a roaster that owns its own brand names, [and therefore] would be a direct, horizontal competitor of other roasters and brands, but for its "Non-Competition" agreements with those companies. . . . Specifically, licensed roasters and brands agree: (1) not to sell beverage products to Competitive Cup makers; (2) not to license brands to Competitive Cup makers; and (3) not to permit Competitive Cup makers to manufacture [\*244] Competitive [\*\*87] Cups for the brand . . . .

(TreeHouse AC ¶¶ 287, 289.) Further, TreeHouse alleges that by entering into an unlawful scheme, "[Keurig] and its [Licensees] can limit competition from lower-priced Competitive Cups by agreeing . . . not to do business with Competitive Cup manufacturers unless they also become licensed and cede control of their pricing and output to [Keurig] in order to elevate prices." (*Id.* ¶ 299; see *id.* ¶¶ 286-300.)

Keurig challenges these allegations by pointing to case law that finds supply agreements—such as those covering intellectual property, distribution, or manufacturing—to be vertical rather than horizontal agreements. (Rogers Def. Mem. 22 (citing *Elecs. Commc's Corp. v. Toshiba Am. Consumer Prods. Inc.*, 129 F.3d 240, 243-44 (2d Cir. 1997); *AT&T Corp. v. JMC Telecom, L.L.C.*, 470 F.3d 525, 531 (3d Cir. 2006); *Generac Corp. v. Caterpillar Inc.*, 172 F.3d 971, 977 (7th Cir. 1999)); see also TreeHouse Def. Mem. 33 (same).) The Second Circuit held in *Toshiba* that, under the facts of that case, the distributor plaintiff and manufacturer defendant were party to vertical agreements even though they also happened to compete at the distribution level (the manufacturer distributed its products independently as well as through a distributor in a so-called "dual distribution" arrangement). [129 F.3d at 243](#). However, that is not what is alleged here. The Competitor Plaintiffs allege that Keurig entered into agreements [\*\*88] with licensees who would otherwise compete in the Compatible Cup Market, and who would potentially seek to enter and compete in the Single Serve Brewer Market. (See Rogers AC ¶¶ 122-23; TreeHouse AC ¶¶ 286-300.) Such anticompetitive agreements are directly related to the competitive landscape in the Compatible Cup and Single Serve Brewer Markets, unlike in *Toshiba*, where the market in which the parties happened to compete was not relevant to the anticompetitive claims. While Rogers includes only one example of a specific agreement with a potential competitor, (Rogers AC ¶ 122), this, coupled with allegations that Keurig has entered into similar agreements with other potential competitors, is sufficient to state a claim for horizontal agreement in restraint of trade, as are TreeHouse's [Section 1](#) claims based on purported unlawful horizontal agreements among competitors.

#### b. Hub-and-Spoke Conspiracy

Next, Keurig challenges the Competitor Plaintiffs' allegations of a hub-and-spoke conspiracy, arguing that Rogers fails to allege any agreement among the "spokes" and that TreeHouse fails to allege agreement among the brand owners or any other possible "spokes." (Rogers Def. Mem. 23; TreeHouse Def. Mem. [\*\*89] 33-34.) I find that the Competitor Plaintiffs allege facts that support the conclusion that the "spokes" have agreed to enter into restrictive agreements with Keurig to keep prices at a supra-competitive level.

For example, Rogers alleges that an "expansive system of exclusionary and noncompetition agreements is orchestrated by Keurig, and coffee and other beverage brands that enter into a license or manufacturing agreement with Keurig do so with the express knowledge of Keurig's anticompetitive agreements with other competitor roasters and brands." (Rogers AC ¶ 148.) Beyond just "conscious parallelism," see *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013), Rogers alleges that the terms of Keurig's agreements with roasters and brands are well known within the market, and each company would have known that its competitors had entered into these agreements. (Rogers AC ¶¶ 123, [\*245] 128.) Further, Rogers alleges that "[co-conspirators entered into [multi-year exclusionary] agreements with the knowledge and agreement that distributors and other resellers will be required to enter into, or already have entered into, agreements that limit their freedom to do business outside of specified authorized locations," thereby restraining the ability [\*\*90] of Competitor Cup manufacturers to enter into their own agreements with distributors or other resellers. (*Id.* ¶¶ 366-67.) TreeHouse

alleges that "the coffee and beverage brands' agreements not to deal with Competitive Cup makers that could otherwise increase their product output and sales revenue and provide a back-up or second manufacturer or the like" can only be explained by a conspiracy to sustain supra-competitive prices for K-Cups by restraining price competition. (TreeHouse AC ¶ 307.)

**HN42** [+] The Competitor Plaintiffs have sufficiently alleged "facts supporting the *inference* that a conspiracy existed." *Mayor & City Council of Baltimore, Md.*, 709 F.3d at 136; see also *Starr*, 592 F.3d at 327 (referencing "behavior that would plausibly contravene each defendant's self-interest in the absence of similar behavior by rivals" (internal quotation marks omitted)). Given that a plaintiff is not required to show, at the pleading stage, that the allegations suggesting agreement "are more likely than not true or that they rule out the possibility of independent action," *Anderson News*, 680 F.3d at 184, I find that the Rogers Amended Complaint and the TreeHouse Amended Complaint allege "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement," *Twombly*, 550 U.S. at 556.

c. Group [\*\*91] Boycott and Concerted Refusal to Deal

**HN43** [+] The Supreme Court "has long held that certain concerted refusals to deal or group boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as *per se* violations of § 1 of the Sherman Act." *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 290, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985). A concerted refusal to deal or group boycott is "an agreement to pressure a supplier or customer not to deal with another competitor." *Reading Int'l, Inc. v. Oaktree Capital Mgmt. LLC*, 317 F. Supp. 2d 301, 318 (S.D.N.Y. 2003) (citing *Nw. Wholesale Stationers, Inc.*, 472 U.S. at 294).

The same allegations that support a conspiracy to restrain trade also support a claim for a concerted refusal to deal or group boycott in violation of Section 1. Specifically, Rogers alleges that Keurig has restrained competition in the Portion Pack and Compatible Cup Markets by (1) conspiring with competitor roasters and coffee brands to enter into anticompetitive agreements to refuse to deal with Competitor Cup manufacturers; and (2) coercing distributors and retailers to enter into anticompetitive agreements to refuse to deal with Competitor Cup manufacturers. (Rogers AC ¶ 373; see, e.g., *id.* ¶¶ 146-47.) These allegations are sufficient to plausibly state a group boycott claim.

TreeHouse alleges that Keurig secured a network of agreements from licensees (1) not to deal [\*\*92] with Competitor Cup makers themselves; and (2) to further require that licensees' distributors likewise refuse to deal with Competitor Cup makers by becoming "Roaster Nominated Keurig Authorized Distributor[s]"<sup>32</sup> [\*246] bound by the same contractual prohibitions in the direct Keurig Authorized Distributor agreements. (TreeHouse AC ¶¶ 303-04; see also *id.* ¶¶ 4-5, 19-20, 244-51.) TreeHouse adequately alleges a vertical group boycott that would violate Section 1, even if the allegations were insufficient to support horizontal restraints. **HN44** [+] "Vertical refusals to deal are agreements among persons or organizations at different levels of the market structure not to deal with other market participants." *Moccio v. Cablevision Sys. Corp.*, 208 F. Supp. 2d 361, 378 (E.D.N.Y. 2002) (citing *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)). To the extent that TreeHouse alleges agreements in which licensees, distributors, or manufacturers are vertically aligned with Keurig, as opposed to horizontally, the TreeHouse Amended Complaint adequately alleges vertical group boycott claims.

In sum, the Competitor Plaintiffs have adequately pled violations of Section 1 and therefore Keurig's motions to dismiss their Section 1 claims are denied.<sup>33</sup>

<sup>32</sup> "Roaster Nominated Keurig Authorized Distributors" is defined by Keurig as "A company that was nominated by a Licensed Roaster and has an effective distribution agreement with Keurig that specifies a geographical territory and channels of distribution. These companies purchase Keurig Products from Keurig and exclusively the nominating Licensed Roaster's K-Cups from the nominating Licensed Roaster, KARDs, or Keurig for resale." (Treehouse AC ¶ 303.)

<sup>33</sup> Keurig also argues that the Competitor Plaintiffs' Section 1 claims fail because they do "not allege that [they have] been injured from any alleged elevation in prices." (Rogers Def. Mem. 24; see also TreeHouse Def. Mem. 12.) This argument fails. The Competitor Plaintiffs allege antitrust injury and even assuming that they may be able to enjoy the effects of Keurig's conduct

### C. Lanham Act False Advertising Claims

#### 1. Applicable Law

Section 43(a)(1) of the Lanham Act [\[\\*\\*93\]](#) provides:

Any person who, on or in connection with any goods or services . . . uses in commerce . . . any . . . false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who [\[\\*247\]](#) believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1). [HN45](#) To prevail on a false-advertising claim under § 43(a) of the Lanham Act, "a plaintiff must show that either: 1) the challenged advertisement is literally false, or 2) while the advertisement is literally true it is nevertheless likely to mislead or confuse consumers." Johnson & Johnson Merck Consumer Pharm. Co. v. Smithkline Beecham Corp., 960 F.2d 294, 297 (2d Cir. 1992). "[I]n addition to proving falsity, the plaintiff must also show that the defendants 'misrepresented an inherent quality or characteristic' of the product." Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 855 (2d Cir. 1997) (quoting Ayerst, 850 F.2d at 917). "This requirement is essentially one of materiality . . ." *Id.*

#### 2. Application to Rogers and TreeHouse

First, Keurig argues that Rogers' allegations concerning Keurig's statements to consumers relate to statements that are "soft" or true, (Rogers [\[\\*94\]](#) Def. Mem. 24-25), [HN46](#) which are not actionable under the Lanham Act. See Lipton v. Nature Co., 71 F.3d 464, 474 (2d Cir. 1995) ("Subjective claims about products, which cannot be proven either true or false, are not actionable under the Lanham Act." (internal quotation marks omitted)); Nat'l Lighting Co. v. Bridge Metal Indus. LLC, 601 F. Supp. 2d 556, 564-65 (S.D.N.Y. 2009) (granting motion to dismiss where allegations did not allege the statement was false and there was no indication that consumers would be misled). Keurig similarly argues that TreeHouse condemns only subjective statements of quality, performance, and safety. (TreeHouse Def. Mem. 35.)

The Rogers Amended Complaint and TreeHouse Amended Complaint detail numerous purported misrepresentations made in the course of advertising through a variety of traditional and social media advertising platforms. (Rogers AC ¶ 234; TreeHouse AC ¶¶ 417, 471, 473, 475, 487.) [HN47](#) Keurig's argument that mere "suggestions" about differences in quality, or implications in advertising that Competitor Cups are of inferior quality are not actionable under the Lanham Act, is incorrect. See Vidal Sassoon, Inc. v. Bristol-Myers Co., 661 F.2d 272,

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that results in supra-competitive pricing for Compatible Cups—something for which there is no evidence—this supposed "benefit" alone is insufficient to contradict the injury they allege. (See, e.g., Rogers AC ¶ 343 (alleging antitrust injury in the form of restraints entry, consumer choice, and incentives to create new products, among others); TreeHouse AC ¶¶ 549-64 (alleging antitrust injury in the form of restraints in output, consumer choice, incentives to create new products, and price competition).) See also N.Y. MedScan LLC v. N.Y. Univ. Sch. of Med., 430 F. Supp. 2d 140, 146 (S.D.N.Y. 2006) (finding that a plaintiff establishes antitrust injury "by alleging adverse effects on the price, quality, or output of the relevant good or service"). In support of its argument, Keurig cites from Original Appalachian Artworks, Inc. v. Granada Electronics, Inc., 816 F.2d 68, 74 (2d Cir. 1987) ("Artworks"). The district court in Artworks found, and the Second Circuit agreed, that Granada's business model was only feasible because of the allegedly artificially inflated prices in the United States, because Granada was buying the cheap goods in Europe and selling them at a profit in the United States. See Original Appalachian Artworks, Inc. v. Granada Elecs., Inc., No. 85 Civ. 9064 (WCC), 1986 WL 2402 (S.D.N.Y. Feb. 20, 1986), aff'd, 816 F.2d 68 (2d Cir. 1987). In other words, it was because of the allegedly artificially inflated prices that Granada was able to profitably conduct business. The Competitor Plaintiffs' businesses would exist without Keurig charging supra-competitive prices. Keurig has not shown how the Competitor Plaintiffs' business model is comparable to the business model in that case, and Artworks therefore does not apply.

[277 \(2d Cir. 1981\)](#) ("Whether or not the statements made in the advertisements are literally true, [§ 43\(a\)](#) of the Lanham Act encompasses more than blatant falsehoods. It embraces innuendo, indirect intimations, and ambiguous suggestions [\[\\*95\]](#) evidenced by the consuming public's misapprehension of the hard facts underlying an advertisement." (internal quotation marks omitted)). Similarly, although Keurig categorizes certain qualifiers used, such as "perfect," as "puffery," this characterization ignores the context in which the qualifiers were used. For example, the TreeHouse Amended Complaint alleges that consumers were misled about the necessity of using Keurig brand cups, as opposed to Competitor Cups that Keurig directly or by implication labeled of inferior quality, and the functioning of the lock-out technology introduced in the 2.0 Brewer. (See TreeHouse AC ¶ 640.) [HN48](#)[[↑](#)] Such statements involve more than the mere use of qualifiers and cross the line into statements of direction or fact. See [Pizza Hut, Inc. v. Papa John's Int'l, Inc., 227 F.3d 489, 501-02 \(5th Cir. 2000\)](#) (finding that in certain contexts, what appears to be puffery "is no longer mere opinion, but rather takes on the characteristics of a statement of fact"). In any event, any challenge based on the actual truth or falsity of the statements, (see Rogers Def. Mem. 25-26), is not appropriately raised on a motion to dismiss. [HN49](#)[[↑](#)] At the motion to dismiss stage, an allegation that the representation was "false and [\[\\*248\]](#) misleading in certain respects" [\[\\*96\]](#) is sufficient "to go forward with the discovery process to substantiate [plaintiff's] claim that the [representation] was clearly false, clearly material, and clearly likely to induce reasonable reliance." [Ayerst, 850 F.2d at 916.](#)

Keurig also argues that its statements to consumers who called to complain about the 2.0 Brewers are not "advertising" and cannot satisfy the dissemination requirement. (See Rogers Def. Mem. 26-27.) Similarly, Keurig argues that messages displayed on the 2.0 Brewer and messages in the 2.0 Brewer warranty cannot be considered advertising since those messages were received by consumers who had already purchased the brewer and thus were not made "for the purpose of influencing consumers to buy defendant's goods or services." (*Id.* (quoting [Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc., 314 F.3d 48, 57-58 \(2d Cir. 2002\)](#)); see also TreeHouse Def. Mem. 36.)

[HN50](#)[[↑](#)] The Second Circuit has adopted a three-part test to determine if the statements at issue are covered by the Lanham Act: the speech is covered if it is (1) commercial speech; (2) for the purpose of influencing consumers to buy defendant's goods or services; and, (3) "although representations less formal than those made as part of a classic advertising campaign may suffice, they must be disseminated sufficiently to [\[\\*97\]](#) the relevant purchasing public." [Fashion Boutique of Short Hills, 314 F.3d at 56](#). Under this standard, the Competitor Plaintiffs' allegations sufficiently state a claim for relief under the Lanham Act.

The Competitor Plaintiffs allege that the challenged statements made to consumers of the 2.0 Brewer are in fact intended to influence those consumers "to purchase defendant's goods," namely the Keurig-licensed K-Cups. For example, the Competitor Plaintiffs allege that, to discourage consumers from using Competitor Cups, Keurig warns customers that use of Competitor Cups may void their brewer warranties, even though Keurig honors brewer warranties when consumers use such cups, or stop the brewer from functioning. (See Rogers AC ¶¶ 238, 242; TreeHouse AC ¶¶ 493-99.) Furthermore, Keurig cites no case law, and I have found none, in which a court has held that warranty policies fall outside the scope of the Lanham Act as a matter of law. In fact, the Lanham Act does not define the metes and bounds of what qualifies as "commercial advertising or promotion."

Moreover, I note that certain of Keurig's statements were made to consumers by using Facebook and Amazon.com. Assuming, as Keurig asserts, that these statements were all made to consumers [\[\\*98\]](#) who had already purchased the brewer, they were made in the open. In other words, they were available to be viewed by not only consumers who owned brewers but also by consumers who were contemplating purchasing brewers. This type of communication is materially different from a one-on-one communication between a manufacturer and a consumer inquiring about the product owned by the consumer. Therefore, such statements are appropriately viewed as being made for consumption by a wider audience for the purpose of influencing other consumers to buy defendant's goods or services.

Finally, Keurig challenges Rogers' allegations of false or misleading statements made to retail customers. Specifically, Keurig argues that Rogers does not have standing to challenge the statements because it "does not explain how Keurig's allegedly inaccurate statements to retailers . . . about how the 2.0 [Brewer's] interactive

technology works were the proximate cause of harm to [Rogers]," and Rogers has not pled materiality. (Rogers Def. Mem. 28.) However, Rogers has sufficiently [**\*249**] alleged that Keurig's misrepresentations are material and have caused injury. (Rogers AC ¶¶ 258-62, 270-74 (alleging that Keurig misrepresented [\*\*99] the simplicity of the 2.0 Brewer, causing Rogers to lose business with companies such as Costco).) **HN51** Therefore, Rogers has standing and the claims survive. See [Lexmark Int'l., Inc. v. Static Control Components, Inc.](#), 572 U.S. 118, 140, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014) ("To invoke the Lanham Act's cause of action for false advertising, a plaintiff must plead (and ultimately prove) an injury to a commercial interest in sales or business reputation proximately caused by the defendant's misrepresentations.").

#### **D. State Law and Common Law Claims**

##### **1. Rogers' State and Common Law Claims**

Rogers brings claims for violations of three California statutes—the Cartwright Act, the Unfair Competition Law, and the False Advertising Law—alleging tortious interference with contractual relationships under California law, intentional interference with prospective economic advantage, and common law unfair competition.

###### a. The Cartwright Act

**HN52** Rogers alleges that Keurig violated California's Cartwright Act, codified at [California Business and Professions Code § 16720](#), which "prohibits, among other things, any combination '[t]o prevent competition in [the] sale or purchase of . . . any commodity' or to '[a]gree in any manner to keep the price of . . . [any] commodity . . . at a fixed or graduated figure.'" [Knevelbaard Dairies v. Kraft Foods, Inc.](#), 232 F.3d 979, 986 (9th Cir. 2000) (quoting [Cal. Bus. & Prof. Code § 16720\(c\)](#) and [\(e\)\(2\)](#)). "The Cartwright Act is modeled after [Section 1](#) of the [\*\*100] Sherman Act, and to state a claim under the Cartwright Act, plaintiffs must allege that (1) there was an agreement, conspiracy, or combination between two or more entities; (2) the agreement was an unreasonable restraint of trade under either a per se or rule of reason analysis; and (3) the restraint affected interstate commerce." [In re Aluminum Warehousing Antitrust Litig.](#), No. 13-md-2481 (KBF), 2014 U.S. Dist. LEXIS 140765, 2014 WL 4743425, at \*3 (S.D.N.Y. Sept. 15, 2014) (internal quotation marks omitted), aff'd, [833 F.3d 151](#) (2d Cir. 2016). Because I find that Rogers has adequately pled violations of [Section 1](#) of the Sherman Act, Rogers' Cartwright Act claim survives.

###### b. California Unfair Competition Law

**HN53** Rogers alleges violations of California's Unfair Competition Law, [Cal. Bus. & Prof. Code §§ 17200, et seq.](#), ("UCL"), which bans "any unlawful, unfair or fraudulent business act or practice." *Id.* [§ 17200](#). To state a claim under the UCL, a plaintiff must show "a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and . . . that the economic injury was the result of, i.e. *caused by*, the unfair business practice." [Allergan, Inc. v. Athena Cosmetics, Inc.](#), 640 F.3d 1377, 1382 (Fed. Cir. 2011) (internal citation marks omitted). "Under the 'unlawful' prong, 'the UCL borrows violations from other laws by making them independently actionable as unfair competitive practices.'" [Merced Irrigation Dist. v. Barclays Bank PLC](#), 165 F. Supp. 3d 122, 143 (S.D.N.Y.) [\*\*101], reconsideration denied, [178 F. Supp. 3d 181](#) (S.D.N.Y. 2016) (quoting [Korea Supply Co. v. Lockheed Martin Corp.](#), 29 Cal. 4th 1134, 1143, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)). Courts in this district have allowed parties to plead UCL claims predicated on antitrust violations. *Id.* (citing [In re LIBOR-Based Fin. Instruments Antitrust Litig.](#), No. 11 MDL 2262NRB, 2015 U.S. Dist. LEXIS 147561, 2015 WL 6243526, at \*95 (S.D.N.Y. Oct. 20, 2015)).

[\*250] Keurig argues that because Rogers' Sherman Act and Lanham Act claims should be dismissed, the UCL claim should also fail. Because, as discussed above, Rogers' Sherman Act and Lanham Act claims survive, the UCL claim also survives.

###### c. California False Advertising Law

Rogers alleges violations of [HN54](#)<sup>34</sup> California's False Advertising Law, which bans "untrue or misleading" advertisements. [Cal. Bus. & Prof. Code § 17500](#). Keurig contends that Rogers' [§ 17500](#) claim fails because its Lanham Act claim fails. (Rogers Def. Mem. 29 (citing [Appliance Recycling Ctrs. v. JACO Envtl., Inc.](#), 378 F. App'x 652, 654-56 (9th Cir. 2010)).) Because I find that Rogers has adequately pled a Lanham Act claim, Rogers' [§ 17500](#) claim survives.

#### d. Tortious Interference with Contractual Relations

[HN55](#)<sup>35</sup> To state a claim for tortious interference with contractual relations under California law, a plaintiff must plead: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." [Fresno Cnty. Hosp. & Med. Ctr. v. Souza, No. CV F 07-0325 LJO SMS, 2007 U.S. Dist. LEXIS 56048, 2007 WL 2120272, at \\*7 \(E.D. Cal. July 23, 2007\)](#) [\*102] (citing [Pac. Gas & Elec. Co. v. Bear Stearns & Co.](#), 50 Cal. 3d 1118, 1126, 270 Cal. Rptr. 1, 791 P.2d 587 (1990)). Rogers alleges that Keurig's conduct supports a claim for tortious interference with contractual relations, and in response Keurig argues that Rogers fails to allege any specific contractual relationship with which Keurig interfered. (Rogers Def. Mem. 29-30.) [HN56](#)<sup>36</sup> Rogers counters that there is no requirement for a plaintiff to identify, in the pleadings, the specific contractual relationship disrupted and cites [Sebastian Int'l, Inc. v. Vincenzo Russolillo](#), 162 F. Supp. 2d 1198, 1203-04 (C.D. Cal. 2001), in which the court noted that "under California law, the Plaintiff does not have to identify the specific contractual relations which have allegedly been disrupted." The court went on to clarify that

If a potential defendant was completely unaware of contractual relations with a third party, then it would be impossible to infer any intent to interfere on the defendant's part. However, such intent can certainly be inferred if the defendant knows that contractual relations with a third party exist, but does not know the specific identity of the contractual party.

*Id. at 1204*. Rogers' allegations are sufficient to infer that Keurig was aware of the existence of contracts with third parties. Because Rogers alleges that Keurig's anticompetitive [\*103] and unlawful actions compelled Kroger to cancel its private label program with Rogers, (Rogers AC ¶¶ 206-12, 273), that other customers have followed suit, (*id.* ¶¶ 268-83), and that Keurig intended to interfere with competitors' relationships to monopolize the Compatible Cup Market, (see, e.g., *id.* ¶¶ 8, 12), Rogers has stated a claim for tortious interference under California law.

#### e. Intentional Interference with Prospective Economic Advantage

Finally, Keurig does not argue that Rogers has failed to allege the elements of an intentional interference with prospective economic advantage claim. Rather, Keurig argues that it is entitled to a "competitor's privilege," and therefore the claim should be dismissed. (Rogers Def. Mem. 30.) [HN57](#)<sup>37</sup> Keurig cites in support of its argument [\*251] [Orion Tire Corp. v. Gen. Tire, Inc., No. CV 92-2391AAH\(EEX\), 1992 U.S. Dist. LEXIS 20224, 1992 WL 295224 \(C.D. Cal. Aug. 17, 1992\)](#), in which the district court noted that "there exists a broad privilege afforded to a competitor to divert a prospective relationship to itself." *Id. at \*3*. However, it is clear from *Orion Tire* that such a privilege does not defeat a claim when the plaintiff has already "effectively allege[d] that [the defendant] used fraud or any other unlawful means to accomplish its goal." [\*104] *Id.* Because, as discussed, Rogers has plausibly alleged that Keurig engaged in a variety of anticompetitive conduct in order to interfere with Rogers' potential customers, (see Rogers AC ¶ 409), this claim survives.<sup>34</sup>

## 2. TreeHouse's State Law Claims

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<sup>34</sup> To the extent that Keurig argues that this claim should be dismissed because Rogers failed to allege under which state's laws it was asserting a claim for intentional interference with prospective economic advantage, I find this argument fails because it is clear from the context of the claim that Rogers asserts this claim under California law. I note that all other common law claims raised by Rogers are under only California law and that the original complaint was filed in California. Indeed, Keurig tacitly recognizes this because its argument for dismissal of this claim is based upon California case law.

The TreeHouse Amended Complaint alleges claims for violations of the Illinois, Wisconsin, and New York antitrust laws; the Illinois and New York false advertising laws; the Illinois and Wisconsin unfair competition laws; as well as claims for negligent and intentional interference with business relations under New York law, and for tortious interference under New York, Wisconsin, and Illinois law.

a. [Illinois, Wisconsin, and New York Antitrust Laws](#)

TreeHouse brings claims pursuant to Illinois, Wisconsin, and New York antitrust laws. As Keurig concedes, (Treehouse Def. Mem. 38), each of these state antitrust statutes apply Sherman Act standards. See [Gatt, 711 F.3d at 81](#); [Baker v. Jewel Food Stores, Inc., 355 Ill. App. 3d 62, 69, 823 N.E.2d 93, 291 Ill. Dec. 83 \(2005\)](#); [Olstad v. Microsoft Corp., 2005 WI 121, 284 Wis. 2d 224, 246-47, 700 N.W.2d 139 \(2004\)](#). Because I have found that TreeHouse's Sherman Act claims survive, the New York, Illinois, and Wisconsin antitrust claims also survive.

b. [Illinois and New York False Advertising Laws](#)

[HN58](#) [↑] TreeHouse's Illinois and New York false advertising claims, which are governed by the same standards as the Lanham [\*\*105] Act, survive for the same reasons that the Lanham Act claims survive. See [Muzikowski v. Paramount Pictures Corp., 477 F.3d 899, 907 \(7th Cir. 2007\)](#) (assuming without deciding that the standards for § 43(a) of the Lanham Act apply to Illinois false advertising claims); [Avon Prods., Inc. v. S.C. Johnson & Son, Inc., 984 F. Supp. 768, 800 \(S.D.N.Y. 1997\)](#) (stating that the "standards for bringing a claim under § 43(a) of the Lanham Act are substantially the same as those applied to" New York false advertising claims); see also TreeHouse Def. Mem. 39 n.27 (conceding that the Lanham Act standard applies to Illinois and New York false advertising claims).

c. [Illinois and Wisconsin Unfair Competition Laws](#)

TreeHouse also alleges state unfair competition claims pursuant to Illinois and Wisconsin law. (TreeHouse AC ¶¶ 646-49, 658-61.) Keurig does not challenge TreeHouse's Illinois claim, and therefore that claim survives. See [\*252] [In re Ford Fusion & C-Max Fuel Econ. Litig., No. 13-MD-2450 \(KMK\), 2015 U.S. Dist. LEXIS 155383, 2015 WL 7018369, at \\*39 \(S.D.N.Y. Nov. 12, 2015\)](#). Keurig concedes that TreeHouse's Wisconsin claim survives if the Amended Complaint alleges conduct that is "actionable under another statute or the common law." (TreeHouse Def. Mem. 39 (quoting [Thermal Design, Inc. v. Am. Soc'y of Heating Refrigerating, & Air-Conditioning Eng'r's, Inc., No. 07-C-765, 2008 U.S. Dist. LEXIS 34344, 2008 WL 1902010, at \\*8-9 \(E.D. Wis. Apr. 25, 2008\)](#))) Because, as discussed above, TreeHouse has adequately alleged violations of other statutes and common law, this claim survives. Cf. [Curtis-Universal, Inc. v. Sheboygan Emergency Med. Servs., Inc., 43 F.3d 1119, 1123 \(7th Cir. 1994\)](#).

d. [Negligent and Intentional Interference with Business Relations \[\\*\\*106\] Under New York Law](#)

TreeHouse also alleges negligent and intentional interference with business relations in violation of New York law. (TreeHouse AC ¶¶ 662-70.) [HN59](#) [↑] A plaintiff asserting a claim for tortious interference with business relations under New York law must plead "the defendant's interference with business relations existing between the plaintiff and a third party, either with the sole purpose of harming the plaintiff or by means that are dishonest, unfair or in any other way improper." [Martin Ice Cream Co. v. Chipwich, Inc., 554 F. Supp. 933, 945 \(S.D.N.Y. 1983\)](#) (internal quotation marks omitted). A plaintiff's "valid antitrust claims . . . provide the unlawful purpose and unjustifiable cause element of its claim of tortious interference with contract." [Commodore Bus. Machs., Inc. v. Montgomery Grant, Inc., No. 90 Civ. 7498 \(LMM\), 1993 U.S. Dist. LEXIS 262, 1993 WL 14503, at \\*3 \(S.D.N.Y. Jan. 13, 1993\)](#); see also [Martin Ice Cream, 554 F. Supp. at 946](#) ("It is beyond dispute that a conspiracy to unreasonably restrain trade or to monopolize trade would constitute improper means. Thus, if [plaintiff] is able to prove the antitrust violations . . . , it will also be able to prove improper means.")

Keurig argues that a claim for tortious interference with business relations under New York law cannot stand based on "actions taken in furtherance of 'normal economic selfinterest.'" (TreeHouse Def. Mem. 39 (quoting [JBCHoldings NY, LLC v. Pakter, 931 F. Supp. 2d 514, 536 \(S.D.N.Y. 2013\)](#))). Although Keurig argues that [\*\*107] its conduct was indeed in furtherance of its own normal, economic self-interest, TreeHouse's Amended Complaint alleges to the contrary, and, as discussed above, states valid claims for conspiracy to restrain trade and to monopolize; therefore, this exception to the application of New York law does not apply. See [JBCHoldings NY, 931 F. Supp. 2d](#)

at 535-36. Accordingly, TreeHouse has plausibly stated a claim for negligent and intentional interference with business relations in violation of New York law.

e. Tortious Interference Under New York, Illinois, and Wisconsin Law

Keurig also challenges TreeHouse's tortious interference with contract claims, brought pursuant to New York, Illinois, and Wisconsin law. (See TreeHouse AC ¶¶ 671-80, 685-91.) HN60[<sup>15</sup>] Under New York law, "the elements of tortious interference with contract are (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's intentional procurement of the third-party's breach of the contract without justification; (4) actual breach of the contract; and (5) damages resulting therefrom." Kirch v. Liberty Media Corp., 449 F.3d 388, 401 (2d Cir. 2006) (internal quotation marks omitted). Tortious interference [\*253] with contract under Illinois and Wisconsin law [\*\*108] require similar showings. See A-Abar Elec. Supply, Inc. v. Emerson Elec. Co., 956 F.2d 1399, 1404 (7th Cir. 1992) (articulating substantially similar elements); Sean Morrison Entm't, LLC v. O'Flaherty Heim Egan & Birnbaum, Ltd., No. 13-cv-753-bbc, 2014 U.S. Dist. LEXIS 28696, 2014 WL 896616, at \*3 (W.D. Wis. Mar. 6, 2014) (same).

Keurig argues that "TreeHouse makes factual allegations of only one contract with a third party," that "TreeHouse fails to allege Keurig knew of that contract," and that the only statements alleged to have been made before that contract was terminated were statements "about warranty, which are not alleged to be the but/for cause of termination." (TreeHouse Def. Mem. 40.) TreeHouse alleges that it had entered into a Co-Manufacturing Supply Agreement with Unilever on August 13, 2012, which Unilever terminated on December 27, 2012. (TreeHouse AC ¶ 296.) Thereafter, in March 2013, Unilever announced an agreement with Keurig by which it would become a licensee of the Keurig brand. (*Id.*) TreeHouse alleges

[o]n information and belief, the contract entered into between [Keurig] and Unilever prohibited Unilever from proceeding with its co-manufacturing agreement with Sturm. On information and belief, Unilever's termination of the Sturm contract was the direct result of [Keurig's] interference with Sturm's business relations [\*\*109] and [Keurig's] misleading and deceptive statements, including statements about the forthcoming 2.0 K-Cup Brewers, Sturm's ability to make Competitive Cups that would work in 2.0 K-Cup Brewers, and [Keurig's] threats that using Competitive Cups in [Keurig] KCup Brewers would void consumers' warranties, among other anticompetitive strong-arm tactics.

(*Id.*) This sufficiently states a claim for tortious interference with contract, but I note that this is the only contract alleged to have been terminated or breached due to Keurig's interference. HN61[<sup>16</sup>] Therefore, TreeHouse's state law tortious interference with contract claims survive solely related to this one contract. See Leibowitz v. Cornell Univ., 445 F.3d 586, 591 (2d Cir. 2006) (at the pleading stage, "a plaintiff is required . . . to give a defendant fair notice of what the claim is and the grounds upon which it rests").

With regard to the HN62[<sup>17</sup>] claim for tortious interference under Illinois law, Keurig also argues that TreeHouse has failed to allege tortious interference with prospective business expectancy under Illinois law because "competition is a complete defense." (TreeHouse Def. Mem. 39.) However, this exception applies only if the "defendant's actions are not . . . anti-competitive," EOne, Inc. v. Oshkosh Truck Corp., No. 06CV1391, 2006 U.S. Dist. LEXIS 83254, 2006 WL 3320441, at \*3 (N.D. Ill. Nov. 13, 2006). As discussed [\*\*110] at length above, TreeHouse adequately alleges anti-competitive conduct. Therefore, Keurig cannot defeat this claim based upon this exception and it survives.

### 3. DPPs' Unjust Enrichment Claims

The DPPs allege that "[i]t would be inequitable under unjust enrichment principles in the District of Columbia and each of the fifty states for Keurig to be permitted to retain any of the overcharges for K-Cups derived from Keurig's unfair and unconscionable methods, acts, and trade practices alleged in this Complaint." (DPP AC ¶ 296.) Keurig challenges these claims on three grounds: (1) that such claims "are not linked to any particular state"; (2) that such claims "are not premised on anything other than DPPs' deficient antitrust claims, and they must be dismissed along

with those claims"; and (3) [\*254] that the named DPPs lack constitutional standing to assert such claims "under the laws of the states where they neither reside nor purchased [the KCups]." (DPP Def. Mem. 24 & n.31.)

First, the DPPs have alleged unjust enrichment claims pursuant to particular state laws, specifically that of "the District of Columbia and each of the fifty states." (DPP AC ¶ 296.) [HN63](#)<sup>35</sup> "The laws governing claims for unjust enrichment [\*\*111] vary from state to state. Some states recognize unjust enrichment as a separate free-standing claim, while others do not." [In re Flash Memory Antitrust Litig.](#), 643 F. Supp. 2d 1133, 1163 (N.D. Cal. 2009) (internal quotation marks omitted).

Keurig has not undertaken a state-by-state analysis of the unjust enrichment laws of the fifty states, and, no challenge having been made by Keurig, I need not and decline to independently address the viability of these claims under each state's law at this stage. In addition, it is clear based on the foregoing that the DPPs' antitrust claims are sufficient.

[HN64](#)<sup>36</sup> Finally, while it is true that courts have held that "named plaintiffs lack standing to bring claims on behalf of a class under the laws of states where the named plaintiffs have never lived or resided," [In re HSBC Bank, USA, N.A., Debit Card Overdraft Fee Litig.](#), 1 F. Supp. 3d 34, 50 (E.D.N.Y. 2014) (internal quotation marks omitted), it is also true that because class certification is logically antecedent to the question of standing to assert state-law claims, many courts in this district have deferred determination of the standing issue until the class certification issues have been fully resolved, see, e.g., [In re DDAVP Indirect Purchaser Antitrust Litig.](#), 903 F. Supp. 2d 198, 213-14 (S.D.N.Y. 2012) ("[T]he issue 'is not whether the Named Plaintiffs have standing to sue Defendants—they most certainly do—but whether their injuries are sufficiently similar [\*\*112] to those of the purported Class to justify the prosecution of a nationwide class action,' which is properly determined at the class certification stage, when this Court may consider commonality and typicality issues with respect to the named plaintiffs and other putative class members." (quoting [In re Grand Theft Auto Video Game Consumer Litig. \(No. II\)](#), No. 06 MD 1739 (SWK)(MHD), 2006 U.S. Dist. LEXIS 78064, 2006 WL 3039993, at \*3 (S.D.N.Y. Oct. 25, 2006)); see also [In re Digital Music Antitrust Litig.](#), 812 F. Supp. 2d 390, 406 (S.D.N.Y. 2011) (finding that named plaintiffs' claims related to conduct "alleged to be the same no matter where any plaintiff resides," and deferring determination on standing until class certification). I will defer determination of standing related to the DPPs' unjust enrichment claims brought pursuant to the law of states where no named plaintiff resides or purchased a K-Cup.<sup>35</sup> Therefore, [\*255] Keurig's motion to dismiss the DPPs' unjust enrichment claims is denied without prejudice.

#### 4. IPPs' State Law Antitrust Claims

Keurig moves to dismiss the IPPs' first and ninth causes of action brought under the antitrust and unfair competition laws of twenty-two states.<sup>36</sup> (IPP Def. Mem. 8, 25-26, Tables A-E.) Keurig bases its motion on three grounds: 1) the IPPs have failed to plead antitrust standing under the laws [\*\*113] of nineteen states that have adopted the AGC test for antitrust standing, (*id.* Tables A & B); 2) the IPPs have failed to plead the substantive elements of an

<sup>35</sup> Keurig also moves to dismiss the IPPs' claims brought under the laws of states where no named plaintiff was harmed, arguing that [Mahon v. TICOR Title Ins. Co.](#), 683 F.3d 59, 64 (2d Cir. 2012), requires dismissal on this ground. (IPP Def. Mem. 9-10.)

[HN65](#)<sup>37</sup> The Court in *Mahon* did not hold that it was necessary in all cases to determine the standing issue prior to the class certification issue. See [683 F.3d at 65](#) ("As such, we think the Court's 'logical antecedence' language is relevant when resolution of class certification obviates the need to decide issues of Article III standing." (citing [Amchem Prods., Inc. v. Windsor](#), 521 U.S. 591, 612, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997))). Rather, *Mahon* preserved the logical antecedence exception to the general rule that Article III standing is a prerequisite to class certification. See [Okla. Police Pension & Ret. Sys. v. U.S. Bank Nat'l Ass'n](#), 986 F. Supp. 2d 412, 419 n.3 (S.D.N.Y. 2013) (explaining that the logical antecedence exception, while narrow, applies to "nation-wide class actions in which claims [are] brought under parallel provisions of different states' consumer protection or antitrust laws"). In addition, *Mahon* held that a plaintiff does not have standing to bring a class action against defendants that did not injure her. [683 F.3d at 65](#). Here, in the case of both the DPPs and IPPs, each named plaintiff has alleged that he or she has suffered an injury-in-fact as a result of Keurig's conduct. (DPP AC ¶¶ 25-35; IPP SAC ¶¶ 37-63.)

<sup>36</sup> For ease of reference and solely for this Opinion & Order, I refer to and include the District of Columbia as a "state."

antitrust claim under the laws of all twenty-two states because each state interprets its antitrust laws in parallel with, or more narrowly than, the federal antitrust laws, (*id.* at 25, Table C); and 3) the IPPs have failed to plead an antitrust claim under the laws of five states that require a specific nexus between defendant's conduct and intrastate commerce within those states, (*id.* at 26, Table E).

For the reasons set forth below, Keurig's motion is granted with respect to the IPPs' antitrust claims under the laws of Michigan, Mississippi, Nevada, New Hampshire, New Mexico, New York, and South Dakota. Their claims under the antitrust laws of the remaining fifteen states—Arizona, California, the District of Columbia, Iowa, Kansas, Maine, Minnesota, Nebraska, North Carolina, North Dakota, Oregon, Tennessee, Vermont, West Virginia, and Wisconsin—survive Keurig's motion to dismiss.

#### a. Antitrust Standing

Keurig argues that the IPPs' state antitrust claims for damages should be dismissed under the laws of nineteen of the twenty-two states under which [\*\*114] the IPPs allege claims because those states have adopted the AGC test for antitrust standing, and the IPPs fail to satisfy that test. (IPP Def. Mem. Tables A & B; IPP Def. Reply 1-3.)<sup>37</sup> The IPPs contend that they have standing under AGC, and that even if they did not, each of the states to which Keurig objects has determined to apply neither the bar against indirect purchaser claims in [Illinois Brick, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707](#), nor the federal standing analysis in AGC. (IPP Opp. 5-13, Tables A & B.)

[HN66](#)[] The role of a federal district court adjudicating a state law claim is to determine the content of state law and apply it appropriately. To do so, the court "look[s] to the state's decisional law, as well as to its constitution and statutes." [Santalucia v. Sebright Transp., Inc., 232 F.3d 293, 297 \(2d Cir. 2000\)](#). When the content of state law is unsettled, the court "is obligated to 'carefully predict how the state's highest court would resolve the uncertainty or ambiguity.'" *Id.* (alterations omitted) (quoting [Travelers Ins. Co. v. 633 Third Assocs., 14 F.3d 114, 119 \(2d Cir. 1994\)](#)). The court must give the "fullest weight" to the pronouncements of the state's highest court while giving "proper" [\*256] regard" to the rulings of the state's lower courts. *Id.* (internal quotation marks omitted).

Keurig contends that the IPPs have failed to allege antitrust standing under the laws of [\*\*115] nineteen states because those states apply the AGC factors to determine whether a plaintiff has antitrust standing.<sup>38</sup> (IPP Def. Mem. Table A.) Keurig asserts that fourteen of those states have expressly adopted the AGC test, citing both state and federal case law.<sup>39</sup> (*Id.* Table B.) For the five remaining states that have not expressly adopted AGC, Keurig cites statutes and case law purportedly harmonizing state **antitrust law** with federal **antitrust law**.<sup>40</sup> (*Id.*) I address each state below.

#### i. Iowa and Nebraska

Of the fourteen jurisdictions that Keurig claims have expressly adopted AGC, only two have decisional authority from the highest court in that state directly addressing the issue: Iowa and Nebraska. [HN67](#)[] The highest courts of both states have held that the AGC factors apply to a determination of whether a plaintiff has antitrust standing. See [Southard v. Visa U.S.A. Inc., 734 N.W.2d 192, 198 \(Iowa 2007\)](#) ("[W]e apply the AGC factors to determine whether the plaintiffs may recover under Iowa law."); [Kanne v. Visa U.S.A. Inc., 272 Neb. 489, 723 N.W.2d 293, 299 \(Neb. 2006\)](#) ("We conclude that appellants lack standing under Associated General Contractors to seek recovery for Visa and MasterCard's alleged violation of the Junkin Act.").

<sup>37</sup> "IPP Def. Reply" refers to the Memorandum of Law in Support of Defendant's Motion to Dismiss the Indirect Purchaser Plaintiffs' Second Consolidated Amended Class Action Complaint, dated May 13, 2015. (Doc. 267.)

<sup>38</sup> The states are Arizona, California, the District of Columbia, Iowa, Kansas, Maine, Michigan, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Oregon, South Dakota, Vermont, West Virginia, and Wisconsin.

<sup>39</sup> The states are California, the District of Columbia, Iowa, Kansas, Maine, Michigan, Nebraska, New Mexico, New York, North Dakota, Oregon, South Dakota, Vermont, and Wisconsin.

<sup>40</sup> The states are Arizona, Mississippi, Nevada, New Hampshire, and West Virginia.

The courts in *Southard* and *Kanne* dealt with essentially identical facts. Both cases were brought [\*\*116] against Visa and Mastercard by plaintiff classes of consumers who made purchases from merchants who accept Visa or Mastercard as a form of payment. *Southard*, 734 N.W.2d at 194; *Kanne*, 723 N.W.2d at 295. The plaintiffs brought the actions under the antitrust laws of both states, alleging that the defendants had engaged in tying arrangements that forced merchants to pay inflated fees for processing transactions, which the merchants then passed on to the plaintiff consumers. *Southard*, 734 N.W.2d at 194-95; *Kanne*, 723 N.W.2d at 295-96. The Iowa and Nebraska Supreme Courts both affirmed the dismissal of the plaintiffs' claims, applying the AGC factors to conclude that the plaintiffs lacked antitrust standing because their claims were too remote, in part because they were not purchasers of any goods or services provided by the defendants. *Southard*, 734 N.W.2d at 199-200; *Kanne*, 723 N.W.2d at 297-99.

The IPPs contend that *Southard* and *Kanne* should be limited to their facts. (IPP Opp. 8, Table B.) Based on both courts' discussions distinguishing earlier rulings of the Iowa and Nebraska Supreme Courts that granted antitrust standing to indirect purchasers without applying the AGC factors, *Southard*, 734 N.W.2d at 195-97 (citing *Comes v. Microsoft Corp.*, 646 N.W.2d 440 (Iowa 2002)); *Kanne*, 723 N.W.2d at 300-01 (citing *Arthur v. Microsoft Corp.*, 267 Neb. 586, 676 N.W.2d 29 (Neb. 2004))), the IPPs urge me to read the holdings in *Southard* and *Kanne* as limited to the proposition that the AGC factors apply to antitrust suits brought by [\*\*117] [\*257] non-purchasers, but not to antitrust suits brought by indirect purchasers. (IPP Opp. 8 n.10, Table B.) I decline to do so.

Both *Southard* and *Kanne* explicitly held that *Comes* and *Arthur* did not eliminate antitrust standing principles. The *Southard* court held that the decision in *Comes* stood only for the "narrow" holding "reject[ing] the federal rule barring claims by indirect purchasers" announced in *Illinois Brick*. *Southard*, 734 N.W.2d at 196. It did not read *Comes* to eliminate the need to determine antitrust standing for all suits brought by indirect purchasers. See *id.* ("[*Comes*] certainly did not, as suggested by the plaintiffs, determine there were no limits on who could sue under [Iowa's competition law].") (citing *Kanne*, 723 N.W.2d at 299-301)). Similarly, the *Kanne* court held that the decision in *Arthur* "addressed whether the *Illinois Brick* Co. bar against indirect purchaser suits should apply under the Consumer Protection Act; [the court] did not address the distinct antitrust standing requirements that bar claims based on derivative or remote injuries." *723 N.W.2d at 300*. The *Kanne* court concluded that its "decision in *Arthur* [did] not eliminate antitrust standing requirements." *Id. at 300-01*.

Because the courts in *Southard* and *Kanne* both held that AGC set forth the appropriate [\*\*118] test to determine antitrust standing, I conclude that the AGC factors apply to the IPPs' Iowa and Nebraska antitrust claims. It is not clear, however, whether the Iowa and Nebraska Supreme Courts apply the AGC factors in the same way as do the federal courts. Both *Southard* and *Kanne* held that non-purchasers did not have antitrust standing, but they did not clarify the boundaries of antitrust standing for indirect purchasers, such as the IPPs. Given that both cases discuss and cite favorably *Comes* and *Arthur*, which held that the indirect purchaser plaintiffs in those cases had standing,<sup>41</sup> it is not apparent that the highest courts in Iowa and Nebraska would find that the IPPs lacked standing under AGC. I have found no subsequent decisions from any court in Iowa or Nebraska clarifying the application of the AGC factors to indirect purchaser claims. Accordingly, I cannot conclude that the highest courts in Iowa and Nebraska would apply the AGC factors strictly according to federal precedent.

## ii. California

Relying primarily on a 1995 case from a California intermediate appellate court, Keurig contends that the Cartwright Act, California's antitrust statute, [\*\*119] requires application of the AGC factors. (IPP Def. Mem. Table B (citing

<sup>41</sup> The plaintiff classes in both *Comes* and *Arthur* were consumers who had purchased computers pre-installed with the Windows 98 operating system. *Comes*, 646 N.W.2d at 441-42; *Arthur*, 676 N.W.2d at 31-32. As such, they were indirect purchasers of Windows 98 because they purchased the software indirectly through retailers or distributors rather than directly from Microsoft. Unlike the IPPs here, the plaintiff classes in *Comes* and *Arthur* had a direct relationship with Microsoft because they were end-user licensees of Microsoft as to Windows 98. *Comes*, 646 N.W.2d at 441-42; *Arthur*, 676 N.W.2d at 32. Nevertheless, *Comes* and *Arthur* are sufficiently analogous to the facts here to create doubt as to how the highest courts in Iowa and Nebraska would apply the AGC factors to the IPP Second Amended Complaint.

*Vinci v. Waste Mgmt., Inc.*, 36 Cal. App. 4th 1811, 43 Cal. Rptr. 2d 337 (1995).) The *Vinci* court observed that the Cartwright Act has "similar language" to the Sherman Act. *36 Cal. App. 4th at 1814*. It noted that "[b]ecause the Cartwright Act has objectives identical to the federal antitrust acts, the California courts look to cases construing the federal antitrust laws [\*258] for guidance in interpreting the Cartwright Act." *Id. at 1814 n.1*. While the court recounted the five AGC factors, it did not perform a factor-by-factor analysis in determining whether the complaint adequately alleged antitrust standing. *Id. at 1814-17*.

Although *Vinci* favorably cites AGC, subsequent cases from the Supreme Court of California cast doubt on the applicability of the AGC factors under California law. See *Aryeh v. Canon Bus. Sols., Inc.*, 55 Cal. 4th 1185, 151 Cal. Rptr. 3d 827, 292 P.3d 871, 877 (Cal. 2013) ("Interpretations of federal **antitrust law** are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century."); *In re Cipro Cases I & II*, 61 Cal. 4th 116, 187 Cal. Rptr. 3d 632, 348 P.3d 845, 872 (Cal. 2015) ("The Cartwright Act is broader in range and deeper in reach than the Sherman Act." (internal quotation marks omitted)); see also *Samsung Elecs. Co. v. Panasonic Corp.*, 747 F.3d 1199, 1205 n.4 (9th Cir. 2014) (citing *Aryeh* for the proposition that it "is no [\*120] longer the law in California" that "the interpretation of California's antitrust statute [is] coextensive with the Sherman Act"); cf. *Knevelbaard Dairies*, 232 F.3d at 987 (applying the AGC factors to perform the antitrust standing analysis under the Cartwright Act, but holding that "California law affords standing more liberally than does federal law"). I cannot conclude, therefore, that the Supreme Court of California would apply the AGC factors in accordance with federal precedents, if at all, to determine indirect purchaser antitrust standing under the Cartwright Act.

### iii. District of Columbia

Keurig cites a trial court opinion of the D.C. Superior Court in support of the application of the AGC factors to the IPPs' D.C. antitrust claim. (IPP Def. Mem. Table B. (citing *Peterson v. Visa U.S.A., Inc.*, No. Civ.A. 03-8080, 2005 D.C. Super. LEXIS 17, 2005 WL 1403761 (D.C. Super. Ct. Apr. 22, 2005)). At least one other trial court decision, however, rejected an interpretation of the *D.C. Antitrust Act* that places limitations on indirect purchaser antitrust standing. See *Holder v. Archer Daniels Midland Co.*, No. 96-2975, 1998 D.C. Super. LEXIS 39, 1998 WL 1469620, at \*5 (D.C. Super. Ct. Nov. 4, 1998) (holding that indirect purchasers had antitrust standing under the D.C. Antitrust Act without applying the AGC factors). Notably, in addressing the harmonization provision of the D.C. Antitrust Act—which provides that a court "may use as a guide interpretations given by federal [\*121] courts to comparable antitrust statutes," *D.C. Code Ann. § 28-4515* (West)—the *Holder* court held that "[s]ince the D.C. [Antitrust] Act was passed to distinguish D.C. **antitrust law** from federal law with respect to standing for indirect purchasers, there is no 'comparable' federal antitrust statute in this respect." *1998 D.C. Super. LEXIS 39, 1998 WL 1469620, at \*3 n.4*. Absent a pronouncement from the D.C. Court of Appeals or more trial court decisions definitively pointing in one decisional direction or another, there is no apparent reason to consider *Peterson* as more authoritative than *Holder*, and Keurig has provided none. Keurig has failed to establish that the D.C. Court of Appeals would apply the AGC factors to the IPPs' D.C. antitrust claim.

### iv. Kansas

Keurig cites to no state court cases applying the AGC factors to determine antitrust standing under Kansas law. (IPP Def. Mem. Table B.) Rather, it cites three federal district court cases as support for its position. (*Id.* (citing [\*259] *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 516 F. Supp. 2d 1072, 1094-95 (N.D. Cal. 2007); *Orr v. Beamon*, 77 F. Supp. 2d 1208, 1211 (D. Kan. 1999), aff'd sub nom. *Orr v. BHR, Inc.*, 4 F. App'x 647 (10th Cir. 2001); *In re Refrigerant Compressors Antitrust Litig.*, No. 2:09-md-02042, 2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at \*9-10 (E.D. Mich. Apr. 9, 2013)).)

None of these cases provides a sufficient basis upon which to conclude that Kansas courts would apply the AGC factors. DRAM relies upon two cases to support its application of the AGC factors. [\*122] The first case, *Wrobel v. Avery Dennison Corp.*, No. 05-cv-1296 (Kan. Dist. Ct. Feb. 1, 2006), is an unpublished trial court opinion. The second case, *Orr*—also cited by Keurig—is a federal district court case that applies the AGC factors, reasoning only that it found "no Kansas cases to the contrary" and that federal precedent was "sufficiently persuasive to guide its

decision with regard to standing under Kansas law." *Orr, 77 F. Supp. 2d at 1211-12*. The third case, *In re Refrigerant Compressors*, relies upon *Wrobel*, DRAM, and *Orr* for its conclusion. *2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at \*9*. These cases do not clearly lead to the conclusion that the Kansas Supreme Court would apply the AGC factors in accordance with federal precedents.

The harmonization provision in the *Kansas Restraint of Trade Act* does not alter this conclusion. [HN68](#)<sup>42</sup> *Subsection (b)* states, "Except as otherwise provided in *subsections (d)* and *(e)*, the Kansas restraint of trade act shall be construed in harmony with ruling judicial interpretations of federal *antitrust law* by the United States supreme court." *Kan. Stat. Ann. § 50-163* (West). *Subsection (d)* states, "The Kansas restraint of trade act shall not be construed to prohibit . . . actions or proceedings by indirect purchasers pursuant to [Kan. Stat. Ann. §] 50-161, and amendments thereto . . . ." *Id.* Although it is plausible that [\[\\*\\*123\]](#) the Kansas courts could interpret the harmonization provision to repeal *Illinois Brick* but still require application of the AGC factors in accordance with federal precedent, Keurig has provided no persuasive authority or argument supporting that reading. Therefore, the IPPs' Kansas antitrust claim survives.

#### v. Maine

Keurig cites a state trial court opinion in support of its position to dismiss the IPPs' Maine antitrust claims on antitrust standing grounds. (IPP Def. Mem. Table B (citing *Knowles v. Visa U.S.A., Inc., No. CIV.A. CV-03-707, 2004 Me. Super. LEXIS 227, 2004 WL 2475284 (Me. Super. Ct. Oct. 20, 2004)*.) The *Knowles* court held that "[i]t is probable that the Maine Law Court . . . would look to the *Associated General Contractors* factors in determining standing under Maine's antitrust laws and would apply those factors except to the extent those factors cannot be reconciled with the legislature's adoption of the *Illinois Brick* repealer." *2004 Me. Super. LEXIS 227, 2004 WL 2475284, at \*5*. *Knowles*, therefore, provides a reasonable basis to predict that the highest court in Maine would apply the AGC factors.

However, a complete reading of *Knowles* makes apparent that its application of AGC is not in lockstep with federal precedents. In particular, the *Knowles* court held that "[i]n light of Maine's *Illinois* [\[\\*\\*124\]](#) *Brick* repealer, the next factor—directness or remoteness of the asserted injury—should be disregarded entirely in any inquiry as to standing under Maine's antitrust laws." *Id. at \*6*.<sup>42</sup> Given that the directness factor weighs particularly heavily [\[\\*260\]](#) against the IPPs' antitrust standing under AGC, I am unable to conclude that the highest court in Maine would apply AGC to preclude the IPPs' antitrust standing under Maine law.

#### vi. Michigan and New Mexico

Keurig cites a state trial court decision and a state intermediate appellate court decision to contest antitrust standing with respect to the IPPs' Michigan and New Mexico antitrust claims respectively. (IPP Def. Mem. Table B (citing *Stark v. Visa U.S.A. Inc.*, No. 03-055030-CZ, 2004 Extra LEXIS 214, 2004 WL 1879003 (Mich. Cir. Ct. July 23, 2004); *Nass-Romero v. Visa U.S.A. Inc.*, 2012- NMCA 058, 279 P.3d 772 (N.M. Ct. App. 2012)).) The *Stark* and *Nass-Romero* courts analyzed the relevant statutory language and case law and concluded that the AGC factors should apply to the antitrust standing determination. *Stark*, 2004 Extra LEXIS 214, 2004 WL 1879003, at \*3-4; *Nass-Romero*, [279 P.3d at 780-81](#). The IPPs do not identify any contrary authority in the case law or statutes of Michigan or New Mexico, and in fact concede that "New Mexico appears to use federal precedent as a guide for interpreting its antitrust laws." (IPP Opp. Tables B-C.) As a result, I conclude that the Michigan [\[\\*\\*125\]](#) Supreme Court and the New Mexico Supreme Court would apply the AGC factors. In addition, although the *Stark* court and the *Nass-Romero* court characterized the plaintiffs there as non-purchasers, see *Stark*, 2004 Extra LEXIS 214, 2004 WL 1879003, at \*4; *Nass-Romero*, [279 P.3d at 780](#), there is no authority interpreting Michigan or New Mexico law to suggest that the courts' AGC analyses would be substantially different for indirect purchasers. Because the IPPs lack antitrust standing to assert federal antitrust claims, I conclude they also lack standing to assert antitrust claims under Michigan and New Mexico law.

<sup>42</sup> [HN69](#)<sup>42</sup> Maine's *Illinois Brick* repealer statute, *Me. Rev. Stat. Ann. tit. 10, § 1104(1)*, provides a private antitrust treble damage remedy for any person injured either "directly or indirectly in [his] business or property."

vii. New York

Keurig cites a New York trial court decision applying the AGC factors to determine antitrust standing under the Donnelly Act to support its argument that the IPPs' Donnelly Act claim should be dismissed. (IPP Def. Mem. Table B (citing *Ho v. Visa U.S.A. Inc.*, 3 Misc. 3d 1105[A], 787 N.Y.S.2d 677, 2004 NY Slip Op 50415[U], 2004 WL 1118534 (N.Y. Sup. Ct. 2004), aff'd, 16 A.D.3d 256, 793 N.Y.S.2d 8 (1st Dep't 2005)).) Keurig also notes that "the Donnelly Act—often called a 'Little Sherman Act'—should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or legislative history justify such a result. *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 520 N.E.2d 535, 539, 525 N.Y.S.2d 816 (N.Y. 1988). Although the *Ho* court did not engage in a thorough analysis of whether New York law requires application of the AGC factors, [\*\*126] the First Department upheld the lower court's decision, and the IPPs do not identify any New York case law or statutory authority suggesting the AGC test should not be applied. Therefore, I "see no reason . . . to interpret the Donnelly Act differently than the Sherman Act with regard to antitrust standing," *Gatt*, 711 F.3d at 81, and I conclude that the IPPs fail to plausibly allege antitrust standing under the Donnelly Act.

viii. North Dakota

Keurig cites a North Dakota trial court case that purportedly applies the AGC factors to determine that plaintiffs did not have antitrust standing under North Dakota law. (IPP Def. Mem. Table B (citing *Beckler v. Visa U.S.A., Inc.*, No. 09-04-C-00030, 2004 WL 2115144, at \*3 (N.D. Dist. Ct. Aug. 23, 2004)).) It is not apparent from a reading of *Beckler* that it applies the AGC factors. Rather, it cites AGC in [\*261] passing in addressing an argument put forth by the defendants in that case. *Beckler*, 2004 WL 2115144, at \*3 (citing to AGC in the context of the statement that "Defendants accepts [sic] [North Dakota's repeal of *Illinois Brick*], but argue the plaintiffs are not really 'indirect purchasers' and that despite the narrow rule of *Illinois Brick*, an anti-trust plaintiff must always have some legal 'standing' to bring, their claim"). The court's standing analysis does not apply the AGC factors, and its [\*\*127] conclusion simply states "[a]s 'nonpurchasers' of defendants' debit card services to merchants, the Court believes that plaintiffs lack standing to sue for the alleged restraint of trade in such services. Their alleged injury is simply too remote." *Id.* Because Keurig's only authority from North Dakota is a trial court decision that references AGC in passing but does not actually apply the AGC factors, I cannot conclude that the North Dakota Supreme Court would apply the AGC factors to determine an indirect purchaser's antitrust standing.

ix. Oregon

In support of dismissal of the IPPs' Oregon antitrust claim on antitrust standing grounds, Keurig cites a federal district court case which applies the AGC factors to the plaintiffs' Oregon antitrust claims. (IPP Def. Mem. Table B (citing *Or. Laborers-Empl'r Health & Welfare Tr. Fund v. Philip Morris, Inc.*, 17 F. Supp. 2d 1170 (D. Or. 1998), aff'd, 185 F.3d 957 (9th Cir. 1999)).) However, as that court noted, "[n]either party [in that case] ha[d] suggested that the analysis for the Oregon antitrust claims should differ from that of the federal." *Or. Laborers-Empl'r Health & Welfare Tr. Fund*, 17 F. Supp. 2d at 1176 n.2. The question of which standard to apply to determine antitrust standing, therefore, was not raised by the parties or analyzed by the court. *HN70*[↑] Furthermore, the Oregon antitrust statute states that federal precedents are persuasive, [\*\*128] but not binding. *Or. Rev. Stat. Ann. § 646.715(2)* (West) ("The decisions of federal courts in construction of federal law relating to the same subject shall be persuasive authority in the construction of [Oregon's antitrust statute].") Absent any authority from the Oregon state courts regarding the application of the AGC factors to determine antitrust standing under Oregon law, I cannot conclude that the Oregon Supreme Court would apply AGC.

x. South Dakota

Keurig cites to an oral bench decision from a South Dakota trial court applying the AGC factors to dismiss antitrust claims under South Dakota law. (IPP Def. Mem. Table B (citing Tr. of Mot. Hr'g 54:4-55:1, *Cornelison v. Visa U.S.A., Inc.*, No. Civ. 03-1350 (S.D. Cir. Ct. Sept. 28, 2004)).) Although the decision itself constitutes less than two pages of the transcript, it followed extensive briefing and oral argument regarding the issue of which standard to apply to determine state antitrust standing. See Tr. of Mot. Hr'g 54:4-54:7, *Cornelison*, No. Civ. 03-1350 ("[T]he Court has considered the numerous authorities that you have presented and the briefs you have submitted as well as the at least an hour and a half of oral argument."). *HN71*[↑] The decision is consistent with [\*\*129] the

instruction of the South Dakota Supreme Court that "great weight should be given to the federal cases interpreting the federal [antitrust] statute." *Byre v. City of Chamberlain*, 362 N.W.2d 69, 74 (S.D. 1985). The IPPs have presented no South Dakota authority suggesting the AGC factors should not be applied. As such, I conclude that the South Dakota Supreme Court would apply AGC to determine antitrust standing under South Dakota law.

Although the reasoning of the *Cornelison* court is not extensive, it is apparent [\*262] that the court placed great weight on the risk of duplicative recovery in dismissing plaintiffs' claim. Tr. of Mot. Hr'g 54:13-54:17, *Cornelison*, No. Civ. 03-1350 (holding that "this suit would only threate[n] to duplicate recovery"). Because the same risk exists here, see *supra* Part IV.A.1.c, I conclude that the South Dakota Supreme Court would apply the AGC factors to dismiss the IPPs' South Dakota antitrust claim.

#### xi. Vermont

Keurig relies primarily on a Vermont trial court decision applying the AGC factors to support its argument that the IPPs lack antitrust standing under Vermont's antitrust statute, the *Vermont Consumer Fraud Act ("VCFA")*. (IPP Def. Mem. Table B (citing *Fucile v. Visa U.S.A., Inc., No. S1560-03 CNC, 2004 Vt. Super. LEXIS 42, 2004 WL 3030037, at \*3 (Vt. Super. Ct. Dec. 27, 2004)* [\*\*130].) However, Keurig's argument is belied by an earlier decision by the Vermont Supreme Court holding that [HN72](#)[<sup>1</sup>] "[n]owhere in the [VCFA] is there any requirement that the definition of who may sue under the Act must be consistent with the definition of who may sue under federal *antitrust law*." *Elkins v. Microsoft Corp.*, 174 Vt. 328, 817 A.2d 9, 17 (Vt. 2002). Rather, "[t]he [Vermont] Legislature clearly intended the VCFA to have as broad a reach as possible in order to best protect consumers against unfair trade practices. This intent underlies a private remedy section that allows suits by 'any consumer' with no suggestion of a distinction between direct and indirect purchasers." *Id. at 13*. Because Keurig has provided no controlling authority contradicting *Elkins*, I conclude that the Vermont Supreme Court would not apply the AGC factors.<sup>43</sup>

#### xii. Wisconsin

Keurig cites a Wisconsin trial court decision in support of its argument that the IPPs lack antitrust standing under Wisconsin law. (IPP Def. Mem. Table B (citing *Strang v. Visa U.S.A., Inc.*, No. 03 CV 011323, 2005 WL 1403769 (Wis. Cir. Ct. Feb. 8, 2005)).) Although the *Strang* court provides a reasoned analysis for why it applied the AGC factors, it ignores the opinion of the Wisconsin Court of Appeals—the state's [\*\*131] intermediate appellate court—in *Obstetrical & Gynecological Assocs. of Neenah, S.C. v. Landig*, 129 Wis. 2d 362, 384 N.W.2d 719 (Wis. Ct. App. 1986). See generally *Strang*, 2015 WL 1403769 (failing to cite *Landig* and noting that "[t]he parties agree that [the issue of antitrust standing] is an issue of first impression in Wisconsin"). Three years after the United States Supreme Court's decision in AGC, the *Landig* court held:

[HN73](#)[<sup>1</sup>] There is no need to make the direct-indirect distinction under [the Wisconsin antitrust statute]. Section 133.18(1) . . . explicitly allows any person injured directly or indirectly to sue upon this statute. Similar language is not found in the federal law. This, coupled with the legislature's instruction that we give the most liberal construction to achieve the aim of competition, compels us to the conclusion that an ultimate consumer who pays a higher price for goods and services indirectly due to a secret rebate comes within the ambit of the statute.

[\*263] [384 N.W.2d at 723-24](#). In deciding that the end-consumer plaintiff had standing, the *Landig* court did not consult the AGC factors. Instead, it noted that the state and federal statutes had different wording and refused to draw a distinction between direct and indirect consumers in determining antitrust standing. Because the trial court in *Strang* appears not to have considered the opinion of [\*\*132] the appellate court in *Landig*, I cannot conclude as Keurig urges that the Wisconsin Supreme Court would adopt the analysis in *Strang*.

<sup>43</sup> Even if *Fucile* controlled, it would not support Keurig's position. The *Fucile* court clearly stated "that the Vermont Supreme Court would also draw upon the standing factors in *Associated General Contractors* for guidance, at least to the extent that these factors are consistent with allowing 'indirect purchaser' standing." *Fucile*, 2004 Vt. Super. LEXIS 42, 2004 WL 3030037, at \*3. Applying the AGC factors to dismiss an indirect purchaser suit would be inconsistent with allowing standing to indirect purchasers. Even under *Fucile*, then, Keurig's position is unavailing.

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For the remaining states, Keurig concedes that they have not expressly applied AGC, but contends that they have provisions providing for harmonization in the interpretation of state antitrust law with federal antitrust law.<sup>44</sup> (IPP Def. Mem. Table B.) I address each in turn.

#### xiii. Arizona

**HN74**[<sup>↑</sup>] Arizona's harmonization provision permits, but does not require, interpretation of Arizona antitrust law in accordance with federal precedents. See [Ariz. Rev. Stat. Ann. § 44-1412](#) ("[I]n construing this article, the courts may use as a guide interpretations given by the federal courts to comparable federal antitrust statutes."). In 2003, the Arizona Supreme Court considered the question of antitrust standing, and it did not apply the AGC factors. See [Bunker's Glass Co. v. Pilkington PLC, 206 Ariz. 9, 16-17, 75 P.3d 99 \(2003\)](#) (refusing to apply federal precedents in finding that the Arizona antitrust statute grants standing to indirect purchasers). I conclude, therefore, that the Arizona Supreme Court would not apply the AGC factors.

#### xiv. Mississippi

Keurig cites a Mississippi Supreme Court case in support of its argument that the IPPs' Mississippi antitrust claim should be [\*\*133] dismissed on antitrust standing grounds. (IPP Def. Mem. Table B (citing [Owens Corning v. R.J. Reynolds Tobacco Co., 868 So. 2d 331 \(Miss. 2004\)](#).) Owens Corning assesses antitrust standing—specifically, whether plaintiff alleged antitrust injury—but does not review each of the AGC factors. See [868 So. 2d at 339-40](#). The fact that the court cites federal precedent to interpret "antitrust injury" does not mean that it would necessarily apply the AGC factors.

#### xv. New Hampshire

**HN75**[<sup>↑</sup>] Like Arizona, New Hampshire also has a permissive harmonization provision, [N.H. Rev. Stat. Ann. § 356:14](#) ("In any action or prosecution under this chapter, the courts may be guided by interpretations of the United States' antitrust laws."); however, the New Hampshire Supreme Court expressly adopted the *Illinois Brick* rule against indirect purchaser suits in [Minuteman, LLC v. Microsoft Corp., 147 N.H. 634, 795 A.2d 833, 838 \(N.H. 2002\)](#) (holding that "it is sound to limit antitrust lawsuits to direct purchasers" and that "the trial court did not err in following the *Illinois Brick* rule when interpreting [the New Hampshire antitrust statute]"). The IPPs cite [LaChance v. U.S. Smokeless Tobacco Co., 156 N.H. 88, 931 A.2d 571 \(N.H. 2007\)](#), to support their position that the New Hampshire Supreme Court would not apply the AGC factors. (IPP Opp. Table B.) However, the question before the *LaChance* court was "whether consumers, as indirect purchasers, may bring a cause of action under the [New Hampshire [\*\*134] Consumer Protection Act]." [Id. at 575](#). The court acknowledged that the question of whether indirect purchasers had standing to bring claims under the state's antitrust statute was decided in [\*264] *Minuteman*. [Id. at 576](#) ("We have, however, held that HN76[<sup>↑</sup>] indirect purchasers may not bring claims under the state antitrust statute." (citing [Minuteman, 147 N.H. 634, 795 A.2d 833](#))). Because the IPPs bring their claim pursuant to the state antitrust statute, (IPP SAC ¶ 384 ("By reason of the conduct alleged herein, Keurig has violated [New Hampshire Rev. Stat. §§ 356:1, et seq.](#)"), they lack antitrust standing under the New Hampshire Supreme Court's holding in *Minuteman*.

#### xvi. Nevada

Keurig cites the harmonization provision of Nevada as a basis on which to dismiss the IPPs' Nevada antitrust claim. (IPP Def. Mem. Table B (citing [Nev. Rev. Stat. Ann. § 598A.050](#)).) **HN77**[<sup>↑</sup>] The harmonization provision states "[t]he provisions of this chapter shall be construed in harmony with prevailing judicial interpretations of the federal antitrust statutes." [Nev. Rev. Stat. Ann. § 598A.050](#). The IPPs do not identify any Nevada authority supporting their position on standing. Given the mandatory language of Nevada's harmonization provision and the lack of any contravening state authority, I conclude that the Supreme Court of Nevada would apply the AGC factors in accordance with federal precedent. [\*\*135] The IPPs, therefore, lack antitrust standing under Nevada law.

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<sup>44</sup> The states are Arizona, Mississippi, Nevada, New Hampshire, and West Virginia.

## xvii. West Virginia

**HN78**[<sup>45</sup>] West Virginia's harmonization provision states that "[t]his article shall be construed liberally and in harmony with ruling judicial interpretations of comparable federal antitrust statutes." [W. Va. Code Ann. § 47-18-16](#) (West). In 1990, the West Virginia Attorney General issued a legislative rule providing that "[a]ny person who is injured directly or indirectly by reason of a violation of the West Virginia Antitrust Act may bring an action for damages." W. Va. Code R. § 142-9-2 (internal citations omitted). The legislative rule further provides that "[t]he purpose of this rule is to allow persons who are indirectly injured by violations of the West Virginia Antitrust Act to maintain an action for damages." *Id.* § 142-9-1. It requires that "[t]his rule shall be liberally construed to effectuate the beneficial purposes of the [West Virginia Antitrust Act](#)." *Id.*

**HN79**[<sup>46</sup>] The Supreme Court of Appeals of West Virginia has held that "[o]nce a disputed regulation is legislatively approved, it has the force of a statute itself. Being an act of the West Virginia Legislature, it is entitled to more than mere deference; it is entitled to controlling weight." [W. Va. Health Care Cost Review Auth. v. Boone Mem'l Hosp., 196 W. Va. 326, 472 S.E.2d 411, 414 \(W. Va. 1996\)](#). West Virginia's [\*\*136] legislative rule permitting indirect purchaser antitrust suits, therefore, carries the force of a statute. Despite the mandatory language used in West Virginia's harmonization provision, the subsequent controlling legislative rule, liberally construed, suggests that the Supreme Court of Appeals of West Virginia would not apply AGC, or if it did, it would apply AGC more liberally than federal precedent would require.

\*\*\*\*

To summarize, the IPPs lack antitrust standing with respect to their claims under the antitrust laws of Michigan, New Mexico, New York, South Dakota, New Hampshire, and Nevada. Keurig's motion to dismiss those claims is granted. For the remaining sixteen states, Keurig's standing-based argument fails because I cannot find that the states' highest courts would apply the AGC factors.<sup>45</sup> I therefore address [\*265] Keurig's substantive challenges below.

### b. Substantive Challenges to State Antitrust Claims

Of the claims from the remaining sixteen states, Keurig contends that the courts in Arizona, Iowa, Maine, Minnesota, Nebraska, North Carolina, North Dakota, Oregon, Vermont, and West Virginia interpret their state antitrust laws "in parallel with" federal antitrust laws. (IPP Def. [\*\*137] Mem. 25.) The allegations in the IPP Second Amended Complaint overlap in relevant part with the allegations in the complaints of TreeHouse, Rogers, and the DPPs. Because Keurig's motion to dismiss the federal antitrust claims in those complaints is denied, see *supra* Part IV.A-B, I conclude that Keurig's motion to dismiss the state antitrust claims in the IPP Second Amended Complaint under the laws of Arizona, Iowa, Maine, Minnesota, Nebraska, North Carolina, North Dakota, Oregon, Vermont, and West Virginia should also be denied.

Keurig contends the antitrust laws of certain states contain additional or narrower requirements than the federal antitrust laws, requiring dismissal of the IPPs' claims under the laws of those states. (IPP Def. Mem. 25.) Keurig argues that the IPPs' antitrust claims under the laws of California, Kansas, and Tennessee should be dismissed because those laws do not permit claims based on a defendant's unilateral conduct. (*Id.* 25 n.32, Table D.) The IPP Second Amended Complaint, however, adequately alleges concerted conduct in those states. (See, e.g., IPP SAC ¶ 316 (California: "Keurig has entered into contracts, in concerted action with others, where the effect of such [\*\*138] contract was to substantially lessen competition or tended to create a monopoly in a line of trade or commerce in California . . . ."); ¶ 340 (Kansas: "Keurig entered into a trust, a combination of capital, skill, or acts, by two or more persons, for the following purposes . . . ."); ¶ 431 (Tennessee: "Keurig has entered into arrangements, contracts, agreements, trusts, or combinations with persons or corporations . . . .").)

<sup>45</sup> Keurig did not include Minnesota, North Carolina, or Tennessee in Table B, which identified the states in which the AGC factors should be applied. I construe this omission as a concession that the IPPs have antitrust standing under the laws of Minnesota, North Carolina, and Tennessee.

Keurig further argues that the IPPs' antitrust claims under the laws of the District of Columbia, Tennessee, and Wisconsin all fail because the law in each of these states requires a specific nexus between defendant's conduct and intrastate commerce within those states. (IPP Def. Mem. 26.) Keurig contends that the IPPs have failed to plead allegations that establish a "substantial effect on intrastate commerce." (*Id.*).

**HN80** [+] The courts of Tennessee and Wisconsin apply a "substantial effects" standard requiring that plaintiffs allege that a defendant's anticompetitive conduct had a "substantial effect" on intrastate commerce. See *Meyers v. Bayer AG, 2007 WI 99, 303 Wis. 2d 295, 735 N.W.2d 448, 461 (Wis. 2007)* ("[A] complaint under the Wisconsin Antitrust Act . . . is sufficient if it alleges [anticompetitive conduct] that substantially affected the [\*\*139] people of Wisconsin and had impacts in [Wisconsin]."); *Freeman Indus., LLC v. Eastman Chem. Co., 172 S.W.3d 512, 522 (Tenn. 2005)* ("[C]ourts must decide whether the alleged anticompetitive conduct affects Tennessee trade or commerce to a substantial degree."). The analysis "does not involve mathematical nicety. Rather, the test is pragmatic, turning on the particular facts of the case." *Freeman Indus., 172 S.W.3d at 523* (internal citation and quotation marks omitted).

[\*266] The IPPs have alleged that Keurig's anticompetitive conduct had substantial effects on intrastate commerce in Tennessee and Wisconsin. Based on Keurig's internal documents for 2008, Keurig shipped at least forty-five brewers to a distributor in Tennessee and at least eighteen brewers to a distributor in Wisconsin over the span of less than a year. (IPP SAC ¶¶ 432, 445.) The same documents, the IPPs allege, list over 90 distributors of Keurig brewers in the Midwest region, which includes Wisconsin, and over seventy distributors of Keurig brewers in the Southeast region, which includes Tennessee. (*Id.*) Over a period shorter than one year, Keurig shipped more than 6,600 brewers to these distributors collectively. (*Id.*) The IPPs also allege that numerous retail outlets sell K-Cups to consumers in both Tennessee and Wisconsin. ([\*\*140] *Id.*) These allegations raise a sufficient inference that Keurig's allegedly anticompetitive conduct substantially affected intrastate commerce in Tennessee and Wisconsin over the span of the multi-year conspiracy alleged by the IPPs.

Keurig cites a federal decision of the District of Maryland to support its argument that the IPPs have failed to plead a "substantial effect on intrastate commerce" in the District of Columbia. (IPP Def. Mem. Table E (citing *Sun Dun, Inc. of Wash. v. Coca-Cola Co., 740 F. Supp. 381, 396 (D. Md. 1990)*)) *Sun Dun*, however, does not provide for a "substantial effects" standard, and Keurig has pointed to no relevant authority that does. Rather, the court in *Sun Dun* evaluated whether the plaintiff alleged a "sufficient nexus to the District of Columbia." *740 F. Supp. at 396*. It held that the D.C. **antitrust law** applied because the plaintiff "asserted that it did much of its business in the District of Columbia, and thus it was possible that plaintiff had suffered harm there." *Id.*

The IPPs have alleged a sufficient nexus to the District of Columbia. The IPPs allege that based on internal Keurig documents, thousands of brewers were shipped to the Mid-Atlantic region, which includes the District of Columbia, (IPP SAC ¶ 329), and many retailers sell KCups [\*\*141] to people in the District of Columbia, (*id.*) These allegations are sufficient to establish a nexus between Keurig's anticompetitive conduct and the District of Columbia.

**HN81** [+] Unlike Tennessee, Wisconsin, and the District of Columbia, the **antitrust law** of Mississippi focuses on the location where the anticompetitive conduct occurred rather than the effects of such anticompetitive conduct or the broader nexus between the conduct and the state in question. See *In re Microsoft Corp. Antitrust Litig., No. MDL 1332, 2003 U.S. Dist. LEXIS 15612, 2003 WL 22070561, at \*2 (D. Md. Aug. 22, 2003)* (interpreting a Mississippi Supreme Court case, *Standard Oil Co. of Ky. v. State ex rel. Attorney Gen., 107 Miss. 377, 65 So. 468 (Miss. 1914)*, to hold that Mississippi law requires that "plaintiffs . . . allege[] at least some conduct by [defendant] which was performed wholly intrastate"). Both Keurig and the IPPs appear to agree with this interpretation of Mississippi law, (IPP Opp. Table E), as do I.

The IPPs contend that the IPP Second Amended Complaint "contains allegations of Keurig's significant activity in Mississippi." (*Id.*) However, the IPPs have failed to allege any intrastate conduct in Mississippi on the part of Keurig. The sole allegations in the IPP Second Amended Complaint with respect to any of Keurig's activity in Mississippi describe that Keurig has distributors across the Southeast region, including in Mississippi, [\*\*142] to which Keurig distributed numerous brewers, and that numerous retail outlets sell K-Cups in Mississippi. (IPP SAC ¶ 367.) These

allegations suggest interstate activity on the [\*267] part of Keurig that might involve Mississippi as part of the Southeast region, not intrastate. The IPPs do not allege that Keurig itself manufactured or distributed any brewers or K-Cups from locations in Mississippi. Nor do the IPPs allege that they bought any brewers or K-Cups directly from Keurig in Mississippi. Moreover, any conspiracy alleged by IPPs is of an interstate nature:

The scheme alleged [in the IPP Second Amended Complaint] was formulated in and emanated from Vermont. Keurig, from its headquarters at 33 Coffee Lane in Waterbury, Vermont (where its principal executive offices, manufacturing, and distribution facilities are located), formulated, conceived of, and reached unlawful and anticompetitive agreements with its Roaster Competitors, Distributors, and Retailers that were intended to and did harm competition and consumers in every state and territory of the United States.

(*Id.* ¶ 109.) Because Mississippi law requires "at least some conduct" by Keurig that was performed wholly intrastate, *In re Microsoft Corp.*, 2003 U.S. Dist. LEXIS 15612, 2003 WL 22070561, at \*2, I [\*\*143] find that the IPPs have failed to state an antitrust claim under Mississippi law.

\*\*\*\*

To summarize, Keurig's motion to dismiss the IPPs' ninth cause of action is granted with respect to claims brought under the laws of Michigan, Mississippi, Nevada, New Hampshire, New Mexico, New York, and South Dakota. Keurig's motion to dismiss the IPPs' first cause of action is denied, and its motion to dismiss the ninth cause of action is denied with respect to claims brought under the laws of Arizona, California, the District of Columbia, Iowa, Kansas, Maine, Minnesota, Nebraska, North Carolina, North Dakota, Oregon, Tennessee, West Virginia, and Wisconsin.

## 5. IPPs' California Unfair Competition Law Claim

Keurig also moves to dismiss the IPPs' ninth cause of action as it relates to their claim under the California Unfair Competition Law. (IPP Def. Mem. 25-26.) Keurig argues that dismissal is required because the claim is based on the same conduct as the IPPs' antitrust claim, which it argues should be dismissed. (*Id.* (citing *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375, 113 Cal. Rptr. 2d 175 (2001)) (holding that "the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not 'unfair' toward consumers" under the [\*\*144] California Unfair Competition Law).) Because I have concluded that the IPPs have adequately pleaded that Keurig's conduct was an unfair restraint of trade, I also conclude that they have adequately pleaded that it was unfair under the California Unfair Competition Law. Keurig offers no other basis on which to dismiss the claim. As such, the IPPs' California Unfair Competition Law claim survives Keurig's motion to dismiss.

## 6. IPPs' State Consumer Protection Law Claims

Keurig seeks dismissal of the IPPs' tenth cause of action, (IPP Def. Mem. 27), brought under the consumer protection and unfair trade practices laws of six states: Arkansas, California, Massachusetts, Nebraska, New Mexico, and North Carolina, (IPP SAC ¶¶ 448-80). Keurig argues that because the IPPs have failed to allege conduct that violates the antitrust laws, they fail to state a claim under each state's consumer protection laws. (IPP Def. Mem. 27.) The IPPs contend that the state consumer protection laws are intended to be broadly construed [\*268] to protect consumers and not to be limited by antitrust concepts. (IPP Opp. 15.)

Keurig does not explicitly state whether it takes the position that each state's consumer protection [\*\*145] laws track, or should be interpreted to track, the antitrust laws of that state or the federal antitrust laws. (See IPP Def. Mem. 27.) Regardless, as discussed above, the IPPs' Second Amended Complaint is substantially similar to the complaints of TreeHouse, Rogers, and the DPPs, and so they have adequately alleged the substantive elements of

an antitrust claim under both federal and state laws. See *supra* Part IV.A-B.<sup>46</sup> Therefore, the IPPs' tenth cause of action under the laws of Arkansas, California, Massachusetts, Nebraska, New Mexico, and North Carolina survives.

## 7. IPPs' State Unjust Enrichment Claims

Keurig seeks dismissal of the IPPs' third and eleventh causes of action, (IPP Def. Mem. 27-28), brought under the unjust enrichment laws of eighteen states,<sup>47</sup> (IPP SAC ¶¶ 245-50, 481-516). [HN83](#)<sup>↑</sup> The elements required to plead an unjust enrichment claim are generally the same under the laws of each of the relevant states. A claim for unjust enrichment requires 1) a benefit conferred upon defendant; 2) appreciation or knowledge of the benefit by defendant; and 3) acceptance of the benefit by the defendant under circumstances that make such [\\*\\*146](#) acceptance inequitable. See, e.g., [\*Haz-Mat Response, Inc. v. Certified Waste Servs. Ltd.\*, 259 Kan. 166, 910 P.2d 839, 847 \(Kan. 1996\)](#); [\*Topaz Mut. Co. v. Marsh\*, 108 Nev. 845, 839 P.2d 606, 613 \(Nev. 1992\)](#); [\*Seegers v. Sprague\*, 70 Wis. 2d 997, 236 N.W.2d 227, 230 \(Wis. 1975\)](#).

For each state under the laws of which the IPPs bring an unjust enrichment claim, the IPPs have sufficiently alleged the elements of an unjust enrichment claim. The IPPs allege that through their [\[\\*269\]](#) overpayments, they conferred a benefit upon Keurig, which Keurig knowingly accepted under circumstances that made such acceptance inequitable, namely that Keurig obtained the overpayments through unlawful and anticompetitive acts. (See, e.g., IPP SAC ¶ 483.) Keurig argues that the IPPs' unjust enrichment claims fail because the IPPs have failed to allege an antitrust claim. (IPP Def. Mem. 27-28.) As discussed, the IPPs have adequately pled antitrust claims under both state and federal laws. Therefore, their unjust enrichment claims do not fail on that basis.

Even if the IPPs had not alleged a viable antitrust claim, the sole authority on which Keurig relies for the proposition that an unjust enrichment claim hinges on a successful antitrust claim is a New York federal district court case interpreting New York law. (*Id.* at 28 (citing [\*Kramer v. Pollock-Krasner Found.\*, 890 F. Supp. 250, 257 \(S.D.N.Y. 1995\)](#))). At least one subsequent New York federal district court has interpreted New York law to permit a standalone unjust enrichment [\\*\\*147](#) claim. [\*Sergeants Benevolent Ass'n Health & Welfare Fund v. Sanofi-Aventis U.S. LLP\*, No. 08-CV-0179 \(SLT\)\(RER\)](#), 2012 U.S. Dist. LEXIS 138790, 2012 WL 4336218, at \*8 (E.D.N.Y. Sept. 17, 2012), report and recommendation adopted in part, [\*20 F. Supp. 3d 305 \(E.D.N.Y. 2014\)\*](#), aff'd, [\*806 F.3d 71 \(2d Cir. 2015\)\*](#). Keurig has provided no authority under the laws of any other state supporting its position that the IPPs' unjust enrichment claims cannot survive without a viable antitrust claim. Therefore, even if the IPPs failed to allege an antitrust claim, their unjust enrichment claims would survive.

<sup>46</sup> Neither party has adequately addressed whether each state's consumer protection laws incorporate the principles of antitrust standing under either federal or state **antitrust law**. In a footnote, without citation, the IPPs assert that "[e]ach of [the six state laws under which they bring consumer protection claims] allows indirect purchasers to bring antitrust claims under their consumer protection laws." (IPP Opp. 15 n.17.) Keurig does not directly address this issue. Instead, Keurig cites to several cases to support the proposition that "[w]here conduct is alleged to harm consumers *through its impact on competition*, the conclusion that it does not violate the antitrust laws means that it does not harm consumers." (IPP Def. Mem. 27 (emphasis in original).) The IPPs in turn cite to several cases for the proposition that "the laws of each of these six states are intended to be broadly construed to protect consumers and not to be limited by the reach of traditional antitrust concepts." (IPP Opp. 15.) Only one of the cases cited by either party sheds light on whether any of the relevant states' consumer protection laws incorporate principles of antitrust standing. See [\*Meijer, Inc. v. Abbott Labs.\*, 544 F. Supp. 2d 995, 1008 \(N.D. Cal. 2008\)](#). [HN82](#)<sup>↑</sup> According to the California federal court in *Meijer*, in order to state a claim under the [\*North Carolina Unfair Trade Practices Act \("NCUTPA"\)\*](#) a plaintiff must allege: "(1) an unfair or deceptive act or practice, or unfair method of competition, (2) in or affecting commerce, and (3) which proximately caused actual injury to the plaintiff or his business." *Id.* (quoting [\*Miller v. Nationwide Mut. Ins. Co.\*, 112 N.C. App. 295, 435 S.E.2d 537, 542 \(N.C. Ct. App. 1993\)](#)). The *Meijer* court applied a proximate cause standard to the plaintiff's NCUTPA claim. *Id.* (holding that the NCUTPA is a "comprehensive law designed to include within its reach the federal antitrust laws" (quoting [\*L.C. Williams Oil Co., Inc. v. Exxon Corp.\*, 625 F. Supp. 477, 481 \(M.D.N.C. 1985\)](#))).

<sup>47</sup> The states are Arizona, Arkansas, the District of Columbia, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Mexico, New York, Oregon, South Dakota, Vermont, and Wisconsin.

Keurig next argues that the IPPs' unjust enrichment claims should fail under the laws of Arizona, the District of Columbia, Kansas, Maine, Massachusetts, Michigan, Minnesota, Nevada, New York, and Wisconsin because those states require a direct relationship between the allegedly enriched and injured parties. (IPP Def. Mem. 28.) I address that claim with regard to each state in turn.

a. Arizona

Keurig cites [City of Sierra Vista v. Cochise Enterprises, Inc., 144 Ariz. 375, 697 P.2d 1125, 1131 \(Ariz. Ct. App. 1984\)](#), for the proposition that Arizona law requires a direct relationship between Keurig and the IPPs. [HN84](#)<sup>↑</sup> That case is unavailing, as it simply states that a plaintiff must establish "a connection between the enrichment and the impoverishment." [697 P.2d at 1131](#). The case does not include a direct relationship between a plaintiff and defendant among the elements for [\\*\\*148](#) an unjust enrichment claim. See [id. at 1131-32](#). Moreover, other courts have noted that "Arizona law does not require either a direct causal connection between the enrichment and the impoverishment, or the transference of a direct enrichment from the plaintiff to the defendant." [Doe v. Ariz. Hosp. & Healthcare Ass'n, No. CV 07-1292-PHX-SRB, 2009 U.S. Dist. LEXIS 42871, 2009 WL 1423378, at \\*13 \(D. Ariz. Mar. 19, 2009\)](#) (internal quotation marks omitted). Therefore, the IPPs have alleged a sufficient connection to preserve their claim. (IPP SAC ¶ 483.)

b. District of Columbia

[HN85](#)<sup>↑</sup> Keurig's lone authority in support of dismissal of the IPPs' D.C. unjust enrichment claim on the basis of a lack of a direct relationship is [Fort Lincoln Civic Ass'n v. Fort Lincoln New Town Corp., 944 A.2d 1055, 1076 \(D.C. 2008\)](#). *Fort Lincoln* holds that an unjust enrichment claim requires only that a plaintiff confers a benefit on a defendant, the defendant retains the benefit, and that retention was unjust. *Id.* This is nothing more than a recitation of certain of the elements of an unjust enrichment claim. It does not provide for a direct benefit requirement. See [\[\\*270\] In re Auto. Parts Antitrust Litig., 50 F. Supp. 3d 869, 898 \(E.D. Mich. 2014\)](#) (rejecting that *Fort Lincoln* precludes indirect purchaser unjust enrichment claim under D.C. law). Therefore, the IPPs have sufficiently pled their unjust enrichment claim under D.C. law. (IPP SAC ¶ 487.)

c. Kansas

Keurig cites two cases in [\\*\\*149](#) support of its argument that the IPPs' Kansas unjust enrichment claim should be dismissed for failure to allege a direct benefit. (IPP Def Mem. Table G (citing [Babcock v. Carrothers Constr. Co., No. 94,471, 2005 Kan. App. Unpub. LEXIS 874, 2005 WL 3527117, at \\*2-3 \(Kan. Ct. App. Dec. 23, 2005\); Spires v. Hosp. Corp. of Am., 289 F. App'x 269, 273-73 \(10th Cir. 2008\)](#)).) The citation to each case is misplaced as neither supports the proposition for which it is cited. [HN86](#)<sup>↑</sup> *Babcock*, an unpublished decision, does not stand for the proposition that an unjust enrichment claim requires a direct benefit. Rather, it holds that a sub-subcontractor may not bring an unjust enrichment claim against a contractor without privity of contract except in certain circumstances. [Babcock, 2005 Kan. App. Unpub. LEXIS 874, 2005 WL 3527117, at \\*2-3](#). Importantly, it relies upon a decision by the Kansas Supreme Court explicitly acknowledging that a direct relationship is not necessary to establish an unjust enrichment claim. See [Haz-Mat Response, 910 P.2d at 847](#) ("[T]he theory of quasicontract and unjust enrichment . . . does not depend on privity."). Similarly, *Spires* is inapposite because its holding relies on the court's conclusion that plaintiffs did not allege that they "had actually conferred a benefit" on the defendant. [Spires, 289 F. App'x at 273. HN87](#)<sup>↑</sup> Finally, other courts interpreting Kansas law have held that failure to plead a direct benefit is not grounds for dismissal of a Kansas unjust enrichment claim. See, e.g., [In re Processed Egg Prods. Antitrust Litig., 851 F. Supp. 2d 867, 929-30 \(E.D. Pa. 2012\)](#) (finding that "Kansas [\\*\\*150](#) law does not mandate the conferral of a direct benefit under an unjust enrichment" (citing [Peterson v. Midland Nat'l Bank, 242 Kan. 266, 747 P.2d 159, 166-67 \(Kan. 1987\)](#))). The IPPs have therefore adequately alleged an unjust enrichment claim under Kansas law. (IPP SAC ¶ 491.)

d. Maine

Keurig relies primarily on two cases, one from the Maine Supreme Court and the other issued by the Maine Superior Court (the trial court in Maine), to argue that Maine requires a direct benefit to support an unjust enrichment claim. (IPP Def. Mem. Table G (citing [Platz Assocs. v. Finley, 2009 ME 55, 973 A.2d 743, 751 \(Me.](#)

2009); Rivers v. Amato, No. CIV. A. CV-00-131, 2001 Me. Super. LEXIS 296, 2001 WL 1736498, at \*4 (Me. Super. Ct. June 22, 2001).) Platz is inapposite because the court's ruling relied upon the lack of any evidence on summary judgment that the defendant had actually received any benefit. Platz, 973 A.2d at 751 ("Indeed, the statements of material facts fail to demonstrate that [defendant] actually received and retained the architectural plans, and thus fail to demonstrate the central element of unjust enrichment, a benefit conferred.").

Rivers, a trial court decision, could be read as being more supportive of Keurig's argument, but I conclude that it does not require dismissal of the IPPs' Maine unjust enrichment claim. In Rivers, the plaintiff had contracted to purchase a parcel of land from the defendants. 2001 Me. Super. LEXIS 296, 2001 WL 1736498, at \*1. After the plaintiff [\*\*151] consulted with a third-party developer, the developer offered to purchase the parcel from the defendants for a higher price than the plaintiff had offered. *Id.* The defendants took the developer's offer, repudiating their contract with the plaintiff. *Id.* The plaintiff brought an unjust enrichment [\*271] claim, arguing that by informing the developer of the parcel of land, he had generated the interest that led to the defendants receiving a higher price to the plaintiff's detriment. *Id. at \*4*. The court found that the plaintiff's "indirect benefit theory" was "based on speculation" and thus unpersuasive. *Id.* While the IPPs here allege an indirect theory of benefit based upon the alleged passing on of overcharges through multiple layers of the distribution channel, I find that the indirect nature of the plaintiff's claim in Rivers is different in kind from the IPPs' claim. Based on the trial court's decision in Rivers, I cannot conclude that Maine's highest court would dismiss the IPPs' unjust enrichment claim based on its indirect nature; therefore, the claim survives.

#### e. Massachusetts

Keurig cites to two cases in support of its argument that the IPPs' Massachusetts unjust enrichment claim fails for failure [\*\*152] to allege a direct benefit. (IPP Def. Mem. Table G (citing Sweeney v. DeLuca, No. 042338, 2006 Mass. Super. LEXIS 147, 2006 WL 936688, at \*8 (Mass. Super. Ct. Mar. 16, 2006); Berry v. Greenery Rehab. & Skilled Nursing Ctr., No. CA923189, 1993 Mass. Super. LEXIS 57, 1993 WL 818564, at \*3 (Mass. Super. Ct. Oct. 29, 1993).) Neither case supports Keurig's position, as both decisions dismiss the unjust enrichment claims due to the failure to establish any benefit conferred whatsoever. See Sweeney, 2006 Mass. Super. LEXIS 147, 2006 Mass. Super. LEXIS 147, 2006 WL 936688, at \*8 ("The [plaintiffs] have not submitted any evidence indicating that [defendant] stood to benefit individually from the sale of the Woods Road Home."); Berry, 1993 Mass. Super. LEXIS 57, 1993 WL 818564, at \*3 (holding that plaintiff was "unlikely to be able to prove a necessary element of her unjust enrichment claim, namely, an uncompensated benefit conferred on [defendant]"). The IPPs have alleged that Keurig actually benefited from the profits resulting from overpayments by the IPPs, (IPP SAC ¶ 495), and therefore, their Massachusetts claim survives.

#### f. Michigan

Keurig cites to an unpublished decision of the Michigan Court of Appeals—Michigan's intermediate appellate court—to support its argument that the IPPs' Michigan unjust enrichment claim must be dismissed. (IPP Def. Mem. Table G (citing A&M Supply Co. v. Microsoft Corp., No. 274164, 2008 Mich. App. LEXIS 433, 2008 WL 540883, at \*2 (Mich. Ct. App. Feb. 28, 2008).) The court in A&M Supply Co. held that a class of indirect purchaser plaintiffs could not maintain a claim for unjust enrichment under Michigan law because "there [\*\*153] was no direct receipt of any benefit by defendant here from the persons seeking class certification." 2008 Mich. App. LEXIS 433, 2008 WL 540883, at \*2. The court reasoned that plaintiffs could point to no direct contact between the defendant and the class, nor could they show any direct payments between the two. *Id.* The IPPs have presented no countervailing authority from the Michigan courts. Rather, they have pointed out that A&M Supply Co. is an unpublished decision. (IPP Opp. Table G.) Although the decision is unpublished and not binding precedent, I conclude that the opinion is a strong predictor of how the Michigan Supreme Court would rule on the analogous facts presented here. Therefore, the IPPs have failed to allege an unjust enrichment claim under Michigan law.

#### g. Minnesota

Keurig cites to Schumacher v. Schumacher, 627 N.W.2d 725, 729 (Minn. Ct. App. 2001), to support its argument that the IPPs' Minnesota unjust enrichment claim fails. (IPP Def. Mem. Table G.) However, Shumacher is

inapposite because it does not state that a benefit conferred must be direct. As such, the IPPs have [\*272] adequately alleged a Minnesota unjust enrichment claim.

h. Nevada

Keurig's citations in support of its argument that the IPPs' Nevada unjust enrichment claim fails are similarly unpersuasive because neither requires [\*\*154] a direct benefit. See *Topaz Mut. Co., 839 P.2d at 613* (acknowledging that jury's consideration of indirect benefits may increase amount owed to plaintiff on its unjust enrichment claim); *Jack v. Ringleader Boxing Mgmt. Co., No. 2:14-CV-00318-JAD-PAL, 2014 U.S. Dist. LEXIS 161628, 2014 WL 6388845, at \*2 (D. Nev. Nov. 14, 2014)* (requiring "a benefit conferred on the defendant by the plaintiff," without stating that the benefit must be direct). The IPPs' Nevada unjust enrichment claim therefore survives.

i. New York

Keurig relies on two federal court decisions from this district for its argument that the IPPs' New York unjust enrichment claims should be dismissed for failure to allege a direct relationship. (IPP Def. Mem. Table G (citing *Carmona v. Spanish Broad. Sys., Inc., No. 08 Civ. 4475(LAK), 2009 U.S. Dist. LEXIS 26479, 2009 WL 890054, at \*6 (S.D.N.Y. Mar. 30, 2009); Redtail Leasing Inc. v. Bellezza, No. 95 Civ. 5191(JFK), 1997 U.S. Dist. LEXIS 14821, 1997 WL 603496, at \*8 (S.D.N.Y. Sept. 30, 1997))*. Both cases require plaintiffs to allege "direct dealings or an actual, substantive relationship" with defendants. *Carmona, 2009 U.S. Dist. LEXIS 26479, 2009 WL 890054, at \*6* (internal quotation marks omitted); *Redtail Leasing, 1997 U.S. Dist. LEXIS 14821, 1997 WL 603496, at \*8*. *Carmona*, in turn, relies upon a New York Court of Appeals case that affirmed the dismissal of an indirect purchaser plaintiff class's unjust enrichment claim because "the connection between [the indirect purchaser plaintiffs and the defendant] is simply too attenuated to support such a claim." *Sperry v. Crompton Corp., 8 N.Y.3d 204, 863 N.E.2d 1012, 1018, 831 N.Y.S.2d 760 (N.Y. 2007)*. Given the direct authority from the highest court in New York on this issue, I conclude that the IPPs' alleged relationship [\*\*155] with Keurig is similarly too attenuated to support a claim of unjust enrichment under New York law.

The IPPs' citation to *Cox v. Microsoft Corp., 8 A.D.3d 39, 40, 778 N.Y.S.2d 147 (1st Dep't 2004)*, does not alter this conclusion and does not negate the subsequent decision in *Sperry* from the Court of Appeals. In addition, the First Department—the intermediate appellate court in New York—in the *Sperry* litigation explicitly declined to follow *Cox*, and that decision not to follow *Cox* was affirmed by the Court of Appeals. See *Sperry v. Crompton Corp., 26 A.D.3d 488, 489, 810 N.Y.S.2d 498 (2d Dep't 2006)* ("We decline to follow the decision of the Appellate Division, First Department in *Cox* . . . ."), aff'd, *8 N.Y.3d 204, 863 N.E.2d 1012, 831 N.Y.S.2d 760*.

j. Wisconsin

Keurig cites to a Wisconsin Supreme Court case in support of its argument that the IPPs cannot maintain an unjust enrichment claim under Wisconsin law. (IPP Def. Mem. Table G (citing *Seegers, 236 N.W.2d at 231*).) *Seegers* does not stand for the proposition that a plaintiff must confer a direct benefit on a defendant in order to bring an unjust enrichment claim. The court in *Seegers* concluded that the plaintiffs could not recover because the alleged conduct "ha[d] not left [defendant] enriched." *236 N.W.2d at 231*. Here, the IPPs have alleged that Keurig has been enriched by the IPPs' alleged overpayments. (IPP SAC ¶ 515.) Therefore, the IPPs' Wisconsin unjust enrichment [\*\*156] claim stands.

\*\*\*\*

In summary, Keurig's motion to dismiss the IPPs' unjust enrichment claims under the laws of Michigan and New York is [\*273] granted. Keurig's motion to dismiss the IPPs' unjust enrichment claims under the laws of Arizona, Arkansas, the District of Columbia, Iowa, Kansas, Maine, Massachusetts, Minnesota, Mississippi, Nevada, New Hampshire, New Mexico, Oregon, South Dakota, Vermont, and Wisconsin is denied.

## 8. Nationwide Application of Vermont Law

The IPPs bring their Vermont antitrust and unjust enrichment claims on behalf of a nationwide class. (IPP SAC ¶¶ 225-50.) Keurig failed to challenge in its opening brief whether consumers in states other than Vermont may bring claims under Vermont law, only raising the challenge it after the IPPs addressed the issue in their opposition. (See IPP Def. Reply 6.) [HN88](#) [ ] Although "as a general rule, courts will not consider arguments raised for the first time in a reply brief," *Estate of Ungar v. Palestinian Auth.*, 451 F. Supp. 2d 607, 611 (S.D.N.Y. 2006), the IPPs clearly addressed the issue, and therefore were not prejudiced by Keurig's delayed assertion of the challenge in its reply. Nevertheless, whether the IPPs may bring Vermont law claims on behalf of a nationwide class is more properly addressed at the class-certification [\*\*157] stage, and thus, I reserve decision on that issue at this juncture.

## **V. Conclusion**

For the reasons stated herein, Keurig's motions to dismiss:

- (1) the Rogers Amended Complaint is DENIED;
- (2) the TreeHouse Amended Complaint is DENIED;
- (3) the DPP Amended Complaint is DENIED;
- (4) the IPP Second Amended Complaint is DENIED with respect to the IPPs' First, Second, and Third Claims for Relief;
- (5) the IPP Second Amended Complaint is GRANTED with respect to the IPPs' Fourth, Fifth, Sixth, Seventh, and Eighth Claims for Relief;
- (6) the IPP Second Amended Complaint is DENIED with respect to the IPPs' Ninth Claim for Relief as to claims brought under the laws of Arizona, California, the District of Columbia, Iowa, Kansas, Maine, Minnesota, Nebraska, North Carolina, North Dakota, Oregon, Tennessee, West Virginia, and Wisconsin;
- (7) the IPP Second Amended Complaint is GRANTED with respect to the IPPs' Ninth Claim for Relief as to claims brought under the laws of Michigan, Mississippi, Nevada, New Hampshire, New Mexico, New York, and South Dakota;
- (8) the IPP Second Amended Complaint is DENIED with respect to the IPPs' Tenth Claim for Relief;
- (9) the IPP Second Amended Complaint is GRANTED with respect to [\*\*158] the IPPs' Eleventh Claim for Relief as to claims brought under the laws of Michigan and New York; and
- (10) the IPP Second Amended Complaint is DENIED with respect to the IPPs' Eleventh Claim for Relief as to claims brought under the laws of Arizona, Arkansas, the District of Columbia, Iowa, Kansas, Maine, Massachusetts, Minnesota, Mississippi, Nevada, New Hampshire, New Mexico, Oregon, South Dakota, and Wisconsin.

SO ORDERED.

Dated: April 3, 2019

New York, New York

/s/ Vernon S. Broderick

Vernon S. Broderick

United States District Judge



## Sentry Data Sys. v. CVS Health

United States District Court for the Southern District of Florida

April 3, 2019, Decided; April 3, 2019, Entered on Docket

Case No. 18-cv-60257-BLOOM/Valle

### **Reporter**

379 F. Supp. 3d 1320 \*; 2019 U.S. Dist. LEXIS 57279 \*\*; 2019 WL 1469672

SENTRY DATA SYSTEMS, INC., Plaintiff, v. CVS HEALTH, CVS PHARMACY, INC., WELLPARTNER INC., and WELLPARTNER, LLC, Defendants.

**Prior History:** [Sentry Data Sys., Inc. v. CVS Health, 361 F. Supp. 3d 1279, 2018 U.S. Dist. LEXIS 147359 \(S.D. Fla., Aug. 27, 2018\)](#)

## **Core Terms**

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pharmacy, allegations, market power, covered entity, geographic, tortious interference, markets, seller, tying arrangement, tying product, local market, tied product, possesses, specialty, retail, competitors, antitrust, patient, relevant market, Defendants', buyer, proximity, chains, terms

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**Judges:** BETH BLOOM, UNITED STATES DISTRICT JUDGE.

**Opinion by:** BETH BLOOM

## **Opinion**

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[\[\\*1324\] ORDER ON MOTION TO DISMISS COUNTS ONE, FOUR, AND FIVE IN PLAINTIFF'S AMENDED COMPLAINT](#)

**THIS CAUSE** is before the Court upon Defendants CVS Pharmacy, Inc. ("CVS") and Wellpartner, LLC's ("Wellpartner") (together, "Defendants") Motion to Dismiss Counts One, Four, and Five in Plaintiff's Amended Complaint, ECF No. [127] (the "Motion"). Plaintiff Sentry Data Systems, Inc. ("Sentry" or "Plaintiff") filed a response, ECF No. [139] ("Response"), to which Defendants filed a reply, ECF No. [147] ("Reply"). The Court has carefully considered the Motion, all opposing and supporting submissions, the record in this case and the applicable law, and is otherwise [\*1325] fully advised.<sup>1</sup> For the reasons set forth below, the Motion is denied.

## I. BACKGROUND

The Court set forth a detailed factual background in its previous Order on Defendants' first Motion to Dismiss, ECF No. [115] ("Order"). [\*\*\*3] For purposes of the instant Motion, the relevant facts are set forth below. Plaintiff is a developer and provider of information technology systems that assist certain hospitals and hospital-like entities—which the parties refer to as "covered entities"—in monitoring compliance with a federal drug pricing program, the 340B Program. ECF No [121] ¶ 1<sup>2</sup>; see also [Public Health Services Act, 42 U.S.C. § 256b](#). Sentry has developed tracking software to assist covered entities in managing their prescription inventory, tracking reimbursements and rebates, and maintaining records of eligible drugs and patients. *Id.* ¶¶ 69-71. Sentry's products further help covered entities comply with self-auditing requirements of the 340B Program, as well as respond to reporting inquiries from the Health Resources and Services Administration ("HRSA"). This case arises as a result of CVS's acquisition of Wellpartner, one of Sentry's competitors, and the subsequent announcement by CVS that all covered entities seeking to maintain CVS as a contract pharmacy generally, whether for retail or specialty drugs, must use Wellpartner for their 340B tracking and program administration.

In the initial Complaint, ECF No. [1], Sentry asserted [\*\*\*4] nine causes of action: unlawful tying in violation of [15 U.S.C. § 1](#) (Count I); violation of [Florida's Deceptive and Unfair Trade Practices Act](#) ("FDUTPA") (Count II); breach of contract (Count III); tortious interference with contract (Count IV); tortious interference with business relationships (Count V); misappropriation of trade secrets in violation of [18 U.S.C. § 1836](#) and [Fla. Stat. § 688.002](#) (Counts VI-VII); Florida common law conversion of confidential information and proprietary information (Count VIII); and Florida common law unfair competition (Count IX). CVS moved to dismiss the entire Complaint, ECF No. [43], and following full briefing and oral argument, ECF No. [111], the Court granted the first motion to dismiss in part. See Order, ECF No. [115]. In pertinent part, the Court determined that Plaintiff had failed to clearly allege a relevant geographic market with respect to its unlawful tying claim and dismissed Plaintiff's Sherman Act claim asserted in Count I. *Id.* Accordingly, the Court granted Plaintiff leave to replead the Sherman Act claim. *Id.* The Court denied the motion to dismiss with respect to Plaintiff's tortious interference claims, finding that they were not preempted by the Florida Uniform Trade Secrets Act ("FUTSA") and otherwise adequately pled.

Plaintiff filed its Amended Complaint, ECF No. [121], on September 10, 2018, asserting seven causes of action, including unlawful tying in violation of [15 U.S.C. § 1](#) (Count I); breach of contract (Count III); tortious interference with contract (Count IV); tortious interference with business relationships (Count V); and misappropriation of trade secrets in violation of [18 U.S.C. § 1836](#) [\*\*\*5] and [Fla. Stat. § 688.002](#) (Counts VI-VII).<sup>3</sup> In the instant Motion, [\*1326] Defendants seek dismissal of the unlawful tying claim asserted in Count I of the Amended Complaint, and Counts IV and V for failure to state a claim, and the tortious interference claim in Count V for the additional reason that it is preempted by FUTSA.

## II. LEGAL STANDARD

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<sup>1</sup> In the Response, Plaintiff requests oral argument. However, because the Court previously heard argument on Defendants' first motion to dismiss, further argument on the issues involved is not necessary.

<sup>2</sup> With leave of Court, Plaintiff filed an unredacted version of the Amended Complaint under seal. ECF No. [123].

<sup>3</sup> The Court previously dismissed Plaintiff's claims asserted in Counts II, VIII, and IX based on preemption, and therefore, Plaintiff does not reassert those claims in the Amended Complaint. See Order, ECF No. [115].

To survive a motion to dismiss brought pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#), a claim "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" meaning that it must contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." [Ashcroft v. Iqbal](#), 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). While a court must accept well-pleaded factual allegations as true, "conclusory allegations . . . are not entitled to an assumption [\*\*6] of truth—legal conclusions must be supported by factual allegations." [Randall v. Scott](#), 610 F.3d 701, 709-10 (11th Cir. 2010). "[T]he pleadings are construed broadly," [Levine v. World Fin. Network Nat'l Bank](#), 437 F.3d 1118, 1120 (11th Cir. 2006), and the allegations in the complaint are viewed in the light most favorable to the plaintiff, [Bishop v. Ross Earle & Bonan, P.A.](#), 817 F.3d 1268, 1270 (11th Cir. 2016). In addition, a court considering a [Rule 12\(b\)](#) motion is generally limited to the facts contained in the complaint and attached exhibits, including documents referred to in the complaint that are central to the claim. [Wilchcombe v. TeeVee Toons, Inc.](#), 555 F.3d 949, 959 (11th Cir. 2009); see [Maxcess, Inc. v. Lucent Techs., Inc.](#), 433 F.3d 1337, 1340 (11th Cir. 2005) ("[A] document outside the four corners of the complaint may still be considered if it is central to the plaintiff's claims and is undisputed in terms of authenticity.") (citing [Horsley v. Feldt](#), 304 F.3d 1125, 1135 (11th Cir. 2002)). Overall, the question is not whether the claimant "will ultimately prevail . . . but whether his complaint [is] sufficient to cross the federal court's threshold." [Skinner v. Switzer](#), 562 U.S. 521, 530, 131 S. Ct. 1289, 179 L. Ed. 2d 233 (2011).

### III. ANALYSIS

#### A. Unlawful tying

As previously stated, the Court dismissed Plaintiff's original Sherman Act claim because it failed to articulate a relevant geographic market. While the Court previously noted that Plaintiff was not alleging a *per se* tying claim in its original complaint, Plaintiff now contends that Defendants' conduct constitutes a *per se* unlawful tying arrangement or, in the alternative, is unlawful under the rule [\*\*7] of reason. ECF No. [121] ¶ 107. Regardless, under either theory, Plaintiff must sufficiently allege market power in a relevant geographic market. In the Motion, Defendants argue that the Amended Complaint lacks sufficient factual allegations to plausibly show that CVS has market power in a properly defined relevant geographic market.

"A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." [Eastman Kodak Co. v. Image Tech. Servs., Inc.](#), 504 U.S. 451, 461-62, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992) (citation and internal quotation marks omitted). "A tying arrangement violates § 1 of the [Sherman Act](#) if the seller has market power [\*1327] and the tying arrangement affects a substantial volume of commerce in the tied product market." [Palmyra Park Hosp., Inc. v. Phoebe Putney Mem'l Hosp.](#), 604 F.3d 1291, 1296 n.4 (11th Cir. 2010).

The Eleventh Circuit has noted that "the essence of illegality in a tying arrangement is the wielding of monopolistic leverage [by which] a seller exploits his dominant position in one market to expand his empire into the next." [Kypa v. McDonald's Corp.](#), 671 F.2d 1282, 1284 (11th Cir. 1982) (citation omitted) (quoting [Times-Picayune Publ'g Co. v. United States](#), 345 U.S. 594, 611, 73 S. Ct. 872, 97 L. Ed. 1277 (1953))). Thus, the plaintiff must demonstrate that the seller of the products "forced or coerced the buyer into purchasing the tied product" that "he [\*\*8] did not want or would have preferred to buy elsewhere on other terms." [Tic-X-Press, Inc. v. Omni Promotions Co. of Ga.](#), 815 F.2d 1407, 1415-16 (11th Cir. 1987); see also [Jefferson Par. Hosp. Dist. No. 2 v. Hyde](#), 466 U.S. 2, 12, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984), abrogated on other grounds by [III. Tool Works Inc. v. Indep. Ink, Inc.](#), 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006) (noting the "essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all or might have preferred to purchase elsewhere on different terms").

However, not every tying arrangement violates the Sherman Act's prohibition against restraint of trade. [Jefferson, 466 U.S. at 9](#); see also [15 U.S.C. § 1](#) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal."). "Courts have long recognized that Congress intended to prohibit only unreasonable restraints." [Metzler v. Bear Auto. Serv. Equip. Co., 19 F. Supp. 2d 1345, 1360 \(S.D. Fla. 1998\)](#) (citing [Southern Card & Novelty, Inc. v. Lawson Mardon Label, 138 F.3d 869, 874 \(11th Cir. 1998\)](#)). "Certain tying arrangements, however, pose a predictable and unacceptable risk of stifling competition and therefore are unreasonable per se . . . [but i]n the Eleventh Circuit, the per se rule is applied reluctantly, and only when experience with a particular type of restraint enables the court to predict with confidence that the rule of reason will condemn it." [\[\\*\\*9\] Id.](#) (citations omitted); see also [Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1334 \(11th Cir. 2010\)](#) ("Examples of such per se illegality include horizontal price fixing among competitors, group boycotts, and horizontal market division—business relationships that, in the court's experience, virtually always stifle competition."). Therefore, most antitrust claims are analyzed using a "rule of reason," which requires a determination as to the reasonableness of the restraint imposed on competition by the practice at issue. [Id.](#) (citation omitted).

In support of their claims, Section One plaintiffs must define both (1) a geographic market and (2) a product market. [Jacobs, 626 F.3d at 1336](#). Although the parameters of the relevant market are generally considered a question of fact, a plaintiff "still must present enough information in [its] complaint to plausibly suggest the contours of the relevant geographic and product markets." [Id.](#) (citing [Thompson v. Metro. Multi-List, Inc., 934 F.2d 1566, 1573 \(11th Cir. 1991\)](#)). These considerations are tempered by the Eleventh Circuit's determination that "Rule 12(b)(6) dismissals are particularly disfavored in fact-intensive antitrust cases." [Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'n's, Inc., 376 F.3d 1065, 1070 \(11th Cir. 2004\)](#) (citing [Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., C.A., 711 F.2d 989, 994-95 \(11th Cir. 1983\)](#)); see [In re Blue Cross Blue Shield Antitrust Litig., No. 2:13-CV-20000-RDP, 2017 U.S. Dist. LEXIS 99705, 2017 WL 2797267, at \\*2 n.1 \(N.D. Ala. June 28, 2017\)](#) (noting that courts in the Eleventh Circuit continue to apply this rule even after *Twombly*).

Defendants [\[\\*\\*10\]](#) do not challenge the sufficiency of the allegations in the Amended Complaint regarding product market. Rather, Defendants argue that Plaintiff fails to adequately allege a relevant geographic market. With respect to the geographic market, a plaintiff must plead a geographic market that "correspond[s] to the commercial realities of the industry, [is] economically significant . . . and include[s] the area in which consumers can practically seek alternative sources of the product." [Q Club Resort & Residences Condo. Ass'n, Inc v. Q Club Hotel, LLC, No. 09-CV-60911, 2010 U.S. Dist. LEXIS 147051, 2010 WL 11454483, at \\*2 \(S.D. Fla. Jan. 6, 2010\)](#) (citations omitted).

The Court previously found that while the allegations in the Complaint demonstrated CVS's power, leverage, and influence over some covered entities, some contract pharmacy markets, and some retail pharmacy markets in certain cities, they nevertheless did not plausibly suggest the contours of a relevant geographic market as required for a tying claim.

### i. Plaintiff sufficiently alleges a national market

In the instant Motion, Defendants first argue that Plaintiff's allegations are again insufficient because the relevant geographic market cannot be both national and local, and that in any event, Plaintiff's national market theory is contradicted by allegations regarding customer behavior. Upon [\[\\*\\*11\]](#) review, the Court disagrees and finds the allegations are sufficient with respect to a national market.

In the Amended Complaint, Plaintiff alleges that there is a relevant national market because CVS operates nationally, competes with other national pharmacy chains, contracts with national and regional health insurers, and contracts with covered entities for provision of 340B contract pharmacy services nationally. ECF No. [121] ¶¶ 33, 112. Plaintiff also alleges that CVS operates an extensive nationwide retail pharmacy, specialty pharmacy, and pharmacy benefits manager operation. [Id.](#) ¶ 36. In addition to Plaintiff's allegations regarding CVS's nationwide footprint, Plaintiff also alleges that covered entities seek to contract with contract pharmacies located both in close geographic proximity to their locations and across the country. [Id.](#) ¶ 112. Plaintiff alleges further that services of contract pharmacies distant from covered entities' physical locations are complementary, and not substitutes for,

contract pharmacies in closer proximity, but that covered entities need contract pharmacies located in close proximity to their patients' location and they cannot turn to contract pharmacies [\*\*12] located outside the relevant local markets. *Id.* ¶ 115. Defendant contends that these allegations are contradictory, but the Court finds that they are not.

In *United States v. Grinnell Corporation*, 384 U.S. 563, 575, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966), the Supreme Court found that the relevant geographic market for the services involved was national, noting that despite the local nature of the actual provision of services, "the broader national market [ ] reflects the reality of the way in which [the defendant companies] built and conduct their business." *Id. at 575-76*. Similarly here, there is not a discrete product involved, but a service—namely 340B contract pharmacy services. As such, Plaintiff contends that some of CVS's contract pharmacy operations are local and that covered entities [\*1329] for practical reasons may prefer to deal with contract pharmacies close to their patient populations. Nevertheless, the alleged competitive advantages that CVS enjoys from its national presence in retail, pharmacy benefits management, provision of contract pharmacy services for specialty pharmaceuticals to covered entities located across the country, and CVS's contracts for provision of pharmacy services across state lines with generally applicable price and service terms, serve to knit the alleged local [\*\*13] markets together into a relevant national market. Thus, the allegations of a national market are not incongruous with allegations regarding local markets. At this juncture, construed in the light most favorable to Plaintiff, the allegations regarding a relevant national market are sufficient.

## **ii. Plaintiff sufficiently alleges local markets**

Defendants argue next that the Amended Complaint fails to define relevant local markets. The Court disagrees. Indeed, relevant geographic markets need not be defined by "metes and bounds" and "cannot [ ] be defined with scientific precision . . ." *United States v. Conn. Nat'l Bank*, 418 U.S. 656, 669, 94 S. Ct. 2788, 41 L. Ed. 2d 1016 (1974). As the Court has already noted, "the parameters of a given market are questions of fact, . . . [and] antitrust plaintiffs . . . must present enough information . . . to plausibly suggest the contours of the relevant geographic and product markets." *Jacobs*, 626 F.3d at 1336 (internal citation and quotations omitted). Here, Plaintiff specifically alleges that the twenty-two core-based statistical areas or "CBSAs" it identifies in which CVS has a 30% or greater share of contract pharmacy locations as the relevant local markets. ECF No. [121] ¶ 114. In addition, Plaintiff alleges that the "local geographic markets relevant to this [\*\*14] action [ ] are no broader than each of the 22 individual CBSAs" that Plaintiff identifies, and "Sentry has existing covered entity customers in more than half of the identified CBSAs, and potential customers in all of the identified CBSAs." *Id.* ¶¶ 114, 117. As such, construed in the light most favorable to Plaintiff, the allegations are sufficient to state relevant local markets.

## **iii. Market power**

Defendants contend that Plaintiff fails to plead market power in any relevant market. "[I]n all cases involving a tying arrangement, the plaintiff must prove that defendant has market power in the tying product." *III. Tool Works Inc.*, 547 U.S. at 46. Here, the tying product or services is contract pharmacy services. In order to state a Sherman Act claim based upon unlawful tying, a plaintiff must allege five elements to state a tying agreement: "(1) a tying and a tied product; (2) evidence of actual coercion by the seller that in fact forced the buyer to purchase the tied product; (3) that the seller [has] sufficient market power in the tying product market to force the buyer to accept the tied product; (4) anticompetitive effects in the tied market; and (5) involvement of a not insubstantial amount of interstate commerce in [\*\*15] the tied product market." *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1502-03 (11th Cir. 1985).<sup>4</sup> "In order to prove this anticompetitive effect on the market, the plaintiff may either prove that the defendants' behavior had an actual detrimental effect [\*1330] on competition, or that the behavior had the

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<sup>4</sup> The Court notes that Defendants' challenge to the sufficiency of the allegations regarding market power appears to relate to the third element of an unlawful tying claim, while Plaintiff appears to understand the challenge as one relating to the fourth element. However, analysis of both elements requires a showing of market power. As such, the distinction is without a difference for purposes of the instant Motion.

potential for genuine adverse effects on competition." *Spanish Broad. Sys. of Fla., Inc., 376 F.3d at 1072* (quoting *Levine v. Cent. Fla. Med. Affiliates, Inc., 72 F.3d 1538, 1551 (11th Cir. 1996)*) (quotations omitted). "At a minimum, [showing potential for genuinely adverse effects on competition] requires a plaintiff to define the relevant market and establish that the defendants possessed power in that market." *Id.* (quoting *Maris Distrib. Co. v. Anheuser-Busch, Inc., 302 F.3d 1207, 1213 (11th Cir. 2002)*) (quotations omitted).

"Market power is the ability to raise price significantly above the competitive level without losing all of one's business." *Jacobs, 626 F.3d at 1339* (citation omitted). However, "[m]arket power, while necessary to show adverse effect indirectly, alone is insufficient. A plaintiff seeking to use market power as a proxy for adverse effect must show market power, plus some other ground for believing that the challenged behavior could harm competition in the market . . ." *Spanish Broad. Sys. of Fla., Inc., 376 F.3d at 1073* (citation omitted). In addition, "market share is frequently used in litigation as a surrogate for market power." *Id. at 1340* (citation omitted). The relevant markets in the instant case are a national and local **[\*\*16]** 340B contract pharmacy services markets. The Court considers the sufficiency of the allegations with respect to each in turn.

Defendants argue specifically that Plaintiff has not sufficiently alleged CVS's market share of the national 340B contract pharmacy market, and that Plaintiff's allegations regarding retail market share are insufficient to establish market power in the relevant market. In response, Plaintiff contends that the Amended Complaint alleges direct evidence of CVS's market power as a contract pharmacy nationally and locally, demonstrated by Plaintiff's allegations regarding specific customers who felt they were forced to purchase the tied product, 340B solutions provider services, from Defendants to gain access to the tying product, contract pharmacy services. See ECF No. [121] ¶¶ 94-95, 108-11, 120-21. Plaintiff also argues that it need only allege that CVS has market power over some covered entities, relying upon *Tic-X-Press, Inc.*

However, the court in *Tic-X-Press* also noted that "[i]n addition, market power requires a showing that would-be competitors in the tied market cannot themselves offer the tying product on competitive terms: that is, that the seller has some **[\*\*17]** cost advantage over rivals in producing the tying product or that there are substantial entry barriers into the tying product market." *815 F.2d at 1420*. With respect to market power, Plaintiff alleges that CVS is the second largest contract pharmacy and has increased its contract pharmacy locations by 281% since 2013. ECF No. [121] ¶ 34. Plaintiff alleges further that CVS is a dominant firm in the 340B contract pharmacy market due to its leading position in three related markets—retail pharmacy, specialty pharmacy, and pharmacy benefits manager ("PBM") markets. *Id.* ¶ 36. According to Plaintiff, CVS held approximately 23.8% of the United States retail pharmacy market, *id.* ¶ 37, and CVS's dominance in the dispensing of specialty pharmaceuticals is growing. *Id.* ¶ 40. Plaintiff then provides numerous allegations regarding CVS's status as a preferred or exclusive provider of specialty pharmaceuticals for various insurers. *Id.* ¶¶ 44-61. Furthermore, Plaintiff attaches a list of 365 covered entities, that as of September 2018, are dependent upon CVS for 30% or more of their contract pharmacy network, and states that CVS has market power over each one listed. See *id.* ¶ 65; Exhibit A, ECF No. [121-1]. Thus, **[\*\*18]** the inference Plaintiff would have the Court draw from the allegations is that because of CVS's **[\*1331]** position in the retail pharmacy, specialty pharmacy, and pharmacy benefits manager ("PBM") markets, it necessarily possesses requisite market power in the contract pharmacy services market nationally.

However, the inference is belied by other allegations in the Amended Complaint. Plaintiff alleges that CVS competes on a national level to offer 340B contract pharmacy services with other national chain pharmacies, *id.* ¶ 112, and acknowledges that six retail pharmacy chains, including CVS, Walgreens, Walmart, Rite Aid, Kroger, and Albertsons collectively account for two thirds of 340B contract pharmacy locations. ECF No. [121] ¶ 34. In addition, Plaintiff concedes that Walgreens "is the single largest contract pharmacy" and that covered entities view Walgreens, in addition to CVS, as a "must have" 340B contract pharmacy services provider. *Id.* ¶¶ 34-35. These affirmative allegations conflict with Plaintiff's contention that CVS wields superior market power in the contract pharmacy market nationally. Indeed, the Amended Complaint contains no allegations giving rise to any plausible barriers to **[\*\*19]** entry given that five other pharmacy chains, along with CVS, dominate a total of two-thirds of the relevant market nationally.

In addition, Plaintiff's reliance on Exhibit A does not lead to the plausible inference that CVS possesses the requisite market share specifically in a national 340B contract pharmacy services market. Exhibit A to the Amended

Complaint does not inform whether CVS holds a significant share of the relevant market—merely because CVS possesses a large proportion of contract pharmacy locations in a contract pharmacy network in any given locality, especially where there are no allegations that 340B contract pharmacy services are provided on an exclusive basis. Indeed, Plaintiff affirmatively alleges that more than 6,000 covered entities participated in the 340B program in 2017, see ECF No. [121] ¶ 12, but the information in Exhibit A pertains to only 365 covered entities nationwide, or a little over 6% of covered entities participating in the 340B program, which belies Plaintiff's assertion that CVS possesses market power nationally. See [Jefferson, 466 U.S. at 26-29](#) (finding 30% market share to be insufficient).

Similarly, considering the disparate allegations in the aggregate do not plausibly [**\*\*20**] allege national market power. For example, while CVS may enjoy a dominant position in the specialty pharmaceutical business, the allegations in the Amended Complaint acknowledge that four of its competitors also have access to significant numbers of FDA-approved limited distribution drugs. See *id.* ¶ 41.

Market power can also exist where sellers possess unique products that competitors are unable to offer. [Jefferson, 466 U.S. at 17](#). But, for similar reasons, the allegations regarding CVS's unique position in the market that allows CVS to offer contract pharmacy services that rivals cannot offer are not sufficient to allege the requisite market power in a national market. The "question is whether the seller has some advantage not shared by his competitors in the market for the tying product. Without any such advantage differentiating his product from that of his competitors, the seller's product does not have the kind of uniqueness considered relevant . . ." [United States Steel Corp. v. Fortner Enterps., Inc., 429 U.S. 610, 620-21, 97 S. Ct. 861, 51 L. Ed. 2d 80 \(1977\)](#). While Plaintiff alleges CVS's superior market power in three related markets, the inference Plaintiff would have the Court draw regarding a national market relevant to its antitrust claim is undercut by Plaintiff's affirmative allegations with respect [**\*\*21**] to the other pharmacy [\*1332] chains specifically in the context of contract pharmacy services. Thus, the Amended Complaint fails to plausibly allege that CVS possesses the requisite market power in a national market.

Nevertheless, the Court finds that at this juncture, the allegations regarding market power in the local contract pharmacy services markets are sufficient. Specifically, Plaintiff alleges that in the twenty-two CBSAs identified in the Amended Complaint, CVS possesses at least 30% of the 340B contract pharmacies. ECF No. [121] ¶ 114. In addition, Plaintiff alleges that covered entities draw from local markets that are limited by their patients' desire to access healthcare in proximity to their homes and workplaces, and therefore contract with contract pharmacies that can serve local patient populations, and more specifically, that covered entities within the CBSAs draw a substantial majority of their patients from within a thirty-mile radius. *Id.* ¶¶ 114-15. Moreover, Plaintiff asserts that even though covered entities may also deal with contract pharmacies across the country, these services are not a substitute for the local contract pharmacy services, and therefore covered entities [**\*\*22**] need contract pharmacies in close proximity to their patient populations. *Id.* ¶ 115. Collectively, these allegations are sufficient to plausibly state that CVS possesses market power in the twenty-two local markets identified in the Amended Complaint.

## B. Tortious interference

Finally, Defendants argue that Plaintiff's claims for tortious interference asserted in Counts IV and V should be dismissed for failure to state a claim because tortious interference claims cannot be based on the same conduct underlying a failed antitrust claim,<sup>5</sup> and that Count V is preempted by FUTSA to the extent that it is based upon the alleged theft of confidential information. Defendants previously sought dismissal of Plaintiff's tortious interference claims for failure to state a claim, which the Court rejected. The Court expressly held that because the claims of tortious interference are not comprised of allegations of trade secret misappropriation alone, they are not preempted by FUTSA. See ECF No. [115]. Similarly, in the Amended Complaint, the tortious interference claims are

<sup>5</sup> The Court acknowledges that it accepted Defendants' argument at oral argument on the first motion to dismiss that the tortious interference claim rises and falls on the tying claim, see ECF No. [112] at 20; however, the Court did not base its ruling upon this argument, and therefore did not address it in its previous order, ECF No. [115].

not premised solely upon Defendants' purported violations of antitrust law, and in any event, the antitrust claim here survives. [\*\*23]

As such, Defendants' Motion improperly raises arguments which the Court has already considered and rejected, and Defendants' arguments on this point are not well-taken.

#### **IV. CONCLUSION**

For the reasons set forth, the Motion, **ECF No. [127]**, is **DENIED**. Defendants shall file their Answer to the Amended Complaint **on or before April 15, 2019**.

**DONE AND ORDERED** in Chambers at Miami, Florida, on April 3, 2019.

/s/ Beth Bloom

**BETH BLOOM**

**UNITED STATES DISTRICT JUDGE**

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